Personal injury claims for children suffering back and neck pain following minor to moderate road traffic accidents: a personal view

Bruce Summers

Over the course of 25 years' experience of providing medico-legal reports for personal injury claims, I have experienced varying trends of soft tissue injury following accidents of minor to moderate severity. At first it was simply neck pain following rear impact road traffic accidents (RTA's), then back pain became increasingly prevalent. More recently complaints of wrist and shoulder pain and claims for post-traumatic stress and depression appear to be cropping up more regularly than before.

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The concept of low velocity impacts causing injury, and the request by medico-legal firms for experts with an understanding of the mysterious "Delta V"* backed by convoluted equations relating to Newton's second and third laws of motion, brought a moment of light relief to a quasi-orthopaedic specialty not known for its scientific exactness. However, of late, I have experienced a worrying trend of children aged 16 years or under appearing for medico-legal consultations for non-specific back and neck pain after RTA's of minor or moderate severity.

A detailed audit of my medico-legal instructions between 2005 and 2013 (Table 1) has indicated an increase in claims for such children from 1.4% of all total requests between 2005-2010, including non RTA claims, to 3.3% between 2011-13. These appear small percentages, but in real numbers this equates to seeing nearly 5 per year from 2005-2010 to nearly 10 per year from 2011-2013. In the year 2014, which is not included in the audit, this increase has been sustained. There has been no change in my practice or association with solicitors or medico-legal firms which might have occasioned such a trend, and the number of total claims I have dealt with has dropped by 10% between these two periods of time. The figures comparing the two time periods does not indicate any change in symptom recovery and the delay from accident to report (not to settlement) has shown a slight fall but remains long at 16.8 months in the last three years.

Of course I accept that my findings may not represent what is happening more generally with other medico-legal experts, and statistically there may be many other explanations for the apparent increase, but I do worry that this may be a damaging trend and that claims are being submitted on behalf of children by their parents or litigation friends without fully appreciating the possible negative consequences of the medico-legal process. Clearly children suffering injury are entitled to compensation under the law as much as adults, but I know that for some of my adult patients, their symptoms are difficult to explain and difficult to refute, and I am often left with a feeling that my opinion and prognosis is as imagined as their injuries. Faced with a child too young to even remember the accident, and with many side-long glances to a parent urging recall on their floundering offspring, these feelings are doubled. Many of the very young children take no

part at all, except as bemused and disinterested bystanders, with the entire history being given by the parent or guardian, and the examination can feel very uncomfortable at times being little more than an unnecessary physical intrusion on a normal child.

Like many of my colleagues, I worry that the medico-legal process, for which I appreciate I am fully part of, can be damaging to those who may be psycho-socially vulnerable. With adults I can accept that they are engaging willingly in this process but with children it is different, they are largely passive hostages to usually a very modest financial fortune, for which in return they undergo a lengthy litigation process, including required appearances in front of a judge to ensure a fair outcome. That of course is only very reasonable in the situation of serious physical or psychological injury but one wonders if it is really necessary for a child with minor spinal pain largely forgotten.

Many of the children I have seen are clearly quite resilient and will sit in bemused boredom during the medical examination, but some, and certainly those seen more recently, have clear and severe psychological disturbance almost certainly unrelated to the minor accident, but in whom the injury is depicted as the instigator of their symptoms. In these children the process is harming, deflecting and delaying the child away from appropriate management. Even in those without psychological issues, a lengthy litigation process fosters an attitude which dwells on pain and disability, and obstructs the normal process of healing.
I do not believe that parents and guardians, are knowingly using children as a source of financial gain but I feel that they can get caught up in the unrelenting slow and rolling process of litigation without fully appreciating the hidden dangers.

I am not certain how this matter could be addressed, or indeed if this is a concern shared by my colleagues. Clearly it is incumbent on solicitors, medico-legal agencies and all involved in the legal process to warn the families and litigation friends of prospective young claimants of the risks involved. Perhaps very early settlement with small sums with minimal medical intervention, or fast tracking children through specific experts such as Paediatricians, or the shortening of limitation time to prevent claims being initiated many years after the incident, might make a difference, but all these possibilities have their pitfalls.

For my own part at the end of a report I simply stress the importance of urgency to avoid the possibility of harm to a child that can come from such a litigation process. But it doesn't seem enough.

**Delta V, in this scenario and put very simply, it is the change in velocity of a vehicle at the time of a collision.*

Comment from Ian Nelson

Serious spine injuries following road accidents are fortunately uncommon in paediatric spine practice, even in major trauma centres. The vulnerability of immature cervical spine structures makes this surprising. Injury prevention through child car seat design may contribute.

Boyd (2002)[1] reported 47% of 105 children involved in road traffic accidents experienced neck pain in an emergency department setting in Australia. A UK study suggested an incidence of 29.5%. The prognosis was favourable. None of the patients reported residual pain after 62 days on direct questioning. Children seem relatively immune to the chronic disability some adults report.

It may be that Mr Summers' paediatric claimants are finally catching up with the perceived rights of their parents! It has been reported that legislative change, with removal of compensation for 'pain and suffering' (Cameron 2008)[2] is associated with an 'improved health status' in the adult populations with neck injuries after road accidents.

The UK Government seems determined reduce the costs associated 'soft tissue injuries' and it will be interesting to see if the observed trend is reversed with recent and future changes introduced by Ministry of Justice. ■

Bruce Summers is a Consultant Orthopaedic and Spinal Surgeon at the Princess Royal Hospital in Telford, Shropshire and a Senior Tutor and Lecturer at the University of Keele Medical School. He has been involved in Medico-Legal reporting for over 25 years.

The author welcomes any views relating to this issue and can be emailed to *brucesummerslegal@gmail.com* or to the Medico-Legal Editor of JTO).

Year	Number of patients (Male/ female)	Age at RTA In years	Age at report In years	Delay from RTA to report (months)	Full Recovery/ Minimal symptoms	Moderate Persistent pain	Severe pain and/ or severe psych. symptoms	Percentage of children in relation to total number of instructions
2005 - 2013	57 (24/33)	11.4 (3-15)	13.0 (7-21)	18.7 (2-84)	37 (65%)	13 (23%)	7 (12%) (3 with severe psych. symptoms)	2.6%
2005 - 2010	28 (12/16)	11.6 (3-15)	13.4 (8-21)	20.7 (5-39)	18 (64%)	7 (25%)	3 (11%) (1 with severe psych. symptoms)	1.4%
2011 - 2013	29 (12/17)	11.2 (7-15)	12.7 (7-19)	16.8 (2-84)	19 (66%)	6 (21%)	4 (14%) (2 with severe psych. symptoms)	3.3%

Table 1: *Details of medico-legal claims for children aged 16 or less at time of road traffic accidents of minor to moderate severity and resulting in non-specific spinal symptoms.*

References

1. Boyd R, Emerg Med J (2002) 19:311-3
2. Cameron ID, Spine (2008) Feb 1;33(3):250-4.

Code of Practice for Orthopaedic Surgeons Preparing Reports in Personal Injury and other Cases (Part 2)

Approved by the BOA's Professional Practice Committee

The Medical Report

The report should be provided along the lines given below:

1. Format and Style: The following general guidance applies to all reports

a. Double spaced
b. One side of the paper only
c. Decent margins on both sides of the text
d. Good quality A4 paper
e. Bound in a manner that allows copying and filing
f. Paginated with paragraphs numbered for ease of reference
g. Clear, relevant section headings
h. Should be comprehensible to a layman i.e. technical/medical terms should be explained
i. There should be clear distinction between facts and opinions

2. Content and Layout:

a. Title page should contain name, address, date of birth, employment status, accident/incident date, interview/examination date, date report was signed, details of instructing party/ies and their reference numbers, documents available to the expert
b. The general layout of the report may vary but should include:
i. Index with contents page, reference to appendices if appropriate, expert's abbreviated CV. In respect of the CV it is important that the expert provides a CV that specifically deals with why the expert is competent to deal with the case at hand rather than relying on a general CV.
ii. Claimant's history of the incident/injury and their account of subsequent investigations and treatment. Plans for future investigation/treatment
iii. Review of all relevant medical records, X-Rays and scans
iv. Outline of the claimant's current condition and ongoing symptoms relating to the incident/injury including current medication
v. The impact of the ongoing symptoms/disability on the claimant's ability to work. In particular their ability to continue in their previous employment, was the time lost from work after the incident/injury justified, are they disadvantaged in the open labour market and will they be able to work until their normal/chosen retirement age. Whether the claimant fulfils the definition of disabled under the Equality Act (2010), as this will impact upon the future calculation of loss of earnings.
vi. The impact of the ongoing symptoms/disability on the claimant's ability to cope in the home and in their recreational/sporting activities. Is the situation likely to deteriorate in the future? Are there (or are there likely to be) care requirements? Do they now need help with certain tasks and chores in the home that they would not have required but for the injury? It is appropriate for the expert to identify those tasks and chores that the claimant will have difficulty with. However, these do not need to be quantified in detail as this is the province of the OT or Care expert.
vii. Review of relevant past medical history and its importance with regard to injuries and ongoing disability
viii. Detailed clinical examination relevant to the injuries sustained
ix. Discussion section, reviewing treatment and, if appropriate, considering further management. Whilst the report is for the Court, if it is glaringly obvious that further investigation/treatment is required which may clarify the reason for ongoing symptoms or potentially improve the claimant's condition then, it is reasonable to say so. Are reports required from other experts e.g. Plastics, Psychiatry, Neurology etc.?
x. A clear statement on causation. This may be apparent i.e. claimant hit by bus. However, it may not be at all clear i.e. claimant with history of back pain injures back at work or in RTA. Where it is not clear it is vital to point out that among experts of similar specialisation to yourself there would be a range of opinion on the matter and your opinion x because of a, b, c. On the question of causation, the expert will be required to provide an opinion on the balance of probabilities i.e. what is more likely than not.

xi. A clear outline of the prognosis. Is the claimant able to continue working? Will they have to take premature retirement as a result of the injury? Will they need further surgery in the future? Are they going to suffer from arthritis in the future? Has a steady state been reached? Is a further report required in the future? Are there co-morbidities that would have prejudiced the claimant's future prospects and quality of life in any case? It is important to remember with opinion on prognosis that the expert will be giving an opinion on future circumstances. As a matter of law, the Court will be concerned to understand the percentage chance of something occurring.
xii. Throughout the report the expert should not stray from their own area of expertise. A useful rule is, "would I be comfortable giving opinion/ advice on this matter on the ward or outpatient clinic?"
xiii. The report should contain the standard declaration and statement of truth that it is mandatory to append to all reports

Clarification of Issues in a Claim, including Part 35 Questions and preparation of Joint Statements with other experts

1. CPR 35 outlines the instruction and use of joint experts by the parties and the powers of the Court to order their use. If instructed as a single joint expert, the expert should:
a. Keep all instructing parties informed of any steps they may be taking, i.e. copy all correspondence to those instructing them.
b. Maintain independence and impartiality, remembering their duty to the Court.
c. If necessary, request directions from the Court.
d. Serve the report simultaneously on all instructing parties.
e. Not attend any meeting or conference which is not a joint one unless it is agreed by all parties in writing or the Court has directed that such a meeting be held and who is to pay the expert's fees.

2. Where the value of the claim is likely to be in excess of a pre-determined level, or is a multi-track case, the Court may permit each party to instruct their own expert where it is proportionate to do so. The court has powers to direct discussion between experts and parties may also agree that discussions take place between their experts. In order to resolve the issues at any meeting of experts the instructing solicitor should provide multiple copies of all records disclosed in the action/ negotiation to the experts with a request that any points of difference be identified and countered upon in writing.

3. The purposes of the discussion between the experts should be to:
a. Identify and discuss the issues in the proceedings
b. Reach agreement on the issues where possible and to narrow the issues in the case
c. Identify the areas of agreement and disagreement and summarise the reasons for disagreement on any issues
d. Identify action that may be taken, if any, to resolve the outstanding issues.

4. These arrangements for discussion should be proportionate to the value of the case. The majority of such meetings will take place by telephone or video link but, in multi-track cases, a face-to-face meeting may be required. The parties, lawyers and experts should co-operate in drawing up an agenda although the primary responsibility lies with the instructing solicitor. The agenda should indicate areas of agreement and summarise these issues. It is helpful to have a series of questions to be put to the experts and, where possible, a joint agenda should be prepared.

5. If differences cannot be resolved in correspondence, experts should be encouraged to have a telephone discussion (a solicitor would not normally be present at a pre-trial conference). If the differences are still incapable of resolution experts should prepare, in light of the issues defined, a schedule of:
a. Resolved issues and reasons for agreement
b. Unresolved issues and reasons for disagreement
c. A list of further issues that have arisen not listed in the original agenda for discussion
d. A record of further actions to be taken or recommended, as necessary, including a further discussion between experts.

6. Whether "hot tubbing" will replace or occur in association with preparation of joint statements remains to be seen at the time of drafting this update.

7. From a practical perspective the question often arises as to who should dictate/draft the Joint Statement, the expert for the Claimant or the expert for the Defence. There are no hard and fast rules on this. The important matters are:
a. Jones v Kaney i.e. the expert should not significantly change their originally expressed opinion without clear and logical reasoning for that change
b. Compliance with Court timetables after Jackson.

8. Under section 35.6 of the CPR either party may put written questions to the expert which must be "proportionate" and for clarification of the experts' report. It is the responsibility of the party who initially instructed the expert to settle the fees for response to these questions.

Attendance at Conferences/Meetings with Solicitors, Barristers and Other Experts

Experts may be asked to attend conferences with the legal team

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that have instructed them together with other experts in complex, controversial or high value cases. The purpose of these meetings is usually to clarify important technical issues and improve the legal teams understanding of certain medical matters (although it is often surprising how well briefed/informed some of the better Counsel and solicitors are in this area).

These conferences may take place over the telephone, video link/Skype or in person. The expert should not attend these conferences without being thoroughly prepared, having read and re-familiarised him/herself with the case. Failure to do so will often lead to difficulties. The time spent considering the documents prior to the Conference should of course be added to the fee note for attending. The instructing party should already be aware of the likely fee range from the expert's terms and conditions.

The expert may be asked to attend in person. This can of course pose greater difficulties than telephone attendance, particularly for experts still in full time clinical practice. If it is mandatory for the expert to attend in person they should bear in mind that in addition to the issues discussed above it is very likely that Counsel wishes to see the whites of the experts eyes and put him on the spot to see how he is likely to stand up under cross examination in the witness box.

Attendance at Court

The vast majority of personal injury or medical negligence cases will settle and will not proceed to Court. However, the expert should always work on the basis that by accepting instructions, he/she is committing to attend Court to speak to their report. Never work on the basis that the case is going to settle and therefore the report can be prepared without appropriate thought, care and skill.

If the case proceeds to a hearing:

1. The solicitor should:

a. Ascertain the availability of experts before a trial date is fixed. Experts should keep an up-to-date list of unavailable dates and the solicitor should not agree to a hearing on one of those dates.
b. Notify the expert that the case has been set down for hearing.
c. Keep the expert updated with timetables, i.e. dates the expert is expected to submit their report, the preparation of joint reports, if necessary, and dates and times when the expert is to attend court and the location of the court.
d. Consider whether the expert may give evidence by video link.
e. Inform the expert if the trial date is vacated.
f. Arrange a meeting with counsel, the expert and other parties involved, where appropriate, prior to the hearing.
g. Limit the time for court attendance to a half-day or the minimum time necessary for the expert to give evidence.
h. Ascertain the fees for all preparatory work and for attendance at Court and be in a position to pay that fee under the terms agreed.
i. Inform the expert of the outcome of the case.

2. The expert has an obligation to attend court if called upon to do so. The expert should:

a. Confer with counsel in advance of the hearing at a place to be agreed.
b. Attend court, whether or not by subpoena
c. Normally attend court without need for the service of a witness summons but, on occasion, the expert may be served to require attendance (CPR 34). The use of a witness summons does not affect the contractual or other obligations of the parties to pay experts' fees. Unforeseen circumstances may mean that the expert has to attend to a patient or other matters and not the Court. Such circumstances should be rare and the onus must be upon the expert to justify their action. It should be noted that if an expert fails to attend trial, there will invariably be cost consequences on the party that he/she is providing expert evidence for. The experts' evidence may be disallowed. Non-attendance by an expert without exceptionally good reason will invariably lead to the expert being sued.

It is the duty of the solicitor to forward immediately any court order to the expert. If a delay in forwarding a court order results in the expert's inability to meet the timetable it must be accepted that this is the responsibility of the solicitor and the solicitor alone.

The conclusion of the case

The instructing party should notify the expert if and when the case has been settled and the outcome. They should also pay any outstanding fees promptly and give the expert instructions regarding the return or disposal of the medical records. It is not acceptable practice at the conclusion of a case for the expert to have to chase the agency, solicitor or insurer for payment as it should follow automatically.

It is often useful/instructional for the expert to have feedback from the solicitor/insurer on the outcome, particularly if there were particularly controversial issue or significant disagreements between experts.