Practical Strategies for Experts: Testifying Without Fear
October 20, 2016

PREPARING FOR EXAMINATION-IN-CHIEF OF THE EXPERT

Presented by:

L Craig Brown, Thomson Rogers

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WHY PREPARE?

"My assessment of Dr. Edwards was that of a sensible, not easily-fooled practitioner who would have no patience either for exaggerators or malingerers. I found Ms. Dunn an honest witness who, without exaggeration, described the problems she had. **I prefer the evidence of Dr. Edwards to that of Dr. Rathbun. Dr. Edwards' evidence struck me as objective and balanced. On the other hand, Dr. Rathbun was handicapped by a failure to bring his notes and by a lack of any memory of this particular plaintiff. His failure to admit that a back injury would exacerbated during pregnancy is typical of Rathbun's unwillingness to even admit the potential for chronic pain in this patient.** In the circumstances of this case, the superior opportunity of the plaintiff's physician to observe Ms. Dunn persuades me that Dr. Edwards' opinion is the more accurate."

- Chadwick J. in *Dunn v City of Mississauga*

"[122] **Dr. B was not a credible witness.** He failed to honor his obligation and written undertaking to be fair, objective and non-partisan pursuant to R. 4.1.01. He did not meet the requirements under R. 53.03. **The vast majority of his report and testimony in chief is not of a psychiatric nature but was presented under the guise of expert medical testimony and the common initial presumption that a member of the medical profession will be objective and tell the truth.“**

- Kane J. in *Bruff-Murphy v Gunawardena*

TRIALS VS ARBITRATIONS

- Differences between trail and arbitration
- Preparation is the same

QUALIFICATION

- CV
- Expert's Undertaking to the Court (Form 7)
  - Tension between duty to be objective and desire to be persuasive
- Statement of Scope of Expertise

EXPERT'S DUTY

"When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Court require more. **The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion.**"

Gold Financial Corp v Puslinch - Ontario Court of Appeal

SCOPE OF QUALIFICATION

Dr. B is permitted to give expert opinion evidence:

On matters relating to physical and rehabilitation medicine; the care and treatment of tetraplegics; the life expectancy and vocational issues relating to tetraplegics and the complications of spinal cord injury.

RETAINER ISSUES

- The letter
- Disclosure of Briefings
- The File
  - Format (e-file if possible)
  - Organization

SAMPLE RETAINER LETTER

L. Craig Brown
416-868-3163
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Certified by the Law Society of Upper Canada as a Specialist in Civil Litigation

October 19, 2016

Dear :

CCC
Date of Birth: August 21, 1956
Our File No. 098993

We have been retained to act on behalf of Ms. CCC, who was a pedestrian injured in a motor vehicle/pedestrian accident on May 28, 2009.

We understand she has come under your care regarding the injuries she sustained in this accident and in this regard we would appreciate receiving from you your complete medico-legal report outlining the injuries she sustained, treatment accorded, your diagnosis and, if possible, your prognosis.

Please include your account for this report and we are enclosing an Authorization to permit you to report to us.

Yours very truly,

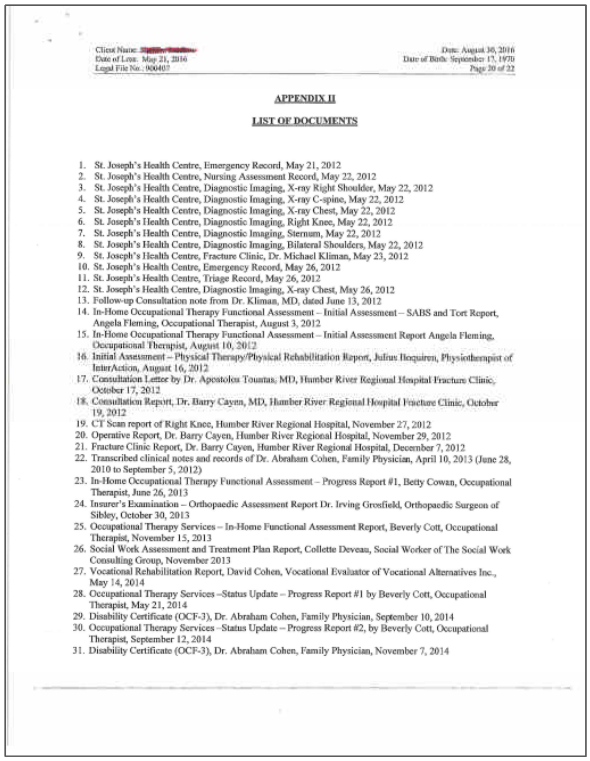
L. Craig Brown
Leslie Craig Brown Law Professional Corporation

LCB/jm
Enclosure

THE FOUNDATION

A Pyramid of Data

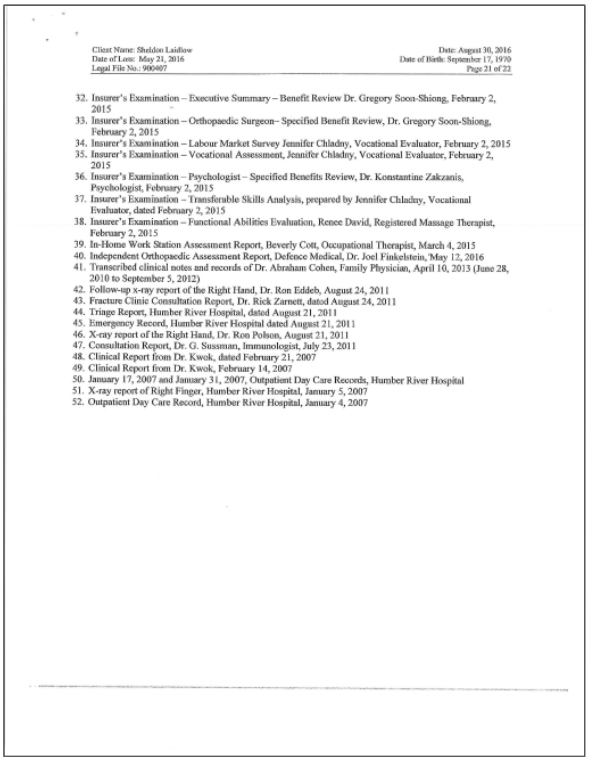
SAMPLE DOCUMENT LIST



APPENDIX II

LIST OF DOCUMENTS

1. St. Joseph's Health Centre, Emergency Record, May 21, 2012
2. St. Joseph's Health Centre, Nursing Assessment Record, May 22, 2012
3. St. Joseph's Health Centre, Diagnostic Imaging, X-ray Right Shoulder, May 22, 2012
4. St. Joseph's Health Centre, Diagnostic Imaging, X-ray C-spine, May 22, 2012
5. St. Joseph's Health Centre, Diagnostic Imaging, X-ray Chest, May 22, 2012
6. St. Joseph's Health Centre, Diagnostic Imaging, Right Knee, May 22, 2012
7. St. Joseph's Health Centre, Diagnostic Imaging, Sternum, May 22, 2012
8. St. Joseph's Health Centre, Diagnostic Imaging, Bilateral Shoulders, May 22, 2012
9. St. Joseph's Health Centre, Fracture Clinic, Dr. Michael Kliman, May 23, 2012
10. St. Joseph's Health Centre, Emergency Record, May 26, 2012
11. St. Joseph's Health Centre, Triage Record, May 26, 2012
12. St. Joseph's Health Centre, Diagnostic Imaging, X-ray Chest, May 26, 2012
13. Follow-up Consultation note from Dr. Kliman, MD, dated June 13, 2012
14. In-Home Occupational Therapy Functional Assessment – Initial Assessment – SABS and Tort Report, Angela Fleming, Occupational Therapist, August 3, 2012
15. In-Home Occupational Therapy Functional Assessment – Initial Assessment Report Angela Fleming, Occupational Therapist, August 10, 2012
16. Initial Assessment – Physical Therapy/Physical Rehabilitation Report, Julius Boquiren, Physiotherapist of InterAction, August 16, 2012
17. Consultation Letter by Dr. Apostolou Tountas, MD, Humber River Regional Hospital Fracture Clinic, October 17, 2012
18. Consultation Report, Dr. Barry Cayen, MD, Humber River Regional Hospital Fracture Clinic, October 19, 2012
19. CT Scan report of Right Knee, Humber River Regional Hospital, November 27, 2012
20. Operative Report, Dr. Barry Cayen, Humber River Regional Hospital, November 29, 2012
21. Fracture Clinic Report, Dr. Barry Cayen, Humber River Regional Hospital, December 7, 2012
22. Transcribed clinical notes and records of Dr. Abraham Cohen, Family Physician, April 10, 2013 (June 28, 2010 to September 5, 2012)
23. In-Home Occupational Therapy Functional Assessment – Progress Report #1, Betty Cowan, Occupational Therapist, June 26, 2013
24. Insurer's Examination – Orthopaedic Assessment Report Dr. Irving Grosfield, Orthopaedic Surgeon of Sibley, October 30, 2013
25. Occupational Therapy Services – In-Home Functional Assessment Report, Beverly Cott, Occupational Therapist, November 15, 2013
26. Social Work Assessment and Treatment Plan Report, Collette Deveau, Social Worker of The Social Work Consulting Group, November 2013
27. Vocational Rehabilitation Report, David Cohen, Vocational Evaluator of Vocational Alternatives Inc., May 14, 2014
28. Occupational Therapy Services –Status Update – Progress Report #1 by Beverly Cott, Occupational Therapist, May 21, 2014
29. Disability Certificate (OCF-3), Dr. Abraham Cohen, Family Physician, September 10, 2014
30. Occupational Therapy Services - Status Update – Progress Report #2, by Beverly Cott, Occupational Therapist, September 12, 2014
31. Disability Certificate (OCF-3), Dr. Abraham Cohen, Family Physician, November 7, 2014



32. Insurer's Examination – Executive Summary – Benefit Review Dr. Gregory Soon-Shiong, February 2, 2015
33. Insurer's Examination – Orthopaedic Surgeon– Specified Benefit Review, Dr. Gregory Soon-Shiong, February 2, 2015
34. Insurer's Examination – Labour Market Survey Jennifer Chladny, Vocational Evaluator, February 2, 2015
35. Insurer's Examination – Vocational Assessment, Jennifer Chladny, Vocational Evaluator, February 2, 2015
36. Insurer's Examination – Psychologist – Specified Benefits Review, Dr. Konstantine Zakzanis, Psychologist, February 2, 2015
37. Insurer's Examination – Transferable Skills Analysis, prepared by Jennifer Chladny, Vocational Evaluator, dated February 2, 2015
38. Insurer's Examination – Functional Abilities Evaluation, Renee David, Registered Massage Therapist, February 2, 2015
39. In-Home Work Station Assessment Report, Beverly Cott, Occupational Therapist, March 4, 2015
40. Independent Orthopaedic Assessment Report, Defence Medical, Dr. Joel Finkelstein, May 12, 2016
41. Transcribed clinical notes and records of Dr. Abraham Cohen, Family Physician, April 10, 2013 (June 28, 2010 to September 5, 2012)
42. Follow-up x-ray report of the Right Hand, Dr. Ron Eddeb, August 24, 2011
43. Fracture Clinic Consultation Report, Dr. Rick Zarnett, dated August 24, 2011
44. Triage Report, Humber River Hospital, dated August 21, 2011
45. Emergency Record, Humber River Hospital dated August 21, 2011
46. X-ray report of the Right Hand, Dr. Ron Polson, August 21, 2011
47. Consultation Report, Dr. G. Sussman, Immunologist, July 23, 2011
48. Clinical Report from Dr. Kwok, dated February 21, 2007
49. Clinical Report from Dr. Kwok, February 14, 2007
50. January 17, 2007 and January 31, 2007, Outpatient Day Care Records, Humber River Hospital
51. X-ray report of Right Finger, Humber River Hospital, January 5, 2007
52. Outpatient Day Care Record, Humber River Hospital, January 4, 2007

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THE BRIEFING

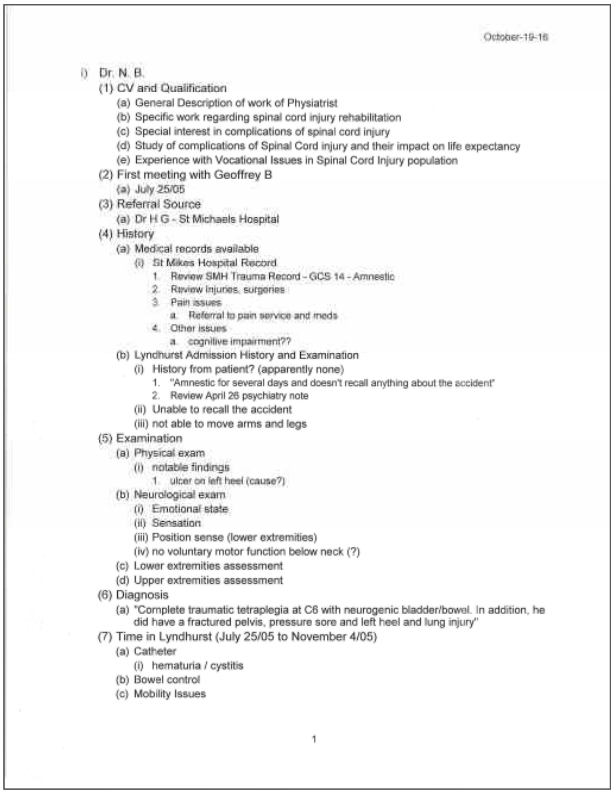
- Scheduling
  - Should begin 6 weeks before trial/arb
  - Should be in your calendar

- Iterative Process
  - Usually 3 sessions
  - Time required varies but at least an hour each
  - Not all need to be in person
  - Use of Technology

THE BRIEFING *CONT'D*

- Use of outliner: based on format of report
- Definition of key terms and phrases
  - Particularly important with a jury
- Body of the evidence
  - History
  - Diagnosis
  - Prognosis
  - Recommendations
  - Review of opposing expert's opinion

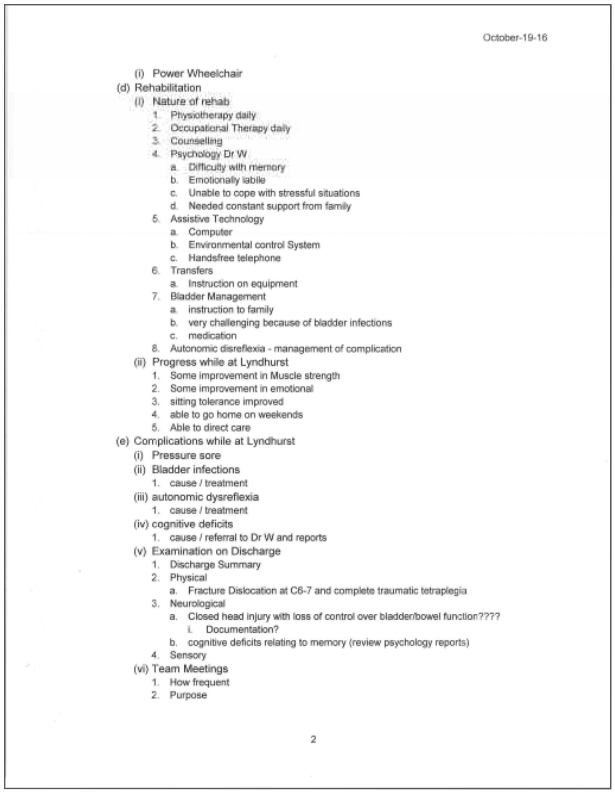
SAMPLE OUTLINE



October-19-16

i) Dr. N. B.
(1) CV and Qualification
(a) General Description of work of Physiatrist
(b) Specific work regarding spinal cord injury rehabilitation
(c) Special interest in complications of spinal cord injury
(d) Study of complications of Spinal Cord injury and their impact on life expectancy
(e) Experience with Vocational Issues in Spinal Cord Injury population
(2) First meeting with Geoffrey B
(a) July 25/05
(3) Referral Source
(a) Dr H G - St Michaels Hospital
(4) History
(a) Medical records available
(i) St Mikes Hospital Record
1. Review SMH Trauma Record - GCS 14 - Amnestic
2. Review Injuries, surgeries
3. Pain issues
a. Referral to pain service and meds
4. Other issues
a. cognitive impairment??
(b) Lyndhurst Admission History and Examination
(i) History from patient? (apparently none)
1. "Amnestic for several days and doesn't recall anything about the accident"
2. Review April 26 psychiatry note
(ii) Unable to recall the accident
(iii) not able to move arms and legs
(5) Examination
(a) Physical exam
(i) notable findings
1. ulcer on left heel (cause?)
(b) Neurological exam
(i) Emotional state
(ii) Sensation
(iii) Position sense (lower extremities)
(iv) no voluntary motor function below neck (?)
(c) Lower extremities assessment
(d) Upper extremities assessment
(6) Diagnosis
(a) "Complete traumatic tetraplegia at C6 with neurogenic bladder/bowel. In addition, he did have a fractured pelvis, pressure sore and left heel and lung injury"
(7) Time in Lyndhurst (July 25/05 to November 4/05)
(a) Catheter
(i) hematuria / cystitis
(b) Bowel control
(c) Mobility Issues

1

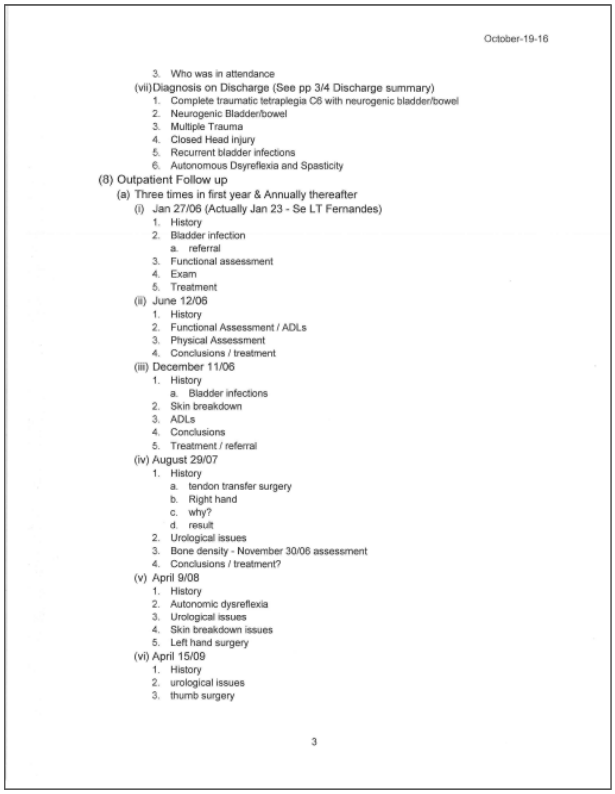


October-19-16

(i) Power Wheelchair
(d) Rehabilitation
(i) Nature of rehab
1. Physiotherapy daily
2. Occupational Therapy daily
3. Counselling
4. Psychology Dr W
a. Difficulty with memory
b. Emotionally labile
c. Unable to cope with stressful situations
d. Needed constant support from family
5. Assistive Technology
a. Computer
b. Environmental control System
c. Handsfree telephone
6. Transfers
a. Instruction on equipment
7. Bladder Management
a. instruction to family
b. very challenging because of bladder infections
c. medication
8. Autonomic disreflexia - management of complication
(ii) Progress while at Lyndhurst
1. Some improvement in Muscle strength
2. Some improvement in emotional
3. sitting tolerance improved
4. able to go home on weekends
5. Able to direct care
(e) Complications while at Lyndhurst
(i) Pressure sore
(ii) Bladder infections
1. cause / treatment
(iii) autonomic dysreflexia
1. cause / treatment
(iv) cognitive deficits
1. cause / referral to Dr W and reports
(v) Examination on Discharge
1. Discharge Summary
2. Physical
a. Fracture Dislocation at C6-7 and complete traumatic tetraplegia
3. Neurological
a. Closed head injury with loss of control over bladder/bowel function????
i. Documentation?
b. cognitive deficits relating to memory (review psychology reports)
4. Sensory
(vi) Team Meetings
1. How frequent
2. Purpose

2

SAMPLE OUTLINE



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3. Who was in attendance

(vii) Diagnosis on Discharge (See pp 3/4 Discharge summary)
1. Complete traumatic tetraplegia C6 with neurogenic bladder/bowel
2. Neurogenic Bladder/bowel
3. Multiple Trauma
4. Closed Head injury
5. Recurrent bladder infections
6. Autonomous Dsyreflexia and Spasticity

(8) Outpatient Follow up
(a) Three times in first year & Annually thereafter
(i) Jan 27/06 (Actually Jan 23 - Se LT Fernandes)
1. History
2. Bladder infection
   a. referral
3. Functional assessment
4. Exam
5. Treatment

(ii) June 12/06
1. History
2. Functional Assessment / ADLs
3. Physical Assessment
4. Conclusions / treatment

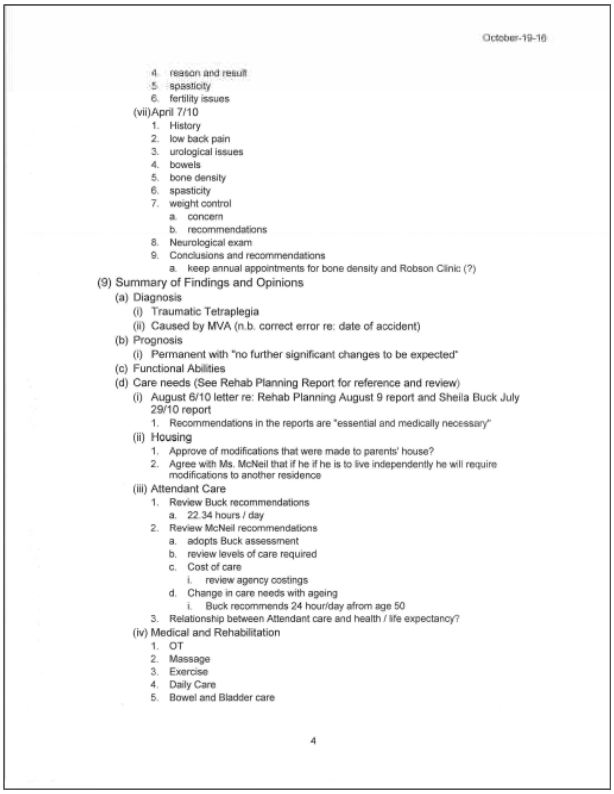
(iii) December 11/06
1. History
   a. Bladder infections
2. Skin breakdown
3. ADLs
4. Conclusions
5. Treatment / referral

(iv) August 29/07
1. History
   a. tendon transfer surgery
   b. Right hand
   c. why?
   d. result
2. Urological issues
3. Bone density - November 30/06 assessment
4. Conclusions / treatment?

(v) April 9/08
1. History
2. Autonomic dysreflexia
3. Urological issues
4. Skin breakdown issues
5. Left hand surgery

(vi) April 15/09
1. History
2. urological issues
3. thumb surgery

3



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4. reason and result
5. spasticity
6. fertility issues

(vii) April 7/10
1. History
2. low back pain
3. urological issues
4. bowels
5. bone density
6. spasticity
7. weight control
   a. concern
   b. recommendations
8. Neurological exam
9. Conclusions and recommendations
   a. keep annual appointments for bone density and Robson Clinic (?)

(9) Summary of Findings and Opinions
(a) Diagnosis
(i) Traumatic Tetraplegia
(ii) Caused by MVA (n.b. correct error re: date of accident)

(b) Prognosis
(i) Permanent with "no further significant changes to be expected"

(c) Functional Abilities

(d) Care needs (See Rehab Planning Report for reference and review)
(i) August 6/10 letter re: Rehab Planning August 9 report and Sheila Buck July 29/10 report
1. Recommendations in the reports are "essential and medically necessary"

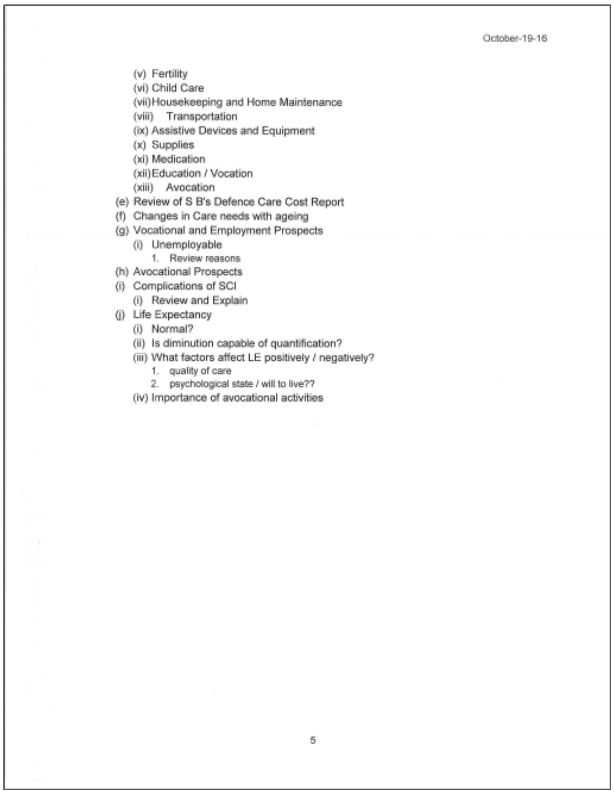
(ii) Housing
1. Approve of modifications that were made to parents' house?
2. Agree with Ms. McNeil that if he if he is to live independently he will require modifications to another residence

(iii) Attendant Care
1. Review Buck recommendations
   a. 22.34 hours / day
2. Review McNeil recommendations
   a. adopts Buck assessment
   b. review levels of care required
   c. Cost of care
      i. review agency costings
   d. Change in care needs with ageing
      i. Buck recommends 24 hour/day afrom age 50
3. Relationship between Attendant care and health / life expectancy?

(iv) Medical and Rehabilitation
1. OT
2. Massage
3. Exercise
4. Daily Care
5. Bowel and Bladder care

4

SAMPLE OUTLINE



October-19-16

(v) Fertility
(vi) Child Care
(vii) Housekeeping and Home Maintenance
(viii) Transportation
(ix) Assistive Devices and Equipment
(x) Supplies
(xi) Medication
(xii) Education / Vocation
(xiii) Avocation
(e) Review of S B's Defence Care Cost Report
(f) Changes in Care needs with ageing
(g) Vocational and Employment Prospects
(i) Unemployable
1. Review reasons
(h) Avocational Prospects
(i) Complications of SCI
(i) Review and Explain
(j) Life Expectancy
(i) Normal?
(ii) Is diminution capable of quantification?
(iii) What factors affect LE positively / negatively?
1. quality of care
2. psychological state / will to live??
(iv) Importance of avocational activities

5

SAMPLE SUMMARY OF OPINION

(9) Summary of Findings and Opinions

a) Diagnosis
b) Prognosis
c) Functional Abilities
d) Care needs (See Rehab Planning Report for reference)
e) Review of S B's Defence Care Cost Report
f) Changes in Care needs with ageing
g) Vocational and Employment Prospects
h) Avocations Prospects
i) Complications of SCI
j) Life Expectancy

- Re-Examination
- Cross-Examination

KEY TO SUCCESS

- Preparation
- Preparation
- Preparation

Lawrence H. Mandel, Thomson Rogers

THANK YOU

Please feel free to call or email with questions.

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