

## **The Interface between the Public and Private Provision of Care and Accommodation Services**

The Civil Justice Council Serious Injury and Clinical Negligence Committee includes among its members judges, barristers, solicitors, insurers and representatives of the NHSLA and a patient organisation, with wide ranging and in depth experience of the practical issues that arise in serious personal injury claims.

The subject of the attached paper - the Interface between the Public and Private Provision of Care and Accommodation Services for Claimants – is currently one of the most intractable issues facing claimants, defendants, the public sector providers, insurers and the courts, in personal injury claims. The Committee are very grateful to William Norris QC for this thorough commentary on the complex statutory provisions, and the recent case law, and for his analysis of possible solutions.

In short the issue is whether the tortfeasor should bear all the reasonable costs of an injured claimant's future care and accommodation needs (as the law currently provides and for which they collect premiums), when in some cases one or more public authorities are under a statutory duty to assess the claimant's needs, and may, in some circumstances, also be under a statutory obligation to provide the claimant with services to meet those needs (sometimes being able to recoup the costs of doing so from the claimant).

Most claimants almost certainly prefer to receive damages from tortfeasors to buy the services they need. The claimant has reasonable certainty the funds will be sufficient to cater for his needs into the future, and the claimant has control over the selection, quality and coordination of the services he pays for. By contrast if the claimant is fully or partly dependant on state care or provision, he lives with the risk that changes in policy or funding will mean a reduction in, or even a withdrawal of, the provision, yet if this happens the claimant cannot invite the court to reopen his damages award. Also the claimant has no control over the quality of the state service provided, and even if he decides to "top up" the state provision by using his damages to buy in additional services, he will face the problem of

coordinating very different regimes provided by different agencies. Finally if a claimant relocates to a different local authority or PCT area with different policies and funding criteria, again he may lose the provision with no possibility of reopening the damages award.

Insurers are concerned about the increasing size of the awards made to claimants in very serious injury cases and about the rising costs of insurance premiums. They consider that claimants should take advantage of state services when they are on offer, that the courts should assess whether those services are likely to be available into the future, and whether the claimant will continue to use them. Insurers also are concerned about the risk of “double- funding” when the claimant’s damages award covers the full cost of the services needed by the claimant, but in fact the claimant chooses to accept the services provided by the state, especially if these are not means - tested.

Claimants, on the other hand are concerned that if the law was changed to allow public bodies to take damages awards into account then public bodies providing traditionally non means tested benefits or services might seek to take part of the damages award into account on like for like basis.

The paper puts forward a number of possible solutions. The Committee considers that they need careful analysis by the policy makers.

Indemnities by the tortfeasor to fill any withdrawal or shortfall in future public services are considered by some to be a possible solution (and the CJC Serious Injury Committee intends to do more work on indemnities) but claimants’ representatives argue they may have difficulty enforcing them.

The paper also canvases adapting the periodic payments regime to solve the double funding problem but in cases settled by agreement the amount of damages the claimant chooses to put into periodical payments may not necessarily reflect a particular care or other requirement. This makes it difficult to compare those payments with provisions by local authorities

Many “interface” cases have been contested to trial in the last few years, and some to the Court of Appeal (as admirably summarised in William Norris’ paper attached). This is a new form of expensive satellite litigation, which puts a particular burden on claimants. Not surprisingly the courts are not finding it easy to resolve the future care dilemma in individual cases. Different judges are taking very different approaches - compare Tomlinson J.’s firm rejection of the defendant’s argument in *Freeman v Lockett* that the claimant would continue to receive funded public care, with His Honour Judge Reid’s decision in *Crofton v NHSLA* that the local authority would continue to pay £68,000 p.a for the claimant’s care and that this amount should be offset against the claimant’s annual care needs.

Evidence on the interface issue can take 2-3 days to hear at trial, which is expensive in court time, and the parties also have to bear the not insignificant costs of investigating the possible state provision and whether it will meet the claimants’ needs. This is compounded by the very different approaches taken by local authorities and primary care trusts towards the assessment of claimants’ needs – many take a considerable time to carry out an assessment, and some decline to do it at all if the claimant has received an interim payment from the tortfeasor. Others change their minds during the conduct of the case over whether they will seek recoupment of their outlay from the claimant if the claim succeeds (see *Freeman v Lockett*) and there has also been one reported attempt by a local authority to recoup the sums paid for care directly from the tortfeasor (see *Islington LBC v University College London Hospital NHS Trust*.)

It is this Committee’s view that an early resolution to this difficult problem is required by the government, because the fundamental issue is a policy one, not capable of consensus by the different interests groups involved. The Committee is very willing to work with the DCA, DOH and DWP to find a workable solution.

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