Some recent legal developments relevant to spinal injury claims

apil South of England Forum: 11.12.2008

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General damages

1.1 In September 2009 the 9th edition of the *Guidelines for the Assessment of General Damages in Personal Injury Cases* was published.

Periodical payments

2.1 You will know that since 1st April 2005 the Courts have had power to impose periodical payment orders (PPOs) on the parties. Previously the court could only make an order for the PPO's Common Law predecessor - the structured settlement - if both parties consented. Now, however, the new Section 2 of the Damages Act 1996, brought in by the Courts Act 2003, enables the court to order that all or part of an award for future pecuniary loss in a PI claim should be by way of a PPO.

2.2 Section 2(1)(b) of the Damages Act imposes an obligation on a court making an award for future pecuniary loss to consider whether to make a PPO.

2.3 CPR 41 allows either party to express a preference for a PPO or lump sum and state why. In spinal injury claims it is very likely that the claimant will at least want to consider a PPO disposal. Some therefore think that it is good practice to indicate this as early as possible, i.e. in the Particulars of Claim.

2.4 Practice Direction 41B sets out what the court must have regard to when considering whether to order a lump sum or PPO disposal. Such factors include: (1) the scale of the annual payments, taking into account any deduction for contributory negligence; (2) the reasons given by the claimant for his preference; (3) the financial advice received by the claimant; and (4) the defendant's preference and reasons for it.

2.5 Although the courts have had the power to impose PPOs for over 2 years[1], not all insurers are or have been geared up to deal with them. Some insurers have been unable to deal with the complexities of arranging their business so that regular payments can be made by them during a claimant's lifetime. As a result, expensive annuity products have had to be purchased from other financial institutions to meet PPO obligations. This has meant that some insurers have been prepared to pay a premium to settle claims on a lump sum basis in order to avoid a PPO. However, most if not all insurers have now adapted and the opportunities for securing a premium to avoid a PPO disposal are diminishing.

Indexation

3.1 A problem has arisen in relation to the costs of future care. Over the past few years studies have shown that professional care costs have risen faster than the Retail Price Index (RPI). Section 2 of the Damages Act

[1] See Burton v Kingsbury [2007] EWHC 2091 (QB) for an example of the court imposing a PPO in respect of future care and case management on a claimant whose preference was for a lump sum

requires PPOs to increase by reference to the RPI except where the court orders otherwise. Thus, if the PPO for future care is ordered to increase with RPI, a claimant reliant on engaging professional care will lose out because the payments will not increase as fast as care costs and a deficit will arise in the funding of the care regime.

3.2 This problem has been raised recently in a series of first instance decisions. In Thompstone v Tameside & Glossop Acute Services NHS Trust[2] Swift J held that the RPI was an inappropriate measure of indexation because it was demonstrated to her that the claimant's future care costs would increase significantly faster than the RPI.

3.3 The claimant (who was 8 and suffered cerebral palsy) called 3 experts to demonstrate that the RPI was inadequate: Dr Wass, an academic labour economist, Richard Cropper, an Independent Financial Adviser and Anthony Carus, an actuary. Swift J accepted that the Annual Survey for Hours and Earnings: Occupational Earnings for Care Assistants and Home Carers (ASHE 6115) was the appropriate index to use to provide for increases in the PPO in that case as the index more accurately reflected pay increases which the claimant's carers would receive[3].

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2 [2006] EWHC 2904(QB)

3 The legal groundwork had already been laid for this decision in Flora v Wakom (Heathrow) Ltd [2006] EWCA Civ 1103 where the Court of Appeal, on an interlocutory point, refused to strike out the claimant's pleaded claim that a PPO should be indexed other than by RPI.

3.4 Thompstone has been followed in at least 3 further decisions: Corbett v South Yorkshire Strategic Health Authority[4], Sarwar v Ali & MIB[5] and RH v United Bristol Healthcare NHS Trust[6].

3.5 Thompstone and other related cases were appealed and heard by the CA on 17th January 2008. The CA rejected the defendants' appeals.

Ogden Tables 6th Edition

4.1 The new edition contains important changes to the way some claims for future loss of earnings are calculated. A more scientific approach is now advocated in relation to calculating loss. The loss of earnings multiplier is to be adjusted by reference to a number of factors including the claimant's gender, age, and employment status at the time of the accident and trial, disability status and educational attainment.

4.2 The multipliers are now all slightly higher, reflecting mortality projections for the whole of the UK as opposed to just England and Wales. This is a subject which would occupy a day's seminar alone. The simplest way to understand the changes is to get a copy of the new tables and read the very helpful introduction and useful illustrations of how the material can be

4 28.03.07 - Lawtel AC0113755 - HHJ Bullimore

5 [2007] EWHC 1255 (QB) - Lloyd Jones J)

6 [2007] EWHC 1441 (QB) - Mackay J)

used. A very clear explanation of the changes may be found in a paper by Simon Levene on the Personal Injuries Bar Association website[7].

Past gratuitous care

5.1 This is frequently a significant part of a spinal injury claim, particularly where several years have elapsed between injury and assessment.

Aggregate rates appropriate

5.2 In Massey v Tameside & Glossop Acute Services NHS Trust[8] Teare J clarified the law relating to the valuation of past gratuitous care. The judge accepted submissions, based on the evidence of the claimant's care expert, Ms Wendy Daykin, that valuation of past family care should be on the basis of the NJC aggregate rates, which are significantly higher than the flat rates because they take account of uplift for work during evening, weekends and unsocial hours.

20% deduction for non-commercial elements

5.3 He also failed to follow the recommendation made by the CA in Evans v Pontypridd Roofing Ltd[9] that the rates should be reduced by 25% (to reflect nominal deductions for the carers' tax and NI) and applied a 20% discount. Use of the NJC aggregate rate and the 20% discount in this decision may reflect the fact that the care was given in the context of a

7 www.piba.org.uk
8 (27.02.07 unreported)
9 [2001] EWCA Civ 1657

cerebral palsy claim (i.e. involving particularly challenging work which is carried out at all hours), but the decision is potentially useful in spinal claims.

Accounting for Carer's Allowance

5.4 Past Carer's Allowance received by the claimant's carer should be offset against the claim for past gratuitous care in order to avoid double recovery[10].

Future care

6.1 2 cases highlight the need for conducting a detailed analysis of the evidence before making concessions on the claim for future professional care.

6.2 In Corbett v South Yorkshire Strategic Health Authority[11] the court was dealing with a 24-year-old claimant whose claim for future care was disputed. The claimant suffered cerebral palsy and was looked after at home by his parents. They wished to substantially relieve themselves of the care and have the claimant looked after by a team of carers in separate bungalow accommodation.

[10] Massey v Tameside & Glossop Acute Services NHS Trust
[11] See above

6.3 Mrs Rosemary Statham, the claimant's care expert, proposed a care regime consisting of a team of support workers working under a team leader and case manager. The annual cost would be £105,625. The defendant proposed that the claimant's care should be provided by a team of live-in carers provided by an agency at a cost of £70,690 per year. As the agreed multiplier for future care was 28.12 (life-expectancy was reduced), the difference between the parties was thus almost £1M - clearly worth fighting over.

Working Time Regulations

6.4 The judge found that the regime proposed by the defendant was inappropriate in relation to the claimant's actual needs, but, crucially, could not have complied with the Working Time Regulations 1998 (as amended) in that, inter alia, it would not have allowed a carer employed within it to have not less than 11 consecutive hours rest in any 24 hour period. For this and other reasons, the claimant's proposals were accepted.

6.5 In Tame v Professional Cycle Marketing Ltd[12] HHJ Harris was required to assess the claim for future care for a claimant who had sustained severe brain damage. The point in issue was the extent of paid professional care which would be required to supplement the care provided by the claimant's wife.

[12] (19.12.06 - Lawtel AC 9601119)

6.6 The court heard that the relationship between the claimant and his wife had deteriorated and that statistical evidence showed that where one partner suffered frontal lobe injury, the relationship would typically break down with 4-8 years of the accident. The court accordingly awarded damages for future care based on the assumption that the wife would no longer be providing care within a short period and that such care would have to be bought in at commercial rates.

Life expectancy

7.1 Although PPOs can ensure that funds are always available for the claimant's care regime, life expectancy must still be predicted in order to enable proper quantification of heads of claim not included in the PPO and which may be dealt with on conventional multiplier/multiplicand principles, such as aids and equipment and accommodation.

7.2 Life expectancy will be reduced in all or almost all spinal injured claimants. The conventional method of calculating the reduction is to look at the epidemiological research and medical literature in relation to the group of injured the claimant belongs to (i.e. tetraplegic/paraplegic). Having determined where the claimant fits in the relevant cohort, his particular life expectancy can then be determined by fine tuning by reference to his own medical history and prognosis[13].

[13] See e.g. Burton v Kingsbury: above

7.3 This process will normally be carried out by the lead medical experts, i.e. the spinal surgeons. Where disagreement arises over interpretation of the medical literature, however, and the disagreement cannot be resolved by the medical experts, statistical evidence will be admitted to resolve the dispute[14].

Local authority funding of care and accommodation

8.1 You will know that in Sowden v Lodge[15] the CA dealt with a claim where the defendant sought credit for the care and accommodation that the claimant would receive from her local authority pursuant to its obligations under Section 21 of the National Assistance Act 1948. Louise Sowden, then 13 years old, was catastrophically injured and resident in a local authority home at no cost to her. The trial judge had found that Louise was likely to remain in the home, which best suited her disabled needs, and that the defendant was only liable to pay damages for the amount of care she reasonably required beyond that being provided by the home: so-called "top up" damages.

8.2 Although the CA remitted the claim back to the trial judge for further consideration of the top up issue, it approved in principle the notion that where care and accommodation was provided by a local authority, the defendant's obligations in this regard pro rata were abated. In the

[14] Arden v Malcom [2007] EWHC 404 (QB)
[15] [2004] EWCA Civ 1370

conjoined appeal of Drury v Crookdake, heard at the same time, the CA approved the trial judge's rejection of a similar argument where that claimant was not living at home and where there was no satisfactory evidence that his or any future local authority would fund his care regime.

8.3 Sowden has reverberated through catastrophic injury litigation producing a series of subsequent decisions causing confusion over whether and to what extent a claimant has to give credit for care and accommodation which is being or might be provided by the state, whether by a local authority under the 1948 Act or by the National Health Service under similar provisions in the National Health Service and Community Care Act 1990 concerning patients following discharge from NHS treatment.

8.4 In Freeman v Lockett[16] Tomlinson J rejected the defendant's contention that the claimant should give credit for direct payments she was and might be entitled to receive from her local authority. The claimant, an adult female, sustained a spinal injury causing upper body paralysis and was living at home. She had been receiving almost £1,000 a week direct payments from her local authority. The claimant had no desire to continue to receive the payments. In what might be termed a robust judgment, Tomlinson J expressed distaste for the argument that an insured defendant could escape paying for the consequences of his negligence. He found that there was no certainty as to what the claimant might

[16] [2006] EWHC 102

continue to receive from the local authority because many factors could change that would impact on their obligation or ability to continue payments. She was awarded her future care costs with no reduction, although the relevance to the court's decision of the evidence that the claimant intended to cease claiming local authority payments after judgment should perhaps not be overlooked.

8.5 The principle underlying these decisions is that an injured claimant should be fully compensated for his loss but should not achieve double recovery, i.e. have his care and/or accommodation provided by the local authority but also receive damages for these losses from the defendant. If the claimant is a patient his damages will be administered by the Court of Protection. Such damages cannot be taken into account by a local authority when assessing a claimant's ability to contribute towards care and accommodation that it is providing.

8.6 These factors were of some importance in explaining the decisions in both Sowden and Freeman, which appear to be in conflict with each other. A more recent decision has produced further confusion. In Crofton v NHSLA[17] the CA held that the trial judge was right to reduce the defendant's liability to pay for future care and accommodation by the amount of direct payments the claimant was likely to receive from his local authority. The judge assessed the claimant's annual care needs arising

[17] [2007] EWCA Civ 71

from brain injury caused by clinical negligence at £122,602 per annum but found that the local authority would make annual payments of £68,018. He then applied the full multiplier of 25.42 to reduce the defendant's liability by some £1.7M.

8.7 Although the case was remitted to the judge for further consideration of a number of issues, the CA in principle upheld the decision that the defendant should be given credit for the direct payments the claimant would receive. The case was remitted for the judge to apply a discount to the multiplier used for calculation of the direct payments as a result of future uncertainty in relation to continuation of such payments.

8.8 In September 2007 the issue arose again in Burton v Kingsbury[18] where Flaux J had to consider the position of a 24-year-old male tetraplegic whose care package required as a result of his injuries was assessed by him at over £121,000 per annum. At the time of the trial the care he was receiving (worth about £80,000 per annum) was being funded jointly by the local authority and Primary Care Healthcare Trust.

8.9 Unlike in Freeman, but as in Crofton, it was clear that after settlement the claimant would continue to receive state-funded care. Flaux J rejected a proposal to impose a 'reverse indemnity' whereby the claimant would receive the full cost of his care from the defendant but would be required

[18] Citation above

to account from time to time to the defendant for the value of state care received in future. The reverse indemnity proposal was rejected largely on the grounds that the court did not think it had the power to make such an order. To avoid double recovery, the court instead ordered the defendant to pay the difference between future state-provided care and the value of the care package which it determined the defendant would otherwise have to pay, i.e. a true top-up. It may be that this is in fact the way forward in this complicated area of law.

Interim Payments

9.1 Pitcher v Headstart Nursery[19] and others is a very recent first instance decision (on Lawtel).When less than a year old, the Claimant suffered a very severe and permanent brain injury when he fell from a changing table whilst in the care of the Defendant nursery. There had been a delay in diagnosis which led to the hospital being added as a Defendant to the proceedings. Liability was admitted by the Defendants. As a result of his injuries, the Claimant was functionally tetraplegic and required permanent care from a team of carers. The Claimant secured interim payments of just over £1 million to facilitate the purchase of a suitable property and to provide a private care package to supplement the care being funded by the local Primary Care Trust. There was a dispute as to life expectancy which affected the parties valuation of the claim. The Claimant valued his claim in the region of £5 million whereas the Defendant valued the claim in

[19] [2008] EWHC 2681 (QB)

the region of £1.8million. For this reason, it was likely that the claim (at least for future care) would be dealt with by way of periodical payments rather than a conventional lump sum.The Claimant made an application for a further interim payment of £950,000 to fund the proposed adaptations and extension of the purchased property and to establish a fully privately paid care package. The application was opposed.

The Defendants submitted that where a periodical payments order was likely, then the Court should not award any interim payment that was likely to fetter the trial judge's discretion in relation to future periodical payments, that is the Court should only consider the likely lump sum element of the award when considering a "reasonable proportion" of final damages within the meaning of CPR. The Claimant argued that the Court should take account of the trial judge's discretion to capitalise the value of periodical payments. The Court held that the interim payment award should be assessed only on the likely lump sum award and it would not be appropriate to make any allowance for the trial judge's discretion to capitalise some or all of the future care claim, because to do so would unduly fetter the trial judge's discretion. As such, a further interim payment was awarded but it was limited to £320,000.