

CARE CLAIMS

Peter Barrie, Guildhall Chambers

Significance of care claims

Evans v Pontypridd Roofing [2001] EWCA Civ 1657 [2002] PIQR Q61
PSLA £100,000 Care £385,000 plus respite

Giambrone v Sunworld Holidays [2004] EWCA Civ 158 [2004] PIQR Q38
£150 for 2 weeks caring for a sick child.

Advantage of the calculator.

Peters

Peters v East Midlands HA [2008] EWHC 778, [2009] EWCA Civ 145

Provided there is no risk of double recovery, claimants are entitled to choose a privately funded care package rather than local authority provision.

If claimant comes up with a reasonable package it will be difficult for defendants to say that LA funded alternative placement should be used to avoid or mitigate the loss.

The subjective approach is “to consider what course the claimant proposes to adopt and to consider whether it is reasonable having regard to the nature and extent of the claimant’s needs, not to consider objectively what course is reasonable” (Ramsay J in *Taylor v Chesworth* [2007] EWHC 1001.)

Reinforces the advice to get a care package in place using assessments under the Rehab Code or interim payments.

Rates

Up to date Crossroads rates difficult to find

Basic rate or aggregate rate? Related to issue of discount.

Shortcomings of NJC

- No paid holiday or sickness absence
- No enhancement for unsocial hours or overtime
- No pension contributions
- No training provision, uniform, subsidised food or perks.

(But no time or expense of travel to work or fixed hours and can get on with other things in own home at the same time)

Allow extra weeks so 58/59 per year for training, sickness and holidays.

F&F editors argue that you should use 59 weeks as well as aggregate rate.

National minimum wage

From 01.10.03	£4.50	less 25% is £3.37
From 01.10.04	£4.85	less 25% is £3.64
From 01.10.05	£5.05	less 25% is £3.79
From 01.10.06	£5.35	less 25% is £4.01
From 01.10.07	£5.52	less 25% is £4.14
From 01.10.08	£5.73	less 25% is £4.30
From 01.10.09	£5.80	less 25% is £4.35

NJC spinal Point 8

2004/05	£6.06	less 25% is £4.54
2005/06	£6.24	less 25% is £4.68
2006/07	£6.43	less 25% is £4.82
2007/08	£6.62	less 25% is £4.96
2008/09	£6.75	less 25% is £5.06

Aggregate rates in F&F

2004/05	£7.94	less 25% is £5.95
2005/06	£8.18	less 25% is £6.13
2006.07	£8.43	less 25% is £6.32
2007/08	£8.68	less 25% is £6.51
2008/09	£8.85	less 25% is £6.64

So for example in January 2008,

NMR gives	£4.14
NJC gives	£4.96
F&F gives	£6.51

Authorities only support aggregate rates in cases of severe injury, night time need and exceptional quality of family care; comparable issues to the discount.

Massey v Thameside NHS [2007] EWHC 317 (cerebral palsy, significant night time care) Teare J allowed aggregate rates and only 20% discount

Smith v E & N Hertfordshire NHS [2008] EWHC 2234 (cerebral palsy, night time care) Penry-Davy J allowed aggregate rates

Conceded in *Beesley v New Century* [2008] EWHC 3033

Noble v Owens [2008] EWHC 359 (severe orthopaedic injuries) Field J refused to use aggregate rates.

ASHE 6115 annual earnings for carers will include some of the enhancements in the aggregate rates but are buried deep in the ONS website.

Conclusion – aggregate rate is worth arguing for in any case of lasting care need.

Points

A commercial care package must not transgress the Working Time Regs.

The Pensions Act 2008 obliges employers to pay pension contributions 3% of earnings between £5,035 and £33,540.

Discount

25% common but not binding. This is the rate approved in *Evans* when defendant contended for 33%. Not worth challenging in ordinary cases.

Giambrone v Sunworld Holidays [2004] PIQR Q38

Headline outcome a victory for claimants – care awards are not restricted to very serious cases or to cases going beyond the call of duty – *Mills v BR Engineering* [1992] PIQR Q130 overruled. Awards in 6 test cases in a range £120 to £275.

Detail sounds a warning on discounts in small cases which has had little impact.

- (a) CA suggestion that, for a child suffering gastro-enteritis of the kind considered, an award should not exceed £50 per week in 2004 values – about 10 hours of care per week, not what the distraught mum will spend.
- (b) McDuff J tried to treat as akin to general damages. He recognised the law on discounts in *Evans* but said “I intend to adopt a more broad brush approach”. The CA did not criticise this. Round figure awards were rounded down from an hours/rate per hour calculation which had been based on basic Spinal Point 8 rates.

Calculation £209	Award £150
Calculation £249	Award £175
Calculation £278	Award £175
Calculation £518	Award £275
Calculation £169	Award £150

Compare O'Connor in *Housecroft v Burnett* “A capital sum sufficient to make recompense to the relative” and Lord Bridge in *Hunt v Severs* an amount “to enable the voluntary carer to receive proper recompense for his and her services.”

Cases of no discount tend to be catastrophic injury.

Will family care continue to be available – eg by parents? If not, reduce the discount or make a stepped claim.

Watch out for credit for Carer's Allowance under *Hodgson v Trapp*.

Hospital visiting

Havenhand v Jeffrey in Kemp 13-005 distinguishes physical care from companionship. Supported by *Evans* and *Giambrone* and by *Huntley v Simmonds* [2009] EWHC 406. Where hospital visits are significant, must prove any physical care provided and seek a medical opinion that visits were therapeutic.

A point to ponder

Hunt v Severs [1994] 2 AC 350 says that the claimant holds the care damages on trust for the carer.

H v S [2003] PIQR Q1 says that this is a real trust which the court will enforce.

Operation is straightforward for past care but can be difficult for future care.

- What advice should we give to the claimant about the trust?
- What advice should we give to the carer, if any?
- What if a carer says he/she does not want to take any of the claimant's money?

- What if the claimant is a child/protected party?
- Should all family carers approve the schedule before it is served?
- Do we owe a duty of care to the carer?
- What conflicts might arise – e.g. on settlement of the claim on a global compromise figure, or a difference of opinion on whether some paid care should be introduced?

Peter Barrie
Guildhall Chambers
October 2009