PI DEFENDANT SEMINAR 2013 - CARE WORKSHOP
Suggested Points

Case 1

Hunt v Severs – Tortfeasor prospering / carer disappearing

The claim throws up a Hunt v Severs point – no recovery where the care provider is the tortfeasor. Is there possible recovery here as liability is split? There are no (known) reported cases on the point and scope for argument as to whether there should be no recovery or recovery of 50%. My own view (MPB) is that as a matter of principle recovery of 50% would seem to be fair.

Is there significance in the breakdown of the relationship between the claimant and the care provider? Another Hunt v Severs esque point may arise if the evidence demonstrates that the care provider is no longer willing to involve himself in the litigation. Where the 'trust' will not be enforced by the carer, a court cannot make an award. See for example H v S [2002] EWCA Civ 792 per Kennedy LJ:

> "...in justice the claimant should not be compensated for the cost of services already provided gratuitously if that compensation is not going to find its way to the service provider."

Note that if the carer has died the claim reverts to his estate (see eg Hughes v Lloyd [2007] EWHC 3133) (and so if the estranged and reticent care provider has died this may be more likely to result in an award than if he is living).

Basic Rate v Aggregate Rate

Logically where care is evenly spread across the whole week, weekends and evenings, an aggregate rate should be applied. However, where care is provided over relatively short chunks, the position is less obvious (especially where the reality is that care is given at sporadic times).

Until Massey v Tameside [2007] EWHC 317, there was a tendency on the part of the courts to award the basic rate save only in the very clearest of cases. Since, there has been increasing willingness to adjust the rate to reflect the reality of the situation albeit the reported cases have concerned much more serious claims than that outlined here. It is also

worth noting that in Massey the court discounted the rate by just 20% to reflect the gratuitous nature of the care provided.

In this case where the overwhelming majority of care is provided during the day by a member of the household, the basic rate is likely to apply with at best some modest enhancement.

Hospital Visits

An award will not be made for hospital visits *per se*; there has to be a 'care element' to the visit. The fact that the claimant would derive some benefit to her recovery and recuperation from visits is probably not enough.

What of the fact that the claimant says that visits were required to alleviate anxiety arising from the previously failed surgery? As a matter of principle this is unlikely to be enough to elevate the nature of the visits or 'care' provided so as to be recoverable. The claimant is effectively seeking an award for care to cover the hospital's alleged failings. Yet following Evans v Pontypridd an award can only be made for visits necessary to provide those services that a hospital would not provide (not *should* provide but fails to do so). Note also the decision in Huntley v Simmons [2009] EWHC 405 (QB) where an argument that a hospital visit was required to assure the claimant of his safety was given short-shrift (the decision was appealed but in respect of future care only).

It is sometimes argued that food and drink brought in for the patient represents the only nourishment the patient receives thereby elevating the 'importance' of the visit! The argument receives little joy...

Mother's Expenses

There are clear issues of mitigation here. Although in principle expenses incurred in providing care are recoverable, the housing costs claimed will not be awarded as these expenses would have been incurred regardless. Costs such as the hotel will be fact dependent but one anticipates an uphill struggle on the part of the claimant.
Is there an argument to say that the commercial cost of such care represents the maximum that can be awarded in any event – see Housecroft v Burnett?

Case 2

National Insurance and Pension

Where carers are to be employed, additional expenses such as ENRIC and insurance can be anticipated. The additional expenses are capable of being calculated.

ENRIC - payable at 13.8% on wages above the secondary threshold (£148 x 52 = £7,696). To calculate the sum likely to be paid deduct from the annual wage bill £7,696 x number of carers:
13.8% of (£96,000 – (£7,696 x 4)) = £8,999.80

NEST – Full implementation for employers such as Edward has been pushed back to March 2016 and may change again. At present the employer will be obliged to contribute 1% of earnings above £8,105 until end September 2016, 2% until end September 2017 and 3% thereafter (£5,564 for workers aged between 16 and 21 who request enrolment).

An Extra 27%

In the case of employed carers, the court will make an award that exceeds the '52 week' calculation to cover holiday, sickness and training. While this was sometimes calculated on a broad brush basis by simply increasing the annualised cost of care by as much as 27%, increasingly courts have awarded care on the basis of an extended year instead (eg A v Powys [2007] EWHC 2996 (QB) – 59 weeks, Huntley v Simmonds [2009] EWHC 405 (QB) - 59 weeks, Whiten v St George's [2011] EWHC 2066 (QB) – 60 weeks).

The 60 week year does not cover handovers and the like. This should be taken into account in calculating the daily/weekly care provisions. However, courts are reluctant to award much for handovers/team meetings/discussions in cases where the care needs do not alter radically from day-to-day (see XXX v A Strategic Health Authority [2008] EWHC 2727 (QB)).

Carer's Allowance

The claimant is in receipt of benefits. It is likely that he has qualified for DLA C (as was) at the middle or higher rate and so it may be that Felicity qualified for carer's allowance in that she:

- Looks after someone who gets a qualifying disability benefit.

- Looks after that person for at least 35 hours a week.
- Is aged 16 or over.
- Is not in full-time education.
- Earns £100 a week or less (after deductions).
- Satisfies UK presence and residence conditions

Any carer's allowance provided for Edward's care needs must be offset against the past care claim.

Day Centre

While it may be that attendance at the day centre can be used to reduce the *past care* to some extent (i.e. while at the centre Felicity was not providing care) it will be disregarded when calculating future care needs / costs – see generally Sklair v Haycock [2009] EWHC 3328 (QB) and Peters v East Midlands [2009] 3 WLR 737. The court will ignore those facilities potentially available through the local authority (and in these uncertain times of austerity that approach is unlikely to change).

Case 3

The case concerns parental contribution and the extent to which it can be taken into consideration. Can the defendant seek to offset the gratuitous care that would have been provided anyway, and/or the commercial care that would have been provided anyway?

See Sklair for a useful discussion of the relevant principles. It boils down to this:

- Where expenditure *would have been* incurred by the claimant in paying for commercial care, credit must be given against future commercial care that the claimant *will now* have to pay for;
- Although a more difficult proposition, where expenditure would, but for the accident, have been incurred by another (e.g. parents), credit must still be given;
- Credit need not be given in these circumstances for care that the father would have provided but is now no longer able to do so (if the father was able to continue to provide care, the position would most likely be different).