

Challenging Care Claims

Euan Ambrose, Guildhall Chambers



Claim for Care in Hospital

- Mr Smith was in hospital for 3 weeks. Mrs Smith visited him each day, staying for 4 hours on each occasion. She found these visits emotionally draining, not least because she was unable to provide practical assistance on account of her own injuries.



Claim for Care in Hospital

- Mrs Smith's attendance on her husband at the hospital is claimed at the National Joint Council pay rates for care workers employed by local authorities, Spinal Point 8 (set out in Facts & Figures 2008/9 at page 289). The aggregate rate for June 2006 was £8.18/hour.

4 hrs x 21 days x £8.18/hr =	£687.12
Less 25% =	£515.34



Defendant's Response

- Was any care actually provided?
- If so, is it compensable?
- See:-
Havenhand v Jeffrey (unreported, 24.02.97, CA)
Tagg v Countess of Chester Hospital Foundation NHS Trust [2007] EWHC 509



Claim for Gratuitous Care (1)

- On his discharge from hospital, Mr Smith required a substantial amount of personal care, amounting to 12 hours per day. He required assistance with washing, dressing, toileting, all transfers, etc. For the first 6 months, this care was provided by his daughter, who took extended unpaid leave from her job as an IT manager in order to look after her father. Prior to take this leave of absence, she had been earning £50,000 net pa. The cost of her care in this period was her loss of earnings
- 6 months' loss of earnings = **£25,000.00**



Defendant's Response

- What were Mr Smith's care needs in this period?
- Carer's loss of earnings v cost of commercial carer.
See:-
Fish v Wilcox [1994] 5 Med LR 230
Fitzgerald v Ford [1996] PIQR Q72
A v National Blood Authority [2001] 3 All ER 289



Claim for Gratuitous Care (2)

As from January 2007:-

- Mr Smith's condition had improved slightly and his care needs reduced to 8 hours/day.
- Mrs Smith reduced her working hours to part-time, i.e. 2.5 days per week, and her commitment to the business ceased. Her own injuries had improved and she was now able to provide more care for her husband. Her daughter returned to work.



Claim for Gratuitous Care (2)

- An interim payment allowed the Claimants to engage carers on a commercial basis to supplement Mrs Smith's care.

Gratuitous care claim from January 2007 to June 2009:-

- In the period between January 2007 and June 2009, Mrs Smith provided 8 hours care per day, for 4.5 days each week. Mrs Smith's care is claimed at the National Joint Council pay rates for care workers



Claim for Gratuitous Care (2)

employed by local authorities, Spinal Point 8 (set out in Facts & Figures 2008/9 at page 289). The aggregate rate for June 2006 was £8.18/hour. Due to the fact that much of this care was of a highly personal nature, the rate is not discounted for gratuitous provision. Therefore:-

$$8 \text{ hrs/day} \times 4.5 \text{ days/wk} \times £8.18/\text{hr} = £294.48/\text{wk}$$

$$2.5 \text{ yrs} \times 52 \text{ wks} \times £294.48/\text{wk} = £38,282.40$$



Defendant's Response

- What were Mr Smith's care needs? What care was actually provided? Distinguish companionship & time when Mrs Smith at home in any event.
- Challenge the use of the aggregate rate. See eg:-
Fairhurst v St.Helens & Knowsley HA [1995] PIQR 1
A v B Hospitals NHS Trust [2006] EWHC 1178
Noble v Owens [2008] EWHC 359
- Apply discount for gratuitous provision. See *Evans v Pontypridd Roofing Ltd* [2002] PIQR Q5



Claim for Past Commercial Care

- In the period between January 2007 and June 2009, commercial carers were engaged via an agency to care for Mr Smith.
- On the 2.5 days when Mrs Smith was at work, for 8 hours per day
- On the remaining 4.5 days, when Mrs Smith was at home, for 2 hours per day to assist with Mr Smith's morning and evening routine.



Claim for Past Commercial Care

- 8 hrs/day x 2.5 days/wk x £12.00/hr = £240/week
- 3 hrs/day x 4.5 days/wk x £12.00/hr = £162/week
- 2.5 yrs x 52 wks x £402/wk = **£52,260.00**



Defendant's Response

- Care expert (if not before) now required to assess care needs.
- Overlap with gratuitous care claim?
- Can the hourly rate be challenged? Has Claimant mitigated his losses?
- Disclosure? Correspondence with agency, invoices, agency assessments, carers' diaries and logs etc.



Claim for Gratuitous Case Management

- In the period between January 2007 and June 2009, Mrs Smith was acting as her husband's case manager, spending approximately 2 hours per month dealing with the agency that supplied her husband's carers. Her services are claimed by reference to the commercial rate for a case manager of £80/hour, discounted by 25% for gratuitous provision to £60/hour.
- 2.5 yrs x 12 months x 2 hrs/month x £60/hr = **£3,600**



Defendant's Response

- Challenge the need for case management on the facts.
- Challenge hourly rate. See eg *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317.



Claim for Gratuitous Care

- For the first month post-accident, Mrs Smith received care from her daughter in the evenings and at weekends. The individual tasks and the times involved in each task are set out in detail in Appendix 1 to this Schedule. The total was 93 hours 15 minutes. [Appendix 1 is not included here, but comprises 4 pages of detailed descriptions of tasks and times].

93.25 hours x £8.18/hour = £762.79
Less 25% = £572.09



Defendant's Response

- What were Mrs Smith's care needs in this period (she was back at work full time within a month of the accident)?
- Challenge to Claimant's method of assessment (number of hours x hourly rate)? See *Giambrone v Sunworld Holidays Ltd* [2004] 2 All ER 891
- Can Defendants still rely on *Mills v BREL* [1992] PIQR Q130?



Claim for Household Assistance (1)

- For the first month post-accident, whilst Mrs Smith recovered from her injuries, her next-door neighbour helped out with the household chores. She provided 2 hours household assistance each day. She does not wish to receive any financial reward for her assistance. Nevertheless the Claimants feel obliged to offer her recompense for her time.

31 days x 2 hours/day x £8.18/hour = £507.16
Less 25% = £380.37



Defendant's Response

- Claimant would hold these damages on trust for her neighbour. See *Hunt v Severs* [1994] 2 AC 350.
- If neighbour will not accept payment, then claim falls away. See *ATH v MS* [2002] EWCA Civ 792.
- Counter-Schedules: Put Claimants to proof in appropriate cases.



Claim for Household Assistance (2)

- Thereafter Mrs Smith was sufficiently recovered to resume responsibility for the household tasks, as she had pre-accident. However, until approximately 1 year post-accident, these tasks took her twice as long as they had done pre-accident. She therefore spent an extra 2 hours per day doing the household chores.

334 days x 2 hrs/day x £8.18/hr = £5,464.24
Less 25% = **£4,098.18**



Defendant's Response

- On these facts, is any household assistance being provided?
- If not, what is the nature of the claim? Entitlement is to general damages. See *Daly v General Steam Navigation* [1981] 1 WLR 120.



Future Commercial Care

- Mr Smith's medical condition is permanent, there are no long-term risks and he has a full life expectancy. He will continue to require 8 hours of care each day for the remainder of his life.
- Mrs Smith would like to be able to continue to look after her husband, but she struggles with the heavier aspects of his care. Future care is therefore claimed on the basis of professional carers and a professional case manager.



- The cost of professional carers for 8 hours per day, or 56 hours per week, will be £45,000 pa. The cost of professional case management at 2 hours per month will be £3,000 pa. Please see the report of the Claimants' care expert for full details of these future costs.
- Multiplier. Mr Smith is now aged 49.5 years. Full life multiplier (Ogden Table 1) is 22.07



Future Commercial Care

- Carers
22.07 x £45,000 = **£993,150.00**
- Case management
22.07 x £3,000 pa = **£66,210.00**



Defendant's Response

- Care Expert required (!)
- Examples of issues arising in larger care claims include:-
 - Legal test for recovery: *Rialis v Mitchell*; *Sowden v Lodge*.
 - Carers engaged via an agency or directly employed
 - Cost of carers: "58/59/60 weeks per year" or "52 weeks + 27%"
 - Cost of carers: Hourly rates
 - Cost of carers: Implications of Pensions Act 2008
 - Lawfulness of care packages: Working Time Regulations 1998



Claim for Future Accommodation

- The Claimants own their own home. It is valued at £200,000. There is no mortgage. It is a 2 storey Victorian terraced house with a narrow winding staircase. It is not suitable for Mr Smith's needs. A bungalow is required.
- A suitable bungalow has been identified near to where the Claimant's presently live. It is for sale and could be purchased for £400,000.



Claim for Future Accommodation

- The costs of moving house will be £20,000.
- The cost of minor adaptations to the bungalow, so that it will meet Mr Smith's needs, will be £10,000.
- The Claimants claim the extra cost to which they will be put as a result of the move, i.e. £200,000 + £20,000 + £10,000.
- Therefore **£230,000.00**



Defendant's Response

- Challenge Claimant's methodology. See *Roberts v Johnstone* [1989] QB 878. Assuming adaptations will not increase value of bungalow, the claim for the cost of the bungalow becomes:-

Extra capital cost	£200,000
2.5% of £200,000	£5,000
Full life multiplier	22.07
£5,000 x 22.07 =	£110,350



Defendant's Response

- On these facts, adaptation costs recoverable as claimed. Contrast with situation where adaptations increase/reduce the value of the property.
- Moving costs recoverable as claimed.
- Claimant has not, but could have, claimed increased cost of living in more expensive property: council tax, utility bills, maintenance etc.



Defendant's Response

- Potential future issues on accommodation claims:-

Is 2.5% the correct rate?

Are periodical payments the solution?


