



FOIL UPDATE

April 2009

Catastrophic Claims - Care Costs

The recent decision of the Court of Appeal in *Peters v East Midlands SHA and Nottingham City Council* [2009] EWCA Civ 145 has attracted a great deal of publicity. Some claimant lawyers argue it has sounded the 'death knell' of the principle in *Sowden* but there will still be live arguments where the claimant only makes a partial recovery or where a factual issue arises on whether the claimant will dispense with statutory care. Fundamentally, the case does not address the real issue which is the ever spiralling cost of care.

In the past few decades care costs have risen at a rate far in excess of inflation. Awards are determined on an impressionistic basis by the care expert and judge without any real expert/empirical evidence to justify the cost. Question - are there any objective models for assessing care? Answer - there are some but some experts don't use them and others cannot agree which model is appropriate. Question - do we ever see evidence about care costs in the claimant's locality? Answer - rarely. Care costs are often the largest component of the damages award but costings often seem to be determined by unqualified or self appointed experts.

One of the problems with the current system of compensation is that notwithstanding the introduction of the new regime of periodical payments the focus of the claimant's advisers is often on damages and not 'need'. An example of the tension which can arise between providing for need and maximising damages can be found in *Huntley v Simmonds* [2009] EWHC 405 (QB) in February. This case involved a young claimant with a brain injury who was unwilling to accept care. The case manager's notes included an entry recording that he told the claimant that he "needed to constantly have carers *for his legal case*". As Mr Justice Underhill commented:

"it is regrettable that in a situation of this kind the distinction between what is necessary in the interests of a claimant, irrespective of the litigation and what may help to maximise his or her claim may become somewhat blurred".

Although satisfied that in the circumstances the case manager was not deliberately "claim building" the judge noted that the claimant had expressed a wish to dispense with paid care workers (who were mainly his friends and family) and had said that he would do so once the case was settled - a practice which defendants suspect is quite common.

FOIL raised the issue of failure by claimants to implement their planned private care regime once a case has settled in its response to the Ministry of Justice Consultation on the Law of Damages which concluded in July 2007. In its Consultation Paper the Ministry of Justice relied upon the Law Commission's Research Report "Personal Injury Compensation: How Much is Enough?" to argue that there was little evidence to suggest that the current system was being abused by claimants. As FOIL pointed out, the Law Commission research was conducted between 1987 and 1991 and was based on cases where the injuries were incurred in the early 1980s and possibly the late 1970s, in which highest award band was £100,000. These cases bear little resemblance to the multi-million pound awards of today and FOIL submitted in its

response that it was inappropriate to base any future policy decisions on such out-dated research.

There is anecdotal evidence of care regimes being disbanded or replaced with publicly funded provision post-settlement but it is difficult to measure the extent of the problem without accurate data on concluded cases. FOIL's view is that greater transparency on claims pre and post settlement is the answer and it is hoped that claimant lawyers will work with defendants to achieve this, for fairer and earlier resolution of claims. As part of its work the FOIL Catastrophic Claims SIG is focussing on this issue with a view to formulating proposals which can form the basis of its lobbying work in the future.

Philip D'netto and Shirley Denyer
Head of SIG Director of Information

And on the issue of care costs and the Peters decision – Andrew Ireland from Andersons outlines the Scottish perspective:

The legal basis for the arguments put forward in *Peters* and earlier cases such as *Crofton* is broadly similar in Scotland. Our own social care legislation, although different, follows the National Assistance Regulations which provide protection for funds sheltered in personal injuries trusts in accommodation cases. The position in non domiciliary nursing cases is somewhat different, based upon each local authority's discretionary charging policy. These are presently understood to be under review on a collective basis.

In Scotland, however, there is no equivalent of the Court of Protection. The management of damages awarded to persons without legal capacity is entrusted to a Guardian, usually a solicitor or accountant, appointed by the court but supervised by the Office of the Public Guardian. Thus there is no direct statutory equivalent of the regulations conferring protection on funds managed by the Court of Protection.

It is fair to say that due to the modest volume of catastrophic injury litigation in Scotland these issues have not been pushed terribly hard. It is understood however that they have been raised in a number of cases all of which have settled. I am involved in one significant pending case in which insurers have resolved to test the issue if need be, after a significant evidence gathering exercise, mindful of the English cases on the subject. Despite the differences in the legislative approach, I fear the Scottish courts are likely to regard *Peters* as persuasive.

I think that it is also fair to say that we tend not to see, even from the significant claimant firms, care claims of the size and scope being presented in England and Wales. The experiences north of the border are perhaps evident of a more conservative approach which I firmly believe is not unrelated to the lack of CFAs and recoverable success fees, something which we hope, like claims building generally, will remain firmly on the other side of Hadrian's Wall.

If you have a view on this issue, or information to share, or would like to be involved in the work of the SIG please contact Philip D'Netto, Head of the SIG at philip.d'netto@dwf.co.uk.

This publication is intended to provide general guidance only. It does not give legal or professional advice and is not to be used in providing the same. Whilst all efforts have been made to ensure that the information is accurate all liability (including liability for negligence) is excluded to the fullest extent lawfully permitted for any loss or damage howsoever arising from the use of this guidance.