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CLINICAL NEGLIGENCE BRIEFING

Care Funding & Exaggerated Claims

The report of my death was an exaggeration. (Mark Twain, 1835 –1910, NY Journal, June 2 1897)

IN THIS ISSUE:

The interface between state and private funding of future care and accommodation

In *McDonald v LB Kensington and Chelsea* [2011] UKSC 33 the care package provided to the Claimant (in Judicial review proceedings) was reviewed by the London Borough of Kensington. Her night carer and commode was to be replaced by having to wear incontinence pads overnight. By a four to one majority, the Supreme Court concluded that the Local Authority's decision was a reasonable and proportionate one, having regard to the interests of other service users.

The case brings into sharp focus the uncertainties and vagaries inherent in the provision of state-funded care and how this factor, as well as others, influences the court's approach to the recovery of future care costs arising out of high value personal injury claims.

Two competing but interrelated issues often arise. On the one hand, a Claimant may wish to provide for his future care and accommodation by means of a privately funded regime paid for by the Compensator. A Compensator, on the other hand, will want to argue that the Claimant should in fact take advantage of services to which he is entitled as a matter of public provision, thereby diminishing the Compensator's financial exposure.

Where an individual has significant care needs, whether or not the requirement for the care has arisen as a result of the fault of a third party, the Local Authority and the local NHS Primary Care Trust have statutory duties to assess the nursing, other medical care and accommodation needs of the individual concerned and provide the care and support services to meet those needs.

Is, therefore, an insurer/Compensator liable for the private costs of care when the care is available at no cost to individual Claimants via the NHS and other statutory bodies?

The simple answer in most cases is yes – the Claimant has the right to claim for the cost of private care if it is available if they so choose and the Compensators ability to reduce the cost to them as a result of alternative state provision is limited: see *Peters v East Midlands SHA* [2009] EWCA 145.

The General Position:-

- As a general principle of English law the Compensator should make good the losses it has caused and this means the Claimant is entitled as of right to full damages (to include the likely cost of all reasonable future care and accommodation) rather than having to rely on state provision
- To some extent this is enshrined in statute by **the Law Reform (Personal Injuries) Act 1948,** whereby the Claimant is able to claim the full cost of private treatment without regard to whether "NHS" Treatment is available for the particular injury involved
- The Court of Appeal has stated consistently that it can see no good policy reason why damages for the provision of care to the Claimant, needed only as a result of a tort, should be reduced to allow for state care thereby shifting the burden from the Compensator to the public purse.
- The justification for this approach is that Claimants are entitled to the security of the knowledge that they have sufficient funds available to pay for their care needs for the remainder of their life They not expected to deal with the additional administrative burdens of funding / care applications to the relevant statutory bodies. A Claimant who is fully or partially dependant on state care or provision lives with the risk that changes in policy, funding or even withdrawal of the provision could jeopardise the future security of their care package in circumstances where they cannot return to the Court for further damages (see, by analogy, the facts of *McDonald v LB Kensington and Chelsea* itself).

There have been many attempts by Compensators in individual cases to bring into account the various types of statutory provision or to provide some protection against the possibility of Claimants claiming the cost of their care on a private basis but whilst still seeking ongoing state funding (double recovery). The courts have allowed a number of inroads into the general principles stated above, however much depends on the nature of the Claimant (whether that be a child, adult person or person under a disability), the extent to which they are already relying on State provision and the evidence available. The following have been utilised or used to provide Compensators with some limited options:-

1. Cases where the Compensator wishes to try and prove that available state care is reasonable to meet the needs of the Claimant and is or could be relied upon or could be claimed for:

The burden of proof in establishing there is actual adequate state provision is placed on the Compensator. The evidence required is complex and substantial. In these times of public spending cuts and uncertainty regarding the impact of the NHS Reforms, it is, in fact, almost

impossible for a Defendant to prove that appropriate provision would be available to an individual Claimant for the remainder of their lifetime.

However, if a Compensator can provide evidence of direct payments from the Local Authority under Section 29 National Assistance Act 1948 in respect of future care costs for the Claimant, then a reduction in damages could be made to avoid double recovery (Crofton v NHSLA [2007] EWCA Civ 145)

2. Indemnities:

a. Full Indemnity

The Claimant agrees to claim state funding (or continue to claim state funding) in circumstances where the Compensator offers an indemnity which becomes operational if the state ceases to provide funding for care or the Claimant changes his mind and wishes to claim on a private basis in the future. The Defendant would then pay the cost of future care, usually subject to an overall financial cap.

The benefit to the Claimant is usually where they already have a settled care regime and there is no particular reason to change or add to the package. The benefit to the Compensator is obviously an initial cost saving, although it is set against the future uncertainty as to whether the claim will resurface and the associated difficulties with reserving and funding.

b. Partial Indemnity

The Claimant claims state funding in circumstances where the Compensator agrees to pay a 'top up' amount, i.e. an amount in addition to the state provision to ensure that all the Claimants reasonable needs are met. These indemnities can also operate in circumstances where the Compensator agrees to pay the Claimant further monies should there be a shortfall in public funding at some point in the future – subject to a cap.

c. Reverse Indemnity

The Claimant is paid the full amount of his damages but is under a duty to account to or give appropriate credit to the Defendant should they be paid benefits or direct payments.

Importantly, the Courts cannot force a Claimant or a Compensator to enter into an indemnity. As such, it is now the view of most Claimants that they have little to recommend them. There is also reluctance on the part of professional Deputies to accept the responsibility associated with an indemnity and the consequent increase in their insurance premiums. However, the multiple indemnity options provide a useful vehicle for a negotiated settlement, particularly where there are significant litigation risks.

3. Undertakings / Recitals in Court Orders:

If a Claimant is not willing to agree to an indemnity, a Compensator can request that an undertaking is given that the Claimant will not seek state funding once the private funding is in place. Even if the Compensator cannot reduce how much it must pay, there is something a little more palatable about the fact that state funding will not also be claimed.

As with indemnities, an undertaking cannot be imposed by the court, so most requests are resisted by Claimants. However, some Claimants do agree to this on the basis that they had no intention of trying to achieve double recovery.

In order to deal with windfall/double recovery risk the Court of Appeal recently suggested that a practical way would be for there to be an undertaking from the Claimant's Deputy that included the requirement to notify the Defendant if at some point in the future the Deputy decided to apply for public funding.

4. Periodical Payments Orders:

It is possible to agree a PPO at the point of settlement which incorporates a defined set of circumstances, usually by reference to expert evidence, which will allow the Claimant to return to the Court to increase future payments if one of the anticipated events arises. However, as with indemnities, periodical payment orders cannot be imposed.

5. Possible Reform:

In 2007 by the Department of Constitutional Affairs reviewed the issue of damages and funding for future care, and stated the most appropriate outcome "*... is one where the Claimant is compensated for his or her losses but only once; and wherever practicable at the expense of the Defendant rather than the Authority responsible for paying for the care costs."*

The NHS does now recover some of the costs of treating accident victims. However, whilst a number of suggested reforms were put forward as at 2011, none have been legislated on by parliament. We are therefore for the moment dependant on the limited inroads made by Compensators in a case by case basis and seeking to ameliorate the impact of the current legal position.

The NHS is currently undergoing a massive reorganisation and it is yet to be seen what the impact of the proposed Health and Social Care Bill, currently before Parliament will have on this, if any.

The risk of 'gilding the lily'

Practitioners will have noticed a recent stiff judicial breeze against Claimants who bring speculative or exaggerated claims. In particular there has been an increasing risk that

the Claimant who exaggerates will be punished by indemnity costs or even by findings of contempt of court.

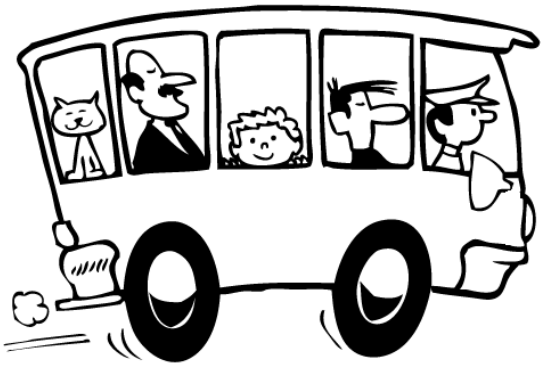
This more activist judicial attitude is increasingly replacing the more laissez-faire 'have a go attitude' which has hitherto been treated with judicial indifference upon the defeat of speculative claims.

I had personal experience of this trend in the county court case of *Desai vs North Essex Partnership NHS Foundation Trust* [8MA25049; Judgment 19th April 2011, trial 14th February 2011; HHJ Knight QC; Central London County Court – in which I acted for the Defendant] the Court found that exaggeration of a claim could leave a claimant open to an award of indemnity costs against her.

In that case the Claimant, a healthcare assistant made an ambitious claim for personal injuries against her employer following an incident with a patient who suffered from Huntingdon's Chorea, the symptoms of which include early onset dementia and jerky uncontrollable movements. The Judge found that the Claimant's account of the incident gave cause for concern; in particular her account that she had been thrown six feet onto the side of a chair was not borne out by the evidence, and it was noted that she had accepted in cross-examination that there was insufficient space in the relevant room for her to have been thrown six feet. Furthermore, the Judge was clearly unimpressed by the Claimant's failure to disclose a very considerable payment from the Criminal Injuries Compensation Authority until the very morning of trial. Consequently the Claimant was ordered to pay indemnity costs from the date of the Defendant's drop hands offer.

The latest manifestation of this trend against exaggeration was very recently reported in the case of *Brighton & Hove Bus & Coach co ltd v (1) Sherihan Brooks (2) Merihan Tadrous (3) Nabil Tadrous* [2011] EWHC 2504 (Admin) a the decision of QB Divisional Court handed down on 14 October 2011.

In that case the bus company, or in reality their insurers, had applied to commit the husband and daughters of an unsuccessful claimant. The claimant had brought a personal injury claim against the bus company because she had been hit by a bus for which they were responsible. She sustained a severe brain injury and a limitation of her mobility as a result.



The claimant was unsurprisingly seen by many experts over a period of two years. She presented at the appointments, usually with either one of the daughters or the husband or both, as a lady with very limited mobility who required the use of walking aids or a wheelchair. The claimant valued her claim at several million pounds.

Surveillance evidence obtained by the bus company showed that the claimant had much better mobility than had been assessed. On several occasions she had walked for hours unassisted.

After disclosure of this evidence the claimant settled her claim on a 50:50 liability basis for £40,000. The bus company brought the committal proceedings on the basis that D and her family had dishonestly misrepresented the extent of her disabilities in order to inflate the quantum of damages.

The bus company said that the family members had connived in the making of false statements or representations by the claimant and deliberately failed to correct them and one of daughters signed the particulars of claim as the litigation friend knowing that they were false and knowing or intending that they would interfere with the administration of justice. Further all three had made witness statements supporting the claimant's claim which they knew were false. Thus the bus company concluded, the overall conduct of the three relatives was an attempt to interfere with the administration of justice and was in contempt of court.

These being contempt proceedings the burden of proof was on the bus company to prove their case beyond reasonable doubt, namely that false representations were made and they would interfere with the course of justice.
In the event the court, comprising of Richards LJ and Nicola Davies J, found that they had serious reservations about the daughters and husband. They also found that the Claimant was undoubtedly very much more mobile than she presented to the experts – they observed that on the surveillance footage the Claimant could "trot or run up" stairs. The court was satisfied that the case was proved as against one of the daughters and the husband. They had agreed to present a false picture of limited mobility and they must have known that the false statements and representations would interfere with the course of justice and although the court rejected the wider case advanced against them both one daughter and the husband were found in contempt of court even in circumstances where, as the court put it (at paragraph 152):

> *"There was no master plan to put forward a fraudulent claim but both of them appreciated that the greater degree of physical disability that [the Claimant] was found to have the greater the likely award of damages"*.

On 20 October both were give suspended prison sentence.

To conclude: although the wind may have shifted against the exaggerating Claimant in both of these cases the court has only acted because there was considerable evidence of upon which it could act. It will still be though the exception and not the rule that exaggerating Claimant's will face sanctions on the failure of their claim. But such sanctions are more likely than they were and if this trend continues there may be salutary effect on exaggerated claims.

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