

Preventing double recovery

Payments by a local authority towards the care costs of a personal injury claimant are relevant when assessing loss.

The recent decision by the Court of Appeal in *Andre Crofton v NHS Litigation Authority* will be warmly welcomed by defendant insurers as it should significantly reduce their damages bill.

Andre Crofton had been severely brain damaged following heart surgery soon after he was born. Consequently, he required lifetime care. He accepted 67.5% of damages assessed on a full liability basis. Damages were decided by Judge Reid on 19 January 2006. A major issue in the case was whether and if so to what extent the claimant's damages should be reduced in the light of the payments that his local authority would (or might) make to him regarding his care costs.

The judge assessed the claimant's total annual care costs. He also heard evidence from the claimant's local authority about the sums they would pay by way of direct payments towards his care. The judge then deducted the annual local authority payments from the claimant's annual care costs, and applied the agreed whole-life multiplier to that multiplicand to arrive at the figure for the claimant's future care head of loss. The claimant appealed against this decision. The appeal was heard in December 2006.

Appeal decision

In a unanimous judgment, the Court of Appeal concluded that 'if the court is satisfied that a claimant will seek and obtain payments which will enable him to pay for some or all of the services for which he needs care, there can be no doubt that those payments must be taken into account

in the assessment of his loss. Otherwise the claimant will enjoy a double recovery'.

The court also discussed the case of *Freeman v Lockett* (2006) EWHC 102 QB, where Mr Justice Tomlinson had considered similar issues but decided there should be no reduction in the claimant's damages to reflect the possibility of direct payments from the local authority. The Court of Appeal considered that Mr Justice Tomlinson was entitled to come to that conclusion given his findings that:

- (1) the claimant wanted to rely exclusively on private funding for her care; and
- (2) there was no basis on which the court could estimate what funding the claimant could reliably expect to receive from the local authority for the rest of her life.

The Court of Appeal accepted there may be occasions where the possibility of a claimant receiving direct payments is so uncertain that they should be disregarded altogether in the assessment of damages. However, the court added: "It will depend on the facts of the particular case. But if the court finds that a claimant will receive direct payments for at least a certain period of time and possibly for much longer, it seems to us that this finding must be taken into account in the assessment. In such a case, the correct way to reflect the uncertainties to which [Mr Justice Tomlinson] referred is to discount the multiplier."

Duty of a local authority

The Court of Appeal considered the complex legislation and guidance that provide the

statutory framework underpinning the duty of local authorities to provide accommodation and domiciliary care. The court referred to local authorities having a duty to assess a disabled person's needs. It then examined the provisions allowing individuals who are assessed as needing community care services to receive direct payments (which will enable them to buy the relevant services themselves) instead of receiving the services directly from the local authority.

The court rejected the claimant's submission that where (as in his case) a claimant has received a substantial award of damages, the local authority will not provide him with practical assistance in his home – and will not make direct payments to him – because the authority does not need to do either of these things to meet his needs. The court expressly ruled that "a local authority is obliged to disregard personal injury damages administered by the Court of Protection in deciding the threshold question".

In confirming that a claimant's personal injury damages are ring-fenced, the court also confirmed that the position is the same in relation to section 21 (which deals with the provision of accommodation) and section 29 (which deals with the provision of care) of the National Assistance Act 1948.

Direct payments

The Court of Appeal went on to say that "once the judge decided that the council would make such direct payments, it seems to us that he was bound to hold that they should be taken to account in the assessment of damages. This point needs to be made because there is much to be said for the

view that the tortfeasor should pay, and that the state should be relieved of the burden of funding the care of the victims of torts and that its hard-pressed resources should be concentrated on the care of those who are not the victims of torts."

Finally, the Court of Appeal dealt with the judge's decision on the amount of direct payments that would be received by the claimant. The court ruled that the judge had come to a justifiable conclusion on:

- (1) the number of hours to be covered by direct payments; and
- (2) the hourly rate that would be paid by the local authority.

However, the Court of Appeal decided to remit the direct payments issue to the judge for further consideration, as it took the view there was no evidence that would have enabled the judge to decide whether (and to what extent) any payments could be regarded as being secure for the next 40 years. The court concluded: "In our view, the judge was wrong to apply the agreed whole-life multiplier to the direct payments. The uncertainties to which he referred . . . and to which [Mr Justice Tomlinson] referred to in *Freeman* should have led him to conclude that a substantial discount to the multiplier was necessary... we do not feel able to determine the correct multiplier"

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