

Victims' choice

The Court of Appeal has ruled that claimants have the right to look to defendants to pay for care even where state funding is available – however with legislation and policy hanging in the balance, the future remains uncertain.

Jamie Clarke discusses the issues

PRACTICALLY ON AN annual basis since *Firth v Geo Ackroyd Junior Limited and Another* [2001] Lloyds LR Med 312, courts have been called on to wrestle with the question of whether the costs of caring for and accommodating accident victims should be met by the state or by tortfeasors and their insurers. The law continues to develop but is not settled.

The parties' concerns

The perennial concern of victims, their advisers and the courts is not necessarily the political issue of whether insurers should have an undeserved windfall because the state will pay. Rather, in an individual claim the concern is long-term security of state provision of care services. In our system of once-and-for-all awards the question is becoming how to protect the claimant against the real risk of changes in policy and also the possibility that state services will become inadequate for the victim's needs.

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This was recognised by Tomlinson J in *Freeman v Lockett* [2006] EWHC 102 (QB) where he quoted from an article in *The Times* of 12 January 2006 regarding funding pressure on local authorities from central Government being likely to lead to a withdrawal of "...care for less dependent people altogether by changing the eligibility criteria for home and residential services. They are also planning to raise income by charging more for home care or providing a lower level of services."

The difficulty is that there seem to be few obvious mechanisms for containing these risks once the litigation is concluded.

From the insurers' perspective, it is simply a matter of ensuring a claim is fairly and properly assessed, and that a claimant is not over-compensated. The recent case of *Crofton*

v National Health Service Litigation Authority [2007] EWCA Civ 17 acknowledged that, and might have been considered by some to have adequately accounted for future risks by the conventional if not haphazard mechanism of adjusting the multiplier – a task with which practitioners will be familiar.

The 'no-loss' defence

In *Crofton* the tortfeasor argued that its liability for care and accommodation costs should be reduced because these services would be provided by the local authority. The Court of Appeal also considered whether the claimant might not in fact receive local authority assistance because of his damages award.

Crofton confirmed that the principle of no double recovery must prevail, establishing that the 'no-loss' defence will hold good where the local authority exercises its discretion to take account of income on the capital of a personal injury award administered through a trust or by the court.

In short, the claimant must not be over-compensated, and where the state steps in to provide reasonable and suitable care provision, either directly or by providing funds, then the liability of the tortfeasor is reduced. The Court of Appeal in *Crofton* could not determine whether the local authority concerned would take account of any income on capital, and therefore remitted the issue to the trial judge (see 'Calculating Awards', *Solicitors Journal* 27 April 2007).

Future risks were not a feature, probably because it was a given that the claimant would always have to rely on the state because any damages award was partial to reflect contributory negligence, and also because his condition was so severe.

Changes since Crofton

Recent economic events will bring claimants' advisers' concerns into even sharper relief. Town hall budgets will be even harder pressed for the reasons identified by Tomlinson J. Some local authorities will have the added pressure of heavy losses from failed investments, and all local authorities will suffer the knock-on effect of likely future lim-

itations on borrowing and increased borrowing costs.

There is also the effect of reduced priority on claims for central funds, not to mention the risk of central Government cutting public services and the overall sense that expectations for the functioning of the state cannot be taken for granted.

In *Crofton* Dyson LJ accepted that "...there may be cases where the possibility of a claimant receiving direct payments is so uncertain that they should be disregarded altogether in the assessment of damages." In fairness, he probably had in mind factors particular to the claimant, rather than macro-economic factors, but there is surely now a sense that the uncertainties faced by claimants can no longer be adequately resolved by adjustments in the multiplier as suggested by the Court of Appeal in *Crofton*.

Imaginative and novel solutions may be necessary because there is no indication that the Government has taken up the cudgels to legislate on these issues in the two years since *Crofton*. Given the present burdens on Government, not to mention a general election between now and May 2010, the prospect of legislative reform is slim. This of course assumes there is any appetite by legislators for reform of a statutory framework intended to provide for all of those in need state care, not just victims of tortious accidents.

Therefore, practitioners will have to continue to wrestle with the issues and the case law. Disputes are likely to become more heated if, as is possible, the discount rate set by the Lord Chancellor pursuant to s.1 of the Damages Act 1996 is reduced to reflect lower returns on gilts and, hence, increased multipliers.

An imaginative solution?

Meanwhile, the Court of Appeal in *Chantelle Peters* (by her litigation friend Susan Mark Miles) *v E. Midlands Strategic Health Authority and Dr P. Halstead and Nottingham City Council* [2009] EWCA Civ 145 has held that a victim has the right to seek damages from a tortfeasor rather than become dependent on

the state, subject to the rule on no double recovery.

In this case, there was a possibility that future provision would be made by the state. While Miss Peters' statutory provision at the time of trial met her reasonable needs, the trial judge held on the evidence that it would not meet those needs indefinitely. The claimant was entitled to buy her own care services. The tortfeasor could not redistribute its liabilities to the local authority.

In any event – and significantly – the Court of Appeal confirmed that even if matters were otherwise equal a claimant is entitled to opt for self-funding and damages as of right, in preference to reliance on the local authority.

However the lead judge, Dyson LJ, who also gave the lead decision in *Crofton*, would only approve the self-funding regime if there was a mechanism to prevent double recovery in the future. He approved a solution whereby the terms of the order of the Court of Protection appointing a deputy to manage Miss Peters' property and affairs would be amended. The deputy would not be permitted to apply for public funding without first applying to the Court of Protection on notice to the defendants who would be permitted to make representations. Effectively the court retains a power to control an application for public funding and thus control the risk of double recovery.

This solution is limited to Court of Protection cases. Defendant practitioners must note that it is not a kind of reverse provisional damages award whereby the defendants would be able to call for downward review of the original damages award. It would seem input is limited to challenging the application for public funding itself on the basis it would contradict the basis of the damages award, but no further.

Notably, the Court of Appeal endorsed the trial judge's concerns in rejecting an *undertaking* from the deputy. Principally there was doubt as to the legal basis for this given the terms of the deputy's formal appointment; hence the need for the mechanism of revised formal terms of appointment. However there was also concern for the promisor's ability to bind successors and the terms for release from indemnities or undertakings. These concerns might have implications for the numerous settlements in non-Court of Protection claims by undertakings from the claimant.

Another notable feature is that Miss Peters is incapable of expressing her wishes for care in the future. It had previously been assumed that autonomy regarding recourse to state care might be confined to claimants able to

make decisions for themselves, such as in *Freeman v Lockett* [2006] EWHC 102.

The trial judge in *Peters* held that the views of a sentient claimant will be very important, even determinative. Where a claimant cannot make his or her own decision, the court will determine on the evidence whether local authority provision meets the *reasonable* needs.

Overall, *Peters* suggests the pendulum has swung back to claimants. The right of choice without penalty is a significant development. In this context the Court of Appeal confirmed that deputies and case managers have no general duty to procure publicly funded care, especially where a self-funding arrangement is available. The decision also gives greater currency to the view that state provision may not be adequate in the long term, particularly for those with profound needs, and Dyson LJ emphasised that the risk of legislative change is a factor.

What became of Crofton?

The parties settled on the basis that Andre Crofton would live in private accommodation. Following the recommendation of the Court of Appeal, the local authority was joined as an interested party (no doubt at the expense of the paying party, presumably the defendant) and indicated that it would provide the equivalent in payments of 50 per cent of the costs of the package as assessed by the trial judge.

It also seems that, contrary to expectations, the local authority concerned does exercise its discretion to take into account income on capital which makes it arguable that,

depending on the level of income on a seven-figure settlement, there might be no direct payments at all. This also raises a concern that *Crofton* is flawed on the means of a claimant the local authority can bring into account, because Dyson LJ had assumed income on capital would be disregarded. There is certainly scope for this particular argument to be re-opened.

The negotiated settlement was based on risks to both sides and is reported also to incorporate a 50 per cent discount to the multiplier. There is not much specific guidance for practitioners save that the claimant's advisers say that they took account of the reality that the claimant's needs were of the highest order and it was assumed he would always be likely to be eligible for state funding of his care and, presumably, that he would avail himself of that care.

What is not clear is the impact of the reduction for contributory negligence (see '*Calculating Awards*', *ibid*): perhaps comfort was taken from the fact that even on his best case scenario, the claimant was certain to exhaust his compensation and then become fully reliant on the state, so it was easier to give concessions that only meant that would happen sooner. Advisers of claimants entitled to 100 per cent damages would not have the same scope for settlement because their obligation would be to ensure adequate funds are available for life.

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SJ takeaway

- A claimant has the right of choice how to fund care. Advisers must take instructions if the defendant takes the point.
- Authority suggests the court must disregard the likelihood of state care if the reason for this is a shortfall in funding because of contributory negligence, but it may be conceded.
- There is no obligation on case managers or deputies to prefer public funding.
- Where there is a possibility of state provision the double recovery principle prevails.
- Where raised, the defendant bears the burden of proof.
- State provision must be particularised with costings in the counter schedule, and backed up with evidence. It may have to join the local authority to the proceedings, at a cost.
- There is a solution to double recovery risk where the Court of Protection is involved.
- Other cases need innovative solutions. Undertakings may be inadequate.
- Claimants must consider s.47 assessments, if necessary get a care package set up and clarify local authority policy on income on capital (an informed case manager is an alternative): on policy issues, *Crofton* might be re-opened.
- There will be postcode discrepancies.
- The test for care needs is 'reasonableness'. This can be fact/context sensitive. Risk of legislative change is a factor.
- Injuries of less than utmost severity where extensive care is required are likely to be the most difficult cases.
- Legislation is unlikely to resolve the issues soon. The damages ringfence is intact.