

Calculating awards

Jamie Clarke considers the *Crofton* decision and its implications for local authorities that are involved in personal injury litigation



WHERE IT IS REASONABLE FOR A PERSONAL

injury claimant to be provided with ongoing care at home, there should be a reduction to reflect the direct financial assistance the claimant will receive from the local authority towards the provision of that care pursuant to s.29 of the National Assistance Act 1948 (and the underlying legislation and Ministerial guidance as also surveyed by *Tomlinson J* in *Freeman v Lockett* [2006] EWHC 102 (QB)). This is the so-called 'no loss' argument, usually advanced by defendants and their insurers – but this argument was recently revisited in *Crofton (a patient by his father and litigation friend John Crofton) v National Health Service Litigation Authority* [2007] EWCACiv 71.

This is a further staging post in the tension between the principle that a claimant is compensated only for actual losses (giving credit for receipts consequential on the injuries sustained) and the perception that state funding should not relieve tortfeasors of the obligation to compensate their victim.

A related issue was whether, being in receipt of an award of damages for personal injury, the claimant will fail the local authority's means test and thereby not in fact receive direct financial assistance.

The decision

Andre Crofton suffers profoundly with the effects of diffuse brain damage caused soon after his birth in 1979 by a negligent failure to deal speedily with a constriction of the aorta. He can do very little for himself and requires care and supervision around the clock. Liability was compromised on the basis that Mr Crofton would receive 67.5 per cent of full liability damages.

Before trial Mr Crofton lived in supervised accommodation funded by the local authority, but the trial judge accepted as reasonable his intention to purchase his own accommodation and employ carers. The judge went on to hold that the local authority would provide direct assistance amounting to approximately £68,000 annually, so that the claimant needed to fund a top-up of just

under £55,000 annually. The award was made on that basis, reduced by 32.5 per cent.

Assuming he would receive local authority funding, the final award leaves Mr Crofton with a funding shortfall on the care plan of about £20,000 annually. Had the local authority funding not been taken into account, Mr Crofton would have received an annual surplus on his care funding of nearly £30,000. Unless Mr Crofton anticipates coping with less than his reasonable care needs perhaps he was looking to the local authority funding to mitigate the shortfall. When the issue arose at trial it was to Mr Crofton's advantage to establish that any local authority funding was ring-fenced, though one can understand also any concern on the part of his advisers that he might not receive any funding at all, in which case the ordinary shortfall would be £40,000.

On the matter of residential or domiciliary care funded by local authorities, the Court of Appeal held that the principle of restitution will prevail: "... 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. 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... *this must be taken into account in the assessment. In such a case the correct way to reflect the uncertainties... is to discount the multiplier*" (emphasis added).

The second core issue, then, is whether the claimant's income derived from an award of damages for personal injury will be taken into account by the local authority on a means test. (Note that where the claimant is provided with residential care, income on capital held on trust is taken into account where the capital itself is disregarded.) The Court of Appeal held the treatment of investment income is a matter for the discretion of the local authority untrammelled by the existing ministerial guidance. The court added that it and the trial judge had insuffi-

cient evidence to deal with this, and remitted the matter.

So it is an open issue as to whether Mr Crofton will receive direct payments towards his care. Either way he will have a shortfall on his care needs, but taking account of the fact that any direct financial assistance will not be reduced by the 32.5 per cent, Mr Crofton will be worse off if it is determined that he will not receive local authority assistance and must depend only on his 67.5 per cent damages award.

Sound decision?

In short, it is this writer's view that Dyson LJ's decision that payments should be taken into account is correct. Whilst the courts have grappled with real political issues, principally of local authority funding and allocation of state resources, Dyson LJ recognised that these are squarely matters for Parliament. In the absence of any direct provision concerning the treatment of state funded services, the principle of restitution must prevail. This writer's view is that judges

have fallen into error in their generalised perception that Parliament would not intend, as it is crudely put, for defendants and their insurers to receive an undeserved windfall, in that they fail to take account of other relevant political factors such as concern for the re-distribution of higher damages awards through premiums and the need for a bureaucracy to manage any recoupment mechanism, particularly where perhaps only a small number of claims by volume will be affected.

The decision on direct payments is buried in the labyrinth of relevant legislation and guidance, and is not obviously flawed. On the facts of claims such as *Crofton* the best that can be said is that public funding will not plug the shortfall, but where provided could ameliorate as much as one-half of the gap. One can envisage countrywide disparities between local authorities' exercise of discretion, working a potential injustice between certain claims of this type. The problems will

not arise where liability is 100 per cent, and are less likely investment income may be below (or within) a means testing threshold.

That uncertainties can be resolved in discounting the multiplier to be applied to any direct payments is entirely in accordance with practice, and will be familiar to experienced practitioners and judges alike.

Practice points

Where there is, or is highly likely to be, a 100 per cent finding on liability and the claimant is not a patient, the first issue is whether the claimant might reasonably decline local authority care. A relevant factor may be the uncertainty inherent in the local authorities' "untrammelled" discretion. The consideration of this issue by Tomlinson J in *Freeman v Lockett* gives useful guidance but which ought to be treated with care.

Otherwise and also where:

- liability is likely to be split;
 - the claimant is under a disability and a receiver will be appointed;
 - the claimant is already in receipt of local authority assistance;
- it is prudent at an early stage for those advising claimants to consider (with expert assistance) the suitability of a local authority care

package and the impact of a damages award on funding arrangements.

Those advising defendants will need to consider such investigations as a matter of course. The difficulty faced by defendants in the light of *Crofton* is that they are in effect enjoined to call witness evidence from the local authority. It is perhaps recognising the potential for conflict between a defendant and its witness that Dyson LJ thought "... it would be highly desirable if the Council were joined as a party to the proceedings". This may be as unedifying a prospect for defendants, as much as it a source of reassurance for claimants.



Defendants and insurers

Whilst the pendulum might appear to have swung in favour of defendants and their insurers, the evidential and technical difficulties inherent in valuing the direct benefits to be taken into account – and the application of a discounted multiplier – has probably denied them a windfall. At the same time the principle against double recovery is preserved.

In the absence of legislation, criticisms on both sides have been addressed. Indeed the clamour for legislation may have been quelled where, after all, only a small percentage of cases by volume are probably affected. It remains to be seen whether this measured decision will put an intolerable burden on local authorities to engage in litigation if they do not clarify their approach to means testing.

Jamie Clarke is a member of the injury team at Hardwicke Building, practising exclusively in personal injury and related insurance matters. Email jamie.clarke@hardwicke.co.uk or telephone 020 7242 2523