

COMPENSATION FOR GRATUITOUS CARE

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1. In almost all personal injury or clinical negligence cases there is a claim for compensation for the care provided to the injured claimant, most commonly from the family members with whom s/he lives. This care is generally provided free of charge, and frequently does not result in loss of wages by the carer.

Right to Claim Compensation for the Gratuitous Care.

2. The right to claim such compensation is now well established; the leading cases are the Court of Appeal decisions from the 1970's in *Donnelly v Joyce*¹ and *Cunningham v Harrison*² which established that the cost of gratuitous care is a loss suffered not by the carer but by the injured claimant, (the loss being the existence of the need for care) and that the value of the gratuitous care although paid to the claimant, is held on trust for the carer. Both these principles have been confirmed by the House of Lords; Lord Bridge in *Hunt v Severs*³ said:

“Thus in both England and Scotland the law now ensures that an injured plaintiff may recover the reasonable value of gratuitous services rendered to him by way of voluntary care by a member of his family... The underlying rationale of the English law... is to enable the voluntary carer to receive proper recompense for his or her services”

3. A defendant will often respond to a care claim by citing the Court of Appeal decision in *Mills v British Railway Engineering Ltd*⁴. This was a case in which

¹ [1973] 3 All ER 475

² [1973] 3 WLR 97

³ [1994] 2 AC 350

⁴ [1992] PIQR Q130

a widow at first instance received £8000 for the value of her caring services to her husband whilst he was dying of lung cancer. Overall compensation in the case was in excess of £80,000. The Court of Appeal reduced the award for gratuitous care to £5000, Staughton LJ holding that:

“It seems to me that a plaintiff would naturally wish to pay some reward or compensation, if he had the money to do so, for care and attendance by a relative which goes distinctly beyond that which is part of the ordinary regime of family life; and, where his disability has been caused by the fault of the defendant, it is right that he should be provided with the money to do so.”

Concurring, Dillon LJ held:

“In principle it must be, in my judgment, a matter for an award only in recompense for care by the relative well beyond the ordinary call of duty for the special needs of the sufferer. . . . It must indeed only be in a very serious case that an award is justified – where, as here, there is no question of the carer having lost wages of his or her own to look after the patient”.

4. It was suggested to the Court of Appeal in *Giambrone v Sunworld Holidays Ltd*⁵ that *Mills* established two principles, firstly that there should be no award for gratuitous care except in a very serious case, and secondly that in order to qualify for an award the relative must provide care well beyond the ordinary call of duty for the special needs of the sufferer, or alternatively care which went distinctly beyond that which was part of the ordinary regime of family life. Brooke LJ however has said (at para 26 of his judgment):

“I reject the contention that *Mills* presents any binding authority for the proposition that such awards are reserved for “very serious cases”. This was not a point which had to be decided in *Mills*, which was on any showing a very serious case, and a proposition like this would be very difficult to police. Where is the borderline between cases in which no

⁵ [2004] EWCA (Civ) 158

award is made at all (unless, for example, a working mother incurs actual cost in hiring someone to look after her sick child when she was at work) and a case in which a full award of reasonable recompense is made? An arbitrary dividing line, which would be likely to differ from case to case, and from judge to judge, would be likely to bring the law into disrepute.”

5. What though, of the need for the services to be “distinctly beyond the ordinary regime of family life”? On this issue, Brooke LJ found that on the facts of the cases before him the children who had fallen ill with gastro-enteritis “of the severity experienced by these children... require[d] care which [went] distinctly beyond that which is part of the ordinary regime of family life.”

This proposition was therefore, seemingly accepted by the Court of Appeal.

Brooke LJ concluded his decision by saying:

“In future, however, and echoing the words of Staughton LJ in the Mills case, I consider that any award for gratuitous care in excess of £50 a week at present day values in a case in which a child suffering from gastro-enteritis receives care from her family (so that there is no question of the cost of substitute care) should be reserved for cases more serious than these. This sum represents, in my judgment, a fair and proportionate balance, in cases of the type I have described ... above, between the consideration that some payment ought to be made for the unpleasant additional burden placed on the family carer and the consideration that the care is being rendered in a family context and that the remuneration on this account should be relatively modest. This may well be a situation in which appropriate representatives of claimants and defendants, perhaps under the auspices of the Civil Justice Council, might usefully try to agree a guideline tariff for gastro-enteritis cases generally, depending on the severity of the illness (founded around this award of £50 per week at 2004 values for the cases described in this judgment), so that the disproportionate cost of proving these small heads of damage may be avoided.”

6. This conclusion does seem to return to the question of whether a case (at least a gastro-enteritis case) is sufficiently “serious” to qualify for an award, and

whilst it is not suggested (as it was in Mills) that it is to qualify for ANY award under this head, it is to recover anything in excess of £50 per week, which at 2004 rates might reasonably be thought to equate to 10 hours of care.

Type of Care which can be claimed for:

7. The usual types of care claimed for are assistance in carrying out personal tasks, or household duties or gardening, etc. There have however, been attempts to push beyond these more traditional heads.

8. In *London Ambulance Services NHS Trust v Swain*⁶ the claimant claimed the cost of valeting his wife's car, which he did before the injury but was unable to do afterwards. The claim was rejected at trial and in the Court of Appeal, who declined to develop the law to enable an injured claimant to recover for the value of services previously provided to a third party for no charge. Interestingly Beldam LJ noted that the Pearson Commission had recommended such a change in the law as long ago as 1978 but Parliament had not implemented it. The claimant was, however, held to be entitled to recover for the cost of valeting his own car.

9. In *Hardwick v Hudson*⁷ the Court of Appeal refused to allow an injured claimant to recover damages in trust for his wife where she had worked an additional 20 hours a week for no further pay running his business and

⁶ Lawtel 1999

⁷ [1999] 1 WLR 1770

mitigating his losses. This decision of Coleman (supported by Brooke LJ) appears to be based on the fact that the nature of the wife's further unpaid work did not have the characteristics of care or attendance and thereby fall into the established policy rule.

10. However, in *Lowe v Guise*⁸ the Court of Appeal held that an injured claimant was entitled to claim compensation for his loss of ability to continue to provide unpaid care to his handicapped brother. Further, he was entitled to recover compensation for the replacement care his mother provided to his brother, by way of mitigation of that loss, and hold the sums recovered on trust for her.

Rate of Compensation.

11. This is always a vexed question unless there is a claim for loss of wages while providing the care (as in *Donnelly*) or for the sums which have actually been paid out by the claimant to a person who has provided care (frequently the case for example, for gardening services).
12. A series of cases approved a standard calculation of this head of claim; taking a commercial rate and applying a discount to reflect the facts that (a) that care was not provided by a trained carer who may be more efficient, (b) the care was not provided for profit, and (c) no income tax or National Insurance contributions would be made on the sum awarded. As for the rate of discount,

this was one third in *Nash v Southmead HA*⁹, and one quarter in the cases of *Fairhurst v St Helens & Knowsley HA*¹⁰ and *Taylor v Shropshire*¹¹.

13. However, a number of more recent cases demonstrate that the court has flexibility in dealing with this head of claim, and need not adopt this ‘standard calculation’ as a rule. In *Evans v Pontypridd Roofing*¹² May LJ said:

“In my judgment this court should avoid putting first instance judges into too restrictive a strait-jacket such as might happen if it was said that the means of assessing a proper recompense for services provided gratuitously by a family carer had to be assessed in a particular way or ways. Circumstances vary enormously and what is appropriate and just in one case may not be so in another.”

14. May LJ referred to the case of *Hogg v Doyle*¹³ where Mrs Hogg had been awarded the net wage she would have earned as a nurse at a rate of one and a half times that sum, as she was found to have been doing the work of at least two full time nurses, as showing the need for, and appropriateness of flexibility. He went on to conclude that :

“Regard may be had to what it would cost to provide the services on the open market. But the services are not in fact being bought in the open market, so that adjustments will probably need to be made. Since however any such adjustments are no more than an element in a single assessment, it would not in my view be appropriate to bind first instance judges to a conventional formalised calculation. The assessment is of an amount as a whole. The means of reaching the assessment must depend on what is appropriate to the individual case. If it is appropriate to have regard to what it would cost to buy the services... in the open market, it may well also be appropriate to scale them down. But I do not think that this can be

⁸ 25.3.02; Lawtel.

⁹ [1993] PIQR Q156

¹⁰ [1995] PIQR Q1

¹¹ [2000] LR Med 96

¹² [2002] PIQR Q5

¹³ Kemp A2-006/1

done by means of a conventional percentage, since the appropriate extent of the scaling down and the reasons for it may vary from case to case.”

15. Following on from this, in the case of *Newman v Folkes*¹⁴ the Court of Appeal upheld the decision of the 1st instance judge who had made no discount at all from commercial rates of care where care was being provided by a wife to her husband (the claimant) who was particularly violent and difficult. Ward LJ held:

“There is... no conventional discount. Each case depends upon its own facts. In this case there was such a broad margin of matters to take into account that the matter had to be looked at in the round. That is what the judge did. I can see no error of principle...”

Checklist of practical considerations.

16. In the absence of the sort of guidelines which have been encouraged by Brooke LJ in *Giambrone*, the following factors should generally be considered:
- a. Witness statements must be taken to reflect accurately what needed to be done for the claimant as a result of his/her injury.
 - b. Exaggeration should be avoided because if this element of the claim is rejected, it may impact negatively on other aspects of the claim.
 - c. If there is an ongoing care need of any significance a care report should be considered. This will value not only future care required, but also past gratuitous care.

¹⁴ [2002] EWCA Civ 591 .

- d. Unless there are good reasons for not doing so, the claim should set out what was done, by whom, how long it took, and a 25% - 33% discount should be applied to a commercial rate.
- e. As any award under this head is held on trust for the carer, claims for people who will not, or is unlikely to be reimbursed (eg an ex-partner) should be avoided.

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