

# Claims for care, assistance and accommodation

## Who cares who pays (II)

### The Problem

1. At the heart of this seminar lies an issue that can be stated in relatively simple terms:

“...reconciling the principle that a tortfeasor must meet the claimant’s reasonable expenses in coping with the injury he has caused with the ever increasing legislative burden on local authorities to provide care for those who cannot care for themselves and the ability (or otherwise) of local authorities to recoup the costs of so doing.” (per Scott Baker L.J. in *Sowden v. Lodge* [2004] EWCA Civ 1370 [101])

2. It was summarised by Longmore L.J. in *Sowden*:

“90. This statutory background has, however, presented a particular problem for judges assessing awards for personal injury claimants. If they decide that it is reasonable for a claimant to incur costs of private care for the rest of their lives, awards are liable to be astronomically high; indeed the amount of such award might in itself become reason for holding that it is not reasonable for a claimant to use private care services. On the other hand experienced judges suspect that care provided or paid for by local authorities will not be of the same high quality as care paid for privately.

91. The matter is further complicated by the fact that a local authority makes its own assessment in any particular case whether a person to whom they are obliged to give care needs care in his or her own home or only requires care in a local authority residential home. The mere fact that a judge has held that only a private arrangement will meet a claimant's reasonable needs does not compel a local authority to agree with that assessment even at the time when the judge so decides; still less will a local authority feel the need to be guided by any such decision as time goes by.

92. Some judges also have an instinctive feeling that if no award for care is made at all, on the basis that it will be provided free by local authorities, the defendant and his insurers will have received an undeserved windfall.”

3. In essence, the problem is balancing the risk of double recovery against the prospect of the undeserved windfall for the tortfeasor (or his insurer). In even more basic terms, it is the obvious tension between the defendant’s desire to reduce its financial outlay to the bare minimum, and the claimant’s wish to maximise his fund of damages.
4. Though the problem can be stated in simple terms, solving it has proved far from simple. That task is not helped by unnecessarily complex and poorly drafted legislation, together with far from comprehensive or consistent ministerial guidance. High Court Judges and the Court of Appeal have expressed deep concern about the state of the legislation and the difficulties which service users, lawyers and even the Courts have in trying to resolve the issues which arise in this area. As Butterfield J. said in *Peters v. East Midlands Strategic Health Authority & Anr* [2008] EWHC 778 (QB)

“44. A mere reading of this tortuous analysis of the labyrinthine legislative provisions is sufficient to persuade me to add my name to the roll call of those who have condemned these regulations as being obscure, opaque and convoluted. I echo the observations of the learned editors of the current edition of McGregor on Damages (17th Edition Para 35-208) that it is high time these legislative provisions were drastically improved. As the editors observe:

‘Until change comes there can be neither certainty nor fairness for personal injury victims. What is the position where there is a conventional lump sum award, with no trust and no structure? Why should there be a difference between the claimant

with an award administered by the Court of Protection and the claimant who has agreed to the sum awarded being placed in a personal injury trust? What is the position where claimant and defendant consent to an award by way of periodical payments? Why should a claimant's position be worsened by agreeing to a structured settlement?"

5. The issue has been before the Court of Appeal on three separate occasions in the last five years. Some hail those decisions as providing great clarity; others have gone so far as to suggest that the last of these cases, *Peters v. East Midlands Strategic Health Authority & Anr* [2009] EWCA Civ 145, has effectively put an end to the issue. I respectfully disagree.
6. I will begin with a review of the three Court of Appeal decisions

***Sowden v. Lodge and Crookdake v. Drury* [2004] EWCA Civ 1370**

7. Louise Sowden was 13 years old when she sustained a catastrophic head injury in a road traffic accident. Liability was compromised on the basis that she was contributorily negligent to the extent of 50%. That compromise was approved by Smith J. The issue of damages was tried by Andrew Smith J.
8. Miss Sowden suffered from very severe brain damage which brought about cognitive, emotional and behavioural difficulties. She suffered from post-traumatic epilepsy. The principal issue which the learned Judge had to resolve was whether the claim for future care and assistance was to be assessed on the basis of the cost of a private arrangement, or on the cost of a “*residential arrangement*” (living in sheltered accommodation with other people with disabilities). It was conceded by the defendant that if the finding was for a residential arrangement the appropriate sum would need to be “*topped-up*” by further privately funded care and assistance.

9. Miss Sowden was a patient (today a protected party) and her damages were to be paid into the Court of Protection to be managed by a receiver (today a deputy).
10. Philip Crookdake was 36 years of age when he sustained an extremely serious head injury when knocked from his bicycle in a road traffic accident. Liability was admitted. Mr Crookdake was to recover 100% compensation. He had been left with profound cognitive and intellectual deficits; he had serious difficulties with regard to behavioural disturbance and aggression; he needed constant prompting, guiding and supervision under a one:one care regime. It was conceded by the defendant that the claimant required 24 hour care in his own home. The issue which Owen J. had to decide was the extent to which the local authority, Devon County Council, would provide accommodation and care to meet Mr Crookdake's reasonable needs. Insofar as not all of Mr Crookdake's needs would be met by local authority provision, the defendant argued that a top-up arrangement would be appropriate.
11. In *Sowden* the Judge acceded to the invitation to assess damages on the basis of a top up arrangement. In *Crookdake* the Judge rejected that invitation and assessed damages on the basis of an exclusively private arrangement; he made no reduction to the claim for future care and assistance to reflect the prospect of the local authority providing care, assistance or accommodation.
12. The issues on appeal were, in fact, relatively narrow: in *Sowden*, was the Judge entitled to find that a top-up regime was appropriate and workable; in *Crookdake*, was the Judge entitled to find that local authority care, assistance and accommodation fell far short of the claimant's reasonable needs and therefore his claim for care, assistance and accommodation was to be assessed on the basis of a private arrangement.

13. It was conceded on behalf of the claimants that where a local authority is likely to provide accommodation and ancillary services which meet a claimant's reasonable needs, the claimant will suffer no loss and the defendant is not obliged to compensate him for such care and assistance<sup>1</sup>. The same principle underpins the top-up argument: the defendant should only be liable for care and assistance beyond that which will be provided by the local authority.
14. The Court of Appeal rejected the defendant's appeal in *Crookdake* but allowed the claimant's appeal in *Sowden*, to the extent that the matter was to be remitted to Andrew Smith J. for consideration of the practicability of a top-up arrangement and whether, in the light of such consideration, a local authority based residential arrangement (augmented by further care and assistance) would continue to meet the Claimant's reasonable needs (see Pill L.J. @ [69-72] and Longmore L.J. @ [94-98]. Insofar as the Court of Appeal was invited to make far-reaching decisions of principle, it declined to do so: "... as the cases have developed and concessions have been made, the resolution of the appeals does not involve consideration of some points of law of general importance which may have been contemplated. Both cases turn primarily on the application of the law to the facts of the case though an issue as to the test to be applied by the judge when considering the adequacy of the proposed provision for the claimant does arise in the case of *Sowden*." (Pill L.J @ [2])<sup>2</sup>.
15. That said, four points of principle do emerge from *Sowden* and *Crookdake*:

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<sup>1</sup> See [13], [55] and [89]. The scope of that concession has been subsequently scrutinised by the Court of Appeal. For reasons set out below it should only have been a concession to the extent that the local authority will in fact provide care and assistance which meets his reasonable needs.

<sup>2</sup> Andrew Smith J. had applied a test of "whether it is shown that the claimant's best interests reasonably require a private arrangement" rather than the correct test of what is required to meet the claimant's reasonable requirements.

- a. A claimant cannot recover damages for private care, assistance and accommodation where it is likely that he will not incur the cost of such an arrangement by taking advantage of state provision: as a matter of principle the no loss/double recovery defence was upheld (per Pill L.J. [41]).
  - b. There is no reason in principle why damages cannot be assessed on the basis of a top-up arrangement, with the tortfeasor augmenting a local authority care, assistance and accommodation package by payment of compensation (per Longmore L.J. [99]).
  - c. The burden of proving that a claimant's care needs will be met, in whole or in part, by a local authority rests upon the defendant (per Longmore L.J. [99]).
  - d. Damages are to be assessed on the basis of 100% compensation before any reduction for contributory negligence is applied (per Pill L.J [79] and [84], and Longmore L.J. [100]).
16. Whilst the Court of Appeal undertook a detailed analysis of the legislation governing the threshold assessment and means testing for residential care, neither appeal strictly required such analysis (in the light of the concessions made).

**Crofton v. NHSLA [2007] EWCA Civ 71**

17. As a result of alleged clinical negligence, Andre Crofton suffered diffuse brain damage with the result that he was left with the mental age of a very young child. He had limited mobility and speech and required 24 hour care. Liability was compromised on the basis that the defendant hospital would pay 67.5% of damages

to be assessed on a full liability basis. The issue of damages was tried by HHJ Reid QC (sitting as a High Court Judge).

18. HHJ Reid QC found that it was reasonable for the Claimant to purchase his own accommodation and employ his own carers. There was no appeal against that decision. The learned Judge was also required to determine the extent to which, if at all, the claim for future care and assistance should be reduced to reflect direct payments which the local authority would or might make to the Mr Crofton. The Judge concluded that the local authority would continue to make yearly direct payments of £68,018 which were to be offset against the claim for future care and assistance of £122,602, producing a net shortfall of £54,584. He then applied a full life multiplier to that annual multiplicand.
19. As Mr Crofton would be living in his own accommodation and not in an institutional setting, the relevant statutory regime is that provided pursuant section 29 of the National Assistance Act 1948, namely domiciliary or welfare services.
20. The issue raised by the appeal was whether the Judge was right to conclude that the local authority was obliged to make and would continue to make direct payments at that, or any, level.
21. The judgment of the Court of Appeal, delivered by Dyson L.J., provides a very useful analysis of the relevant statutory framework. The Court of Appeal identified the appeal as raising two central issues<sup>3</sup>:
  - a. Will the local authority make direct payments?

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<sup>3</sup> There were in fact three issues but the first was whether the Defendant should have been permitted to raise the direct payments issue at all [29-46]. The Court of Appeal held that it was right that the issue was addressed, notwithstanding the obvious shortcomings in preparation and presentation of the issue.

- b. What level of direct payments, if any, will the local authority make?
22. On closer analysis, the first of those issues required consideration of a number of more specific questions specifically in relation to welfare services:
- a. When assessing need (the threshold stage), can the local authority take into account capital derived from an award of damages for personal injury administered by the Court of Protection?
- b. When assessing need, can the local authority take into account income derived from an award of damages for personal injury administered by the Court of Protection?
- c. When assessing means (the charging stage), can the local authority take into account capital derived from an award of damages for personal injury administered by the Court of Protection?
- d. When assessing means (the charging stage), can the local authority take into account income derived from an award of damages for personal injury administered by the Court of Protection?
23. The answers to those questions were: (a) No; (b) No; (c) No; (d) Maybe<sup>4</sup>. On that basis the Court of Appeal concluded that the local authority could not take into account the claimant's capital or income derived from his award of damages when assessing need at the threshold stage, it could not take capital into account at the means testing stage, but it could take income into account at the means testing stage. On account of the lack of evidence as to the local authority's policy, practice and intentions vis-à-vis Mr Crofton, that issue – whether income would be taken into

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Depending upon the policy and practice of the relevant local authority.

account at the means testing stage - was remitted to the Judge for further consideration. To that end the local authority was subsequently added to the litigation as an interested party.

24. In order to arrive at that decision, the Court of Appeal once again undertook a detailed analysis of the primary and secondary legislation, together with the ministerial guidance issued in respect of both welfare services (*Fair Access to Care Services Guidance on Eligibility Criteria for Adult Social Care* (“Fairer Charging Policy”)) and residential accommodation (*Charges for Residential Accommodation Guidance* (“CRAG”)). To descend into such a detailed analysis in this paper would be little more than a reproduction of the judgment of the Court of Appeal. Instead I attach (Appendix 1) a condensed analysis which cross-refers the relevant legislation, ministerial guidance and authorities to produce a bullet-point appraisal of the current state of the law.
25. As for the second question, what credit, if any, was to be given for the prospect of direct payments, the Court of Appeal remitted that issue back to the Judge for reconsideration. It did so in the light of the conclusion on the first issue, namely that the Judge had failed to consider the prospect of the local authority taking the Claimant’s income from his award into account at the charging stage, but also because the Judge failed to reflect the obvious uncertainties associated with state provided care by adopting a full-life multiplier for the direct payments [107-108]. As Dyson L.J. said,

“108. In our view, the judge was wrong to apply the agreed whole-life multiplier to the direct payments. The uncertainties to which he referred at paragraph 17 of his judgment and to which Tomlinson J referred in *Freeman v Lockett* should have led him to conclude that a

substantial discount to the multiplier was necessary. It is by no means far-fetched to suggest that, at some time in the future, the ministerial policy of ring-fencing personal injury damages and/or the Council's approach to that policy will change.”

26. The Court of Appeal also took the opportunity to add its name to the list of those expressing their dismay at the “*complexity and labyrinthine nature of the relevant legislation and guidance*” [111].

**Peters v. East Midlands Strategic Health Authority & Anr [2009] EWCA Civ 145**

27. Chantelle Peters was born with congenital rubella syndrome as a result of the negligent failure to ensure that her mother received a rubella vaccination before she became pregnant. Miss Peters obtained Judgment against the Strategic Health Authority and a Dr Halstead. She is extremely disabled with a low IQ and significant behavioural problems; her vocabulary is limited to a few words and she is able to sign a few more; she is effectively blind.
28. The issue of damages was tried by Mr Justice Butterfield. All heads of loss were agreed save for loss of earnings (past and future), care (past and future), future case management and future costs of deputyship.
29. The central issue at the trial was who was to bear the cost of caring for Miss Peters. By that stage she was living in residential accommodation, “*The Spinnies*”. The cost of that arrangement was shared between the local authority and the local Primary Care Trust. The defendants argued that the local authority was obliged to provide that care and accommodation pursuant to section 21 of the National Assistance Act 1948 and would continue to do so: there was no loss for the Claimant. The local authority disputed this and asserted that if it was required to fund Miss Peters’ care

then it would look to her for a financial contribution towards her care costs from the damages she was awarded in the litigation (at the means testing stage): it argued that Miss Peters would have to pay for some or all of her care. In that event the Claimant would have a loss which she could and would recover in the litigation. The defendants therefore joined the local authority as a Part 20 Defendant in the proceedings, seeking declarations to the effect that the local authority, Nottingham City Council, could not charge for the Claimant's past, present or future care.

30. Mr Justice Butterfield concluded as follows:

“38. ... In my judgment the plain effect of the legislation is that in making any assessment of the claimant's capital for the purpose of determining her liability to reimburse the Local Authority for the cost of her residential accommodation and care the whole amount of any award to the claimant in these proceedings must be disregarded and I so find.”

“43. ... In the circumstances of this case [the claimant being a protected party whose award of damages will be administered by the Court of Protection] as it seems to me I am bound to follow the conclusion of the Court of Appeal in *Crofton v. NHSLA* [2007] 1 WLR 923 where at paragraph 58 the Court held:

“The position with regard to Section 21, therefore, is that where a Claimant is awarded damages for personal injury that are administered by the Court of Protection, the sum awarded and any income that might be derived from that sum are disregarded at the threshold stage. They cannot be taken into account for the purposes of deciding whether the Claimant is in need of care and attention which is not otherwise available.’”

31. Accordingly, the learned Judge made the declarations sought by the defendants (see [47-48])<sup>5</sup>, effectively that the local authority could not take into account any part of the Claimant's damages at the threshold or means testing stage. Having made those declarations, the Judge went on to consider who should foot the bill for the Claimant's future care.
32. It was agreed by the parties that the reasonable cost of meeting the Claimant's future care needs was £134,546 per annum, the annual cost of her care in the residential accommodation funded by the local authority and the PCT. The issue was therefore whether the Claimant's reasonable needs would be met by local authority provision, for which the defendants would have no liability to compensate her, or whether her reasonable needs could not be met by local authority provision, in which event funding for a private arrangement was required to be funded by the defendants. The learned Judge concluded,

“72. In the light of my findings of fact, together with my view about the probabilities of C remaining at *The Spinnies* indefinitely even if funding was available, I am satisfied that the defendants fail to establish that C's reasonable needs for care in the future will be provided by the Local Authority. Whilst as the law presently stands C will have access to State-funded care in the future, that care is unlikely to provide her with the quality of care she presently enjoys for the rest of her life. The only way to ensure that she does receive such care in the future is for her to be self-funding.

73. In my judgment there is no reason in principle why she should give up that option at the behest of the tortfeasor defendants and make herself dependent on the State. She has an immediate right to full compensation from the tortfeasor. She is entitled to look to the

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<sup>5</sup> Although he did so on the current state of the legislation, expressly recognising that such declarations would cease to have effect in the event of legislative change and further recognising the near inevitability of further litigation in that event [48].

tortfeasor for such compensation. She is not obliged to make herself dependent on State resources. On the evidence it would be folly for her to do so if the aim is to ensure, as all the experts agree is appropriate, that she stays at The Spinnies or at some comparable establishment. For the avoidance of doubt I find that it is reasonable for C to choose to be self-funding as opposed to relying to any extent on state provision for her care, and reasonable for her to make that choice immediately. No one suggests that there is any half-way house available in the circumstances of this case, whereby for example the Local Authority met part of the necessary care costs with the tortfeasors topping up any shortfall. In those circumstances and in the light of my findings of fact I conclude that the defendants are liable to pay the costs of past care, to the limited extent indicated, and the costs of future care to the claimant subject to the question of mitigation of damages and double recovery.”

33. The defendants also pursued an argument in relation to mitigation of damage. They argued that a claimant must “apply for and take the accommodation which the Local Authority are required to provide for her (even though she has an established right of full recovery against the tortfeasors.” [74]. Butterfield J. rejected that argument:

“74. ... I accept that the claimant must take all reasonable steps to mitigate the loss to her consequent upon the defendants’ negligence and she cannot recover damages for any such loss which she could have avoided but which, through unreasonable action or inaction, she has failed to avoid. The claimant cannot recover for avoidable loss.

75. But the loss sustained by the claimant here is fixed and established. It is, for present purposes, the cost of her future care. She cannot avoid or reduce or mitigate any part of that loss. The question here is not one of mitigation of loss, but who should pay for it. In any event, as I have made clear, in my judgment it is entirely reasonable for the claimant not to rely on the statutory obligation of the Local Authority to provide for her where the alternative of recovery from the defendants is available to her for all the reasons articulated in this judgment. Even if matters were otherwise equal as between relying on the Local Authority and recovering from the defendants – which they are not – the claimant would be

fully entitled as a matter of law to choose to pursue the tortfeasors. The argument of the defendants is simply unsustainable. The loss of the claimant remains the same whoever foots the bill. I am quite satisfied that there is here no question that the claimant will recover for avoidable loss.”

34. Finally, the Judge turned to the issue of double recovery. The deputy, Mrs Miles, had offered an undertaking not to seek statutory funding for Miss Peters’ care, such undertaking to be qualified in whatever terms were appropriate. The Judge rejected that proposal, doubting that it had any proper legal basis and emphasising that he considered it to be impractical and undesirable. He was able to circumnavigate the double recovery argument on the basis that with 100% compensation, the deputy would not require local authority care “in the absence of some wholly unexpected development which compels her to abandon her stated intention to rely on private funding.” He further found that he could rely upon any subsequent deputy taking precisely the same view [78]<sup>6</sup>.
35. The defendants appealed the Judge’s decision that there should be no reduction in the claimant’s damages to reflect the local authority’s duty to provide care. The local authority appealed against the Judge’s decision that all of the damages awarded to the claimant for personal injury fell to be disregarded by the local authority when determining whether it had a duty to provide accommodation and care for the claimant.
36. The local authority’s appeal turned upon statutory interpretation of the words “*an award of damages for personal injury*” in paragraph 44(2)(a) of Schedule 10 to the Income Support (General) Regulations 1987. The paragraph identifies, *inter alia*, capital

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<sup>6</sup> On any view, very robust findings.

which is administered by the Court of Protection and which is derived from an award of damages for personal injury as capital which cannot be taken into account at the threshold and means testing stage. The Court of Appeal upheld the Judge's finding that that phrase extended to every aspect of an award of damages for personal injury was not to be limited to the general damages award for pain, suffering and loss of amenity, nor was it to be limited to the whole award save for those elements awarded for care and accommodation [28-32].

37. The defendants' appeal raised the more interesting issues. The first was whether a claimant is entitled as of right to damages rather than state funded care. The Court of Appeal held,

“We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. There is no dispute as to what that should be and the Council currently arranges for its provision at The Spinnies. The only issue is whether the defendant wrongdoers or the Council and the PCT should pay for it in the future.” (per Dyson L.J. [53])

38. That conclusion, however, was subject to an important caveat introduced a number of paragraphs later,

“In our judgment, therefore, **provided that there was no real risk of double recovery**, the judge was right to hold that there was no reason in principle why the claimant should give up her right to damages to meet her wish to pay for her care needs herself rather than to

become dependent on the State. The judge was right to be concerned about the possibility of double recovery to which we now turn.” (per Dyson L.J. @ [56]) (**emphasis added**)

39. It is plain, therefore, that the Court of Appeal did not grant claimants a completely unfettered right to assert their preference for a private care arrangement and thus eliminate any argument as to local authority care: a court will first have to assess the risk of double recovery. If there is a realistic risk of double recovery then, unless that risk can be excluded, it has to be reflected in the assessment of damages. That led to the next issue: the risk of double recovery.
40. The Court of Appeal reaffirmed the validity of the double recovery/no loss defence [57]. It therefore had to consider the Judge’s finding that there was no prospect of the claimant’s then deputy, or any subsequent deputy, seeking local authority care and accommodation absent some wholly unexpected development. The Court of Appeal remarked that this was not “an entirely satisfactory way of dealing with double recovery.” [62]. Instead, the Court of Appeal developed the suggestion of the deputy giving an undertaking not to seek local authority care and accommodation and arrived at the following conclusion,

“But during the course of argument in this court, it became clear that there is an effective way of policing the matter and controlling any future application by Mrs Miles for the provision of care and accommodation by the Council. It can be achieved by amending the terms of the court order pursuant to which she is acting. The Court of Protection Order made on 28 January 2006 sets out in considerable detail the scope of her authority. Paragraph 6 of the order provides that the Receiver (now Deputy) is not authorised to do any of the acts or things stated in subparagraphs (a) to (p) “unless expressly authorised to do so by the court by further order, direction or authority”.

64. Mrs Miles has offered an undertaking to this court in her capacity as Deputy for the claimant that she would (i) notify the senior judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of this court and that of Butterfield J; and (ii) seek from the Court of Protection (a) a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under section 21 of the NAA can be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public funding of the claimant's care under section 21 of the NAA and be given the opportunity to make representations in relation thereto.

65. In our judgment, this is an effective way of dealing with the risk of double recovery in cases where the affairs of the claimant are being administered by the Court of Protection. It places the control over the Deputy's ability to make an application for the provision of a claimant's care and accommodation at public expense in the hands of a court. If a Deputy wishes to apply for public provision even where damages have been awarded on the basis that no public provision will be sought, the requirement that the defendant is to be notified of any such application will enable a defendant who wishes to do so to seek to persuade that the Court of Protection should not allow the application to be made because it is unnecessary and contrary to the intendment of the assessment of damages. The court accordingly accepts the undertaking that has been offered.

66. In these circumstances, we do not see the risk of double recovery as a reason for rejecting the judge's decision to award the claimant the full cost of care and accommodation." (per Dyson L.J.)

41. The defendants sought to challenge the Judge's finding that it was reasonable for the claimant to opt for self-funding rather than provision by the local authority. On that issue, they were successful in challenging the Judge's conclusion that *The Spinnies* was not a suitable home for life for the claimant [67-70]. They were not, however, successful in arguing that the Judge was wrong to find that it was "*highly unlikely*" that

the claimant would have a home for life at *The Spinnies* if her care was funded by the local authority and the PCT [71-84]. The defendants also failed in their argument that the Judge was wrong to find that it was possible that the legislation would change at some point in the future so as to impose an obligation on the claimant to contribute to the cost of her care and accommodation. The Court of Appeal held that that was a fair consideration and “That there is no reason why the claimant should take the risk that the policy of ring-fencing personal injury damages is changed and with immediate effect” [88].

42. The defendants raised a further issue, namely that the Judge should have reduced the multiplier to reflect the fact that the claimant would be entitled to state funded care for at least a period into the future. To that end the defendants relied upon a passage from the Court of Appeal decision in *Crofton* [96]. The Court of Appeal dismissed that argument: in *Crofton* the claimant was receiving and was likely to continue to receive direct payments for at least a certain period of time and possibly much longer; in *Peters*, the claimant would not be receiving any State-funded care unless her deputy was authorised by the Court of Protection to apply for public funding.

43. The Court of Appeal’s conclusion that it was reasonable for the Claimant to opt for self-funding rather than state provision effectively addressed the failure to mitigate argument. However, the Court of Appeal did add a very telling postscript on the mitigation issue,

“There is much to be said for the view that it is reasonable for a claimant to prefer self-funding and damages rather than provision at public expense, on the simple ground that he or she believes that the wrongdoer should pay rather than the taxpayer and/or council tax

payer. In other words, it is not open to a defendant to say that a claimant who does not wish to rely on the State cannot recover damages because he or she has acted unreasonably. In Freeman, Tomlinson J. came close to embracing this view at [6]. We heard no argument on this approach to the mitigation issue and we express no concluded view about it.” (Dyson L.J. @ [89]).<sup>7</sup>

### **Is *Peters* the solution to “The Problem”**

44. Whilst it solves some aspects of the problem, many remain. The mischief in *Peters*, as in all the other cases, was the risk of double recovery. The Court of Appeal’s solution was the deputy’s undertaking.
45. We should remind ourselves of some of the facts of *Peters*. Chantelle Peters was a protected party assisted by a professional financial deputy. The deputy’s powers were limited by the order appointing her and her actions could be supervised by the Court of Protection. It was those facts which enabled the Court of Appeal to accept the undertaking of the deputy not to apply for state funding without the permission of the Court of Protection. What of the non-protected party who intends to place his funds in a Personal Injury Trust? How do the Courts prevent or police the risk of double recovery?
46. What of the deputy’s ability to give such an undertaking. Chantelle Peters was entitled to 100% compensation: there was to be no reduction to her compensation to reflect litigation risk or contributory negligence. In those circumstances it is perhaps easy to understand the deputy’s willingness to give the undertaking. Consider the 50% recovery case (a la *Sowden*) or the 67.5% recovery case (a la *Crofton*). Can a deputy give a *Peters* undertaking not to apply for state funded care without the

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<sup>7</sup> Although the Court of Appeal heard no argument on it, it was plainly keen to convey a fair degree of support for the argument.

permission of the Court of Protection? Is an undertaking not to apply for state funding beyond 100% compensation or not to offend the double recovery principle workable or enforceable? What of the burden on the Court of Protection? It struggles to cope with the demands currently placed upon it. Can it cope with an avalanche of satellite litigation revolving around the extent to which a claimant is seeking state funded care beyond the 100% boundary?

47. What of the deputy's duty to the claimant? It was argued in *Peters* [60], adopting the argument previously run in *Sowden* [35], that the Deputy is under a duty to "secure and maximise funding available from public funds" and "ensure that such benefits as are available are obtained." How does the surrender of the power to do so without restriction sit with the Deputy's duties to the claimant? The Court of Appeal rejected this argument but it is important to read exactly what was said,

"More importantly, neither Ms Ainsworth (the claimant's case manager) nor Ms Douglas (the defendant's care expert) was addressing the specific question of the scope of the duty in circumstances where the a court has awarded 100% of the care costs that are necessary to meet a claimant's needs. We do not accept that, **in such circumstances**, there is a duty on the case manager or Deputy to seek full public funding so as to achieve a double recovery. There is no basis in law, fairness or common sense for such a duty."<sup>8</sup> (per Dyson L.J [61]).

48. But what of the partial recovery case? Surely the deputy is under a duty to seek public funding so as to maximise the claimant's resources, otherwise he leaves the claimant without sufficient means to meet his needs? Assume that the deputy is able to devise a workable undertaking which prohibits him from seeking public funding which would offend the double recovery principle. The deputy applies for local

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<sup>8</sup> The ultimate duty owed by any Deputy is to act in the best interests of the person to whom the appointment relates. It is perhaps striking that the Court of Appeal did not refer to that in its analysis.

authority care by way of residential accommodation. According to *Sowden and Peters*, at the threshold and means testing stages the local authority cannot take into account capital or income derived from damages for personal injury which are administered by the Court of Protection. As a matter of law the local authority must assess the claimant's needs and means without regard to the substantial compensation award. It must therefore devise an accommodation and care package which meets all of the claimant's needs, not just 25% or 50% of his needs. The deputy has no power to control or limit the assessment, or the proposal made. The local authority is under a duty to provide that care and accommodation. How does the deputy secure the additional care which the Claimant needs without offending the double recovery principle? Is an undertaking a workable solution to the double recovery argument in the partial recovery case?

#### **Alternative mechanisms to meet the double recovery argument**

49. All of the cases where these issues have arisen involve catastrophic personal injury with claimants requiring substantial lifetime care. Those are exactly the types of case where an ASHE-linked periodical payments order is arguably the appropriate form of award for the future care and assistance claim. Can a periodical payments order be used to prevent double recovery in a non-protected party case?
  
50. In *Burton v. Kingsbury* [2007] EWHC 2091 (QB), Mr Burton was rendered a C4 quadraplegic as a result of a road traffic accident. He did not lack capacity to conduct his litigation nor to manage his affairs; he was not a protected party. Liability was admitted and he was to receive 100% compensation. He lived in his own accommodation with his wife and son. He had substantial care needs, valued

by the Judge at £111,941.27 p.a. to age 50, and £131,842.80 p.a. thereafter. As at the date of the trial the local authority and PCT were contributing a combined total of approximately £80,000 to the claimant's care package.

51. Mr Justice Flaux was provided with evidence from the relevant local authority that its practice was to “look at any sums awarded by way of damages to see for what purpose the funds were received. If they represent funding for future care, they may well have to be brought into account” [102]<sup>9</sup>. On the basis of its policy at the time, the local authority could have recovered a maximum of £20,500 p.a. from the Claimant in respect of his care [104]. It was conceivable that the policy could be amended so as to abandon the maximum charging limit and permit the recovery of the total cost of the care provided [104]. In the light of that evidence, Flaux J. concluded that it would not be “appropriate or fair to the Claimant simply to make a reduction in the multiplier as the Court of Appeal suggests. Since the amount of care which the Council funds is no more than adequate, whereas I have accepted that the Claimant should be entitled to the better, more expensive, care regime as advocated by Mrs James, the effect of such a reduction in multiplier might well be, in the event that the Council does make such a change in policy, to condemn the Claimant to a less adequate care regime in future.” [106].
52. The parties offered different solutions to the double recovery argument. The claimant offered a “*reasonable endeavours*” reverse indemnity [107]. The defendant suggested that the Court should order a periodical payment with the defendant's

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<sup>9</sup> Note that if a lump sum award was made which was not placed in a Personal Injury Trust then the then current capital and income disregards (as at 2007) would not apply as Mr Burton was not a protected party.

- insurers funding the shortfall between the local authority provision and the Claimant's annual needs (approximately £112,000 and £132,000 as set out above)<sup>10</sup>.
53. Flaux J. preferred the defendants' proposal, having earlier set out in his judgment his in principle conclusion that principle periodical payments was the appropriate form of award for the future care and case management claims. The Judge doubted whether he had jurisdiction to order a reverse indemnity (given that the defendant was unwilling to submit to such an arrangement). He concluded that the proposed shortfall periodical payment (my description, not the learned Judge's) was fairer to the claimant in that it eliminated the risk of under compensation given the unpredictability of the future charging policy of the local authority.
54. Mr Justice Flaux's solution certainly appears to avoid double recovery; it eliminates the risk of under compensation; and seems a workable and enforceable solution with the claimant and defendant insurer retaining an ongoing relationship, with safeguards in place, for the purposes of the periodical payments order in any event. It is perhaps surprising that it has not received greater support or consideration in any of the other authorities. However, it obviously does not assist where the claimant elects to take the award by way of lump sum rather than periodical payment, the common situation in the partial recovery case.
55. Is there any solution to the double recovery argument in lump sum non-protected party cases? The short answer is that the only solution at present appears to be the reverse indemnity which cannot be ordered but can be implemented by agreement between the parties. For both parties, there has to be a financial incentive to agree to

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<sup>10</sup> It is understood that the proposed solution was for a full payment for year 1, with credit being given for the previous year's local authority contribution in year 2 and so on – the Claimant had a substantial lump sum award to absorb any ups and downs year on year.

a reverse indemnity. For the defendant's part, if it is to have any value then it has to be a "*reasonable endeavours*" or positive reverse indemnity, otherwise there is no saving to the defendant; he simply serves the public good of preventing double recovery. For the claimant's part, there has to be some financial benefit, whether that be receiving a proportion of the sums recovered from the local authority (sharing those monies with the defendant) or an enhancement to the lump sum.

56. It is difficult to formulate a solution which the Court can order (without the consent of both parties) in a lump sum non-protected party case. In those cases the Courts will have to revert to the *Crofton* solution, making primary findings of fact as to the prospect of the claimant receiving or continuing to receive local authority care and/or accommodation and adjusting the multiplier accordingly.

### **Thoughts for the future**

57. In the absence of government intervention to overhaul the legislation, it is difficult to see a simple fix all on the horizon. Regrettably, there is every reason to fear that without such intervention, this will become a more rather than less difficult problem.
58. Successive governments have embarked upon a process of shifting the delivery of social care and accommodation from local authority controlled resources towards a system which permits flexibility and choice for the service user, with the local authority providing funding rather than the actual care services. The Direct Payments programme reflects that shift. The enthusiasm for greater flexibility and

choice remains and has recently been demonstrated by a pilot programme for Individual Budgets<sup>11</sup>.

“Individual Budgets (IBs) are central to the aim of ‘modernising’ social care in England. They build on the experiences of direct payments and *In Control* and are intended to offer new opportunities for personalised social care.” (*Evaluation of the Individual Budgets Pilot Programme* (October 2008) – Section 1.1).

“Individual budgets were to bring together those resources from different funding streams (including local authority social care, housing-related support services, adaptations and equipment budgets) for which an individual is eligible into a single sum that can be spent flexibly according to the priorities and preferences of that person.” (Section 1.2)

59. The concept of the Individual Budget is to bring together various local authority and other state funding streams into a single budget which the person can then use in a flexible fashion<sup>12</sup> to meet his needs. The first difficulty which the Individual Budget might present is defining which aspects of the budget relate to care and which relate to other aspects of the person’s needs.
60. Funding streams included in the Individual Budgets pilot programme included: adult social care; Access to Work; the Independent Living Fund (both the responsibility of the Department for Work and Pensions); Supporting People and the Disabled Facilities Grant (both the responsibility of the Department for Communities and Local Government); and local Integrated Community Equipment Services, which were funded from pooled social care and NHS resources. Individual Budgets were calculated on the basis of a points score across a series of domains to give a total

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<sup>11</sup> Manchester was one of the pilot schemes.

<sup>12</sup> Not so flexible as to permit the money to spend on holidays, luxury cars or such like.

number of points; a point had a cash value<sup>13</sup>; the total number of points produced a total cash value and therefore the Individual Budget. The pilot programme provided that “IB levels calculated through these processes may subsequently be adjusted following discussions between care managers and potential IB users” (Section 1.4). How easy is it going to be to deconstruct an Individual Budget to assess what has been allocated for care, equipment or any of the person’s other needs?

61. The Individual Budget programme is yet to be progress beyond the pilot stage, although it seems highly likely that it will. Whilst we will simply have to wait and see how the system operates in practice, we can surely expect, absent substantial changes in the legislation, new but no less complicated problems.

62. Finally, contributory negligence. In *Sowden* at first instance, Stephen Stewart QC, as he then was, argued that the Court should take into account the 50% reduction for contributory negligence when considering whether a private or residential arrangement was the appropriate arrangement to meet the claimant’s reasonable needs:

“He argued that because the claimant is to recover only half of the damages for full liability, the claimant is unlikely, on any view, [to] be able to afford a private arrangement for the rest of her life. Accordingly, it is said, if the claimant has a private arrangement, she is likely to face a disruptive change at some time in the future. Mr Stewart submitted that I should take this into account in comparing the merits of a private arrangement and a residential arrangement.” [73]

63. Andrew Smith J. accepted the argument in principle but considered it to be only a marginal consideration [79]. The Court of Appeal rejected the argument:

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<sup>13</sup> Calculated by dividing the global social care budget by the total number of points to obtain a cash value for each point.

“76. Miss Gumbel [for the Claimant] submits that the Court assesses damages in the ‘100% world’ and shuts its eyes to contributory negligence at that stage. ...

79. I agree with Miss Gumbel’s submissions. Damages are to be reduced having regard only to the ‘claimant’s share in the responsibility for the damage’. That assumes an assessment of the sum recoverable prior to any reduction for contributory negligence. Sub-section 1(2) [of the Law Reform (Contributory Negligence) Act 1945] points strongly in the same direction. The reduction takes account of share of responsibility for the damage but not how the damages are likely to be spent.” (per Pill L.J.)

64. Could it not be argued in a partial recovery case that it is wholly artificial to make an initial assessment of damages in the “100% world” which the claimant does not occupy and when in the real world there is a very strong prospect that the claimant will be making use of local authority care to supplement his partial award of damages? Whether the claimant elects to rely upon local authority care throughout his lifetime and to top up that care using his damages, or to exhaust his damages before becoming wholly dependent upon the local authority, the effect is the same: the claimant will **as a matter of fact** be receiving local authority care when his damages have been calculated on the premise that he will not be receiving such care.
65. There are difficulties with that argument:
- a. It appears to fly in the face of the Court of Appeal decision in *Sowden*.
  - b. If followed to its logical conclusion it is a self fulfilling argument: if the court finds as fact that the claimant is going to make use of local authority care for a period then the award for private care is reduced; after the reduction for contributory negligence the damages available to the claimant are further

reduced; therefore the claimant's need for local authority care increases, and his entitlement to damages further reduces; and so on.

- c. Whilst the invariable practice is to distill the reduction for contributory negligence to a percentage, the 1948 Act provides that “the damages recoverable in respect [of the damage suffered] shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ....” (s.1(1)). Can it be just and equitable for contributory negligence to be used as a vehicle to effectively defeat an otherwise valid claim for care and assistance which is in part attributable to the actions of the defendant?<sup>14</sup>
  - d. It offends the sensibilities of most Judges who incline to the view that the tortfeasor should compensate for the injuries, losses and expenses which he has caused.
66. But what of double recovery, the fundamental problem which underpins this entire seminar? If you value damages on the basis of a wholly artificial assumption that the claimant will self-fund his care without recourse to state provision, there is the very, very real risk that that claimant, a partial author of his own misfortune, will benefit from double recovery and will be overcompensated. If that is correct then how can valuation in the 100% world be sustainable in principle or practice?

### **Final thought**

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<sup>14</sup> See the speeches of Lord Hobhouse and Lord Millett in *Platform Home Loans Ltd v. Oyston Shipways Ltd* [2002] AC 190 HL.

67. In both *Sowden* and *Crofton*, the Court of Appeal upheld the claimant’s complaint that they had been taken by surprise and needed more time to deal with the no loss argument. In *Crofton*, Dyson L.J. said,

“What occurred in this case proves the wisdom of the remarks made by all three members of this court in *Sowden*. The springing of surprises is anathema to modern case—management. That is what happened in this case. To raise an important and difficult issue in the way that the direct payments issue was raised was an unacceptable way to conduct litigation. We do not criticize either Mr Taylor or the Judge but it can now be seen that the right course would have been to adjourn the issue to enable Mr Grace to formulate it properly and for Mr Taylor to consider it fully.” [46]

68. If I can make one practical suggestion to assist you when you are confronted by the local authority versus self-funded care argument at a future date, it can only be to investigate the issue fully, with the local authority, relevant experts and financial adviser, and present comprehensive evidence addressing the issues which arise. As this is an area where acronyms abound, I suggest you adopt the six Ps: **P**roper **P**reparation **P**revents **P**ublic **P**rovision **P**roblems<sup>15</sup>.

**Byrom Street Chambers**  
**Manchester**

**DARRYL ALLEN**  
**7<sup>th</sup> May 2009**

□  
<sup>15</sup> To be contrasted with the six Ps (Prior Planning Prevents P\*\*\* Poor Performance) recommended by the trial Judge to defence counsel in the case of *R v. Dean Cole* [2008] EWCA Crim 3234.