Discount on claims for gratuitous care: 33%, or lower?

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For many decades, the courts have been willing to compensate injured Claimants for the gratuitous care they may have been provided with as a result of the injuries sustained (held on trust for the carer following ***Hunt v Severs*** [1994] 2 AC 350, HL.

In the well-known case of ***Evans v Pontypridd Roofing*** Ltd [2001] P.I.Q.R. Q5, Lord Justice May stated at para 25:

> *'In my judgment, this court should avoid putting first instance judges into too restrictive a straight-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. If a caring relation has given up remunerative employment to care for the claimant gratuitously, it may well be appropriate to assess the proper recompense for the services provided by reference to the carer's lost earnings. If the carer has not given up gainful employment, the task remains to assess proper recompense for the services provided'*.

Giving the courts flexibility, gives the parties opportunities to challenge the assessment of the number of hours, the hourly rate (whether basic daytime rates or aggregate rates to reflect care being provided at the weekend and antisocial hours), and the discount to be provided.

This article looks at just one aspect: the discount to be provided.

It is conventional to allow this discount to reflect the fact that the carer will not have to pay tax or national insurance (payable by a commercial carer) and, because the carer often lives in the same house, will not have to take the time and incur the expense of travelling to work does not arise when a relation provides the care is well established; see ***Whiten v St George's Healthcare Trust*** [2011] EWHC 2066 and ***Totham v King's College Hospital NHS Foundation Trust*** [2015] EWHC 97.

In the vast majority of cases the Defendant Trust will argue for a 33% discount. This often includes reference to **Evans** (referred to above) where May LJ observed at para 37 that:

> *'...If the carer has not given up gainful employment, the task remains to assess proper recompense for the services provided. As O'Connor LJ said in Housecroft v Burnett, 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'*.

Although, as May LJ said, also in **Evans**:

> *"I am not persuaded that the reasons for making a discount which may be regarded as normal should result in a deduction greater than 25%."*

There have been many other cases where the courts have considered the "normal" discount to be 25% (see the review in ***A & Others v National Blood Authority*** 2001 Ll Med 187 (@ 274 per Burton J and ***Whiten*** per Swift J.

Whilst Defendants may argue for a one-third discount (without success as far as I can see), it is open for Claimants to argue for a lower rate. In ***Miller v Imperial College Hospital NHS Trust*** 2014 EWHC 3772 per HHJ Curran sitting as an HCJ, the trial judge discounted his assessment of gratuitous care by just 20% where a woman with an amputated leg was provided with her son (who lived nearby but not in the same house). We also argued that tax and NI rates had changed radically since **Evans** was decided.

It is even still possible to get no discount in cases of the most severe disability (see ***Parry v NW Surrey HA*** (Penry-Davey J. unreported) and ***Lamey v Wirral HA*** (Morland

J Kemp A4-106 and ***Newman v Marshall*** Folkes [2002] EWCA Civ 591). In **Newman**, the Court of Appeal refused the defendant's appeal in a case where the judge had given no discount from commercial rates, even though the care provided by the claimant's wife was being provided gratuitously. Ward LJ observed that, as per *Evans*, there was no conventional discount that should be applied but instead each case depends on its own facts.

It is always worth arguing for a lower discount, particularly if the person doesn't live in the same house, provided care outside normal day hours or where the care is particularly complex and skilled (often after training had been provided). Nothing ventured, nothing gained.

In short, 33% is unlikely. 25% likely, but probably the ceiling.