How Do We Assess Gratuitous Care?

SERJEANTS' INN

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One of the forces behind this series of articles is the realisation that Counter Schedules have been introducing arguments which have been rejected by the courts, often many years ago, or were inconsistent with the courts' rationale.

I have found that there are renewed challenges to the assessment of gratuitous care. To give some recent examples:

– that visiting someone in Hospital isn't to be compensated (as the care is provided by the Hospital staff),

- the re-introduction of a "stopwatch" to calculate care provided,

- that night-time care should not be compensated at an aggregate rate (which is said not to be a concept paid in the private sector),

- that the care provided is not sufficiently serious to justify an award (relying on some obiter remarks in Mills v British Rail Engineering, a case decided in 1992).

These arguments have little merit. Even allowing for the games Defendants will play, and the principle that "nothing ventured, nothing gained", these are really aimed at achieving an undeserved discount on the appropriate level of damages. With that in mind, this article looks at how gratuitous care is assessed, and points to the very wide range of activities and support which have been held should be compensated.

Principles

The object of an award for gratuitous care is 'to enable the voluntary carer to receive proper recompense for his or her services' (*Hunt v Severs* 2004 AC). It is normally agreed that there is a "ceiling" on such awards, set by the commercial cost of providing care (*Housecroft v Burnett* 1986 1 ALLER 332). This sets a ceiling in the very unusual case of a person giving up a well paid job to care for a relative – they cannot recover their loss of earnings, but will be subject to a ceiling of the cost of commercial care (see *Woodrup v Nicol* [1993] PIQR).

But this article looks at what can be claimed. A good starting point is Brooke LJ's judgment in *Giambrone v JMC Holidays Ltd* [2004] EWCA Civ 2158 (a case involving food poisoning). Brooke LJ established the principle that the care to be compensated should include care which goes distinctly beyond that which is part of the ordinary regime of family life.

The court had been asked to conclude that cases of food poisoning were not serious enough to justify an award for care, relyiing upon the old case of *Mills v British Rail Engineering* (1992). Brooke LJ said (supported by his colleagues):

> *'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 the case in which no 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 the 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 ...*
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> *In my judgment the judge was correct in principle to make an award for the cost of care in each of these cases. Anyone who has had responsibility for the care of a child with gastro-enteritis of the severity experienced by these children will know that they require care which goes distinctly beyond that which is part of the ordinary regime of family life. The fact that one of these mothers had a child who had suffered in this way on previous occasions provides no good reason for concluding that an award of some sort is not appropriate if there is an identifiable tortfeasor to blame'.*

In assessing what goes beyond the ordinary regime of family life, is that limited to the periods when actual care/ support is being offered (the "stopwatch" approach), or a more generous assessment of an availability to provide such care.

In *Evans v Pontypridd* Roofing Ltd [2001] EWCA 1657 the court rejected the stopwatch argument. Mr Evans needed not just physical care and physical assistance, but emotional support (for a very severe depression). The trial judge assessed the care at 24 hours per day. Those acting for the Defendant roofers went to the Court of Appeal arguing that the care claim should not include the emotional support, and that there should be no compensation for the periods when Mrs Evans was not providing support (for example, when she was asleep).

The key passages are in the judgement of May LJ who stated (paragraph 30):

> *'Any determination of the services for which the court has to assess proper recompense will obviously depend on the circumstances of each case. There will be many cases in which the care services provided will be limited to a few hours each day. The services should not exceed those which are properly determined to be care services consequent upon the claimant's injuries, but they do not, in my view, have to be limited in every case to a stop-watch calculation of actual nursing or physical assistance. Nor ... must they be limited in every case to care which is the subject of medical prescription. Persons, who need physical assistance for everything they do, do not literally receive that assistance during every minute of the day. But their condition may be so severe that the presence of a full time carer really is necessary to provide whatever assistance is necessary at whatever time unpredictably it is required. It is obviously necessary for judges to ensure that awards on this basis are properly justified on the facts, and not to be misled into findings that a gratuitous carer is undertaking full time care simply because they are for other reasons there all or most of the time.'*

This passage is very helpful in advising many partners/ spouses who feel trapped by their role as carer – unable to get on with their own lives, go out, maintain social interests and activities because they have to be "on hand just in case" the injured person needs their help. Such time can be compensated.

Specific Activities

Unless there is some pre-injury medical history indicating that such care was required in any event, it is usually agreed that actual physical care (helping with dressing, washing, bathing, transfers, cutting up food/feeding and so on), and support such as cooking, shopping and cleaning will be recovered.

What is clear (and not always agreed) is that the care to be compensated can go beyond these physical acts.

a. As the case of Evans shows, it can include offering emotional support, so frequently needed as the injured person comes to terms with their disability.

b. Painting, decorating, DIY, gardening and looking after the car (see for example Smith v East and North Hertfordshire Hospitals NHS Trust [2008] EWHC 2234.

c. Prompting and encouraging a brain-injured Claimant, and helping them to organise their affairs (appointments and finances).

d. Helping with the organisation of carers and treatment ("Case management") Massey v Tameside & Glossop Acute Services NHS Trust [2007] EWHC 317.

e. Providing care for others which would have been provided by the injured person Froggatt v Chesterfield & North Derbyshire Royal Hospital NHS Trust [2002] All ER (D) 218.

f. Attending at Hospital – see O'Brien v Harris (22 February 2001 QBD Pitchford J; Warrilow v Warrilow [2006] EWHC 801 Langstaff J, but not the conflicting case of Huntley v Simmonds [2009] EWHC 405 Underhill J.

The Hourly Rate

It has become conventional to use the Spine Point 8 of the National Joint Council rates. In many cases, the family member provides care during the night, at weekends, on Bank Holidays and so on. The court usually allow an enhanced "aggregate rate" rather than the flat rate to reflect this. For example, in a case called **Whiten v St George's Healthcare Trust** 2011 EWHC 2016, Mrs Justice Swift held:

> *From the beginning, the claimant has required a very high level of care by comparison with an uninjured child. That care has been required at all hours of the day and night. The levels of stress and exhaustion experienced by the claimant's parents as a result of the demands placed upon them are well documented*

in the evidence. When paid care was first introduced, it was available only on weekdays. It was not until April 2009 that the claimant's parents 2obtained some assistance with overnight and weekend care. Up to that time, they had been solely responsible for his care at those periods. Moreover, the claimant has always required one to one care. His needs are such that it is not possible to care for him whilst at the same time carrying out any other activity. I am quite satisfied therefore that, in the circumstances of this case, it is appropriate to value the gratuitous care given by the claimant's parents throughout the relevant period at the aggregate NJC rates ..

Although there are the odd case where enhanced rates are provided for Case Management (see, for example, Massey cited above), the courts have not looked at the actual costs of some of the more skilled aspects of care: it is obvious that one cannot find a competent counsellor/ therapist, or a builder at Spine Court 8 rates. One battle that has yet to be fought and won is for a much higher hourly rate for some of the more skilled caring activities.