

**THE INTERFACE BETWEEN THE PUBLIC AND PRIVATE PROVISION  
OF CARE AND ACCOMMODATION SERVICES:**

**OBSERVATIONS BY THE CLINICAL NEGLIGENCE AND SERIOUS  
INJURY COMMITTEE OF THE CIVIL JUSTICE COUNCIL**

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Committee**

**The problem**

1. In large value personal injury claims two competing but interrelated issues often arise. On the one hand, a Claimant may wish to provide for his future care and accommodation by means of a privately funded regime paid for by the Defendant. A Defendant, on the other hand, will want to argue that the Claimant should in fact take advantage of services to which he is entitled as a matter of public provision, thereby diminishing his (that is, the tortfeasor's) financial exposure.
2. This Committee represents all sides in litigation. It follows that it is unrealistic for us to seek to articulate a single, concluded, view as that of this Committee. However, what we are all agreed is that the problems posed by those questions must be addressed with urgency, probably by primary legislation. Until that happens, this will remain what I have previously described as the "single most corrosive and complex issue in contemporary personal injury litigation".
3. By that I meant that the judiciary, lawyers and litigants alike are entitled to be frustrated at the expense and complexity which attaches to investigation of these issues on a case by case basis. All recognise that this creates inevitable obstacles to settlement.

4. Furthermore, inconsistency of decision making is manifestly unsatisfactory. It is therefore illuminating to see that recently there have been two, essentially contradictory, decisions which prove the point.
5. The first of those decisions is that of Tomlinson J in *Freeman v Lockett* [2006] EWHC 102 (QB) and the second is that of His Honour Judge Reid QC in *Crofton v NHSLA*, a decision on 19<sup>th</sup> January 2006 in respect of which there is, as yet, no neutral citation reference.

### **The legislative framework**

6. As a starting point, a student of this subject might usefully begin with the decision of the Court of Appeal in *Sowden v Lodge* [2004] EWCA Civ 1370. It should be noted at the outset, as is stressed in that case, that it is very difficult for the appellate courts to identify clear points of principle where the decisions at first instance are inevitably fact sensitive. So often, the decisions depend upon the quality of evidence as to what services are currently, or in the future may be, provided by a particular Local Authority, for example, or a PCT.
7. Even if there is evidence about what is provided today and will be tomorrow, that by no means guarantees that the Court can be confident as to what will happen in the future either as to the kind of services that may be provided or as to whether their provision will be and remain free of charge to the user.

### **Statutory framework**

8. We hope it will be helpful to provide some detail as to the statutory framework. This is not intended to be comprehensive, nor should it be seen as a substitute for a more detailed analysis should that become important.
9. The important cases include those already mentioned plus *Tinsley v Sarkar* [2005] EWHC 192 QB; *London Borough of Islington v University College*

*London Hospital NHS Trust* [2005] EWCA Civ 596; *Eagle v Chambers* [2004] EWCA Civ 1033; and *Walton v Calderdale Healthcare NHS Trust* [2005] EWHC 1053 QB.

10. Section 47 of the **National Health Service and Community Care Act 1990** obliges the Local Authority to provide services:

“Where it appears to a Local Authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such service, the Authority:

- (a) Shall carry out an assessment of their needs for those services.
- (b) Having regard to the result of that assessment, shall then decide whether his needs call for the provision by them of any such services.”

11. During the initial assessment process, the financial circumstances of the person being assessed are not considered. However, once during the assessment Local Authority establishes the person is “disabled” it is required to:

- (a) Proceed to make a decision as to the services required; and
- (b) To tell the Claimant what is going to be done and of his rights under the Disabled Persons legislation.

12. At this stage, the Local Authority is also typically required to call in other bodies to take part in the assessment process: these are likely to be the Primary Care Trust or the Local Housing Authority to see, for example, whether there is an obligation on the PCT for the provision of services under the **NHS Act 1997** and/or for the Local Housing Authority to provide services within the meaning of the **Housing Act 1985**.

13. Once it is established that the person is probably disabled, the Local Authority is then obliged under section 4 of the **Disabled Persons (Services, Consultation and Representation) Act 1986** to provide those services in accordance with section 2(1) of the **Chronically Sick and Disabled Persons Act 1970**. Section 2 of the 1970 Act imposes the duty on the Local Authority to assess the individual needs of anyone falling within section 29 of the **National Assistance Act 1948**.
14. The assessment process and the decision as to the nature and extent of the services to be provided must be made in accordance with the criteria identified in the Fair Access to Care Services (2002) Policy Guidelines/ FACS 2003 Practice Guidelines<sup>1</sup>. Authorities have to use the “critical/ substantial/ moderate/ low” bands to determine levels of need and disability.
15. Under section 29 of the **National Assistance Act 1948** and under section 2 of the **Chronically Sick and Disabled Persons Act 1970**, we find key provisions governing the provision of domiciliary and day care services, a range of which are usually provided by Local Authorities to enable people in need to receive those services in their own home in the community. The services available typically include personal care and domestic assistance, transport, home adaptation, equipment, day care, leisure and the like.
16. The two statutory provisions can usefully be quoted:

S.29(1)

“A Local Authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the Local Authority shall make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged 18 or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged 18 or over, who are

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<sup>1</sup> That this is the LA’s obligation is clear from *Heffernan v Sheffield City Council* [2004] EWHC 1377 (Admin)

substantially and permanently handicapped by illness, injury or congenital deformity or such other disabilities as may be prescribed by the Minister”.

CSDPA1970,S.2

“Where a Local Authority having functions under section 29... are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the need of that person for that Authority to make arrangements for all or any of the following matters, namely:

(a) The provision of practical assistance for that person in his home...

(b) – (c) (Many other services are then listed).

... it shall be the duty of that Authority to make those arrangements in the exercise of their functions under the said section 29”.

17. As will be apparent from the text, it is only adult Claimants who may be affected by this provision. The duty to provide the equivalent services to children is governed by section 17 of the **Children Act 1990** read in conjunction with section 2 of the CSDPA 1970.

18. Section 17 of the **Children Act 1989** provides that every Local Authority:

“Shall facilitate the provision by others (including particular voluntary organisations) and services that the Authority has the power to provide by virtue of this section (and others) and may make such arrangements as they see fit for any person to act on their behalf in the provision of any such service”.

19. The care, health and general welfare needs of children are the subject of Part III, Sch. II of the **Children Act 1989**. In a nutshell, where it appears to a Local Authority that a child within their area is in need of welfare/social or health services, then the Authority may assess their needs for the purposes of the Act at the same time as any assessment of their needs made under a variety of other statutory provisions.
20. Against that background, a Defendant may wish to contend that the individual Claimant has an entitlement to social care or NHS services, for example, by the provision of a support worker. It may also be that as a matter of practice in an appropriate case such entitlement will be met by the Local Authority providing Direct Payments to fund the support worker of the Claimant's own choice.
21. As we shall see in a moment, whilst the Local Authority has the power to charge for the provision of section 29 services it cannot exercise such power against a Claimant whose only asset is his damages fund. This must be disregarded by the Local Authority in accordance with the statutory guidance, entitled "Fairer Charging Policies Home Care and other non-residential Social Services".
22. Consideration has also to be given to section 117 of the **Mental Health Act 1983** which is discussed in some detail in *Tinsley v Sarkar* [2005] EWHC 192 QB and by Leslie Keegan in [2005] JPIL Issue 3/05.
23. In *Tinsley*, the judge held that although the PCT had a duty to the Claimant pursuant to this provision to provide him with care free of charge without the prospect of recoupment, this also involved the regular assessment of community care services needs for the purposes of the NHS CCA 1990 (section 47 particularly). The judge held that the Local Authority's resources were a relevant consideration but he concluded that the statutory bodies responsible for the provision of such care were often short of funds and might not be able to provide what the Claimant reasonably requires. Hence the Court made an award on a conventional (private provision) basis.

24. This case demonstrates a further uncertainty about the attitude of different Authorities.
25. Although the PCT may have the obligation to provide the aftercare free of charge and without any recoupment, the Trust nevertheless did as a matter of practice (on the evidence in that case anyway) decide in a very general way what the individual Claimant's actual needs were and was entitled to take broadly into account what other calls there were likely to be on its funds.
26. The next relevant provision is section 21 of the **National Assistance Act 1948**. It is probably sufficient to refer to the summary of the effect of this provision provided by Buxton LJ in the *London Borough of Islington* case at paragraph 2. Having recited the relevant Act and Regulations, Buxton LJ said that:

“The position can be summarised in this way.

- (i) A Local Authority must provide residential accommodation to a person they consider to be in need thereof who is ordinarily resident in their area and which is not otherwise available to him. See **National Assistance Act 1948** Section 21(1)(a): L.A.C.(93) 10 paragraph 2(1)(b).
- (ii) The accommodation provided in accordance with that duty should normally be in premises managed by the Local Authority but may be in premises of voluntary organisations or other persons: **National Assistance Act 1948** Section 21(4) and Section 26. It is the case that Mrs J was in fact cared for in premises other than those managed by the Local Authority.
- (iii) In deciding whether a person is “in need” for the purposes of the 1948 Act and if so in determining what type of accommodation could meet such need, the Local Authority may have regard to its resources: see *R v Gloucester County Council ex parte Barry* [1997]

A.C. 584. Further the Local Authority may also treat resources as relevant to deciding between types of accommodation provided that each meets the individual's need: see e.g. *R (Mokoko Batantu) v Islington LBC* [2004] C.C.L.R. 445.

(iv) Whether accommodation is provided to a person in accordance with the 1948 Act the Local Authority providing it must recover from him payment for that accommodation either at the standard rate or at such other rate as the Local Authority shall determine: **National Assistance Act 1948** Section 22(1) and 22(3).

(v) In assessing a person's ability to pay, the Local Authority must disregard in calculation of both his capital and income the funds of any trust which are derived in payment made in consequence of any personal injury to that person, the value of the trust fund and the value of the right to receive any payment under that trust including sums administered by the Court of Protection: see National Assistance Act 1948 Section 22(5); National Assistance (Assessment of Resources) Regulations 1992, Regulations 21(2) and Schedule 4 paragraphs 10 and 19; The Income Support (General) Regulations 1987, Schedule 10 paragraphs 12 and 44(a)."

27. This same statutory scheme is usefully discussed in *Sowden* at paragraphs 4 to 9 of the judgment of Pill LJ.

28. A very important consideration when assessing personal injury damages is the direct payments scheme. The fact that a Claimant is likely to receive such payments, if this can be established, takes the argument somewhat beyond ordinary questions of mitigation: if a Claimant is simply entitled to receive, say, £200 to £250 as a matter of entitlement by way of a contribution to his or her domiciliary care package (as may very well be the case), it might seem an odd situation if that reality is to be entirely disregarded and an absurd one if a



Claimant is in fact entitled to receive benefits post settlement in respect of needs already provided for within that settlement.

29. What sometimes happens as a matter of compromise (though this cannot be imposed) is that in such a situation a Claimant may undertake to pursue any claim for a direct payment and to account to the tortfeasor for anything recovered by that process. In another situation, a Defendant may be prepared to offer an indemnity against any shortfall. But none of these solutions can be imposed by the courts. Yet indemnities would provide a practical (or at least a pragmatic) solution to the possibility that a Claimant in receipt of compensation calculated on the basis that he will not receive or have to account for any state benefits, then proceeds to claim them.
30. The cases demonstrate obvious inconsistencies of approach. For example, in *Freeman* no indemnity was offered by the Defendant. In *Crofton*, on the other hand, an indemnity was offered but the Claimant refused it. In other cases, there is a consensual solution. In *Thacker v Steeples*, for example, and in a number of other recent NHSLA cases, the Claimant undertook to pursue a claim for direct payments from the Local Authority and/or to account for the proceeds of doing so. In *Harden v Chesters*, the Defendant provided an indemnity against any shortfall.
31. Where direct payments are received, the Claimant is able to apply the money received to the cost of his own private regime. Local Authorities' obligations to make such direct payments arise under statutory guidance issued in September 2003 by the Department of Health (SI2003/762). The guidance applies to:
  - (i) Community care services provided within section 46 of the **NHS and Community Care Act 1990**.
  - (ii) A service under s. 2 of the **Carers and Disabled Children Act 2000**.

(iii) Services provided by the Local Authority under section 17 of the **Children Act 1989**.

32. Whereas Local Authorities are obliged to make such direct payments to eligible individuals and their carers, the NHS has no such obligation. However, a complication arises from the fact that section 31 of the **Health Act 1999** encourages the NHS and Local Authorities to provide services under pooled budgets/partnership arrangements.
33. Further, whereas Local Authorities are excluded from providing nursing services directly (section 49 of the Social Care Act 2001) the NHS can effectively delegate its functions of providing such care to the Local Authority under SI2000/617.
34. The arguments between the parties usually turn on the extent to which the level of payments under this scheme depends on the discretion of the individual Local Authority. Suffice it to say (for these purposes) that the answer is not entirely straightforward. It is also potentially very important (if correct) that a person under a disability may not be able to consent to the receipt of such payments at least according to a very recent (and so far unreported, even on Lawtel) decision of Judge Seymour QC in *Morgan v Phillips*. At paragraph 124 of the judgment, Judge Seymour found that the condition precedent of the making of direct payments embodied in s.57(1) of the **Health and Social Care Act 2001** that these depend on the recipient's "consent" meant actual consent which could not be given by a person without capacity.
35. The other situation that often arises in practice is that of "top up" – as to which see, generally, *Sowden v Lodge*. There are cases in which the Claimant will in fact receive a certain service from the State but there might nevertheless be a disparity between the quality of that service and the service that might typically be provided under a fully funded private regime. In such cases, it is open to a Defendant to show that he is prepared to "top up" the public provision by (for example) providing a greater degree of support in the Claimant's home. That

such an arrangement is legitimate is acknowledged in cases such as *Sowden* (see paragraph 60 for example).

### **Charging for Services: How is this dealt with?**

36. It is one thing to establish which of the above services is provided free of charge. It may be another matter entirely to be confident that the current situation will prevail throughout the very long lifetime (as it may well be) of some Claimants.
37. Certainly, the NHS continuing healthcare provision is free of charge. Governments continue to insist that they are committed to the concept of a free service at the point of delivery – but that this is a flexible rather than absolute concept is illustrated by charges made for the costs of prescriptions and dental care.
38. On the other hand, Local Authority provision of accommodation for Residential and Nursing Homes is means-tested. Under the Fairer Access to Care Service Guidance, Local Authorities may means test for domiciliary services. But where they do decide to charge for such domiciliary services, then the service users must be no worse off than they would be under a section 21 assessment. These guidelines are known as CRAG – “Charging Regulations and Guidelines”.
39. Section 29 of the NAA 1948 empowers a Local Authority to make charges with respect to the services provided to children if it sees fit. But what Local Authorities actually do varies: Leeds City Council, for example, does not in fact make any such charge<sup>2</sup>.

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<sup>2</sup> The current edition of its “Family Placement Services” specifically states that “there is no charge for children’s services”.

40. Other Local Authorities take a different position by reference to the published guidelines “Fairer Charges for Home Care and other non-residential Services”, which were gradually implemented between October 2002 and April 2005<sup>3</sup>.
41. A Local Authority providing care and accommodation under section 21 must, by virtue of section 22 of the 1948 Act, charge for its services but the **National Assistance Act 1948 (Assessment of Resources) Regulations 1992 (Amended 1998)** provides for certain capital and income therefrom to be disregarded<sup>4</sup>.

### **Conflicting arguments arising in recent case law**

42. The decisions of His Honour Judge Reid QC and Tomlinson J in *Crofton* and *Freeman* respectively cannot readily be reconciled. However, although the Defendants obtained the judge’s permission to pursue an appeal in *Freeman*, we understand that they are not going to do so. *Crofton*, however, is apparently going to appeal.
43. We comment only briefly on the principle of mitigation which was, in effect, the third basis for Tomlinson J’s decision. One recognises that it may well be relatively easy in many cases for a Claimant to justify as reasonable his choice to pay privately for care and accommodation when that will probably give him a better quality of service, greater continuity, he will have better control over the management of that provision and insulation against the risk that in the future policies might change either as to the nature and extent of what was provided or as to whether it was being provided free of charge.
44. The more controversial question is whether Tomlinson J was correct to go further and to justify his decision by reference to analyses of principle of tortious compensation.

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<sup>3</sup> See particularly paragraph 59 of those guidelines, which provides that “other forms of capital may be taken into account as set out in CRAG”.

<sup>4</sup> A good example would be monies administered by the Court of Protection.

45. First, as is clear from paragraph 6 of his Judgment, Tomlinson J clearly comes from the same judicial camp as Leveson J in *Tinsley v Sarkar* [2005] EWHC 192 QB (see paragraph 129 of his Judgment) a constituency identified by Longmore LJ in *Sowden v Lodge* at paragraph 92.
46. In short, Tomlinson J, like his brethren, saw part of the purpose of an award of damages against a tortfeasor as being to relieve the victim of the tortfeasor's negligence of the necessity to resort to State funding of his or her care, thereby incidentally relieving the State of the necessity to fund the care of that victim. That same logic also ensures that the State's limited and hard-pressed resources are available to fund the care of those whose injury or affliction has not come about as a result of the actionable fault of another, who is by statute required to purchase insurance against the risk of his causing injury through his negligence.
47. This is, essentially, a political debate with two positions, each diametrically opposed to the other.
48. The principle that the "tortfeasor pays" lends support to the argument that the insurer who is likely to have calculated his premiums upon the basis of full compensation for the wrong that his insured has done should not have the commercial advantage of being relieved of that burden by whatever may be the injured person's entitlement to State provision.
49. But even that is not an absolute rule, given that the state is obliged to provide many services needed as a consequence of the tort (through the NHS, for example) which, if taken up, relieve the insurer of expense he would otherwise have to bear and which, in general (albeit with some recent exceptions) cannot be recouped from the tortfeasor.
50. An insurer might also reasonably argue that an injured person's entitlement to State provision is a longstanding (at least post 1948) reality of a welfare state and that the expectation that such State provision would continue is an element which - whether consciously or unconsciously - has always underpinned the

pricing structure within the insurance market. How far that might be capable of proof is a different matter.

51. It would also have been argued on behalf of the Defendant on appeal in *Freeman*, we understand, that the Judge's approach was, in effect, to allocate all risk to the Defendant whereas, historically, compensation has been provided on a balance of risk by balancing probabilities: this would be very different from the approach that Tomlinson J took at paragraph 32 of his Judgment.
52. Yet a further point that a defendant can properly argue against the first basis of Tomlinson J's judgment is that only by balancing what probably will happen in terms of entitlement to State benefits can one avoid – as a matter of compulsion, at least – what all must regard as being the thoroughly unattractive prospect of double recovery.
53. By that we mean the situation with which all of us are familiar, in which a Claimant's compensation is calculated on the basis of full private provision and yet following settlement he continues or begins to claim non-means tested benefits.
54. But the answer to that, we have always thought, is that that is a matter to be addressed in the regulatory and legislative framework and that if Parliament wants to legislate against that iniquity, it is very well able to do so. And sensible use of indemnities or Claimant's undertakings may avoid the problem in practice.
55. The second basis for Tomlinson J's judgment was the clear distinction that he drew between Sections 21 and 29. This he spells out at paragraph 38 of his judgment. In so doing he is, in effect, following the distinction drawn by Leveson J in *Tinsley* at paragraphs 106 and 123.
56. We can see an element of artificiality in treating sections 21 and 29 as unrelated. Each is, after all, directly concerned with meeting the needs of people suffering

from need and disability as a consequence of illness and injury. Both sections impose legal duties upon public bodies and the assessment processes in respect of those different provisions do have marked similarities.

57. The fourth basis of Tomlinson's decision was concerned with these same considerations of policy and principle as formed his first basis. The judge found that Parliament cannot have intended s.29 benefits to accrue to the benefit of the tortfeasor. But even assuming that one could establish Parliament's intentions either way, that is not necessarily so. It is a very similar situation to that which arises under s. 2(4) of the **Law Reform (Personal Injuries) Act 1948**: if Parliament wished to ensure that State funding under s.29 did not accrue to the benefit of the tortfeasor, it could easily have said so.
58. The Tomlinson J approach is, effectively, to say that it will almost always be reasonable for a claimant to prefer to provide for his needs privately partly because of the principle that the tortfeasor pays, partly because he may have a legitimate preference to receive his funds from the person who did him harm rather than be a burden upon the limited resources of the State and largely because, in practice, private provision is likely to afford a better quality of care, better continuity, will avoid the prospect of negotiation for provision of services or equipment and will, in the long term, be secure without any risk that local or national policy may change so as to affect the quality of the care with which he is provided and its provision free of charge to him. As an application of conventional principles of mitigation, such an approach is likely to prevail in most cases.
59. Reliance on a "once and for all" lump sum which takes into account current local authority funding is all the more difficult because few injured victims remain in the same medical state for the rest of their life. Ageing, in addition to injury, creates needs in itself which would not have existed but for the event giving rise to the claim for compensation. This may cause difficult issues as to whether (and if so when) a claimant will cross the boundary from needing just

local authority social care (for which he might be charged) to NHS nursing care (for which he may not be).

60. But it is going a stage further to argue that a Claimant has no obligation to pursue a clear entitlement to a steady stream of state benefits (under the Direct Payments scheme, for example). Moreover, it is unlikely to be a particular burden upon a Claimant to give a *Thacker* style undertaking to pursue such entitlement and to account to the Defendant, especially if there is a cross-undertaking by the Defendant to meet any expense incurred in so doing.
61. Alternatively, an indemnity of the kind that was offered (but refused) in *Crofton*, agreed in *Harden v Chesters* but not offered in *Freeman* provides another sensible route: it is worthwhile remembering that the fact that there was no indemnity offered in *Freeman* and no evidence from Hertfordshire CC as to its present and future policy were further reasons for Tomlinson J's decision.
62. Is that not exactly the kind of situation that Pill LJ envisaged at paragraph 63 of his judgment in *Sowden*? Not according to Tomlinson J, paragraph 39 of whose judgment provides another explanation of what Pill LJ must have meant. This is more controversial: it might be thought that Pill LJ was indeed envisaging a situation in which Claimants were expected to cooperate with obtaining provision in accordance with their statutory entitlement.
63. It is particularly important to recognise that to disregard that entitlement entirely would also create a substantial inconsistency between the court's approach in cases where a Claimant is going to recover 100 percent of his damages and those where he recovers significantly less (say because of contributory negligence) and is therefore anxious both to maximise his damages and to preserve his non-means tested benefits.



64. There are many examples of such cases. The Claimant in *Crofton*, for example, was only ever going to recover 67.5 percent of his damages: similarly, in *Harden v Chesters* there was a 70/30 liability split.
65. The analysis of His Honour Judge Reid QC's decision in *Crofton*, ultimately, depends on the simple approach in principle that he took on the basis of the evidence he had. His conclusion (see paragraph 84) was that on the evidence the Local Authority was likely to continue to provide direct payments to that claimant at a cost to the Local Authority (and saving to the defendant) of £60,018 per annum.
66. In that case, it is difficult to see as a matter of pure principle how the clear prospect that the claimant will continue to receive such direct payments can legitimately be ignored. Take an extreme example: consider that the claimant's expectation of life is only two years and that he or she was going to recover only 50 percent because of contributory negligence.
67. Any judge would be sufficiently confident that within that two year period there would be no legislative intervention or change in national or local policy which would mean that the direct payments were suddenly going to be reduced because the Claimant's award of damages suddenly became assets that could be taken into account. Could anybody sensibly argue that even in that extreme case the court should simply ignore the prospect that such direct payments would be received throughout that period?

### **Evidential Difficulties**

68. A Defendant will either seek to argue that the Claimant will, as a matter of fact, probably apply for and receive benefits to which he is entitled as a matter of right or that he *should* do so because not to do so would be a failure to mitigate. Neither approach is free of difficulty from the point of view of evidence and principle.

69. In the first place, a Claimant may not have any incentive to apply for benefits if the same services can be funded privately. Secondly, as regards the concept of mitigation, there is the unresolved question of whether a Claimant, faced with two equally satisfactory regimes, one privately funded, one state funded, would necessarily be acting unreasonably by preferring the privately funded option. Would it be unreasonable for that Claimant to say that he chose it because he subscribes to the “tortfeasor pays” view of compensation and did not wish to be a burden on the state?
70. Put that way, of course, the question is largely theoretical since there will be many cases where a Claimant is able to justify the reasonableness of his decision to go down the private route on the basis that this gives the better quality, continuity and flexibility of service. On the other hand, that is no answer to the problem posed by Direct Payments which, by their very nature, are payments against the cost of a privately funded and organised regime.
71. If a Defendant wishes to argue that the Claimant’s entitlement to state benefits is an obligation which he should pursue as part of his duty to mitigate, then there are, in practice, real evidential problems. The burden of proving a failure to mitigate is on the Defendant and so it will be the Defendant who has to make the running as regards the evidence (see *Sowden* at paragraphs 62-3 and 99 and *Walton* at paragraph 18). On one view, Pill LJ in *Sowden* (at paragraph 63) may be thought to be suggesting that the Claimant is under such an obligation: but Tomlinson J (paragraph 39 of *Freeman*) does not agree.
72. The cases which we have already discussed show the variation in quality and content of state provision in any particular case, and how the best possible evidence of that state provision can be obtained. It may be possible to call evidence directly from the local authority, for example, but that has practical difficulties and costs implications.
73. It may also be possible to call one of the experts in the market who assert an expertise in care provision but, to date, Judges have varied in their enthusiasm

for the admission of such evidence. Sometimes, the Defendant will apply for a s.47 assessment but how far a Claimant must or will co-operate with such an application is unpredictable: possibly, a Defendant faced with an intransigent Claimant could apply to stay the action until he did co-operate – but that is a rather blunt instrument. In any case, where a Claimant has already established a private regime, the local authority (for example) may well respond by saying that there are no unmet needs to be met.

74. The argument also does not deal with the difficulty that local authority provision varies from one part of the country to another – an example of the so called “post-code lottery”. Any reasonably young Claimant may legitimately claim that in due course (s)he may move (or wish to move) from her or his present address to a new one in another area. Family or marital circumstances may change: it has long since ceased to be a sensible assumption that a person suffering catastrophic injuries cannot have a personal or family life, albeit the obvious difficulties involved. To address this problem by a “finger in the wind” assessment of chances may be thought an unsatisfactory solution, especially where more radical approaches are available which would avoid its artificiality.

## **Conclusions**

75. For reasons that we have already explained, we regard it as unrealistic to propose one particular solution. As a Committee, we represent too many constituencies. We do, however, all agree that something must be done.
76. A number of solutions would be possible, subject to the political and economic considerations that the legislature is best placed to evaluate. There seem to us to be five principal ways, and a possible sixth, in which the problems could be resolved or alleviated. At least the first four of these would necessitate some primary legislation. In summary, they are:

**(1) Amending s 2(4) of the 1948 Act** so as either (a) to extend the principle of “tortfeasor pays” to enable a Claimant to fund his care and accommodation

privately as a matter of choice, by providing that a Claimant would, as a matter of right, be entitled to recover the full costs of his accommodation and care if obtained privately rather than from or through the NHS or by a Local Authority; or (b) provide that a Claimant's entitlement to State and Local Authority funded benefits should be regularised throughout the country so that it can be identified with confidence in every case what a Claimant is entitled to receive as a matter of statutory entitlement, and then treat that as the equivalent to the entitlement to NHS care which is expressly covered by section 2(4) of the 1948 Act (indeed, it is argued that in fact many of the services that arise for discussion in this paper are actually NHS services falling within section 2(4)).

In that case, unless a Claimant is able in the particular case to demonstrate why he should go down the private rather than the public route, the insurers ought to be able to deduct an identifiable sum from an award. That is not to give them a particular commercial favour but to reflect the long established application of the principles set out in *Hodgson v Trapp*. If society wishes compensation to be organised on a different basis, it is going to have to pay for it one way or the other, whether through tax and national insurance or otherwise by insurance. The logical conclusion of this would be that one might therefore abolish s. 2(4) entirely rather than contemplate extending it.

(2) **Extending the power of Public Authorities to recover outlay from Insurers** so that a public funder would be entitled to recover from the tortfeasor if the public funder had made provision instead of the tortfeasor. To do so would extend the new NHS Injury Costs Recovery Scheme further and would be consistent with pressure over a number of years from some quarters (such as the Law Commission in relation to medical expenses in 1999) which has called for legislation to allow NHS Trusts and Local Authorities to recover medical provision and care direct (see paragraph 89 of the judgment in *Sowden*). If this were to happen, however, it would be questionable<sup>5</sup> whether

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<sup>5</sup> It cannot be said that the claimant should have no right to fall back on the State, for to do so would be to expose some successful but spendthrift claimants to a risk that their income might not cover their necessary outlay, so as to leave them after the first few years of lavish provision in a state of destitution

(or how far) a Claimant should be allowed to continue to recover State benefits on a non means-tested basis. That would have to be dealt with by further legislation.)

### **(3) Adapting the Periodical Payments Regime**

The paper thus far tends to assume that an award is made in lump sum form, so that it is both made once and for all at the outset and cannot respond to changes, favourable or unfavourable, in the subsequent availability of financial support from public funds.

However, there are two ways in which periodic payments might be adapted to meet the problem

(a) If the amount of those payments currently awarded for future care was specifically to be spent only on future care, then there would be no question of the claimant taking the money, and being able to spend it on some other purpose before falling back on the State or Local Authority to provide his care. Instead, he would have first to exhaust his periodic payment entitlement for the period concerned *before* availing himself of such support. However, there are those who argue that linking payments to RPI will be likely to mean that annual amounts paid for care drop progressively below the costs of care so that a shortfall is likely to develop over the years and will lead to dependence on benefits at some stage of the Claimant's life. A further problem is that the "care" element of any periodic payment award, though it has to be separately identified, will include aids and equipment and other services which are not currently the subject of public provision. It would be wrong, therefore, to offset the costs or charges which a local authority might impose to the full extent of the care element of any periodical payment

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– and this would both be undesirable in itself and also potentially a breach of the Human Rights Act. (See the logic which compelled the courts to order that income support be available for asylum seekers

(b) If the circumstances in which a variable order could be varied were extended to include alterations in the level of provision afforded by public authorities pursuant to legislation, and more than one application for variation in such circumstances were to be permitted, then a court of first instance could simply take the level of current provision into account in determining an award.

(4) **Give the courts authority to impose an indemnity** This was called for by the Master of the Roll's Structured Settlement Working Party as a useful adjunct to the court's existing powers. Although imposition would have to be in carefully defined circumstances (to avoid long-tail liabilities which it would be difficult to reserve against on the one hand, and difficulties of knowing that a promise made by the indemnitor was sufficiently secure on the other) it is worth noting that the NHSLA enthusiastically embrace such opportunities and that the ABI in general is content to offer them. Their careful use would provide a flexible and just answer to the problem of variations in provision and its availability by public authorities

(5) **Alter the Acts and Statutory Instruments which provide (in terms, or in effect) that a personal injury victim may receive free care.**

By a number of drafting amendments to the current legislative matrix underlying NHS and LA provision of care and accommodation, it could be provided that a personal injury claimant could be obliged to pay for any care he received to the extent of his award. This would place the burden of paying for such care on his insurer, as part of the award, though how it would apply in cases where there was a discount for contributory fault would have to be worked out. So too would there need to be a clear way of identifying the relevant part of a damages award which might be taken in payment. It would be invidious, for instance, for the State to require an injury victim to surrender part of his lump sum for pain, suffering and loss of amenity to the State, and it

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in some circumstances).

may be invidious for him to be required to surrender money he has received for aids and appliances, employment, pension loss, accommodation etc.

A **sixth possibility** has also been canvassed by some of our number. It is that of a change in the basis on which damages are awarded, so that any periodical payments were indexed so as to keep pace with costs rather than RPI generally. Lump sum awards would be increased by a reduction in the discount factor, which at the moment is set on the assumption that after allowing for RPI, investments will show a real return equivalent to the “discount rate” adopted, an assumption which is identical to that underpinning periodical payments and equally questionable.

The Committee will be pleased to assist the DCA further in finding solutions to the difficult issue.

**William Norris QC**

**CJC Serious Injury Committee Civil Justice Council**

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