

## Calculating damages claims

### Abstract

This paper considers how compensation claims are calculated for people who have suffered injuries as a result of negligence or an accident. It distinguishes between criminal compensation and civil damage and clarifies the full recovery principle, i.e. that the claimant should receive sufficient compensation to place them in the same position as if the incident had not occurred. The heads of damages are then explored in detail, before considering how those who lack capacity are protected. It concludes that gaining full compensation for someone is not simply a matter for solicitors but requires the support of the multidisciplinary, the client and their family.

### Introduction

For those who suffer an acquired brain injury, it may, subject to establishing liability on the part of a tortfeasor, be that they will be fortunate to recover damages to reflect the pain, suffering, loss of amenity and financial losses arising for the index event.

Whether those who suffer acquired brain injury, through clinical negligence, accident at work or in a car accident, should be treated differently from those with non acquired brain injury, is outside the scope of this article. This review is a summary of the potential heads of claim (“heads”) that victims of accidents may recover.

However, the starting point, before examining the various heads, is to consider the principles of recovery, which is frequently termed the full recovery principle, i.e. that the Claimant should receive full compensation, that puts them broadly back into the same position as if the negligence or breach of statutory duty had not occurred.

The reality is that no amount of compensation can give the Claimant, i.e. the victim of acquired brain injury, what they really most desire, i.e. complete recovery or turning back of the clock. The remedy of money is recognised by the courts as being crude, but financial recompense is the limit of judicial powers.

### **Criminal compensation and common law damages.**

For victims of criminal injuries, the Government has a scheme by which innocent victims of crime can seek some redress through a tariff system run by the Criminal Injuries Compensation Authority. However, this tariff system is limited to the extent that it does not take full account of the claimant’s personal injuries, losses and expenses. The limit of any claim, however serious the injury, is £500,000.

This compares with the common law system of damages, to which there are no specific financial limits imposed. The principle applicable to a number of heads of claim is that losses or expenses should be reasonably necessary and are reasonable in amount, in order to be recovered at trial. It is for that reason that even when injuries

appear similar, the level of damages varies greatly, most frequently due to different levels of care that are necessary for a particular individual.

Having indicated that with acquired brain injury the Claimant will be able to recover damages at court, determined by established legal principles, I turn to the various heads that frequently arise.

### **The heads of damages**

The first is general damages, notably consisting of compensation for pain, suffering and loss of amenity. Loss of amenity embraces all issues which reduce the Claimant's enjoyment of life and impair their senses. Cases are fact sensitive, with the award determined by evidence that will influence a court when assessing the correct level of award. That evidence is medical reports and witness statements. As to the former, the Claimant will commission and rely upon reports from various consultants to demonstrate the nature of injury, the severity and most importantly the long term impact of injury. Those consultants that provide evidence, in the case, will be identified as expert witnesses by the court. Those expert witnesses have specific duties to the court and are expected to undertake pertinent training to ensure that they are able to fulfil their professional obligations.

The long term effect of any injury is key. It is not unusual for those with brain injury to have similar histories in the early days, but who then go on to have different experiences on a long term basis. Pain and suffering are relatively minor issues, when compared to long term impact on activities of daily living and loss of amenity.

In addition to medical evidence in the form of reports (and not just analysis of medical records), claimants will rely on statements from their lay witnesses as to the impact of the injury upon the Claimant. These will consist of statements from friends and family.

Having formulated the evidence, the court (in the absence of an amicable settlement being achieved by the opposing parties before a trial) will take account of the reports and statements, to judge the level of award. The key issues that impact on those awards will be:

- nature of injury
- severity
- interference with daily activities
- reliance on others for needs
- memory
- cognition, and
- insight into the effects of the injury.

The judge will then make an award. For relatively minor head injuries the damages will be no more than a few thousand pounds, where the Claimant makes a full recovery within 12 months.

However, where there has not been (and never will be) a full recovery the award can be up to about £250,000. The actual amount will take account of the above issues, as well as previous case law, which provides guidance from other, similar, cases.

The award for pain, suffering and loss of amenity is known as a General Damages award. In most cases, it comprises of this component only. However, there are occasions, particularly in serious head injury cases, where the award of General Damages may be supplemented by other heads of loss. One such example is loss of congenial employment. Where the Claimant is unable to return to their pre-accident employment and can persuade the court, on the balance of probabilities that they have lost job satisfaction or lost status, due to the injuries sustained, then an additional award may be made, although this is likely to be less than £10,000. Further, it will only be appropriate to make an award where the Claimant has insight into their injury and, most probably, that they have in fact returned to some form of employment. In cases where the injury is serious, the courts are less likely to make a separate award.

An additional head under this broad umbrella of General Damages may be loss of marriage or stable relationship prospects. The award will be for loss of joy, comfort and companionship. Awards are not very common and where pursued are frequently swept up within the award for pain, suffering and loss of amenity. Indeed, the case law on this issue is old so that there are few recent cases reported. However, where successful, awards may be in excess of £10,000. In addition, those who are married, may find their relationship deteriorating in consequence of a head injury. Indeed, research shows that where one party to a relationship has sustained a head injury, their marriage is more likely to breakdown within 4-8 years. In those circumstances, the claimant will have the costs of the divorce proceedings. In addition there may be a claim on the Claimant's assets when it comes to distribution of the family assets under those ancillary relief proceedings. This may bite heavily into the Claimant's damages, which were awarded to meet his/her reasonable needs arising from the injuries sustained. In that respect, the current law appears to highlight an injustice in that damages for the Claimant may be reduced, later, following divorce. Until the law ring fences a Claimant's damages, Claimants will continue to be vulnerable to reduction of their compensation unless their lawyers work smartly to ameliorate the impact.

Having looked at the common elements of General Damages, we now turn to Special Damages, which cover all those financial losses and expenses that can be more precisely quantified, with reference to evidence of expenses incurred and to be incurred.

In traumatic brain injury cases, cost of care and associated expenses will form the largest component of the award. It is from cases with high levels of dependency and care claims, that one reads of corresponding high monetary awards. Care, like many elements, varies from case to case, as all awards are case sensitive. Care will cover the Claimant's needs, which in some cases, particularly where the victim is a child or young adult, will be provided by parents. However, even well meaning and supportive, family carers will require respite and, in time, care and associated case management, provided by professionals will come to the fore. Whenever professional input is seen or required, the Claimant is entitled to claim the reasonable cost of that, to meet his reasonable needs. When care is provided gratuitously, then

the claim is based on the professional cost but subject to a discount, to take account of the fact that the Claimant will not be paying tax and national insurance on his family support.

For those highly dependent on care, it may be that care is provided by multiple carers each day and allowing for overlap, it is not unusual to see care claims for in excess of 24 hours each day. The result can be very high annual care costs, over six figures.

It is in this area where one sees tension between the parties. The Claimant will argue for high level support, although the insurers will frequently argue that the Claimant's care needs can be met by fewer carers and or carers spending less time supporting the Claimant. In those cases, the courts look to care experts, who produced reports for the courts, to guide them as to the Claimant's needs. Those care experts will then be cross examined on their reports, following which the court will make a judgement as to what the Claimant's real requirements are. Therefore, it is essential the Claimant's legal advisors fully understand the Claimant's needs and how those needs are catered for, so that pertinent evidence is placed before the court. In those circumstances case managers and professional carers are very important in the litigation process.

Whenever a large care claim is seen there will be a related claim for equipment to support the Claimant and a claim for alternative accommodation. That accommodation will either be adapted existing property, or a new home will be purchased. Where the Claimant has (for example) wheelchair requirements then even alternative accommodation will have to be modified, the costs of which will be included in the claim from the tortfeasor.

Another important item in the claim for special damages is lost earnings. In many cases of serious head injury the claim for lost salary will represent a full loss, i.e. there will be no discount for residual earning capacity. In those circumstances, the Claimant will simply produce evidence, i.e. salary slips and or P60s to illustrate pre accident earnings, which are then extrapolated to retirement, although even here there can be dispute between parties as to when the Claimant may have retired or what his career may have looked like but for the accident.

As to retirement, even mature working adults appear to give the matter little thought, but once asked how they would provide for themselves for up to 20 years post national retirement age, they soon realise they would have to work longer. Therefore, despite insurers frequently suggesting that individuals are retiring earlier, the realities, particularly in difficult economic times, are that few people will retire much before age 65 and many more will work beyond the normal retirement age, which is due to increase in the years ahead in any event.

There are many other heads of loss although those above are frequently the largest parts of any claim. Other heads of loss may comprise of cost of travel and additional transport costs, as well as additional expenditure relating to holidays, for the accommodation and carers to assist.

## **Claim settlement**

When it comes to settling the claim, the Claimant has the choice of accepting all his damages either by way of lump sum or periodical payments. It was once the case that the Claimant, whatever their personal circumstances, nature of injury and financial acumen, would receive settlement in the form of one lump sum. However, research revealed that some seriously injured claimants would not always use their compensation how it was intended to be spent. For example, it would not be unusual for some Claimant to spend their compensation on toys or gifts for friends and family, whereas others would save their money, for fear that in later years, their damages may be insufficient to cover expensive care costs in later years.

The consequence of the latter was that health may deteriorate and thus Claimants would not live long enough to enjoy the savings. For the former, there was a real risk the damages would be gone well before their needs expired. Both sequelae are unsatisfactory and thus around 20 years ago an alternative form of settlement was developed (called a structured settlement), allowing Claimants to take money by way of installments. This had some measure of success, but could not be imposed by the courts.

However, that has changed. The courts can now impose an installment settlement, known as periodical payments, which can be coupled with a lump sum. Indeed, the courts require the Claimant's advisors to give active consideration to a periodical payments settlement, whenever there are future loss concerned, notably care and earnings. The consequence is that in the vast majority of serious head injury cases, the Claimant will have a mixture of a lump sum award and periodical payments. One of the key benefits to such an award is that annual (or more frequent) sums are guaranteed (if required) for life. This compares with a traditional lump sum award, where damages are on a once and for all basis, providing a clean break for the insurers. One of the risks of a lump sum settlement is that they are based on known mortality rates. However, if the Claimant lives longer than the anticipated life expectancy, the damages will run out. However periodical payments can be for life and thus the Claimant and, frequently, parents, can take comfort that their loved one will have sufficient funds for life. Further, periodical payments are index linked, to ensure the award keeps pace with inflation.

## **Claimants who lack capacity**

An agreement of damages may not be the end of the matter if the Claimant lacks capacity to manage their finances. If they do not have capacity then the Claimant will have a Deputy appointed by the Court of Protection to take responsibility for their damages, other capital and income, to ensure that funds are correctly used for required items of expense. The Deputy will also act as gatekeeper to protect the Claimant, where he may be vulnerable to influence.

## **Conclusion**

Those acting for clients with an acquired brain injury have an important role to play. The lawyers endeavour to establish liability to enable the client to recover damages.

Having overcome that obstacle, the solicitor will build a case to enable the opponent and the court to understand the full impact of the brain injury. A good case will result in the Claimant recovering full compensation, so that they may live their lives in relatively comfortable surroundings, knowing they will have sufficient funds to pay for proper care and services over their remaining years. However, lawyers do not work alone and rely heavily on the case manager and professional carers. They are the eyes and ears of the lawyers, providing valuable information which ensures the solicitors comprehend the challenges the client faces. Together, they work for the benefit of the head injury victim, performing an important role in society.

**If you would like to talk to us about the issues raised by this note, please contact:**

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