

Criminal injury claim – care costs of the applicant – whether applicant entitled to recover them in his claim – whether bound to pay them to health authority

Neutral Citation No. [2006] NIQB 11

Ref: **GIRC5483**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **08/02/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

WILLIAM JOSEPH HERRON

Applicant/Appellant

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Appellant/Respondent

GIRVAN J

[1] This is an appeal from a decree dated 8 June 2005 made in the County Court for the Division of Ards ordering the payment by the Secretary of State to the applicant of the sum of £55,903.35.

[2] The applicant in April 1996 was the victim of a vicious assault which occurred outside his house in Osborne Drive, Bangor, County Down. As a result he sustained severe facial and head injuries. These led to him being rendered seriously and permanently disabled to the point of requiring continuing nursing care. He is unable to live independently. He was cared for in two separate establishments, the Phoenix Clinic and Annahilt Nursing Home. The Ulster Community and Hospital Health and Social Services Trust ("the Trust") is responsible for the care of the applicant and arranged for his placement in those residential homes. The applicant was entitled to income support during the period of his residential care and these monies have been used to contribute to the cost of his care and accommodation. The Trust discharged the balance of the charges due to the residential home but seeks to recover those from the applicant.

[3] The Trust claims a statutory entitlement to recover the care costs from the applicant and argues that the applicant is entitled and bound to seek to

recover those costs from the Secretary of State as part of his criminal injury claim.

[4] The applicant suing by his brother and next friend made a claim for compensation in respect of his injuries under the Criminal Injuries (Compensation) (Northern Ireland) Order 1988. By a determination made on 28 June 2004 the Secretary of State determined compensation in the sum of £100,000 made up entirely as compensation for personal injuries, pain and suffering and making no allowance for pecuniary loss or expense. The applicant's solicitor duly applied for approval of the sum of £100,000 as compensation for "general damages". When the matter was put before the court for approval it was however made clear to the court that there remained an issue as to whether the Secretary of State should pay in addition a sum in respect of the care costs incurred in relation to the applicant. The figure of £100,000 was approved on 2 July 2004 on that basis, leaving open the issue of a potential claim for the care costs.

[5] The questions of the Trust's entitlement to claim for the care costs against the applicant and the applicant's entitlement to recover the same from the Secretary of State as part of his compensation claim came before a different judge in the County Court in May 2005. His Honour Judge Gibson QC held that the Trust was entitled to recover the care costs from the applicant and the applicant was accordingly entitled to include the care costs in his criminal injury compensation claim. He, accordingly, made a decree in the sum of £55,903.35.

[6] Mr McCloskey QC on behalf of the Trust took the court through the relevant statutory framework which is helpfully set out in section 2 of his skeleton argument.

(a) Article 98(1) of the Health and Personal Social Services (NI) Order 1972 ("the 1972 Order") enacts the general principle that services provided under the aegis of the "NHS" are free of charge, subject to the qualification expressed. It provides:

"The Services provided under this Order shall be free of charge, except where any provision contained in or made under this Order expressly provides for the making and recovery of charges."

(b) The 1972 Order governs the provision of three main types of services:

- a. Health Services
- b. Personal Social Services
- c. Pharmaceutical Services

Pursuant to Article 3, “health services” are defined as “any service or services designed to secure any of the objects of Article 4(a)”. “Personal social services” are defined as “any service or services designed to secure any of the objects of Article 4(b) ...”

(c) Article 4 of the 1972 Order provides as follows:

“It shall be the duty of the [Department]:

a. to provide or secure the provision of integrated *health services* in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness.

b. to provide or secure the provision of *personal social services* in Northern Ireland designed to promote the social welfare of the people of Northern Ireland ...”

[Italics added].

(d) Article 5 of the 1972 Order provides as follows:

“5(1) The [Department] shall provide throughout Northern Ireland, to such extent as it considers necessary, accommodation and services of the following descriptions -

(a) hospital accommodation ...

(b) premises, other than hospitals, at which facilities are available for all or any of the services provided under this Order,

(c) *medical, nursing and other services whether in such accommodation or premises, in the home or the patient or elsewhere.*”

[Italics added].

(e) Article 7 of the 1972 Order provides:

“7(1) The [Department] shall make arrangements to such extent as it considers necessary, for the purposes of preventing illness, the care of persons

suffering from illness or the after-care of such persons.

7(2) The [Department] may recover from persons availing themselves of any service provided by the [Department] under this Article, otherwise than in a hospital, such charges (if any) in respect of the service as the [Department] considers appropriate."

(f) Article 15 of the 1972 Order provides, in relevant part, as follows:

"(1) In the exercise of its functions under Article 4(b) the [Department] shall make available advice, guidance and assistance to such extent as it considers necessary and for that purpose shall make such arrangements and provide or secure the provision of such facilities (*including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities*) as it considers suitable and adequate.

(1A) Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the personal social services on such terms and conditions *as may be agreed between the Department and that other body or person ...*

(4) *The [Department] may recover in respect of any assistance, help or facilities under this Article such charges (if any) as the Department considers appropriate."*

[Italics added].

(g) Pursuant to Articles 16, 17 and 18 of the 1972 Order, together with certain provisions of the Health and Personal Social Services (NI) Order 1994, the Department is empowered to establish Health and Social Services Boards which in turn exercise on behalf of the Department such health and personal social services functions as the Department may direct: see Article 17(1) and Schedule 1, paragraph 2. By virtue of the reforms effected by the Health and Personal Social Services (Northern Ireland) Orders 1991 and 1994, the relevant statutory functions under 1972 Order are now exercised by Trusts – hence the intervention of the Trust in this litigation.

(h) Article 36 of the 1972 Order empowers the Department, in making arrangements under Article 15 to enter into arrangements with the management of residential care homes “... for the provision of accommodation in such home or premise”. Article 36(3) provides:

“(3) Any arrangements made by virtue of this Article shall provide for the making by the Department to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements; and, subject to paragraph (7), the Department shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this Article.

(4) Subject to the following provisions of this Article, a person for whom accommodation is provided under any such arrangement shall refund to the Department:

(a) Where the payments made in respect of him under paragraph (3) include any amount in respect of nursing care by a registered nurse, the amount of such payments less any amount paid in respect of such nursing care.

(b) In any other case, the amount of the payments made in respect of him under paragraph (3).

(4A) In paragraph (4) “nursing care by a registered nurse” means any services provided by a nurse registered under .. the Nursing and Midwifery Order 2001 and involving: (a) the provision of care or (b) the planning, supervision or delegation of the provision of care, other than any services which, having regard to the nature and circumstances in which they are provided, do not need to be provided by a nurse so registered.

(5) Where a person for whom accommodation is provided, or proposed to be provided, under any such arrangements satisfies the Department

that he is unable to make a refund at the full rate determined under paragraph (4) or (b), the Department shall assess his ability to pay and accordingly determine at what lower rate he shall be liable to make a refund.

(6) Regulations may make provision for the assessment, for the purposes of paragraph (5), of a person's ability to pay."

It is not in dispute that by a chain of various Orders and statutory subordinate regulations the Department's financial claim if any to recover care costs is vested in the Trust in this instance.

[7] The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993 ("the 1993 Regulations") and the 1998 Amendment Regulations regulate assessments of the financial ability of a resident to pay for accommodation provided under arrangements made pursuant to the 1972 Order. The Regulations contain detailed rules governing the financial calculations which must be carried out by a Health Board when exercising its powers under Article 36(5) of the 1972 Order to determine a lower rate. Pursuant to a combination of the Health and Personal Social Services (Assessment of Resources) (Amendment) Regulations (Northern Ireland) 1998 and the Income Related Benefits (Miscellaneous Amendments) (No 5) Regulations (Northern Ireland) 1994 the Trust is precluded from taking into account in an any assessment of ability to pay the following:

"Any sum of capital administered on behalf of a person ... by the High Court under the provisions of Order 80 or 109 of the Rules of the Supreme Court (Northern Ireland) 1980 or by the County Court under Order 44 of the County Court Rules (Northern Ireland) 1981 ... where sums arise from

- (a) an award of damages for a personal injury to that person;
- (b) compensation for the death of one or both parents."

[See paragraph 43 of Schedule 10 of the 1987 Regulations as amended].

[8] In his initial skeleton argument on behalf of the Secretary of State Mr McNulty QC argued that the care costs were not recoverable from the applicant or from the Secretary of State under the compensation claim. In

paragraphs 6 to 8 of the skeleton argument counsel contended that the policy and the principles which govern a criminal injury compensation scheme funded from public funds are not analogous to the position of a compensating tortfeasor. It is inappropriate to seek to levy on the compensation scheme funds administered by the Compensation Agency, expenses incurred by front line agencies acting on behalf of the Department of Health and Social Services where the same had been incurred in the fulfilment of their statutory obligations. The expenses associated with the provision of accommodation and care are not expenses actually reasonably incurred by the victim. These charges are sums incurred by the Trust in fulfilment of its statutory obligations. These charges could only be interpreted as being expenses actually and reasonably incurred by the victim by wholly artificial construction devoid from the realities. It is only where the Trust have made a decision to attempt to levy the same upon the victim because he has made an application for compensation that the Trust can initiate its argument. The victim does not have in fact any capacity to incur the expenses and did not in fact incur them in any ordinary construction of the language. The right to compensation remains at all times subject to and in accordance with the Order. The Secretary of State is required to have regard to all the circumstances that are relevant in deciding the amount of compensation in any individual case. He is entitled to regard the cost of providing residential care on the applicant's discharge from hospital as being an expense not actually incurred by the applicant. The applicant insofar as he was placed within the residential care arrangements was so placed without being aware that he was liable to be charged for same other than to the extent that his income support would contribute towards the cost of same. He was not in fact charged at any time for his accommodation and care. Accordingly, he did not include any claim for such charges in his application form. It would be contrary to the restrictive nature of compensatory provisions to award a victim accommodation and care costs incurred from public funds and at the same time deduct as against all claims for care and accommodation any collateral benefits emanating from public funds. The provisions of Article 6(7) of the 1998 Order appear to presume that a victim's care costs will be publicly funded facilities at public expense.

[9] In Avon County Council v Hooper [1997] 1 All ER 532 D was born in 1978 in a hospital run by the second defendant health authority. As a result of negligence he suffered mental and physical damages necessitating full-time care until he died in 1991. The costs of maintaining D were borne by the plaintiff local authority in the discharge of its duties under the National Assistance Act 1948 and Schedule 8 of the National Health Service Act 1977 to provide for the welfare of disabled persons to take care of persons suffering from illness. In 1989 D's action for damages was settled, the settlement including provision to cover the costs of care from the date of approval. The health authority agreed to indemnify D and his estate against liability for care costs prior to the date of approval. In 1991 the local authority commenced

proceedings to recover the costs of the provision of care. The defendant health authority contended that the charge was only recoverable under Section 17 if it was made at the time when the service was provided and the fact that D had a claim against the health authority did not mean that he had the means to pay for the purposes of Section 17. Hobhouse LJ giving the majority judgment of the Court of Appeal at 537 rejected the arguments stating:

“Where the person has a right to be indemnified by another against the cost of the service, he has the means to pay. He can enforce his right and make the payment. There is nothing in any part of Section 17 which suggests that it is intended that sub-section (3) should have the effect of relieving those liable to indemnify the recipient of the service for the costs of the service from their liability. On the contrary, it is clear that the intention of the section is to enable the local authority to recover the cost, save when it is unreasonable that it should do so or impracticable for the recipient to pay. The argument of the health authority would, if accepted, frustrate the clear intention of the section.”

[10] Section 17 of the relevant provision under consideration in that case gave the plaintiff a power but not a duty to recover the cost of providing the care. Article 36(3) of the 1972 imposes a duty on the Department to recover the costs and a concomitant duty on the patient to refund the costs. Thus the reasoning in Avon applies a fortiori in the Article 36 context. The person for whom the accommodation is supplied may satisfy the Department that he is unable to make a refund and in that event the Department shall assess his ability to pay and accordingly determine at what lower rate he should be liable to make a refund. Regulations may make provision for the assessment of a person’s ability to pay. In the event of an award of damages being made to party in circumstances where as a result of disability the award must be invested in court the capital sum awarded is disregarded as part of his means by virtue of the regulations. Where the court is awarding damages in the context of a person under disability the effect of the statutory duty to disregard the capital sum to be invested in court on his behalf is that the injured party would not be liable to pay care costs out of that money in court and is thus not entitled to recover those costs as part of its claim against the defendant (see Firth v George Akroyd Junior Limited [2000] LR Medical 312).

[11] The argument in this case ultimately came down to the question whether the award of compensation to the applicant is to be treated as an “award of damages for a personal injury”. If it is to be so treated, the logic of

Firth is that the care costs would be irrecoverable by the Trust against the applicant (assuming, as is the case here, that he has no other assets of value). If that is so the applicant would not be entitled to recover the costs as part of his criminal injury claim since he will not be suffering that loss. If, however, the award of compensation does not fall within what is meant by an award of damages under the Assessment of Resources Regulations the applicant would be liable to the Trust and would have a right to recover as part of his claim from the Secretary of State.

[12] Mr McNulty QC very properly brought to the attention of the court the decision of the Court of Appeal in McCaughey v Secretary of State [1975] NI 133. The question which arose in that case was whether the court had jurisdiction to award interest on criminal injury compensation under Section 17 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 which conferred power on a court to award interest on a debt or damages where the court is trying proceedings for the recovery of debt or damages. The Court of Appeal held that it did not. Lowry LCJ stated:

“The word ‘damages’ is based on the concept of legal, though not necessarily moral, wrongdoing: Halsbury Laws of England 3rd Edition Volume 11 page 216 paragraph 383, adopted by Pearson J in Jabbour v State of Israel [1954] 1 All ER 145, and, in my opinion, the word ‘damages’ in Section 17(1) of the 1937 Act does not include statutory compensation. I note also the distinction between damages and compensation under the Criminal Injury Code in Section 3(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 ... It is of no avail to draw analogies between tortfeasors and the hypothetical wrongdoers consisting of the inhabitants of a county: the claim is simply not a claim for damages.”

[13] Mr McNulty QC also accepted that the definition of damages in text books such as Halsbury’s Laws of England and McGregor on Damages was against the proposition that an award of compensation is an award of damages. Thus, for example, “damages” are defined in Halsbury Volume 12(1) paragraph 802 as “pecuniary recompense given by process of law to a person for the actionable wrong that another has done him.” They are thus distinguishable from compensation (see paragraphs 802 and 807).

[14] As a matter of ordinary construction an award of damages for personal injury refers to an award made in consequence of a conclusion by a court that the defendant has breached the legal rights of the plaintiff. Compensation payable under the Criminal Injuries Order or under the new scheme does not

fit within that concept. As a matter of construction accordingly paragraph 43 of Schedule 10 of the relevant regulations cannot be called in aid by the applicant to resist a claim for recovery of the costs of care under Article 36 of the 1972 Order. It must be said there appears to be little logic in treating an award of compensation for personal injuries arising from a criminal injury differently from an award of damages for the purposes of the relevant regulations. Mr McCloskey could point to no reason for the differentiation. It may be that the Northern Ireland regulations simply followed the English regulations and disregarded the fact that in the Northern Ireland criminal injury context there would be a significant number of cases where there would be the potential for this question arising. It may equally be said that there appears to be little logical reason why in the context of tort claims the mere fact that because money has to be paid into court on behalf of a person under disability the plaintiff should not have to recover from a tortfeasor defendant the costs of care when he effectively would have to do so if he is not under disability. In terms of the financing of the cost of such care a question of policy arises as to where the burden of the cost should fall. These are matters essentially for policy makers and not for the court. The applicant is entitled and bound to include in his compensation the care costs.

[15] The decision of the court awarding the sum of £55,903.35 should have been a decree for the total sum of the award which included the earlier sum of £100,000 approved by the court in respect of the personal injuries. To that extent the appeal will be allowed and a decree of £155,903.35 will be made. I will hear counsel on the question of costs.