

CLINICAL NEGLIGENCE BRIEFING

Local Authority Care Services

"I have always found that mercy bears richer fruits than strict justice"
Abraham Lincoln, 1809 - 1865

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Peters v East Midlands Strategic Health Authority

Edward Faulks Q.C. provides a case comment and **Lisa Dobie** considers the issues before the Court of Appeal

Case Comment by Edward Faulks Q.C.

Last month the Court of Appeal gave judgment in this case, awarding the Claimant the cost of a lifetime's care. The case raises important arguments about the relationship between damages and funding available as of right from the state

Rather unusually all the experts agreed that the Claimant was ideally placed at the Spinnies. Although there was always a possibility that the Council would in the future move her to a cheaper home there was no immediate prospect of this.

The main question for the Court was whether damages should be awarded for the cost of the Spinnies (or equivalent) for the rest of the Claimant's life. The Defendants' case was that since the council had a statutory duty that it was discharging so as to provide for her care, no loss had been established. The Claimant, on the other hand, argued that it was her right to choose damages and then pay for the Spinnies privately out of the sums received.

The Court decided that the claimant was entitled to express a preference for damages (albeit through her Deputy) and that on receipt of an appropriate undertaking from the Deputy, the Court of Protection would be notified so as to ensure that there was no double recovery, then the risk could be ignored.

If the case does not proceed to the House of Lords, Peters marks the end of most if not all of the arguments often advanced by Defendants as to their liability to pay damages when the State provides care and accommodation. However, where case managers regard it as their duty to maximize state benefits for their client and when Deputies would generally consider that they were under a similar duty, there is a real danger that the public purse, in a case like this, may pay more than it should. Against this is the visceral unease which judges feel in allowing tortfeasors to shift their liability onto the state.

Peters v East Midlands Strategic Health Authority

Background:

In many clinical negligence cases, Claimants are often entitled to large awards of which the most substantial element is attributable to care. Often, a Defendant will contend that the Claimants needs will be met by the state. A Claimant will argue that they are entitled to be fully compensated by the tortfeasor so as not to be reliant upon state funding.

The case of *Peters v East Midlands Strategic Health Authority and Others* is a 2009 Court of Appeal decision which considers this issue. Judgment was entered for the Claimant in February 2000 on the basis that the Defendant's jointly failed to ensure that the Claimant's mother received a rubella vaccination. The Claimant suffered from severe learning difficulties, autistic spectrum disorder, visual impairment and behavioural problems. Most of special damages were agreed and the central issue concerned future care.

The Claimant was being cared for in a private residential care home known as the "Spinnies". The cost of accommodation and care at the Spinnies was being borne 50:50 by Nottingham City Council and the Primary Care Trust. All parties agreed that the Spinnies was excellent accommodation and was the best placement for the Claimant.

First Instance:

At first instance, Butterfield J held that the Claimant was entitled to recover the full private cost of her accommodation and care in the future as damages from the Defendants, so as to enable her to be free of reliance on state funding. In particular it was held that there was a risk that the Council (joined as part 20 Defendant's in the proceedings) would in the future reduce the value of the provision it was prepared to make for the Claimant and that the only way to ensure that the Claimant received accommodation and care at the Spinnies, or an equivalent for the rest of her life, would be for her to become self funding. Butterfield J gave permission to appeal

The Council's Appeal:

The first issue on appeal was made by the Council. At first instance Butterfield J held that all monies for

personal injury fell to be disregarded by the Council when determining whether they had a duty to provide accommodation. The central question was whether the wording “an award of damages for personal injury” included all sums awarded in consequence of such an injury (capital and income), or whether, as was contended on behalf of the Council, they are restricted to damages in respect of pain, suffering, loss, and amenity.

Following *Firth v Geo Ackroyd Junior Ltd [2001] PIQR Q4*, there was no basis for holding that the Council’s interpretation was correct. Lord Justice Dyson accepted the Defendants’ submissions and was clear and unequivocal in expressing the Court of Appeal’s judgment when he stated “[t]he phrase “an award of damages for personal injury” is clear, unambiguous and unqualified. We find it impossible to construe it as referring only to some heads of an award of damages for personal injury. We can see no basis for construing the phrase as referring only to general damages for loss of earning”.

The Defendants appeal

In the main, the Defendants appealed on three issues,

1. *Whether the Claimant was entitled as of right to pursue the tortfeasor in respect of future care when the Claimant has a statutory right to receive equivalent provision from the state;*

Lord Justice Dyson highlighted that there was no decided case law quite the same as this case. Unlike *Peters*, in earlier continuing care cases, the state care was ruled as being inadequate, uncertain or unavailable. In its conclusion the Court of Appeal drew support from a Merchant Shipping Act 1894 case (*The Liverpool (No.2)* [1963] P64), in which it was held that the Claimant was entitled to pursue the wrongdoer even though the Claimant had a statutory right to have the loss made good. Consequently, it was held that where there is no risk of double recovery, there was no reason why the Claimant should give up her right to damages from the tortfeasor.

2. *Whether Butterfield J was right to hold that there was no risk of double recovery;*

The Deputy had given evidence at the quantum trial that she had not identified the terms of the undertaking that she was offering, nor was she sure that she was entitled to give such an undertaking.



Further, any such undertaking would not bind her successors. Butterfield J had therefore concluded that such an undertaking would be impractical and undesirable. However, went on to decide that there was no real risk of double recovery in any event. The Defendants appealed this point and submitted that a Deputy was under a duty to “secure and maximise funding available from public funds” which could lead to double recovery. The Court of Appeal rejected that there was such a duty upon a Case Manager or a Deputy in circumstances where the tortfeasor had already paid for such care. Further, it was held that an effective way of policing such an undertaking would be to amend the terms of the Court of Protection Order under which the Deputy was acting so that she would only be able to exercise the powers relating to state funding with the express authorisation of the Court.

3. *Whether Butterfield J was right to hold that it was reasonable for the Claimant, through her deputy, to choose her care accommodation to be self funded.*

Butterfield J made a series of findings to support his overall conclusion that it was reasonable for the Claimant to choose self funding as opposed to state funding. Amongst these findings were the following:

- 1) it was unlikely that the Spinnies would be a home for life;
- 2) the Claimant’s accommodation may change if she is reliant upon state funding as the state will seek to minimise public spending; and,
- 3) legislation relating to the ring fencing of personal injury was ripe for reform and it was “quite possible” that such reform would not be favourable to the Claimant.

The Defendant appealed these findings on the basis that they were either irrelevant as to reasonableness because the position would be the same whichever party was paying, or, simply not supported by the evidence. The Court of Appeal accepted some of the Defendant’s submissions that the findings were irrelevant. Crucially, however, Butterfield J’s finding that the Council may move the Claimant to alternative accommodation in order to “make savings” was upheld. Further, it was held that there was a risk that future legislative changes were a relevant factor to the consideration of reasonableness, and that it could not be ruled out that such legislative changes would not be in the Claimant’s favour.

Consequently, the appeal was dismissed and the Defendants were ordered to pay the cost of the Claimant’s future care and accommodation.

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