

ASSESSING GRATUITOUS CARE

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Introduction

1. The majority of people who are injured do not have sufficient funds to pay for professional nursing care and are therefore reliant upon friends and relatives in order to meet their care needs¹. It is trite law that a claimant is able to recover damages for the value of nursing services provided gratuitously by a friend or relative². Over time numerous contentious issues have arisen and the assessment of the appropriate award is not without its difficulties, especially in the absence of an agreed formula or universally accepted hourly rate.

Who Can Claim?

2. The House of Lords in *Hunt v Severs* [1994] 2 AC 350 held that where care was provided gratuitously to an injured claimant, the loss belongs to the carer and not to the claimant. Although there can be no direct claim by the carer (who is unlikely to be owed a duty of care by the defendant in any event), the claimant is entitled to recover compensation on the carer's behalf. Any damages recovered in respect of the care provided are held on trust by the claimant for the benefit of the carer or the carer's estate³.

¹ This is borne out by the empirical research carried out by the Law Commission: see further para 2.15 of the Law Commission's Report No 262 'Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits' (November 1999).

² *Hunt v Severs* [1994] 2 AC 350. For a history of the law relating to gratuitous care claims see further *Lowe v Guise* [2002] EWCA 197; [2002] PIQR Q9; and *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657.

³ In the event of the carer's death, the damages are held on trust for the benefit of the carer's estate: *Hughes v Gerard Lloyd and anor* LTL 10/1/2008.

Care Provided by Defendant

3. As the claimant holds the damages, representing the cost of gratuitously provided care, in trust for the provider of that care, it logically follows that no damages should be recoverable, where the carer is the defendant, for the claimant would be recovering damages from the defendant only to hold them on trust for the defendant. In addition there is strong countervailing policy argument that a tortfeasor should not be able to benefit from his or her wrongdoing, as he would do where the liability is in effect paid for by an insurer. Under the present law, therefore, no damages can be recovered for gratuitous care provided by the tortfeasor⁴.

Proposals for Change

4. The Law Commission has recommended that this rule in *Hunt v Severs* should be legislatively reversed, and that as a matter of policy all claimants should be able to recover in full even where the defendant has personally provided services gratuitously⁵. The Ministry of Justice issued a consultation paper entitled 'The Law of Damages' on 4 May 2007 suggesting that instead of a trust there should be a personal obligation to account. In the Government's response published on 1 July 2009, the Government confirmed that it considered that a more flexible 'personal obligation to account' should replace the current method of holding damages on trust. Further in section 7 of the draft Civil Law Reform Bill published in December 2009 proposed that the court must not refuse to award damages which have been gratuitously provided merely because the person providing the services is the defendant. However, these provisions have not come into force.

Threshold Tests for Recovery?

(1) MILLS V BRE

5. Following the case of *Mills v British Rail Engineering Ltd* [1992] PIQR Q130 it was argued that care claims were limited to 'very serious cases' where the care provided went 'well beyond the ordinary call of duty'. However, the Court of Appeal clarified the position in *Giambrone v JMC Holidays Ltd* [2004] EWCA Civ 158 which involved a

⁴ *Hunt v Severs* [1994] 2 AC 350 at 363–364.

⁵ See further para 3.76 of the Law Commission's Report No 262 'Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits' (November 1999).

claim brought on behalf of numerous claimants for food poisoning. Giving the lead judgment of the court (with which Mance LJ and Park J agreed) Brooke LJ said:

'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 ...

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'.

6. Therefore there is no threshold test for recovery as long as the care provided goes 'distinctly beyond that which is part of the ordinary regime of family life'⁶. This approach ties in with the Court of Appeal's earlier decision in *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657 which made no mention of the need to surpass a threshold test. Indeed, as detailed below, Evans LJ specifically took the opportunity in that case to emphasise that judges at first instance should not be put in a straight-jacket when assessing proper recompense for carers. In passing it is noteworthy that this approach also accords with the view of the Law Commission who considered that there should not be any limits on the recovery of gratuitous care claims.

⁶ Since *Giambrone v JMC Holidays Ltd* [2004] EWCA Civ 158 it is unusual to find a claim for care where this test is not satisfied, however, one example is the decision of HHJ Seymour in *Palmer v Kitley* [2008] EWHC 2819 (QB).

(2) THE CLAIMANT MUST INTEND TO REPAY THE MONEY TO THE CARE PROVIDER

7. The claimant will hold any damages he or she receives by way of gratuitous care for the person who provided that care. Where there are reasons which prevent the claimant from being able to repay the money to his or her gratuitous care providers – eg if the care providers have died since providing the care or the claimant is no longer in contact with them – the court may be disinclined to make such an award. In *ATH v MS* [2002] EWCA Civ 792 Kennedy LJ in considering a claim for service dependency under the Fatal Accidents Act 1976 said at [19]:

'The simple underlying truth is that in justice the claimant should not be compensated for the cost of services already provided gratuitously if that compensation is not going to find its way to the service provider.'

8. In an extreme case where the care provider is still alive but the court has considerable doubts as to whether or not the money received will be paid to the carer, the court may direct that the damages are to be paid into court and the administration of the monies (including any application for payments out) should be dealt with by the Master. But what happens where the care provider has since passed away? In *Hughes v Gerard Lloyd and anor* LTL 10/1/2008 HHJ Hodge QC (sitting as a judge of the High Court) held that damages recovered in respect of gratuitous care are held on trust for the deceased's estate.

For What Services are Damages Recoverable?

9. In *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657 the claimant fell off a roof and suffered severe injuries to his right arm and elbow. He required a great deal of physical care and assistance from his wife on a daily basis. In addition he developed severe clinical depression and had historically been at risk of suicide at night. He relied upon his wife heavily for emotional support. At first instance the judge made an award for gratuitous care based upon his wife providing 24-hours' care per day. On appeal the defendant submitted that it was wrong to include in the assessment of care those activities which were not strictly required by reason of the claimant's physical injuries. It was suggested that the claim for care should have been limited to the physical nursing care (including assistance with mobility and assistance with washing, dressing etc) without allowing anything for the companionship, emotional and psychological support that was provided. In addition it was argued that no account should have been

taken of the normal household chores which the claimant's wife would have performed in any event or of the time when she was asleep (and was therefore not providing physical care). The Court of Appeal unanimously rejected this interpretation of the assessment of care. May LJ stated at [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, as Mr Purchas' submissions appeared to suggest, 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.'

May LJ continued at [31]:

'In the present case, I am not persuaded that the judge made an over-assessment of the services provided by Mrs Evans to her husband as a result of his injuries. He concluded that there was no doubt that the claimant requires 24 hour care and he said that the evidence was overwhelming. In my view, the evidence to which we have been directed justified the judge's conclusion and justifies the conclusion that the services which Mrs Evans provides are those of a full time carer. The fact that for some of the time she does things which she would have done if her husband had not been injured does not detract from this conclusion. It is neither necessary nor to be expected that a full time carer should spend every hour of the day and night engaged in providing physical services. In substance, on the judge's finding Mrs Evans does provide the services of a full time carer and her proper recompense should be assessed on that basis.'

10. In summary, under the present law damages may be recovered for, but are not necessarily limited to, the following types of gratuitously rendered services (as long as the same are supported by the medical evidence as being reasonably necessary as a

result of the claimant's injuries and the claimant would not have needed such assistance in any event):

- Physical nursing care and attendance – such as washing, dressing, undressing, brushing teeth, combing/brushing hair, changing bandages, administering medication etc.
- Assistance with mobility – such as assisting the claimant on and off the lavatory or commode, helping with wheelchair transfers, helping the claimant get in and out of vehicles, acting as a support when walking, being there in case of falls etc.
- Taking the claimant to and from hospital appointments, treatment appointments, X-rays etc.
- Making sure that the claimant does not injure him or herself.
- Prompting and organising a brain-injured claimant⁷.
- Cutting up food for an injured claimant who is unable to do it him or herself⁸.
- Offering emotional support and reassurance (particularly where there is a recognised psychological injury or risk of suicide)⁹.
- Helping to manage the claimant's affairs and finances¹⁰.
- Attending a sick child¹¹.
- Babysitting/child minding a healthy child who otherwise would have been looked after by the claimant¹².
- Performing domestic chores such as cooking, cleaning, washing, ironing, shopping etc.
- Performing DIY or home maintenance activities – such as painting, decorating, gardening and car servicing¹³.
- Providing care and assistance to family members or friends which the claimant would otherwise have provided¹⁴.
- Feeding and looking after pets and animals – such as mucking out horses, dog walking, taking sick animals to the vet.

⁷ *Pratt v Smith* (18 December 2002, unreported), QBD.

⁸ *Pratt v Smith* (18 December 2002, unreported), QBD.

⁹ *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657.

¹⁰ By analogy see eg the allowances made for paid care in respect of these services in the case of *O'Brien v Harris* (22 February 2001, unreported), QBD.

¹¹ *Giambrone v JMC Holidays Ltd* [2004] EWCA Civ 158.

¹² See eg *Froggatt v Chesterfield & North Derbyshire Royal Hospital NHS Trust* [2002] All ER (D) 218 (Dec), in which £945 was awarded for the past cost of childcare provided gratuitously by the children's grandmother.

¹³ See eg *Hoffman v Sofaer* [1982] 1 WLR 1350; and *Assinder v Griffin* [2001] All ER (D) 356 (May); *Tagg v Countess of Chester Hospital Foundation NHS Trust* [2007] EWHC 509 (QB); *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB).

¹⁴ *Lowe v Guise* [2002] EWCA Civ 197; [2002] PIQR Q9.

- Case management ie liaising with treating medical staff and therapists, liaising with the claimant's school and/or employers, corresponding with the local authority, local education authority or social services, helping to find suitable alternative accommodation etc¹⁵.
11. However, it should be noted that in the absence of an expressed or implied contract, care provided voluntarily to assist the claimant's business is not recoverable¹⁶. Further, in relation to services provided which do not amount to 'nursing care' it is arguable that the decision in *Daly v General Steam Navigation Co Ltd* [1981] 1 WLR 120 prevents an award for past loss over and above an uplift in the award for general damages in respect of pain, suffering and loss of amenity save where the claimant has either spent money or where the services were provided gratuitously by someone who had to forgo paid employment in order to provide them. This distinction may seem somewhat illogical and arbitrary. Indeed to the extent that there remains a rule following *Hunt v Severs* that past and future non-care gratuitous services are to be treated differently (which is uncertain), the courts have in practice tended to ignore it. The Law Commission has criticised any such difference in treatment and has recommended that the law permits a claimant to recover damages for the cost of work done where the work has been or will reasonably be done gratuitously by a relative or friend.

The Quantum of Damages

(1) THE OBJECT OF THE AWARD

12. The object of an award for gratuitous care is 'to enable the voluntary carer to receive proper recompense for his or her services'¹⁷. There is, however, no conventional way or ways of quantifying this loss, which is essentially a jury question for the judge to decide¹⁸. As May LJ stated in *Evans v Pontypridd Roofing Ltd*:

'In my judgment, this court should avoid putting first instance judges into too restrictive a straight-jacket, such as might happen if it was said that the means of assessing a proper recompense for services provided gratuitously by a family carer had to be

15 *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB) Teare J awarded £8,750 for past gratuitous case management

16 *Hardwick v Hudson* [1999] 1 WLR 1770; [1999] PIQR Q202.

17 *Hunt v Severs* [1994] 2 AC 350, per Lord Bridge at 363A; *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657, per May LJ at [36]. See also *Housecroft v Burnett* [1986] 1 All ER 332 in which O'Connor LJ at 334 referred to the need to provide 'a capital sum ... sufficient ... to make recompense to the relative'.

18 *Spittle v Bunney* [1988] 1 WLR 847.

*assessed in a particular way or ways. Circumstances vary enormously and what is appropriate and just in one case may not be so in another. If a caring relation has given up remunerative employment to care for the claimant gratuitously, it may well be appropriate to assess the proper recompense for the services provided by reference to the carer's lost earnings. If the carer has not given up gainful employment, the task remains to assess proper recompense for the services provided. As O'Connor LJ said in *Housecroft v Burnett*⁴, regard may be had to what it would cost to provide the services on the open market. But the services are not in fact being bought in the open market, so that adjustments will probably need to be made. Since, however, any such adjustments are no more than an element in a single assessment, it would not in my view be appropriate to bind first instance judges to a conventional formalised calculation. The assessment is of an amount as a whole. The means of reaching the assessment must depend on what is appropriate to the individual case. If it is appropriate, as I think it is in the present case, to have regard to what it would cost to buy the services which Mrs Evans provides in the open market, it may well also be appropriate to scale them down. But I do not think that this can be done by means of a conventional percentage, since the appropriate extent of the scaling down and the reasons for it may vary from case to case.'*

(2) THE 'CEILING PRINCIPLE'

13. In *Housecroft v Burnett* [1986] 1 All ER 332 O'Connor LJ stated at 343D:

'Once it is understood that this [that is, this element of compensation] is an element in the award to the claimant to provide for the reasonable and proper care of the claimant and that a capital sum is to be available for that purpose, the court should look at it as a whole and consider whether, on the facts of the case, it is sufficient to enable the claimant among other things to make reasonable recompense to the relative, so in cases where the relative has given up gainful employment to look after the claimant I would regard it as natural that the claimant would not wish the relative to be the loser and the court will award sufficient to enable the claimant to achieve that result. The ceiling would be the commercial rate.'

14. The last sentence of the above passage has become known as the 'ceiling principle', ie that the ceiling of any claim for gratuitous care should be limited to the commercial rate. In other words the maximum award that can be made in respect of gratuitous care should be limited to the cost of obtaining those services professionally. Also, it is noteworthy that May LJ in *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ

1657having cited the above passage from O'Connor LJ's judgment in *Housecroft v Burnett* explained that judges at first instance should not be put in too restrictive a straight-jacket such as might happen if it was said that the means of assessing a proper recompense for services provided gratuitously by a family carer had to be assessed in a particular way or ways. In particular, he did not expressly refer to the ceiling principle as placing any fixed limit on the court's ability to award proper recompense for the gratuitous services provided³.

(3) THE DIFFERENT APPROACHES IN PRACTICE

15. The two leading cases in relation to the quantification of damages for gratuitous care are the Court of Appeal decisions in *Housecroft v Burnett* [1986] 1 All ER 332 and *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657. As explained above, the law does not lay down any dogmatic rules regarding the assessment of this head of loss and judges are given a very wide discretion to select the method of calculation most appropriate to the facts of the case. In practice, however, the approach adopted by the court largely depends upon whether or not the care provider has had to give up paid employment in order to look after the claimant.

(i) *Where the Carer Gives Up Paid Employment*

16. Where employment is foregone in order to care for a claimant, then the loss which may be claimed is prima facie the loss of the net income to have been expected from that employment¹⁹. However, this may not be all. Where the employment the carer carried out prior to the claimant's injuries was part-time or not very well paid, the voluntary carer may be entitled to recover more than the total amount of his or her net loss of earnings. For example, in *Fish v Wilcox* [1994] 5 Med LR 230 the carer gave up a job earning £4,000 per annum to look after a seriously disabled child. The judge assessed the value of that care at £5,000 per annum. Further in *Hogg v Doyle* (1989, unreported), CA the Court of Appeal upheld an award of one-and-a-half times the claimant's wife's earnings. The wife was a nurse who was found to have been providing the level of care of two full-time nurses (and was on the verge of a nervous breakdown)²⁰.

19 *Housecroft v Burnett* [1986] 1 All ER 332. See also *Fitzgerald v Ford* [1996] PIQR Q72 and *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657 in which May LJ stated at [25] that: 'If a caring relation has given up remunerative employment to care for the claimant gratuitously, it may well be appropriate to assess the proper recompense for the services provided by reference to the carer's lost earnings.'

20 Although see further the comments in relation to this case in *Fitzgerald v Ford* [1996] PIQR Q72. In summary Stuart-Smith LJ referred to *Hogg v Doyle* as being a decision on its own facts which created no

17. The position may be different, however, where the gratuitous carer gives up a well-paid job to look after the claimant. Under the present law, arguably the maximum that can be recovered is the professional costs of providing the care following the 'ceiling principle' in *Housecroft v Burnett* [1986] 1 All ER 332. For example, in *Woodrup v Nicol* [1993] PIQR Q104 the Court of Appeal reduced the damages awarded by Wright J at first instance in relation to the care provided by the claimant's father. These damages consisted of the father's estimated loss of earnings for the period in question, amounting to twice the commercial cost of his services, although the sum awarded by the Court of Appeal still exceeded the commercial rate.

(ii) *Where the Care Provider Does Not Give Up Paid Employment*

18. In cases where there has been no loss of earnings as such, courts have tended to calculate damages for care by relatives by taking the commercial rate and applying a discount to it. A 'conventional' discount in the writers' experience has been about 25%. The nature and quality of the services provided may well be relevant to the assessment and the deduction made. If the services are those usually performed by skilled workers (eg accountancy services, painting and decorating, plumbing and tiling) then to pay a carer unskilled in such tasks the 'skilled' rate is to over-compensate. On the other hand, many domestic services are perhaps qualitatively better performed by those caring for their own home rather than for another's, and require little experience to do well, and basic caring/nursing services are likely to be performed just as well if not better by a close relative than by a paid stranger. In these latter cases, there seems to be no reason why a friend or relative providing gratuitous services should not be paid the full commercial rate, subject only to the deduction of a sum to represent the likely impact of tax and National Insurance.

(4) ASSESSMENT OF THE COMMERCIAL RATES

19. There are numerous different commercial pay scales for nursing care provided by different bodies including the National Joint Council for Local Government Services (known as the 'National Joint Council rates'), the Crossroads rates, the Whitely rates and the British Nursing Association rates (the 'BNA rates'). Within the different pay scales there are different rates which depend upon the grade of carer, the nature of the services provided as well as how and when that care is provided (ie whether the

new principle, in particular, there was no principle that where a member of the family who was working eight hours a day for five days a week gives up their employment to care for the claimant 24 hours a day, they should be paid 1.5 times of their earnings, or, indeed any more than their loss of earnings.

care is provided by the hour, by the day or by week and whether the care is provided during the day or during the evening, at night or at the weekend). The rates have historically tended to increase either annually or bi-annually at a rate outstripping inflation as recorded by the RPI and following the European Working Time Directive even agency workers are entitled to take annual holiday or payment in lieu of holiday.

20. Although there is no nationally accepted or approved rate for assessing past gratuitous care, it is common for care experts to use Spine Point 8 of the NJCLGS (NJC) rates, ie the rates applicable to home helps or companions²¹. However, following the Court of Appeal's decision in *Thameside & Glossop v Thompstone and ors* [2008] 1 WLR 2207, which confirmed that ASHE (6115) was the correct measure for the indexation of future care costs, it may be argued that ASHE (6115) should be used for assessing past gratuitous care as well. In 2010 the Civil Justice Council issued a consultation regarding the standardisation of care costs. It remains to be seen whether a single rate could be agreed for past gratuitous care, which would reduce disputes regarding the appropriate hourly rate and save costs.
21. Whilst the applicable hourly rate remains open for debate, care should be taken to ensure that the correct rate is applied to the service that has been provided. For example, where a family member has been trained how to carry out certain procedures such as administer medicine or provide therapy, it might be possible to claim care at a higher rate. The best evidence is quotes or estimates from local providers. It may be that the hourly rate for directly employing support workers is significantly higher than Spine Point 8 of the NJC rates (which is often demonstrated once carers have been employed). Also, it will often be more expensive to employ someone to carry out tasks such as home maintenance (including painting and decorating) and gardening than it would be to employ someone to carry out domestic tasks such as hoovering and cleaning. In the absence of local rates, appropriate average figures may be gleaned from the annual publication produced by the Royal Institute of Chartered Surveyors entitled the 'Building Maintenance Price Book' (the applicable rates usually being attributed to 'building craft operators' or 'labourers')²².

21 The job description for this post/Spine Point is as follows: 'The duties will include: domestic duties (for example, cleaning, cooking and washing), physical tasks approximating to home care (for example, dressing, washing and feeding clients) and social duties (for example talking with clients to maintain contact with family, friends and community, assisting with shopping and recreation) aimed at creating a supportive homely atmosphere where clients can achieve maximum independence.'

22 A copy of this book can be obtained from Building Maintenance Information, 3 Cadogan Gate, London SW1X 0AS (tel 020 7695 1500) or the Building Cost Information Service Ltd & Building Maintenance

(5) AGGREGATE OR FLAT RATES

22. Often care is provided by friends and relatives during antisocial hours such as evenings, weekends, bank holidays etc. A home help employed on NJC Spine Point 8 would receive various enhancements for working unsociable hours which forms part of the commercial rate. When assessing past gratuitous care the following reasons may suggest that, save in exceptional circumstances, in the Schedules Book we took the view that aggregate rates should generally be preferred over the flat or basic rate for the following reasons:

- The provision of gratuitous care is not limited to normal working hours. More often than not, care is provided by family members before or after they return from work, during weekends and other holiday periods such as bank holidays, Christmas and Easter. Further a gratuitous carer may have given up well paid employment to provide the necessary care and their loss may far exceed the NJC hourly rate.
- The NJC basic hourly rate does not reflect the actual package that the carer receives. In particular NJC carers are entitled to benefits such as sick pay, holiday pay and maternity leave. They are also entitled to join the Local Government Pension Scheme which is a generous final salary pension scheme. This is a benefit that should not be under-estimated. A gratuitous carer giving up paid employment to provide gratuitous care would be significantly under-compensated if he or she was only rewarded at flat NJC rates for ongoing care when in fact he or she has not only lost employment but also employer contributions towards a pension (which will be obligatory for the majority of employers as a result of the Pension Act 2008). In reality local government carers are content to accept the low hourly rates of pay because of the additional benefits that they receive.
- Although it is often used as a measure for assessing past nursing care, the basic NJC rate is invariably less than the agreed cost for employing private carers. In any catastrophic injury case this can readily be seen by comparing the NJC rate allowed for ongoing care with the rate being paid to carers in a private regime and/or the rates suggested for future care (which in and around London are often as much as £12 or £14 per hour, particularly for care provided at the weekend). Where care is in part being provided by the family and in part by paid support workers, it is not uncommon to see care experts value the gratuitous care at basic

Information website: www.bcis.co.uk/index.html. It should be noted that the costs of maintenance have also shown a substantial increase over and above the rate of inflation in recent years.

- NJC rates, which are 30-40% lower than the actual rates being paid to support workers for carrying out exactly the same tasks.
- Although the basic NJC rate (currently £6.84 per hour) is often used to measure past assistance with domestic tasks, the rate is usually significantly less than it costs to employ a private cleaner (circa £8-10 per hour).
 - Although it is often used to assess other types of past gratuitous assistance, the basic NJC rate is usually significantly under what would need to be paid for other tasks such as childcare, gardening and DIY.
 - NJC carers also enjoy the possibility of career advancement and obtaining higher levels of pay e.g. if they take on any managerial responsibility.
23. Arguably therefore the basic NJC rate may not provide “proper recompense” for the care provided since it falls far short of the actual commercial cost of the care. It is noteworthy that the care rates published in Facts & Figures are the aggregate hourly rates. Such rates have been awarded or agreed in a number of cases, particularly where there has been a significant element of night care²³. An alternative to assessing care at the aggregate rate is to value past care using a flat rate but without any discount to reflect ‘the gratuitous element’²⁴. However, there are some judges who have declined to award any uplift on the standard rates to take account of the care provided during unsociable hours because the care was provided gratuitously and still applied a 25% discount²⁵.

(6) DISCOUNT TO REFLECT THE ‘GRATUITOUS ELEMENT’

24. As seen above, when calculating the claim for gratuitous care, a discount is commonly applied to the commercial rate. The rationale for this discount is fourfold in order to take account of:
- Tax that the commercial carer would pay.
 - National Insurance that the commercial carer would pay.
 - Travel expenses that the commercial carer would have incurred.

23 *Massey v Tameside and Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB); *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234. Aggregate rates were also agreed in *Pankhurst v (1) White (2) MIB* [2009] EWHC 1117 (QB). It also appears they were used in *Crofts v Murton* LTL 10/9/2008 and *Beesley v New Century Group* [2008] EWHC 3033 (QB).

24 See eg *Newman v Folkes* [2002] EWCA Civ 591; *A v B Hospitals NHS Trust* [2006] EWHC 1178 (QB); *Warrilow v Norfolk and Norwich Hospitals NHS Trust* [2006] EWHC 801 (QB).

25 *Fairhurst v St Helens and Knowsley Health Authority* [1995] PIQR Q1; *Noble v Owens* [2008] EWHC 359; *Willisford v (1) Jones (2) MIB* LTL 11/6/2009.

- The fact that the quality of the care provided might be lower than that available professionally.

25. Whilst discounts of up to 35% are not unknown²⁶ in order to take account of these factors, at today's rates of tax and National Insurance, as seen above, the common discount is more likely to be in the region of 25%. However, there is no conventional percentage discount and each case must be decided on its own facts. In *Evans v Pontypridd Roofing Ltd* the defendant argued that the discount made by the judge of 25% was too low and should be increased to 33.33%. As explained by May LJ at [37] and [38]:

'In my judgment, there is no scientific basis for a strictly mathematical answer to this question. Nor is the exercise upon which the court is engaged amenable to such an answer. The assessment has to be a broad one, and what in the end is required is a single broad assessment to achieve a fair result in the particular case. I appreciate that a conventional discount would be convenient and might remove one variable from practical settlement negotiations. But I do not consider that one possible element of a single broad assessment should be required to be a conventional figure. On the contrary, it seems to me that first instance judges should have a latitude to achieve a fair result. For instance, if the gratuitous carer provides specialist care services, that might be reflected in the commercial rates rather than a discount to scale them down. On the other hand, I do not consider that the judge in Fairhurst was wrong to allow this element of his assessment to take effect through his discount. Although there may well be elements such as tax and National Insurance contributions which would normally feature as to contributing to a discount, there may in particular cases be other elements which can properly be reflected by a greater or lesser discount. One possibility might be if it were necessary for the assessment for future care to take account of the possibility that the services of the gratuitous carer may not be available for the entire period upon which the assessment is based. That is not to say that this consideration has got to be reflected in an adjustment to a discount; only that in an appropriate case it may be one possibility. That consideration does not arise in the present case on either party's submission.

In my judgment Mr Purchas' submissions do not persuade me that the judge's assessed discount in the present case of 25% was wrong. I am not persuaded that the reasons for making a discount which may be regarded as normal should result in a deduction greater than 25%. There were no grounds in the present case for making a

26 See eg *Bordin v St Mary's NHS Trust* [2000] Lloyd's Rep Med 6(287).

discount which was greater or less than normal. I would uphold this part of the judge's assessment for both past and future care.'

26. As one commentator has pointed out, it seems unfair that a discount as much as a third should be allowed against the claim for gratuitous care bearing in mind that although the care provider may not pay tax and National Insurance, likewise the carer does not benefit from any of the security of employment such as sick pay, holiday pay, pension, maternity leave etc²⁷. Where the professional carer would be on a low wage (eg the National Minimum Wage) the discount for tax and National Insurance is very unlikely to be as much as 25% or 33.3%. Indeed it should be noted that there have been a number of cases in which no discount in respect of the 'gratuitous element' has been allowed against the full commercial rate at all. Instances where no discount would be appropriate may include the following factual situations:
- Where the care provider has given up well-paid employment in order to care for the claimant²⁸.
 - Where no allowance has been made when calculating the commercial rate of care for services during unsociable hours, ie evenings, nights, weekends and public holidays²⁹.
 - Where the commercial rates claimed by the claimant are at a lower rate than probably would be charged for the care involved, eg charging at the rates for a 'home help' when the services would have been more appropriately provided by a specialist carer³⁰.
 - Where the care provided was of extremely high quality³¹.
 - Where the care provided is modest and amount of damages received does not exceed the personal annual tax allowance³².

27 See further Jacqueline Webb 'One claimant – two opposing views about the cost of care' [2003] *Quantum*, Issue 4/2003.

28 See eg *Hogg v Doyle* (6 March 1991, unreported); *Fish v Wilcox* [1994] 5 Med LR 230; *Abdul-Hosn v Trustees of The Italian Hospital* (10 July 1987, unreported), QBD

29 *Newman v Folkes* [2002] EWCA Civ 591; *A v B Hospitals NHS Trust* [2006] EWHC 1178 (QB); *Warrilow v Norfolk and Norwich Hospitals NHS Trust* [2006] EWHC 801 (QB).

30 *Parry v NW Surrey Health Authority* (29 November 1999, unreported), QBD.

31 *Lamey v Wirral Health Authority* [1993] CLY 1437 in which Morland J held that gratuitous services needed to be assessed 'not only quantitatively but also qualitatively'. Further in *A v National Blood Authority* [2001] Lloyd's Rep Med 187 at 230 Burton J held that it was 'plainly right that the services must be valued qualitatively as well as quantitatively'. See also *Wells v Wells* [1997] 1 WLR 652, in which the Court of Appeal refused to overturn the original judgment of Dyson J in *Page v Sheerness Steel Co plc* [1996] PIQR Q26 in applying no discount for tax and National Insurance. And more recently *Brown v King's Lynn and Wisbech NHS Hospitals Trust* (20 December 2000, unreported) in which Gage J also declined to apply a discount in order to reflect the 'gratuitous element' because of the remarkable quality of the care provided notwithstanding that the full commercial rate had been applied throughout including an uplift for weekend rates etc.

- Where the defendant accepts on the basis of full information the care claim advanced on behalf of the claimant in its counter-schedule without any discount³³.
 - Where the carer, who receives the award for gratuitous care, will actually have to pay tax and National Insurance on the money received³⁴.
27. Where the care provider has received state benefits or increased payments in respect of the care provided, such benefits or payments should be offset against the calculation of gratuitous care in order to avoid double recovery in accordance with the principle in *Hodgson v Trapp* [1989] 1 AC 807. For example credit has been given for Carer's Allowance³⁵, Jobs Seeker's Allowance³⁶ and Foster payments³⁷ which would not otherwise have been received but for the claimant's injury.
28. However, if a deduction is to be contended for the point should be raised promptly³⁸ and credit need not be given for Incapacity Benefit which results from the gratuitous carer's ill-health looking after the claimant³⁹.

(6) THE NATIONAL MINIMUM WAGE

29. Presumably, the bottom limit to the quantification of a claim for gratuitous care would now be the National Minimum Wage adjusted for tax and National Insurance, the effects of which are likely to be minimal at such a low level of wage.

Lump Sum Award

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- 32 See further *Lane v Lake (Deceased)* LTL 31/7/2007. The personal tax allowance for 2010/11 is £6,475 (although higher rates apply to people aged over 65 and other categories).
- 33 *Parkhouse v North Devon Healthcare NHS Trust* [2002] Lloyd's Rep Med 100.
- 34 It is unclear that a gratuitous carer would need to pay tax on payments received for gratuitous care in the UK (see *Lane v Lake (Deceased)* LTL 31/7/2007, but it could happen where the claimant and care provider live abroad).
- 35 *Warrilow v Norfolk and Norwich Hospitals NHS Trust* [2006] EWHC 801 (QB); *Morgan v Phillips* LTL 29/9/2008; *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB); *Noble v Owens* [2008] EWHC 359 (QB).
- 36 *Noble v Owens* [2008] EWHC 359 (QB).
- 37 See eg *Whyte v Barber* (18 February 2003, unreported), QBD. This was an approval hearing of a settlement in which a gratuitous care claim in respect of past care was brought notwithstanding the fact that the voluntary carers had received foster payments from the local authority. Credit was given as against the past gratuitous care claim for the payment of £15 per week which was specifically attributable to the claimant's disability but no credit was given for the remainder of the payment which the carers would have received in any event. See further William Norris QC and John Pickering 'Claims for Catastrophic Injury' [2004] JPIL, Issue 1/04.
- 38 See eg *Huntley v Simmonds* [2009] EWHC 405 (QB).
- 39 *Noble v Owens* [2008] EWHC 359 (QB).

30. Generally speaking, as seen above, where the carer has given up work to care for the claimant, the appropriate award for gratuitous care is usually determined by reference to the care provider's lost earnings (subject to the ceiling principle). Where the carer has not had to give up paid employment, the care claim is calculated by working out the number of hours care provided per day or week applying the commercial hourly cost to the same and then discounting the total to reflect the savings made by reason of the fact that the care was provided gratuitously.
31. If the facts of a particular case merit such an approach, the court may instead decide to make a broad brush assessment of the care gratuitously provided. This involves the court making an assessment in the round of the value of the voluntary services provided and awarding one global lump sum reflecting reasonable recompense for the same. For example, in *Giambrone v JMC Holidays* [2004] EWCA Civ 158 HHJ Macduff QC adopted this method of assessment and made awards for six claimants, who had suffered from the effects of food poisoning whilst on holiday, of between £120 and £275 for the services provided.
32. However, a broad brush assessment is not necessarily limited to trivial or minor cases of injury involving a relatively brief period of care. Such an approach may also be appropriate where it is difficult actually to assess the total number of hours of care provided or the calculation is hampered by many changes of rate over an extended period. For example, in *Pollitt v Oxfordshire Health Authority* (16 July 1998, unreported), QBD Daniel Brennan QC made a lump sum award of £10,000 for past gratuitous care.

Care Provided During Hospital Visits

33. It may be considered that a claimant should not be entitled to recover damages for gratuitous care during the period when the claimant is in hospital receiving treatment from trained professionals. However, compensation for such care provided by friends/relatives during the period of the claimant's hospitalisation will be recoverable assuming the same is an aid to the claimant's recovery rather than facilitating ordinary

social contact which would have occurred in any event⁴⁰. As Beldam LJ stated in *Havenhand v Jeffrey* (24 February 1997, unreported), CA:⁴¹

'There is one further matter to which it is necessary to refer. It is a small part of the amount awarded by the Judge, but in his judgment, after paying tribute (as anybody would) to the care which the family gave to their mother when she was in hospital, considered the extent of the claim made on their behalf for payment for assistance given to their mother whilst she was actually in hospital. The appellants argued that it would be wrong to take the entire estimated period during which they were visiting their mother in hospital because, for a large part of the time, they would simply be chatting with her and generally improving her outlook on life, making her feel that her family cared for her and that she was not, as it were, abandoned alone in the hospital. In short, the majority of the hours which were taken up by these hospital visits were the normal hospital visits arising from family affection, and not given for the purpose of providing services which the hospital did not provide.'

The Judge clearly accepted that there were occasions on which the family did perform services for the respondent, and the real question was: for how many hours should an award be made and at what rate? The Judge estimated the number of hours during which this family were administering to the respondent in hospital at 400 hours, and Mr Douthwaite says that this is a gross over-estimate of the period. He submits that a figure of 100 hours would be much closer when it is borne in mind that these services consisted, for example, of taking the respondent down to X-ray or for physiotherapy, and going with her when she had to go somewhere about the hospital. They helped to feed the claimant until she was able to feed herself, and they took her for walks in a wheelchair while they were visiting hospital. But Mr Douthwaite says, taking all those factors into account, 100 hours at a rate which the Judge decided should be GBP3.75 per hour was an appropriate award for those services.'

I agree with Mr Douthwaite's submission. Though it is a very small amount and involves a reduction in the sum awarded of no more than GBP1,125, nevertheless, the submission was valid and I would accept the 100 hours' figure which Mr Douthwaite puts forward.'

40 See eg *Owen v Brown* [2002] EWHC 1135 (QB) in which Silber J allowed 12 hours' gratuitous care per day even though the claimant was in hospital; and *Warrilow v Norfolk and Norwich Hospitals NHS Trust* [2006] EWHC 801 (QB).

41 Although it should be noted that this decision now needs to be read in light of the Court of Appeal's more recent decision in *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657 which applied a less restrictive definition in relation to what constituted 'care'.

34. A further example is provided by the case of *O'Brien v Harris* (22 February 2001, unreported), QBD in which Pitchford J awarded the sum claimed of £1,865 for the claimant's wife's attendance at hospital which was considered to be 'essential to the claimant's recovery'. Likewise in *Warrilow v Warrilow* [2006] EWHC 801 (QB). Langstaff J rejected the argument that *Havenhand v Jeffrey* laid down any principle that 'companionship cannot amount to care'. He distinguished the facts of *Havenhand* which involved an old lady who may have had various relatives going to visit her in any event. But where a claimant reasonably requires companionship for psychological or psychiatric stability, it may be recoverable provided the relative would not otherwise have done any similar act⁴².
35. Unfortunately the decisions in *Owen v Brown*, *O'Brien v Harris* and *Warrilow v Warrilow* do not appear to have been brought to the attention of Underhill J in the more recent case of *Huntley v Simmonds* [2009] EWHC 405 (QB). In this case Underhill J rejected the entire claim for time spent by family members visiting the claimant whilst he was in hospital accepting the defendant's submission based upon *Havenhand* that no allowance should be made for 'normal hospital visits arising from family affection and not [made] for the purposes of providing services which the hospital did not provide'⁴³. The claimant's care expert had justified some allowance for care during hospital visits on the basis that the family needed to be present in order to 'provide information and support to the clinicians as required' and because 'they were concerned about his safety'. Although these justifications might seem objectively reasonable, no direct evidence was called on this aspect and the claimant had been in a coma for much of the period he was in hospital. Interestingly when disallowing the claim under this head Underhill J purportedly relied upon the endorsement of *Havenhand* in *Evans v Pontypridd Roofing Ltd*³. However, in *Evans* it was the defendant's counsel, Christopher Purchas QC, who was relying upon the case of *Havenhand* to support his submissions and there was no express endorsement of a principle arising from *Havenhand* to the effect contended. Indeed May LJ (with whom the Rix and Ward LLJ agreed), specifically held that at paras 30-31 that care did not have to be limited to a stop-watch calculation of actual nursing or physical assistance.

42 Per Langstaff J at para [159]: 'Care is not only physical labour: time has its cost, and if time is devoted which would not otherwise be, and meets the reasonable needs of an injured party, it deserves recompense'.

43 It should be noted that even in *Havenhand* some allowance was made for services provided, it was just that the award was reduced by the level of ordinary social contact which would have occurred anyway.

Deductions to Take Account of Pre-existing and Normal Parental Care

36. In accordance with normal tortious principles a claimant may only recover for the additional care which has been provided over and above that which would have been provided in any event. But where care would otherwise have been provided at no cost to the claimant due to pre-existing injuries it may not be appropriate to deduct a notional allowance to reflect the value of such care⁴⁴. Further when assessing future loss in respect of a severely injured child it may not be appropriate to deduct 'normal parental care' from the costs of the future paid care where a 24-hour care regime is required⁴⁵. It remains a moot point whether or not the parental care that would have been provided in any event should always be deducted from past gratuitous care. For example, it may be argued that time which would have been spent performing enjoyable activities such as playing football in the park or supervising games or homework should not be used to offset the demanding one-to-one physical nursing care required to look after a severely brain damaged child. In other words the 'care' that is now required may be of a very different nature and not truly comparable to the care (or more usually supervision) that may have been required before. Also, parents with multiple (uninjured) children may be able to supervise them all at the same time without difficulty and/or carry out a number of activities at the same time eg supervise children whilst cooking or cleaning. However, a severely disabled child may need constant attention and to deduct the whole time that would have been spent looking after the child whilst looking after other children and/or performing other activities at the same time might be considered to be unfair.

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44 *Sklair v Haycock* [2009] EWHC 3328 (QB).

45 *Stephens v Doncaster Health Authority* [1996] Med LR 357; *Iqbal v Whipps Cross University* [2007] LS Law Medical 97