

Grieving process

Richard Edwards outlines a case that could help family members to receive bereavement damages

Since 1996, criminal injuries scheme compensation awards have been reduced by the full value of payments made for the same injury, whether flowing from another similar scheme, criminal proceedings, or from a civil claim for damages. The relevant rule is found in paragraph 48 of the 2008 Scheme - and this received consideration in a recent case that came before the First-tier Tribunal. The outcome reached will be of interest to other practitioners working in this area.

The application arose from a tragic set of circumstances. In the early hours of 27 November 2010, David Gaskell was driving a stolen Audi Q5 in Liverpool city centre. The vehicle was being tailed by an unmarked police car, and as it came to a halt at a set of traffic lights, police officers attempted to box the stolen vehicle in. In a bid to escape, Gaskell mounted the pavement.

Two officers struck the windscreen with batons and tried to pull the driver from the vehicle. But Gaskell managed to drive off, heading the wrong way up two one-way streets, and described by witnesses as having bulldozed his way through the traffic, striking numerous vehicles and causing pedestrians to jump for cover. The vehicle then headed for the two-lane, one-way Churchill Way flyover, heading east against the flow of traffic.

Two months earlier, Andrew O'Neill had started the second year of his degree in building surveying, having completed the first year at Ulster University. That night, he had been

out with friends in Liverpool city centre, and was on the pedestrian crossing where Dale Street meets Churchill Way, with the green man showing in his favour. Gaskell, without slowing, drove the stolen vehicle at him.

The impact sent Andrew's body 25 metres in the air, causing massive multiple injuries, and he was pronounced dead on arrival at hospital. Gaskell, who had previous convictions for aggravated vehicle taking, was convicted of causing death by dangerous driving and sentenced to 9½ years' imprisonment.

In sentencing him, the Recorder of Liverpool, Judge Henry Globe, described this as 'almost as bad as any case could be'.

He continued: 'I am satisfied that your offending is in the most serious category. It encompassed driving that involved a deliberate decision to ignore and a flagrant disregard for the rules of the road and apparent disregard for the great danger being caused to other people'.

I was instructed by Andrew's parents, and submitted claims for compensation to the insurers of the vehicle and the CICA.

The CICA claim

As Andrew was over the age of 18 and unmarried, no claim for bereavement damages could be made to the insurers. But these restrictions did not preclude recovery of bereavement damages under the criminal injuries scheme. The civil claim was therefore limited to funeral, probate and travel expenses, plus gifts for thirteen family members and dependency (in essence, the benefit of care and assistance lost by the parents and Andrew's stepfather). The criminal

injuries claim was restricted to the bereavement award.

At first instance, and on review, the CICA claim was rejected under paragraph 11 of the scheme, on the basis that the authority was not satisfied the death was caused by the vehicle being used as part of a deliberate attempt to cause injury. That issue is still to be resolved and will be dealt with at a later hearing. The First-tier Tribunal agreed to deal with the question of whether or not paragraph 48 of the scheme would apply as a preliminary issue. It had been submitted that this was the most desirable way to deal with

matters, because the paragraph 11 issue would require the attendance of police witnesses and involve lengthy and complex submissions, and that hearing was likely to be attended by Andrew's parents, who would need to travel over from Northern Ireland. Paragraph 48 of the Criminal Injuries Compensation Scheme (2008) provides:

(1) An award payable under this Scheme will be reduced by the full value of any payment in respect of the same injury which the applicant has received, or to which he or she has any present or future entitlement, as a result of; ...

(c) an order by a civil court whether in the United Kingdom or elsewhere for the payment of damages; ...

(e) a settlement of a claim for damages, compensation or both on terms providing for the payment of money.

The authority contended that since the full value of the civil award would exceed the bereavement award payable under the scheme, the effect of paragraph 48 would be to reduce the CICA award to nil.

On 15 November 2012, the matter came before the First-tier Tribunal chaired by Judge de Vos and assisted by two panel members. On behalf of the parents, it was submitted the CICA's interpretation of the scheme was wrong, and that paragraph 48 did not apply - whether one adopted a literal or a purposive approach. It was also submitted that the application of the authority's interpretation would produce absurd outcomes.

The Literal Approach

For the purpose of this claim, it was submitted that the key words in paragraph 48(1) were 'the same injury' and also the reference to payments received by 'the applicant'.

On behalf of the parents, it was



contended that the same injury for the purpose of the application was the bereavement award (as it is defined in paragraph 39 of the scheme). This award was for the grief and sorrow suffered by the parents. There was to be no payment in respect of that injury in the civil claim. The civil claim was for financial losses only, and they arose from the death of Andrew, not from the grief suffered by his parents. Paragraph 48 therefore had no application.

It was further contended that paragraph 48 was concerned only with payments received by the applicants. In the civil claim, the schedule of loss set out claims for the estate (funeral and probate expenses) and gifts for beneficiaries, eleven out of thirteen of whom were not CICA applicants. This therefore wholly undermined the authority's argument that the full value of the civil award must be taken into account. It was acknowledged that this would open up the question of whether or not the proportion of the award that would go to the applicants should be deducted. But this was dealt with by the submission that those payments (the claims for dependency and gifts) were not payments in respect of the same injury, but rather, compensation for financial loss arising from death, as opposed to bereavement.

The Purposive Approach

On behalf of the parents, it was contended that the purpose of paragraph 48 was to do no more than preserve the principle that there should be no double recovery. This was a well known and understood principle, with a proper basis in the common law. The position advanced by the CICA went well beyond this, and was based on a misinterpretation of the scheme.

Absurd outcomes

If the CICA were right, then on behalf of the parents it was contended that in the two following scenarios, paragraph 48 would require the deduction of the full civil award, and that could not be sustained.

Scenario One

Imagine a similar situation to that faced by Andrew's parents, but slightly adjusted so that again the CICA application was still restricted to the bereavement award, and only a claim for funeral expenses was made to the insurers. If the authority was correct, then the bereavement award would have to be reduced by the full cost of the funeral.

One absurd effect of this would be to encourage applicants such as Andrew's parents to claim for the full cost of the funeral from the authority, instead of the tortfeasor. This did not accord with the general desire to reduce the burden on the limited resources available to the Criminal Injuries Scheme.

Scenario 2

Again using a similar situation, but this time the only adjustment was that the civil claim would be restricted to gifts for other family members, rather than the applicants. If the authority's position were right, then the parents would lose the full bereavement award, despite not being entitled to recover damages

elsewhere. One effect of this could see different family members racing against each other to put in a claim first - and this was particularly undesirable.

The outcome

The arguments advanced for the parents were accepted by the tribunal, and a summary of review was given, which stated: 'The Tribunal accepted the submission by the appellant that to apply paragraph 48 in the circumstances of this appeal would potentially lead to absurd outcomes and would not result in a double recovery'.

Reference was also made to the non-availability of bereavement damages in the civil claim. Under Section 1A of the Fatal Accidents Act 1976, bereavement damages are restricted to marital or civil partners, or, where the deceased victim is a minor, to his parents if the child is 'legitimate', or the mother only if the child is 'illegitimate'. The bereavement award is presently £11,800 under the 1976 Act.

This case will help parents such as Andrew's recover bereavement damages, and thereby escape the harsh effect of the restrictions placed upon grieving family members under the Fatal Accidents Act. But the apparent acceptance that paragraph 48 intends only to preserve the principle against double recovery could also present wider opportunities.

The case has now been adjourned for a further hearing to consider the applicability of paragraph 11.

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