Features

Claiming for special education needs – state versus private provision

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The State provides schools and education for the general population and also provides additional help for those with special needs, but it often does not cater adequately for them. Can the claimant recover damages for his additional educational needs following a brain injury?

If as a result of an injury for which the tortfeasor is liable a claimant requires special teaching or educational support, there is no reason why a tortfeasor should not pay for it pursuant to tortious measure of damages, namely to put the claimant in the position he would have been in but for the accident. However, the nature and extent of the State's obligations to provide for a child's special educational needs means that in practice it is not always easy to determine whether and to what extent the claimant has sustained any loss.

For the sake of brevity, this article deals with special educational needs provision for those of compulsory school age. Practitioners should note that many of the State's obligations extend beyond school age to further and higher education. It should also be noted that in addition to special educational provision, the State can be under an obligation to provide ancillary nursing or therapeutic support. It may not be clear whether it is the local education authority (LEA) or the local authority with responsibility for the provision of care that has the duty to fund the same. Again, the issues that arise here are not considered in detail. However the same arguments as discussed below and in the context of care claims arise by analogy.

The interaction between a complex statutory regime imposing myriad duties on the State and the tort victim's entitlement to compensation on the tortious measure of loss has been the subject of numerous decisions in the context of claims for the cost of care. In contrast, for reasons explored below, there is a dearth of authorities on the issue of claims for the cost of the provision of special educational needs. Whilst the care cases provide

useful illustrations of the court's thinking on such issues, their use is naturally limited by the fact that a different statutory regime is engaged, placing, as the case may be, more or less onerous obligations on the LEA than on a local authority in the context of care.

The statutory regime

The State has wide ranging and complex obligations for the provision of special educational needs. This framework is set out in the Education Act 1996. One important principle to be kept in mind is that, unlike the provision of care, the State has no power to charge pupils for education.

The LEA must carry out an assessment of a child's educational needs if it considers that the child has, or probably has, special educational needs (section 323 Education Act 1996). If following such an assessment it is necessary for the LEA to determine the special educational provision which any learning difficulty a child has may call for, the LEA is required to make and maintain a statement of special educational needs (SSEN) (section 324 Education Act 1996). Such a determination is usually only required in the more severe cases of learning difficulties or disabilities. It is likely that in the case of brain injury victims the learning difficulties the child has will be sufficiently serious to warrant an SSEN.

A child has a direct right to receive the educational provisions set out in the SSEN (section 324(5) (a) Education Act 1996). The LEA is required to meet the needs of those with special educational needs. Further those needs should normally be met in mainstream, as opposed to specialist, schools. An LEA's duties extend to an obligation to pay the fees for private schools where it is appropriate that educational provision be made at such a school (section 348 and section 517 Education Act 1996). If a parent selects a private school and it can meet the child's special needs, the parent's choice should be agreed unless it is much more expensive (*Wardle-Heron v London Borough of Newham and the Special Educational Needs and Disability Tribunal* [2004] ELR). The mandatory requirement for LEAs to provide the educational services set out in an SSEN applies unless the child's parents have made 'suitable arrangements' for their child's education (section 324 (5) (a) Education Act 1996).

Parents have the right to appeal an assessment of their child's special educational needs to the Special Educational Needs and Disability Tribunal (SENDIST) (section 336 of the Education Act 1996). A decision of SENDIST is amenable to judicial review.

Thus the State has extensive duties to provide special needs education to those that need it. Moreover, not only is the State obliged to provide for a child's special educational needs, there is in place a system for challenging whether the State is complying with that duty, namely the parents' right of appeal to SENDIST and thereafter the right to judicial review.

Comparison with care claims

As mentioned above, unfortunately there is a dearth of authorities on claims for the cost of education. As a result the authorities related to care are a useful guide to the likely approach of the court. As with the care cases, a key problem that presents itself is the risk of double recovery if the claimant recovers the cost of private educational provision and then in fact avails himself or herself of the same provision from the public purse.

The high watermark in the care cases was *Freeman v Lockett* [2006] EWHC 102; [2006] PIQR P23 in which Tomlinson J stated that the "purpose of an award of damages against a tortfeasor would in these circumstances be to relieve the victim of his negligence of the necessity to resort to state funding of his or her care". In *Crofton v NHSLA* [2007] EWCA Civ 71; [2007] 1 WLR 923 the Court of Appeal rejected the general application of such a wide principle. However, the Court of Appeal appears to have accepted that the decision in *Freeman* was correct, on the grounds that the claimant in that case had indicated that if she received damages for the full cost of care she would not seek public funding. This would thereby eliminate the risk of double recovery. The Court of Appeal in the case of *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145; [2009] WLR 737 went as far as to hold that there is no reason in policy or principle why a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. This was with the caveat of "provided that there is no real risk of double recovery".

Likely claims

So in cases where a claimant's educational needs are being met by the State, where there is no suggestion that such needs will not be met in the future, and where the claimant has not indicated a wish to seek the provision of special education elsewhere, it seems likely by analogy with the care cases that a claim against the tortfeasor for the cost of special educational services would represent double recovery.

On the other hand, three circumstances where a claimant may have a legitimate claim for the cost of special educational services appear to be where:

- The claimant's special educational needs are being met but her intention is to seek privately funded education;
- The claimant alleges that those needs are not being met by the State *and* the LEA refuses to fund the additional cost of the alternative arrangement proposed by the claimant; or
- The claimant's special educational needs are being met by the State and she has no present intention of funding her education privately, but there is a concern that the State may not meet its obligations in the future.

It may be that although a parent does not dispute that his or her child's educational needs are being met by the educational provision funded by the State, they nevertheless wish to educate

their child either at a private fee paying school or at home. The claimant's wishes (expressed through his or her parents) are accorded considerable weight within the applicable statutory regime. As long as a proposed independent school or home teaching arrangement reasonably meets the claimant's special educational needs, an award of damages would enable his or her parents to make such 'suitable arrangements'. Therefore it is possible for a claimant to clearly set out privately funded educational provision he or she intends to rely on, such as to bring the claim within the principles set out in *Peters* [2009] EWCA Civ 145; [2009] WLR 737.

A claimant may argue that his or her educational needs can only be met at a fee paying school and seek damages to fund the same, and the defendant may argue that the claimant's special educational needs can be met at a mainstream school with some top-up provision of education or ancillary care. The issue of top-up care was considered by the Court of Appeal in *Sowden v Lodge* [2007] EWCA 1370; [2005] 1 WLR 2129; [2005] 1 All ER 581; [2005] Lloyd's Rep Med 86. It is clear that the defendant bears the burden of establishing that such a top-up scheme would be practicable. The reasonableness of the parents' views may turn upon their own education, their standard of living, the plans they had for the child if he or she had not been injured, and what type of education any siblings are receiving or would in due course receive.

On the other hand a claimant may argue that the special educational provision set out in the SSEN is inadequate to meet his educational needs but nevertheless he wishes to continue in a mainstream state funded school. In *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 the past cost of employing one to one teaching support was awarded.

A claimant may incur legal costs in appealing decisions of the LEA with regard to the assessment of his or her special educational needs. Such costs are generally not recoverable from the LEA within the SENDIST appeal process. However, these costs can be claimed from the defendant tortfeasor where it has been found that the claimant's reasonable educational needs are not being met by the present state provision. It is perhaps for that reason that reported cases relating to claims for the cost of education have been concerned with claims for the legal costs associated with an appeal to SENDIST against the LEA's SSEN. In *Haines v Airedale NHS Trust* [May 2, 2000], QBD (unreported) it was held that such legal costs were not too remote as disputes with the LEA regarding special educational provision were readily foreseeable. In *Smith* [2008] EWHC 2234 the judge also awarded the cost of two tribunal appeals. The claim for future education costs was adjourned pending the outcome of the appeals and in the event that the LEA failed to meet the cost of the appropriate school.

Many claims are settled by parties agreeing indemnities or reverse indemnities to cover future education costs or the cost of challenging LEA decisions as to the provision of education. Such settlements can help to protect a claimant against any adverse change in the LEA's provision of special educational services in the future. However, it is doubtful whether the court can order such an indemnity if the defendant does not agree to it. Langstaff J certainly took the view that the court does not have such a power when approving a settlement in the case of *De Bono v Wellcare Nursing Home* [February 3, 2011] QBD (unreported), where he commented that Flaux J was only able to order such an indemnity in *Burton v Kingsbury* [2007] EWHC 2091 QB because the defendant consented to it.

If it is argued that the child's educational needs are not presently being met by the state funded provision, it is an obvious pre-requisite in such cases to obtain expert evidence that supports such a proposition. In most cases the appropriate expert will be an educational psychologist. Of course in line with the cases of *Smith* [2008] EWHC 2234 and *Haines* [May 2, 2000] QBD (unreported), if an educational psychologist is of the view that a claimant's special educational needs are not being met, a defendant may well argue that this is a sound basis for an appeal to SENDIST and that this route should be taken in the first instance. Indeed defendants may argue that as SENDIST is a specialist tribunal experienced at assessing a child's special educational needs, a civil court assessing damages in a personal injuries action is not in a position to second guess its assessment.

Conclusion

A claimant's special educational needs may often be met by the State as a result of various factors, including the depth and breadth of the State's obligation to make provision for a child's special educational needs; its duty to respond to the wishes of children as expressed through their parents; and the availability of a specialist legal process of review which itself is subject to judicial review. Recognition of this, and the fact that legal costs relating to educational provision are recoverable, account for the dearth of authority on the issues. Claimants have instead settled claims with indemnities as to the cost of future education and/or legal costs of appeals against the LEA. However, as the authorities on care demonstrate, where a claimant indicates that he or she reasonably wishes to undertake his or her education privately and not rely on the State, or where it can be established that the State provision does not meet his or her reasonable needs, the cost of education is likely to be recoverable. ■