Reverse Indemnities—Whether and When to Give Them

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Robert Glancy QC looks at the issue of reverse indemnities and whether or not they are appropriate. He reviews the case law in the area and discusses a recent case in which he was involved. He concludes that the risk of double recovery may just be one that insurers are going to have to accept. The alternative risks under-compensating a seriously injured claimant.

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Although the issue of mitigation of loss by obtaining state funding has been the subject of considerable judicial discussion in recent years since the case of *Sowden v Lodge*[1] and might have been thought to have been resolved finally by the case of *Peters v East Midlands SHA*,[2] the ramifications of these decisions still rumble on and are still the subject of considerable discussion in settlement negotiations in particular. Since the *Peters v East Midlands SHA* [2009] EWCA Civ 145 decision, it is really not open to a defendant to argue that a failure to seek or obtain state funding in order to relieve the defendant of the burden of paying for care for an injured claimant is a failure reasonably to mitigate one's loss although such contentions are still pleaded on occasion. But the Court of Appeal in *Peters v East Midlands SHA* [2009] EWCA Civ 145 made it clear that the claimant's right to decide that the defendant tortfeasor should pay for his or her care needs rather than the claimant becoming dependant on the state was, nevertheless, conditional upon there being no real risk of double recovery.[3] The Court of Appeal, of course, accepted that it was trite law that the claimant cannot recover twice for the same loss. The judge at first instance in *Peters v East Midlands SHA* [2009] EWCA Civ 145 had rejected an undertaking offered through the claimant's Deputy that she would not seek statutory funding for the claimant's care and accommodation. This was because the judge was not satisfied that there was any proper legal basis for that undertaking and it certainly could not bind her successors. The judge at first instance regarded any such undertaking as impractical and undesirable and the Court of Appeal agreed that the undertaking was unsatisfactory for the reasons that he gave. The judge at first instance had pointed out that the Deputy had not identified the terms of any qualification to the undertaking such as the circumstances in which she might be released from it, nor was she even sure that the terms of her appointment gave her the authority to give such an undertaking. She further accepted that any undertaking that she offered would be personal to her and could not bind her successor(s) as Deputy.

At [62] of the judgment in *Peters v East Midlands SHA* [2009] EWCA Civ 145, the Court of Appeal stated that if it had been necessary to do so, they would have held that the judge was entitled to take the view that the possibility of double recovery was effectively eliminated by the judge's finding that, if the tortfeasors paid the care and accommodation costs, the Deputy and her successor(s) would not require the Council to discharge its statutory duty under s.21 of the 1948 Act "in the absence of some wholly

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[1] *Sowden v Lodge* [2004] EWCA Civ 1370; [2005] 1 W.L.R. 2129.

[2] *Peters v East Midlands SHA* [2009] EWCA Civ 145; [2010] Q.B. 48.

[3] See, e.g. Dyson L.J. (as he then was) at [53]–[56] of *Peters v East Midlands SHA* [2009] EWCA Civ 145.

unexpected development which compels her to abandon her stated intention to rely on private funding". The Court of Appeal pointed out that such a finding was made in *Freeman v Lockett*[4] at [34] and was said in *Crofton v NHS Litigation Authority* at [92][5] to be a proper finding to make. However, the Court of Appeal stated that they could see that this was not an entirely satisfactory way of dealing with the possibility of double recovery. The judgment of the court stated:

> "Take the present case. For example, what would happen if (contrary to the Judge's expectation), (the Deputy) or her successor(s) did seek provision of care and accommodation from the Council in circumstances which were not 'wholly unexpected'? What is a 'wholly unexpected development'? Who would be the judge of whether a wholly unexpected development had occurred? It is not at all obvious how this would be policed and what rights of recourse, if any, the Defendants would have if (the Deputy) or her successor(s) did seek provision from the Council in circumstances which were not 'wholly unexpected'."

The Court of Appeal came to the view that the undertaking was not, therefore, the proper way to deal with the possible difficulty of double recovery but they did consider an offer of an undertaking to the Court of Appeal made by the Deputy that she would notify the Senior Judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of the Court of Appeal and that of the judge at first instance and also seek from the Court of Protection a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under s.21 of the 1948 Act could be made without further order, direction or authority from the Court of Protection and also provision would be made for the defendants to be notified of any application to obtain such authority and the defendants would be given the opportunity to make representations in relation thereto. This, the Court of Appeal felt, placed the control over the Deputy's ability to make an application for the provision of a claimant's care and accommodation at public expense in the hands of a court and gave the defendant the opportunity to seek to persuade the Court of Protection not to allow any such application to be made because it was unnecessary and contrary to the intendment of the assessment of damages. The Court of Appeal accordingly accepted the undertaking that was offered and therefore stated that the risk of double recovery was no reason for rejecting the judge's decision to award the claimant the full cost of care and accommodation.

Since that decision, certain difficulties have arisen in relation to the undertaking that the Court of Appeal accepted and which they thought was a satisfactory way of policing the possible risk of double recovery. First, the Court of Protection itself has indicated that it was not happy to adopt this role whereby it had to police such situations and that it did not regard it as part of its function to do so. The Court of Protection was concerned that this would add to the already considerable burden that it bears dealing with all the other issues that come before it. Secondly, those who act as professional Deputies have expressed concern that such undertakings add to their already considerable burdens and that they are not content that this obligation to the court, which may last many decades in some cases, is held over them and indeed binds their successors if any. One point made by the Deputies, for example, is what would happen if a successor Deputy did not realise that he or she was bound by this undertaking and made an application for public funding without complying with the undertaking. Would this expose that Deputy to possible proceedings for contempt of court? Such a proposition is often suggested by defendants in negotiation. Thirdly, there is the question of the costs of such applications, particularly if they were contested. If, say, the Deputy made such an application to the Court of Protection and the defendants appeared by Counsel to argue that such an application should not be granted and if the Court of Protection took the view that the application indeed should not be granted, who would pay the costs of the parties making the application or resisting

[4] *Freeman v Lockett* [2006] EWHC 102 (QB); [2006] P.I.Q.R. P23.
[5] *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71; [2007] 1 W.L.R. 923.

the application? The defendants' costs, in those circumstances, may run into many thousands of pounds. Would there be any need for expert evidence in regard to whether the application was based on a "wholly unexpected development" or whether some cheaper solution could reasonably be adopted? Fourthly, whilst this mechanism may or may not work in relation to those who are lacking capacity and who are therefore protected beneficiaries, what about the situation where a claimant is not under the Court of Protection even though he or she would be entitled to public funding for care or accommodation? Such a situation may well apply, for example, in the case of a spinal cord injury.

For these principal reasons, some practitioners advising claimants in situations of this kind have advised that no such undertakings should be offered. It seems clear that the court does not have the power to impose such an undertaking unless it is voluntarily offered. What is less clear, however, is how a court would deal with the potential risk of double recovery if the claimant and/or his Deputy simply refused to offer the court such an undertaking but the claimant and/or his Deputy just gave evidence to the court that they would not seek public funding at all in the absence of a "wholly unexpected development". Whilst this was accepted in *Freeman v Lockett*, as the Court of Appeal and the judge at first instance pointed out in *Peters*, there would be real difficulties in policing such a situation, particularly if the application for public funding was made many years after the event. The solution proposed by the Court of Appeal in *Crofton* was that the multiplier ought to be discounted if there was a risk of double recovery. With the greatest respect to the Court of Appeal in that case, it is not the general view of practitioners in the personal injury field that this is a fair or reasonable solution. It is difficult to see upon what rational or principled basis the multiplier can or should be so reduced. Any such reduction would inevitably be arbitrary and potentially unfair, particularly to a claimant. Even if care were dealt with on a lump sum basis, it would mean that the claimant would probably run out of funds to support his care before the end of his predicted life expectancy. Ironically, he would then, of course, be forced back on to public funding to pay for his care whether he wanted to seek it or not. If the multiplier were reduced in relation to an accommodation claim on the same basis then the difficulties that already arise for a claimant to purchase a suitable property which the court has deemed to be a reasonable property for him to buy as a result of the effect of the *Roberts v Johnstone* formula would be greatly increased. Again, in the case of a genuine claimant, it is difficult to see why such difficulties should be increased simply because a judge takes the view that there is a risk that the claimant will seek public funding despite his honest assertion that he will not.

But, of course, as far as care is concerned, the position is even more difficult in the modern era where most orders for compensation for care needs are made in the form of a periodical payments order. In those circumstances, the judge clearly cannot, by definition, reduce the multiplier and to reduce the periodical payment by a proportion to reflect the risk of double recovery would necessarily involve under-compensating the claimant. For a claimant who is seriously injured and who needs every penny he can get to fund his care, this is clearly an injustice.

The problems that these issues create arise even more acutely in cases where the claimant's damages are reduced by contributory negligence. A good example of this arose in a case in which I was recently involved called *L v M*. In that case, the claimant, who was very severely brain damaged in a road traffic accident, had his damages reduced by 33.3 per cent to reflect contributory negligence and this settlement was approved by the court in a split trial. The matter then proceeded to an assessment of damages and numerous experts' reports were prepared to deal with that issue. The claimant had, ever since his accident, resided either in hospital or in a rehabilitation unit and latterly in a residential care home funded entirely by the local authority. Through his claim, certain top-up care has been provided at the home. The family were not satisfied with the standard of care at the home and, in any event, thought that the claimant would progress more if he were in his own home with his own team of carers. This view was supported by their experts. For their part, the defendant's legal team did not seriously dispute that it was reasonable for the family to wish the claimant to be in his own home but they questioned the genuineness of the family's

intentions. Further, they were concerned about the risk of double recovery but the parties were unable to agree in negotiation what the definition of double recovery would be in this situation. The claimant's position was that double recovery would not arise unless and until the claimant received public funding over and above the 100 per cent figure for care/case management whatever that was agreed to be or whatever the court decided it should be. Accordingly, the claimant's position was that the defendant should pay a periodical payment which amounted to two thirds of the agreed or awarded cost of care/case management and double recovery would not arise unless and until the claimant recovered more than the remaining one third from public funding. The defendant's position was that double recovery would arise if the claimant recovered any more than the two thirds figure of the periodical payment (whatever that may be) and thereafter they were entitled to two thirds of the public funding which should be remitted to them. The court refused permission to the defendant to call an expert witness who would advise the court as to what the probabilities were of support from the local authority or the Primary Care Trust and there was no appeal against this interlocutory decision.

In the end, the court approved a settlement that had been agreed between the parties whereby the claimant would have a care regime based upon him living in his own home with his own care team, that the defendant would pay a periodical payment which represented two thirds of the agreed sum for care and case management and that the claimant's Deputy would give an undertaking to pay to the defence insurer any sums obtained from a Primary Care Trust or a local authority (including any successors in title or function or agents of such body) in respect of the claimant's care and case management in excess of the present value sum representing one third of the total agreed sum. That said present value sum, of course, had to be recalculated each year by reference to the same indexation provisions as applied to the periodical payments order. The undertaking also provided for a mechanism whereby if the claimant's Deputy wished to be released from its undertaking then the Deputy would give notice in writing of that wish to the defence insurer and if it was agreed then the Deputy would be immediately and irrevocably released from its undertaking. If the defence insurer was not prepared to release the Deputy from the undertaking, the issue of whether or not the Deputy should be released from it was agreed to be determined at a hearing before a judge of the High Court when the claimant's Deputy and the insurers could adduce evidence and make representations. The Deputy was defined to include any successors in title under the Mental Capacity Act 2005 or subsequent legislation. It was also provided that in the event that the current Deputy ceases to be the claimant's Deputy, then the Deputy would be automatically released from the undertaking when the appointment ceased. It then stated: "For the avoidance of doubt, at such time the replacement Deputy shall be bound to continue the undertaking or apply to the court pursuant to paragraph 4 above". To what extent a replacement Deputy could be held to be bound by an undertaking that he or she had not given to the court remains unclear.

It is my view that where there is a Deputy in place and particularly where there is a finding of contributory negligence, such an undertaking is clearly the most that any claimant could be required to give. With respect to the argument put forward by the defendant's legal team in that case, I cannot see how double recovery arises until more than 100 per cent of the agreed or awarded figure for care/case management is recovered. In such a situation, the claimant clearly cannot give such an undertaking because he or she lacks capacity. Therefore, the Deputy is the only individual who can give such an undertaking even though being bound by such an undertaking is obviously an unsatisfactory situation for the Deputy or his or her successors in title. Whether such an undertaking provides any real protection to a defendant insurer must be doubtful. Presumably the insurer is relying upon the integrity of the Deputy reporting any such application for public funding to the insurer and complying with the undertaking. This may be all very well in the case of a professional Deputy but, in many cases, the Deputy will be a member of the claimant's family and the chances of that person complying with the undertaking years down the line may be somewhat less than if it were a professional Deputy who has professional obligations. Further, a non-professional

Deputy may well take the view that the chances of the defendant's insurer finding out about any such application for public funding, particularly if made many years after the event, are sufficiently slim so that the odds are that the insurer will never know about it and therefore there is no real need to comply with the undertaking. Also, even if the undertaking is given by a professional Deputy, there seems nothing to prevent the claimant's family terminating the appointment of that Deputy shortly after the approval of the settlement and, as stated, it must be doubted as to whether any such undertaking could be enforced against whoever else was appointed as the Deputy. Moreover, as mentioned already, issues of the cost of funding any such application to the High Court to be released from the undertaking would be matters of great concern.

Having said that, the undertaking does at least give insurers some comfort and protection albeit that it may not be complete. In the case of a claimant who is not a protected beneficiary, that protection is going to be even less and bearing in mind that insurers do not, one would imagine, have the time or resources to monitor these agreements or undertakings they may well come to the conclusion that any such protection is illusory rather than real.

We therefore seem to be in a position at the current time where neither the *Crofton* or the *Peters* solutions are satisfactory or fair and the *Freeman v Lockett* basis for dealing with the risk of double recovery is not usually acceptable to insurers who, understandably, have concerns about either the genuineness of the stated intention not to seek public funding or the impossibility of policing such a situation even if genuine at the time when the statement is made. The court does not have the power to order such an undertaking to be given as part of its award and there appears to be no decision, as yet, which deals with a situation where the defendant raises the risk of double recovery before a judge but the claimant simply refuses to give such an undertaking. There is a disagreement as to how "double recovery" should be defined particularly in a situation where there is a finding of contributory negligence although it is my view that it is very unlikely that a court would disagree with the definition of it that I put forward in *L v M* and which was approved implicitly by the High Court in that case. It is agreed on all sides that the claimant cannot and should not recover twice for the same loss and the Court of Appeal in *Peters* did not think that the *Freeman v Lockett* solution was "an entirely satisfactory way of dealing with the possibility of double recovery". I would argue that although that is not an entirely satisfactory way of dealing with this problem for the reasons stated, what is even less satisfactory is in any way to penalise a claimant (particularly if he is a protected party) for not giving an undertaking to the court. Why should, for example, Mr L receive a lower periodical payment for care and case management simply because his legal team and/or his Deputy do not think it right to give such an undertaking to the court? The legal team and/or the Deputy may be taking an unreasonable view but it surely cannot be fair or just to penalise Mr L himself for that reason. It is for these reasons that many practitioners take the view that the *Freeman v Lockett* solution is, at the end of the day, the only reasonable way for the court to proceed in such a situation and that defendants' insurers will simply have to bite the bullet and accept that there is going to be a risk of double recovery in the future about which they can do little. It is also the view of such practitioners that even if an undertaking is given as it was in *L v M*, the protection afforded to the insurers is actually very little in reality. If, years down the line, an unscrupulous Deputy is determined to act improperly and wrongly by seeking public funding over and above the periodical payments order or the 100 per cent figure, it is difficult to imagine many cases in which the insurer will either know about this or be able to do anything effective about it in practice. In a sense this is simply an unfortunate consequence of our long established and well entrenched system of making one award of damages which will apply for the rest of the claimant's life. If, for example, the claimant receives a substantial sum of money for future therapy but does not avail himself of such therapy and simply pockets the money, the same injustice will occur to insurers and, except in a very rare case, the same inability to rectify that injustice will also occur. If the claimant receives a substantial sum whether by lump sum or periodical payment for future loss of earnings and then finds

that he makes a "wholly unexpected" recovery or is simply very fortunate to find employment that neither he nor the court expected that he would find, the defendant will have over compensated the claimant and, short of proving fraud at the outset, simply has to put up with that situation. The only alternative to this system would be periodic reviews of awards of damages which have been rejected for good reasons. As long as one adheres to the principle that there must be finality in litigation, it may be that insurers will simply have to accept that there is a risk of double recovery occurring in the future and that there is little that they can do about it.

One possible solution that is suggested by some practitioners in this field is that in a situation where the claimant requires a substantial annual payment for care/case management but is only receiving a proportion of his damages, rather than give the sort of undertaking referred to and rather than have the problems at trial that have been referred to in dealing with the risk of double recovery, the claimant ought to argue that his damages should be paid by way of a lump sum payment rather than a periodical payments order. Of course, there are a number of disadvantages to such a form of award. It involves the court in making a finding of life expectancy which may turn out to be too short. It puts the burden of investment upon the claimant who may have to cope with the difficulties caused by inflation and taxation. However, the great advantage is that the claimant can then fund his care/case management to the extent of 100 per cent out of his lump sum award until the fund runs dry. How quickly this will happen is, of course, impossible to tell as it is bound up with a number of factors including investment returns, inflation, taxation, earnings of carers and so on. It may also, of course, depend upon whether the claimant lives as long as his projected life expectancy or not. But at least the claimant knows that, for some years to come, he will probably be able to fund the care regime that he needs in full and then, if and when the fund does run dry, he will be able to seek support from the NHS and/or his local authority for his continuing care. His need, by then, would have been clearly established and he should be able to obtain direct payments from the local authority and under the National Health Service (Direct Payment) Regulations 2010[6] from the PCT or its successor in title. This will give the claimant the right to select and employ his or her own care staff which is usually very important to claimants. The High Court recently approved such a settlement in the case of *Nicholson v Willis*.[7] If, after careful consideration, that particular route is the route chosen by the claimant or his Litigation Friend and his legal and financial team, it can be pointed out to the court as it was in that case that either route involves a degree of uncertainty. If one accepts a periodical payments order of a proportion of the cost of the care regime then the claimant is uncertain as to whether the NHS or the local authority will supplement the periodical payments order up to the 100 per cent figure. He will also be subjected to assessments and examinations by those bodies and will be caused anxiety each year when he is reassessed. All this uncertainty can be put off by means of the lump sum route for at least a period of years although, as I have said, one then has the various disadvantages such as inflation, taxation and so on. But a claimant who recovers less than his full award because of contributory negligence is always going to be subject to some anxieties and uncertainties whichever route is chosen so that he and/or his Litigation Friend have to decide which is the lesser of the two evils.

[6] National Health Service (Direct Payment) Regulations 2010 (SI 2010/1000).
[7] *Nicholson v Willis*.