

SPOTLIGHT ON..... collateral benefits in loss of earnings claims

In our latest bulletin, drawing on our experience of reporting in personal injury and clinical negligence claims for over 25 years, we summarise the key areas to bear in mind when considering collateral benefits in loss of earnings claims.

1. The Compensation Recovery Scheme

Remember that under the Social Security (Recovery of Benefits) Act 1997, only those listed benefits designed to replace earnings can be deducted from claims for loss of earnings. The list is to be found in Schedule 2 of the Act, and the benefits typically shown on a CRU certificate as recoupable against the claim for loss of earnings will be Employment & Support Allowance (which replaced Incapacity Benefit and Income Support on the grounds of Incapacity), Jobseeker's Allowance, Industrial Injuries Disablement Benefit (now officially described as Disablement Pension payable under section 103 of the 1992 [Social Security Contributions and Benefits] Act), and Universal Credit (currently being introduced on a phased basis to replace income-based Employment & Support Allowance and Housing Benefit).

Thus the care and mobility components of Disability Living Allowance (DLA) and Personal Independence Payments (also currently being phased in to replace DLA) shown on a CRU certificate cannot be deducted from the claim for loss of earnings, rather these are to be deducted from the claims for care and mobility related expenses respectively. Under the CRU provisions it is also relevant that only benefits paid in the 'relevant' period, being the period from the date of the accident (or date when the benefit was first claimed in the case of a disease) to the date of settlement of the claim or trial, subject to a maximum of five years, can be deducted from the head of compensation to which they relate, in the same relevant period.

Therefore, the continuing receipt of Employment & Support Allowance, for example, cannot be deducted from the future loss of earnings claim. Furthermore, any excess earnings related benefits in the relevant period over and above that required to extinguish the claim for loss of earnings in the same period cannot be deducted from other heads of claim, including any claim for loss of earnings beyond the relevant period and the claim for general damages, which is ringfenced.

Practitioners dealing with industrial disease cases should, however, watch out for lump sum payments such as those under the Pneumoconiosis etc (Workers' Compensation) Act 1979 and the 2014 Diffuse Mesothelioma Payment Scheme which are recoverable under the 1997 Act and are offset against general damages first, with any balance to be applied to any of the remaining heads of compensation.

2. Housing and other benefits not listed

The case of *Clenshaw -v- Tanner [2002] EWCA Civ 1848 (CA)* raised the issue of the deductibility of those benefits not included in Schedule 2 of the Social Security (Recovery of Benefits) Act 1997. In this case the Court of Appeal upheld the decision of the judge at first instance to deduct 70% of the Housing Benefit paid to the Claimant by his local authority from his claim for loss of earnings, on the basis that, but for the Claimant's accident, he would not have been in receipt of Housing Benefit for 70% of his time, being the proportion of his time it was found he would have been working. This follows the general common law rule that a Claimant must give credit for benefits received as a consequence of his injuries as confirmed by the decision in *Hodgson -v- Trapp [1989] AC 807*. The decision in *Clenshaw -v- Tanner* may be extended to other benefits e.g. Council Tax benefit/support receivable in consequence of an accident.

3. Unclaimed benefits

State Benefits which the Claimant has failed to claim are not deductible and are not to be treated as a failure to mitigate loss (*Eley -v- Bedford [1972] 1QB 155*).



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4. Tax credits

Two types of tax credit can be claimed by low earners and families with children, being Working Tax Credit and Child Tax Credit. They are administered by HM Revenue & Customs and the amount of credit payable depends on which elements of the credit the applicant qualifies for and the gross income of the applicant and his/her partner. Applying the principles of common law and the treatment of Statutory Benefits that fall outside the CRU scheme, there is an argument that tax credits received as a result of a reduction in the Claimant's earnings, following an accident, should be brought into account as a deduction from the loss of earnings claim. In practice, the calculation of the deduction required can, however, present difficulties, particularly in the case of couples, where it is necessary to have details of a spouse's/partner's income which might affect entitlement and bearing in mind that some entitlement might have arisen in any event.

5. Redundancy payments

If redundancy arises as a result of a Claimant's injuries then the redundancy payment is deductible in full from the claim for loss of earnings (*Wilson -v- National Coal Board [1981] SLT 67*). Under employment legislation, however, redundancy payments are only supposed to be made when an employee's job has ceased to exist. Accordingly, if a Claimant has been made redundant following an accident it is possible that the redundancy would have occurred in any event. This possibility should be explored, as it will inevitably impact on the calculation of the Claimant's expected earnings, as the Claimant is likely to have found himself looking for alternative employment. Alternatively, if the redundancy has been due to the Claimant's injuries then this may have led to a claim for unfair dismissal, in which case any compensation awarded by an Employment Tribunal might also fall to be deducted as a collateral benefit. Another possibility is that the Claimant's injuries may have led to him volunteering for redundancy, the reasonableness of which may need to be considered by the Court.

6. Company sick pay

Company sick pay, including any Statutory Sick Pay, is deductible in full unless there is an obligation to repay. Many employers now include in their contracts of employment a clause to the effect that, in the event of sick leave being due to the actions of a third party against whom a claim is made by the employee, any sick pay given during the sick leave should be treated as a loan, repayable in the event of a successful claim against the third party. The element of company sick pay, represented by Statutory Sick Pay, should not be recoverable by the employer in such circumstances and, hence, should remain deductible from the loss of earnings.

7. Accident insurance proceeds

The general rule is that payments under such accident or sickness policies are disregarded (*Bradburn -v- Great Western Railway Company [1874] LR 10 Exch 1*) but this is generally where the Claimant has paid for or contributed to the insurance policy. Where, however, the Claimant has not contributed to the insurance policy and instead this has been funded by the tortfeasor, then payments from the insurance policy, sometimes to provide sick pay, will become deductible (*Gaca -v- Pirelli General Plc [2004] EWCA Civ 373, CA*).

8. Charitable payments

Charitable payments are to be disregarded as deductible collateral benefits (*Redpath -v- Belfast & County Down Railway [1947] NI 167*) unless the payment was made by the tortfeasor. Similarly the benevolence of friends and family or an ex-gratia payment by the Claimant's employer (not the tortfeasor) would be disregarded.

9. Ill-health retirement pension

An ill-health retirement pension is not deductible from a claim for loss of earnings and credit is also not required against the loss of pension claim until normal retirement age in accordance with the decision in *Parry -v- Cleaver [1970] AC 1*, confirmed by *Smoker -v- London Fire and Civil Defence Authority [1991] 2 AC 502*.

10. Saved work-related and living expenses

Savings in work-related expenses should in theory be deducted. For self-employed Claimants such expenses ought to be included in their accounts, used as a basis for assessing their loss of net profit, prior to the deduction of income tax and National Insurance. For employed Claimants, however, costs such as those incurred travelling to and from work, will not be included in their pay records. In our experience, when such costs are modest or unknown (see for example *HS -v- Lancashire Teaching Hospitals NHS Trust (2015) EWHC 1376 (QB)*) any saving arising as a result of incapacity is generally ignored but where significant then the Defendant might be entitled to investigate and bring such a cost saving to the Court's attention. Consideration should also be given to savings in living expenses, if material, as a deduction against the claim for loss of earnings. For example, where an accident has caused a lengthy stay in hospital or nursing home, as a minimum there may be savings in food and laundry costs, which would otherwise have been met from the Claimant's earnings, although where the Claimant is still responsible for maintaining a home it is unlikely that any saving in accommodation costs will have arisen.

If you consider that you might require assistance in any personal injury, clinical negligence or fatal accident claim, then please do not hesitate to contact Nick Fail, Jackie Clifford or Peter Whittam, who will be more than happy to discuss matters on a no obligation basis.

