

Criminal injuries compensation for abused children

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An introduction to the topic of compensation for children who have been physically or psychologically abused

Discretionary schemes to compensate the victims of violent crime have been in place in Great Britain since 1964. The original framework provided that compensation would be awarded on a “common law basis” whereby awards were assessed in exactly the same way as if being made by a court—that is, adhering to principles of restitution, seeking to put the victim back, so far as possible, into the same position that they would have enjoyed had the crime and the injury not occurred. Apart from compensation for the actual injuries, awards would therefore also include full and future care costs, provision of therapies, equipment, transport needs, special accommodation, loss of earnings, and future earnings. There was no limit on an award and each case would be assessed on its individual merits.

THE CRIMINAL INJURIES COMPENSATION SCHEME

In 1996, a statutory scheme (the Criminal Injuries Compensation Scheme 1996) was introduced under the provisions of the Criminal Injuries Compensation Act 1995 to replace the earlier discretionary ones, with awards for pain and suffering to be made on a tariff basis with a limit of £250 000 for catastrophic injury and an overall limit of £500 000 in total, inclusive of care needs, loss of earnings, etc. The scheme was revised slightly in 2001, and is now administered by the Criminal Injuries Compensation Authority (CICA).

ELIGIBILITY

Compensation may be paid to an applicant who has sustained a criminal injury after 1 August 1964. If the victim has since died, payment can be made to a qualifying dependant claimant.

A criminal injury is defined as a personal injury directly attributable to a crime of violence. Personal injury includes physical (incorporating fatal) injury, mental injury (being a temporary mental anxiety, medically verified, or a disabling mental illness confirmed by psychiatric diagnosis), and disease.

Mental injury or disease can result directly from physical injury or from a sexual offence, or may occur without physical injury.

It is not necessary for there to be a conviction against the offender, or prosecution, for an award to be made.

The injury must have been sustained in Great Britain. This includes on a British aircraft, hovercraft, or ship, on a lighthouse off the coast of Great Britain, and part of the channel tunnel. If the injury was sustained in Northern Ireland, a different scheme applies (see final section).

TIME LIMITS

The general rule is that the application must be made within two years of the date of the incident.¹ The time limit may be waived where this is considered to be reasonable and in the interests of justice, and this is normally what happens in the case of a child who has been abused.

BURDEN OF PROOF

It is for the applicant to satisfy the CICA on the normal civil burden of proof, the balance of probability, that the injury resulted from a crime of violence. In many cases the evidence will be fairly clear. However, other more complex circumstances of non-accidental injury will give rise to the need for the submission of detailed medical evidence to deal with causation issues.

Awards can be withheld or reduced if the victim provoked or failed to report the incident or fails to cooperate with the authorities at the time or afterwards. In addition the character of the applicant as shown by any criminal convictions can be taken into account in exercising discretion to refuse an award or reduce it. Although unlikely to affect children, these considerations may be relevant in cases involving adolescents.

AMOUNT OF AWARD

The starting point is the Tariff of Injuries. These are graded in levels, with Level 1 representing the minimum award (£1000) and Level 25 representing the

maximum (£250 000). Within each category of designated injury, there are subdivisions, depending on the severity of that injury, and there is also provision in the scheme to create and add new categories. Table 1 gives some examples.

In the event of more serious but separate multiple injuries the applicant will receive the tariff amount for the highest rated description of injury plus 30% of the tariff amount for the second highest rated injury, and where appropriate an additional 15% of the tariff amount for the third highest rated description of injury.

Over and above the tariff, if the applicant has lost earnings or earning capacity for longer than 28 weeks compensation can be awarded. This will apply in the case of children if it can be shown that it is likely that earning potential has been lost. In addition is what is known as the element of compensation for special expenses. These can be in the nature of physical aids and treatment costs, special equipment, adaptations to accommodation the cost of care, and finally Court of Protection costs.

In serious cases, care is usually by far the largest single item in this part of the claim. The cost of care being provided at home by a relative or friend can be assessed by reference to a commercial basis or by comparison with the loss of earnings, if any, suffered by the carer; there is a formula for this to be calculated into the future. However, the CICA is required to reduce the award to take account of social security or other state benefits, or indeed a claims officer may withhold payment if it is felt that benefits may become available or should have been claimed. Another provision of the scheme is that compensation for special expenses will not be paid in respect of anything that is provided by or available free of charge from the National Health Service, local authorities, or other agencies. What is available can be difficult to ascertain because provisions by local agencies vary considerably from area to area and depend on the special needs of the particular individual and on his or her circumstances. Moreover local authorities can provide a clear statement of available provision only after an individual assessment. Unless this covers explicitly all that has been included in the application for special expenses, the CICA may ask for further information or clarification. An additional complication is that local agencies' policies on charging for services are not uniform. While provision for children with special needs is most often free, in some cases a flat rate charge may be made, and in others

Table 1 Examples of some different levels of awards

Physical abuse of children		
Minor abuse (e.g. isolated or intermittent assault(s) resulting in weals, hair pulled from scalp, etc)	Level 1	£1000
Serious abuse (e.g. intermittent physical assaults resulting in accumulation of healed wounds, burns, or scalds but with no appreciable disfigurement)	Level 5	£2000
Severe abuse (e.g. persistent pattern of repetitive violence resulting in moderate multiple injuries such as bruising and minor fractures and/or minor disfigurement)	Level 10	£5500
Severe abuse (e.g. persistent pattern of repetitive violence resulting in significant multiple injuries)	Level 12	£8200
Severe abuse (e.g. persistent pattern of repetitive violence resulting in severe multiple injuries)	Level 14	£13 500
Brain damage—impairment of social/intellectual functions		
Minor brain damage	Level 12	£8200
Moderate brain damage	Level 15	£16 500
Serious brain damage	Level 20	£44 000
Very serious brain damage	Level 23	£110 000
Extremely serious brain damage (i.e. no effective control of bodily functions)	Level 25	£250 000

the charge may depend upon the parents' financial circumstances.

MENTAL INJURY

So far as non-physical injuries or injuries with a "mental" element are concerned, the tariff contains a fairly wide variety of categories. These range from "disabling but temporary mental anxiety, lasting more than six weeks, medically verified", to "more prolonged but not permanent disabling mental illness, confirmed by psychiatric diagnosis". Post-traumatic stress disorder and permanent mental illness, either moderately or seriously disabling, are taken into account, together with psychological symptoms such as anxiety, tension, and insomnia. These must be medically verified, that is to say diagnosed by a registered medical practitioner. A psychiatric diagnosis and prognosis must have been diagnosed or made by a psychiatrist or clinical psychologist. The award tariff varies depending on the period during which it is assessed that the condition is "disabling". Notably, there is also provision for awards to be made in respect of conditions that embrace both physical and psychological injury, for example, infection with HIV/AIDS, loss of fetus, and a range of conditions caused by sexual abuse.

CLAIM PROCEDURE

The claim is made by way of an application form. On receipt, the CICA will write to the police, medical authorities, and any other relevant authority to verify the basic details. The police will be asked to confirm that the injury was reported to them, and whether in their view it was attributable to a crime of violence. In cases where a

number of applicants have brought allegations against the same abuser, the CICA may be willing to deal with the applicants in a group. In these circumstances there may be corroborating evidence in the police files which may assist the CICA in reaching its decisions.

The CICA has wide powers on receipt of an application to make enquiries. If discrepancies or issues arise, it can make further enquiries of the applicant, and it can delay the consideration of the application if the applicant's medical prognosis is unclear. The CICA can also require the applicant to submit to a medical examination.

There are two steps in the decision making process. The first is whether the injury was the result of a crime of violence, and whether the applicant complied with the rules relating to reporting the injury (for example, the injury must have been reported to the police). Having established that the applicant is eligible for an award, the second step is to determine the amount of the award.

The applicant may, if dissatisfied with the decision made, make an application for a review of that decision. Ultimately there is a right of appeal to the Criminal Injuries Compensation Appeals Panel. There is no right of appeal against the Panel's decision other than to the courts by way of judicial review should there be grounds for challenging any procedural deficiencies in the decision making process or errors of law.

FUNDING AND LEGAL REPRESENTATION

The scheme expressly excludes payment for any cost of representation in addition to the award of compensation.

There are provisions which enable payment of the reasonable expenses of the applicant or persons attending to give evidence at a hearing, which anticipates medical experts. Legal aid is not, and never has been, available for tribunal cases of this nature.

As in any other form of claim, it is not strictly necessary to have legal representation. However, it may be extremely difficult for the layman to present the claim without having an in depth understanding of the detailed workings of the scheme and knowing where and how to respond to the CICA in relation to the evidence, the level of award, its timescales, and procedures.

The basis of charging must, of necessity be a matter for agreement between the legal representative and the applicant or those charged with his or her care. There are different bases available, including payment by reference to the time spent and degree of responsibility, or alternatively on a contingency ("no win, no fee") basis by reference to the degree of success. In cases involving children, the compensation will fall under the ultimate control of the Court of Protection, which will ensure that an independent assessment of fees is carried out by a court officer and verified before payment.

In terms of who has responsibility, this might rest with a parent or local authority, or ultimately with an adoptive parent. The scheme goes to some lengths to ensure that if the assailant was a parent or family member they should in no way benefit from the award. Particularly in serious cases, where a local authority has responsibility for a child in care or foster care, the social services department or indeed the legal department may lack the specialist experience to handle these claims.

Where a child has been adopted, the adoptive parents are very often left to fend for themselves in continuing with the claim with little or no guidance, and it can then be a matter of luck whether they find their way to appropriately qualified advisers.

INVESTMENT OF AWARDS

Small or modest awards can be released to those with parental responsibility or held in Trust. However substantial awards made to a child are likely to come under the control of the Court of Protection. The court will require the appointment of a Receiver to administer the funds. The Receiver can be a professional or more commonly a family member if there is someone suitable available. For the largest awards, consideration will often be given to the possibility of a Structured Settlement. This is an arrangement whereby an amount

of money will always be retained and invested conventionally on behalf of the child, but a proportion of the award will be used by the CICA to purchase a series of annuities on behalf of the child which will result in a guaranteed, lifetime, index linked income. By concession with the Inland Revenue, the income from the annuities is tax free in the recipient's hands, compared to income from the conventional investments, so it can be an attractive proposition.

NON-ACCIDENTAL HEAD INJURY

In some cases, very severe neurological damage, and a very poor prognosis, are evident at an early stage. However, there is a large subset of cases in which the evolution of neurological damage may take a number of years to become evident. For example, in a long term follow up study (mean duration of follow up seven years) of 13 infants (mean age 5.5 months) with shaken baby syndrome injuries, the full clinical appearance of neurological deficits due to interruption of brain growth took up to four months to appear.² It took 6–12 months for the appearance of lesions of the central nervous system long pathways, up to 2 years for the appearance of epilepsy, and 3–6 years for behavioural and neuropsychological signs to appear. The authors of this study concluded that in infants who had been injured in this way it was impossible to formulate a precise and final neurological prognosis before the age of 6 years or later. It is self evident that the delays in establishing the prognosis in such cases are bound to lead to delays in agreeing an appropriate level of compensation.

There is no "fast track" for children or for particularly serious cases. The prognosis in some cases of non-accidental head injury can be particularly complex to determine, and in such cases an expert report will be needed. Where the CICA

agree that an expert report is required, then the CICA will pay for the costs of the report (unless an applicant selects a particularly costly expert, in which case the CICA may only meet part of the costs).

THE ROLE OF THE PAEDIATRICIAN

It is vital that paediatricians go out of their way to provide the necessary details at all stages of the claims process, indicating not just the medical diagnosis (for example, "spastic quadriplegia") but also the functional impact on the child. As most of the CICA staff have no medical background, it is essential that medical information is provided in a way that is easily comprehended.

The scheme suffers from a low profile. A danger is that each agency thinks that another is providing direction. It would be reasonable, therefore, for a paediatrician to remind the parents, carers, or guardians of abused children that compensation may be obtainable for the child's injuries.

Regarding the preparation of reports for the scheme, there are three practical points. These are:

- Be careful to identify other, supplemental injuries. Additional awards can be made where there is more than one definable injury.
- If the prognosis is that of a permanent injury, or alternatively it is in some way uncertain, state this clearly. This may well help to avoid a figure from the wrong category being awarded, and may reduce the risk of an inappropriately over-optimistic view of the injuries being made by the CICA.
- Respond promptly to requests for reports or information by the CICA.

CONCLUSIONS

The state pays compensation for injuries to blameless victims of violent crime.

There are, however, limits to the payments, and in cases of severe injuries they can be at a lower level than for individuals who have been injured in a motor accident, in which the driver is insured and able to meet an award of unlimited damages. Therefore it is beneficial to the victim for a claim of criminal injuries compensation to be concluded as soon as possible and paediatricians may be able to assist in this.

An introductory guide for potential applicants, a full guide to the scheme, a special supplement for cases of child abuse, and an application form, are all available from the Criminal Injuries Compensation Authority, Tay House, 300 Bath Street, Glasgow G2 4LN, UK; tel: 0141-331-2726, fax: 0141-3331-2287, www.cica.gov.uk. For injuries that occurred in Northern Ireland, further information is available from The Compensation Agency, Royston House, 34 Upper Queen Street, Belfast BT1 6FD, Northern Ireland; tel: 028-9024-9944, www.compensationni.gov.uk.

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