



## **Briefing Note:**

**Local Authority Circular (DH) (2009) 3, Charging Regulation and the 2009 CRAG published on the Department of Health Website, Monday 6<sup>th</sup> April 2009**

Mike Hurst, 17<sup>th</sup> April 2009

It is important to remember that the changes introduced to the CRAG and by virtue of LAC (DH) (2009) 3 relate purely to charges for residential accommodation and **not** to the charging regime for domiciliary care.

### **LAC (DH) (2009) 3**

#### **Paragraph 9 under Part IV states:**

*The National Assistance (Sums for Personal Requirements and Assessment of Resources) Amendment (England) Regulations 2008 (S.I. 2008/593) included new provisions to bring the National Assistance (Assessment of Resources) Regulations 1992 in-line with changes to the way the Department for Work and Pensions (DWP) treats certain resources in calculating entitlement to certain 'means tested' benefits.*

#### **Paragraph 10 under Part IV states:**

*As of 7<sup>th</sup> April 2008, the following resources are to be disregarded:-*

- *awards of damages for personal injury **and** where such sums are*
  - *administered by the High Court or a County Court under Rule 21.11 (1) of the Civil Procedure Rules 1998, or by the Court of Protection, **or***
  - *which can only be disposed of by Order or Direction of any such Court.*
  - ***initial (but not subsequent)** payments in consequence of personal injury for up to 52 weeks from the date of the initial payment **excluding** any such payment or part of any such payment that has been specifically identified by a court to deal with the cost of providing care.*

#### **Paragraph 11 under Part IV states:**

*The period of 52 weeks mention in paragraph 10 begins from the date of the initial payment and so any person who has held a payment for 52 weeks or more on 7<sup>th</sup> April 2008 will not benefit from the disregard.*



**Paragraph 12 under Part IV states:**

*A person who has received an initial payment of compensation on, say, 3 March 2008 will have 'used up' 5 weeks of the possible 52 weeks and so will be eligible for a maximum disregard period for a further 47 weeks from 7 April 2008.*

**Paragraph 13 under Part IV states:**

*Where the payment is paid into a personal injury trust or is administered by a court, the relevant disregards apply.*

Paragraph 13 under Part IV is of particular significance because, as we will see later, even where a court does identify that an element of a personal injury settlement is for future care and this is held by a court, as described above, or in a Personal Injury Trust ("PIT"), then the funds will be disregarded.

We expected that, following the introduction of S.I.2008/593, this ability to take into account an element *specifically identified* as being for future care would be widened to beyond the scope of the 52-week disregard and, thereby, reduce any entitlement to funding.

This would have precluded any potential of double recovery under:

1. A periodical payments Order (as CPR 41.8 (1) states that "where the court awards damages in the form of periodical payments, the order must specify ... the amount awarded for future ... care and medical costs");
2. A case where the court has assessed quantum and handed down Judgment in respect of an amount (either on a conventional lump sum basis or periodical payments) for future care;
3. A case where the Defendant has made an offer that would specifically identify the future care element of the settlement terms.

Whilst this is the case, it is only so if the claimant is not a Protected Beneficiary and fails to establish a PIT.



Clearly, any claimant would be ill advised to keep his award held outside of a PIT, if he was awarded any capital or income for future care, and wishes/needs to claim Local Authority assistance. Clearly, if the claimant has his funds administered under the Order of the Court, the disregard would automatically apply.

I conclude that, for Residential Charging, “double recovery” has not been addressed.

The only other point of note in this circular is to be found at VIII, which confirms that a spouse is no longer legally liable to maintain the other spouse if one enters residential care. In practice, the law was not being enforced in this respect for some time.

**Charging for Residential Accommodation Guide (CRAG)**  
**In Support of the National Assistance (Assessment of Resources)**  
**Regulations 1992 (S.I. 1992/2977)**

The CRAG has been updated to take account of changes introduced by virtue of S.I. 2008/597. Such changes were referred to in the Explanatory Memorandum at 2.1 which states that the instrument up-rates certain disregards and allowances in the residential charging regulations.

These regulations set out how each Local Authority should assess what a person could afford to pay for care in a care home, which has been arranged by the Local Authority.

7.1 of the Memorandum states that certain disregards and allowances are being up-rated in line with the increase of average earnings. The disregards referred to at 7.1 are clearly included in the new personal injury clarifications which are outlined below.

**Capital and Income Disregards as they relate to Personal Injury Damages, either Administered by the Court, or in Trust, are contained in sections 6, 8 and 10 of the CRAG 2009.**

**Capital to be disregarded:**

- the value of a right to receive:
  - income under an annuity
    - *Schedule 4 para.9*
  - outstanding instalments under an agreement to repay a capital sum
    - *Schedule 4 para.13*

- payment under a trust where the funds derive from a personal injury
  - *Reg 21(2) and Schedule 4 para.10*
- income under a life interest or a life rent
  - *Schedule 4 para.11*
- income (including earnings) payable in a country outside the UK which cannot be transferred to the UK
  - *Schedule 4 para.12*
- an occupational pension
  - *Schedule 4 para.15*
- any rent
  - *Schedule 4 para.15*
- Capital derived from an award of damages for personal injury and which is administered by a court or which can only be disposed of by a court order or direction.
  - *Reg 21(2) and Schedule 4 para 19*
- The value of the right to receive any income under an annuity purchased pursuant to any agreement or court order to make payments in consequence of personal injury or from funds derived from a payment in consequence of personal injury and any surrender value of such an annuity.
  - *Reg 21(2) and Schedule 4 para 9*
- Periodic payments in consequence of personal injury pursuant to a court order or agreement to the extent that they are not a payment of income are treated as income (and disregarded in the calculation of income).
  - *Reg 16(5) and 15(2) and Schedule 3 para 10*

The annotations referred to in the CRAG refer to the National Assistance Assessment of Resources Regulations 1992.

The above disregards make it clear that capital held by a court from an award of damages is to be disregarded as is the right to receive income from a structured settlement and, of course, periodical payments. This confirms our understanding of the position.

Paragraph 8.015 of the CRAG, '**Income from certain disregarded capital**' has had a major revision, although unfortunately, the attempt to clarify matters in terms of some of the language leaves a lot to be desired.

### **Income from certain disregarded capital**

8.015 Income from capital will generally be treated as capital and not income (see 6.042 and Reg 22(4)).

If there is any corresponding *capital* disregard then that will apply (for example the 52 week capital disregard for a payment in consequence of personal injury and the capital disregard for personal injury damages which are administered by a court).

However, income which comes from certain forms of disregarded capital is treated as income. This will be the case where the capital is:

1. the normal dwelling of a temporary resident (but see 3.011 for disregard of income needed to cover housing commitments);
2. business assets which the resident is taking steps to dispose of;
3. any capital consisting of the value of trust funds which derive from a payment for personal injury and the value of the right to receive any payment under that trust;
4. a dwelling which the resident intends to occupy as his home and which he is taking steps to occupy;
5. the former dwelling of the resident which is occupied by a partner or relative of the resident who is over age 60, under 16 and whom the resident is liable to maintain, or incapacitated;
6. premises belonging to the resident which are occupied in whole or in part by a third party, where the Local Authority is using its discretion to disregard those premises;
7. any premises which the resident intends to occupy as his home and in respect of which he is taking legal steps to obtain possession; and
8. any premises which the resident intends to occupy as his home but which needs repairs or alterations in order for the resident to occupy.

Income from such capital is generally not disregarded in the calculation of income.

However, in situations 4-8, income which covers mortgage repayments, payments for water rates and council tax may be disregarded (see paragraph 8.037; *Schedule 3 para.14*).

Further, as stated overleaf, payments at regular intervals from a PIT are disregarded in the calculation of income.



*Income from capital to which there is actual or deemed beneficial entitlement is also disregarded as income for example income from capital consisting of a payment in consequence of personal injury and income from capital derived from personal injury damages which are administered by a court. **However this does not apply to income from the value of trust funds derived from a payment in consequence of personal injury.** (paragraph 8.015)*

From reading the first part of this paragraph, it is clear that both capital and income derived from personal injury damages held in a PIT or administered by a court are disregarded.

However, the last sentence of paragraph 8.015 (highlighted in red) gives rise to potential ambiguity and seems to contradict what goes before, unless one has a full understanding of the annotation of *Schedule 3, para 14 of the NAAR Regs.*

Paragraph 14 of Schedule 3 of the NAAR Regs 1992 states:

***Paragraph 14 – (1)** Any income derived from capital to which a resident is or is treated under Regulation 27 (Capital Jointly Held) is beneficially entitled but, subject to sub-paragraph (2), not income derived from capital disregarded under paragraph 1, 2, 5, 10 or 16 of Schedule 4.*

The reference to Schedule 4 is of significant importance. Paragraph 10 of Schedule 4 of the NAAR Regs 1992 states:

*10 – Any amount which will be disregarded under paragraph 12 of Schedule 10 to the Income Support Regulations “Personal Injury Trust”.*

The litigation division of the Department for Work and Pensions/Department of Health Legal Services has recently clarified to us the meaning of the last sentence of CRAG 8.015.

It actually means that if a Trust was set up by, say, a parent who had received an award of damages for personal injury, subsequently died and passed the beneficial ownership of the Trust to, say, his son, and then the son made a claim for Local Authority Assistance, the PIT disregard would not apply because the personal injury had not occurred to the person now making the claim.

Section 10 of the CRAG deals with the treatment of Trust funds in general and I reproduce the wording from 10.023 to 10.026 inclusive as follows:

## *Compensation for personal injury*

### *Information needed*

- 10.023 Obtain confirmation that the capital held in trust is a lump sum payment of:
- compensation for injury or death (including vaccine damage)
  - damages under the Fatal Accidents Act

10.024 Find out whether the beneficiary receives any income from the capital held in trust, and if so:

- a) how much is paid; and
- b) how often it is paid

### *Treatment of capital*

10.025 Where the capital consists of any payment made in consequence of personal injury and a court has **not** specifically identified the payment as being to cover the cost of providing care, that capital is disregarded for a period of up to 52 weeks from the date of receipt of the first payment. If the money is placed in a disregarded location such as a personal injury trust or is administered by a court the relevant disregards will apply. Subsequent payments outside the 52 weeks are taken fully into account unless they are placed into a disregarded location.

10.025A Where the capital consists of any payment made in consequence of personal injury and a court **has** specifically identified the payment as being to cover the cost of providing care, that capital is taken into account. However, if the money is placed in a disregarded location such as a personal injury trust or is administered by a court the relevant disregards will apply.

Reg 21(2) and Schedule 4 para 10A

### *Treatment of income*

10.026 The following periodical payments are disregarded:

- Payments from a trust whose funds are derived from a payment made in consequence of any personal injury.
- Payments under an annuity purchased pursuant to any agreement or court order to make payments in consequence of personal injury, or from funds derived from a payment, in consequence of any personal injury.
- Payments received by virtue of any agreement or court order to make payments to the resident in consequence of any personal injury.

Reg 15(2) and Schedule 3 para 10

(The agreements mentioned above include out-of-court settlements.)



Paragraph 10.025A makes it clear that any payment made in consequence of a personal injury, that a court has specifically identified as being for the cost of providing care, could be taken into account. However, if the monies are placed in a disregarded location, such as a PIT, or are administered by the court, then the relevant disregards will apply.

It is my opinion that the position on personal injury awards, as they relate to Residential Charging, is now clear and is likely to remain as things stand for the foreseeable future.

It also remains the case for domiciliary care that a Local Authority must continue to disregard capital held in a PIT or administered by the court, but has discretion over the treatment of income derived on such capital, or by way of periodical payments. Consequently, whether a claimant will be entitled to statutory funding for domiciliary care, post-settlement, remains uncertain.

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*17<sup>th</sup> April 2009*

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