

Briefing Note

KQ v Secretary of State for Work and Pensions
[2011] UKUT 102 (AAC) (10 March 2011)

Is a payment for professional negligence, as a result of negligent advice in respect of a claim for personal injury, a ‘payment made in consequence of a personal injury’?

There is nothing new in the understanding that it is not just personal injury damages settled into trust or administered under the Order of the Court that benefit from the capital disregard under paragraphs 12 and 12a of Schedule 10 to the Income Support General Regulations.

Any suitable ‘payment made in consequence of a personal injury’ can be settled into trust or held under the order of the Court and be similarly disregarded.

For instance, voluntary, charitable and certain insurance payments, such as those for permanent and total disability, paid to a client as a result of injuries sustained in an event, are all deemed to be payments made ‘in consequence of a personal injury’.

However, what defines a suitable ‘payment made in consequence of a personal injury’?

In the past, it had been generally accepted that a payment received in respect of professional negligence for a failed or mismanaged personal injury claim was a suitable ‘payment made in consequence of a personal injury’, limited to the amount that would have been recovered under the original action, but for the negligence¹. Indeed, when we disclosed such facts to local Decision Makers upon implementation of a Personal Injury Trust for clients where part or all of the settlement had derived from such a claim, we always received confirmation that the capital would not detrimentally impact on the Claimant’s entitlement to means tested benefits.

That was until 26th June 2009.

For one of our clients, KQ, the local Decision Maker declared that the capital disregard did not apply to her professional negligence claim. With our support and assistance, our client appealed the decision and on 29th September 2009 the relevant appeals section confirmed that the decision had not been changed.

This decision had far reaching ramifications. If upheld, should our client pursue a professional negligence claim against the professional negligence litigator for under settling the claim, as they did not take into account her loss of benefits? In some cases, the loss of future lifetime means tested benefits entitlement could exceed the total quantum attributable to the original personal injury action.

¹ For reasons set out later in this Briefing Note, what follows does not apply to any additional loss that does not reflect the original payment in consequence of the injury (for example additional out of pocket expenses or additional paid and suffering).

Furthermore, claimants who had implemented personal injury trusts and had not made the origin of funds abundantly clear, could be pursued for the repayment of received benefits.

In relation to future professional negligence claims, professional negligence solicitors would surely have to consider the additional head of loss attributable to loss of means tested benefits. This is not a straightforward question, as issues such as “how long will the claimant remain over the applicable capital thresholds?” would need determination.

Again with our assistance, the decision was appealed to Tribunal.

On 25th January 2010 Judge S R Jones again upheld the local Decisions Maker’s view that the capital could not fall to be disregarded. Judge Jones stated that “... *the causation between the payment and the personal injuries sustained is too remote*”.

Yet again we applied for permission for appeal to the Upper Tribunal. The application for permission was granted on 16th April 2010 noting that “*there appears to be no authority on the issue*” and recognised that the issue was “*one of importance*”.

On 10th March 2011, Judge Levenson of the Upper Tribunal [CIS/1269/2010] found in favour of our client, concluding:

The compensatory element of damages for professional negligence are generally intended to put the claimant in the same position as they would have been in had the negligence not occurred. They are calculated by reference to the loss caused by the negligence. The claimant should not end up in a better financial position than if there had been no negligence.

In this case the First-tier Tribunal failed to give due weight to the meaning of the words “in consequence of”. I accept that the chain of causation does not go on for ever. Had the damages included an amount in respect of stress caused by the activities (or non-activities) of firm A, or an element of punitive damages, that might well not have been included in the disregards in paragraphs 12 and 12A. However, in the present case it is not disputed that the whole of the £170,000 amounted to damages in respect of what would have been claimed from the negligent surgeon. I simply do not see how in these circumstances the payment can be said not to be in consequence of the personal injury. Had the disregards referred to “payments made by the person causing the personal injury or their insurers” that would also have been different, but on the actual wording of the disregards, this appeal by the claimant succeeds.

As a side note, even in light of this clear decision, Chester Benefits Delivery Centre did not agree to restart benefit support until the end of June 2011.

Fortunately for our client, we have always taken the view that the implementation of a Trust is not complete until we have obtained confirmation from the local Decision Maker that the Personal Injury Trust is effective at protecting the Claimant’s ongoing entitlement to means tested benefits.

Therefore, our costs for assisting her with every step of the appeal process were covered by our fixed-fee of £550 plus VAT. I estimate that over 60 hours were spent helping KQ with her appeal.

However there remains a number of outstanding issues with regard to what is a suitable “payment in consequence of a personal injury”. For example, it is still unclear as to whether the current regulations would apply to a divorce settlement where the marital breakdown was as a direct result of a personality change following an accident or injury. Or the treatment of a payment from an ex-employer in compensation for wrong dismissal as the employer considered the claimant to be less able to undertake his job post-accident a result of injury.

In this regard, I note the contents of *CP v Secretary of State for Work and Pensions* [2011] UKUT 157 (AAC) (07 April 2011) which states:

The representatives’ submissions touched on a number of other authorities, e.g. Malekout v Secretary of State for Work and Pensions [2010] EWCA Civ 162 and *Wakefield v Secretary of State for Social Security* [2000] 1 FLR 761 (also reported as R(CS) 2/00). The issues there were whether certain types of pension payments amounted to either “a payment made in consequence of any personal injury” (*Malekout*) or to “any compensation for personal injury” (*Wakefield*). However, the cases were to some extent decided on points which do not arise in the present case – for example, in *Malekout* the central question for the Court of Appeal was whether the payments were received under an “agreement” to make payments “in consequence of any personal injury to the claimant”, with the focus being on whether there was an agreement. Insofar as these cases are relevant, they tend to support Mr Brown’s approach. The real problem for Mr Rutledge is that the expression “a payment made in consequence of any personal injury to the claimant” (emphasis added) cannot bite on a FAA award to a dependant in the light of the plain meaning of the language used and the analysis adopted in R(IS) 3/03. It follows that paragraph 12 of Schedule 10 cannot apply in the circumstances of the present case, where the personal injury (or rather the fatality) was suffered by the claimant’s parent.

Since the oral hearing in this matter, Judge Levenson has issued his decision in *KQ v Secretary of State for Work and Pensions (IS)* [2011] UKUT 102 (AAC), in which he held that paragraph 12 of Schedule 10 covered a payment received in settlement of a professional negligence claim against solicitors who had missed a limitation period for bringing proceedings against a surgeon, whose negligence in turn had caused the claimant personal injury. Judge Levenson held that the payment in question was still “made in consequence of any personal injury to the claimant”. However, he also accepted that “the chain of causation does not go on for ever” (at paragraph 13). I considered whether to seek further submissions from the parties on the potential relevance of this decision. However, I regard *KQ v Secretary of State for Work and Pensions (IS)* as a case decided on its own very special facts. It does not require me to reconsider the conclusions reached above.

It is clear that this is an area of continuing development and we remain committed to helping our clients maximise their entitlements to statutory support.

Ian Rowe
December 2011

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