

CARERS' LOSS OF EARNINGS

GUIDANCE NOTE

Eligibility – summary of requirements

Clause 5.4 of the Trust Deed provides the eligibility requirements that have to be met for the carers' loss of earnings claims. These are as follows:

The Claimant must be:

- ❖ a Qualifier as defined under the Scheme, which broadly means they must be a relative or carer; and
- ❖ must have provided gratuitous care to the Victim; and
- ❖ must have suffered loss of earnings which causes **particular** hardship.

Importantly, you will note that the particular hardship must be attributable to the provision of care and not to the illness and death of the Victim or the onset of a psychiatric condition.

Mandatory Deduction

Clause 5.4 makes it clear that the Trustees are obliged to deduct from the loss of earnings any amount paid to the Claimant for gratuitous care, purchased care, travel expenses incurred for providing care, and any other expenses incurred for the purpose of caring for or alleviating the suffering of the Victim (i.e. payments made under clause 5.3). The Trustees have no discretion in this respect, and therefore are obliged to make the deduction. Obviously, there will be no deduction if the Claimant has not been paid any sums under clause 5.3.

Meaning of particular hardship

The Trust Deed does not state what is meant by particular hardship, and applying this concept to the claims will be extremely difficult. Importantly, hardship must be 'particular', and must therefore be more than is 'normal' or 'usual'. It is clear from the phraseology used in the Trust Deed that there will be hardship in many if not most of the cases in which a Claimant has suffered loss of earnings as a result of caring for the Victim, but compensation will only be payable where the hardship is of a different magnitude, that is to say beyond that suffered by most Claimants.

To make the assessment, the Trustees have no option but to make a comparison between the various claims so that they can identify the claims where the hardship is at the normal or usual level of severity and those where the hardship is more than normal or usual, i.e. particular. This has been, and will continue to be, an invidious task, but is required under the Scheme.

Further, it is important to note that compensation is for particular hardship, and not loss of earnings per se. Although the nature and scale of the earnings will be material considerations, it does not follow that loss of earnings, whatever its scale, has resulted in particular hardship. Thus a comparable level of loss of earnings may result in particular hardship in one case, but not in another. All will depend on the circumstances of the individual case.

Factors that could, depending on the circumstances of the case, give rise to particular hardship include:

- ❖ Fall in living standard
- ❖ Borrowing
- ❖ Selling possessions
- ❖ Use of savings
- ❖ Result of debt default
- ❖ Loss of job benefits in kind
- ❖ Loss of pension

Factors which will also be taken into account include whether:

- ❖ The loss of earnings was caused by the provision of care, rather than, say, the onset of the psychiatric condition (if any). This is to ensure that there is the requisite causal connection between the loss of earnings, care, and particular hardship, as required under the Scheme. The date of onset of any psychiatric condition will be important.
- ❖ Particular hardship has been alleviated by payments of Basic Sum or dependency. Where appropriate, account will be taken of state benefits.
- ❖ There are prospects of re-employment.

NB - Other payments, including life insurance payments or inheritances from the estate of the Victim (other than the Basic Sum), will not usually be taken into account.

Duration of Loss of Earnings

As mentioned, the loss of earnings has to be caused by the provision of care, and therefore the duration of the loss of earnings that can be claimed as causing particular hardship will be from the time the Claimant started to provide care to the Victim, until the death of the Victim. A Claimant may have claims for particular emotional and/or financial hardship caused by a psychiatric injury in relation to losses arising after death.

It is important to note that claims for carers' loss of earnings causing particular hardship are not subject to the cut-off date that applies to claims for gratuitous care and care related costs under clause 5.3. Therefore, claims for carers' loss of earnings causing particular hardship can be made even in cases where a claim for gratuitous care (and other costs) under clause 5.3 has been excluded because a Care Package had been introduced or the care was provided after 31 March 2001.

Compensation

The Trustees would like to be able to compensate in full the actual and financial loss of earnings sustained by those who have suffered particular hardship. However, payment is from the Discretionary Fund, which is limited and for all discretionary payments relating to 250 Victims. The Trustees therefore propose to adopt an approach that is similar to other discretionary claims and compensate for particular hardship by reference to graduated categories, ranging in severity. The possible payments for carers' loss of earnings causing particular hardship are £5,000, £10,000, £25,000 or £40,000 depending on the severity of hardship.

Evidence to be Submitted

It is for Claimants and their solicitors to decide what claims can be properly submitted under the terms of the Trust Deed and what evidence should be lodged in support. The Trustees have requested that claims be submitted in accordance with the following:

- ❖ Completed Application Form for carers' loss of earnings claims (to be obtained from Charles Russell, Solicitors)
- ❖ A Summary showing the amount claimed (to be obtained from Charles Russell, Solicitors)
- ❖ An optional Witness Statement (no more than 3 sides of A4), or other evidence of particular hardship. The Trustees are acutely aware that providing information on particular hardship may be distressing for Claimants, but this information has to be provided to enable the Trustees to make a decision under the terms of the Trust Deed. The Witness Statement or other document should provide details of the following, as appropriate:
 - ❖ Brief employment background.
 - ❖ Employment at the time of providing care, including how long the Claimant had/had been in this employment.

- ❖ Annual net earnings, including overtime where appropriate. Net earnings, including overtime where appropriate, during the period of care.
- ❖ Details of the causal link between the loss of earnings and provision of care.
- ❖ Details of 'particular' hardship (see above).
- ❖ Documentary evidence should be provided in support of the amount submitted for loss of earnings. The Trustees have requested a letter from the Claimant's employer, if possible, or from the Claimant's accountant or from the Inland Revenue if the Claimant is self-employed. Such letters are routinely obtained in claims that proceed through the Courts, and should be easily obtainable at a relatively low cost. In the cases where these documents will not be available, payslips and/or bank statements for the relevant period should be provided. The Trustees have expressed concern about the clarity of the evidence provided in relation to other discretionary claims, and have stressed the importance of providing clear, comprehensive evidence. Failure to do so is likely to prevent the Trustees being able to reach a favourable decision and will cause delay.

All Discretionary Fund claims on behalf of a Victim's family must be submitted at the same time, with confirmation of any such claims which are not being made. Possible claims are as follows:

- (i) Purchased and gratuitous care, and related expenditure provided before the earlier of a Care Package being implemented or 31 March 2001.
- (ii) Victim's loss of earnings that causes particular hardship to the Victim or his/her dependants.
- (iii) Carers' loss of earnings that causes particular hardship to them.
- (iv) Payment to a qualifier for a psychiatric condition giving rise to particular financial or emotional hardship.
- (v) Payment to a dependant of the Victim based on the Victim's projected earnings.
- (vi) Payment to a dependant for a period beyond the age of 21.
- (vii) Payment to a dependant who is unable to obtain life insurance or mortgage protection without having to pay a higher premium.

The Trustees recognise that claims under point (vii) may only materialise, and be submitted, at a later date.

Costs of making an application

The Trustees have a discretion under the terms of the Trust Deed to reimburse Claimants for the costs of their solicitors in submitting such claims. They will however only be willing to do so in relation to work reasonably undertaken and in relation to a beneficiary under the Scheme, and may therefore decline to make payment for claims submitted which clearly do not meet the criteria set out in this Guidance Note. This is because of their duty to control costs being paid out of the Trust Fund. The Trustees also have authority to pay for accountants' fees for preparing letters detailing loss of earnings, in cases where this is necessary and provided that these are appropriate and reasonable.

Victims' Loss of Earnings

The Trustees have not yet considered the principles for claims under Clause 5.5 for Victims' Loss of Earnings causing particular hardship to the Victim or Dependents, as no claims have been submitted to date. Claims can only be made for the loss of earnings incurred by the Victim during his or her life.

Conclusion

The Trustees are anxious to deal with these claims against the Discretionary Fund in a sympathetic and expeditious manner. They have had to adopt principles and procedures which comply with the Trust Deed, whilst at the same time trying to cut down on the distress suffered by families, reduce the amount of work involved and control the legal costs to be paid out of the Trust Fund. They certainly do not wish to discourage claims but hope that families will recognise that the principles and procedures summarised above have been adopted to enable the Trustees to decide claims in a fair and consistent manner and in accordance with the provisions of the Trust Deed.

March 2007