



GROUPS

Minutes of Spinal Injuries Special Interest Group
25 July 2016

Exchange Chambers, 201 Deansgate, Manchester M3 3NW

Accommodation Issues in Spinal Injury

- Obtaining an Interim Payment AMANDA YIP QC
Use of Interim Payments for Property Needs TOM WETHERS

Table with 3 columns: Role (Chair, Speakers, Attendees), Name, and Organization. Includes names like Jonathan Fogerty, Hugh Johnson, Bridget Collier, Amanda Yip QC, Tom Wethers, and various solicitors and firms.

Speakers & Delegates: 27

Preliminary

Jonathan Fogerty (JF) introduced himself to the SIG. JF introduced the Secretary, Hugh Johnson (HJ), the speakers and thanked Exchange Chambers for hosting the SIG at their offices and for providing the welcome refreshments.

JF explained that any member wanting to review the previous minutes could do so via the SIG section of the APIL website. He noted that minutes will be prepared by HJ after this meeting and similarly posted online, with speaker presentations.

The presentations of the speakers are kindly reproduced and kept with the minutes with permission of the authors. ©Amanda Yip QC.

the minutes comprehensive such that those unable to attend could still find useful material through the notes of the discussions. Finally, JF noted that the survey of the SIG members could also be found online. This was scanned in with the minutes of the last meeting and reflected the outcome of about 60 members who had completed the online questionnaire.

JF thereafter outlined the programme for the evening and introduced the first speaker, Bridget Collier to address the SIG as to the actions being taken by APIL at a time of substantial change for the profession and injured Claimants alike, not least given the Brexit vote.

APIL EC Update

The details of the EC updates are intentionally omitted from the Spinal Injury SIG minutes at a time of fast moving development. The APIL office can be contacted for details of all current EC activity and initiatives.

JF thanked Bridget Collier and the APIL President, Neil Sugarman, who added his comments on the importance of APIL members seeking to obtain individual accreditations to differentiate themselves and to demonstrate to clients and others expertise in the field. JF then introduced the first of the guest speakers, Amanda Yip QC.

Obtaining an Interim Payment

Amanda Yip QC

A copy of the presentation slides and a further reference paper/handout are available and filed with these minutes.

Amanda Yip (AY) explained that her presentation would not cover any significant changes in law, which is largely well-established, rather what she wanted to present was a route-map to a successful interim payment application, which would hopefully reaffirm the approach already adopted by many of the practitioners in the room. In many cases it is possible to signpost the need and to adopt a collaborative approach to the accommodation issues.

AY indicated that a key issue for her was to consider the strategy from Day 1 – in complex catastrophic injury litigation, it is easy to anticipate the need for such applications and, in the absence of agreement, an application is required. Her experience is *'get the accommodation right and the rest will follow.'* Expanding, AY commented that until the Claimant is in an adapted property it is very often difficult for him/her and the family to fully adapt to care and have the necessary privacy and the full package of care that they might need. There are also likely to be restrictions on therapies etc.

She advised that the early preparations should involve good witness evidence from the client and the family regarding the accommodation. AY presented examples of how much better lay evidence from the Claimant could be compared with a solicitor's witness statement (however competent on the face of it) in support of the application. She advised that care should be taken not to hold off from making the application too long. If a half day is required with a listing before a High Court Judge it may take some time to get the listing. The CPR permits an application prior to the complete evidence being available, which can always be served later. Indeed, the evidence can be updated on an ongoing basis if there are further developments on an ongoing basis.

AY then turned to CPR Part 25, addressing the provisions, before turning to the relevant case law. Her view is that whilst *Eeles v Cobham Hire Services Ltd* may have been seen by some Defendant insurers as the panacea that would restrict Claimant interim payment applications, it is actually helpful, insofar as the application can be targeted for the elements and it is possible to present an application that it is hard to rebut. Furthermore, the case law is now supporting awards worth up to 90% of the past losses and general damages.

AY noted the difficulty of knowing whether to apply to the Court on the basis of the hypothetical perfect property or holding off until a property had been identified. The difficulties with the latter, being that the Court may not award a sum sufficient to purchase that property or that the application may be made later than it otherwise may be. This is clearly a difficult question to answer, but AY felt that there should be a finalised position (preferably an identified property) to present to the Court at the point of the contested hearing as that will assist the application.

With regard to rental options, such properties are few and far between and difficult to source (with which Tom Wethers agreed) and therefore action should be taken to strongly resist any unsupported arguments from the Defendant that the Claimant should simply rent.

A fallback position is important. Cases presented on an 'all or nothing' basis may end up being wholly unsuccessful and attempting to change position in the hearing to present a fallback may be too late – *Crispin v Webster*.

Concluding, AY recommended that when approaching a contested hearing of this type:

- it needs to be treated almost as a mini-trial with a detailed bundle prepared;
- lay evidence is key;
- the case can be driven alongside the application;
- a collaborative approach with early discussions should be adopted – the costs of hearing will be significant

Using the Interim Payment – Property Needs

Mr Tom Wethers

Tom Wethers (TW) explained that the original title of his presentation was originally 'using accommodation payments wisely.' He explained that clients live in all sorts of circumstances and preference and need will vary between Claimant. What he would therefore do is present more of a discussion of factors arising from his practice. TW noted, memorably, how he had assessed property needs in homes where pythons were uncaged on the floor, where the floor was not visible because of rubbish in the property and where the Claimant was naked save for a small cloth – and everything in between.

The common pre-injury accommodation is a 2-up/2-down semi-detached property. The property is often a rental property. The Claimant will inevitably need guidance on how to spend the money. However, what the Claimant has in mind may be very different from the usual recommendations of a specialist architect, surveyor or indeed their lawyer. Indeed, he is aware of a client that wishes to render exposed brickwork at a cost of £12,000 simply because he dislikes it.

His experience is that since *Eeles* recovery does seem to be more limited: Clients are often in a position to buy following a successful interim payment application, but may not be able to fully adapt the home. That then means that the Claimant needs his own back-up plan. Will he buy, carry out modest adaptations and then later move out for the full works to be carried out or does he now need

to buy a different property altogether? Carrying out adaptations in stages may cost more in the long-run and the temporary adaptations may need to be ripped out when the full adaptations are undertaken.

In discussions with the Defendant experts he finds that whilst differing approaches may be taken to the assessment of property needs, most have price ranges, as does he. Sometimes the reports will include reference to example properties and those may sometimes include the same properties as his report. Discussions can therefore take many approaches. He has seen Claimant's find properties with swimming pools that were (remarkably) still within the agreed expert budget, such that the Court sanctioned the expenditure.

Key issues with any property are (1) Access; (2) Bathrooms and (3) Kitchens. Having addressed the access and bathroom needs, one can also begin to think about therapies. His preference with all adaptations is level access – if necessary by raising the driveway etc. This avoids the need for ramps. Cosmetically it is better – “a normal” appearance and it avoids the need for railings/metalworks along the ramps.

Suitable provision will need to be made for carer accommodation

With all builds, the budget is critical. He encouraged Claimants not to seek to project manage the adaptations themselves – or at least, if there was an intention to do so, to run plans and costings past an expert in advance to cross-reference and to avoid costs spiralling out of control. It is the nature of things that adaptation works in what is “an insurance funded job” as far as the contractors are concerned, will increase.

There may be a need to manage expectations. The property is not a ‘money no object’ purchase and adaptation, if he is required to support it. For example, he indicated that expensive Corian or Granite worktops are rarely appropriate in kitchens (unless there was a particular preference and the Claimant had those fittings pre-injury). Kitchens are available for both the able-bodied and wheelchair users with height-adjustable worktops, for example. Those can be expensive and it is very often the case that two levels of worktop are required.

With regard to rentals, TW noted that Claimants disliked the rental option as a general rule and the upheaval that multiple moves caused. Nevertheless it was possible, if the right property could be sourced and permissions obtained. Clearly reinstatement costs also needed to be considered. His experience is that Courts will often sanction quite high rental costs where the proposal would get the Claimant out of dire circumstances in inappropriate property and the rental is likely to be for a defined, short, period of time. When looking for a rental property TW looks for a relatively large property as one can only do as much as the landlord will allow to the property and whilst taking account of the likely time in the property. The rental property needs to be as close as it can be to the size and type of property recommended. That includes therapy rooms, storage etc. Those needs remain constant. Where possible, the existing bathroom can be adapted, but very often the Claimant may not be able to have an en-suite. Ramps are used (metal or timber decking) with a rental and doorways widened. Landlords rarely ask for doorways to be reinstated as they have the option of the disability market if needed thereafter and the property gets redecorated. The typical rental adaptations will cost between £30-50,000 and thereafter there will be the reinstatement costs in addition. For rentals longer than 5 years those costs will likely go up as more permanent longterm adaptations are reasonable.

Defendants will often work on a m² approach to their evaluation of the floorplan. This then allows them to simply look at any property and determine a minimum size, without necessarily considering the layout appropriately. For example, TW asked who goes into a living room in an existing property and says “This is slightly larger than I need, we'd better reduce it?” The correct question is whether the rest of the rooms adequately meet the needs. Whilst TW calculates reference sizes he prefers

not to include them in reports for that reason. It is the property that needs to be considered for adaptation.

As an expert, very often the preference would be to start with a plot of land and to build from scratch. The costs of the build on a m² basis are cheaper for a new build as supposed to an extension. The arguments are also less complex – you do not go into a property trying to ascertain where the extension could go or what room it should lead off. Necessarily the Roberts v Johnstone calculation is more difficult and it is a less common solution.

Touching upon AY's presentation, TW said that he felt the evidence needed to be simple. The client would have their evidence, but this was the case from the experts too. His preference, even if he has updated his report over time for the instructing solicitor, would be to have one consolidated report with everything in it. The information is easier to marshal and the evidence clearer.

TW's key points were then summarised as:

- Instruct and retain an expert to advise on the need and to assist with the adaptations once they need to be undertaken
- Set and keep to a budget
- Keep the evidence simple

JF, the Chair, then asked TW what determined whether the appropriate accommodation may be a house or level-access accommodation? JF revealed that as a wheelchair user himself, he lived in a two storey property.

TW said that for sheer accessibility and taking into account issues such as escape in the event of fire, as a general rule level-access accommodation would be the preferred option of an expert. Nevertheless, the preferences of the Claimant did need to be considered. He was not averse to conventional houses, provided that they could be made to meet the needs of the Claimant. He noted, for example, that because bungalows are often regarded as properties for the elderly, some Claimants will want to live in a house. Costs need to be considered carefully: One issue is where the Claimant sleeps vs carer accommodation. If the Claimant is sleeping on an upper floor and sleeping/night care is required, it is appropriate for the carer to also sleep nearby on that floor. That may mean that the carer accommodation/annexe requires a more expensive two storey extension rather than a one storey extension as would be the case in a bungalow.

Closing Remarks

JF then thanked AY and TW for their presentations. He then reminded members of the following forthcoming APIL events:

- 29-30 September 2016 APIL Clinical Negligence Conference
- November 2016 (TBC) Next APIL Spinal SIG meeting (*a provisional date, subject to the forthcoming elections process*)

JF informed the meeting that he is vacating the position of coordinator of the APIL Spinal Injury SIG as he is currently not practising. He explained that APIL rules require those filling the Coordinator and Secretary posts to have a practising role. JF explained that HJ's two year tenure as Secretary was coming to an end, but HJ had confirmed that he would be standing again as Secretary.

JF went on to explain to the members that they should have already received an email informing them of the election process for both positions. If members have an interest in standing for either position JF invited them to register this with the APIL office. JF wished his successor as Coordinator well and then invited attendees to adjourn next door to continue informal discussions over a glass of wine.

HJ
29.07.16