QUANTUM UPDATE: A REVIEW OF RECENT CASE LAW AND HOT TOPICS

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TO THE APIL DAMAGES SPECIAL INTEREST GROUP ON 3 NOVEMBER 2015

Introduction

1. There has been a raft of new significant quantum cases in 2015. Due to a policy change, the NHSLA decided to fight many more cases. This handout considers a number of these decisions and the practical application of the same.

REASONABLENESS AND THE ASSESSMENT OF DAMAGES

(a) Trite Law: 100% Principle

2. One might be forgiven for thinking that the legal basis for assessing damages was clear. It is trite law that so far as financially possible the claimant should be put back into the position as if the negligence had not occurred. In terms of pecuniary loss, the fundamental principle is that the Claimant is entitled to full compensation i.e. 100% of the value of his or her proven net expenses and losses.

3. As stated by Lord Steyn in *Wells v Wells* [1999] AC 345 at 382-383:

> *"The premise of the debate was that as a matter of law a victim of a tort is entitled to be compensated as nearly as possible in full for all pecuniary losses. For present purposes this mainly means compensation for loss of earnings and medical care, both past and future. Subject to the obvious qualification that perfection in the assessment of future compensation is unattainable, the 100 per cent. principle is well established and based on high authority*: *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39; *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 187E, per Lord Scarman".

4. Lord Hope said in the same case at 390A:

> *" ... the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss."*

5. And per Lord Lloyd at 363H:

> *"It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much. So far as the multiplier is concerned, the plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the cost of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial scaling down."*

(b) Past Expenses: Mitigation and the Test of Reasonableness

6. The claimant is under a duty to take reasonable steps in order to mitigate his or her loss[1]. The question of whether or not the claimant has failed to mitigate his loss is a question of fact not law[2]. The burden is firmly upon the defendant to prove that the claimant has failed to mitigate his loss[3]. The claimant needs only to act "reasonably" having regard to all the circumstances and account is only taken of matters known to the claimant at the time and subsequent knowledge with the benefit of hindsight is ignored[4]. The standard for judging the claimant's actions is not high[5]. Although the claimant must act with the interests of the defendant in mind he is "not bound to nurse the interests" of the defendant[6].

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1 Although see *The Solholt v Sameiet Solholt* [1983] 1 Lloyd's Rep 605 in which Lord Donaldson MR stated: 'A [claimant] is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the claimant in consequence of his so acting. A defendant is only liable for such part of the [claimant's] loss as is properly to be regarded as caused by the defendant's breach of duty.'

2 *Payzu v Sanders* [1919] 2 KB 581, CA; and *The Solholt v Sameiet Solholt* [1983] 1 Lloyds Rep 605.

3 *Roper v Johnson* (1873) LR 8 CP 167 as affirmed in *Garnac Grain Co v Faure & Fairclough* [1968]; *Geest Plc v Lansiquot* [2002] UKPC 48 which expressly disapproved of its earlier decision in *Selvanayagam v University of West Indies* [1983] 1 WLR 585; and *Eaton v Johnston* [2008] UKPC 1.

4 *Richardson v Redpath Brown & Co Ltd* [1944] AC 62; *Rubens v Walker* [1946] SC 215; and *Morris v Richards* [2003] EWCA Civ 223.

5 See further McGregor on Damages and the extract from Stephenson LJ cited above in *Rialis v Mitchell* (1984) Times, 17 July where he said "… the court must not put the standard of reasonableness too high when considering what is being done to improve a [claimant's] condition or increase his enjoyment of life…"

6 *Harlow and Jones v Panex (International)* [1967] 2 Lloyd's Rep 509 at 530. This was a contractual case but the principle applies equally to tort.

7. It should be remembered that the claimant needs only to act 'not unreasonably' having regard to all the circumstances[7]. The court considers what a reasonable man would have done in the claimant's position[8]. Account is only taken of matters known to the claimant at the time and subsequent knowledge with the benefit of hindsight is ignored[9]. The claimant's impecuniosity is not to be held against him or her[10]. Further, a mistaken judgment may be considered a natural consequence for which the defendant is responsible[11].

8. As regards the appropriate test to be applied Sachs LJ said in *Melia v Key Terrain Ltd* (1969) No 155B:[12]

> *"As between a claimant and a tortfeasor the onus is on the latter to show that the former has unreasonably neglected to mitigate the damages. The standard of reasonable conduct required must take into account that a claimant in such circumstances is not to be unduly pressed at the instance of the tortfeasor. To adopt the words of Lord Macmillan in the well-known Waterlow case, the claimant's conduct ought not to be weighed in nice scales at the instance of the party which has occasioned the difficulty".*

9. Importantly, any reasonable expenses incurred by the claimant in minimising his or her losses e.g. medical and travel expenses may be recovered[13]. Should the mitigation prove unsuccessful or worsen the claimant's condition, assuming the steps taken were reasonable and the chain of causation has not been broken, the defendant will remain liable for the extent of the claimant's injuries including any deterioration[14]. Likewise, if the treatment takes longer than expected or the expense incurred in pursuit of mitigation is greater than first anticipated, assuming the claimant has acted reasonably and the chain of causation is not broken, any additional loss will be recoverable[15].

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7 *Richardson v Redpath Brown & Co Ltd* [1944] AC 62.

8 *Morgan v T Wallis* [1974] 1 Lloyd's Rep 165.

9 See eg *Rubens v Walker* [1946] SC 215. See also the case of *Morris v Richards* [2003] EWCA Civ 232.

10 *Lagden v O'Connor* [2003] UKHL 64.

11 Per Lord Haldane in *The Metagama* [1927] 29 Ll L Rep 253.

12 Passage cited with approval in *Morris v Richards* [2003] EWCA Civ 223.

13 Although it should be noted that the expenses claimed must be reasonable. Where a treatment is claimed whose long-term efficacy or side-effects are unknown, or the claimant undergoes alternative therapies with no proven medical benefit, recovery may be refused. See eg *Biesheuval v Birrell* [1999] PIQR Q40 in which Eady J disallowed a claim for Viagra; cf *Re McCarthy* [2001] 6 Ch 172.

14 *Rubens v Walker* [1946] SC 215; *Hoffberger v Ascot* (1976) 120 Sol Jo 130, CA although this claim was in contract the same principles apply in tort.

15 *Mattocks v Mann* [1973] RTR 13; *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] 1 AC 1; *Lagden v O'Connor* [2003] UKHL 64. In *Mattocks v Mann* [1993] RTR 13 the repair of the

However, if the steps taken to mitigate loss are successful, the defendant is entitled to the benefit of the same[16].

10. There are two recent examples of the reasonableness test being applied to past expenses. Firstly, in *Totham v King's College Hospitals NHS Foundation Trust* [2015] EWHC 97 (QB) the defendant challenged past case management fees on the basis that they significantly exceeded Mrs Sargent's estimate. Relying upon, *Loughlin v Singh* [2013] EWHC 1641 (QB) [17], the defendant submitted that it should not have to pay for inefficient or ineffective case management and there ought to be a heavy discount from the "grossly unreasonable" costs incurred. Mrs Justice Laing rejected this argument holding that the claimant's mother had taken care to appoint a reputable company (she had interviewed no less than 5 case managers before appointing ILS); she changed case managers in ILS; and checked with the experienced deputy (Eddie Fardell) whether their fees were out of line.

11. Secondly, in *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC9 (QB) the defendant argued that the claimant had acted unreasonably in buying a Land Rover Discovery. Mrs Justice Cox rejected this argument because she wasn't persuaded that the claimant's parents, who had taken advice from their deputy, had acted unreasonably. When considering the legal principles applying to the assessment of damages, Mrs Justice Cox helpfully explained the approach to past expenses as follows:[18]

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claimant's car should have taken 6 weeks but was actually not completed for 12 weeks. Beldam LJ stated at 18: 'For a supervening cause or a failure to mitigate to relieve a defendant of a period of hire there must, in my judgment, be a finding of some conduct on her [Mrs Mattocks] part or on the part of someone for whom she is in law responsible, or indeed of a third party, which can truly be said to be an independent cause of loss of her car for that period.' See also *By grave v Thomas Cook Tour Operations Ltd* [2004] EWCA Civ 1631 in which the claimant took a full-time job in mitigation of her loss which then rendered her too tired to carry out her domestic chores. The Court of Appeal upheld the judge's award for domestic assistance.

16 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673; *Bellingham v Dhillon* [1973] QB 304; *Birch v Aslam* [2001] CLY 1532; *Dimond v Lovell* [2002] 1 AC 384, cf *Woodrow v Whitbread plc* (10 December 2001, unreported), QBD, Rougier J where the claimant retrained as a result of an accident and was thereby likely to receive more than he otherwise would in his pre-accident job.

17 Please note there is some helpful commentary on this case, which was probably wrongly decided, in Facts & Figures, page 291-292 of the latest 2015/2016 edition.

18 Para 14 of her judgment.

"In relation to expenses already incurred the Claimant and those who act on his behalf have a duty to take reasonable steps to mitigate his loss. In relation to a particular choice of treatment, for example, or transport, as arises in this case, the key is reasonableness. If the choice is unreasonable it will result in injustice to the Defendant and will not be recoverable. Provided the Claimant's choice is within the range of potentially reasonable options open to him, he will have reasonably mitigated his loss. A Defendant cannot reduce his liability by arguing that the Claimant should have chosen a cheaper option from within that range".

(c) Future Expenses: the Test of Reasonableness

12. Whether or not certain heads of future expenses[19] are recoverable, and if so, the extent that is recoverable, the test is reasonableness. Claimants are entitled to damages to meet their "reasonable requirements" or "reasonable needs" arising from their injuries: *Sowden v Lodge* [2004] EWCA Civ 1370. However, it is important to note that there may be a range of "reasonable" options to meet a claimant's needs and the item or package claimed does not need to be the cheapest available – see per Stephenson LJ in *Rialis v Mitchell* (1984) Times, 17 July where he said at pp 24-26 of the transcript:

"What the [claimant] here claims has been spent, is being spent and will be spent on his care may be looked at as mitigation of the injury and damage done to him by the defendant's negligence or as a natural result of them. In either case the question is: is it reasonable? For if it is reasonable it is a reasonably foreseeable consequence of the wrong done (sic) the [claimant] and the defendant cannot complain that it requires payment of a very large sum of money. The court must not react to dreadful injuries by considering that nothing is too good for the boy which will ameliorate his condition and increase pathetically little enjoyment of life which is all that is left to him; that would lead to making the defendant pay more than a fair and reasonable compensation. But the court must not put the standard of reasonableness too high when considering what is being done to improve a [claimant's] condition or increase his enjoyment of life… I think, the right question is: what is it reasonable to do for this injured boy? Mr Fricker gives the wrong answer in submitting that it would be reasonable to give him the less expensive care and treatment which other parents might prefer to give him or which these parents, if restricted by their own means without the defendant or insurers to look to, might or would have given him. That may be the answer in some cases, but what has to be first considered by the court is not whether other treatment is reasonable but whether the treatment chosen and claimed for is reasonable. There is here the complication that because of his injuries the injured person cannot himself choose his treatment or make known his choice, and the choice has to be made for him by his parents. But that does not alter the principle that the defendant is answerable for what is reasonable human conduct and if their

[19] Note that in relation to future losses such as loss of earnings, such losses need not be reasonable, they merely need to be reasonably foreseeable and established to the requisite standard of proof.

choice is reasonable he is no less answerable for it if he is able to point to cheaper treatment which is also reasonable".

(d) Applications of the Reasonableness Test

13. Following *Sowden v Lodge* [2004] EWCA Civ 1370 claimant representatives formulated a "reasonableness test". Based upon the judgment of Stephenson LJ in *Rialis v Mitchell* (1984) Times, 17 July as approved in *Sowden v Lodge*, it was argued that all the court needed to do was to consider whether the care package chosen and claimed for by the claimant was reasonable, and that when judging reasonableness there might be a number of options and the claimant wasn't confined to the cheapest available. Although this formulation was initially rejected by Sir Roger Bell in *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB), thereafter it often went without challenge and was adopted in a number of cases including *A v B Hospitals NHS Trust* [2006] EWHC 1178 (QB); *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB); *Taylor v (1) Chesworth (2) MIB* [2007] EWHC 1001 (QB); *Wakeling v (1) McDonagh and MIB* [2007] EWHC 1201 (QB); *A v Powys Health Board* [2007] EWHC 2996 (QB); and *Pankhurst v (1) White (2) MIB* [2009] EWHC 1117.

14. In *A v Powys Health Board* [2007] EWHC 2996 (QB) the approach in *Rialis v Mitchell* and *Sowden v Lodge* was taken a step further and was applied to heads of loss other than care. In particular Mr Justice Lloyd-Jones (as he then was), held that the principles stated in those cases "applied equally to the assessment of damages in respect of aids and equipment"[20]. He confirmed that the correct approach was first to make findings regarding the nature and extent of the claimant's needs and then to determine whether or not what is proposed by the claimant is reasonable having regard to those needs. In relation to items such as the Theraposture bed because the item and cost of that item claimed by the claimant was reasonable, he held it was irrelevant that the defendant put forward a cheaper item that was also reasonable[21].

[20] Paragraph 94 of the judgment.

[21] Lloyd-Jones J's reasoning was criticised by James Rowley QC in an article entitled "Serious Personal Injury Litigation – a Quantum Update" [2008] JPIL 109.

15. However, in *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB) Mrs Justice Swift added a caveat to the reasonableness test by referring to Lord Woolf's judgment in *Heil v Rankin et al.* [2001] 2 QB 272 who said at paragraphs 22, 23 and 27:

> *".. the aim of an award of damages for personal injuries is to provide compensation. The principle is that 'full compensation' should be provided. ... This principle of 'full compensation' applies to pecuniary and non-pecuniary damages alike. ... The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable".*

16. Mrs Justice Swift said at paragraph [4] of her judgment:[22]

> *"The claimant is entitled to damages to meet his reasonable needs arising from his injuries. In considering what is "reasonable", I have had regard to all the relevant circumstances, including the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item".*

(d) Problems with the Reasonableness Test

17. A number of issues have arisen as regards the interpretation of the well-known reasonableness test:

    (i) Do the same reasonableness principles apply to past as well as future loss?

    (ii) Do the cases of *Sowden v Lodge* and *Rialis v Mitchell* wrongly elide principles of mitigation of loss with assessment of damages?

    (iii) Is it right that the legal or evidential burden of proof is sometimes reversed as it was in the cases of *Massey* and *A v Powys Health Board?*

    (iv) Is a proportionality principle to be incorporated into the test of reasonableness?

    (v) What if the defendant is able to identify an alternative option which is also reasonable, but cheaper to provide?

(e) Recent Case Law and Analysis

[22] The principles regarding the assessment of damages were apparently not in issue in the case of *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC9 (QB) where this same passage from Lord Wolf was relied upon.

(i) Past and Future Losses and Expenses

18. Arguably, there is a distinction between assessing the recoverability of items of expenditure which have already been incurred and items of loss or expenses which are yet to be incurred.

19. When assessing damages, there are a number of over-arching principles in play: taking your victim as you find him or her; foreseeability and remoteness; causation; reasonableness; and mitigation of loss. Items of past loss and expense will not be recoverable unless they were reasonably foreseeable, causally related to the injuries and reasonably incurred both in terms of nature and amount. However, when can the principles of mitigation be utilised to reverse the burden of proof and improve the chances of recoverability?

20. In relation to some items of past expense – for example medical treatment – it is clear that the expenditure was incurred to ameliorate the effects of the injury, which in turn results in a mitigation of loss. The position in relation to other heads of loss such as care, case management and items of equipment purchased is not so clear. Expenditure in these areas is not necessarily incurred in mitigation of loss: it is driven by needs arising from the injuries which may in fact increase loss. For example, it is difficult to describe a claimant who employs professional support workers as "mitigating their loss". The support workers are employed because they are needed, not because they are reducing any loss to the defendant.

21. However, in *Totham* it was argued (and accepted by the Defendant) that analogous principles to mitigation of loss should apply to the assessment of past professional case management. In oral closing submissions, the Defendant, perhaps generously, conceded that at least the evidential (if not the legal) burden was on it to prove that the past expenditure was unreasonable. The Claimant submitted that where there is a causal connection between the injuries and the expenditure incurred, the test for recoverability is one of reasonableness in light of all the circumstances; the claimants actions are judged at the time of the expenditure (not with the benefit of hindsight); the burden is on the defendant to prove that the item of expenditure was unreasonable; and the test of reasonableness is not a high one.

22. Cox J similarly employed principles relating to (or analogous to) mitigation of loss in the case of *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC9 (QB).

(ii) Future Losses: Application of *Sowden* and *Rialis*

23. Both *Sowden* and *Rialis* involved questions of the claimant's long-term care regime. In particular, the issue was whether a private home regime was reasonable as opposed to care in a state-funded residential institution. For all practical purposes, similar arguments are now largely redundant by virtue of the Court of Appeal's helpful decision in *Peters v East Midlands Strategic Health Authority & Anor* [2008] EWHC 778 confirming the claimant has a right to choose private over state-funded care[23].

24. Whilst *Sowden* and *Rialis* are useful for setting the scene, often the task being performed by the court is not whether the type or category of expenditure is reasonable. The issue is more commonly the number of hours of private care that are reasonably required rather than whether private care is justified at all. To that extent Mr Justice Lloyd-Jones may have gone too far in *A v Powys Health Board* [2007] EWHC 2996 (QB) by holding that it was irrelevant for the defendant to have produced alternative costings for different beds.

25. However, the fact that the defendant identifies an alternative option which is also reasonable (but cheaper) does not necessarily limit the claimant to claiming the lower amount. The judge still retains a large discretion in this regard. There is no straightjacket of authority which compels the court to restrict the award the defendant's lower figure.

26. Albeit technically *obiter*, it is submitted that Foskett J accurately summarised the law regarding the approach to assessing full compensation in *Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB) as follows:[24]

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23 See also *Harman v East Kent Hospitals NHS Trust* [2015] EWHC 1662 (QB).

24 Pleasingly, whilst not brought to his attention during the course of the trial, Foskett J's encapsulation of the law in these paragraphs is very similar to the approach I suggested in an article entitled "A Quantum Update: Pushing Boundaries" JPIL [2009] 140-163.

> *"166. To my mind, in assessing how to provide full compensation for a claimant's reasonable needs, the guiding principle is to consider how the identified needs can reasonably be met by damages – that flows from giving true meaning and effect to the expression "reasonable needs". That process involves, in some instances, the need to look at the overall proportionality of the cost involved, particularly where the evidence indicates a range of potential costs. But it all comes down eventually to the court's evaluation of what is reasonable in all the circumstances: it is usually possible to resolve most issues in this context by concluding that solution A is reasonable and, in the particular circumstances, solution B is not. Where this is not possible, an evaluative judgment is called for based upon an overall appreciation of all the issues in the case including (but only as one factor) the extent to which the court is of the view that the compensation sought at the top end of any bracket of reasonable cost will, in the event, be spent fully on the relevant head of claim. If, for example, the claimant seeks £5,000 for a particular head of claim, which is accepted to be a reasonable level of compensation, but it is established that £3,000 could achieve the same beneficial result, I do not see that the court is bound to choose one end of the range or the other: neither is wrong, but neither is forced upon the court as the "right" answer unless there is some binding principle that dictates the choice. It would be open to the court to choose one or other (for good reason) or to choose some intermediate point on the basis that the claimant would be unlikely to spend the whole of the £5,000 for the purpose for which it would be awarded and would adopt a cheaper option or for some other reason.*
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> *167. I apprehend that parties have been settling cases and the courts have been deciding cases on this broad approach for many years without doing violence to the full compensation principle. Inevitably, broad-brush judgments are called for from time to time and, as I have been invited by both parties to do on occasions in this case (where so many individual items remain in dispute), the court must simply "take a view". I will be adopting that broad approach, where appropriate, when considering certain disputed heads of claim in this case".*

(iii) Proportionality

27. In *Ellison v University Hospitals Bay NHS Foundation Trust* [2015] EWHC 366 (QB) the defendant sought to expand Swift J's comments in *Whiten* to support a more general principle that damages must be proportionate.

28. Warby J dealt with these arguments at paragraphs 18-20 of his judgement as follows:

> *"18. Ms Vaughan Jones also relied on a proposition in the same paragraph of Swift J's judgment, that the relevant circumstances include "the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item". I accept, and I did not understand it to be disputed, that proportionality*

is a relevant factor to this extent: in determining whether a claimant's reasonable needs require that a given item of expenditure should be incurred, the court must consider whether the same or a substantially similar result could be achieved by other, less expensive, means. That, I strongly suspect, is what Swift J had in mind in the passage relied upon.

19. The defendant's submissions went beyond this, however. They included the more general proposition that a claimant should not recover compensation for the cost of a particular item which would achieve a result that other methods could not, if the cost of that item was disproportionately large by comparison with the benefit achieved. I do not regard Whiten as support for any such general principle, and Ms Vaughan Jones did not suggest that Swift J had applied any such principle to the facts of that case. She did suggest that her submission found some support in paragraph [27] of Heil v Rankin, where Lord Woolf MR observed that the level of compensation "must also not result in injustice to the defendant, and it must not be out of accord with what society would perceive as being reasonable."

20. Those observations do not in my judgment embody a proportionality principle of the kind for which the defendant contends, and were in any event made with reference to levels of general damages for non-pecuniary loss. Ms Vaughan Jones cited no other authority in support of the proportionality principle relied on. I agree with the submission of Mr Machell QC for the claimant, that the application to the quantification of damages for future costs of a general requirement of proportionality of the kind advocated by Ms Vaughan Jones would be at odds with the basic rules as to compensation for tort identified above."

29. In *Robshaw*, Foskett J expressed his tentative agreement with Warby J's analysis of Swift J's formulation of the correct test.

30. Further in the non-injury case of *Network Rail Infrastructure v Simon Handy and others* [2015] EWHC 1175 (TCC) Akenhead J considered the proper approach to the assessment of damages regarding various rail incidents. There are a number of helpful passages. In particular at paragraphs 43 and 46 Akenhead J said as follows:

"43. In case after case (in negligence), the courts over the years have analysed the elements or exercises which need to be established or done: the existence of duty, scope of duty, reasonable foreseeability, remoteness and measure of damages, linked necessarily by causation considerations. I agree with Moore-Bick LJ that there is ***no overarching or separate principle which requires damages to be reasonable as between claimant and defendant.*** *Otherwise, one might descend into arguments that it is disproportionately unreasonable, as between claimant and defendant, that a poor defendant should have to pay to a better off claimant the full amount of loss otherwise established. The negligent defendant whose poor driving paralyses a highly successful claimant*

> *whose earnings run into hundreds of thousands or possibly millions of pounds every year can, currently, be expected to pay damages for the actual loss of the particular claimant's earnings, even if the claimant is, say, a banker and, if it be the case, bankers' earnings (with bonuses) are considered to be extravagantly high:* ***there is no principle that the paralysed banker should not be compensated for the earnings which he or she can prove would have been earned but for the accident or that the Court should reduce those damages to a level which might be considered to be reasonable as between claimant and defendant.***
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> *45. It is at least theoretically possible that in an appropriate case the Court could find that the scope of the tortious duty did not extend to cover a type of loss which is likely either to be unconnected with any breach of the duty or which produces a level of loss which is so far beyond what might be considered to be reasonable that the duty should not extend at all to such loss. At the very least, that must be a rare case, if it ever happens at all, because when considering the scope of duty it will or will not to a large extent encompass the types of loss which are reasonably foreseeable and which are otherwise not too remote.* ***What the Court of Appeal decided was that the loss of revenue as such was a recoverable head of loss and it is difficult to see how it could be a totally irrecoverable head of loss just because the amount was thought by one party to be excessive.*** *This is partly because it is difficult to establish criteria by which a loss of £5X as opposed to £X is "excessive" or "unreasonable". One then gets into a debate as to whether the Court should or can allow an award of damages at a level which is not "excessive" or "unreasonable".* [emphasis added]

31. These observations may assist to counter a suggestion that there is an overarching principle of proportionality and that claims must be kept within reasonable bounds. However, it should be noted that the context of the discussion was assessment of *losses* flowing from a tortious act (trespass). As discussed above, arguably a distinction can be drawn in principle between losses flowing from the consequences of an injury (such as loss of earnings or loss of business opportunity), which should be recoverable without limit, and future anticipated expenses, to which different principles may apply.

Summary Regarding Reasonableness

32. Despite its apparent simplicity, the assessment of "reasonable needs" or "reasonable expenditure" is a complex area prone to confusion. There are a number of distinct but overlapping principles. I would venture to suggest the following summary:

    (i) There is a distinction to be drawn between losses and expenses. Where a loss has been incurred by reason of the defendant's tort, there is usually no need to

prove reasonableness, just that the loss is reasonably foreseeable and causally related to the injuries. However, where an item of expense has been incurred, or it is proposed will be incurred in the future, it is necessary to establish that the item in question is reasonable both in terms of nature and extent.

(ii) Reasonableness is a question of fact and is judged on the basis of all the circumstances and evidence in the case.

(iii) Whilst the test of reasonableness is objective (and carried out by the judge considering what the reasonable claimant would do in the claimant's shoes), it takes into account subjective elements. For example, the claimant's age, sex, religious and cultural background will be considered along with their social and financial standing. Thus it will be reasonable for a claimant to hire an Aston Martin to replace his or her damaged car, but only if he or she owned a similar car before the accident rather than a beaten up old banger.

(iv) There may well be a difference regarding the consideration of past and future expenses. Where there is an item of past expenditure, it may be possible to invoke principles of mitigation of loss (or analogous principles), thereby reversing the legal or evidential burden of proof.

(v) Where a category or type of future expenditure (e.g. a care regime) is in issue, the claimant bears the burden of proving that the type of expenditure or method of meeting the claimant's needs being claimed for (e.g. home care) is reasonably required.

(vi) Once the claimant proves that a particular category or item of expenditure is reasonably necessary, the claimant is not necessarily limited to claiming the cheapest possible item or method of meeting his or her needs.

(vii) Alternative costings provided by the defendant are likely to be relevant to assessing the appropriate amount to be allowed under a particular head of loss where the category or type of future expenditure is accepted to be reasonable, but where the extent of the expenditure is disputed.

(viii) Proportionality has a role to play to the extent that the expenditure must be proportionate to the injuries. Likewise it will be difficult to recover the increased costs of a particular item, if there is an alternative which provides the same or very similar benefits at a much reduced cost. But, there is no overarching principle that the expenditure must be proportionate as between

the claimant and defendant and no reasonable item will become irrecoverable, simply because the cost is considered by one party to be disproportionate.

(ix) Where the claimant and defendant both put forward competing items or regimes of future expenditure which are both reasonable, the judge may prefer one over the other (for good reason) or may select an intermediate figure.

33. In short mean judges are likely to continue making awards at the lower end of the scale and generous judges at the higher end. Some battle lines are beginning to be drawn as regards contentious issues such as proportionality. Whilst guidance from the higher courts on the assessment of "reasonable needs" and "reasonable expenditure" may be welcome, it is anticipated that there is unlikely to be much appetite for curtailing the current wide scope for judicial interpretation, which allows judges to come to decisions they believe to be fair on the evidence.

Why does the Test of Reasonableness Matter?

34. In many cases, the precise formulation of the reasonableness test will not matter. For example the defendant may not have any viable alternative option and if the head of loss is considered reasonable, the claimant's figures are likely to be accepted. In practice it may only be the rare case where the court's ruling on the approach to be adopted will make a difference to the outcome and it is noteworthy that in *Robshaw*, Neil Block QC for the defendant struggled to identify any concrete examples where this would be the case, which is why Foskett J's comments are strictly *obiter*.

35. Three examples may illustrate why it is important to be alive to these issues. First, cases involving London property purchases (or rental costs). Take for example the case of a family living in a Council House in Islington. If the child claimant is severely injured and alternative accommodation is required, the starting point would be to consider alternative housing in the same area to put the claimant back in the position he or she would have been in before the accident. However, defendants routinely argue that there needs to be some proportionality and the claimant could be housed more economically in a different area. To date there have been no reported cases dealing head on with this issue. No doubt each case will need to be decided on its own facts and there is likely to be a need to consider closely the claimant's ties to a

particular area including the location of friends and family, school / college and employer (for the claimant and the family members living with him or her).

36. Secondly, proportionality may feature in amputee cases when considering some of the latest developments in prosthetics or orthotics such as the exo-skeleton. For example, the BiOM system with its powered ankle is the most advanced lower limb prosthetic currently available on the market. Claimants will naturally argue that in order to put them back into the position they would have been in before for their injuries so far as financially possible, they should be provided with the best substitute for their missing limb. But whilst the BiOM may be the best currently available prosthetic for below knee amputees, it is significantly more expensive than conventional prosthetics. It is likely that judges will need to be persuaded that the claimant will benefit from and make use of the BiOM's features. However, can a defendant simply object to the cost of the BiOM on the basis that it is too expensive and the additional cost of purchasing the BiOM over and above a conventional limb are disproportionate to the benefits that will be enjoyed? Could a defendant argue that the BiOM is the gold or ideal standard which is outside the range of reasonableness? This is exactly what happened in *Wagner v (1) Grant (2) Arla Foods UK Plc* [2015] CSOH 51 where the judge disallowed the BiOM. The judge, influenced by the fact that the claimant's prosthetic expert accepted that the BiOM was "a Rolls Royce" prosthetic arrangement, found that the BiOM was not reasonably necessary.

37. Lastly, the issue is likely to arise in relation to items of equipment and assistive technology. Where the claimant is proposing significantly more expensive items than those conceded by the defendant, most judges will need to be persuaded that the more expensive items are accompanied by material benefits. Where there is a range of items and no clear advantages of one item over another but the costs are different, a generous/sympathetic judge may allow the claimant's figure, a mean/unsympathetic judge may allow the defendant's figures and a neutral judge may simply split the difference (as Foskett J was minded to do on a number of occasions in *Robshaw*).

QUANTUM UPDATE

Retirement Ages

38. The starting point for assessing pension retirement age is the State Pension age, which can be checked using the free State Pension age calculator: **https://www.gov.uk/calculate-state-pension.**

39. The claimant's state retirement age is likely to be used for calculating his or her loss of earnings in the absence of a good reason to depart from it: see, for example, *Tait v Gloucestershire Hospitals NHS Foundation Trust* [2015] EWHC 848 (QB).

40. However, arguably the position is different for young claimants where it is expected that the applicable state retirement age would have increased over the claimant's working life. In particular, a statement retirement age of 70 was recently accepted by the judges in both *Totham* and *Robshaw* for claimants aged 7 and 12 respectively

Loss of Pension

41. Laing J in *Totham* did not make a separate award for loss of pension, however, the fact that no additional award was made was used to negate any credit for expenses related to employment (i.e. travel costs and costs of work clothing etc).

42. In *Robshaw* the parties agreed a claim for loss of employer pension contributions of 5.5% per annum of the claimant's gross salary.

43. In *Manna* the defendant objected to any pension loss claim on behalf of the 18 year old claimant. Cox J held that the claim for loss of pension contributions was a valid head of loss in addition to loss of earnings. The claim appears to have been limited to the obligations under the Pensions Act for employers to automatically enrol all employees aged between 22 and state pension page and make annual contributions equivalent to 3% of gross earnings (the total claim was £700 x 22.81 = £15,967).

Credit for Travel Expenses Against Claims for Loss of Earnings

44. Defendants routinely rely upon *Eagle v Chambers* [2004] EWCA (Civ) 1033 to argue for a discount of 15% in respect of claims for loss of future earnings.

45. Three cases have rejected such an approach and the reliance placed on *Eagle v Chambers* [2004] EWCA (Civ) 1033 by defendants for such a discount.

46. In *Robshaw* Foskett J followed Swift J's decision in *Whiten* by only making a modest deduction for travel expenses of a few hundred pounds per annum (the claim for £31,501.72 net was rounded down to £31,000).

47. William Davis J went even further in *HS v Lancashire Teaching Hospitals NHS Trust* [2015] EWHC 1376 (QB) and refused to make any deduction at all for travel expenses. He did not accept that *Eagle v Chambers* (2004) laid down any principle of law and followed *Dews v NCB* (1988) At paragraph 40 he said as follows:

> *"Miss Bowron Q.C. argued that some modest deduction from any figure for loss of earnings should be made to take account of travelling expenses to get to work. She cited Eagle v Chambers [2004] EWCA (Civ) 1033 as authority for such a deduction. The Court of Appeal in that case was faced with a judgment in which the judge had made such a deduction. The judgment of Lord Justice Waller did not establish any principle that such a deduction should be made. Rather, Lord Justice Waller declined to interfere with the decision of the judge on the basis that it was not wrong in law. The passage cited by Lord Justice Waller from the decision of the House of Lords in Dew v NCB shows that such a deduction was not to be encouraged. I do not propose to make one for the reasons given in Dew".*

48. In *Totham*, where the claimant lived in London, Laing J took a different approach. During the course of oral submissions she was concerned that the claimant's travel costs to work might have been reasonably high, especially if the claimant moved out of London and commuted in (as many people do). However, instead of making a reduction for travel (and other work related expenses), Laing J accepted the claimant's secondary argument that no discount should be made for travel expenses should be made if no claim was allowed for benefits since the two offset each other.

Life Expectancy

49. Foskett J's judgment in *Robshaw* is as clear and detailed exposition on life expectancy in a cerebral palsy case as you could hope to see. Account was taken not only of the claimant's current feeding skills, but also the likely progress in this regard in light of further speech and language therapy input. The claimant's use of a neater eater was relevant to his ability to self-feed and on the facts of the case, the claimant's feeding tube was considered to be a minor positive rather than a negative factor. In terms of wider principle, importantly Foskett J was prepared to accept the intuitive argument that a large award of damages would make a material difference in terms of life expectancy. Notwithstanding the absence of scientific literature confirming the link between favourable economics and an increased life expectancy, he was prepared to increase the claimant's life expectancy by two years. Logically similar adjustments should be contended for and made in other types of case.

Multipliers

50. Table 28 has been re-confirmed as the appropriate table to be used for calculating the claimant's lifetime multiplier when medical experts express the claimant's life expectancy in the form that "the claimant is likely to live to age X".

51. Swift J in *Whiten* refused to follow the suggested guidance at paragraph 20 of the introduction to the Ogden Tables. She held she was bound by *B v RVI & Associated Hospitals NHS Trust* [2002] Lloyd's Rep Med 282 to use an unadjusted fixed term multiplier from Table 28. The difficulty with using Table 1 in accordance with paragraph 20 is that the effect would be to produce a discount (albeit relatively modest) from the multiplier based upon the claimant's full life expectancy.

52. Swift J's decision was followed by Foskett J in *Reaney v (1) University Hospital of North Staffordshire NHS Trust (2) Mid Staffordshire NHS Foundation Trust* [2014] EWHC 3016 (QB) and by Cox J in *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC9 (QB). It is somewhat odd that the defendant contested the use of Table 28 in *Manna* when it had been agreed by the NHSLA as the appropriate method for assessing multipliers in both *Totham* and *Robshaw*.

Dis-applying the Discount Rate

53. The current discount rate remains at 2.5% as set by the Lord Chancellor exercising his powers conferred under s 1(2) of the Damages Act 1996.

54. In *Thomson v Thomson* the Supreme Court of Bermuda (22 June 2015) the court was persuaded to follow *Helmot v Simon* [2012] UKPC 5 and to apply different discount rates. On the evidence, a discount rate of -1.5% was applied for heads of damage likely to be affected by real earnings increases and 0% in relation to heads of damage likely to be affected by price inflation. It is understood that the defendant is attempting to appeal the decision.

55. A similar challenge was made to the discount rate in *LHS v CICA* [2015] EWHC 1077 (Admin). The claimant argued that the CICA should not be restricted to the statutory discount rate of 2.5%. Jay J rejected the statutory construction contended for by the claimant holding that the CICA was not a "civil court" and was therefore not bound to only follow common law principles regarding the assessment of loss. Periodical payments are not available under the CICA scheme. When assessing the appropriate lump sum award, it was reasonable to have regard to approach taken in civil courts (which was to apply a discount rate of 2.5% as imposed by statute). However, the lack of periodical payments in the CICA scheme could not be used to usurp the discount rate of 2.5% because the rate selected by the Lord Chancellor does not violate the full recoverability principle.

Home Hydrotherapy Pools

56. There have been three recent cases considering claims for home hydrotherapy pools.

57. In *Ellison v University Hospitals Bay NHS Foundation Trust* [2015] EWHC 366 (QB) the judge allowed the claim for a home hydrotherapy pool on the basis of medical or therapeutic reasons. The evidence was that the claimant suffered from intractable pain and that hydrotherapy was one of the only pleasurable activities she enjoyed which gave relief from her symptoms including reduction in painful spasms, enhancement of physiotherapy and reduction in risk of spontaneous fracture. Warby J found that to put the claimant in anything like the position she would have been in but

for the negligence, it was necessary to provide her with relief from the agony she was in. Notwithstanding the lack of scientific literature affirming or confirming the effectiveness of hydrotherapy, he accepted that the overwhelming effect of the factual evidence was that hydrotherapy was an effective means of relieving the claimant's pain and discomfort. There were no viable alternatives to hydrotherapy which could offer a similar level of symptom reduction. In conclusion Warby J found as follows:

> *"119. For these reasons I have ultimately concluded that, in what I strongly suspect are the exceptional circumstances of this case, the cost of a hydrotherapy pool in the home is a cost that is reasonably required in order to provide the pain relief that will place Ayla, as far as possible, in the position she would have been in if she had not suffered the injuries that lead to this claim. There is in my view no reasonable alternative; no other means would provide the same or any substantially similar relief from the "agony" which Ayla suffers.*
>
> *120. I would add that in my assessment the nature, frequency and degree of pain involved mean that the difference between the effects that provision of in-home hydrotherapy would have, and the alternatives, make the cost – though very substantial – proportionate to the need. As already noted above, I have taken account in arriving at my award of general damages of the relief from pain that the provision of an in-home hydrotherapy pool will in my judgment afford the claimant".*

58. In *Robshaw*, for the first time in a reported case, the claimant recovered the costs of building a home hydrotherapy pool due to lack of available local facilities. The claimant loved swimming and being in water. Whilst it was common ground between the parties' respective paediatric neurologists that there was no clinical or therapeutic need for hydrotherapy, it was agreed that swimming was a good activity for him to do both psychologically and in terms of maximising his quality of life. The difficulty was that there were no suitable local facilities. The defendant suggest three different venues, however, these were visited by the claimant's physiotherapy expert, Susan Filson, who was able to discount each one in turn due to problems with the water temperature, changing facilities or access to the pool e.g. due to inappropriate hoisting. The judge found that the case for a home-based pool is made out here on the basis of the real and tangible psychological and physical benefits that swimming will give to the claimant, but which could not be obtained in a convenient local public facility. He ordered that the claimant be provided with a pool measuring 5 x 3 m and that the water should be maintained at 32°C.

59. A claim for a home hydrotherapy pool failed in *HS v Lancashire Teaching Hospitals NHS Trust* [2015] EWHC 1376 (QB). Unusually in this case William Featherby QC was representing the claimant. A claim was advanced for a home hydrotherapy pool costing £250,000. However, the evidence was that the claimant could hire a private hydrotherapy pool in Bolton which was about a 40 minute drive away from her home. William Davis J allowed the alternative claim for twice-weekly hydrotherapy costing £5,000 per annum, totalling £125,000 over the claimant's lifetime.

Gratuitous Case Management

60. The claimant recovered an additional £12,987 for gratuitous case management in *Totham*. There was an argument about the rate to be applied. The judge accepted that the hours should be costed by reference to the aggregate NJC rate.

61. The agreed past losses in *Robshaw* in the global sum of £1,300,000 encompassed claims in the schedule of loss for additional gratuitous care not costed by Mrs Sargent totalling £13,881.21 and gratuitous case management totalling £25,045.24 (after the 25% discount). The additional care not costed by Mrs Sargent included taking the claimant to and from medical appointments and taking the claimant to and from respite care once a month.

62. Attached at **Appendix 1** is a list of tasks may fall under gratuitous case management and upon which instructions should be taken.

Education Costs

63. In *Totham* future education was agreed in the sum of £45,205. On the evidence, this allowed a contingency in respect of a SENDIST tribunal costing £30-35,000 as well as private teaching support for 12 months and some psychological support.

64. In *Robshaw* a figure of £150,000 was agreed for future education costs (against a claim for £200,000). This sum was intended to cover a large number of contingencies. The case was complicated by reason of the claimant's complex needs and the requirement for his curriculum to be differentiated for use with sophisticated eye gaze equipment. The claimant's educational lawyer, Gurvinder Kaur from

Shoosmiths, had had experience of local education authorities challenging the one-to-one support and additional teacher input that was required to differentiate the curriculum. The sum agreed was intended to cover a list of various potential future costs as set out in **Appendix 2**.

Additional Childcare Costs

65. The judges in *Totham* and *Robshaw* rejected claims for the increased costs of childcare in the event that the claimants had children. Both claims had been discounted to reflect contingencies (i.e. that the claimants would not have children or they would not need as much additional care as being suggested). Disappointingly, neither judge considered that the prospects of the claimants bringing up children were sufficient enough to warrant an award under this head.

Application of Ogden Discount Factors

66. In *FM v Ipswich Hospital NHS Trust* [2015] EWHC 775 (QB) the claimant suffered a severe shoulder dystocia at birth. He was aged 18 at trial and there was a dispute regarding the assessment of loss of future earnings and earning capacity. The medical evidence was that there was so little movement in the claimant's shoulder and arm that he was "a little better than an amputee". The defendant argued for a *Blamire* award because of the "large number of imponderables". However, this argument was rightly rejected by the judge who made an award for loss of future earnings based upon average male earnings. The calculation was undertaken using a conventional multiplier and multiplicand approach on the basis that the claimant was disabled under the Equality Act 2010.

67. The Court of Appeal's eagerly awaited judgment in *Billett v MOD* [2015] EWCA Civ 773 was handed down on 23 July 2015. The claimant, who was a Lance Corporal in the Royal Logistics Corps of the Army, suffered a non-cold freezing injury. His symptoms were mild but had a substantial adverse effect on his ability to undertake daily activities in cold weather. The symptoms were not sufficient to impact on his ability to carry out his job in the Army and he was categorised as "MFD" i.e. medically fit for full deployment anywhere in the world. When he left the Army the claimant took up work as a lorry driver and he was unable to undertake this work

without any problems. The judge found that the claimant left the Army due to personal reasons (non-related to his injuries). However, he calculated loss of future earnings on the basis of an adjusted Ogden approach (he used a residual earnings discount factor of 0.73 rather than the suggested discount factor from Table B of 0.54). The total award for loss of future earnings was £99,062. The defendant appealed on the basis that the judge should have made a *Smith v Manchester* award.

68. The Court of Appeal agreed that the judge was wrong to have applied a conventional multiplier / multiplicand approach to the calculation of loss of future earnings. Contrary to the view expressed by Dr Wass in JPIL[25], the Court of Appeal did not overturn the trial judge's finding that the claimant met the criteria for being disabled. However, giving the judgment of the court Jackson LJ relied upon three particular factors as to why the use of Tables A to D was not appropriate on the facts of this case. First, the claimant's disability was described as being at the outer fringes of the disability spectrum (the trial judge found that the claimant met the criteria for being disabled under the Equality Act, but only just). Secondly, the claimant's disability affects his ability to pursue his chosen career much less than it affects his activities outside work. And thirdly, that there was no rational basis for determining how the reduction factor should be adjusted. In the event, the Court of Appeal substituted a *Smith v Manchester* award of £45,000 based upon two years loss of earnings for the trial judge's award.

69. Whilst it is clear that the trial judge's award was too generous and could not stand, the Court of Appeal's approach is likely to lead to confusion and uncertainty. Until this appeal, it had been thought that if the claimant met the criteria for being disabled then the suggested Ogden Table residual earnings discount factors would be used, although they may be adjusted to take account of the particular facts of a given case. The Court of Appeal has now created a further category of case where the claimant's injuries meet the definition of disability, yet the circumstances allow the court to depart from the conventional multiplier / multiplicand approach. Although the case of *Billett* should be restricted to its very specific facts (how can a large award of damages for loss of earnings realistically be made for someone who was medically fit for full

[25] *Billett v MOD and the meaning of disability in the Ogden Tables* by Dr Wass [2015] JPIL, 37.

deployment in the Army?), the likelihood is that defendants will now seize upon this decision to argue for *Smith v Manchester* and *Blamire* type awards in numerous types of cases where the injuries are considered to be relatively modest or the claimant has returned to his or her pre-accident role without limitation. Examples might include minor brain injuries, incomplete spinal injuries or below knee amputations where the claimant has returned to full-time work.

70. There is no doubt that Dr Wass's solution to the problem would have been the simpler and cleaner way to resolve further disputes. Having a dichotomy of cases (those where the claimant is disabled and those where he or she does not meet the criteria for being disabled) would have been much less problematic than the acceptance of a hybrid category where the claimant can be disabled but the suggested discount factors are irrelevant. Having said that there are of course numerous cases e.g. where the claimant is self-employed or where there are a large number of imponderables when a *Smith v Manchester* or *Blamire* type of award would be the more appropriate method of calculating future loss despite the fact that the claimant might satisfy the criteria for being disabled.

71. It remains to be seen to what extent *Billett* will be used by judges to move away from the Ogden Tables A to D approach. No doubt there will be more cases to come which test the boundaries. In contentious cases, practitioners would be well advised to seek appropriate advice from an employment expert or labour economist since the data has shown that judges' impressionist valuation of loss of earnings claims often under-estimates the impact of injuries on long-term employment prospects.

Credit for Parental Accommodation Expenses

72. The judgment of Swift J in *Whiten* refusing to make the claimant give credit against her award for accommodation to reflect savings made by the claimant's parents has been followed in *Ellison* and *Robshaw*.

73. Warby J in *Ellison* said at paragraph 152:

> *"I should only depart from Swift J's decision if I am persuaded that it is wrong. I am not so persuaded. On the contrary, I agree with Swift J's conclusions, and her reasoning is entirely consistent with my own. It involves a recognition that it is just to look holistically at the comparative situations of the parents, as they are and as they would have been, bringing into the reckoning what they have lost as well as what they may gain. In some cases, some of what the parents lose may be capable of calculation. The present case may in principle be such a case, given the striking difference between the financial consequences of the futures the family would have had, and will now have. Swift J focused, however, on losses that are not easy to measure in money. I share her view that this does not mean that they ought not to be acknowledged".*

74. Likewise in *Robshaw* Foskett J refused to make the claimant give credit to reflect the benefit she receives living rent free in the claimant's home or the rent she received from renting out the property she bought with a loan from her brother.

Second *Roberts v Johnstone* Claim

75. In *Manna* Cox J allowed a modest second accommodation claim to allow the claimant's biological father to adapt his property in order to permit access. This is an understandable and legitimate application of the "take your victim as you find them" principle. It is no different to the not uncommon scenario where the parents of a disabled child split up and provision needs to be made for housing expenses at both the claimant's mother and father's properties.

Credit for Travel Costs in Any Event

76. Whilst it is not apparent from the face of the judgment in *Totham*, practitioners should note that the claimant's future transport claim was accepted in full which included only giving 50% credit for the capital costs of a car that would have been bought in any event.

77. The 50% credit principle is frequently applied in relation to accommodation claims where it is commonly argued that the claimant only needs to give 50% credit for the equity he or she would have had in a property bought with a partner or friend[26]. This is the logical extension of that argument. The argument was successful in *Totham*

[26] *M (A Child) v Leeds Health Authority* [2002] PIQR Q4 (Sullivan J); *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB).

because the evidence was that the claimant's family lived in London and largely relied upon public transport. The claimant's parents only had one car between them. It was not unreasonable to suspect that the claimant would have shared a family car, rather than having two separate cars.

78. The same argument was unsuccessful in *Robshaw*. However, the claimant lived in Lincolnshire. There was a much greater chance that the claimant (and any partner) would have needed to drive to work and that his family would have needed two cars.

Adapted Motorhome

79. *Robshaw* is the first reported case in which an adapted motorhome was awarded. The claimant came from a family who greatly enjoyed camping and caravanning. Before he became too big, the claimant used to go away with his grandparents in their touring caravan. It was common ground between the parties' respective OT experts that the only adapted motor home which could meet the claimant's needs was a Kon Tiki motorhome costing £96,000. The judge allowed this one-off expenditure in full, plus £1,000 per annum. The total adapted motor home award came to £124,970. However, the judge found that having bought an adapted motorhome the claimant would choose to spend one holiday in three in the UK. Averaged out over the claimant's lifetime, this reduced the holiday claim by £36,705. The claimant was therefore £88,265 better off by advancing the claim for the adapted motorhome.

Holidays

80. The claimant in *Totham* had a history of going on regular foreign holidays with her family (usually about 3 times a year). The claim for estimated past holiday costs was proved on the basis of the claimant's father's oral evidence. The future holidays claim compromised for an equivalent of £18,730 per annum.

81. Foskett J in *Robshaw* allowed additional (agreed) holiday costs based upon £11,000 per European holiday, £14,000 per long-haul holiday and £7,198 per UK motorhome holiday. The average additional holiday cost was therefore £10,733 per annum.

82. In *Ellison* the parties agreed £10,000 per annum for additional holiday costs when the claimant was a child and reasonably expected to go away with the rest of her family on holiday. However, Warby J rejected the claim for additional holiday costs beyond the age of 19. His reasoning is set out at paragraphs 173-175 of his judgment as follows:

> *"173. Holidays with the family in her actual condition would not afford Ayla any substitute for the intellectual experiences she would have had as an adult holidaying independently. Nor would the change of location have any material impact on her emotional well-being. Mrs Ellison said: "I don't think it matters that much to Ayla, like, where she is. If she is at home with the right people that know how to deal with her, then she is happy, but then like, if we take her abroad with the right people that knows what to do with her, then she is happy." Mrs Ellison's point was that Ayla could be as happy on holiday as at home, if suitably cared for; but the opposite is also true.*
>
> *174. This leaves the physical enjoyment Ayla derives from experiencing the sunshine. That is not disputed, but there is no medical evidence to support a reasonable need for sunshine specifically as a means of giving Ayla pleasure and enjoyment. It is in my judgment something that can be substituted for in other ways, a principal means being hydrotherapy. Further, there is a real risk that travel would exacerbate unhappiness in some respects and for some of the time. Whilst I am quite satisfied that the family and carers would do their utmost to moderate any discomfort that Ayla would encounter in the course of travel I do consider that additional moving and handling, are inevitable and that consequent distress could not be avoided either.*
>
> *175. For these reasons I do not consider that compensation for the cost of holidays after the age of 19 is a head of damages to which Ayla is entitled. The fair and just compensation for the loss of the benefits that Ayla would have obtained from holidays in adulthood is, it seems to me, to be found in the award of general damages for loss of amenity, and the damages I am awarding to afford her the facility of a hydrotherapy pool in her home".*

CCTV

83. In *Robshaw* Foskett J was not persuaded that CCTV was a necessary or reasonable provision. Although the claimant was vulnerable to some extent, he said he thought that carers would find CCTV intrusive. Whilst the risk of a recruitment of an unsatisfactory carer can never be avoided completely, he thought there would be a sufficient number of professionals coming and going on a regular basis for any problems to emerge quite quickly.

84. However, in *Manna*, a case in which the claimant suffered from challenging behavioural problems, Cox J did allow the costs of CCTV together with motorised entrance gates. The claims were supported by the claimant's care expert (Mrs Sargent) and OT (Ms Penny Smith). Cox J said at paragraph 253:

> *"On the evidence, the installation of a CCTV system is becoming a more regular feature in such cases. Ms Penny Smith is now using it in the majority of her cases and Mr and Mrs Cocking would value it in this case. Mr Seabrook raised data protection concerns, but Maggie Sargent's evidence is that legal advice has been sought and obtained by her company as to the lawfulness of such equipment within certain parameters. I accept that evidence. The application, on legal advice, of appropriate guidelines as to the obtaining of consent before installation seems to me to offer security and peace of mind both to anxious families and to those care workers who are supporting vulnerable individuals in areas of the home away from the rest of the family. The use of short clips from the film obtained also provides useful training material for carers".*

Court of Protection Case Regarding Payment of School Fees for Sibling

85. Whilst not directly related to the assessment of damages, the decision of the Senior Judge of the Court of Protection, Denzil Lush, in *Ross v A the OS* [2015] EWCOP 46 will be of interest to practitioners who continue to have contact with their clients after the conclusion of their claims. The claimant's deputy made an application for permission to apply approximately £17,000 per annum of the claimant's damages (a lump sum settlement of £5m) towards payment of his brother's school fees. The Official Solicitor objected to the use of the claimant's damages in this way, which would force the claimant's parents (who were continuing to provide gratuitous care to the claimant) to seek work to pay for the fees, which in turn would result in the need to spend significantly greater sums in professional care. In a detailed and well-reasoned judgment, Senior Judge Lush found that the payment sought was reasonably affordable (the Claimant's settlement was still intact and if anything was larger than it was four years ago when the award was made), mutual dependency of the family on the award was inevitable and that theoretical alternative of refusing the application and compelling the parents to return to the job market and employ an external care team was absurd. He held that the Official Solicitor had unnecessarily cautious, paternalistic and risk-averse. On balance he was satisfied that the deputy had made the right decision although the judgment was tailored to the specific facts of the claimant's circumstances and should not be constructed as a precedent for other cases.

Credit on Interim Payments Received

86. In *Manna*, there was an interesting argument about whether credit interest on interim payments received should be given against general damages at 2% per annum (as contended by the defendant[27]) or against special damages at 0.5% per annum (as contended for by the claimant).

87. Cox J found in favour of the claimant meaning that credit was given for interest of £940 instead of £7,460.

88. Her reasoning was that the usual assumption is that an interim payment will be sought and paid to a claimant to fund expenditure that will thereafter become part of the claim for special damages (see *Cobham v Eeles* [2010] 1 WLR 409, at paragraph 4). Indeed the defendant had been critical that more of the interim payment had not been used to fund additional care for the claimant. Cox J stated that if the defendant had sought to offset the interim payment against interest on general damages, this should have been agreed at the time of negotiating the interim payment. No such agreement was sought in this case. However, no doubt all savvy defendants will now be adding this requirement to all letters involving voluntary interim payments from now on!

Part 36 Offers

89. In *Totham* the claimant made a number of broken down Part 36 offers regarding individual heads of loss. There was a disagreement about the extent to which these had been equalled or bettered, and the calculation of the additional payments under CPR, Part 36. The parties eventually agreed a compromise for a further payment of £57,136.60 in respect of additional Part 36 interest and additional sums under CPR, r 36.14(3)(a) and (d).

90. In *Robshaw*, the claimant again made broken down Part 36 offers in relation to individual heads of loss including periodical payment offers. The determination of

[27] This point was not taken by the defendant in *Totham* or *Robshaw* and credit interest was offset against interest due on past losses and expenses in the conventional way.

the court's approach and the calculation of additional payments has been adjourned until the next hearing dealing with form of award. However, in the meantime the court has ordered that the defendant made an interim payment in the sum of £42,968.06 on account of the court's determination of the level of additional amount to be paid under CPR, r. 36.17(4)(d) as a result of beating his offer relating to future transport (which was largely due to winning on the issue of the adapted motorhome).

Judgment Act Interest

91. Following the handing down of judgment in *Totham* on 22 January 2015, there was a significant delay in the defendant providing the draft PPO. Relying upon *Sycamore Bidco Ltd v Breslin* [2013] EWHC 174 (Ch) the claimant submitted that interest should run from the date of judgment until the date of payment at the Judgment Act rate of 8% per annum. The Defendant argued that interest should run from the date that the final order was finally agreed or 28 days thereafter in order to allow payment (which is the usual position agreed in relation to approval hearings against the NHSLA). Following written submissions, Laing J held that interest should run from the handing down of judgment, which resulted in a further payment of £69,270.

Evidence of Factual Witnesses

92. In order to prove the claimant's reasonable needs and the cost of meeting those needs it is often sensible to obtain witness evidence from treating clinicians, therapists and case managers etc.

93. Such evidence is routinely adduced on behalf of claimants where quantum is in issue (see a list of examples at **Appendix 3**). Whilst there is no clear definition of what constitutes expert evidence, defendants often object to such evidence on the grounds that it is inadmissible opinion evidence. Often statements from treating practitioners can be drafted in such a way so as to be purely factual however occasionally the opinion of the witness may be relevant to an important issue in the case. In the unreported case of *Ingham v Bashir* (QBD, 14.5.15), Mr Justice Holgate had to consider the admissibility of a witness statement from a treating spinal injuries clinician. The claimant had attended a residential rehabilitation centre in order to improve his level of function. At the end of the rehabilitation Mr Jamil concluded

that the claimant required 24 hour care from two carers at all times (i.e. an increase in his care needs from what he had at the time of admission). The defendant challenged this conclusion and argued that this level of care was inappropriate. Having heard submissions Holgate J granted permission for the Claimant to rely upon the oral and written evidence of Mr Jamil (including any opinion evidence) as set out in his witness statement.

94. Where the defendant can point to specific elements of the witness statements which cross over into inadmissible opinion evidence, if the judge is unwilling to grant permission to rely upon that opinion evidence, another option is to invite the judge to simply ignore the offending passages, which is the course that was taken by Jay J in the case of *Farrugia v Burtenshaw & Others* [2014] EWHC 1036 (QB).

HOT TOPICS

(a) Fatal Accident Act Multipliers

95. Permission for a leap-frog appeal was granted in *Knauer v MOJ* [2014] EWHC 2553 (QB) regarding the calculation of fatal accident act multipliers. The law in this area is ripe for review in order to bring the assessment of fatal accident act claims in line with claims for personal injury. We will have to see whether the appeal actually makes it to the Supreme Court or whether the claim is compromised beforehand.

(b) Indexation of Periodical Payments

96. In *Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB) there remain a number of live issues concerning the form of award and indexation of periodical payments. The parties had agreed that the award for future treatment and therapies should be paid by way of periodical payments[28]. Whilst the appropriate index for this head of loss is yet to be determined, the closest match would appear to be ASHE 222. A further 3-day hearing has been listed in December 2015 to resolve the outstanding issues regarding form of award and indexation of periodical payments.

[28] The defendant has indicated an intention to resile from this agreement.

(c) Lost Years

97. Laing J in *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB) accepted that she was bound by *Croke v Wiseman* [1982] 1 WLR 71 to reject claim for lost years for young child but found the reasoning irrational and illogical.

98. Permission was granted to appeal. At the time it was necessary to seek the defendant's consent before being appeal to pursue a leapfrog appeal to the Supreme Court, although the position has now changed[29]. In the event the claimant decided not to pursue the appeal because the defendant offered to continue paying periodical payments for loss of earnings until normal retirement age of 70 if the claimant lived beyond her agreed life expectancy to age 47.

Conclusion

99. Taxpayers would be horrified to hear about the NHSLA's ill-advised decision to fight so many recent quantum cases resulting in a colossal waste of money. The NHSLA did spectacularly badly including failing to beat various Part 36 offers in *Totham* and *Robshaw*. However, on the plus side, in an area which historically does not see many contested trials, personal injury and clinical negligence lawyers have benefited from a large number of careful and detailed judgments which will help with the assessment of ongoing cases.

CLOISTERS **WILLIAM LATIMER-SAYER**

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3 November 2015

[29] Criminal Justice and Courts Act 2015, s 63 which came into force on 13.4.15 (SI 2015/778 (C. 44)).

Appendix 1 – Gratuitous Case Management Examples

1. Liaising with PCT, local authority, OT and local social services.
2. Time spent finding appropriate treating clinicians and therapists.
3. Time spent liaising with treating clinicians and therapists (including booking appointments and correspondence etc).
4. Accommodation – time spent arranging C's discharge home, liaising with hospital OT and undertaking adaptations to existing property.
5. Accommodation - time spent researching and finding new accommodation.
6. Accommodation - time spent helping C move to new accommodation.
7. Accommodation – time spent in relation to the new accommodation such as informing new utility providers, buying furniture or furnishings (generally and/or for carers) and undertaking adaptations etc.
8. Time spent accompanying the claimant to treatment and therapy appointments.
9. Time spent training carers.
10. Time spent researching and buying special toys or equipment.
11. Time spent cleaning and maintaining equipment.
12. Time spent ordering medical supplies, picking up prescriptions and buying medication etc.
13. Additional time spent learning to use specialist equipment and assistance technology and programming / customising the equipment to make it easier for the Claimant to use and/or loading on media for the Claimant to use.
14. Time spent undergoing special training e.g. spinal care, lifting or epilepsy management.
15. Education - time spent researching appropriate schools, attending meetings with school and SENCOs and appealing SEN.
16. Time spent liaising with charities, sourcing equipment.
17. Time spent liaising with case manager and carers (including liaising with parents and other gratuitous carers regarding arrangements for respite cover).
18. Additional time spent researching trips away, holidays etc.
19. Transport - time spent researching and buying an appropriate vehicle or arranging school transport (if over and above that which would have been required anyway).
20. Time spent taking the Claimant to and from school (assuming the claimant might otherwise have walked or got the school bus or would not have needed to have been accompanied by the parents) including any times when the claimant has needed to be picked up early due to ill-health or a fit etc.
21. Time spent researching and organising extra insurance cover for equipment, carers and holidays.

Appendix 2 – Education Pleading from *Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB)

Gurvinder Kaur's experience from other cases involving the same Local Educational Authority suggest that there will be a dispute regarding nature and extent of the Claimant's educational needs and his entitlement to an AAC coordinator. Whilst the Local Education Authority's decision is being appealed, the Claimant's educational needs must still be met. However, the appeal decision is not retrospective and the SENDIST tribunal has no power to reimburse the Claimant for costs incurred giving an incentive to the Local Education Authority to contest and prolong actually delivering what the tribunal orders should be provided.

Following the introduction of the Children's and Families Act 2014 and Education, Health and Care Plans there is likely to be even greater scope for dispute as Local Education Authorities seek to categorise some aspects of provision under the Health section of the plan which is not amenable to review.

The Claimant seeks a lump sum to cover the following:

(i) The legal costs from October 2014 to February 2015 in relation to pursuing the SEN appeal.

(ii) Continued private funding of the AAC coordinator and other missing elements of education provision until the outcome of the SEN appeal due to be heard in February 2015 (with the decision expected within weeks or months of the hearing).

(iii) The possible need to make a second tier appeal regarding the wording of the Claimant's SEN.

(iv) The costs associated with enforcing the SENDIST tribunal or second teir tribunal's decision which may involve the need to Judicially Review the decisions of the Local Education Authority.

(v) The cost of continued private funding to meet the Claimant's educational needs pending the enforcement of the second tier or judicial review proceedings.

(vi) Legal fees incurred when the Claimant's SEN transfers to an Educational, Health and Care Plan (EHCP) by 1 April 2018 including the possible need to appeal the wording of the EHCP to a SENDIST tribunal costing at least £35,000 and/or issue Judicial Review proceedings costing at least £50,000 and/or bring enforcement proceedings against the Local Education Authority.

(vii) The cost of continued private funding pending the outcome of the appeal of the Claimant's EHCP and/or pending the outcome of enforcement proceedings.

(viii) Legal fees incurred reviewing, challenging or appealing a change to the Claimant's EHCP following the transitional period at age 16 when the Claimant moves into sixth form, as well as the cost of continued private provision pending the outcome of the review, challenge or appeal.

(ix) Legal fees incurred reviewing or challenging provision for further education from age 18, as well as the cost of continued private provision pending the outcome of the review, challenge or appeal.

(x) Legal fees incurred reviewing or challenging provision for further education from age 21, as well as the cost of continued private provision pending the outcome of the review, challenge or appeal (NB under the Children's and Families Act 2014 an EHCP can cover an individual with special educational needs up to the age of 25).

Appendix 3 – Examples of Professional Witnesses Evidence being Adduced

- The evidence of treating doctors and nurses who frequently give factual evidence on behalf of defendant NHS Trusts explaining what they did and why they did it: two recent examples include *A v East Kent Hospitals University NHS Foundation Trust* [2015] EWHC 1038 (QB) and *Shorter v Surrey & Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB).
- The Claimant's GP: see e.g. *Gall v Chief Constable of West Midlands* [2006] EWHC 2638 in which Tugdendhat J accepted the evidence of the Claimant's GP, Dr Yap, was witness rather than expert evidence despite the fact that she wrote a letter summarising the nature of the Claimant's injuries and commenting that the "bruise marking was in the shape of a boot/heavy shoe".
- Case managers are routinely called to give evidence for example in the recent cases of *C v Dixon* [2009] EWHC 708 (QB); *Farrugia v Burtenshaw & others* [2014] EWHC 1036 (QB); *Robshaw v United Lincolnshire* [2015] EWHC 923 (QB)).
- Treating doctors giving evidence about the treatment they consider to be in the best interests of their patients: see for example *NHS Trust v SR* [2012] EWHC 3842 (Fam).
- Treating psychiatrists and psychologists: e.g. *Ure v Ure* (2007).
- Treating prosthetist: e.g. following a contested hearing in *Metelka v Tattersall* (10/11/13) Master Fontaine granted permission for the Claimant to rely upon the witness evidence from his treating prosthetist as regards the advice he had given in relation to the Claimant's prosthetic needs and replacement periods etc.
- Witness evidence is also routinely admitted from other treating therapists such as physiotherapists, speech and language therapists and occupational therapists: for example in *Ali v Canton* [2013] EWHC 1730 (QB); *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066(QB); and *Robshaw v United Lincolnshire* [2015] EWHC 923 (QB).
- Witness evidence is also routinely admitted from professional trustees and deputies with regard to the extent of their fees incurred to date and estimated fees going forwards: see e.g. *Farrugia v Burtenshaw & others* [2014] EWHC 1036 (QB) and *Robshaw v United Lincolnshire* [2015] EWHC 923 (QB).
- The witness evidence (including opinion evidence) of the claimant's treating spinal injuries consultant was admitted by Mr Justice Holgate in the case of *Ingham v Bashir* (QBD, 14.5.15).