SPINAL INJURY QUANTUM: PUSHING BOUNDARIES

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1. Over the last two years or so I have been instructed as junior counsel in 8 major quantum trials. Two cases settled during the course of trial, but the remaining six went the full distance (ranging between 5 and 13 days). This paper deals with some of the lessons learned from those cases, and in particular the practical steps that can be taken in order to maximise the recovery of damages for your clients.

2. Why "pushing boundaries"? Because some of the cases involved setting new records for the level of damages awarded following contested trials. *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 involved a young male tetraplegic who recovered a total gross award of approximately £9.5 m (although the judge awarded periodical payments rather than a lump sum and the award was reduced by 25% for contributory negligence). The second case was the cerebral palsy case of *A v Powys Health Board* [2007] EWHC 2996 (QB) in which the claimant, an Irish National, received a total lump sum in Sterling and Euros equivalent to £10.7 m, thought to be the highest court award ever made in a personal injury or clinical negligence case. Most recently in *XXX v A Strategic Health Authority* [2008] EWHC 2727 (QB) the claimant recovered a grossed up lump sum of circa £9.4 m for a boy with cerebral palsy, which is thought to be the highest ever court award (with the highest court assessed periodical payments for long-term care in excess of £250,000 pa) following a contested trial for an English national.

3. This handout covers a range of issues, with an emphasis on catastrophic injury cases. The oral presentation will focus upon spinal injury cases in particular. However, the points covered in this handout will be equally applicable to many other types of personal injury claim where quantum is disputed.

LOSS OF EARNINGS

(a) Ogden VI

4. There have been a number of recent first instance decisions considering the new edition of the Ogden tables and related guidance notes.

Child claimants

5. What if the claimant is a child as at the date of injury and was not employed? Should the Claimant be treated as employed or unemployed? The answer to this lies in paragraph 41 of the guidance notes which states:

> *"In the case of those aged under 16 at the date of the accident, the relevant factor from the tables would be chosen on the basis of the level of education the child would have been expected to have attained, had the injury not occurred, together with an assessment as to whether the child would have become employed or not. The relevant factor for 16 would be chosen using the assessed employment status and educational status likely to be ultimately attained, discounted by the appropriate factor from Table 27 for the number of years from the age at the date of trial to the age of 16".*

6. In *A v Powys Health Board* [2007] EWHC 2996 (QB) Lloyd-Jones J rejected a submission from the defendant that the claimant should be treated as unemployed or that a higher discount should be applied to take account of the uncertainty that the claimant would complete her education and become employed, and he applied the ordinary Table C discount of 0.87.

7. That said, there is perhaps still an argument left open to a defendant in respect of a claimant who was aged less than 16 prior to injury but is aged between 16 and 19 or between 20 and 24 as at the date of trial. Acting for a claimant one would seek to minimise the reduction for contingencies e.g. by arguing that the appropriate discount is the one to apply as at the date the claimant would have started employment (often age 21 if the claimant would have gone to university). Using the tables there is a small difference between the discounts to be applied between

the different age periods (and the discount for the 20-24 age group is 2% less than the 16-19 age group). The reason for this discrepancy is uncertain from the guidance notes. However, a defendant could argue that the lower discount for those aged 16-19 should apply because a higher discount is appropriate for someone who has not yet completed his or her education compared to someone who has completed further education and started work i.e. an additional small discount might apply to reflect the risk of dropping out of further education and not achieving the claimant's full educational potential.

Female claimants

8. The defendant attempted another rather old-fashioned discount of 50% in *A v Powys Health Board* [2007] EWHC 2996 (QB) reflecting the chance that the claimant might have had time off work to have and bring up children. Paragraph 40 of the guidance notes specifically states: *"The factors in Tables A to D allow for the interruption of employment for bringing up children and caring for other dependants"*. The judge refused to apply a discount over and above that already allowed for in the tables notwithstanding the expert employment evidence in the case which suggested that the many women take between 5 and 10 years off work to bring up children and most would return on a part-time basis. The award made for loss of earnings was a little over £620,000 including about £9,000 for earnings from age 16-21.

9. Unfortunately the decision in *A v Powys Health Board* was not brought to the attention of Penry-Davy J in the case of *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB). Instead of making a discount in accordance with Table C of about 13%, Penry-Davy J discounted future earnings by 40%. This was said to be justified by taking into account the costs of working, career breaks and an element of overlap as identified by Griffiths LJ in *Croke v Wiseman* [1982] 1 WLR 71 at 83b-c. This reasoning is not understood bearing in mind the guidance notes already take account of career breaks and the purported overlap regarding living expenses was not applicable given the finding that it was

reasonable for the claimant to live independently rather than in an institution. Furthermore, whilst some discount may be appropriate to take account of travel costs these would not have been significant on the facts of the case (a teacher living in the local community) and may well have been more than offset by perks and benefits associated with employment over and above salary and pension e.g. access to leisure facilities, access to a library, free teas and coffees, free or discounted food, the ability to borrow equipment etc. The award made for loss of earnings was a shade under £220,000.

10. Whilst each case must be decided on the basis of its own facts, should you be faced with an argument from a defendant that inadequate allowance has been made for time out to have children, it may be worth noting that childbirth and childrearing may well be the reason why there is a discrepancy between the discounts for contingencies between men and women. Interestingly the difference between the discounts in Table A and Table C is considerably less after the age of 40, particularly in respect of those in the O category i.e. below GCSE grade C or CSE grade 1 or equivalent or no qualifications. Therefore if this factor has already been taken into account in the discount for contingencies, there is no need to take account of it again e.g. by using a multiplicand reflecting part-time earnings for a period because that would amount to a double discount. Reliance should be placed upon *Herring v Ministry of Defence* [2004] 1 All ER 44 in which Potter L.J. observed at para 31:

"… statistics, or at any rate guidance upon research, are now available in the notes to the Ogden Tables which demonstrate that so far as the level of any "arbitrary" or generally applied level of discount is concerned, a figure of 25% is a gross departure from that appropriate simply in respect of future illness and unemployment. In order to justify a substantially higher discount by reason of any additional future contingencies, there should in my view be tangible reasons relating to the personality or likely future circumstances of the claimant going beyond the purely speculative".

Disabled or Not Disabled

11. In *Conner v Bradman & Co* [2007] EWHC 2789 (QB) HHJ Peter Coulson QC (as he then was) considered the definition of disablement under the Disability

Discrimination Act 1995. He considered the guidance notes published by the Secretary of State. Interestingly the guidance notes disregard any medical treatment or correction which has been carried out (which is likely to lead to further litigation I am sure if the treatment or correction has removed any ongoing disability!). On the facts of the case he considered that the claimant, who had suffered a knee injury requiring surgery, and was disabled. He then went on to consider the appropriate discount for contingencies to be applied for residual earning capacity and paragraph 32 of the guidance notes which state:

"The suggestions which follow are intended as a 'ready reckoner' which provides an initial adjustment to the multipliers according to the employment status, disability status and educational attainment of the claimant when calculating awards for loss of earnings and for any mitigation of this loss in respect of potential future post-injury earnings. ***Such a ready reckoner cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases****. In particular, it can be difficult to place a value on the possible mitigating income when considering the potential range of disabilities and their effect on post work capability, even within the interpretation of disability set out in paragraph 35. However, the methodology does offer a framework for consideration of a range of possible figures with the maximum being effectively provided by the post injury multiplier assuming the claimant was not disabled and the minimum being the case where there is no realistic prospect of post injury employment."* [my emphasis]

12. The medical evidence was that the claimant could probably work as a minicab driver until normal retirement age. The judge refused to apply the full discount allowed by the tables for the claimant's residual earning capacity of 0.49. Instead he applied a midpoint discount for contingencies of 0.655 (which was the midpoint discount between someone who is disabled and someone who is not disabled).

13. In *Garth v (1) Grant (2) MIB*, QBD, Lawtel 17/7/2007, HHJ Hickinbottom (sitting as an additional judge of the High Court) had to decide whether a morbidly obese claimant was disabled as at the time of the accident so as to justify a higher discount to her potential future earnings. At the time of the accident the Claimant weighed 28-30 stones and accepted that she has had a "long and tortuous fight against obesity". However, she gave evidence that she used to play tennis and do water aquaerobics, and her weight had never affected her work. The judge accepted that

she was not significantly functionally disabled by her weight and therefore applied Table C as opposed to Table D.

14. In *Leesmith v Evans* [2008] EWHC 134 (QB) the parties' respective employment consultants agreed that the claimant had a residual earning capacity of £10,000 net pa. The defendant argued that this multiplicand already took into account the degree of disability of the claimant and therefore to apply the Table B discount factor of 0.54 was unjust. The judge said that he partly agreed with the submission and reduced the discount to 0.60.

Employed or Not Employed

15. In the Northern Irish case of *Hunter v MOD* [2007] NIQB 43 Stephens J assessed the future loss of earnings for a Corporal in the Royal Irish Regiment in accordance with Ogden VI. The main live issue concerned the appropriate discount to the multiplier for the claimant's residual earning capacity. Since the claimant was unemployed and disabled as at the date of trial, Table B suggested a discount of 80%. However, if he was in employment and disabled the discount would have been 61%. The judge held on the basis of the medical evidence that there was no reason why the claimant should not be in employment and therefore approached the assessment on the basis that the claimant was employed. He held that:[1]

"in arriving at the appropriate reduction to the multiplier, the court is required to consider the degree of the plaintiff's disability and where the plaintiff falls in the range of potential reductions to the multiplier".

16. In the circumstances a discount of 40% was held to be appropriate (i.e. half of the discount that would otherwise have been expected from a straightforward application of the tables).

[1] Para [13] of the judgment.

Family Background

17. The case of *Peters v East Midlands Strategic Health Authority* [2008] EWHC 778 (QB) is well known in relation to local authority funding issues. However, Mr Justice Butterfield also dealt with submissions regarding Ogden VI and discounting for contingencies. According to the guidance notes, the appropriate discount for contingencies was 32%. However, the judge increased the discount to 40% (pre-trial) and 50% (post-trial) to take account of the claimant's family background which suggested a culture which relied upon benefits where the incentive to find and keep employment was not strong.

18. If judges can be persuaded to increase the discount factor for contingencies due to poor family background, there is no reason why it should not be possible to persuade them to reduce the discount factor in an appropriate case where the Claimant's family background can be shown to have been particularly impressive and would have instilled a strong work ethic and desire to earn a good living (see further *M (A Child) v Leeds HA* [2002] PIQR Q46).

Summary

19. The decisions to date are all very fact-sensitive, however, the following conclusions may be drawn about how the new tables are being applied in practice:

- The court has resisted further discounting claims on behalf of children and females but the approach has not been consistent.
- However, judges are not feeling constrained by the recommended discounts allowed for in the tables and appear to be deciding each case on its facts.
- Given the large discretion given by paragraph 32 it will be difficult to predict outcomes, resulting in more cases proceeding to trial (and higher court guidance would be of assistance).

- Where the claimant's pre-accident functional capacity is being challenged, detailed witness evidence regarding his or her ability to carry out day-to-day activities is invaluable.
- Likewise where the claimant's degree of post-accident disability is challenged it will be useful to prepare detailed witness evidence dealing with the factors set out in the Guidance Notes to the Disability Discrimination Act 1995.
- Medical experts need to be given careful guidance on the definition of disablement.
- It cannot be guaranteed that someone who is unemployed as at the date of trial will be treated as such, especially if he or she ought to have been able to find suitable alternative work.

20. Dr Wass published an article in the 2008 Journal of Personal Injury Law entitled *"Discretion in the Application of the New Ogden Six Multipliers: The Case of Conner v Bradman and Company"*. This provides some useful statistics regarding unemployment following disability and some good reasons for not departing from the Ogden VI guidance notes. It remains to be seen what impact this will have on judges, but guidance from the higher courts on this issue would certainly be welcomed in the near future to avoid protracted disputes. In an appropriate case it may well be sensible to consider instructing Dr Wass to prepare a report. Whilst some actuaries are offering their services in this regard, assuming permission is granted, given her research underpinning the tables, Dr Wass is likely to be the most authoritative expert in this area.

(b) Multiplicands

Earnings during school and university

21. Many people work during school or college. Although the sums are not great, they can add to a claim and may not be contentious: see for example *A v Powys Health*

Board [2007] EWHC 2996 in which the sum claimed was agreed. To support the claim evidence from the claimant's mother was served detailing the jobs obtained and earnings received by children of family friends of a similar age. The Minimum Wage can be used as a benchmark. If an employment consultant has been instructed to consider the future loss of earnings claim, he or she can also provide some figures for earnings during this period as well.

Averaged multiplicands over the claimants' working life

22. Defendants often argue for stepped multiplicands since people tend to earn less at the beginning of their career. Such an approach may reduce the loss of earnings calculation especially for a young claimant because the claimant's higher earnings period will be some distance away and therefore attract a larger discount for accelerated receipt. However, in both *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 and *A v Powys Health Board* [2007] EWHC 2996 – in line with previous case law such as *Cassell v Hammersmith and Fulham HA* [1992] PIQR Q1 – Lloyd-Jones J accepted an averaged multiplicand approach was more appropriate in the case of a claimant who had not yet entered the employment market as at the time of trial (when the assessment by its very nature has to be fairly broad brush).

23. At para 36 of H Lloyd-Jones said:

"In deciding the preferable approach, I have in mind the modern trend in favour of seeking to secure greater accuracy in calculations of future loss wherever this is possible. It may well be that Mr. Whitfield's approach would be appropriate in circumstances where the claimant has suffered injury during his or her career and where the likely progress of that career can be predicted with greater certainty. However, in the present case I am faced with assessing the prospects of a person who has never worked. This will inevitably be a more general exercise. I therefore accept the submission of the Claimant that I should make a single assessment based on average earnings across the entire working life of the Claimant and seek to take account of the opportunities, risks and discrepancies in earning levels at different stages in selecting an averaged multiplicand and in the approach taken to discounts for contingencies".

24. A similar approach was recently adopted by Mr Justice Cooke in *Leesmith v Evans* [2008] EWHC 134 (QB) in relation to an older claimant. In this case the claimant advanced a loss of earnings claim on the basis that but for the accident he would have become a lighting director earning £250,000 per year. The defendant argued that because there were so many imponderables in the case that a *Blamire* award was appropriate[2]. However, the judge adopted an averaged multiplicand approach taking into account all contingencies. In essence the judge adopted the "reasonable career model" along the lines of *Herring v MOD* [2003] EWCA Civ 528 and despite the large number of imponderables considered that a conventional multiplier/multiplicand approach was most appropriate.

Perks & benefits: London weighting etc

25. All additional allowances such as London weighting, rent allowance and various bonuses or enhancements (which are considered part of someone's pay) should be recovered by way of loss of earnings: see *Crofts v Murton* LTL 10.9.08. In this case Andrew Collender QC was not prepared to reduce or disallow these claims because living in certain geographical locations would have increased his cost of living. But such a decision may not be appropriate where a claimant has saved living expenses by moving somewhere cheaper to live after the accident – in this scenario the court may be tempted to consider what costs savings have been made as it would do when considering living expenses saved by being in hospital[3].

(c) Retirement Ages

26. People are living longer than ever before. In light of the "pensions crisis" people need to work longer in order to make adequate provision for their retirement. The Government's White Paper entitled "Security in Retirement, Towards a New

[2] However, for recent cases in which the court has made a *Blamire* award see further *Van Wees v (1) Karkour v (2) Walsh* [2007] EWHC 165 (QB); and *Smale v Ball* (MIB), QBD, Lawtel 6/6/07.

[3] *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 191–2. See also the Administration of Justice Act 1982, s 5 provides that any saving to the injured person which is attributable to his maintenance, either wholly or partly, at public expense in a hospital, nursing home or other institution is to be set off against loss of earnings.

Pensions System" published in May 2006 recommended increasing the state retirement age. These recommendations are to be implemented by the Pensions Act 2007 as from 2024 with new retirement ages as set out in Schedule 3 of the Act (to a new maximum retirement age of 68). Schedule 3 to the Pensions Act 2007 sets out the new retirement ages depending upon sex and date of birth. However, an easier way to calculate this for an individual claimant is to use the Pension Service's retirement age calculator which can be found at: www.thepensionservice.gov.uk/state-pension/age-calculator.asp.

27. In both *Sarwar* and *A v Powys Health Board* Lloyd-Jones accepted a retirement age of 68 for the respective young male and female claimants. In the recent Fatal Accident Act case of *Beesley v New Century Group Ltd* [2008] EWHC 3033 (QB) Hamblin J accepted a retirement age of 70. However, the claimant was aged 62 as at the date of death and a higher discount for contingencies other than mortality was applied from age 65.

(d) Mitigation of Loss

28. *Eaton v Johnston* [2008] UKPC 1 is a further Privy Council authority confirming that the burden is on the defendant to prove that the claimant has failed to mitigate his loss in seeking appropriate treatment or taking appropriate steps in order to realise his or her full residual earning capacity.

(e) Blamire Awards

29. You could be forgiven for thinking that Blamire awards had been making a comeback recently. For example such awards were made in the cases *of Van Wees v (1) Karkour v (2) Walsh* [2007] EWHC 165 (QB); and *Smale v Ball* (MIB), QBD, LTL 6/6/07. However, such an approach was expressly rejected by Mr Justice Cooke in favour of an averaged multiplicand in *Leesmith v Evans* [2008] EWHC

134 (QB) where the claimant was relatively young at the date of injury and was seeking to embark on a career as a lighting engineer.

30. Further in *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194 Keene LJ put such awards, which are often favoured by defendants because they almost inevitably end up with a lower figure for future loss, properly back in their place saying at para 21 of the judgment:

> *"Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges therefore should be slow to resort to the broad-brush Blamire approach, unless they really have no alternative".*

LOST YEARS

31. Claims for lost years on behalf of children have been precluded now by the Defendant's successful appeal in *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] EWCA Civ 1190. Although the Court of Appeal granted permission to appeal, the appeal was compromised thus preventing the House of Lords ruling upon the matter (unfortunately we will need to wait for the right case to be able to take it further). Until the House of Lords is able to review this issue, it may be that the law returns to the unsatisfactory state it was in prior to the appeal, resulting in an inconsistent approach with some claims being settled at a discounted rate and others not. Certainly there appears to be no good reason in principle why the claims for lost years on behalf of children should be treated any differently to the claims made on behalf of adults which would be inconsistent with the decision in *Pickett v BREL* [1980] AC 136.

32. It is important to note that lost years claims for adults and adolescents have not been affected by this decision. A lost years claim for someone with spinal injuries is always worth investigating given the inevitable reduction in the claimant's life expectancy. In *Sarwar* Lloyd-Jones accepted the approach of adding 0.5 to the loss of earnings multiplier applied to the averaged multiplicand of £55,000 gross pa, but

agreed it may also have been appropriate to simply calculate loss of earnings to age 70 instead of 68.

33. A more detailed calculation can be made by using the pension loss tables. Credit needs to be given for living expenses of say one third. A claim can be based upon the claimant's entitlement to state pension combined with a private or company pension (which may have to be estimated at a percentage of final salary).

34. A recent example of pension loss claimed during the lost years is provided by *Crofts v Murton* LTL 10.9.08. Here the judge had no difficulty awarding loss of pension during the lost years subject to a discount of 40% for living expenses.

CARE

(a) Gratuitous Care

Aggregate Rates

35. In *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB) Teare J preferred aggregate rates to calculate past care in light of the care provided during unsociable hours, subject to a discount of 20%. The aggregate rates (provided by Maggie Sargent) are now published as part of Facts & Figures 2007/8 (instead of the rates for nurses and home helps). The issue of aggregate as opposed to flat rates was recently argued in *Noble v Owens* [2008] EWHC 359 (QB) (a case before Field J) regarding an adult claimant who suffered multiple severe orthopaedic injuries as opposed to cerebral palsy. Field J refused to apply the aggregate rates. However, this may well have been because he was persuaded by the defendant's Counsel that this would have been highly unusual and the only example where it had been done before was *Massey*. This is not strictly correct. Whilst unusual there have been other instances where aggregate rates have been allowed see e.g. *Brown v King's Lynn and Wisbeach NHS Hospitals Trust* (20 December 2000, unreported) in which Gage J (as he then was) awarded aggregate rates and also declined to apply a discount in order to reflect the 'gratuitous element' because of the remarkable quality of the care provided.

36. That said in very few cases have the full arguments been put forward for justifying the aggregate rates. Jacqueline Webb & Co produce a note of some good reasons for using the aggregate rate which highlights some of the defects of the NJC rate. One of the main differences is that the NJC rates do not reflect: (i) paid holiday and sickness (including maternity benefits); (ii) enhancements paid for unsociable hours and overtime; (iii) pension; (iv) training; (v) free uniform; (vi) cheap/subsidised food; and (vii) other perks and benefits. The fact is that virtually no support worker working for a local authority is restricted to only claiming the basic flat rate: they earn more. This is easily proved when seeking to employ carers privately, it is often necessary to pay a significant uplift to replace the missing benefits associated with employment.

37. Now that aggregate rates have been included in Facts & Figures it remains to be seen whether they will be commonly accepted in cases other than cerebral palsy cases (where there is often a significant element of night care). However, the tide does seem to be turning a little. Indeed Gazala Makda (of all people) recently agreed to the use of aggregate rates following a joint discussion with Maggie Sargent in the tetraplegia case of *Pankhurst* which fought to trial in June 2008 (although the decision is not expected until spring next year!).

38. Most recently, in October 2008, Mr Justice Penry-Davy accepted the application of aggregate rates for past care in *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB). However, it should be noted that this was a cerebral palsy case where a significant amount of care had been provided at antisocial hours.

Case Management

39. In *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB) Teare J awarded £8,750 for past gratuitous case management. There is no reason why this not a recoverable head of loss and should be considered in all relevant cases. Similar awards have recently been agreed in subsequent cases such as *A v Powys Health Board* and *Noble v Owens* [2008] EWHC 359 (QB).

Unfortunately the rates likely to be allowed are the discounted gratuitous care rates. It seems unlikely that a discounted case management rate of £70 or £80 per hour will be allowed (even if the case management has been as good if not better than subsequent paid case management) since that would mean a family member receiving significantly more compensation for carrying out administrative chores as opposed to proving hands on care.

Discounts

40. In *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB) Teare J (correctly) held that credit should be given against a claim for gratuitous care in relation to any Carer's Allowance received by the person who provided the care in accordance with the principles laid down in *Hodgson v Trapp* [1989] 1 AC 807. The same principle might apply to Job Seeker's Allowance or other benefits received (which would not otherwise have been received but for the need to care for the claimant). However, the precise nature of the benefit has to be considered and in *Noble v Owens* [2008] EWHC 359 (QB) Field J, correctly I would submit, refused to order the claimant to give credit for Incapacity Benefit received by the claimant's partner due to her own psychiatric injuries (resulting from the need to care for the claimant).

(b) Professional Care

The correct legal test for recovery

41. In *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) Sir Rodger Bell rejected a submission based upon *Rialis v Mitchell* (1984) Times, 17 July and *Sowden v Lodge* [2004] EWCA Civ 1370 that the legal test for recovery was simply whether the claim for care as advanced by the claimant was reasonable. In *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 the judge did not expressly deal with a similar submission (but did in fact go on to consider whether or not the claim for care as presented by Mrs Sargent was reasonable). However, this subjective

formulation of the test for recovery has since been accepted by a number of first instance judges.

42. For example in *Taylor v (1) Chesworth (2) MIB* [2007] EWHC 1001 (QB) Mr Justice Ramsay said at para of 84 of his judgment:

> ***"I accept that the test therefore, as submitted by Mr Sephton, is to consider what course the claimant proposes to adopt and to consider whether it is reasonable having regard to the nature and extent of the claimant's needs, not to consider objectively what approach is reasonable.*** *However, the logical way of approaching the issue must, in my judgement, be to make findings as to the nature and extent of the claimant's needs and then to consider whether what is proposed by the claimant is reasonable having regard to those needs". [my emphasis]*

43. Likewise in *Wakeling v (1) McDonagh (2) MIB* [2007] EWHC 1201 (QB) His Honour Judge Mackie QC said:

> *"The legal approach is not in dispute having been restated by the House of Lords in Wells v Wells [1999] AC 345 carried through by the Court of Appeal in Sowden v Lodge and Crookdale v Drury [2005] 1 WLR 2129.* ***The Court of Appeal in effect reiterated the principle that the court is first concerned not with whether other identified treatment is reasonable but whether that chosen by the Claimant is reasonable recognising that a Claimant or those looking after him are entitled to make a choice.*** *This is an aspect of the basic principle that a Defendant is obliged to put the Claimant back so far as money can, into the position he would have been in but for the negligence". [my emphasis]*

44. Again in *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB) Teare J said at para 59 of his judgment:

> *"In resolving the differences of opinion on these matters I have sought to apply the principles stated and explained in Sowden v Lodge [2004] EWCA Civ 1370 and [2005] 1 WLR 2129 which were in turn derived from Rialis v Mitchell (unreported 6 July 1984). In the former case Pill LJ approved statements of Stephenson LJ and O'Connor LJ in the latter case to the effect* ***that the claimant was entitled to the reasonable cost of caring for him in the manner chosen by him, or by those with responsibility for the claimant, so long as that choice was reasonable.*** *A lesser*

sum would only be payable if the claimant's choice of care was unreasonable and another form of care was reasonable; see paragraphs 10-11 and 38. Longmore LJ agreed with Pill LJ that the correct question to be addressed in relation to care was "What is required to meet the claimant's reasonable needs?"; see paragraph 94. Scott Baker LJ agreed with both judgments; see paragraph 101." [my emphasis]

45. The decisions in *Rialis v Mitchell* (1984) Times, 17 July and *Sowden v Lodge* [2004] EWCA Civ 1370, and the above cases relying upon them, have been criticised because they elide the principles of mitigation of loss and the assessment of compensatory damages[4]. Likewise it is true to say that once a decision had been taken in those cases that it was reasonable for the claimant to set up a private regime, the costs of care in an institution were no longer strictly relevant. However, it is quite clear that both cases were dealing with the assessment of damages (see for example Sir Denys Buckley's judgment in *Rialis* and the references in *Sowden* at paras 10-12 under the heading "damages at common law"). Therefore as statements of principle they are binding guidance upon lower courts.

46. The more difficult issue is what happens when there are two competing regimes one put forward by the claimant and one put forward by the defendant both of which are "reasonable". Here it is submitted the court retains a large discretion. In its simplest form the court's job is to award is a sufficient level of damages to meet the claimant's reasonable needs. But, it is submitted, there is, or ought to be, a three stage approach to the assessment process. First, an assessment needs to be undertaken regarding the nature and extent of the claimant's needs (including long-term needs resulting from any change in prognosis). Secondly, a subjective assessment needs to be made regarding the claimant's chosen model of regime and whether that is reasonable (i.e. choosing a private care regime at home rather than a residential regime). And finally, an objective assessment needs to be undertaken regarding the reasonableness of the costs of the claimed regime (at which point the defendant's suggested costs may well be relevant).

[4] See paper by James Rowley QC entitled Serious PI Litigation - a Quantum Update: Winter 2007-8.

47. Often it will be possible to show that the defendant's care regime is defective in some way, does not fully meet the claimant's needs or that there are significant advantages to the claimant's regime which justify an increased cost.

48. In the unlikely event that the parties' respective regimes are identical in quality and the ability to meet the claimant's needs, the claimant is likely to struggle to recover the extra costs of the more expensive regime if there is no discernable benefit to him or her.

49. Where however there are advantages and disadvantages of both regimes and it is not possible to make a straight comparison, but both regimes are considered to be objectively reasonable, in my view, it is unlikely that any higher court will impose further guidance on the assessment process. A generous judge may award the claimant's care regime because it is reasonable, notwithstanding that there might also be a reasonable model suggested by the defendant. A mean judge may restrict the claimant to recovering the cheaper regime since it meets the claimant's reasonable needs. The unsatisfied party in either scenario will find it difficult to appeal. The decision is likely to be considered a question of fact for the trial judge.

<u>58 / 59 / 60 weeks</u>

50. There have been a number of cases resulting in different outcomes regarding the number of extra weeks per year should be allowed to cover training, sickness and holidays as set out in the table below:

58 weeks	**59 weeks**
• *A v B Hospitals NHS Trust* [2006] EWHC 1178 (QB) • *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) • *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375	• *Lynham v The Morecambe Bay* Hospitals *NHS Trust* (Garland J, 25 March 2002) • *Crofton v NHSLA* (first instance decision of HHJ Reid QC, QBD, 19 January 2006)

58 weeks	59 weeks
	• *Lewis v Shrewsbury Hospital NHS Trust* (HHJ MacDuff, QBD, as he then was). • *A v Powys Health Board* [2007] EWHC 2996 • *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB)

51. Mostly recently in *XXX v A Strategic Health Authority* [2008] EWHC 2727 (QB) Mr Justice Jack awarded professional care on the basis of 60 weeks per year. In addition he also made a modest allowance for staff liaison. It remains to be seen whether or not other judges will follow suit, however, some experts have already started increasing their costings to take account of this decision.

Increased Assistance Due to Childbirth

52. In *A v Powys Health Board* [2007] EWHC 2996 a claim was advanced for additional child care assistance in the event that the claimant had children. Although the claimant was medically capable of having children, this claim was disputed in its entirety because it was said to be so speculative as to be remote. At the invitation of the parties, the judge's discussion of this point was brief in the judgment (so as not to cause distress to the claimant when she came to read through it in due course). In the event he awarded the costs of a full-time nanny for 7 years and a part-time nanny for 11 years. The costs were discounted by 50% for contingencies. It is likely that the judge was influenced in this assessment by having seen the claimant give evidence. Whilst she was severely disabled, we argued that attitudes in society were changing and Lloyd-Jones J was not prepared to find that she would never meet a partner or have children.

Cleaning

53. Allowances were made in *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 and *Massey v Tameside & Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB) for cleaning services in addition to the awards for care. A modest allowance for cleaning of 4 hours per week was made in *XXX v A Strategic Health Authority* [2008] EWHC 2727 (QB).

Working Time Regulations 1998

54. Live-in care packages suggested by defendants have been found to be unlawful in two recent cases: *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) and *Corbett v South Yorkshire Strategic Health Authority* [2007] LS Law Medical 430. In *A v Powys Health Board* [2007] EWHC 2996, the claimant obtained advice from Conor Quigley QC, a European/Irish law specialist, regarding the position in Ireland. Importantly the Irish implementation of the Working Times Directive only differed slightly from the English Regulations (and were more restrictive because there was no opt out clause from the 48-hour working week). The advice obtained was clear that the regime proposed by the defendant would be in breach of the regulations. The defendant did not seek to challenge this view (accepting that Conor Quigely QC was an eminent lawyer). Euro MPs voted in December 2008 to end the UK's opt out of the 48 hour working week. This may also have an impact on care regimes, potentially leading to the need for more carers (and therefore more training and other on costs).

Pensions

55. The Pensions Act 2008 received Royal Assent on 26 November 2008. From 2012 employers will be obliged to pay 3% of the employee's earnings into a pension scheme (with the Government contributing an additional 1%). In *XXX v A Strategic Health Authority* [2008] EWHC 2727 (QB) Jack J held that these provisions would apply to a claimant employing a private team of carers. The obligation applies to

qualifying earnings defined by section 13 of the Act as earnings above £5,035 but not more than £33,540. In the case of *XXX* the pension contributions added an extra £4,623 pa to the long term care package. It is understood that care agencies are likely to increase their care costs to comply with their statutory obligations and in any case where care is likely to be provided by an agency, an estimate should be obtained regarding the likely increase in annual costs.

ACCOMMODATION

(a) Betterment

56. There are still a number of defendants who attempt to argue that the betterment sum should not be added to the *Roberts v Johnstone* claim despite the previously decided cases of *Almond v Leeds Western HA* [1990] 1 Med LR 370 and *Willett v North Bedfordshire HA* [1993] PIQR Q166. However, this point was conceded in *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375.

(b) Credit for equity in "but for" property

57. A number of recent cases have followed the example set in *M (a child) v Leeds HA* [2002] PIQR Q46 that credit should only be given for a 50% share in the property the claimant would have bought but for the accident since he or she would have bought it with a partner. In *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) the court held that the claimant would have a two-thirds share in a property, but this may have been influenced by cultural factors. In *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 the judge found that the claimant would have had a 50% share in a property but for the accident.

(c) Credit for parents / partner living rent free

58. In *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) Sir Rodger Bell refused to discount the *Roberts v Johnstone* claim to reflect the fact

that the claimant's parents would live rent free in his adapted property. To this end the judge followed previous similar decisions in *M (a child) v Leeds HA* [2002] PIQR Q46 and *Parkhouse v Northern Devon Healthcare NHS Trust* [2002] Lloyd's Rep Med 100. However, in *Lewis v Shrewsbury Hospital NHS Trust*, QBD, 29/1/07 HHJ MacDuff, as he then was, did make a discount where on the facts of the case the claimant's parents were renting out their property for a profit. This decision is doubted because the benefit belongs to the parents and should not therefore be offset against the claimant's claim – a point raised in the judgment. The answer (also considered in the judgment) may be to deduct any saved rent from continuing gratuitous care, but of course such an argument does not arise where a full private care package has been implemented.

59. In a new spin on the argument the defendant in *Noble v Owens* [2008] EWHC 359 (QB) sought credit for the "notional costs" of accommodation that the claimant had saved. At the time of the accident he was living in his partner's house (mortgage free) and he paid her a weekly sum for his keep. He argued these payments would have stopped when they were married. The Defendant submitted that the claimant should give credit for his notional accommodation costs and/or that his partner should give credit for the benefit of living rent free in his adapted house (allowing her to rent out her former property). These arguments were (correctly) rejected by the judge who held that there was no legal basis for saying that the claimant should give credit for a benefit enjoyed not by himself but by another (i.e. his partner).

HOLIDAYS

(a) The Legal Test for Recovery

60. There appears to be developing a divergence of views as to the correct approach to apply in relation to additional holiday costs. Some judges have apparently indicated that instead of providing the claimant with the sort of holidays that he or she had before, regard should be had to the reasonable cost of holidays considered objectively. In *Noble v Owens* [2008] EWHC 359 (QB) the claimant and his

partner had previously enjoyed holidaying in the Caribbean. It was their holiday destination of choice and they had subsequently attempted going on a cruise since the accident. The intention in the future was to cruise to an island, stay there for a few weeks and catch a cruise back. During the course of argument the judge, Field J, referred to the House of Lords case of *Ruxley Electronics And Construction Ltd V Forsyth : Luddingford Enclosures Ltd* [1995] 3 WLR 118. The argument was that the law did not require the claimant to be put back into the position of having similar holidays to those he previously enjoyed, but that he was merely entitled to the reasonable costs of meeting his holiday needs. In the event Field J went on to only award the increased costs of a European trip as opposed to a Caribbean holiday saying that Mr Noble could: "travel by TGV to the south of Europe where the weather is warm and there is a wide choice of scenic, relaxing and pleasurable locations". He awarded a total of £6,250 pa (including £1,500 pa for weekend breaks) using a full lifetime multiplier.

61. It is submitted that this approach is wrong in principle. As was made abundantly clear in *Wells v Wells* [1999] 1 AC 345 the legal test for recovery in this country is based upon putting the individual claimant back into the position he would have been in but for the accident[5]. Thus the calculation of loss is subjective, not objective; and, it is submitted, that the claimant should be entitled to the reasonable costs of putting him or her back into the position he or she would have been in e.g. if he was used to having 3 or 4 holidays per year or always holidaying in the Caribbean the claim should be costed on this basis, not the additional costs of what a reasonable person might think is appropriate such as holidaying in France.

62. The appropriate approach was raised in *Rialis v Mitchell* (1984) Times, 17 July in which Sir Denys Buckley dealt with a submission that an "objective" measure of assessment should be used as follows:

"Mr. Fricker, on behalf of the appellant defendant, has contended that, in the case of a severely injured person such as the plaintiff in the present action, upon whose medical and personal care very large sums may fall to be expended over a long

[5] See in particular, per Lord Steyn at 383.

period amounting in total to very much more than many members of the general public could possibly expect to be able to pay out of their own resources, the judge upon whom the duty of assessing the damages rests should regard the matter "objectively" by reference to "what a reasonable person would spend who did not have access to exceptional financial resources". The damages awarded should, Mr. Fricker submits, be confined to what such a person could reasonably be expected to spend.

There seem to me to be at least two objections to such an approach. First, on principle, the means of a defendant are irrelevant to the question of what sum will in all the circumstances of the case afford the plaintiff fair compensation. In any particular case that sum may be enormous, and the defendant may be entirely without means to pay it, but that cannot lead to the conclusion that some lesser sum would fairly compensate the plaintiff. For the same reason it cannot, in my judgment, be right to restrict the amount of the general damages recoverable in a personal injuries case to what a fictitious person, who does not have access to exceptional financial resources, could reasonably be expected to spend upon the treatment and care in respect of which those damages are awarded.

Secondly, it seems to me that the specific characteristics and circumstances of "a reasonable person who does not have access to exceptional financial resources" must defy definition. What amount of financial resources should be regarded as exceptional or unexceptional? What other calls upon his purse is the fictitious person to be supposed to be subject to? What supposed circumstances affecting his judgment as to how much he could and should spend on the injured party are to be taken into account? The task of a judge who has to assess what damages it is reasonable to award in the circumstances of the particular case with which he is concerned are formidable enough. To require him to introduce a further criterion of so entirely vague a character as Mr. Fricker proposes would, I think, render the task impossible – beyond the capacity of even a judicial Hercules."

(b) Awards being made

63. Recent awards made for additional holidays costs have included:

- *Hart v Pretty* (unreported, 18 April 2005, HHJ Taylor) - £6,000 pa.
- *Sarwar v (1) Ali (2) MIB* [2007] EWHC 274 (QB) - £10,000 pa.
- *A v Powys Health Board* [2007] EWHC 2996 (QB) - £5,000 pa.
- *Noble v Owens* [2008] EWHC 359 (QB) - £6,250 pa.

- *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB)- £3,000 pa[6]

64. It is unclear what, if any, award was made for future holiday costs in *Burton v Kingsbury* [2007] EWHC 2091 (QB), however, some allowance was made for past additional costs going on two holidays (less a discount of £1,000 for the cost of holidays which would have been incurred in any event).

HYDROTHERAPY

65. There have been a number of claims in recent years where the cost of a private hydrotherapy pool at home as been claimed as set out in the following table.

Successful	Unsuccessful
• *Haines v Airedale NHS Trust* (unreported, 2 May 2000, QBD) • *Hart v Pretty* (unreported, 18 April 2005, HHJ Taylor) • *Lewis v Shrewsbury Hospital NHS Trust* (HHJ MacDuff, QBD, as he then was) 29/1/07. • *Wakeling v McDonagh and MIB* [2007] EWHC 1201 (QB) • *Burton v Kingsbury* [2007] EWHC 2091 (QB)[7]	• *Cassell v Hammersmith and Fulham HA* [1992] PIQR Q1 • *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111(QB) • *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 • *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB)

6 Although it should be noted that the claimant was severely disabled and the costs were based upon one holiday with two carers per year and a full lifetime multiplier was applied.

7 This was related to the accommodation issue: see also *Willett v North Bedfordshire HA* [1993] PIQR Q166.

66. Although such claims remain contentious, as the above table shows, they are gradually gaining ground and acceptance. In *A v Powys Health Board*, the future accommodation claim was compromised once the medical experts had given evidence. On our calculations we received about 50% of the claim (in light of the disputed evidence)

67. Suggestions for maximising the chances of recovery under this head include:

- Selecting your experts carefully in advance – courts have rarely awarded such claims unless there is a consensus of some therapeutic benefit. Some medical experts and physiotherapists are staunchly in favour of hydrotherapy. If possible these experts should be agreed as joint experts.
- Obtain as much literature as possible to support the contentions that hydrotherapy / swimming would be of benefit on the facts of the case[8]. It may be that this is the only form of exercise the claimant can undertake.
- Carefully identify all the reasons why hydrotherapy / swimming is said to be beneficial.
- Carry out detailed research regarding the availability of local pools and list all of the reasons why any such facilities are inadequate.
- Consider obtaining video evidence showing the claimant during a hydrotherapy session. Are there any obvious benefits such as reduced spasticity and increased muscle tone which can be demonstrated?
- Consider presenting an alternative claim based upon attending regular hydrotherapy sessions (if the claimant goes regularly and needs a therapist in the pool at the same time, sometimes the cost of attendance together with travel can mount up and over the long-term be just as expensive as having a pool at home[9]).

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8 For cerebral palsy cases see further "Decline in function and life expectancy of older persons with cerebral palsy" by Strauss and others relied upon in the case of *Wakeling*; and the article "Aquatic exercise for children with cerebral palsy".

9 In *Noble v Owens* [2008] EWHC 359 (QB) Mr Justice Field awarded £72 per week or £3,456 pa in respect of hydrotherapy and acupuncture (a total award over a lifetime in excess of £85,000).

68. Generally speaking it will be necessary to obtain some supportive medical or therapeutic evidence, but the absence of such evidence is not necessarily a bar to recovery. In *Noble v Owens* [2008] EWHC 359 (QB) the orthopaedic experts agreed in their joint statement that there was no scientific evidence that hydrotherapy or acupuncture were of therapeutic benefit. However, the judge accepted that the claimant had been advised to undergo this treatment and that he did derive some worthwhile benefit from it:[10]

> *"At the suggestion of his physiotherapist, Mr Noble has been attending hydrotherapy and acupuncture treatment on a weekly basis. I accept his evidence that these treatments make him feel better, improve the pain, and improve his sleeping and help with his constipation. The defendant submits that it ought not to have to pay for these treatments because in their joint report the orthopaedic experts say that there is no good scientific evidence to justify regular and formal physiotherapy/hydrotherapy/acupuncture. I disagree. In my opinion these treatments are reasonably required. I accept Mr Noble's evidence that his weekly hydrotherapy and acupuncture sessions help with the pain and make him feel better generally. I also note that Mr Noble was advised at St George's Hospital to continue with hydrotherapy and his treating physiotherapist has given him the same advice".*

AIDS & EQUIPMENT

69. In *A v Powys Health Board* [2007] EWHC 2996 Lloyd-Jones applied the reasoning in *Rialis v Mitchell* (1984) Times, 17 July and *Sowden v Lodge* [2004] EWCA Civ 1370 to claims for aids and equipment. Therefore the claimant was entitled to claim items which were reasonable even if a cheaper item was suggested by the defendant. Further in *Burton v Kingsbury* [2007] EWHC 2091 (QB) Flaux J preferred the evidence of Mr Southall to that of Colin Clayton, stating that "*If such technology is available to give the Claimant a level of independence so that he does not have to summon a carer or his wife to switch on a light or a piece of equipment or to draw a curtain or blind, it seems to me that he should be entitled to it and to recover its cost from the Defendant".* However, this should be contrasted with the case of *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC

[10] Para [53].

3111(QB) in which Sir Roger Bell refused the claim for a wheelchair lift to allow the claimant to access the grassy part of his garden because he found that the bungalow was suitable for his needs without requiring access to the grassy area.

TRAVEL AND TRANSPORT

70. The some points to note are as follows:

- Little or no credit should be given on the resale of adaptations: see further *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375[11].
- The annual mileage is important and should be supported by detailed witness evidence. If there is a higher annual mileage this likely to mean a shorter replacement period: compare *A v Powys Health Board* [2007] EWHC 2996 (replacement every 5 years) with *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375 (replacement every 4 years).
- If the claimant is likely to drive himself this may add significantly to the claim by way of hand controls and other modifications: *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375.
- Good evidence should be obtained regarding increased insurance cover for carers: see further *Sarwar v (1) Ali (2) MIB* [2007] LS Medical 375.
- In *Burton v Kingsbury* [2007] EWHC 2091 (QB) Flaux J allowed a mileage rate of 35 ppm;

71. In *Noble v Owens* [2008] EWHC 359 (QB) a court view was arranged of the claimant's current vehicle arrangements, which ultimately led to an agreement that his present vehicle was unsatisfactory.

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11 Although it should be noted that some mobility consultants, such as Steering Developments, prepare their own calculations which do allow for some residual value.

PROVISIONAL DAMAGES

72. In the case of *Garth v (1) Grant (2) MIB*, QBD, Lawtel 17/7/2007, HHJ Hickinbottom sitting as an additional judge of the High Court had to deal with a novel application for provisional damages involving the risk of complications arising from future planned surgery. The claimant sustained multiple severe injuries, the most serious of which was an open book fracture of her pelvis. Hip replacement surgery was planned which carried with it a 1% chance of a fatal anaesthetic complication, a 5-10% chance of sciatic nerve palsy and a 10-15% chance of an infection around the prosthesis. In short there was a risk of about 20% that the claimant would be no better off following the operation and may in fact be worse off. An application was made under s 32A of the Supreme Court Act 1981 for provisional damages on the basis that the claimant does not suffer "sciatic nerve palsy and/or prosthesis infection and/or any other known or unknown risk of adverse outcome as a result of either primary or secondary hip replacement operation such as to cause her to be in a worse condition with less functionality than she presently has".

73. HHJ Hickingbottom found the claimant's submission uncompelling that she would suffer a serious deterioration in her condition if she were to suffer a palsy or infection. Rather oddly he said "It would not be her condition that would deteriorate in these circumstances; it would be her prognosis". I do not follow this since prognosis is simply a prediction of future condition. If her condition did deteriorate following surgery then, assuming the need for the surgery was related to the accident, there does not appear to be any good reason why this event could not be the subject of a provisional damages award. However, on the facts of this case, HHJ Hickingbottom found as follows:

> *"I am not satisfied that, if Ms Garth were to suffer either a sciatic nerve palsy or an infection, then this would amount to a "serious deterioration in her physical condition" for the purposes of Section 32A, as submitted by Miss Tracy Forster. It would not. It would, unfortunately but simply, result in a failure to improve her overall condition as hoped for and indeed expected from such as operation. To the extent that a palsy may make her overall condition worse, then, on the basis of Mr*

Bircher's evidence, I am not satisfied that that would represent a ***serious*** *deterioration".* [emphasis as original]

74. In the recent case of *Davies v Bradshaw and others* [2008] EWHC 740 (QB) Mr Justice Wilkie refused to award provisional damages in the case of a claimant who had suffered a spinal cord contusion at C5/C6 and was at risk of developing a syrinx. He accepted that the application for provisional damages satisfied the relevant legal tests, however, he decided in his discretion not to allow them because he did not think the condition was sufficiently "distinct from the types of cases referred to in *Wilson v MOD* to call for the court to exercise its discretion to make a provisional award". This does not make sense because he had accepted that the legal test was passed and practically if the claimant did develop a syrinx, annual care costs might increase substantially. This aspect of Wilkie J's judgment was subsequently appealed by consent and an order was made for provisional damages on the assumption that the claimant did not develop syringomyelia at any time in the future.

CONCLUSION

75. The assessment of quantum has become more complex and detailed than ever before. 8-10 day quantum trials now appear to be the norm rather than the exception. Many of the significant personal injury and clinical negligence cases in recent years have involved issues of quantum. However, the boundaries of a number of the principles regarding the assessment of damages are yet to be fully determined. No doubt further refinements will continue to be made over the coming years and further heads of loss will be considered in greater detail. Hopefully we will keep pushing at the boundaries so as to comply with the 100% principle and to ensure that claimants are provided with sufficient funds to meet their needs and maximise their independence.

WILLIAM LATIMER-SAYER

27 January 2009