SERIOUS PERSONAL INJURY LITIGATION - A QUANTUM UPDATE

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Abstract

Arguments concerning the indexation of periodical payments orders triggered many more cases than usual being tried out after 2005 on numerous heads of damage. Further cases followed after the issue of indexation was decided, leading to the landmark decision in Whiten (2011). In late 2014/2015 there has been a further spate of reported cases driven by the NHS LA. James Rowley QC brings together the judgments so that trends in awards in the most serious litigation can be identified.

We are now bombarded with case reports by email and over the Internet[2]. The reporting of 1st instance quantum decisions used to be a comparative rarity before 1992 and the PIQR. Even then there was a time lag in publication and many decisions were never covered. On one level, we are immensely fortunate now to be able to discern how the best counsel and 1st instance judges set about their respective tasks in serious personal injuries litigation; but with that opportunity comes the obligation on the serious practitioner to take the time really to get to grips with the lengthy judgments. It is not easy. This paper, evolving since the autumn of 2007, is an exercise in the on-going fulfilment of that obligation.

The emphasis in the review will be on awards for care and attendance, which is the largest part of any big claim. The major recent cases are set out in the accompanying tables[3]. Just reading the tables and seeing the cases summarized alongside each other goes a long way towards achieving my aim. In this commentary, consideration of [1] *Crofton*/local authority and [2] periodical payments points is left out account in respect of the earlier cases: if they were to be included, this paper would be so widened as to require a small book[4]. Anyway, these points have largely withered away in more recent times.

In order that I may retain the ability to argue points in future cases[5], I will limit what I write for the most part to a description of the various decisions without endorsement or opposition, concentrating on points of principle or at least relatively hard-edged points. Occasionally, where there is an interesting issue, I may hazard an alternative argument as a *suggestion* (and not a concluded view.)

Non-commercial care

Care while still in hospital

In *Tagg v Countess of Chester Hospital Foundation NHS Trust* [2007] EWHC 509 (QB) McCombe J allowed [85] the claim for the physical care provided by relatives while the claimant was still in hospital *without* the claimed companionship/emotional support element, thus cutting the number of hours from the total spent at the bedside. In making his decision he referred to no authority, which might be found back in *Havenhand v Jeffrey* (unrep. 24.02.97 CA) quoted in *Evans v Pontypridd Roofing Limited* [2002] PIQR Q5 at [28]-[29.] Following these decisions, Underhill J in *Huntley v Simmons* disallowed the claim for non-commercial care

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An earlier draft of this paper and the accompanying tables appeared at [2008] JPIL 109 and it has been updated many times.

[2] Major quantum decisions reported by Lawtel beginning with *A v B* in 2006 up to 1 February 2017 are covered. Not all cases are necessarily referred to on all points, however, by reason of lack of space.

[3] Cases referred to first of all without their reference will be found in the tables, where the case references appear if they have been allotted.

[4] The same is now true in respect of issues relating to loss of earnings, only ever touched on briefly in earlier drafts. Those sections are now deleted.

[5] When speaking to this Paper, Chatham House Rules apply to the Author's remarks.

comprising hours of visiting in hospital at [65]. As to the submission that the family were at the bedside because of concern that the Claimant might pull out his tubes when unattended (as happened once after he came out of a coma), he found (footnote to [65]) that he could not on that evidence alone justify awarding the costs of their attendance as, in effect, a precaution against negligence on the part of hospital.

Non-commercial rate – aggregate or basic rate? 25% or 33% reduction?

The leading modern case is *Massey v Tameside & Glossop Acute Services NHS Trust.* On the specific facts (see the accompanying table) Teare J, who was referred to *Fairhurst v St Helens & Knowsley Health Authority* [1995] PIQR 1 and to Lloyd Jones J in *A v B* (see [42]), awarded an enhanced aggregate rate derived from spinal point 8:

> The Spinal Point 8 rate is a flat rate which does not take account of the anti-social hours (nights and weekends) during which much of the care provided by Joseph's mother has been provided. Nor is it a rate which takes any particular account of the intensive care required of a person caring for someone with Joseph's needs which, it is common ground, are at the most serious end of the spectrum of sufferers from athetoid cerebral palsy. Whilst any rate for voluntary care is in one sense artificial I have difficulty in accepting that the Spinal Point 8 flat rate is a rate which enables Joseph's mother to receive proper recompense for her services when much of her services were provided during the night or at weekends and were particularly demanding because Joseph's needs are and were particularly demanding. For the same reason I have difficulty in accepting that the Spinal Point 8 flat rate is a rate which is appropriate in this case or which can produce a fair result in this case. In order to be appropriate and produce a fair result the Spinal Point 8 flat rate requires some enhancement to reflect the particular circumstances of the care provided by Joseph's mother. [40]

It must be said that in nearly all really serious cases since *Fairhurst* there have been the twin elements of care at anti-social hours and in demanding circumstances; yet the courts generally allowed only the basic rate. It is interesting to see to what extent Teare J has been followed.

In *Noble* Field J distinguished *Massey* on the basis that the case before him was less severe and allowed only the basic rate [77.] It was, nevertheless, a serious case. This approach was followed recently by Sir David Eady in *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB), a case of reactive arthritis and pain syndrome (general damages £93,000), allowing the basic rate with only the briefest of reasoning at [44]. Jay J [203] awarded the basic rate in the neck/chronic pain case (general damages £37,500) of *Hayden v Maidstone & Tunbridge Wells NHS Trust* [2016] EWHC 3276 (QB).

In *Crofts*, HH Judge Collender QC allowed £8 an hour for the non-commercial care in the immediate period prior to trial (1.01.07-4.07.08 - cf £8.68 as the aggregate rate and £6.62 as the basic rate from April 2007.) The case involved a very demanding, one-armed, brain-injured Claimant; and the award was in respect of the high quality care from his wife. A discount of 25% was applied for the non-commercial element in the past. £8 an hour was also the allowed figure in respect of future non-commercial care, which he found would have to diminish with stepped increases in commercial care over time [124.] No non-commercial discount is articulated in the judgment for the future.

In *Smith v East & North Hertfordshire Hospitals NHS Trust*, Penry-Davey J awarded the aggregate rate with a 25% non-commercial discount. This was a serious case of autistic spectrum disorder with severe learning difficulties, no expressive communication, night incontinence, temper and impulsivity in a child.

In *Whiten v St George's Healthcare NHS Trust*, Swift J awarded the aggregate rate (also with a 25% non-commercial discount) [141] and [144] in a case of severe mixed spastic-dystonic cerebral palsy where the Claimant's needs had been for truly one-to-one care at all hours, with high levels of stress and exhaustion.

In *AB v Devon & Exeter*, Irwin J awarded the aggregate rate since the care was at various times of the day and sometimes involved travel [129]. He reduced the figures of the claimant's expert by one third for care that

would have been required anyway for unrelated conditions.

Thus, the seeds sown by Teare J in *Massey* have germinated and taken root in really serious cases. Lack of reported decisions entails that the practical position in more moderate cases is unclear but a number is beginning to be reported[6].

As to the appropriate non-commercial rate for *future* parental care, in *A v B*, Lloyd Jones J refused to award the aggregate rate and stuck with the basic rate [56] - [57.] While the defendant did not try to discount the rate for the non-commercial element in the future (perhaps following the line of the Court of Appeal in *Willbye v Gibbons* [2003] EWCA Civ 372 in which future contingencies which might cause the break down in non-commercial care were properly taken into account by not making a non-commercial discount – see [12]-[16]) Lloyd Jones J did not see any logical force in the claimant's argument to the effect that, because a rate was later to be discounted for tax, national insurance etc, those discounts were somehow relevant to choice of the correct rate in the first place.

In *C v Dixon* the Defendant did take the point about a discount from non-commercial care in the future and King J deducted 25% at [74]. The contingencies for commercial care were already catered for in the detailed approach on the facts; so there is no conflict with *Willbye* ibid.

In *AC v Farooq & MIB* [7], King J (again) awarded [131] the claimed non-commercial rate of £7.11 per hour in respect of future non-commercial care but made no discount for the non-commercial element, justifying it on the basis that the rate represented a compromise with a truly commercial one to start with. The allowed rate equates with the then aggregate rate less just under 25% - the same result achieved a different way.

In *Zambarda v Shipbreaking (Queenborough) Ltd* [2013] EWHC 2263 (QB), John Leighton Williams QC (sitting as a Deputy High Court Judge) made only a 20% discount [64] because the sum was so small that income tax would not be paid.

Nevertheless, in the large cases the Courts have alighted on 25% as the usual reduction involving past non-commercial care: *Whiten* [144], *Loughlin* [81] and *Ali* [323b-d]. See also similar results in *Farrugia*, *Tate v Ryder Holdings*), *Ellison v University Hospitals of Morecambe Bay NHS Foundation Trust*, *Totham*, *Robshaw v United Lincolnshire Hospitals NHS Trust*, *HS v Lancs.* and *AB v Devon & Exeter*.

In *Farrugia*, Jay J made the discount in respect of future non-commercial care over a small number of hours (10) per week. The starting point, however, was not the aggregate rate used for past care but the commercial rates awarded within the future package of £11.50/£14 an hour - see the Schedule to the Judgment.

In *Totham*, the Parties agreed the rate and the hours. Nevertheless, the Claimant argued that Mrs Totham had given up highly paid work and consequently there should be no discount for the non-commercial element. The attempt was rejected at [25]-[28]: the argument in respect of Mrs Totham's work did not go to the correct non-commercial percentage reduction (principally to do with tax and NI), rather it went to the correct rate to be allowed for the hours (already compromised.)

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[6] In the asbestosis case of *Nicholas v MoD* [2013] EWHC 2351 (QB), HHJ Burrell QC (sitting as a High Court Judge) awarded the aggregate rate at [23] for cleaning, cooking, shopping, care with personal hygiene - much of it at anti-social hours, evenings and weekends. In *Knauer v MOJ* [2014] EWHC 2553 (QB) Bean J (as he then was) awarded the aggregate rate in respect of general household tasks [13]. In neither case does it appear there was any spirited resistance …

[7] [2012] EWHC 1484 (QB) – a case of brain injury, more towards the *Noble* level of claim, where the Claimant required substantial but not absolutely continuous supervision; and the non-commercial side of it came from her husband against whom various findings were made.

Now that the Courts are sensitive to awarding the correct rate for the care, it is important to compartmentalise arguments since the non-commercial reduction should no longer be used as a broad brush tool: the reduction appears to have settled at 25% and the real argument is usually over the correct choice of rate to provide *reasonable recompense*.

Taking a broad brush appealed to Stuart-Smith J in *Ali v Caton & MIB* at [323b-d] where he effectively reached a rate between the aggregate and basic rate. He took the starting point of the Claimant's expert's figures and discounted them by 25% on account of arguments over both rates and the number of hours.

> Adoption of a basic rate throughout would lead to under-compensation while adoption of the enhanced rate would have the opposite effect.

Carer's Allowance – deductibility?

Teare J in *Massey* also heard argument on the deductibility of past Carer's Allowance from the claim in respect of family, non-commercial care and found:

> To the extent that the carer has received benefits in respect of his or her voluntary care the claimant does not need a sum of money to give proper recompense for that care. It therefore seems to me that the Defendant's contention is right in principle. [52]

If there has been a liability discount, carers may well argue that the Carer's Allowance should be set against that discount rather than their already reduced damages for non-commercial care.

Commercial care

Past commercial care

We probably all thought we knew the correct legal principles. Where there has been actual expenditure in the past on commercial care, it should be capable of easy proof (or reasonably accurate estimation if records have not been kept.) It will usually be awarded in full unless the defendant raises issues of unreasonable provision (or elements of separate causation leading to unrelated provision.) The primary measure of damage against which to judge the claimed level of provision is one of reasonable care to meet a claimant's needs. If, at first blush, the claim in the past appears to exceed the primary measure of damage, principles of mitigation of loss may yet come to a claimant's aid if some evidence is adduced to explain the apparent over-spend. Once a claimant raises such arguments, the burden of proof lies on a defendant to prove a failure in mitigation; and the standard against which to judge a claimant's actions is not a harsh one[8]. But are these the right principles after 2013?

In the case of *Loughlin* Kenneth Parker J was invited [62] to disallow the costs of past care and case management on the basis that *the standard of such care and management fell significantly below that which could reasonably be expected to meet the exigencies of the Claimant's condition and circumstances.* The full submission was rejected as *wholly disproportionate and unjust*; but the claim was reduced by 20% with a broad brush on account of the case manager's failure to address the Claimant's need for a specific and effective sleep hygiene regime in timely fashion. Kenneth Parker J made a finding that *the efforts made on this fundamental aspect of the rehabilitation were simply not adequate* [61].

> Principle requires that I should take due account of the fact, that I have found, that the standard of the care and case management services did, in an important respect, fall significantly below the standard that could reasonably have been expected. In other words, the objective value of what the Claimant received was less than the amount of the charges made for the relevant services. There is no precise means of quantifying the appropriate reduction - the exercise requires the court to take a broad view of what the claimant did receive,

[8] The topic is beyond the scope of this paper; an obvious source of assistance lies in McGregor on Damages 19th edition in Chapter 9.

> and the nature and extent of the putative shortcomings, bearing in mind the particular difficulties of the case. [62]

There was no finding in *Loughlin* that the Claimant through his Financial Deputy had knowingly appointed an incompetent case manager. Kenneth Parker J made no finding of failure to mitigate against the Claimant/Financial Deputy in the handling/funding of the case manager (although this may have been an under-current in the case). As long as the findings amounted to *gross* negligence on the part of the case manager, his observations can be squared with wider principles of third party *novus actus* articulated by Laws LJ in *Rahman v Arearose Ltd* [2001] QB 351 and applied in the clinical negligence context of *Webb v Barclays Bank* [2001] EWCA Civ 1141: insofar as the increased costs of failing to implement a sleep hygiene regime were caused by the gross negligence of a third party, they were separately caused. It is not easy to see, however, why a finding of mere as against gross negligence in the past of a third party should break the chain of causation and lead to the dis-allowance of part of the claim. Nevertheless, there is now first instance authority under which the objective value of that which the Claimant has received is assessed; then there is a broad-brush adjustment for any significant disparity with actual cost.

In the later 2013 case of *Ali v Caton & MIB*, Stuart-Smith J awarded the full claim for past support workers, the regime having been set up in accordance with apparently competent third party advice.

> The position of a significantly brain-damaged claimant who acts on the basis of apparently reasonable advice is strong, though not always impregnable, when seeking to recover the costs of doing so from a tortfeasor. On this item, the balance of the argument strongly favours the claimant [323f-h].

This approach is in keeping with the writer's understanding of the correct legal principles set out in the introduction to this section on the previous page.

The point raised its head again in *Totham* where the Defendant criticised (with some justification) the past professional case management. Laing J conveniently ignored making a decision over whether the third party work had been merely negligent or grossly negligent (it was described by the Defendant as *wholly unreasonable* [33]) and simply awarded the whole claim on the basis that Mrs Totham "had acted reasonably in appointing [the case management company] in the first place, and in continuing to employ, and pay, them until they walked off the job." [39]

Number of notional weeks in the year – 58 weeks+

The courts alighted pretty heavily in 2006-7 on a 58 week notional year to take into account (for directly employed carers) an allowance in respect of i) paid holidays ii) higher hourly rates paid on bank holidays iii) sick leave and iv) down time in the package for training days.

It was Sir Rodger Bell in *Iqbal* who, first in the recent reports, heard evidence and ruled on the point [33] - [34.] The allowances made by Mrs Sargent previously [4 weeks for holiday, 8 days bank holidays at double time effectively adding on a further 8 days, and 6 further days for sick leave and training combined, making a total of 6 extra weeks on top of the 52] were sufficient. If split between school term times and holidays for a child, the logical split of the 58 weeks was found [35] to be 43.5:14.5 = 58 weeks in all.

Percentage uplift on 52 weeks rejected

Sir Rodger Bell rejected the defendant's approach (Mrs Conradie: 52 weeks in the year + a notional 27% for the rest to include ERNIC) on the basis that she was unable to explain how the percentage was reached. This had also been the decision of Lloyd Jones J in *A v B* [81], based on the *58 weeks* + solution being *more likely to reflect actual costs.*

The *58 weeks*+ solution, though not binding as the *only* possible approach, was given the imprimatur of Lloyd

Jones J in *Sarwar No.2* where he heard the point afresh [30] – [33.] HHJ Mackie QC in *Wakeling* followed *Iqbal* without detailed further ruling. In the later case of *Burton*, the Claimant's care expert had calculated the costs by reference to the now out of favour 52 weeks + a percentage method (but with higher allowances for training and induction – some swings and roundabouts); and so Flaux J never had to make any decision.

59 weeks+

The regulations governing statutory holiday pay changed on 1 April 2008 [9], increasing entitlement by 0.8 of a week; and the fight for the 59-week solution was renewed. In *A v Powys* Lloyd Jones J approved [54] an agreed calculation based on 59 weeks on the express provisos that it was based on Irish conditions of employment and was necessarily broad brush. Without any detailed ruling, Field J in *Noble* allowed 59 weeks in the year; and he rejected Mrs Conradie's 52 weeks + 27% solution, which now looks more than a little tired [10]: [91] – [92.] Penry-Davy J allowed 59 weeks in *Smith* with the following findings without reference to the new Regulations on holiday pay [emphasis added]:

> As to (3), the issue as to whether calculation should be based on 58 or 59 weeks, Ms Slawson's view of 3 days for training and team meetings was based on the standard ICCM package but did not include on the job supernumerary training, which would still have to be paid for. Mrs Sargent's view that the appropriate figure was 7 days was **based on her experience and on the specific specialist nature of the care required by the Claimant**. Her view that the appropriate figure for paid sick leave was 6 days, again **based on her experience**, was that that number of days was **necessary as an incentive for staff retention**. Ms Slawson's view that 3 days was appropriate was based upon the standard ICCM approach. In my judgment Mrs Sargent's approach was reasonable and appropriate and **for the reasons she gave** I conclude that 59 weeks is the appropriate number of weeks per annum to form the basis of calculation of the figures.

Thus, in the serious case where detailed training and staff retention are particularly important, the *59 weeks* point won the day without recourse to the increased holiday entitlement.

60 weeks+

The tipping point for 60 weeks was reached in *XXX v A Strategic Health Authority*. The change introduced on 1 April 2008 was only phase 1 of an overall increase of 1.6 weeks from the original 4 weeks entitlement; the second increase of 0.8 of a week was to start on 1 April 2009. Jack J found as follows at [24]:

> I am satisfied that, if training time is now included – as it is now agreed on the claimant's behalf that it should be, it is appropriate to calculate the annual cost of care on the basis of a 60 week year to take account of the time when they are entitled to be paid but will not be actually caring for the claimant. In previous cases either 58 or 59 weeks have been used. On 1 April 2009 the statutory entitlement to holiday pay will increase from 4.8 weeks to 5.6 weeks. It had previously been 4 weeks.

Thus, the point here revolved not around training and retention but holiday pay. And this is where the position still rests, the earlier 58-week cases distinguished logically by the increase in statutory holidays (1.6 weeks when fully implemented) and rounded up by 0.4 of a week (probably for better training standards.) Without undermining the logic of the original cases at 58 weeks, change of circumstance now leaves us inexorably with a 60-weeks+ solution[11].

In *Whiten*, the Defendant's suggestion was to take 60 weeks, but apply only 52 weeks to the full weekly multiplicand, and allocate the remaining 8 weeks to hours assessed at basic weekday rates - a modest saving. Swift J had no difficulty rejecting the suggestion [168] since periods of carer's sickness and holidays would span weekends and anti-social hours. Jay J in *Farrugia* [100] described taking the 60-week year as *standard*

[9] SI 2007 No. 2079 The Working Time (Amendment) Regulations 2007

[10] Very few experts now continue to use the percentage basis over 52 weeks. The method still has the fatal disadvantage of being near impossible to justify arithmetically in evidence if not agreed.

[11] The case of *C v Dixon* was heard before *XXX* but judgment delivered after it. The Claimant did not take the 60-week point.

practice.

Care experts who routinely bill separately for Bank Holidays and down time for training, as well as contending for 59.6 or 60 weeks in the calculation, had better have impressive justification on the facts of the case. As the "60 weeks in the year" evolved (and it came out of cases of the utmost severity), the practice was evidently supposed to take into account an allowance for down time, training and team meetings, as well as Bank Holidays. Recent attempts to push the 60-week boundary, under various disguises, have failed.

In *HS v Lancs.*, the claimant's care expert asked for a 5% contingency uplift (5% x 60 weeks = 3 more weeks!) *in order to cover holidays, sickness and other unexpected and sudden absences on the part of employed carers.* William Davis J rejected the argument at [31] on the basis that the 60-week calculation included the contingency of holidays and sickness. He continued: *Any maternity leave will be funded from the public purse given the number of employees. Any other absences will almost certainly be accommodated with the carers' shift patterns.*

In *Robshaw* Foskett J rejected [479] the claim for extra pay for the case manager, team leader and support workers in attending multi-disciplinary meetings: while he allowed the time for the attendance of the therapists, the case manager, team leader and support workers were to attend in their normal working hours i.e. within the 60 week and case management calculation.

***Add on* costs**

The tables setting out the major decisions summarize the *add on* costs allowed and rejected on the facts of each case. These are in addition to the 60 week calculation + ERNIC + NEST[12].

ERNIC

Earnings related national insurance contributions [ERNIC] by the employer have to be added on to the total figures once calculated as do *add on* costs. The issue used to be poorly understood, but no longer. Contributions for tax year 2016/17 are payable at 13.8% on wages above the secondary threshold [13] (£156 a week x 52 weeks = £8,112 pa.) So, to reach the annual sum of ERNIC, calculate the annual wage's bill and deduct from it (£8,112 x the likely number of carers in the package) to give the sum on which 13.8% is likely to be paid.

NEST

In *XXX* the Claimant argued that the Pensions Bill 2006 envisaged the introduction by 2012 of compulsory contributions from employers into new *personal account* pension schemes for employees, which will run alongside the current inadequate system of State pension provision. Jack J, finding for the Claimant contending for the additional cost of this contribution, said only the following about this issue at [39]:

> The claimant's father introduced this claim on the basis that it was proper for an employer to contribute to pensions for his employees and that it would make a position with the claimant more attractive. The case is on firmer ground in its reliance on the Pensions Bill and the compulsory contributions which it will require from 2012 if it becomes law. There is no reason to think that it will not: I was told that it had secured the approval of the House of Lords. The probability is clearly that contributions of 3% of pay within limits as set out in the Bill will be required. The award should accordingly provide for this.

Jack J was evidently correct when he considered that the proposals were likely to pass into law: the Pensions Act 2008 received Royal Assent on 26 November 2008. The scheme is now known as the National Employment Savings Trust [NEST.] Its provisions have changed over time; even now it is worth checking

[12] Excepting the case of *Burton.*

[13] There is an upper ceiling; but no carer is ever paid enough to bring it into play.

the web site[14] from time to time to see if anything has altered. The following information comes from the NEST web site as at 1 February 2017.

1. If enrolled within the scheme, employers pay a percentage of *qualifying earnings*: for tax year 2016/17 this is between £5,824 and £43,000 pa.
2. Enrolment is compulsory for all workers aged at least 22 but under State Retirement age who earn at least £10,000 pa from that employer, who work (or normally work) in the UK and who are not already an active member of a qualifying scheme with that employer.
3. Enrolment is at a worker's own option if aged at least 16 and under 75, with the employer having to contribute if they have *qualifying earnings* i.e. earn over £5,824pa.
4. The staged introduction of the duties depending on the size of the employer has begun; all care packages have fewer than 30 employees so will stand to be introduced into the scheme between Jan 2016 and April 2017.
5. Once the duties have bitten on an employer, the full impact of the contributions is also to be phased in; the plan is still sliding and subject to Parliamentary approval but presently[15]:

	Minimum percentage of qualifying earnings that must be paid in total	Minimum percentage of qualifying earnings that ***employers*** must pay
To end Mar. 2018	2%	**1%**
Apr. 2018 to end Mar. 2019	5%	**2%**
Apr. 2019 onwards	8%	**3%**

Swift J did not have had the benefit of the most up to date position even for mid 2011 presented to her in evidence in *Whiten*. She rejected [175] the Defendant's submission that it was all too nebulous and speculative; and awarded contributions from 2016 (which would now be 2017 after the modifications), reducing the awards modestly for contingencies such as, in the early years, that it would be phased in, and after that for the chance that not all members of the care team would qualify under the scheme [176] - the long term annual multiplicand of £4,446 being reduced to £3,000. The only discount for contingencies open for argument after April 2019 (assuming no more sliding) appears to be whether there will be carers aged under 22 or over State retirement age in the package and who will not opt to be enrolled - a tiny rounding down. No discount appears to have been made in *Farrugia* looking at the calculations in the Schedule to the Judgment. Past sliding has been in terms of the implementation date not the principles in the long run.

Hourly rates

The correct hourly rates for commercial care are again principally issues of fact depending on the area where the care package is to be set up and the calibre of carer reasonably required.

The lowest rates in the tables were in *Massey* (location unclear and there had been difficulty in recruiting at the rates which were based on those paid under the Direct Payments Scheme – see [73]-[74].) The Claimant's expert did well on everything else; but Homer may have nodded on hourly rates and the rate for *waking* night care. Certainly, looking at the table of awards, this case is the odd one out.

The next lowest rates (*Wakeling*) were for Hackney in London and involved the court largely splitting the difference between the experts, based on their experience of what would have to be paid. It is probably important in practice that this was in respect of a care regime that had never been tried and the market rates never tested.

[14] http://www.nestpensions.org.uk/schemeweb/NestWeb/public/NESTforEmployers/contents/nest-for-employers.html

[15] http://www.nestpensions.org.uk/schemeweb/NestWeb/public/pensions/contents/auto-enrolment.html

For, as Sir Rodger Bell found in *Iqbal,* where the market had been tested in Epsom and the evidence was available:

> The proper hourly rates for day and waking night care were in issue. Mrs Sargent allowed £10 an hour during the week and £12 an hour at weekends, which are the rates which Mr and Mrs Iqbal pay now. Mrs Sargent said that those were the rates she was paying in the area where the family lived. Mrs Conradie thought those rates were too high. She advises a family in Chelsea, who pay £9.50 and £10.50, and those were the rates which the defendant argued to be reasonable. However, Mrs Iqbal said that they had been unable to recruit and keep carers at £8.50 and £9.50, so they went straight to £10 and £12 and they had a good response and got carers with whom they were happy. Mrs Theresa Messenger who has been Mr and Mrs Iqbal's case manager for several months said: "It would be nice if one could do it for £9.50 and £10.50 in Epsom, but you can't do it". There had been two attempts at recruiting since she had been involved with Khazar. She had not been involved in an attempt to recruit at less than £10 and £12, but it had been "good" since they offered those rates. Mr Spencer pointed out that no attempt had been made to engage staff at £9.50 and £10.50, but I do not believe that there is any obligation on parents in the position of Mr and Mrs Iqbal to creep up pound by pound in the hope of saving the defendant a pound or so an hour. They are entitled to shorten the process by offering a good rate. In my judgment, the evidence of practical experience points overwhelmingly to £10 and £12 being reasonable rates which it is necessary to pay in order confidently to achieve the required continuity of competent, willing carers.

As a precursor to a section below introducing controversial issues on the legal basis of the claim for care, Sir Rodger made a primary finding in the final sentence of the quotation from *Iqbal* that the rates were reasonable. Since the rates were in fact reasonable, there was no prima facie unreasonable element to the claim upon which notions of reasonable attempts at mitigation (heralded to a certain extent in the previous sentences) might have had to bite.

In *Crofts*, Mrs Johnson (Claimant) and Ms Palmer (Defendant) agreed £12 an hour in Hertfordshire. The judgment is not explicit but it looks to have been a composite rate to apply to all days of the year, daytime and evening. The calculation [124] in the long-term future [taking *14 hours a day for 7 days a week – total annual care 5096 hours*] shows that only 52 weeks in the year were being allowed at the £12 an hour flat rate. The experts appear to have presented calculations in a rather different format from the now common 58-60 weeks+ solution; or the Judge approached matters in his own way.

In *Smith* (and in Hertfordshire again), Penry-Davey J allowed £10 and £12 an hour (weekday/weekend.)

In *XXX*, Jack J had to decide the reasonable hourly rates in Guildford, acknowledged to be an expensive area in respect of recruitment. The requirement for care was described as being of the following order [13]:

> It was emphasised on the claimant's behalf that he will need a high quality of carer, in particular because of combination of his physical disability and his mental ability. He will need people who are thoughtful, sensitive and stimulating in addition to being able to provide physical care. It was emphasised that because of the needs which his mental ability gives rise to looking after him will be far more challenging than with a person who has little mental ability. I accept that the work will also be for that reason the more interesting.

The Claimant suggested £12/£14 an hour and provided apparently general supporting evidence from care providers/case managers in the area, including Mrs Sargent and Associates (she was not the expert witness in the case.) The Defendants countered with £10/£12 an hour and little evidence in response other than by reference to some local agency rates (when the care package was to be directly employed.) Jack J had this to say at [16]:

> I have not found this evidence satisfactory. I would like to have had some specific examples of who was being paid what for doing what in the Guildford area. But my job is to make a decision on the basis of the evidence that has been adduced. The complete evidence suggests that there is a wide range in the pay of carers. In this

> context the difference between the parties is not large even though when it is multiplied up over years it becomes significant. The figures provided on behalf of the claimant relate to what two case management providers are actually having to pay, and they are the same. They are supported by Mr. Young. Mr. Pace has made an estimate based on agency pay. In these circumstances I should accept the former as the better guide to what it will be necessary to pay to obtain appropriate carers for the claimant.

As in all matters requiring close decision in this sphere, a little bit of evidence goes a long way. £12/£14 an hour, based on general evidence which was better than nothing, won the day in Guildford in late 2008.

By way of contrast with the position in *Iqbal*, King J in *C v Dixon* at [90]–[93] found that the hourly rates paid in the historical package (Barnsley) had been allowed to run away with themselves. Having started at £7/£7.50 an hour, they were increased to £9/£10 an hour in February 2004; to £11.50/£13.50 (a 28% increase in one go) in May 2005 and then £11.80/£13.85 in April 2006. The Claimant was found *not* to be in need of the *most experienced support workers*. King J said at [90]

> I accept the Defendant's submissions that there has been no evidence justifying the increases in February 2004 or May 2005 or the present rates by reference to any market testing/advertising or evidence of the support workers requiring such rates on threat of leaving and no evidence explaining how any of the hourly rates have been arrived at by JSP.

The award for future care (past care having been agreed) was pulled back to £10 /£11 an hour for weekdays/weekends.

The allowed rates for a privately employed package in *Whiten* (London) were £13/£15 an hour [157]. In *AC v Farooq & MIB* supra, King J allowed the PULSE agency rates[16].

Two cases in 2013/14 saw different outcomes: *Streeter* and *Farrugia*. In *Streeter* (Sept. 2013), a case of ASIA A tetraplegia at C4 (sensory) and C5/6 (motor)) Baker J found in line with the Defendant's researched evidence for £9/£10 an hour near Aylesbury [209][17]. In *Farrugia* (April 2014, a case of very severe brain injury involving spastic tetraparesis) Jay J allowed [102] £11.50/£14 an hour in Portsmouth, moderating the clinical case manager's evidence [37] for £12/£14 slightly.)

The Parties agreed £10 and £11 an hour in *Robshaw* (Lincs.). Cox J ruled in *Manna* (Bolton) in favour of £10.50 and £11.50 [216] rejecting a flat rate of £10.

Future parental contributions to the care package

HHJ MacDuff QC (as he then was) said the following about future parental contributions in *Lewis* [207], apparently on the basis that it was agreed as the right approach. It is, at any rate, a familiar way of looking at things.

> At this point it is necessary to say a word or two about the parents. Up to this point, they have been providing gratuitous care. They are to be compensated for what they have done in the past. And, of course, that award is in respect of the *extra* care provided over and above that which they would have provided for Katie if she had not been injured. As time moves on, during Katie's teenage years, they will continue to assist. If Katie had not been injured, they would, as normal parents, have continued to supply care and support in many different ways. The support and care they will provide over the next eight or nine years will not sound in damages because it is acknowledged that, now that a properly funded care regime is to be set up, their contributions will be the equivalent of what they would have done if Katie had not been injured. In fact they will help the paid carers by assisting with the bathing, the nappy changing, the feeding, the lifting and the repositioning etc. If Katie had

[16] £19.93/hr. (Mon.-Fri.); £20.91 (Sat.); £21.88 (Sun.); £39.86 (Bank Hols.); £76/night sleep-in.

[17] The Judgment does not articulate Mrs Gough's package in detail but the writer has examined the expert joint statement in the case to confirm the rates allowed.

> not been injured they would, as normal parents, have done other things – given lifts to school or to parties, helped with homework, provided support in all the ways that a parent provides to a healthy teenager. It is accepted and acknowledged that they will continue to provide assistance to the paid carers in lieu of what they would otherwise have done.

Sir Rodger Bell considered this topic in *Iqbal*, in a passage beginning at [15] which is too lengthy to reproduce here but worth reading. He acknowledged that the approach embodied in earlier cases (along the lines of that in *Lewis*) was a well-established one in practice but decided at [20] that it was wrong in principle on the facts of *Iqbal*, where the parents wanted to retreat from formal care duties and to take part on a looser basis *qua* parents.

> However, bad practice should not be honoured by time, and on reflection it seems to me that it is consistent with both *Evans* and *Stephens* and, regardless of authority, only fair and sensible, that the need for paid care for Khazar must not be reduced simply by the number of hours of normal, voluntary parental care which would have been given to Khazar were he not disabled, regardless of whether Mr or Mrs Iqbal will in fact voluntarily look after Khazar for particular periods. The fact is that Khazar has been seriously disabled as the result of the defendant's negligence to the extent that he will always need 24-hour care from one or more carers. It follows that he is entitled to recover the cost of that care and the cost of it will only be reduced to the extent that his parents will willingly take it upon themselves thereby becoming part of his care package. It is obvious that care for a child with Khazar's problems is in large part more wearing than care for a child with no disabilities, and it must not be assumed that even the most devoted parents will be willing or able to render the same amount of care, in terms of time, to a disabled child as to one who has not been injured, once they are provided with the funds to employ the necessary care beyond their own voluntary help. Even then the need for outside, paid care can only be reduced to the extent that the number of parental hours falls within the number of hours of normal parental care which they would have given but for the injury. If and to the extent that Mr and Mrs Iqbal want to look after Khazar for periods in excess of what would have been periods of normal parental care, they can be incorporated as paid carers at a lesser rate than employed carers, but they cannot be constrained to do so, and there was no evidence that they do want to contribute to Khazar's care beyond the bounds, in terms of time, of normal parental care. That is not what they meant by expressing a wish to continue to be involved in Khazar's care, in my view. They were simply expressing a wish to help care for Khazar to some real extent; there was nothing in the evidence which indicated an intention to spend more time caring for him than they would have done but for his disabilities. Such an intention is inconsistent with their patent relief at being able afford paid help to allow them to return to something like a normal life and to have another child.

Even though often likely to be on hand and actually to help, the parents in *Iqbal* were not legitimately to be bound to assist with transfers and replace the role of paid carers. Sir Rodger Bell [50]:

> I do not doubt that Mr and Mrs Iqbal will find themselves willingly involved in some "two carer" activities, including some transfers where their part will be to reassure Khazar if he becomes agitated, as they do at present, and that the time spent doing this will be no more than the time they would spend reassuring or helping an uninjured child in one situation or another. But I do not consider it legitimate to incorporate them in the care plan as paid carers, beyond this. I consider it reasonable for Mrs Sargent to allow for a second paid carer for 4 of the 10 Saturday and Sunday and holiday hours which the first carer will be working.

Again in *Iqbal*, the parents were not to be forced to continue with night care even while the claimant was still a child (10 at trial.) Sir Rodger Bell [44]:

> In my judgment the reluctance to reassume night care which Mrs Iqbal expressed for herself and her husband is perfectly reasonable, however much Khazar's sleeping has improved. It follows from the evidence which I have summarised that although Khazar may have many undisturbed nights there will always be a risk that he will wake and require attention once or twice. This will require whoever is responsible for him to get up and tend to him. The disturbances will probably be short, but I do not consider it reasonable that Mr or Mrs Iqbal be constrained to bear the burden of them against their wishes. I therefore find that Khazar is entitled indefinitely to an outside, paid, sleep-in night carer after the next year of waking night care.

Teare J put the matter pithily in *Massey* at [64]:

> Mrs Massey is not obliged to assume any role in Joseph's life other than that of parent. If funding is available she is not obliged to act as one of his carers or as his case manager.

Lloyd Jones J in *A v Ponys* refused to reduce the commercial care in the future on account of the possibility of parental input [57]:

> While I have no doubt that they will be willing to assist in meeting A's needs, as and when appropriate, it may well be that they wish to return to the role of parents and to place disability-related care into the hands of professional carers. In these circumstances, I can see no justification for a reduction in the amount of professional care to be provided. (See *Stephens v Doncaster Health Authority* [1996] Med LR 357 per Buxton J at p367.)

HHJ Collender QC in *Crofts* quoted from *Iqbal* and *Massey* at [120] to the effect that a family member is not obliged to carry on as carer or case manager in the future. The rate he allowed for future non-commercial care was the same as the pre-trial rate - £8 an hour – but without non-commercial discount.

Returning to *Lewis*, HH Judge MacDuff QC had rather different evidence, or at any rate a very different feel for the case – see [214] in respect of the adult package, where he speculated that, even though he would award damages for future commercial care, the parents would still be major planks in the provision in later life.

The practical lesson for practitioners/nursing experts is to discern the true intentions of the family shortly prior to trial (neither during it, as in some of the above cases; nor too early on, before the reality of the daily grind of care has been hammered home) and make sure that the future packages and rates truly reflect those intentions. Family members can be incorporated into the future package if they really want to be part of it on a formal basis. And if Sir Rodger Bell is right, they can be paid an appropriate rate for that role. Many will want to resume the role of parent or spouse only; but few will be so cold or calculating as to say they will not take some role in caring for their injured relative after the trial. Where the care is to be given occasionally on that basis *qua the family relationship* rather than *qua formal carer*, judicial opinion has either ignored that contribution when evaluating the future care package (providing all the hours commercially) or, more recently, making use of non-commercial care with the lightest of touches.

By the time we get to the case of *Whiten* (mid 2011), the Defendant did not even try to obtain a significant discount for parental care in adult life even though the clear intention was that they would all live together. The only point at which the parents' potential contributions were considered was in allowing for an agreed single night sleeper in the commercial package on the basis that the parents would be available *in an emergency* [205.]

In *Farrugia* (early 2014), Jay J [96] took into account non-commercial care as one element of the 2-carer package [1] only to the Claimant's age of 49 and [2] only on 3 days a week (for 2 hours a day on 2 weekdays and 6 hours over the weekend) [3] the reduction being only for 48 weeks in the year (missing out holidays) - something which the Judge himself described [97] as *admittedly modest adjustments to the Claimant's pleaded case.*

2015 saw the argument rise again in slightly different form. The NHS LA did not seek a reduction from the full commercial cost of care while the claimant *Robshaw* was a teenager (12 at trial) but it tried to do so as the main point of *HS v Lancs.*. There the claimant was only 8. She had moved to her long-term property prior to trial and had instituted a *much more comprehensive outside care regime* [10] already. No direct attack was made on the parents' credibility in saying they would stand back from the care regime; rather, it was suggested they would, on reflection after trial, choose to become involved again [17]. Given the severity of the case and onerous duties required, William Davis J found for the cost of full commercial care in the future, even at

night, commenting on the Defendant's suggestion that waking to deal with a disturbed child at night is all part and parcel of being a parent thus [22]:

> That of course is correct. But any parent who was disturbed to a significant degree by a child of 8 as often as HS requires two carers during the night would regard himself or herself as extraordinarily unfortunate. Moreover, the nature and extent of the disturbance on any given night is very different to that experienced by the parents of a normal healthy child even if that child's sleep is disturbed.

The view expressed by Sir Rodger Bell in *Iqbal* has survived the challenge and was followed again in *Manna* [204]

Directly employed v agency residential carers

2006/7 surely heard the death knell for the residential carer argument in most *really serious* cases. When argued in *Iqbal*, *Massey, Corbett* and *Burton* the decision was in favour of a directly employed package under case management supervision.

In *Corbett* the claimant was ambulant in callipers and the care package did not require two carers in attendance, either during the day or at night. HHJ Bullimore rejected the CPA agency residential care package (£70,690 pa in total) in favour of the directly employed package (£105,625.) This was on 2 main grounds. Firstly, while within the capabilities of one carer alone, the care would be arduous; it would be unattractive to individuals of the outstanding nature required and likely to deteriorate in quality and continuity if attempted on a "1-2 weeks on : 1-2 weeks off" basis [83]-[89.] Secondly, the resident carer regime fell foul of the Working Time Regulations. The *domestic servant in a private household* exemption (Regulation 19) did not apply since the work was of the nature of *personal* rather than *domestic service* [70.] The exemption (Regulation 20) under which *the duration of the working time … can be determined by the worker himself* did not apply either because the necessary degree of autonomy in the worker was not there; for instance the Claimant needed toileting when he required it, not when the carer decided to do it [72.] Finally, the exemption under Regulation 21 did not apply: the claimant's home was not a *private hospital or similar establishment*; and the need for personal care at night was not an *exceptional event, the consequences of which could not have been avoided despite the exercise of all due care by the employer* since the need was *hardly exceptional …sometimes 2 or 3 nights together, and usually a couple of times a week. It is not unexpected* [73.]

In *Iqbal* Sir Rodger Bell found along similar lines in respect of the adult package [67]:

> In my judgment, Khazar's parents will continue to use directly employed carers throughout his adult years after leaving residential college, continuing to want to retain the control over his carers, which they will have become accustomed to over the years. In any event, there are real difficulties with the scheme of agency care which Mrs Conradie promoted. First, although the agency which she approached considered that it could provide residential care which conformed with The Working Time Regulations 1998 and The Working Time (Amendment) Regulations 2006, I do not believe that this is so in all respects, even if the carer works for 7 rather than 14 days at a time, opts out of regulation 4 (the 48 hour maximum working week), and is relieved by an employed or local authority carer for a few hours each day. In particular, the agency carer will not receive a rest period of not less than 11 consecutive hours in each 24 hour period as required by regulation 10(1); the night hours will not count towards this rest period as the carer will be on duty, and I do not share the agency's view that it would be saved from this provision because the carer would be working unmeasured working time for the purpose of regulation 20. I cannot fit an agency carer into the definition of unmeasured working time in the particular circumstances of Khazar's case. Second, and even if I am wrong in my construction of the regulations, the agency's own terms and conditions for "live-in Personal Assistants" provide for an 8 hour sleep period with no disturbances, and there will be night-time disturbances from time to time in Khazar's case. Third, and in any event, I do not believe that a 7 day carer would survive 7 days and nights in a row, even with some day relief, with the high dependency attention which Khazar will require, without becoming weary to the point of leaving or not returning for any further tours of duty or at least showing less energy and efficiency than he is entitled to.

In *Burton* a resident carer package (directly employed, not agency, at a premium rate of £90 a day to try to attract quality applicants) was proposed by the defendant, supplemented by ad hoc agency staff for 2 hours a day overlap care *if it proved necessary* (or requiring the Claimant's wife to muck into the formal package at a non-commercial rate.) Flaux J had little difficulty in rejecting the package in favour of a directly employed hourly daytime package (14 + 4 hours overlap) on the grounds of lack of safety in transfers; unreasonable reliance on the claimant's wife; doubtful availability and unacceptable turn over in agency overlap carers; even with enhanced rates, the resident carer package would not attract the right sort of carer [65.]

Then came the partial tetraplegia case of *Davies* where a *residential carer* was an appropriate option, but only for a short period of time – between the ages of 70 and 75.

In *Whiten*, the Defendant resurrected the idea of an agency residential package forming the bedrock of provision, with extensive hourly care on top. Swift J had *no hesitation* in rejecting the proposal [204.]

Until May 2016, the only modern, reported big case in which a *resident carer* figured as part of the decided solution was *Davies*. Now, in the high paraplegia case of *AB v Devon & Exeter* a single resident carer was the solution until age 55 [142]; then 2 resident carers [144], supplemented with a £30,000 contingency (discounted for early recovery to £21,231) for extra care at the end of life [146].

***Davies* – some physical risk outweighed by benefits of self-reliance and an active life**

The Claimant was a partial tetraplegic. Wilkie J rejected the already-installed resident carer package as being unreasonable for the immediate future – the Claimant was aged 63 and it was reasonable for her to live with a lesser package until aged 70. A resident carer was the reasonable solution, however, to the need for care with aging and deterioration between the ages of 70 and 75, after which double up care would have to be added. Thus, a resident carer package can still be viable in cases below those of the utmost severity where a lighter touch is reasonable.

Davies is also interesting because in Wilkie J's judgment it was unreasonable to wrap the Claimant in cotton wool so far as the care provision was concerned. Only with some risk could the benefits won through self-reliance and an active life be attained.

> 107. I accept the evidence that she is at risk of falling and has fallen on a number of occasions including recently. I accept that when the carer is present or other people are present she benefits from their assistance in getting up. I do not accept that when she is at home she would be unable to get herself up, though obviously with some difficulty. Whilst falling, for someone with the claimant's condition, is potentially hazardous in terms of exacerbating her injuries or causing new ones I accept the assessment of Dr Burt that the present enhanced risk of falling is not, on its own, sufficient to justify live in care. …
> 110. In this respect, whilst I understand the clinical judgment made by Mr Jamil from his specialist perspective concerning the inadvisability of persons with the claimant's injuries trying to walk for the sake of it, in my judgment he fails sufficiently to take account of the contribution which a person's sense of worth and well-being makes to their functioning and the extent to which physical activity, contributing to a general state of fitness and stamina, has a positive impact upon their functioning which overrides in the patient's mind and objectively the clinical risks to which he refers. I note that, in expressing the views which he has, he has effectively been in a minority of one amongst all the experts and that he acknowledges that his advice is ignored by many of his patients.
> 111. In my judgment, the current provision of live in care, whilst it has undoubtedly helped the claimant and her husband to restore a more normal relationship than when he was undertaking the vast preponderance of the care regime, constitutes significant over provision and I conclude that, currently, provision for a live in carer is not a reasonable amount of provision. I consider below what amount of care would constitute a reasonable amount.

***C v Dixon* – management of risk versus the Claimant's need and right to independence**

The Claimant was suffering organic personality change and dysexecutive syndrome following severe brain injury. His claim was advanced for 24-hour care with very extensive case management and some double up time. The defence contentions were that the proposed package went beyond what was reasonably necessary to meet his needs and would be positively harmful in not promoting the independence to which he was entitled. The evidence suggested that the Claimant could be resentful of the care provided; and there had been *free time* periods in his care package which had been successful in the past.

King J found that the Claimant did reasonably require 24 care of some sort; but this could include non-commercial support from his partner overnight and in the evenings; some *free time* while the partner was at work with a commercial carer available on the telephone, an arrangement which had worked previously; and if the partner was not available (which he found as a fair balanced assumption should be taken to be in 10 years' time) a night sleeper would be required and some *free time/telephone support* could still be incorporated in the 14 hours of daytime care. The balance of risk was discussed thus at [35]:

> … The Claimant must be entitled to adequate protection from the real risks, even if small, if the effects if they materialise would be potentially catastrophic for him. I have no doubt that such risks are very real in this case given the inherent unpredictability of the Claimant's behaviour arising out of his permanent cognitive impairments and personality disorders if suddenly confronted by the unfamiliar or that which makes him angry. As Dr Scheepers said in a telling piece of evidence in my judgment, it is not a question of numbers, and all the good days can be negatived by one very bad day. "*One can't wrap (the Claimant) in cotton wool but the risks are very high.*"

Thus, although the Claimant won the issue of 24-hour care in its widest sense, the reasonable package allowed was significantly lower in terms of cost than was contended for (especially given that the hourly rates were cut as well – see above.) [18]

***Ali v Caton & MIB* - rationale for care package in moderate brain injury cases**

It is sometimes tempting in moderate brain injury cases to envelope a claimant in so much care that it is tantamount to wrapping in cotton wool; young men in particular find this difficult to accept. In such a case (general damages £147,500 – July 2013 - *Ali v Caton & MIB*) Stuart-Smith J described the scope of the care package there allowing 15 hours a week of support as follows [331ii)]:

> The purpose of the future care regime should be to provide sufficient support to enable [the Claimant] to pursue a structured and constructive existence so far as possible, reinforcing constructive routines and being available to assist when he is confronted by the new, the unfamiliar or the complex.

Miscellaneous care decisions

2 carers throughout the day

In *A v B* (contrast *Sarwar No.2* with 8 hours overlap) the same judge, Lloyd Jones J, found that *total overlap* was required (14 + 14 hours) on the facts during the day [44.]

> Moreover, I consider that any attempt to reduce the number of transfers would seriously damage A's quality of life and would therefore be unreasonable. It will be necessary for A to be transferred for his health and comfort throughout each day. In particular, as long as he remains incontinent it will be necessary to transfer him to clean him, change his nappies and pads and replace soiled clothing … Moreover, in any event, [even as an adult] whereas certain transfers can be planned to take place at particular times, this will not always be the case. I consider that this makes it necessary that two carers should be available throughout the day so that transfers can be carried out immediately, as and when required.

[18] King J also decided *AC v Farooq & MIB* on the basis of a jury assessment that while the Claimant required continuous supervision in the sense of someone to turn to, she could be left safely for an hour or two.

The matter was put rather differently on the facts in *Massey* to lead to a similar result of total overlap care (14 + 14 hours.) The Claimant was cognitively intact (or almost so) but grievously injured. Anything less than total overlap care to enable transfers at all times of the day would adversely affect his autonomy.

> 87 However, the care regime suggested by Mrs. Daykin will not wholly restore to Joseph that independence, freedom of choice, autonomy and mobility which non-disabled people have. Counsel for the Defendant correctly observed that if Joseph expresses a wish to go to bed unexpectedly late after the second carer has left that wish will not be fulfilled. When he is out with carers it is unlikely that there will be a facility in which to change his pads. This might well curtail his freedom of choice as to what he wishes to do during a day out. But it does not follow, as suggested by Counsel for the Defendant, that Mrs. Daykin's approach is flawed. The fact that it is not possible to restore full autonomy to Joseph does not appear to me to be a good reason for not adopting that care regime which restores autonomy so far as is possible or realistic. …
>
> 91 The care regime suggested by Mrs. Bingham is clearly cheaper; but that, on the authorities, is not the test. The Defendant needs to show that Mrs. Daykin's care regime is unreasonable. I do not consider that the Defendant can show this. Moreover, Mrs. Bingham's care regime would leave Joseph with only one carer for about 1 and half hours in the morning and for two periods of 2 and half hours in the afternoon. During these periods transfers could not be effected. This seems to me unreasonable. I am not satisfied that it is more likely than not that patterns may emerge over time in Joseph's toileting behaviour, as suggested by Mrs. Bingham, but even if they did, the restrictions on Joseph's freedom of movement would still be unreasonable. I am not satisfied that, as submitted by counsel on behalf of the Defendant, they would only have a limited impact on the quality of Joseph's life. [91]

Jay J in *Farrugia* took a slightly different view of the *autonomy* argument when it was urged on him that the Claimant required 2 commercial carers throughout so that he could *be free to do whatever he wishes at the spur of the moment.* (He allowed 2 carers throughout, the vast majority commercially - see above - so the curtailment was indeed modest.)

> I do not consider that Jack's personal autonomy is overridden, or the dictates of spontaneity are unreasonably quelled, by providing for a regime which presupposes a modest degree of pre-planning and organisation. This, after all, reflects the realities of ordinary life. [94]

In *A v Powys*, in what appears may have been a close run thing, Lloyd Jones J found that 2 carers would be needed throughout the day from age 18: [67]-[87.]

In *XXX* Jack J found for 2 carers throughout the day, even though for long periods of time the Claimant would simply need somebody at hand.

> 19. This was also given the heading 'doubling up'. It was suggested by Mr Pace that the day care might be scheduled so that, for example, there were two periods in the day of an hour when there would be one carer on duty. This was not supported by the claimant's witnesses. The main point to be made on the claimant's behalf is that it takes two people to move him. Moving covers moving him in and out of his wheel chair, whether to go to the toilet or for any other reason. It includes moving him into the correct position in his chair, which is something which has to be done every hour. His parents have been meticulous about that, which has played a large part in maintaining a straight posture. The claimant is mainly continent, but is incontinent of urine, particularly if he is made to laugh, about once a week, and is incontinent of faeces about once a month. It takes two to deal with this. He can only go out on any sort of visit or trip with two attendants.
> 20. The contrary argument is that the claimant does not require the attention of two people for much of the time, and that there will be periods such as when he is watching television, reading, listening to music, and perhaps when using his keyboard, that he will not require any attention at all, but will only need somebody at hand. I accept that this will be so.
> 21. Nonetheless I have concluded that, save for the 8 hours of the night, it is appropriate and reasonable for the claimant to have two carers. The matters I have listed in the previous paragraph but one carry the day.

By the time of *Whiten*, the experts had agreed full 14+14 hour double up provision during the waking day in adult life.

The argument for a 12-hour day rather than 14 was rejected in *HS v Lancs.* at [26] where complete double up was agreed in adult life (and found even in childhood on the evidence [18].)

Manna saw the principal dispute at trial focus on the amount of double up care for a young man with profound cognitive problems, prone to outbursts and able to walk: 14+14/day was reasonable because of the unpredictability of outbursts [209]; it would simply be too much for one person alone to provide the required structured care all day [211]; 28 hours a week double up was rejected.

Night care

Some cases (*Sarwar No.2* at age 47 [55]; and *Burton* at age 50 [69]-[72]) have been astute to consider the possibility of increased intervention in later life with aging/deterioration and a stepping up of the package from a *sleeping* to a *waking* carer at the appropriate time. In *Sarwar No.2* Lloyd Jones J accepted that sleeping night carers are not expected to provide assistance more than once in a night, which slid towards the end of [54] to accepting the following evidence: *carers are alive to the difference between sleeping care and waking care rates and they would not tolerate being woken up more than* ***once or twice*** *a night if they were paid at the lower rate.* In *A v Powys*, while it was accepted as reasonable that the parents continue to provide *sleep-in* cover at nights until the claimant left for university, Lloyd Jones J allowed them [59] 2 nights off, one in the week and one at weekend rates, with commercial cover. See also above and *HS v Lancs.* under the heading *future parental contributions to the care package.*

In *AB v Devon & Exeter* there was an unusual solution on the unusual facts: 2 resident carers, neither working continuously but doubling up sensibly, would see to the Claimant's reasonable needs including turning him 2-3 times at night after age 55 [144].

On call

It was held unreasonable on the facts to provide for the additional carer required for relatively frequent transfers during the day through an *on call* system (rather than having a true overlap carer available 8 hours a day) – *Sarwar No.2* [41.] By contrast, in *A v B on call* was a reasonable answer to an occasional need for an extra pair of hands to supplement the night sleeper while the parents were away from the home for only 4 weeks per year [78] when their non-commercial input was to be covered by additional commercial care during the day [79.] *On call* periods were part of the overall 24-hour care package in *C v Dixon* - see above.

Off set for day centre / play scheme attendance

This old argument for offset from the commercial care package has largely died a death, what with the withdrawal of local authority funding in many area and the cases that follow.

In *Iqbal*, despite medical evidence that feeding through a gastrostomy was easy, on the facts there was *no guarantee* that play scheme attendants would be willing to do it; and the claimant would have to be accompanied by his own carer for the 4 weeks of attendance each year, particularly given the shortness of the period and the need to get acquainted with him [28.] In adult life, on the evidence the claimant would be able to *dip in and out* of the use of day centres on an *irregular basis*; and there was insufficient confidence in the arrangements to reduce the commercial package for potential savings [73.]

Contrast the situation in *Lewis* where the Judge found as the proper assumption that attendance at a day centre for 3 days a week would happen for roughly 2/3rds of the time in the future, saving on the need for hourly paid care and discounting the hours for 2 days as an average per week overall accordingly [199.]

In *Massey* the argument developed rather differently and cleverly on its facts. The evidence for likely

attendance at a day centre in adult life collapsed to a chance of 6-8 hours a week at best - the defendant's submission at [81.] Here the point was not analysed as one of a chance based on *third party* (local authority) action and the availability of day centre care. Rather the point came to depend on whether the claimant (cognitively intact but grievously disabled) would actually wish to go to a centre where there were likely to be many with cognitive disabilities, unlike him [88] – a matter of the claimant's own intent and motivation and not *loss of chance* at all. Teare J made no deduction from the commercial package.

> 88. … I do not consider that it can presently be said to be more likely than not that he will wish to spend 6-8 hours a week at a day centre and therefore I do not consider it appropriate to deduct those hours from the appropriate domestic care regime.

Mrs Massey had given evidence to the effect that she did not think the claimant would wish to attend a day centre in adult life [83.]

> 85. Joseph is not (yet) able to express his own views as to the manner in which he will wish to spend his adult life. But there is no reason to think that he disagrees (or will disagree) with his mother's evidence. Indeed, from what the Court has learnt of his character from the evidence in this case it is unlikely that he would disagree.

This is a very neat solution where a claimant can form an intention, even if he is too young and disabled to communicate it. In fact, Teare J also found that what was said by mother was reasonable and *autonomy* featured again:

> 86. It is very difficult to see why, in principle, a preference to lead as normal a life as possible can be said to be other than reasonable. The brain injury Joseph suffered at birth has deprived him of that independence, freedom of choice, autonomy and mobility which non-disabled people have and take for granted. It has also limited his ability to use his unimpaired cognitive abilities to enrich his life. The care regime advised by Mrs. Daykin aims to give him that independence, freedom of choice, autonomy and mobility and to maximise the extent to which he can use his unimpaired cognitive abilities to enrich his life in so far as that can be achieved by a care regime. For example, the regime will enable him to have his pads changed whenever necessary during the day whilst he is at home and will enable him to change position or go out of the house to pursue his interests when he wishes.

College

In *Iqbal* the experts agreed that the fees would be met *unless there is a significant change in government policy* by the Learning and Skills Council [LSC] and there was no evidence that the claimant would require to take his own carer with him, which would be the responsibility of the local authority and the LSC together [60.] The period taken (thereby reducing the future employed care package) was 2 not 3 years: while there was sense in the notion that the claimant might develop slowly over a 3 year stay, there was no evidence that the public funding criteria with a view to his development over longer than 2 years would be met [59.]

In the case of *Massey*, Teare J found that the claimant would continue in education to age 21. One should be alert to what generally happens to a directly employed, elaborate care package when at age 19 the claimant is shunted off to college. The care package is destroyed; expensive agency care is often required at weekends and holidays when the claimant comes home; and it is very expensive and difficult to start the whole thing off again at 21 or 22.

In *A v Powys*, Lloyd Jones J held that the commercial package (2 carers throughout the day) would be needed at university: there was no satisfactory evidence that the authorities would provide care at university in Ireland [62.]

Despite the potential for further education now to continue to age 25, similar uncertainties in the UK led in *Manna* to taking the conventional age of 19 as the point of major step up in the care package for adult life. Cox J at [155]:

> His time at this school will come to an end in July 2016. He may secure a place at a college for a further period of education to the age of 25 but, even setting aside funding issues, whether he does secure a place is presently uncertain. There is, in addition, no certainty that he will be assessed as suitable for an adult centre.

Nursing rates

On the facts it was unreasonable in *A v B* to have a qualified nurse as a hands on member of the care team, attracting higher rates for a substantial number of hours each week; a consultancy role was found reasonable (3 hours a week at £17.50.)

Liaison meetings and hand over time

A 2-hour monthly *entire team* meeting was held unnecessary on the facts in *A v B*: liaison was part of the function of the case manager (already costed and allowed); and there was also a small nursing supervision/consultancy role already built into the package: [74] – [76]. 1½-hour team meetings every 4 months (as an average) were allowed in *XXX* [30.] An extra hour a day was allowed for handovers (3 x 20 minutes each) between shifts in *Massey* [93]; but the same point was rejected *without hesitation* in *XXX* [25]. King J in *C v Dixon* allowed 1 hour of case management time a month for meetings/direct communication between the case manager and support workers [83]; but it is unclear what if any allowance was made for the support workers.

The argument for *liaison* (principally of the care team) has been finessed more recently into *multi-disciplinary* team meetings. No additional allowance is made for the care/case management team (see above under *60 weeks*) but the time of therapists has been allowed. Foskett J in *Robshaw* allowed 5 meetings in the first year; 4 pa then until age 18; 3 pa then to age 25; the claim was limited to 1 pa then for life but he would have awarded 2 pa. All meetings were said to require 2 hours allocated to them and should not be rushed. See [474]-[479].

Team leaders

The reasonable requirement for an employed carer being paid at team leader's rates was rejected in *Iqbal* [64] in favour of the mother (who was capable and willing on the facts) continuing in the role of organizer with the support of a case manager (for which allowance had already been made.) The mother's role as organiser would be minimal in the adult phase anyway. The parents were not, however, incorporated into the future care package while the claimant remained a child – see above. Since 2006, however, the argument for team leader (pay uplifted for 52 weeks in the year, not 60, since the position is personal to one worker) has been refined and is now successful in serious cases.

In *Massey*, Teare J allowed one of the carers to have an enhanced rate of pay by just £1 per hour [71] – [73] on account of team leader duties.

The principle of enhanced pay for a team leader was conceded in *XXX* in the sum of an additional £2 an hour [26.] The Court there also ruled in favour of 2 additional team leader hours per month for *out of hours* work [27.] Further, 1 hour a year was allowed for *out of hours* liaison between the team leader and each member of the team [31.] The claim for a team leader, however, was rejected on the facts in *C v Dixon.*

From 2011, the argument has had substantial success, albeit the extent appeared originally volatile. Swift J found in favour of a team leader in *Whiten* [164], paying a weekday rate supplement of £3 an hour (from £13 to £16 in Central London) over 30 hours a week. The suggestion that the uplift only be paid for a smaller number of hours was rejected: the object was to create a post to attract a person of suitable experience to

give real leadership to the care team [164.] Baker J in *Streeter* allowed £2 an hour over only 15 hours a week for team leader duties[19]. Jay J allowed the claimed £5 [104] an hour in *Farrugia* but for only 22 hours a week, commenting [103] that he *simply could not accept that a full week's work was required for the combination of tasks, notwithstanding a good team leader's potential to reduce case management time.* Foskett J allowed in *Robshaw* 30 hours x £4 an hour to age 19; 25 hours a week x £5 from age 19 for life [183]-[185]. William Davis J in *HS v Lancs.* split the difference between 30 and 37.5 hours a week at 33.5 but the rate of uplift is not articulated in the Judgment [30]. In *Manna* Cox J allowed £5 an hour (rejecting £2) [215] but the number of hours a week is unclear. The uplift seems to be settling at £5/hour in 2015; the hours at 25+/week.

Case management costs

Rates have generally been agreed or uncontroversial – see the table. Judges have tended to compromise the hours allowed between the positions of the respective experts (even when a claimant has otherwise won clearly on the care package) with barely reasoned decisions. Experience shows care experts often agree the hourly rates, which have been creeping up slightly: £90/hour in *Whiten* (2010) (£45 for travel time) and £93.50 (£55 for travel time) in *AC v Farooq & MIB* (2012), £95/hour in *Streeter* and *Farrugia.* £98 an hour was then awarded in *Tait v Gloucestershire Hospitals NHS Foundation NHS Trust* [2015] EWHC 848 (QB) at [92]. The claim for £107 an hour, however, already being paid in *Manna*, was refused as being beyond the normal range [217] with retreat back to £95 an hour – the rate suggested by the Defendant's expert. In *AB v Devon & Exeter*, Irwin J allowed the claim at £102 per hour when reaching the unbroken down annual figures at [142] and [145].

Personal assistant

In *A v Powys* the claimant argued that although she was not a protected party or beneficiary, her physical disabilities (severe dyskinetic cerebral palsy and dysarthria) and vulnerability made it reasonable that she have a personal assistant to help her manage the large award. The claim was largely rejected on the basis that Lloyd Jones J found that she was no more vulnerable than many other claimants in serious cases [158.] Moreover, much of the role was to be covered by the case manager and OT (and already costed under other heads of damage) [159.] Premium banking facilities were allowed, however, at an annual cost of €500 [161.]

In *Noble*, while the Claimant was not a patient, the parties agreed £500 pa for *future management of the award* in later life beyond the help that the case manager would provide [149.] The legal basis for the agreement is not made clear.

Childcare

The costs of caring for children have been claimed recently in *Totham* and *Robshaw*. Both were cases of cerebral palsy and the childcare costs were resisted on the basis that neither claimant would realistically have children. The Courts found for the defence in slightly different ways. In *Totham*, Laing J found [71] that she was *not satisfied that there is a more than fanciful chance that Eva will have children.* In *Robshaw*, Foskett J [191] would not go so far as to say the chance was *merely speculative or fanciful* but nevertheless said that the discount for contingencies would have to be so significant that *it would reduce the figure to something that would bear no real relationship to that actual cost if the event itself materialised. An award of such a sum would, in my view, be wholly artificial.* And he made no award at all [192].

A claim for a nanny in *Hayden v Maidstone & Tunbridge Wells NHS Trust* [2016] EWHC 3276 (QB) was demoted by Jay J [214] to £9,082 pa for a "factotum" to help with heavier housework and childcare until the youngest child reaches age 5; then 4 hours a week at £12 an hour.

[19] This is not articulated in the Judgment but implicit in accepting Mrs Gough's figures at [209]. The writer has seen the Joint Statement to verify the amounts.

The legal basis of claims for personal injuries

Leaving aside the detail of the awards for a while, the very nature of the assessment of damages for personal injuries has come under 1st instance scrutiny over the last decade.

The recent cases

The first decision was in *Iqbal*. The Claimant suggested that while the legal test in relation to allowing claims was *reasonableness*, there may be a range of reasonable options to meet a claimant's care needs and that, provided the care package for which the claimant contends falls within this range, it should be accepted by the Court; to mount an acceptable attack on a claimant's case a defendant has to do a good deal more than show that the odd element is a little higher than might be paid in some circumstances; and reliance was placed on Buxton J, as he then was, in *Stephens v Doncaster HA* [1996] Med LR 357. Sir Rodger Bell rejected the argument [14]:

> It comes too close to saying that there is a rebuttable presumption that the care package put forward on behalf of a claimant should be accepted. It does not seem to me to be supported by *Stephens*, where Buxton J. did no more than find that the care programme put forward on behalf of the plaintiff was reasonable, for the carefully analysed reasons which he gave. In *Wells* at page 390 A-B, Lord Hope reminded us that:
>
> > "the aim is to award such a sum of money that will amount to no more, and at the same time no less, than the net loss."
>
> In a case like the present where the issues on future care are numerous, it should not matter whether one starts with the claimant's care plan, although that may be a convenient approach, or simply looks at the plans of the defendant and claimant together, before deciding in detail what is reasonably necessary for the proper care of the claimant. My preference for the view of one expert rather than the other, or a solution somewhere between the two on any particular issue, boils down to a personal judgment on the strength of the experts' reasoning and my own view of the reality of [the claimant's] likely situation in the light of the whole body of evidence.

Next came the decision of Teare J in *Massey*. The same point was put before him, derived this time from *Sowden v Lodge* [2004] EWCA Civ 1370 rather than *Stephens* supra, without knowledge of the previous decision in *Iqbal*. He followed the claimant's suggested line at [59] without contrary argument from the defendants being apparent from the judgment.

> In resolving the differences of opinion on these matters [care] 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.

Teare J then decided the care regime on the basis of a reverse burden of proof. He explicitly found that the claimant's suggested future care package was reasonable at various points *because* the defendant could not show that it was unreasonable e.g. at [91]:

> The care regime suggested by Mrs Bingham is clearly cheaper; but that, on the authorities, is not the test. The Defendant needs to show that Mrs Daykin's care regime is unreasonable. I do not consider that the Defendant can show this. …

Next came the case of *Corbett*, where the legal test was put in dispute. HHJ Bullimore dealt with the point very briefly at [80] in favour of the defendants (and it is unclear how the argument was put):

> Merits of the rival regimes
> This is the third area of contention. I accept Mr Porter's argument that the preference of Mrs Corbett and Mrs Jones for the Rosemary Statham regime is in itself irrelevant. The benefits and disadvantages of the two schemes are for the court to assess, although the evidence of those two witnesses as to what experience has shown as to what [the claimant's] needs are, and how they are best met, is highly relevant.

The line of decisions then swings back to the claimant in *Taylor v Chesworth & MIB* [2007] EWHC 1001 (QB.) Again the claimant ran the point relying on *Sowden* (in its turn relying on *Rialis*.) After referring to the now well-trodden passages in *Sowden*, and without apparent counter argument from the defendants, Ramsay J found at [84]:

> I accept that the test therefore … 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 judgment, 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.

The same point was trailed without dispute before HHJ Mackie QC in *Wakeling*, again going the claimant's way at [45].

> 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 *Crookdake v Drury* [2005] 1WLR 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 recognizing 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.

The point has spilt over from *care & attendance* into another head of damage. In *A v Powys*, it does not appear that the *claimant* arguments were run in the area of *care & attendance*; but Lloyd Jones J said this at [94] in the introduction to his judgment on *aids & equipment*:

> The basis of assessment is the test of reasonableness as stated in *Rialis v Mitchell* (Court of Appeal, 6th July 1984) and *Sowden v Lodge* [2005] 1 WLR 2129. The claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. Accordingly, if the treatment claimed by the claimant is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable. *Rialis* and *Sowden* were concerned with the appropriate care regime. However, the principles stated in those cases apply equally to the assessment of damages in respect of aids and equipment. In determining what is required to meet the claimant's reasonable needs it is necessary 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. (*Massey v Tameside and Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB), Teare J at para. 59; *Taylor v Chesworth and MIB* [2007] EWHC 1001 (QB) Ramsay J at para 84.)

Lloyd Jones J then decided between the competing equipment submissions, stating the cost of the items and considering the claimant's needs, but never considering if [1] the defendant's suggestion also met the reasonable needs and [2] the claimant's choice represented reasonable value for the additional cost. Thus, for example at [110]:

> Mrs Ho considers that A should have a three quarter size or double bed because of her involuntary movements. This is now agreed by Ms Page. Mrs Ho recommends a Theraposture bed at a cost of £3,500. Ms Page, on the other hand recommends a Bakare bed at a cost of £1,945. I am satisfied that the Theraposture bed recommended by Mrs Ho possesses all of the features which A requires and does not possess any features which exceed her needs. Furthermore, I accept Mrs Ho's evidence that the Theraposture bed has better mechanics

and as a result has smoother movement and makes less noise. Accordingly, I consider that the Theraposture bed reasonably meets A's needs. *Following the approach to reasonableness which I have outlined above, I consider that, in the light of this conclusion, the fact that A's needs may be satisfied by a cheaper bed is* ***irrelevant***. [Emphasis, including double emphasis, added to highlight a point to be made below.]

Discussion

Until *Sowden* threw up the unreported and largely forgotten authority of *Rialis*, few would have seriously suggested, when considering the reasonableness of the care or equipment claimed, that comparing the prices of alternatives with the incremental improvements was not at the very heart of the exercise. I venture to suggest that most experienced PI practitioners, rightly or wrongly, would previously have given an instinctive response along the lines of that given by Sir Rodger Bell in *Iqbal*, that it is for the court to decide, objectively, what is reasonable, on the basis of all the evidence. This instinct would have followed the decision in *Campbell v Mylchreest* [1999] PIQR Q17 CA: the court holds the ring on what is a claimant's reasonable need however an interim payment may have been spent in the exercise of choice.

Sir Rodger Bell disposed of the Claimant's argument in *Iqbal* perfectly well, based as it then was on *Stephens*. Since then, the *Rialis/Sowden* rationale has taken over, with scarcely a peep from the defendant's side according to the judgments. Some will have found this rather disorienting; and an attempt should be made at least to sketch some potential objection. I particularly do not express any concluded view here; but arguments might be mounted from first principles as follow.

No one has dared to suggest in any of the above cases that the claimant does not still formally bear the legal burden in proving what is reasonable.

The finessing of the burden of proof involves the notion that the court must first consider what the claimant suggests is the reasonable need (and the answer to it) before considering what the defendant has to say. This led Lloyd Jones J (*A v Powys*) so far as to declare that the defendant's contentions for a reasonable, cheaper alternative were irrelevant; and Teare J (*Massey*) to place a burden on the defendant to prove the claimant's suggestion unreasonable. The reality of the finesse, while paying lip service to retaining the formal burden of proof on a claimant, is to push the case *through the looking glass* into a back to front world, at least compared with the old world we thought we had come to know. The attempt is to get the court to approach the issue of reasonableness from the point of view of the claimant subjectively (his *choice*) and place the tactical burden on a defendant to make all the running against that subjective position (if he is allowed to make headway at all and his evidence not ignored as irrelevant.)

The overall effect is familiar to us in a different situation: when the court is considering failure to mitigate arguments and a defendant bears the burden of proving a claimant's past conduct unreasonable, with the standard of what is reasonable and unreasonable being a generous one in favour of the claimant. In the recent cases, however, the issue at stake has not been a question of past fact in mitigation (e.g. was the expenditure on the accommodation/case manager/team leader/carer unreasonable in all the circumstances? – all true questions of mitigation if the prior assessment of the normal measure of damage has led to a decision that the loss claimed is, at first blush, unreasonable.) Rather, the real question has been a future hypothetical one, turned only into a pseudo-question of mitigation by equating the fine tuning of a claimant's long term care package with an issue of past or fundamental current *choice*. The questions are, in effect, put: would it be in the future an unreasonable expenditure in mitigation if the claimant were to spend £2 an hour more on a team leader; or pay for 14 hours double up time rather than 10 each day; and so on? Future hypothetical questions of this sort, it may be objected, are impermissible reformulations of questions that really concern the *normal measure of damage* (what is the reasonable need of the claimant for care and its reasonable cost?) and not *mitigation of loss*.

Now, the normal measure of damage has not been put in dispute – reasonable care/accommodation/ equipment/etc. to meet the need. It was put succinctly by Lord Lloyd in *Wells v Wells* [1999] 1 AC 345 at 377F in just 17 words:

> Plaintiffs are entitled to a reasonable standard of care to meet their requirements, but that is all.

Indeed, in *Rialis*, which is the source of the claimant's finesse, Stephenson LJ took great pains in the early pages of his Judgment to trace the origin of awards of damages for personal injuries back to the Victorian railway cases. If one considers those cases, as with other types of damages *so clear is the way of mitigation that it often tends to become incorporated into the normal measure of damages. When this happens it loses its identity and does not expressly appear as a separate issue*[20]. … *The practical importance of defining the normal measure in this way lies in the burden of proof*[21]. This is the very point at issue in the recent cases; and the mitigating step has already been incorporated into the normal measure of personal injury damages, the burden of which lies on a claimant.

Stephenson LJ himself said at 24A-C:

> But though the means of the wrongdoer are, in my judgment, irrelevant to the assessment of compensation for the injured, that assessment is properly to be moderated by what is reasonable. A judge must resist the temptation to make the wrongdoer pay for the best possible treatment, regardless of whether the injured party will in fact receive such treatment or *whether it is reasonable for him to receive less expensive treatment*. [Emphasis added.]

There is every reason to believe, based on the emphasized section, that Stephenson LJ would have found the recent notion - that an alternative cost, for what is basically a reasonable option, put forward by the defendant is irrelevant, or somehow second rate – as puzzling as most of us.

The finesse goes back to a passage in *Rialis* not much further on in the judgment at 24Gff where Stephenson LJ introduced the concept of *mitigation of injury and damage* as being the basis of the claim in damages. This was unfortunate terminology since it may well have led him down the path by the end of the next page to the now often quoted passage at 25H: … *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.*

O'Connor LJ did not decide *Rialis* on the basis of *choice* but because, on the facts/agreement of the parties, *everyone agrees that for his own sake the plaintiff ought to be accommodated at home* – 16C. On that footing the defendant's suggested costing, based on care in an institution (on policy grounds) was clearly irrelevant (once the policy grounds themselves were rejected.)

> There may well be cases in which it would be right to conclude that it is unreasonable for a plaintiff to insist on being cared for at home, but I am quite satisfied that this is not such a case, and once it is concluded that it is reasonable for the infant plaintiff to remain at home then I can find no acceptable ground for saying that the defendant should not pay the reasonable cost of caring for him at home, but pay only a lesser sum which would be appropriate only if it was unreasonable for him to live home and reasonable for him to be in an institution. [16D-G]

On the facts of Rialis it is easy to see the origin of the notion that the defendant's suggested costs were irrelevant. O'Connor LJ said nothing to the effect that the defendant's alternative costs of a care package *at home* would have been irrelevant if put forward; only that the costs in an institution were irrelevant, because care in an institution was irrelevant, because agreed to be unreasonable. Nor did Stephenson LJ say anything as explicit and startling as that alternative costs *at home* would have been irrelevant if presented to

[20] See McGregor on Damages, 19th edition at 9-034ff
[21] McGregor at 9-036

the court.

Rialis was clearly correctly decided on its facts. The claimant had been back at home for many years. The decision/*choice* that he go home was not attacked as *then* being unreasonable (a true mitigation question); and the future care/accommodation package had to be considered in the light of the established situation at home. At the heart of the real point in *Rialis* (not argued because hopeless for the defendant, but it gives the clue as to why the judgments were expressed as they were) was a *choice/mitigation* issue about the past decision to go home. Stephenson LJ did not need to decide the nature of personal injury damages in *Rialis*; and the quotation of apparent wider principle, picked up in *Sowden,* was at best obiter insofar as it may be read as applying to future losses rather than the past choice to go home. More likely, if capable of being read this way it was inconsistent with axiomatic principles and the authorities he had already cited on the normal measure of damage.

Sir Denys Buckley agreed with both judgments in *Rialis*; and the same points apply.

The distinction between the factual situation in *Rialis* and that concerning the double sized profiling bed in *A v Powys* is now obvious. If Lloyd Jones J had found against the defendants contending (counter-factually) that a *single* bed was reasonable for the claimant's needs (and they only put forward the cost of a single bed) he could legitimately have rejected their costing as irrelevant to the required double bed (as was the defendant's costing in *Rialis* for care in an institution.) When the need for a double profiling bed is agreed as reasonable, the question may be raised: how can the court properly dismiss the cost of an item fitting that description, when suggested by the defendant, as *irrelevant*?

Sowden, like *Rialis*, revolved around a decision whether to care for the claimant at home or in an institution. It was not an argument about the fine-tuning of an essentially reasonable future care regime, agreed to be appropriate at home. Those responsible for the claimant made an immediate current *choice* to cover the claimant's future on the fundamental issue of whether she could live in her own home or had to remain in an institution. Logically, that issue had to be decided first; and the decision on its facts is impeccable. The Court of Appeal did not need to invoke *Rialis* to reach its decision; and anyway it did not reverse the burden of proof or reject the defendants' evidence as irrelevant.

It really should make no difference if the concept of *full compensation* or the *100*% principle is invoked: if the normal measure of damage is *reasonable* compensation, reasonable compensation *is* full or 100% compensation.

Cases revisited

Since the above section was first published, the saga has continued without a definitive full argument and ruling. When the Defence deployed submissions in line with the above discussion in *C v Dixon*, a strong legal team for the Claimant decided to withdraw the argument rather than risk a full determination by King J who said this at [5]:

> I accept as a matter of principle the question for the court is its assessment on all the evidence of what is reasonably necessary to meet the Claimant's likely future care needs rather than asking whether the existing regime is within the range of reasonable options. However in making this assessment the Court cannot ignore entirely aspects of the existing regime for example the existence of an already established committed and loyal team of support workers.

And yet, it appears that still claimants put forward the *Rialis/Sowden* line without opposition, as appears to have happened in *Pankhurst* [10.1 ff] and *Smith v LC Window Fashions Ltd* [2009] EWHC 1532 (QB) at [37] – [39.] Underhill J in *Huntley* [107] directed himself on the approach to the level of care required *in accordance with the decision of the Court of Appeal in Sowden v Lodge*; but he then went on to consider the strength of the

expert reasoning on both sides, rejecting the extremes of both and making his own determination, as Sir Rodger Bell had suggested was the right approach in *Iqbal* supra. The Court of Appeal firmly upheld the decision.

While there does not appear to have been any dispute about the legal test in *Whiten*, Swift J reminded herself [4] of the Judgment of Lord Woolf MR in *Heil v Rankin et al* [2001] 2 QB 272 at [22-3] 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.

Swift J continued [5]:

> 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. [Emphasis added for a point to be picked up later in the text.]

If we thought it was all over, King J said this (in mid-2012) in *AC v Farooq & MIB*:

> I accept that the correct question to be addressed in this context is "what is required to meet the Claimant's reasonable needs?" I accept that the Claimant is entitled to damages to meet her reasonable support needs arising from her injury for the rest of her life, and as afar as possible to give her the quality of life which she would have had but for the accident. I also accept the proposition that where there are a range of 'reasonable options' to meet the Claimant's needs, the question is not in the first instance whether some other provision is reasonable, but whether the provision chosen or claimed for on behalf of the Claimant is reasonable (see *Rialis v Mitchell*, The Times 17 July 1984, per Stephenson LJ at pp 24-6; *Sowden v Lodge* [2004] EWCA Civ 1370, [2005] 1 WLR 2129).

Again the point does not appear to have been argued; nothing turned on it as the Judge applied his own views in fact as a jury question in deciding what was a reasonable package without giving the Claimant's expert evidence special status; we appeared to be going round in circles on this point after more than five years.

More recently Claimants have continued to invoke the 100% principle widely, no doubt hoping to provide a soothing backdrop to submissions on what amounts to reasonable damages: see e.g. *Totham* at [12] and *Ellison* at [9]. Defendants have started to latch on to Swift J's use of the word *proportionality* as creating a mood more in keeping with their aims: see e.g. *Ellison* at [13].

At [13] in *Ellison*, Warby J said this:

> " … 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 above."

In *Robshaw*, Foskett J expressed agreement with Warby J at [165] and continued at [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.

In *Manna*, Cox J repeated the quotation from Lord Woolf at [27] in *Heil v Rankin* supra. She continued at [13]:

> This Claimant is therefore entitled to damages to meet his reasonable needs arising from his injuries. Reasonableness always depends on the particular circumstances and it applies to the head of loss claimed and to its amount. Disputes as to future losses will often require the court to make an assessment of the chances of various future events.

At [14] she correctly contrasted the approach for the future with that for past losses, which involves principles of mitigation of loss.

The issue of the status of a future family choice on behalf of a claimant raised its head in the recent case of *Harman v East Kent Hospitals NHS Foundation Trust* [2015] EWHC 1662 (QB). The Claimant, aged 13 and suffering severe autism with significant cognitive impairment, was being cared for in a specialist placement funded by the LEA but spending 8 weeks a year at home. The dispute was over where the Claimant would live when his education came to an end in 12 years at age 25: the parents wanted him then to come home. Turner J found in favour of that course, following expert evidence that a care package which met with the aspirations of the parents would be more likely to succeed than one which did not [38]. As to the underlying point of law, however, the parents' choice did not trump the view of the Court of the primary measure of damage in the future:

> [36] Care must be taken in cases such as this not to equiparate the preferences of relatives with the regime of care and support the cost of which should be the basis of reasonable compensation. Each case must be looked at on its own facts. There may well be circumstances in which, however strong and genuine the desire of the parents or a spouse or partner may be to have the claimant home, there are good reasons for taking a contrary course. The purpose of damages in a personal injury claim is to compensate the victim and not to accommodate the wishes of his family whatever the extent of the inevitable personal sympathy one might have for those who are left to pick up the pieces and suffer the inevitable and sustained emotional impact of serious injury to someone dear to them.

And so, the idea that a claimant or deputy/relative can effectively choose to set the level of future damages subject only to tests of remoteness and mitigation - long criticised in this paper - appears to be withering away. As for more modern attempts at finesse, while the labels *full compensation* and *proportionality* may be deployed from opposite sides of the adversarial process, the normal measure of damage is surely *reasonable damages* simpliciter[22], a concept which is infinitely flexible and requires no gloss. No one could seriously

[22] Professor Andrew Burrows, writing Chapter 28 of the leading practitioner's textbook *Clerk & Lindsell*, 21st Edition, clearly espouses what this Paper has considered the orthodox line: see §28-23. For the alternative and increasingly lone view, see the late Dr Harvey McGregor in *McGregor on Damages*, 19th Edition, at 38-056.

argue for an *unreasonable item* even if wrapped up as *full compensation*[23]. No one could reject a *reasonable item* (once found as such) on the basis of high expense and *proportionality*.

Chance assessment of damages within a PPO regime

Huntley supra is interesting on another point: it illustrates that the essential *chance* assessment of damages for future loss has survived the new PPO regime, which purports to trace everything back to a claimant's *needs*. There the claimant, who had suffered a frontal lobe injury and whose rehabilitation had not gone well up to trial, contended for 24 hours of care per day as the long-term solution: the defendant submitted for 21 hours per week. Underhill J approached matters by evaluating first the hard-core *minimum level* that he thought was reasonable, which he assessed at 6 hours a day [109.] This hard-core cost he would have put within a PPO [114] but not the full *chance* reasonable amount that he went on to evaluate as follows. He uplifted the package by 50% from 6 hours to 9 hours a day with a broad brush *for all the possibilities* of needing greater care. He then discounted that back by 1 hour to 8 hours a day for the chance that the Claimant would not in fact engage all the care that he might reasonably require. There was a real chance that he would reject care (as he would if he entered a stable relationship) and small chances of imprisonment and detention under the Mental Health Act. This additional 2 hours, beyond the core 6 hours, Underhill J would have provided within an additional lump sum award; but the whole PPO submission was withdrawn when the claimant did not recover for 24-hour care.

Kenneth Parker J did much the same thing within an entirely conventional lump sum approach in *Tate* [38]-[43]. He averaged the private cost of care at home or in a residential placement at £175,000, which he reduced to £170,000 because the small chance of imprisonment; that figure was then discounted by 20% for the chance of more general non-compliance to £136,000.

Pre-existing conditions – a matter of causation or deduction?

In *Huntley* and *Tate* the claimants' pre-accident tendencies had not led to any prior requirement for care and attendance. In other cases, later negligence increases a pre-existing need for care, accommodation and therapies above those that would have been required anyway. How should the Court approach the task? Is it a matter of *causation* so that, when damages are assessed, it is only in respect of the strictly increased elements satisfying the prior test of causation? Or, is it a matter of *quantification of damage* so that the whole of the reasonable needs are taken as the starting point and the pre-existing needs considered only as a matter of potential deduction? If the latter, a claimant can recover damages for the whole of his condition on a commercial basis and, if the pre-existing needs would have been satisfied at essentially no cost to him (family or local authority care), giving little or no credit.

In *Sklair v Haycock*, the claimant (49 and looked after informally by his *Bohemian* father) had suffered with Asperger's Syndrome and Obsessive Compulsive Disorder. Edwards-Stuart J found that the claimant's elderly father would have continued to look after him for 5-10 years longer, when his wider family would have looked after him at a financial cost to them of £150-£200 per week for 5-10 years, after which a residential placement in local authority care would have been likely. The accident had turned the Claimant's

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[23] *Full compensation* may be the target but it is still subject to a test of reasonableness; some arrows aimed at the target properly fall short.
See Foskett J in *Robshaw*: [270] "The concession in principle was, in my view, rightly made because the logic of the proposition is to place James in the same position, as nearly as possible, as if he was not disabled. As I have indicated elsewhere, however, it is only reasonable to go so far in achieving this objective. It seems to me unreasonable to specify absolutely that there should be "no high level compartments and no low-level drawer compartments" anywhere in the property." See also below under *accommodation*.
See also Warby J in *Ellison*: considering the issue of future holidays [172] "… as with the issue of the lift I do not believe that the requirement to put Ayla in the position she would have been in should be taken too literally, as enabling her to travel to such places as she would have gone uninjured. It is necessary to examine more closely the substance of the actual losses, and whether the suggested expenditure would truly compensate for those losses."

need for this lower level of care (as a matter of fact) into a reasonable need for 24-hour commercial care [80.] The findings of Edwards-Stuart J amounted to deciding the causation issue on the basis that the negligence had caused the whole of the need for care (awarding the full commercial cost) and he then made, as a matter of quantification of the damages, a small deduction only for the short period when modest financial cost would have been incurred.

In *Reaney v Various Staffs NHS Trusts* [2014] EWHC 3016 (QB), the claimant's spinal cord condition had been made worse by clinical negligence: she would have needed some more modest care etc. anyway but now needed, on Foskett J's findings, an intensive commercial package. He too decided that the negligence had caused the whole of the need for commercial care etc. and made no real deduction in respect of the prior needs. He went so far as to say that the principle of *material contribution* would have led him to a similar result [71].

The Defendant appealed in *Reaney* where the Master of the Rolls, [2015] EWCA Civ 1119, overturned the reasoning and remitted the case for further consideration[24]. The essential question is one of *causation* not *deduction*. Where negligence increases a claimant's needs *quantitatively* (even if *significantly* or *substantially* so - *more of the same*) [21], a defendant's negligence only *causes* the additional need, not the underlying one: *Performance Cars Ltd v Abraham* [1962] 1 QB 33 followed, as applied in *Steel v Joy* [2004] 1 WLR 3002. How the need would have been/will now be supplied (whether at commercial cost or free) is irrelevant to the causation question [33].

If, however, the negligence makes a *qualitative* difference - the needs are no longer of the same type - it has *caused* the whole of it in its different form. The Master of Rolls agreed with Counsel for the Appellant that the causation result in *Sklair* might be explained on the basis that the care need before and after the negligence was indeed qualitatively different - the difference between *personal support in a 24-hour care regime* and *general supervisory care of an essentially independent life* [32]. Nothing was said, in that event, as to the correctness of making even a small deduction at the quantification stage. In *Reaney*, however, despite the findings of Foskett J for very substantially increased needs, they did not go far enough to move the case across the line between the negligence having made merely a *quantitative* as against a *qualitative* difference. It may be, on future reconsideration by Foskett J, that most of the current needs and claimed losses were caused by the negligence of Trusts but, as the Court of Appeal has found, not all of them.

Further it was a mistake to invoke ideas of *material contribution* and the principle (described as an *accurate distillation of the law*) in *Bailey v MoD* [2007] EWHC 2913 (QB). Since there was no doubt as to the claimant's needs before and after the negligence, the principle could have no application. See the discussion at [36].

Whipple J distinguished *Reaney* and instead applied *Rahman v Arearose Ltd* [2001] QB 351 in the case of *XP v Compensa Towarzstwo SA & Przeyslaw Bejger* [2016] EWHC 1728 (QB). In *Reaney* the claimant was already paralysed before the clinical negligence and there was a clear baseline against which the Court could assess how much, if any, additional or different care was needed. Whipple J contrasted the *Reaney* position [93] with the one before her: 2 accidents on top of each other and no clear baseline to determine condition and prognosis after the first accident compared with the position after the second accident. She found the facts of the case not to be capable of such neat separation as envisaged in *Reaney* [95] on some heads of damage; she there applied the broader brush of the Court of Appeal in *Rahman,* coming to a *just conclusion* with a 75:25 split.

Life expectancy / multipliers

The courts have consistently applied *Royal Victoria Infirmary v B (a child)* [2002] Lloyd's Law Rep. (Med.) 282. The decisions in *Sarwar No.1* and *Lewis* came out at roughly the same time and were arrived at independently

[24] It proved impossible at [2016] EWHC 1676 (QB) and the outcome remains unknown to the writer.

of each other. *Burton* was decided along similar lines in knowledge of *Sarwar No.1* but after further detailed evidence and argument.

There appear to be the following practical propositions in approaching life expectancy, which I have assembled for the most part, as there is insufficient space to derive everything from the passages in the cases themselves.

a) In the first place it is for the clinicians to derive what they can from the medical/statistical literature and use it to inform their overall opinion on life expectancy. Clinical experts who claim to be unable to unravel and apply the scientific literature will normally be looked at askance. Strauss and Hutton should not be the first port of call.

> In my judgment it is in the spirit in the decision of the Court of Appeal in *Royal v Victoria* sic that the clinician experts should be the normal and primary route through which such statistical evidence should be put before the court. It is only if there is disagreement between them on a statistical matter that the evidence of a statistician, such as Professor Strauss, ought normally to be required. Tugendhat J in *Arden v Malcom* [2007] EWHC 404 (QB) at [36]

Only if the dispute between the clinicians relates to a statistical matter (as against their clinical judgment) should it be necessary to obtain statistical evidence.

b) There is no supremacy of clinical over statistical evidence (or vice versa) once the evidence is before the court. All the evidence must be considered and given appropriate weight.

c) The *top-down* or *bottom-up* argument is an irrelevance as a point of principle. The court will decide, guided by the experts, where the best starting point is on the facts of each case.

d) Where the medical literature and statistical evidence use a common starting point for the analysis, it may well be that this should be the starting point from which the doctors apply their clinical judgment.

e) Where the literature tends to an analysis in terms of a *reduction of a number of years* or *percentage reduction in survival* from normal (as appears to be so in the spinal injuries literature – see *Sarwar No.1* and *Burton*), the analysis will conveniently use normal life expectancy (Ogden 7) as the starting point. It will then apply the *prima facie* appropriate statistical variation from the cohort(s) exhibiting the closest match(es) to the Claimant. Then it will refine the variation for the clinical considerations (often listed as *positives* and *negatives*) of the particular claimant which may tend to place him in a particular part of a cohort (or even outside it.)

f) Where the literature is not defined as above but relates to length of survival from an event or death at a certain age (as appears to be the primary literature on cerebral palsy and traumatic brain injury – see *Lewis* and general experience of Strauss and Hutton reports), *normal life expectancy* as a starting point *has nothing to offer* – Thorpe LJ in the *Royal Victoria* case at page 289, applied by HHJ MacDuff QC in *Lewis* [57.] The approach will therefore miss the first stage in the previous paragraph by reference to normal life expectancy and simply find a starting point from the closest matching cohort(s) in the literature. This will then require clinical variation as before.

g) Where a claimant's individual condition is closely matched by the cohort(s)/database, it should come as no surprise if the variation from the statistical evidence for clinical condition is very small whichever starting point is being used.

h) The arguments must have some basis in evidence and logic (*pace* Professor Barnes in *Lewis*.)

i) The effect of HHJ MacDuff QC's findings in *Lewis* was that the Strauss populations were so close to the specific, traumatically brain-injured claimant there should be little variation from the statistical starting point. Normal life expectancy had nothing to offer: the literature did not use it as a reliable yardstick. He increased the overall life expectancy [146] by 3 years from age 37 to 40 - an admittedly arbitrary amount - on account of one point of distinction only: the claimant receiving *a first class care package* [144] and better than those in the cohorts used for comparison.

j) Strauss has now published in the context of cerebral palsy claims[25] conceding that the life expectancies in his earlier work (based on cohorts of past American patients using *historical* mortality as the basis for PI claims) should be adjusted for current longer UK life expectancy and for the fact that the UK Courts apply tables for *projected* life expectancy. It is beyond the scope of this paper to go further but specialists in this field should refer to the methodology set out in the paper itself. Strauss et al have also argued that evidence does not actually support the line that *quality of care* – the only distinguishing feature found by HHJ MacDuff QC on the evidence before him – makes any significant difference (but see the next paragraph.)

k) In *Sarwar No.1* and *Burton* (both spinal injuries), a statistical variation was applied from a starting point of normal life expectancy, which was then refined through clinical judgment. On the evidence before the courts, they were both satisfied that socio-economic factors (the same *first class care* point in different clothing) were substantial reasons for altering the initial statistical estimate upwards. In *Pankhurst*, MacDuff J, as he by then was, enhanced his findings on the statistical life expectancy of 18 years to 19 years [from age 53] for the first class care package the Claimant would have – see [7.17.] In *Robshaw* the reasoning was moved on. The Court heard from Dr Rosenbloom (a co-author with Strauss et al) on the issue of whether a high quality of care should extend mean expectation of life. Foskett J reviewed earlier decisions and concluded that life expectancy was not solely determined by the underlying extent of damage [127]-[128]: *where there is good reason to believe that the quality of future care will reduce some identifiable risks to life, then it is appropriate to reflect that in the overall assessment of life expectancy*. He increased life expectancy by 2 years for the quality of future care and lifestyle [132] (and by a further year for the likely increase in use of a Neater Eater - a different point.) So, mean expectation of life is not lengthened by any woolly notion of high quality cuddles; rather, where close attention to specific adverse risks affecting mortality reduces them from the average, some (modest) extension of life expectation is logically required.

l) If the medical analysis takes into account all medical conditions and considerations (whether related to the accident or not) to reach a medical *prediction* (in the word of Lord Lloyd in *Wells*), it has been argued that Ogden table 28 should be used to fix the multiplier - Lloyd Jones J in *Sarwar No.1*. To work from Table 1, the argument runs, where there is effectively an agreed (or found) life expectancy is to double discount.

m) Even where the doctors had not factored in chance events such as falling under a bus, Lloyd Jones J decided to apply Table 28 rather than Table 1 in *Sarwar No.1* [30.]

> However, in view of the fact that by far the greater proportion of risks to this Claimant's life have already been taken into account by the experts in their assessment of life expectancy, and in the absence of any evidence as to what apportionment between Tables would be appropriate, I conclude that the appropriate multiplier should be calculated by reference to Table 28

[25] *Life expectancy in cerebral palsy: an update* Developmental Medicine & Child Neurology 2008, 50: 487- 493 at 493, Strauss, Brooks, Rosenbloom & Shavelle. The authors reiterate the approach while giving the updated life expectancies in *Recent trends in cerebral palsy survival. Part II: individual survival prognosis* Jordan C Brooks et al, Developmental Medicine & Child Neurology 2014. Contrast the recent updated publications by the same Californian collaboration in the realms of traumatic brain and spinal cord injury where, although it is difficult to give reasons medically, the statistics do not support these cohorts enjoying improved expectations of life in line with the general population, rather the reverse.

n) The Introduction to the Ogden 7th edition at paragraph 20 is, however, much expanded from that available to Lloyd Jones J in the 5th edition when deciding *Sarwar*. The approach using Table 28 is said, tersely, by the Ogden Working Group to be

> … likely to give a multiplier which is too high since [it] does not allow for the distribution of deaths around the expected length of life. For a group of similarly impaired lives of the same age, some will die before the average life expectancy and some after; allowing for this spread of deaths results in a lower multiplier than assuming payment for a term certain equal to life expectancy.

The Ogden Working Group recommends using Tables 1 and 2.

o) HHJ Collender QC considered argument in *Crofts* on whether to apply Table 1 or Table 28 to a life expectancy reduced by 5 years. He decided that he had *not* made a ruling on *how long the Claimant was likely to live* (when Table 28, he said obiter, would be appropriate to avoid double discounting.) Rather, he had decided the Claimant's life expectancy was reduced by 5 years from *his pre-morbid statistical life expectancy, whatever that was* [97.] Hence, he applied Ogden Table 1, taking the Claimant at a theoretical age 5 years older than he was to reach the proper life multiplier [100.] [26]

p) Cranston J in *Smith v LC Window Fashions Ltd* [2009] EWHC 1532 (QB) followed the reasoning in *Crofts* and applied Table 1.

q) No one suggested there was room to dodge the argument and the apparent tension between *Royal Victoria/Table 28* and *Ogden Introduction/Table 1* in the case of *Whiten*. Swift J found a further life expectancy of 28 years; but then had less than perfect help in understanding the point of Paragraph 20 of the Ogden Introduction *supra*. She said this:

> 103. I have heard no statistical evidence explaining the Paragraph 20 methodology. Consequently, I do not understand the logic of assuming a spread of two years around the predicted life expectancy of 28 years, in preference to a spread of – say – four, six or eight years. But, whatever the logic may be, it is clear that the Paragraph 20 methodology is intended to make allowance for the fact that the predicted life expectancy of 28 years might be wrong. Moreover, it seems to me that underlying the methodology must be the assumption that the claimant has a greater chance of dying before the expiration of his predicted 28 years than of surviving for longer than 28 years. If that were not the case, the multiplier produced by using Table 1 would be greater than that derived from the application of Table 28. If I am right about that, the argument being mounted by the defendant in this case is, in reality, the same as that advanced unsuccessfully in B.
>
> 104. In any event, there can be no doubt that the effect of using Table 1 in the manner suggested by Paragraph 20 is to produce a discount (albeit a relatively modest discount) from the multiplier based on the full life expectancy as predicted. That being so, the application of Table 1 in accordance with the Paragraph 20 methodology in a case such as this would offend against the principle that there should be no discount from the multiplier calculated by reference to a claimant's predicted life expectancy.

r) Swift J made it explicit that she did not understand the Ogden Introduction at Paragraph 20; and she evidently believed that if she were to apply Table 1 she would risk breaching Lord Lloyd's injunction in *Wells v Wells* [378D-E], relied upon by Tuckey LJ in *Royal Victoria* [24]:

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[26] I am grateful to Anthony Carus, Consulting Actuary who writes (personal correspondence) doubting the distinction:

> I believe that it is simply a matter of semantics to distinguish between an adjustment to the unimpaired life expectancy; and a 'direct' assessment of life expectancy. What is the difference between saying:
> a. "The claimant's life expectancy is 10 years less than unimpaired life expectancy of 40 years" and b. "The claimant's life expectancy is 30 years."

> There is no room for any discount in the case of a whole life multiplier with an agreed expectation of life. In the case of life expectancy the contingency can work in either direction. The plaintiff may exceed his normal expectation of life or he may fall short of it.
>
> There is no purpose in the courts making as accurate a prediction as they can of the plaintiff's future needs if the resulting sum is arbitrarily reduced for no better reason than that the prediction might be wrong. A prediction remains a prediction.

s) There is a linguistic problem - with the word *prediction* carrying different layers of meaning - which has probably led to a slip. Swift J had not made a *prediction* of the date of death - only a finding as to *average life expectancy*. This is clear from her introductory discussion of the issue in the Judgment at [19]:

> The life expectancy of an individual is assessed by reference to the average survival time of a large group of individuals with similar characteristics. That average survival time does not reflect the actual time for which a given individual will live. The survival time of that individual could be much longer or shorter than the average life expectancy of the group to which he/she belongs. This is particularly so in the case of people with disabilities, for whom the variations in life expectancy are far greater than amongst the general population.

t) Table 28 gives multipliers over a *term certain*. The finding in *Whiten* (indeed any finding about life expectancy) is not that the Claimant will die on a specific day (or even in a specific year.) It is a finding of an *average term* of life, which is a *term necessarily uncertain*. Table 28 multipliers apply strictly where the period is absolutely fixed, beginning and ending at certain times, not where the period is only an average and can end sooner or later.

u) The importance of this point can be illustrated using the finding of a mean life expectancy of 28 years, as in *Whiten*. Let us see what difference it makes to Table 28 multipliers with, to use Lord Lloyd's language in *Wells*, contingencies working equally in opposite directions.

Mean expectancy of 28 years	Table 28	Percentage of mean	Difference
Lives 18 years (10 years less)	14.53	71.89	- 28,11%
Lives 23 years (5 years less)	17.55	86.84	- 13.16%
Lives 25 years (3 years less)	18.65	92.28	- 7.78%
Lives 28 years (mean)	20.21	100.00	-
Lives 31 years (3 years more)	21.66	107.17	+ 7.17%
Lives 33 years (5 years more)	22.57	111.68	+ 11.68%
Lives 38 years (10 years more)	24.65	121.97	+ 21.97%

Thus, if we take Table 28 multipliers the contingency of early death has more effect compared with later death *over the very same periods*. Apparently equal and opposite contingencies are not equal and opposite in terms of multipliers discounted for early recovery[27]. If, falsely, we treat a finding/prediction merely of *average* life expectancy as if a prediction for death on a certain day (and use a Table 28 multiplier), Lord Lloyd's injunction not to tinker with a prediction is in fact breached, since to do so is to mistake the real nature of the prediction in a claimant's favour.

v) Tables 1 and 2, on the other hand, make an allowance for the spread of deaths around mean life expectation. In other words, when calculating the multipliers for different rates of return compared with the 0% column (where there is no adjustment because, by definition at 0%, there is no discount for early

[27] Anthony Carus writes further:

> In short, we might say that because the value of the possible lost years before the life expectancy exceeds the value of the possible gained years after the life expectancy then the Table 1or 2 value is less than the Table 28 value.

recovery) the tables correct for the over-compensation illustrated above [28]. And, if we use the bespoke prediction of average life expectancy in any given case (28 years in *Whiten*), find that value in the 0% column and read across to the multiplier in the relevant column for the rate of return under the prescribed discount rate, there is no further discounting or importation of background risks of smoking etc. in the general population. Those risks are incorporated at a prior stage in the fixing of mean life expectation across the whole UK population in the 0% column. If all we are doing is taking a bespoke *average* life expectancy in the case and reading across from the 0% column into say the 2.5% column, we do not introduce any discounts *at all*: we simply apply the table which is closest for the real nature of the prediction we have made - a finding of average life expectation rather than a prediction of death at a pre-ordained age.

w) Nevertheless, no Court appears yet to have had the opportunity of considering full argument from both sides. Jay J in *Farrugia*, like Swift J in *Whiten*, used table 28, believing that it was the approach dictated by *Royal Victoria* [69]. In *Reaney v University Hospital of North Staffs NHS Trust and another* [2014] EWHC 3016 (QB) Foskett J decided to follow the line of Swift J in *Whiten* and no reference was made to the above arguments. In *Manna* Cox J followed *Whiten* and *Reaney* using Table 28 almost as a matter of judicial comity [184] but relying on the support of McGregor on Damages [185.] In *AB v Devon & Exeter*, Irwin J used Table 28 at [125]. In none of these cases has the Court been invited to grapple with the fundamental difference between a finding as to the timing of death (impossible) and one of mean expectation of life (the best that can be done.) If the true nature of the assumption is teased out (and following *Wells* to make *best use of the tools available* i.e. the Ogden Tables), the writer still cannot see how Table 28 is to be preferred to Tables 1 and 2.

x) By way of contrast, Stuart-Smith J took some trouble to avoid Table 28 and carefully traced back the source evidence for the reduction in life expectancy in *Ali* [299]-[311] to find that it was by reference to normal statistical expectancy: he followed the *Crofts* and *Smith* line - see above - using Table 1 and avoiding the Table 28 dilemma. If Jay J had been invited to carry out a similar exercise in *Farrugia*, he could have reached a similar conclusion.

y) Seeing as the overall expectation of life even in cerebral palsy cases like *Whiten*, *Robshaw* and *Manna* is now actually determined by reference to a percentage of normal UK projected expectation (to allow for transportation of historical US data into the context of UK assessment of damages - the see j) above), it is always open to a Court to follow the route of Stuart-Smith J in *Ali* to avoid having to consider the Table 28 v Table 1 and 2 debate. Having made a finding [124] in *AB v Devon & Exeter* for a 58% reduction in the Claimant's uninjured projected life expectancy, Irwin J appears not to have been invited to follow the *Ali*, *Crofts* and *Smith* line.

Lost years

In *Lewis*, *Iqbal, Massey* and *Sarwar No.2* arguments were run on behalf of seriously injured, *infant* claimants (who are now most unlikely ever to have dependents following their injuries) for damages in the *lost years* between the expected date of death and what would have been their normal life expectancies. There were different outcomes, with the cases running at about the same time without the arguments and results known in the others. Sometimes *Croke v Wiseman* [1982] 1WLR 71 CA (disallowing infant claims in the lost years) was followed; sometimes it was ignored; and sometimes it was distinguished.

[28] They do so looking at a standard mortality curve for the whole UK population. With an impaired life, the curve for the individual may or may not be similar to the standard curve. However, applying a standard curve is better than making no allowance (or Table 28); and getting any closer to the real thing would be to advocate actuarial/statistical evidence in every case of impaired life expectancy, contrary to the decision in *Arden* - see a) above.

Given the Court of Appeal decision in *Iqbal*, discussion of the 1st instance authorities is now removed from this draft[29]. Sir Rodger Bell had made a slip in considering that he could validly distinguish *Croke* on the basis of change in circumstance: *Croke* had decided a point of general principle and he was bound by it. He had been broadly right, however, on the *merits*. The issue became one surrounding the proper application of *stare decisis* and the circumstances in which the Court of Appeal is allowed to depart from its own earlier decision. All 3 Members of the Court considered that *Croke* was probably decided inconsistently with *Pickett v British Rail Engineering Ltd* [1980] A.C. 136 and with *Gammell v Wilson* [1982] AC 27; but since it was decided in full knowledge of the *previous* decision of the House of Lords and was not strictly *per incuriam*, the inconsistency had to be corrected by the House itself. If it were otherwise, there would be no end to the Court of Appeal tinkering with its own previous decisions. Contrast the situation in which a *subsequent* decision of the House raises the inconsistency, when it is the Court of Appeal's duty to correct the situation.

In *Totham v King's College Hospital*, Laing J followed *Croke* [46] as she was obliged but made a theoretical assessment of the damages and was encouraging of an appeal [47]. The NHSLA would not, however, consent to leapfrog to the Supreme Court [48] and the issue has since been compromised with a PPO. Unless the loss of earnings claim is vital to the amount of capital for the purposes of providing accommodation and a contingency sum, it is better to forego the small capital element in a short life expectancy case and claim a PPO for loss of earnings, which can continue to run in the event the claimant outlives the mean expectation of life. Incidentally, the consent of the Respondent is no longer required for a leapfrog appeal.

In *Crofts* HHJ Collender QC had to consider the correct percentage to allow for the *lost years* in an adult claimant who was not caught by *Croke*. On the facts of the Claimant's lifestyle, he deducted 40% for his own living expenses during the lost years' pension claim [158.]

Fatal Accidents Act cases – death of *Cookson v Knowles*

While beyond the scope of this paper but to flag up an important issue, a claimant has finally taken a challenge to the Supreme Court in *Knauer v MOJ*. Bean J [2014] EWHC 2553 (QB) found himself bound to follow *Cookson v Knowles* and calculate multipliers at the date of death, rather than the date of trial, but signed a leapfrog certificate. The Supreme Court granted permission and allowed the appeal at [2016] UKSC 9.

Let us now leave issues of wider principle and return to gallop through some of the illuminating detail of various cases. Much of the time there will be reference to the tables and the commentary brief.

Accommodation

Capital offset

Some useful detail appears in the tables concerning the way in which courts are approaching the issue of what credit to give under *Roberts v Johnstone* for the capital cost of the accommodation the claimant would have had anyway. Where the reports show that a point has been taken (*Sarwar No.2* and *Iqbal*), only a proportion (1/2 or 2/3) of the cost has been offset because of likely shared equity with a partner; and only from the claimant's mid-20s (range 23-28.) In *Whiten* [472], a sum of £125,000 was taken (on the basis of what the Claimant was likely to afford irrespective of whether he bought on a shared basis) from age 28. In *Robshaw*, credit was given [281] on the facts for a 50% share in properties valued at £75,000 (age 25-35) and £150,000 (after that.)

Credit for parental rent against infant's accommodation claim

This issue has been considered in a number of cases over the last few years with a very strong theme emerging at First Instance.

[29] Anyone still interested can find the discussion in [2008] JPIL 109.

In *Lewis* the parents still had their former property (to which HHJ MacDuff QC found they were unlikely to return even when the claimant became an adult.) Their avowed plan was to rent it out at £5,400 pa and the costs of doing so would be about 10%, leaving them in profit to the tune of £4,860 pa. Acknowledging that the parents' entitlement to rent was difficult to offset from the claimant's own claim for accommodation, the Judge nevertheless told the parties at [171] to find a way of setting it off when they calculated the damages following judgment. His primary reasoning [170] was that the value of the parent's free accommodation in the Claimant's property should be deducted from the claim in respect of their non-commercial care; and the value of that was taken to be equivalent to the profit they were making on renting out the former home. Perhaps realising but not articulating the problem that would soon occur (when the parents no longer had a claim for non-commercial care from which to offset), he then articulated a reason [171] (but without actually making a finding) why the parents' rent should still be offset (namely that the defendants had had to fund the extra adaptation of the property, beyond that required for the claimant, to make it a family property and yet they were still paying for care.) This reason has not found favour in later cases.

In *Iqbal* the parents had previously lived in rented accommodation, the cost of which was covered by Housing Benefit. The passage of Sir Rodger Bell's judgment is worth reading from [81] but is too long to reproduce here. Paragraph [83] is now set out.

> In my view, Mr Spencer's argument fails for practical reasons in the circumstances of the present case. The fact is that Mr and Mrs Iqbal are not paying rent to Khazar or his receiver, whereas parents naturally tend to volunteer the proceeds of sale of any existing home towards the purchase of a more expensive, suitable house in which to live with the claimant, as Mr and Mrs Woodward did in *Roberts v. Johnstone*. Both *M* and *Parkhouse* remind us that the claim is the claimant's claim, not that of his parents, and the allowance which Mr Spencer claims could only be justified, in a roundabout way, by finding that Khazar had (via the Court of Protection or his receiver) failed to take reasonable steps to mitigate his loss in relation to accommodation by, in turn, failing to demand "rent" from his parents. In my view the failure to demand rent cannot be castigated as unreasonable. In the specific circumstances of this case it would involve granting some form of licence or demanding "rent" in order to try to achieve the handing over of money in the form of Housing Benefit from one public body simply to save another public body the same amount. More generally, it is not just to deprive parents of the incidental benefit of living rent free, when there are so many sacrifices on their part, most obviously the detriment to their quality of life, which must go uncompensated under our law of tort, however high the award in their child's favour.

There is a narrow determination on the facts and a wider statement of principle in the above passage. Neither *Lewis* nor *Iqbal* illustrates, beyond the apparently wide statement of principle in *Iqbal*, what to do if the parents owned a previous property, have sold it and, unlike in *Roberts v Johnstone* and *Lewis* recently, chose not to re-invest in the new property.

In *Noble* Field J had to decide what to do when, if the accident had not occurred, the claimant would have lived in his partner's house, without contributing (on his findings) to the equity or paying rent. After the accident, the claimant now was to purchase the property for adaptation; and the partner to live with him under similar conditions. Field J *with a degree of reluctance* rejected the defendant's submissions that the claimant should give credit for a *deemed* contribution he would have made to the couple's expenses if the accident had not happened [109.] This notion of a *deemed* contribution was a dodge to make the set off appear to be against the claimant's own claim when the real profit was, in fact, to the partner under the new regime. There was no basis in law to order this profit to another to be set off from the claimant's own damages; and Field J cited *Iqbal*. Further, there was a real chance that the partner might leave; and although not a formal part of the care regime, while she stayed she would continue to be of assistance in a range of small matters so that it would not be reasonable for the claimant to charge her formal rent. *Lewis* was also cited but distinguished on its facts.

The point arose again at the same 1st instance level in *Whiten*, with Swift J taking the *Iqbal/Noble* line for her own reasons, which were not dissimilar to those of Field J in *Noble*. The Claimant's parents evinced an intention to live with him (aged 7) on a life-long basis; and there was to be the purchase, by the Claimant alone out of damages, of long-term suitable accommodation in about 5 years' time. On sale of the current property (owned by the parents) there was unlikely to be much in the way of equity; and there was no proposal they that contribute. Swift J made many observations of general application:

> 466. One way of achieving fairness for both claimants and defendants might be to require parents to pay a claimant an appropriate rent for occupying the accommodation and for the sum paid by way of rent to be deducted from the claim for his annual loss of investment income on the capital value of the new property. In many cases, the parents would be able to afford to pay some rent, even if it fell short of the market rent for the property. However, this would not be possible in all cases since some parents (like those in *Iqbal*) would lack the financial resources to pay rent. There would moreover be a risk that the parents' ability to pay rent might change over time. In that event, a claimant would end up out of pocket if, at trial, a deduction had been made from the annual claim for investment income on the capital value of his new property in order to take account of rent which was not in fact paid.
>
> 467. This court cannot require a claimant's parents to pay rent. Whether or not rent is paid is a matter for discussion and negotiation between a claimant's parents, the claimant's deputy and, possibly, the Court of Protection. As the judge in *Iqbal* observed, if there is no agreement that rent should be paid, the only way that a court can make a deduction of the notional amount of the rent from the claimant's damages is to characterise the failure on the part of the claimant to demand rent as a failure to mitigate his loss. The ordinary principles of mitigation of loss require the defendant to prove the failure by establishing that the claimant has unreasonably failed to take certain mitigating steps.
>
> 468. In the present case, the claimant's parents have indicated that, because of the severity of the claimant's cognitive disabilities, they intend that he should live with them for the rest of his life. That is a considerable commitment on their part. It is true that the claimant will have paid carers who will be responsible for most of his day-to-day care needs. Nevertheless, he will always function at the level of a young child and his parents will remain ultimately responsible for him. His condition means that he will require a considerable amount of emotional and other support from them. His disabilities will inevitably restrict the range of choices open to them in the future. If they are to take holidays as a family, their destination and mode of travel will have to be suitable for him. If they want to undertake leisure activities as a family, those activities will have to be tailored to meet his requirements. Once they are in the new property, it will be difficult or impossible for them to move again, because of the substantial costs of adapting another property for the claimant. In these and many other ways, their quality of life in the future will be adversely affected. Having regard to those factors, I do not consider that a failure on the part of the claimant (or those acting on his behalf) to demand that his parents pay rent to him can properly be regarded as "unreasonable".
>
> 469. The factors I have described above will be present, to a greater or a lesser extent, in the vast majority (if not all) cases involving children with severe disabilities, where the family has to move to alternative, disability-related accommodation. The context and circumstances of those cases will not, in my view, be appropriate for a finding of a failure to mitigate loss to be made. The view expressed by the judge in *Iqbal* -to the effect that it is not just to deprive parents of the incidental benefit of living rent free having regard to the uncompensated effects of the defendant's negligence on them - can perhaps be regarded as another way of expressing the same conclusion.

Warby J added himself, in *Ellison* [152], to the long line of First Instance Judges refusing to reduce a claimant's damages on account of incidental benefit to third party family members; as did Foskett J in *Robshaw* [278] and Cox J in *Manna* [272]. Warby J also rejected on the facts that there was actually a gain to Mr and Mrs Ellison: they had lost the free accommodation that would have been associated with the work Mr Ellison had to give up by reason of his daughter's injuries. Warby J's decision went further than others before him in refusing to make any offset either from the claim for *increased running costs*; this was by parity of

reasoning with the previous argument against offsetting from the *Roberts v Johnstone* element of capital provision - see [163].

Contingency fund on adaptation works

In *Iqbal* a 5% contingency fund was allowed for the adaptation works over and above those which could be specifically articulated in the schedule of works [90.] Baker J allowed an overall contingency of 10% on adaptations in *Streeter* but from a low starting point on the Defendant's essentially preferred evidence but which lacked *the finer details* [170]. Foskett J allowed 10% in *Robshaw* [301].

Adaptations - *reasonable* and *full* compensation

It was contended in *Iqbal* that there should be provided access up to a raised area of the garden where, it was said, visiting cousins went to play, in the form of a step-lift at a cost of £10,000. The claim was rejected.

> 93. … I find this claim more difficult than the spa pool, but I have come to the conclusion that the claimant's case for it has not been made out because the areas to which Khazar does have access are enough to make the bungalow suitable for his needs without access to the grassy area. It follows that the defendant should not have to pay for access to the grassy area.

Where the injury gives rise to a need for adapted accommodation, reasonable adaptation to meet the need *is* full compensation. It does not mean disabled access to every conceivable nook and cranny in house and garden.

This approach to the facts was applied by Warby J in *Ellison*: a claim for a lift to the first floor of the house was rejected on the basis that the Claimant was so badly injured and had such little cognition that the objective of providing her with reasonable space for activity and interaction with the family could be achieved at ground floor level without going upstairs to the family bedrooms [132].

Contrast *Robshaw* where, in a scheme involving demolition and re-building, since the Claimant had full awareness of his surroundings *an inability to go everywhere in his own home safely would be to undermine the principle that damages are designed to place a claimant, so far as is possible, in the position he would have been in if uninjured* [234]. He required a lift. The tension in the correct legal test to be applied, most obvious in care claims, is mirrored within accommodation claims. For, when it came to the provision of storage space, Foskett J said at [270]:

> The concession in principle was, in my view, rightly made because the logic of the proposition is to place James in the same position, as nearly as possible, as if he was not disabled. As I have indicated elsewhere, however, it is only reasonable to go so far in achieving this objective. It seems to me unreasonable to specify absolutely that there should be "no high-level compartments and no low-level drawer compartments" anywhere in the property.

A separate exercise/physiotherapy room, *reserved solely for those purposes*, was allowed [255] as well as 16 m^2 independent living space (covering study/hobbies/communications/sitting around) for the Claimant and his carers over and above what was to be found elsewhere in the property: he was not to make do using the family sitting room and conservatory [250]-[257]. Each of the carer's bedrooms required its own shower room given that the male claimant was likely to be attended by carers of both sexes [266].

Other homes

In *Robshaw* [282], the claims for structural ramps built into the father's and grandfather's properties (£5,500 each) were rejected in favour of £500 portable ramps available at each house.

In *Manna* the claim for a *second home* succeeded to allow the 18-year-old claimant to enjoy visiting contact with his natural father. Cox J expressed her decision as being very much on its own facts and in the absence

of any principled opposition. The detail of the substantial (surely not *relatively modest* as described at [283]) sums allowed is set out in Part 4 of the Table. The Court of Appeal recently rejected the appeal, regarding the award of a second home as *intensely fact-dependent*; *generous*; *[not]establishing a precedent*; but *within the generous ambit of decision-making entrusted to the judge* [26]. Since the counter schedule had failed to take the point below that the multiplier should be over the father's lifetime (not the claimant's), even that mistake remained uncorrected [27]-[32].

Failure to mitigate

Even acknowledging that the standard for judging a claimant's actions was not a high one [10.3], MacDuff J in *Pankhurst* found that the Claimant had purchased (£450,000) an unreasonable property. It was subject to subsidence (known before the purchase) and ultimately demolished and essentially re-built, with the finest of fittings and a heat pump, to about twice the floor space originally specified as reasonable by the Claimant's own expert witness. In the end the "adaptation" cost £924,000 against the original estimate at £190,000. Finding the purchase to be unreasonable, MacDuff J disallowed the figures as claimed and substituted £500,000 as a reasonable theoretical purchase price, with £235,000 for adaptations and £20,000 enhancement in value through the work.

In *Whiten*, while having *considerable sympathy for the defendant's position*, Swift J found that the allegation of failure to mitigate - in purchasing and carrying out pretty extensive alterations to a property which could not be made suitable in the longer term - was not made out. The arguments did not *take sufficient account of the stress and pressures on the claimant's parent in 2006/7 and the very unsatisfactory conditions under which they and the claimant were living* [41.]

In *Andreou v S Booth Horrocks & Sons Ltd* Lawtel 13.01.2017 (transcript awaited), the claim in respect of mesothelioma included one for an already-installed, 3 storey lift at home carrying a cost of £84,000. HHJ Walden-Smith rejected it in favour of £6,000 for chair lifts.

Services

It is not often that High Court Judges get to consider DIY and decorating, so when they do it is useful for the smaller County Court cases. Mackay J had this to say in *Fleet v Fleet* [2009] EWHC 3166 (QB).

> 25. This is claimed based on a multiplicand of £1500 p.a. I do not understand the multiplier to be controversial. The defendant contends for between £750 and £1000 per annum as a "more conventional sum" than the £1500 sought by the Claimant. The evidence on this issue is that Mr Fleet did all the DIY in the house and had in the past installed a new bathroom according to his wife. He was a skilled man albeit he was busy and worked long days and sometimes long weeks. He also said that he had plans to redecorate the house, and Mrs Fleet said that the living room now needs redecoration; though she could do some of the preparatory work, and did do so when her husband did the work, she could not in my judgment be reasonably expected to fill the gap left by him.
> 26. Equally, there is considerable garden at the house which Mrs Fleet tends but she cannot manage the trimming of the trees a screen of which separates the house from its neighbours and which has to be kept in order, or cut the grass.
> 27. I believe I am justified in saying that I can take into account the general level of awards under this head of damage from past experience. It would be dismal if experts had to be called to say how much it costs to mow a lawn or paint a room; after all judges do have some experience of that kind of activity and what it cost to buy it in the market place.
> 28. I see nothing wrong with the figure of £1500 per annum claimed by the plaintiff and I think that is the right sum.

Seven more recent High Court cases have led to decisions on services and the answers were very fact sensitive. Bean J awarded £900 for gardening and £600 for decorating in the fatal case of *Knauer v MOJ* [2014] EWHC 2553 (QC) [34]. John Leighton Williams QC (sitting as a High Court Judge) allowed £1,250

pa with a future multiplier to age 77 in *Zambarda v Shipbreaking (Queenborough) Ltd* [2013] EWHC 2263 (QB) at [88]. In *McGinty v* Pipe [2012] EWHC (QB) 506, HHJ Foster QC (sitting as a High Court Judge) awarded the female Claimant £750 pa for gardening and DIY with a multiplier (at age 51) of 16 (equivalent to just past age 70) to take account of lesser contribution with age. Contrast Stuart-Smith J in *Ali v Caton & MIB* at [337] where he awarded only £250 pa to a young man with no track record for DIY, decorating and gardening. Kenneth Parker J discounted the claim in *Tate* heavily with a broad brush for similar reasons [57]. In *FM v Ipswich Hospital NHS Trust* [2015] EWHC 775 (QB), HHJ McKenna, sitting as a Deputy High Court Judge, awarded £900 pa between the ages of 25 and 70 [96]. In *Hayden v Maidstone v Tunbridge Wells NHS Trust* [2016] 3276 (QB) Jay J awarded a 45-year old woman £1,000 pa for future gardening [215] and £750 pa for future decorating/DIY [216] (with multipliers of only 7.05 given that it was an *acceleration case*).

Hydrotherapy at home

Hydrotherapy has also been called aquatic physiotherapy and, more recently, water-based activity. The tables reveal what has happened in the various cases. Much depends on the experts retained and how the issue is apparently formulated. Rarely has there been a detailed consideration of what is at stake until the latest case of *Ellison*.

As with other heads of damage, the question is (or should be – see above for the challenge to orthodoxy) one of the *reasonableness* in provision to meet *the need*. What the need is on the score of water-based activity should be defined for any particular claimant. The answer to the claim should logically involve evaluating, first of all, the benefits towards the need that will be obtained through the therapy/medication/exercise/activity regime already to be instigated, with the equipment to be provided, and including such hydrotherapy as might be reasonably available outside the home. Then one should evaluate the additional benefits aimed at the need to be delivered by a hydrotherapy pool at home, balanced against the additional cost of the provision.

If contested, the claims have tended to fail, even in the severe cerebral palsy case of *Whiten* where Swift J provided the following analysis [262] – [263] in line with her *orthodox* view of the test of reasonableness – see above.

> … I have no doubt that the Claimant enjoys his aquatic physiotherapy sessions, just as he enjoys his visits to the swimming pool with his family and/or carers. I readily accept that exercising in water is generally beneficial for him. However, I am not satisfied that the Claimant has established a clinical need which cannot adequately be met by physiotherapy exercises carried out in an ordinary swimming pool with suitably trained carers and occasionally, his treating physiotherapist. Consequently, I make no award for the costs of future aquatic physiotherapy.
>
> Whilst it might be convenient for the claimant to have a pool at his new home, there is no evidence of a real need for that facility. The Claimant will have trained carers and a suitably adapted vehicle to take him for sessions in a swimming pool at a local private leisure club whenever he wishes to go. The availability of suitable pool facilities will be one factor to be considered when the family come to decide where their new home should be sited.

Nevertheless, Warby J allowed the claim for a very substantial pool in *Ellison* because of the *exceptional circumstances of this case* [119]. Painful spasm could only be relieved on the evidence by total immersion in warm water. The pool was not awarded to further any physio*therapy* regime but to provide relief from the "agony"; professional carers could take the Claimant into the pool to console her even in the middle of the night [117]. It was the only way to achieve full compensation (to get the Claimant close to the largely pain-free life she would have enjoyed): [109] and [119]. Nevertheless, having invoked the *full compensation* principle, Warby J also found along orthodox lines that it was also a reasonable and proportionate provision notwithstanding its very substantial cost [119]-[120]. See Table 3 for the figures.

A second claim - *Robshaw* - has succeeded recently, this time for a small (c.5m. x 3m. - see [299]) swimming pool at home. The claim was not presented on the basis of *hydrotherapy* but, as found, on the *real and tangible psychological and physical benefits that swimming will give* [296] to a Claimant who was able to swim with supports; *just providing pleasure would not ordinarily be sufficient and some real and tangible benefits would need to be demonstrated* [294]. He had already moved into his long-term accommodation in Lincolnshire (contrast *Whiten* who could still choose to live near a suitable pool) and there was no such pool within commuting distance. Foskett J based his decision on the specific facts and considered that *the decision in this case should not be seen as a green light for claiming a home-based pool in every other case* [295].

William Davis J in *HS v Lancs.* Gave the claim for a pool at home a red light in this more straightforward but nevertheless serious case of cerebral palsy. He doubted that a domiciliary hydrotherapy pool would get the claimed usage [47] and there was unanimous evidence denying any strict therapeutic benefit [44]. He allowed instead c.£5,000 pa for pool hire, twice a week for life, outside the home [48] - still a very substantial sum. Irwin J rejected the claim for a hydrotherapy pool at home in *AB v Devon & Exeter.* "It seems to me that it is not in the end reasonable to engage such a large capital expenditure, when there is a risk it might not be used in the long term" [174]. He awarded £2,000 pa for private hire of facilities – see Appendix 1.

Housing in mild brain injury and with separation of partners

In *Edwards v Martin* [2010] EWHC 570 (QB), the defendant argued that a claimant with organic personality disorder arising out of brain injury should not be regarded as having a reasonable need for alternative accommodation flowing from that injury in the following circumstances. He had separated from his partner and young child after the injury but required only an average of 10 hours a week support worker input with 80 hours pa case management. Rather, it was said, the need for alternative accommodation flowed from the breakdown of the relationship and was too remote from the injury [42.] David Clarke J rejected this argument [43]:

> I consider this takes too narrow a view. … the psychiatric effects of the Claimant's head injury have made it impracticable for him to continue to live with his family. Such a situation was reasonably foreseeable as a consequence of an injury such as this. The sum claimed is recoverable.

Calculations in respect of the additional property and half of the original one (his partner funded half) were allowed [80], albeit the multiplier was reduced from just over 25 [74] to 20 [79] for the chance of separation anyway. In addition, though challenged as being even more remote than the accommodation claim, the Judge allowed the reasonable costs of the Family Court proceedings as part of the damages: the former partner had not been acting unreasonably in resisting access to such a young child; and the claimant's pursuit of the claim was factually a manifestation of his brain damage (rigid thinking and lack of insight) [44.]

Transport

See the table for some recent awards. The Chrysler Voyager[30] was in vogue but is now no longer being converted. The VW Caravelle has taken over as the most claimed (and allowed[31]) vehicle. A relatively consistent line has emerged that has survived recent attempts to test it.

Unless there is a high mileage, while a claimant has got the more expensive Voyager/Caravelle, it will be changed every 5 years rather than more often. The case of *Smith* is the odd one out on the period between changes (6½ years); but on the agreement of the parties. The NHS LA conceded a 5-year replacement period in *Ellison* [178] but fought for 8 years in *Robshaw*, where the claimant's cross-attempt at a replacement every 4 years also failed, in favour of the usual 5 years [351]-[354].

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[30] This was the agreed vehicle in the recent case of *Pankhurst.*

[31] Most recently in *Manna* at [243]; cf. *AB v Devon & Exeter* where the Claimant was a single, middle aged man and a large Caravelle was not a reasonable cost for him [183]. The alternative to the Caravelle is the Mercedes V-class.

Of the earlier cases in Table 1, only in *Sarwar No.2* (and then with the same Judge in *A v Powys*) does there appear to have been a really thorough presentation of the potential claim (although *Smith* came close later on.) Note the substantially increased insurance for a large team of carers in which it was the fair assumption that there would always be someone under the age of 25 to increase the premium – *Sarwar* [65]-[68] cf *A v Powys* (where the evidence was lacking) and *Smith* (where the claim was at a much lower level for an ordinary car.) Foskett J allowed the claim for an additional £2,000 pa for insurance in *Robshaw* [359], rejecting the suggestion of £500 and a mid-point figure at £1,250. Driving lessons for new carers (£84pa) were rejected as unnecessary [360]; car washing and valeting was also disallowed on the basis that the claimant was likely to have incurred similar costs anyway [361].

A point of general application in the calculation was also covered in *Sarwar*, which was resolved on the basis of the evidence. Should the cost of the Entervan[32] (wheelchair side access) conversion be treated as part of the capital cost (to depreciate in line with the tables in PNBA *Facts & Figures* and so adding something to the resale value); or should it be treated as an immediate cost thrown away as in the conversion and adaptation of a property? On the evidence available in *Sarwar*, the conversion added nothing to the resale value compared with an unconverted vehicle. Disabled people would be wary of buying a second hand vehicle (which the disabled claimant would reasonably be changing); and it would be difficult to sell to the uninjured that had no need of the conversion. Hence it was a cost thrown away on each purchase [64.] The point was recently re-argued by the NHS LA in *Totham* with the same result [79]. It then agreed this approach in *Ellison* [178].

By way of contrast, where as a matter of fact a claimant is likely to have recourse to a vehicle under the *Motability* scheme, the costs are to be calculated by reference to the periodic cost of the deposit: see *Whiten* at [475][33].

A one-off expenditure of £96,000 was allowed in *Robshaw* (together with £1,000 pa refurbishment costs) for a Kon Tiki motorhome to enable the claimant to go on caravanning and camping holidays, a particular feature of his mother's family tradition [364]-[373]. Nevertheless, the claim for holidays was cut back to a significant extent on the assumption that the motorhome would be used for the main annual holiday one year in three [372]. When the allowance for weekend breaks was reduced from £3,000pa to £1,000pa because of the motorhome [373]. It may appear that the provision of the motorhome had, by now, become a Pyrrhic victory; agreement, however, of increased holiday costs - not articulated in the Judgment - at £7,198 pa in the years for its use for the main holiday means that this is not so. A similar claim in *AB v Devon & Exeter* was rejected [187] for a middle-aged, single man (high paraplegia) with a chaotic lifestyle.

Holidays

See the tables for the fine detail of recent awards. The evidence in any given case is crucial; and awards range considerably.

In *Sarwar No.2*, outward bound courses at £800 pa were not allowed [77] on top of £10,000 pa already allowed for the additional cost of holidays [72]-[76.] Contrast *Lewis*, where on the facts expensive foreign travel was not found to be a useful benchmark, rather holidays in the UK and Northern Europe, using the Caravelle and equipment taken from home with very little extra cost - £1,250 pa [221.] Contrast again *Burton* in which foreign holidays in the past were allowed subject to offset for what would have been spent [191.] £5,000 pa was the award in *A v Powys*. Field J in *Noble* awarded [115] – [119]: £4,000 for the travel and holiday costs of 2 carers + £750 extra for the accommodation of the Claimant and his partner +

[32] The Chrysler Entervan solution was again the reasonable solution in *Noble v Owens* [2008] EWHC 359 (QB.)

[33] Unusually for a Motability vehicle, an allowance of £1,500 pa seems to have been made for insurance – agreed by the OTs. Usually insurance, maintenance etc, are found under the scheme; the only real cost is fuel.

additional costs of 3 weekend breaks at £500 each = £6,250 pa. Penry-Davey J in *Smith* was only persuaded to £3,000 and one holiday a year.

In *Pankhurst* the Claimant (a C4 tetraplegic) had, before the accident, spent about 6 months of the year (during the winter months) touring Europe in a luxury motor home. The claim was for £51,500 pa to try to replicate 4 months of the year in a villa in Europe, involving flying out 2 teams of carers on a fortnightly rota to wherever the Claimant happened to be. The claim was rejected for many reasons, most notably that it was unreasonably expensive; and unworkable since a team of staff could never be recruited (all female at the Claimant's insistence) in the rural area where the Claimant lived who would endure such working/travel conditions.

In *Whiten*, a claim was made on behalf of a child with severe cerebral palsy to fund the adaptation/equipping of a long-term holiday home in Northern France. The claim was rejected since the sums involved were *very substantial indeed and would be disproportionate to the benefit which would be derived by the claimant since he would be staying there for no more than a few weeks a year* [523.] An allowance of £5,000 pa with a broad brush was made for holidays after the age of 12 for life [527.] A broadly similar end result (£5,017 pa) was the result in *Streeter* [252].

In *McGinty v Pipe* [2012] EWHC 506 (QB), HHJ Foster QC (sitting as a High Court Judge) accepted that the claimant, who had serious orthopaedic and vascular injury to a leg, would find long haul flights in economy class *very uncomfortable*. He declined, however to award the claimed £2,585 pa[34].

> … I do not think she would have taken a long haul flight every year or that the additional cost with proper investigation is £2,585, or that a whole life multiplier is appropriate. I allow £1,250 x 2 x 12, £30,000, plus the D's figure of £1,360 for priority boarding; Total £31,360.

In *Ellison*, having awarded the hydrotherapy pool at home and found for the Claimant on many aspects of the large accommodation claim, Warby J allowed increased costs of holidays only to the age of 19. He found the provision would be unreasonable after the end of wider *family holidays* since the Claimant's own appreciation of them was so limited. He finessed his earlier invocation of the *full compensation* principle (surely showing that the real basis of assessment is *reasonable damages*) as follows [172]-[173]:

> "… I do not believe that the requirement to put Ayla in the position she would have been in should be taken too literally, as enabling her to travel to such places as she would have gone uninjured. … 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. The physical enjoyment of sunshine ... can be substituted in other ways, a principal means being hydrotherapy.

In *Robshaw*, the NHS LA agreed the additional cost of holidaying (taking 4 commercial carers) in a serious case at £11,000 (going to Europe) and £14,000 (flying long haul) [367]. Considering also the use of the motorhome (see above), the main holidays would run in a 3-yearly cycle [372].

On the facts of *HS v Lancs.* (where the family might go to India for 3-4 weeks a year to visit the extended family), the full commercial UK care costs were not discounted for the chance of a saving but the holiday award was reduced to £5,000 pa with a broad brush [43].

In *Manna*, 3 (including the Claimant) business class flights were allowed rather than the 4 claimed; the remaining family was old enough to fly separately in standard [241]. Only 2 commercial carers were to accompany holidays [218] despite this being a *total double up* case, which can only have been based on the

[34] Judge Foster QC also made robust findings as to the provision of a silicone cosmesis by Dorset Orthopaedic: *I am not convinced C will regularly use the silicone cover. She will probably try it and I make provision for 1 replacement… I do not think C will go to Dorset Orthopaedic every year and I halve item 7* …

family being involved while all were away together.

In *AB v Devon & Exeter*, having rejected the motorhome purchase argument *supra*, Irwin J found that the claimant, who had a pre-existing hard drug habit and had shortly come out of prison, was unlikely to remain abstinent. The discussion is brief but it would appear unlikely that he had much of a track record of real holidays. The award was of £1,500 pa for holiday costs, which could include the hire of a motorhome if desired – see [187] and Appendix 1 to the Judgment.

Deputyship and Court of Protection costs

Until recently, usually this head of damage has been agreed and the Courts have approved settlement of the issues. Back in 2004/5 after *Eagle v Chambers No.2* a sum of about £5,000 pa was not unusual. It may be useful to see what has been approved since then.

	Year of approval	Lump sum award / life multiplier	First/second year - £ (if known)	Annual - £ (after first year or derived average)
Iqbal	2007	-	13,000	7,647
Lewis	2007	-	9,400 / 5,875	4,700
Massey	2007	170,000 / 23.43	-	7,250
Taylor	2007	-	-	13,634 [35]
Smith	2008	267,781 / 34	-	≤ 8,000
Huntley	2009	321,003 / 28.75	-	≥ 11,000
Sklair	2009	204,312 / 20.80	-	≤ 10,000
Whiten	2011	-	17,898	9,211 [36]
Ali	2013	300,000/29.56	-	≥10,000
Farrugia	2014	-	11,463	11,463 [37]
Totham	2015	275,784 / 24.6	-	11,211
Ellison	2015	22,235	10,500	10,500
HS v Lancs.	2015	310,263 / c. 25.5?	-	12,167
Manna	2015	332,000 / 28.43	-	11,678

There have now been 2 decisions of the High Court. *Tate* (2014) was a case of severe head injury where the Claimant would be very difficult to handle and manage. The Claimant's evidence from his Professional Financial Deputy went surprisingly unchallenged: large sums were awarded [49]-[50]. The breakdown is somewhat unclear from the Judgment but it look like the Professional Deputy's fees alone were to be £14,000 + VAT pa, with supervision fees, security bonds etc. on top. The overall annual figure may have been around £20,000. In addition, a lump sum of £100,000 was awarded to cover the replacement of deputies (£8,288 claimed), statutory wills (£13,148 claimed), a pre-nuptial agreement and best interests/deprivation of liberty applications (£238,060 claimed.) The case may be of most interest as a reminder to both sides [1] to obtain evidence and [2] claims may be very substantial, especially for difficult young men.

If we thought *Tate* was an aberration because of lack of evidenced opposition, the award of Foskett J in *Robshaw* (2015) shows a very significant step up. The Judgment repays careful reading at [433]ff for the fine

[35] Provisionally awarded as a PPO with a lump sum of £8,000 to cover special items.

[36] In addition:

Statutory wills	in 2022 / 29	at current cost of £5,380 each
Replacing deputy	in 2017/27/37	at current cost of £1,700 each
Cost of winding up	on death	at current cost of £1,200

[37] This was awarded as a PPO indexed to Guideline Hourly Rates for Solicitors at Grade A National Band 1, see [119] and the Schedule at the foot of the Judgment.

detail, which is beyond the scope of this discussion. As with other aspects of that case, Foskett J made it plain that his decision was based on the specific facts:

> Just as I do not find much assistance by reference to other cases, I would not expect to see what I decide in this case to be cited in support of or against a claim for Deputyship costs in another case. At all events, on any view, [the claimant's] situation is very different from that of the claimant in *Whiten*.

Foskett J awarded £43,500 in year 1, £30,900 in year 2, £20,800 pa then to age 18, and £23,200 from age 18 for life. The award in *Manna* (see the table) was agreed and approved after *Robshaw*. Readers will have to form their own conclusion on the utility of the above illustrative table of approved awards and where any benchmark might be.

Nevertheless, there may be the odd case justifying a very high award in the first year after trial. At least the Parties agreed as much in *AB v Devon & Exeter* - £39,023 [188] - when a professional deputy would have much to do and many difficult decisions to make given the substantial reduction agreed for liability risks. Once the difficult decisions and capital purchases had been made, however, Irwin J found that the claimant would have capacity to handle his own property and affairs. While it was likely that he would lose capacity again at some stage, this would be because of returning to his pre-negligence abuse of hard drugs with serious effects on his mind; recovery of deputyship fees after the first year was precluded by the *ex turpi causa* principle [88]. He awarded the costs of a statutory will in the first year at a cost of £9,060 [189] but followed Silber J in *Owen v Brown* [2002] All ER (D) 534 in refusing to award the costs of a trust since it could be broken at will once the claimant recovered capacity after year 1 [190].

Miscellaneous items

Credit against interest for interim payments

In *Massey* the defendant wanted credit at the full rate of interest for interim payments; the claimant offered credit at only the half rate. On the facts the half rate was appropriate:

> The payment on account was not, so far as I am aware, attributed to any particular item of expenditure though it was spent on his needs. The logic of giving credit for the notional interest accruing on this payment from the date of payment until judgment is that the Claimant has not been deprived of the use of that money from the date on which it was paid. Since almost all of the past losses consist of recurring expenditure on which interest is awarded at half rate the fair approach appears to me to give credit at the half rate as contended by the Claimant. [56]

This result can usually be avoided by defendants, however, by more careful calculation of appropriate interest on individual heads of damage in the first place and contesting the calculation of *notional interest* - see the above quotation - in the first place. To the extent that the Claimant already has money on account, it surely stops interest accruing in the first place

The idea of an interim payment *stopping* the accrual of interest (rather than it continuing with a credit calculation at the end) was the approach of the Parties and the Court in *Manna*. There, a substantial payment had been ordered without stipulating against which heads of damage it was to be offset later - against special damages (the Claimant's position, given the low special account rate) or general damages (the Defendant's position.) Cox J found that the usual assumption is that an interim payment is made to fund expenditure that will become part of the claim for special damages. Accordingly, in the absence of express stipulation that interest on general damages would be stopped to the extent of the payment, it was to stop the accrual of interest on special damages [184].

Travelling expenses

The cost of travel to medico-legal examination was disallowed in *Lane v Personal Representatives of Deborah Lake (Deceased)* Lawtel 2007 by John Leighton Williams QC sitting as a Deputy High Court Judge on the basis that it was properly a matter of costs [41.]

In *Tagg v Countess of Chester Hospital Foundation NHS Trust* [2007] EWHC 509 (QB) mileage for visiting in hospital in 1999 was awarded by McCombe J at 36p per mile bearing in mind depreciation as well as basic running costs [84.] Similarly in *Burton,* Flaux J rejected the defendant's lower rate and awarded 35p per mile at 2004 rates [199.] In *Streeter*, Baker J allowed [201] 40p per mile against the defendant's suggested 20p (and even against the suggested compromise of 30p) - there was clearly extra wear and tear and depreciation in 17,212 additional miles for visiting in hospital in late 2004/2005. Nevertheless, without reference to any of the above cases or the level of mileage claimed (hence depreciation), HHJ McKenna, sitting as a High Court Judge, allowed [92] only 25p in *FM v Ipswich Hospital NHS Trust* [2015] EWHC 775 (QB).

JJR
1 February 2017