Clinical Negligence

St John's CHAMBERS

Birth Injury Claims

Monday, 15 October 2018
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> “This leading set attracts vast acclaim for its strength in depth, as sources note its ‘great profile across all areas of clinical negligence.’

CHAMBERS UK, 2018 CLINICAL NEGLIGENCE

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Justin undertakes clinical negligence work for both Claimants and Defendants with experience of a wide variety of claims including birth injury claims, spinal injury, nursing care, psychiatric treatment, cosmetic surgery errors, misdiagnosis/delay in diagnosis, incorrect prescription, negligent dental treatment, surgical injuries and fatal claims.

As an advocate and litigant Justin has considerable experience representing parties at inquests, and drafting complex high value Schedules of Loss in brain, catastrophic and fatal accident claims.

His most recent cases within clinical negligence include:

- *C v County Durham & Darlington NHS Foundation Trust* (misdiagnosis/failure to diagnose Crohn's disease).
- *G v NHS Commissioning Trust* (Claimant suffered Erb's palsy at birth).
- *W v Betsi Cadwaldr* (failure appropriately to treat rejection episode following corneal transplant).
- *S v University Hospital of Morecambe Bay* (failure to diagnose and then treat infected abdominal aortic aneurysm which led to Claimant's husband's death).

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Birth injury claims – quantum issues

Justin Valentine, Barrister, St John's Chambers

Birth Injury Claims, Quantum Issues: A Review of Recent Cases

Justin Valentine, Barrister, St John's Chambers

Published on 8 October 2018

Introduction

This seminar is an overview of several, complex areas of the law many of which could justify a separate seminar. The approach taken is a summary of recent reported cases to gain insight into the approach taken by the Courts on those issues. Summaries of the cases reviewed are attached.

This approach will hopefully assist in contributing to greater awareness of how to approach the separate issues to achieve the best result. For example, it is clear in relation to care claims that the credibility of the expert is paramount.

As a general point, emphasis should always be given to the issues on which the largest sums depend, for instance life expectancy and any annualised loss; most particularly care. In many of the cases it appears that considerable effort was put into marginal issues which had little effect on the overall award.

It is well worth reading the judgments on particular issues. The judgments are long but generally there are headings so the relevant sections can generally be read almost in isolation.

Facts & Figures is very helpful for keeping up-to-date (and not overly expensive).

Case Summaries attached

1. *Leo Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB)

2. *HS v Lancashire Teaching Hospitals NHS Trust* [2015] EWHC 1376 (QB)

3. *Lamarieo Manna v Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC 2279 (QB)

4. *R v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] 1 WLR 4847

Life Expectancy

There was a significant debate on life expectancy in *Whiten*. Small differences in life expectancy will result in significant changes to the overall award. It is suggested that expert dealing with life expectancy should be competent to do so and that the matter be explored in detail.

When life expectancy is reduced and the experts have provided a figure then a whole life multiplier rather than the multipliers for pecuniary loss for life are utilised on the basis that the risk of mortality is already built into the reduced figure[1].

Periodical Payments

These will be appropriate in the most serious of cases though are less popular with a negative discount rate. There appears to be a consensus in the cases as to the appropriate index for uprating care awards (80th or 90th centile of ASHE 6115). For aids and appliances the RPI is appropriate (which will generally be lower).

Double Recovery

Following *Peters v East Midlands SHA* [2010] QB 48 there is no duty to mitigate by seeking local authority care. This raises the possibility of double recovery especially as the deputy has a duty to maximise state provision. The solution suggested in *Peters* is an undertaking by the deputy to amend the terms of the court order by which the deputy acts so as to limit the deputy's power to apply for state funding. Senior Judge Lush in *In the matter of TACP*, unreported, 25 September, 2009 (Court of Protection case number 11497825) approved a variation in the following terms:

> *"The Deputy, as appointed from time to time, shall be precluded from making any application for public funding of the Claimant's care, case management and accommodation needs, whether under section 21 of the National Assistance Act 1948 or section 3 of the National Health Service Act 2006 or section 47 of the*

1 For example, the multiplier from Table 7 Loss of earnings to age 60 for a 20 year old is 45.67 whereas the Ogden Table 28 figure for 40 years is 46.68.

National Health Service and Community Care Act 1990or any other or successor legislation unless:

(1) The Deputy gives the Defendant three months' notice in writing that he or she intends to ask the Senior Judge of the Court of Protection for permission to make such application for public funding and gives the Defendant the information which will be considered by the Senior Judge; and

(2) The Deputy applies, on notice to the Defendant, to the Senior Judge of the Court of Protection for permission to make any such application; and

(3) The Senior Judge of the Court of Protection, having first heard the Defendant or having given the Defendant the opportunity to be heard, grants such permission."

In *F v Yorkshire and the Humber SHA*, the Claimant's deputy gave an undertaking to seek an order in similar terms. There seems to be no persuasive reason why such an order should not be sought before compromise or adjudication on the final award.

Accommodation

Subsequent to *Swift v Carpenter* [2018] EWHC 2060 (QB) claims for accommodation following the *Roberts v Johnstone* methodology are unsustainable. Unless or until the discount rate becomes positive it seems unlikely that any award will be made. It appears that attempts are being made to sidestep the judgment by seeking awards for rental of appropriate properties rather than outright purchase.

Therapies

There are regularly skirmishes about a huge range of equipment and therapies. These are on a case by case basis.

Care - Key Issues

The cases selected are perhaps not typical since they all involve catastrophic injuries. However, the following general propositions can be made:

1. Care experts. Practical experience of undertaking case management will inevitably gain more traction with the judge; see eg *Whiten* and *R v Sheffield.*

2. Live-in Care. This has been out of favour for some time. This is even the case when a resident carer package is proposed on a directly employed basis; see eg *Burton v Kingsbury* [2007] 2091 (QB) at para 65. In *Corbett v South Yorkshire*

SHA, 28th March 2007, Judge Bullimore held that live-in care would not comply with the Working Time Regulations 1998. In *Iqbal v Whipps Cross University Hospital NHS Trust*, the Defendant made a concerted effort to provide a care regime which would comply with the Working Time Regulations. This was rejected by the judge:

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.

3. See, more recently, *Whiten,* where logistical/management issues were paramount.

4. Team leaders are generally accepted as necessary and paid at an enhanced rate. See, eg, *Whiten.*

5. 60 weeks per year is considered standard; see *Farrugia* and *Whiten*. This includes paid holidays, bank holidays, double rate for public holidays, seven days of paid sick pay and training.

6. Employers' Pension Contributions will be included though there is evidence of a broad-brush approach; see *R v Sheffield*.

7. One or two carers. This is a factual exercise. The Courts lean against the suggestion that parental help should bridge the gap; see *Manna* and *HS*.

8. Sleeping v waking night care. Where there is sleeping night carer much of the disagreement revolves around the number of nights to be allowed for sleeping care to become waking care. In general sleep diaries have assisted the Claimant's analysis; see *HS* and *R v Sheffield*.

9. Two night carers or one. In the most serious cases the Courts lean towards one waking carer and one sleeping carer (with contingency payments). See *HS*.

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8 October 2018

Case Summaries

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Leo Whiten v St George's Healthcare NHS Trust [2011] EWHC 2066 (QB)

Justin Valentine, Barrister, St John's Chambers

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Case Summary

Brief Facts

1. C injured at birth, 24th June 2004. Seven at date of trial. Suffered profound hypoxic ischaemic damage. Severe quadriplegic cerebral palsy. Limited mobility. General damages £235,000. Trial on damages before Mrs Justice Swift. The total award was over £6,000,000.

Medical Experts

2. For the Claimant:

   (a) Dr Miles, Consultant Paediatrician.

   (b) Mr Baldwin, Educational and Paediatric Psychologist.

   (c) Mr Paterson, Consultant Orthopaedic Surgeon (in relation to hip problems, evidence agreed).

3. For the Defendant:

   (a) Dr Thomas, Consultant Paediatric Neurologist.

   (b) Dr Hood, Consultant Paediatric Neuropsychologist.

Life Expectancy

4. Dr Miles and Dr Thomas gave oral evidence. Key issues were mobility, feeding skills and interpretation of the Strauss data.

The Appropriate Multiplier

5. The Claimant argued that the whole life multiplier should be utilised with reference to Ogden Table 28. The Defendants sought application of Ogden Table 1 "Multipliers for pecuniary loss for life (males)" which introduces

mortality risks. The judge ordered that Ogden Table 28 be utilised on the basis that life expectancy had been established separately by the paediatric neurologists who assessed the Claimant's life expectancy by reference to his mortality risks as a whole.

Periodical Payments

6. A periodical payments award was agreed in relation to care and case management. The 90th centile[1] of the Annual Survey of Hours and Earnings (ASHE) 6115[2] was utilised.

7. The Court also ordered that a periodical payments order be made for loss of net earnings uprated by reference to the ASHE earnings data for gross annual pay for all male full-time employees in the UK.

Loss of Earnings

8. The judge commented:

113. Given the claimant's age and disabilities, it is not possible to form any view of his employment prospects save by reference to the educational and employment attainments of his parents and other members of his family

9. On the basis of that evidence the judge awarded a sum for loss of earnings greater than average male earnings.

Care Experts

10. Of Mrs Sargeant for C, the judge said:

126. Mrs Sargent has very considerable experience in assessing the care needs of persons with severe disabilities living in the community and of setting up and supervising appropriate care packages for such persons. She is currently a director of a national care consultancy, Community Care Management Services Limited (CCMSL) which, inter alia, provides case management services for clients with profound disability. Her wide and varied practical experience enables her to speak with considerable authority on the merits and demerits of different types of care regime.

11. Of Ms Douglas for D, the judge said:

127 Ms Douglas has worked for the last 19 years as consultant/adviser to care providers from the statutory, private and voluntary sectors. That work has involved maintaining close links with care and case managers who co-ordinate domiciliary care regimes on an individual and group basis. Ms Douglas does not undertake case management herself, nor does she have experience of managing and supervising personally care regimes for individuals with complex disabilities in a domestic setting. Those features make her less able than Mrs Sargent to speak with authority on some aspects of the care claim. Nevertheless, her

1 The case does not specify why the 90th centile was used but this presumably follows *Sarwar v Ali* [2007] EWHC 1255 (QB) where it was argued by Dr Wass, and accepted by the Court, that the care rates for a severely disabled child are higher than the mean or the median.

2 ASHE 6115 is the occupational code which relates to wages paid to care assistants and home carers.

evidence was careful and considered and I found it helpful in a number of respects.

Key Issues as to Care

Aggregate or Basic Rate of Pay for Past Gratuitous Care.

12. The judge was "*quite satisfied therefore that, in the circumstances of this case, it is appropriate to value the gratuitous care given by the claimant's parents throughout the relevant period at the aggregate NJC rates used by Mrs Sargent.*" (para 141).

The Employment of a Team Leader.

13. The judge weighed the respective submissions of the experts as follows:

Mrs Sargent's evidence was that the care regime is likely to work more effectively if one carer with an appropriate degree of experience is designated as "team leader" and is paid an enhanced rate for carrying out additional duties over and above his/her role as part of the care team. (para 158)

The defendant's case is that the appointment of a team leader is unnecessary and may well be counter-productive. Ms Douglas's evidence was that the claimant's needs are not sufficiently complex or unpredictable as to require the input of a team leader. She considers that the claimant's care regime has worked well in the past without a team leader. (para 159).

14. The judge held:

I accept that the claimant's needs would best be met by the appointment of a team leader in accordance with the arrangements described by Mrs Sargent. She has very considerable experience of setting up and monitoring private care regimes and of evaluating their success. I accept her evidence that the team leader model works well in practice and is required in this case in order to give the care regime the best possible chance of achieving continuity and stability. The appointment of a team leader will provide promotion prospects for members of the care team. I do not consider that the employment of a team leader, if properly managed, would give rise to the difficulties described by Ms Douglas. (para 163).

15. The judge therefore allowed an enhanced rate of £16 per hour (as opposed to £13/hour Monday-Friday and £15/hour Saturday and Sunday).

Allowance for Replacement Care to Cover Holidays, Sickness and Training Periods.

16. C argued for an additional 8 weeks per annum. The judge held:

I consider that Mrs Sargent's approach provides a far more realistic estimate of the costs that are likely to be incurred. I have therefore adopted her method of calculating the costs of replacement care. (para 168).

Employers Pension Contributions.

17. The judge noted in respect of C's submissions:

Mrs Sargent has included estimated future pension contributions within her costings and a claim is made in respect thereof. On behalf of the claimant, it is said that, although the precise details of the scheme are not yet certain, the payment of pension contributions for employees will be a legal requirement in the future. It is likely that most members of the claimant's care team will fall within the relevant provisions and that contributions will have to be made for them. If no award is made under this head, there will be a shortfall in the claimant's periodical payments for the costs of care and he will be under-compensated." (para 173)

18. The judge held:

It does not seem to me that I should ignore the effect of the provisions of the Act, which are already enshrined in statute, albeit not expected to come into force (at least insofar as the claimant is concerned) for some time. (para 175)

Care from the Age of 19 Onwards: Directly-employed v Agency Live-in

19. The cost of care was split into three periods, from the date of trial to the age of 11, from 11 to 19 and from 19 onwards. The most significant disagreement concerned the form of care from 19 onwards:

Mrs Sargent and Ms Douglas differ significantly in their approaches to the claimant's care from the age of 19 years. Mrs Sargent's view is that his needs will best be met by continuing the previous regime of a directly employed team of carers, expanded so as to provide him with two carers for 14 hours per day, together with a night sleeper for 10 hours per night (para 199).

Ms Douglas considers that a better arrangement would be to provide a live-in carer (in practice probably a number of live-in carers, working in rotation) working in conjunction with directly employed carers (including a sleep-in carer) working shifts. The live-in carer would work for 8 hours during the day and would be entitled to 3 hours' rest within that 8-hour period. Other carers would provide 10 hours' care per day during the week and 12 hours per day at weekends, together with sleep-in care every night." (para 200).

20. The judge preferred Mrs Sargent's evidence supported as it was by practical experience of the competing care regimes:

203 Mrs Sargent's evidence was that the use of agency staff was unlikely to work satisfactorily. Although a good agency will attempt to provide continuity of care, in practice it is difficult to find live-in carers who are prepared to do the job on a permanent basis. People often take live-in posts as temporary "fill-in" jobs because of their own personal circumstances at the time. When their circumstances change, they move on. In addition, agency staff are paid significantly less than the rates paid to directly employed carers. Mrs Sargent's experience is that agency staff tend to be of lower calibre than staff who are recruited directly and often have less commitment to their clients than members of a directly employed care team. Mrs Sargent said that the fact that the live-in carer would be entitled to a 3-hour rest period in the middle of the day would also present problems. The claimant would require the assistance of a second carer throughout the day. He may wish to go on an outing lasting all or most of

the day. The fact that, for 3 hours of every day, he would have only one carer available would place a significant restriction on his activities.

204 On this issue I have no hesitation in preferring the evidence of Mrs Sargent to that of Ms Douglas. No doubt there are cases in which Ms Douglas's proposed care model works well. However, it is entirely dependent on the calibre and commitment of the individual whom the relevant agency is able to provide at any given time. There is an obvious potential for rapid turnover of live-in staff and for difficulties in ensuring that any replacement/relief staff provided by the agency — perhaps at short notice — are fully and properly trained in the claimant's needs. There is also a potential for confusion of management responsibilities between the case manager and the agency, and for conflict to be caused by an arrangement whereby live-in carers are working alongside higher paid, directly employed staff. Moreover, Ms Douglas's proposed regime would inevitably leave the claimant for 3 hours every day without a second carer. That would not be in his best interests.

205 I am satisfied that the claimant's needs would best be met by the recruitment by his case manager of a team of carers who would, between them, provide care for him round the clock and would work under the direct control and management of the case manager, assisted by the team leader. I consider that this arrangement has the best chance of providing continuity of care for the claimant and of ensuring that, at all times, those caring for him are fully trained to meet his specific requirements, in particular his mobility, communication and feeding needs. The existence of a team of carers should mean that periods of illness, holidays and other absences can be covered by carers known to the claimant and appropriately trained. I recognise that such a care regime will inevitably mean that a significant number of people will be visiting his home on a daily basis. I also recognise that, during the night, only one carer will be present. However, since it is envisaged that the claimant will be living with his parents throughout his life, it is likely that one or other of them would be available to help in the event of an emergency. In any event, I consider that the advantages of Mrs Sargent's proposed regime significantly outweigh any disadvantages. I therefore accept her costings for this period.

Deputyship Costs

21. Each party instructed solicitors with expertise in deputyship work. There was little difference between the two parties.

Therapies

22. A number of experts were instructed by each party in relation to therapies. In relation to past therapies the only dispute arose in relation to membership of a private club for swimming. The judge held that:

I find that the overwhelming probability is that the claimant's parents would in any event have taken out membership of a private leisure club so as to enjoy swimming and other activities with their children in more comfortable conditions than those offered by a public facility. I make no award for this item.

23. There was agreement that ongoing physiotherapy would be required but a dispute as to the amount.

24. There was a claim for aquatic physiotherapy. No award was made.

25. There was a claim for hippotherapy which is exercises performed in lying and other positions on a pony (the Claimant would not be able to ride). A small sum was awarded.

26. A substantial award was made for speech and language therapy.

Psychological and Educational Issues

27. An award was made for ongoing psychological input.

Legal Representation at a Disability and Special Needs Tribunal and the cost of employing a one to one education assistant

28. Legal representation was sought to cover the eventuality that the claimant may move and the funding of a one to one classroom assistant was removed. In the event, the former was agreed and a highly discounted sum allowed for the latter to cover the risk of funding being refused and the appeal being unsuccessful.

Occupational Therapy

29. Both OT experts gave oral evidence. A substantial award was made.

HANDLE Therapy

30. HANDLE is a type of sensory integration therapy. It was not supported by the physiotherapists and no award was made.

Specialised Aids and Equipment

31. The physiotherapist experts recommended a range of equipment. Much was agreed. There were various disputed items.

32. There were recommendations for specialist equipment provided by an orthotist. The claim was awarded in full.

33. There were items of specialised equipment recommended by the OT experts. Much was agreed. There were disputes as to items such as an all terrain buggy, a specialised bath, powered wheelchairs and a SMART chair.

34. The assistive technology expert recommended various aids and equipment such as a personalised laptop with special switches. AT review was also budgeted. The judge accepted the Defendant's argument that the Claimant would make little use of such equipment in light of his limited cognitive ability. An award was made for a "My Tobii" device (an eye tracking device).

Accommodation

35. The Claimant was likely to live with his parents for life so there was no claim for independent accommodation. However, there were disputes as to adaptation of his parents' property. The aim was for the Claimant to purchase a new property into which his parents would move. A Roberts v Johnstone calculation was made. A deduction was made to represent the value of the property that the family would have had in any event until the time the Claimant might have been expected to purchase his own own.

Transport and Travel

36. An award was made for a larger vehicle with a dicount to reflect the fact that the Claimant would probably have purchased a car at some point.

Miscellaneous Heads

37. There were a number of miscellaneous items as follows:

(a) Furnishings and equipment for carers' accommodation

(b) Additional costs associated with feeding and incontinence

(c) Costs of cleaning service

(d) Future costs of paying for decorating, do-it-yourself and gardening work

(e) Petty cash

(f) Holidays

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HS v Lancashire Teaching Hospitals NHS Trust [2015] EWHC 1376 (QB)

Justin Valentine, Barrister, St John's Chambers

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Case Summary

Brief Facts

1. C, born in October 2006, suffered a catastrophic brain injury as a result of negligent post-birth management by the Defendants. Bilateral spastic cerebral palsy. Profound cognitive impairment and behavioural problems. Eight at trial. Liability was admitted. General damages agreed at £305,000. Trial on damages before Mr Justice Davis. The issues in dispute were limited to:

   (a) Future care

   (b) Case management.

   (c) Loss of earnings.

   (d) Additional cost of holidays.

   (e) Hydrotherapy pool.

2. The remaining heads of agreed damage were approved by the judge on a broad brush basis. The list of those heads could provide a useful checklist (as set out below).

Care - Key Issues

One Day Time Carer or Two Before Adulthood

3. There was an issue as to whether the division between day and night care should be 12:12 or 14:10 when C is an adult (there was agreement that it should be 12:12 until then) in the event resolved at 14:10. However, the more significant issue was whether two full time day carers were required until she reached 19:

   The significant dispute is as to the level of care recoverable until HS reaches the age of 19. Her case is that she should recover the cost of two full time carers throughout the day for the whole of that period. The Defendant's case is that

until HS reaches the age of 11 the cost of only one full time carer will be recoverable. From that point until HS reaches the age of 19 the Defendant contends for one full time carer with a second carer for part of each day. Thereafter it is agreed that there will have to be two full time day carers. (para 14).

4. The judge concluded:

18 I am satisfied that the cost of two full time carers during the day is recoverable forthwith and throughout HS's remaining childhood and teenage years. The facts of every case are different. Here the Claimant is profoundly disabled. Any kind of movement of her requires the attendance of two carers because of her disability and the potential for behavioural disturbance. The points at which two carers might be necessary will be wholly unpredictable. It is unrealistic to suppose that one of the parents necessarily would be available at the relevant point. Both aim to work full time albeit on differing shift patterns. There are two other young children with whom they will be concerned. The kind of care which HS requires is light years away from the supervisory role which would be required for a child between the ages of 8 and 11. Even though HS is only 8 years old, I am satisfied that a regime of two full time carers is necessary and proportionate. I am further satisfied that, in the particular factual circumstances of this case, JS and AS will maintain that arrangement.

Waking or Sleeping Night Carer

5. C contended for one waking carer and one sleeping carer. D initially contended for one sleeping carer only albeit that approach changed during trial when confronted with sleep diaries (presumably requested after receipt of D's care report):

20 Until the commencement of the trial there was a very significant dispute as to the level of night care required. On behalf of HS it was said that a waking night carer was required because of HS's tendency to wake regularly during the night and to become distressed or disturbed if not attended to immediately. The Defendant's case was that a sleeping night carer would suffice. That position changed as a result of the Defendant's care expert considering sleep diaries maintained by HS's current carers from the middle of October 2014 to the middle of February 2015. These demonstrated that a waking night carer was required. However, the need for a second night carer – to be employed as a sleeping night carer – remained in dispute.

6. The judge concluded, based on examination of the sleep diaries, that a second night carer would be required (para 21).

7. D then sought to argue that until 19, it would be reasonable and proportionate for that second carer to be one of the parents rather than professional care. The judge rejected this submission:

Miss Bowron Q.C. also argued that waking to deal with a disturbed child at night is all part and parcel of being a parent. That of course is correct. But any parent who was disturbed to a significant degree by a child aged 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. I am satisfied that it is reasonable and proportionate for a second night carer to be provided as a sleeping night carer. (para 22).

8. The judge further held that the contingency weeks when the sleeping carer should become a waking carer would be four weeks per year (para 24) when a 12:12 division applied and two weeks per year when a 14:10 division applied (para 25).

Loss of Earnings

9. The parents in this case were first generation immigrants which was relevant to the assessment:

37 If HS's siblings were older, there might be some useful information to be gleaned from their progress. Since they are only 4 and 2, there is not. JS is a qualified nurse. Whilst AS works as a machine operative in the UK, his qualifications in India were to post-graduate level. It follows that there is some assistance to be gained from considering the intellectual capacity of the parents. Moreover, they are first generation immigrants to the UK who came here to further themselves and to give their children a better opportunity to progress. Wholesale generalisation of how the children of such families progress would not be a reasonable basis on which the determine HS's likely path had she not been catastrophically damaged by the Defendant's negligence. Equally, the ambition of such families for their children is a relevant consideration.

10. In the event the Court made a broad brush award for loss of earnings:

39 The various calculations made by the parties provide varying figures between £223,063 and £327,511. At the conclusion of his submissions on this topic Mr Featherby Q.C. suggested that "a round view" of this head of damage might be appropriate. He argued for an award of £300,000 on that basis. I agree with Mr Featherby Q.C. that a relatively broad brush lump sum approach is appropriate. It does leave the risk that HS will be under-compensated. I do not suggest that JS's initial ambition and hope for her first child – that she should become a doctor – would have been achieved. But it is not wholly unrealistic for her to have harboured that ambition. Had it come to fruition HS's earnings would have been very much more than the figures set out above. Nonetheless, I consider that Mr Featherby's proposed lump sum figure is appropriate. I award £300,000 for loss of future earnings.

Holidays

11. There was a dispute between the parties as to whether the Claimant was entitled to the additional cost of holidays to India, the Defendant arguing that it was unrealistic that the Claimant could go to India on holiday. The judge made a broad brush award of £5,000 per annum without making any findings on where those holidays might be.

Hydrotherapy

12. There was no expert evidence to support therapeutic benefit of a hydrotherapy pool. Rather, " *The claim is put on the basis that HS has few real pleasures in life*

and that it would be reasonable for her to be provided with something that will give her pleasure for her lifetime."

13. The judge rejected the claim for home hydrotherapy but allowed twice weekly visits to a private facility s a total capitalised cost of £125,000.

Agreed Heads

HEAD OF LOSS	**£Amount**
General damages (inclusive of interest)	305,000
Past losses	
Care and assistance	270,000
Case management	50,000
Equipment	1,750
Holidays	3,279
Physiotherapy	16,171
Speech and language therapy	2,121
Neuropsychology	7,275
Occupational therapy	6,445
Miscellaneous	20,000
Interest	29,000
Future losses	
Care and case management (up to commencement of periodical payments)	146,895
Equipment	400,000
Loss of earnings	300,000
Transport	250,000
Holidays	128,000

Accommodation	820,000
Physiotherapy	134,800
Pool hire	125,440
Speech and language therapy	83,000
Neuropsychology	35,000
Chiropody	4,897
Riding for the disabled	6,500
Occupational therapy	48,000
Assistive technology	60,000
Music therapy	25,000
Court of Protection and deputy's costs	310,263
Miscellaneous	3,500
GRAND TOTAL	**3,592,336**

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St John's Chambers

8 October 2018

Lamarieo Manna v Central Manchester University Hospitals NHS Foundation Trust [2015] EWHC 2279 (QB)

Justin Valentine, Barrister, St John's Chambers

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Case summary

Brief Facts

1. C injured at birth, 20th December 1996. 18 at trial. Suffered severe brain damage resulting in widespread neurological dysfunction. Bilateral tetraparetic cerebral palsy. General damages £250,000. Trial on damages (on 50% basis) before Mrs Justice Cox.

2. Many heads of damages were agreed but there were substantial disputes in relation to care, case management, occupational therapy, equipment, transport and accommodation.

Purchase of a Land Rover

3. There was a dispute about the purchase of a Land Rover which was not an approved vehicle under the Motability Scheme. The family purchased this partly so they could travel to Scotland and go off road. There had been discussions with the OT expert, with the deputy and with the Motability adviser. The judge found that there had not been a failure to mitigate.

Multiplier

4. The Claimant contended for a whole life multiplier using Ogden Table 28. The Defendant contended for Ogden Table 1. The judge followed *Whiten* and adopted Table 28. The judge held:

187 In this case the parties have agreed a life expectancy of 67.5 years for the Claimant, being the mid-point between the life expectancy assessments of the paediatric neurologists. Those assessments were made by reference to this Claimant's mortality risks as a whole, not just those risks associated with his cerebral palsy, so the experts have already factored in impairment of life. The medical evidence has therefore established how long this Claimant can be

expected to live. As the authors of ***McGregor on Damages*** *(19th edition, paragraph 38-216) point out, "….since mortality will already have been taken into account in coming to a view on life expectancy, to use Tables 1 or 2 will result in a double discount, evidenced by the fact that the use of Tables 1 and 2 invariably produces a somewhat lower figure than emerges from use of Table 28….in paragraph 20 of its explanatory note….the point about double discount appears to have been missed by Ogden ."*

5. A deduction for contingencies other than mortality was applied to the relevant figure.

Loss of Future Earnings and Pension

6. There was no dispute as to the multiplicand for loss of earnings. The dispute concerned the pension. The claim was made on the basis of contributions that the Claimant's employer must make under recent pension legislation. The judge made the award sought.

Care - Key Issues

Two Carers or One with Provision for Double Up

7. The parties agreed that C required 24 hour care but disagreed whether two carers were needed at all times.

195 The central dispute between the parties relates to care in the home setting. The experts agree that Lamarieo needs 24 hour care. Maggie Sargent recommends that two carers should be available at all times during the day because of the particular challenges posed by Lamarieo and the difficulties presented for those who are providing that care. Liz Utting's recommendation is for one carer for 14 hours in the day plus additional hours for 'double up' purposes to be organised flexibly, for outings away from home and in times of need. This flexible care translates to 28 hours per week if he does not have a further education placement from the age of 19 and 14 hours per week if he does.

8. There was a dispute as to how challenging C's needs were but it was also apparent that D's expert had incorporated ongoing assistance from C's mother. The judge concluded:

203 … ultimately my clear view is that the recommendation of Mrs Sargent is the more persuasive, supported as it is by the other evidence in the case and my determination of the main areas of dispute between the parties as set out above. As Mr Seabrook fairly acknowledged, his submissions as to the appropriate level of care and case management would depend largely on my findings as to the nature and extent of Lamarieo's challenging behaviour and needs, and as to whether there has been the remarkable improvement he suggests, with still further improvement likely in the future.

204 Given my conclusions on those issues, I am in no doubt that in the case of this exceptionally challenging young man, two carers will be required at all times, for the sake both of his own safety and the safety of others. This provision will not, in my view, overwhelm or crowd him unnecessarily.

Experienced carers can avoid that risk and ensure that he has sufficient space while simultaneously ensuring his safety and well-being.

205 The weaknesses of Ms Utting's analysis were exposed in cross-examination. Although she stated that she was not proposing the incorporation of Lamarieo's parents into the care regime, this seemed to me to be implicit both in her report and in her evidence, at least so far as his mother is concerned. Lamarieo's ability to manage so far with one external carer is largely due to his mother fulfilling the role of second carer. Mrs Cocking's devotion to her son and her wish to remain involved in his life "as a mum" does not indicate her intention to continue to act as his carer. Indeed the evidence shows the opposite to be the case. She is now anxious to resume a normal family life with all her children, free from the heavy burdens imposed by Lamarieo's demanding and daily needs.

Sleeping Night Carer

9. The experts were agreed on the need for a sleeping night carer with waking night carer contingency for six weeks per annum (para 196).

Therapies

10. Awards were made for future physiotherapy, speech and language therapy and for hiring a hydrotherapy pool.

11. There was a significant dispute as to future OT and equipment. The judge preferred the approach of the Claimant's expert.

Miscellaneous Heads

12. The Court made awards for:

    (a) DIY/decoration.

    (b) Gardening.

    (c) Cleaning and laundry.

    (d) Holidays (on the basis of business class travel for the Claimant, one care and one care/parent).

    (e) Future travel.

    (f) Assistive Technology.

Accommodation

13. A claim was made for two properties, the principal home where the Claimant can live with his mother, stepfather and siblings, and a second home where he can stay with his natural father.

14. In relation to the principal home, the Defendant sought set off of the full value of the present family home. This was rejected:

274 The Defendant submits that I should deduct the full value of the present family home but, as Mr Seabrook fairly acknowledged, the decision in Whiten is against him in this respect. For the reasons set out by Swift J, in particular at

paragraphs 465 – 469, she considered it wrong in principle for the value of a property that would have been owned by the Claimant's parents to be deducted from the value of the new property to be owned by him. I entirely agree. Such a deduction would be unfair to the Claimant and would inevitably result in him being inadequately compensated for the loss of investment income on the capital value of the new property. In effect it transfers the parents' borrowing to the Claimant, as Mr Sweeting submits. It removes the asset which would otherwise be available to the family and the Claimant's siblings and prevents the parents disposing of their property as they wish. It precludes the parents from choosing to live elsewhere in retirement or in the event of any matrimonial breakdown. It also assumes that there is no mortgage on the property. I therefore reject the Defendant's submission as to deduction of the value of the family home.

15. On the facts the Court allowed the cost of a second home to enable the Claimant to stay with his natural father.

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R v Sheffield Teaching Hospitals NHS Foundation Trust [2017] 1 WLR 4847

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Case Summary

Brief Facts

1. C, born 14th November 1992, 24 at trial, suffered brain injury at birth. He suffered moderately severe spastic cerebral palsy and significant cognitive impairment. General damages agreed at £300,000. Liability admitted. Mr Justice Davis assessed quantum.

Pension for "Lost Years"

2. The Claimant brought a claim for loss of pension that he would have received during the "lost years", ie the years he would have lived had his life expectancy not been shortened (his life expectancy was 70). Whilst a catastrophically-injured child claimant is precluded from bringing a lost years claim, there was no bar to an adult claimant injured as a child bringing such a claim. The multiplicand was reduced by half to reflect his living expenses.

Accommodation

3. This claim was heard after the change in the discount rate to -0.75%. *Roberts v Johnstone* therefore yields a negative sum for any claim for accommodation. Accordingly, no award was made[1].

4. A substantial award was made in relation to adaptation costs however.

1 This was subject to appeal and the claim was compromised prior to the hearing of the appeal. That the Court considers itself bound by *Roberts v Johnstone* was recently affirmed in *Swift v Carpenter* [2018] EWHC 2060 (QB).

Care - Key Issues

Waking Carers versus Sleeping Carers

5. It was agreed that C required two carers around the clock. The issue was whether the night carers should both be waking carers or whether one could be a sleeping care (para 51).

6. The judge examined the sleep diaries (prepared by the professional care team on speaking to C's parents who continued to provide night care) and concluded that C would require two waking carers for the rest of his life (para 54).

The Amount of Case Management

7. This was dealt with as follows:

55 There is an issue as to the amount of case management required to manage the care package for R. Nicola White, the defendant's care expert, said that a care team leader (the cost of which was agreed between the experts as an extra £4 per hour for that individual) would take on much of the responsibility of a case manager. In her view 97 hours per annum would suffice—though her costings per hour are such that they equate to around 123 hours on the costings per hour of Mrs Sargent. Nicola White has expertise in relation to care packages and case management. However, her training was as an occupational therapist and that has been her main occupation to date. Within the last month she has worked as a case manager but not prior to that. Mrs Sargent has direct experience of case management stretching back 29 years. She said that the case manager should be budgeted on the basis of 150 hours per annum ie three hours per week. She said that R would have a large care package. He was someone who wanted to be as active as possible which would require organisation and risk management. In those circumstances, she said that three hours per week as an average was reasonable. I accept that evidence and the case management element of the care package should be costed on the basis of 150 hours per annum of case management.

Pension Contributions

8. The judge adopted a broad-brush approach to the claim for employers' pension contributions:

57 There must be an allowance for employers' pension contributions. In Whiten's case [2012] Med LR 1 Swift J concluded that 2% was the appropriate figure. Her rationale is set out at para 176 of the judgment. Although the financial climate has changed since the time of her judgment, I consider that the rationale holds good. The parties will be able to calculate the appropriate figure.

Heads of Damage

9. There was a considerable number of further heads of loss many of which were agreed. The damages ultimately awarded/agreed were as follows:

HEAD OF LOSS	CLAIMANT	DEFENDANT	Amount to be recovered post trial as a result of agreement or finding of the court
General damages and interest	TBQ	TBA	£300,000
Past losses			
Loss of earnings	106,620·71	71,751	
Care and assistance	665,469·84	414,079	
Therapy	32,542·37	28,467	
Aids and equipment	75,876·96	75,877	
Accommodation	8,505·88	8,506	
Miscellaneous	105,737·70	40,728	*4887
Travel and transport	73,168·45	17,300	
AT and camera equipment	21,932·58	12,000	
Court of Protection and deputy	54,237·10	31,373	
Interest	660,260·24	140,016	
Total of past losses	£1,771,809·46	£840,097	£1,112,338·00
Future losses			
Loss of earnings and pension	1,305,102·10	880,368	£1,194,666·00
Care and assistance	16,449,485·50	14,182,527	£189,313

Equipment	2,334,562·83	717,927	£1,189,289
Physiotherapy	722,761·07 (this has been reduced by C to reflect agreed hourly rate & on D's calculation the total should be c £610,211)	188,131·20	£501,277
Occupational therapy	125,010·60	44,702·80	£45,000
Speech and language therapy	56,121·60	43,172·56	£52,290
Podiatry	12,333·44	9,529·20	£11,000
Accommodation	2,867,030.06	5540,91	£840,000
Travel and transport	2,030,419·83	715,458	£1,462,474
Miscellaneous expenses	100,481·60	81,659	£90,000
Orthotics	46,283·74	36,463	£41,500
Court of Protection and deputy	1,448,740·10	541,212	£898,993
Total future losses	£27,498,332·50	£17,982,067	£6,515,802
Grand total	£29,270,142	£18,822,164	£7,928,140
PP for care and case management from 15.12.17 with first variation 15.12.17 linked to ASHE 6115 80th centile			Annual PP: £293,117