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Recent developments in catastrophic quantum claims

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NOTES

For the purposes of this paper I have taken a sample of cases from the last 2 years and sought to extract from them issues which I have addressed in separate categories. The cases with their references are attached as an appendix. This does not purport to be a comprehensive review of the period. Many of these cases were fought by the NHSLA and arose from injuries arising from birth, or to young children, which are claims inevitably bringing their own problems. I have not covered the *Eeles v Cobham* IP cases, many of which also deal with accommodation which is all being covered in a separate talk.

Preliminary: Expert evidence – and the judges' complaints

Reflecting comments by the President of the Family Division [2013] Family Law 816, and subsequently, last week, the Family Justice Council's Guidance for 'Psychologists as expert witnesses in the Family Courts in England and Wales' which referred to the need for reports which are "succinct", "focused", "analytical" and "evidence based", Turner J in *Harman v E Kent* comments on the shortcomings of many expert reports which he suggests are simply far too long, setting out too much history and factual narrative while being light on analysis and evidence based opinion. He complains about the unnecessary repetition of narrative detail and the disproportionate increase in time (and costs)

as a result of the need to read it all, and the danger of important points being lost in the vastness of the context in which they appear.

He also complains that relevant and important issues are not addressed in reports and have to be fleshed out in oral evidence, which should not happen.

Will anyone listen? Lawyers in particular need to do so, when exercising some control over (or as the Supreme Court has said "policing") their expert witnesses.

The Supreme Court considered the position of experts and 'skilled witnesses" in Scotland (albeit in the context of liability evidence) in *Kennedy v Cordia* [2016] UKSC 6 (paras 37-61) and provided guidance (some relevant to a wider UK audience) on the evidence of skilled witnesses under Scots law and, in particular, the obligations of the lawyers to police the performance of their experts (equally relevant here). Meanwhile in England and Wales the observations of Cox J on the duties of experts (here again liability experts) in *Sinclair v Joyner* [2015] EWHC 1800 (QB) are cogent and robust. In a non PI case *Al Nehayan -v- Kent* [2016] EWHC 623 (QB) Mrs Justice Nicola Davies ruled inadmissible 'expert' reports (on foreign law) which did not comply with Part 35.

It is evident that judicial patience with inadequate expert evidence is wearing thin.

I turn to the issues addressed in the recent cases – not all of which break new ground, and some of which are more illustrative of established principles:

1. General Damages

An important development was the publication in the summer of 2015 of the 13th edition of the Judicial College Guidelines for the assessment of general damages, in general reflecting an RPI increase of 3.4% over the previous edition (April 2013). The recent decisions referred to below were made under the influence of the previous edition of the Judicial College Guidelines (12th ed) with some uplift for RPI. The new Guidelines assume the *Simmons v Castle* 10% uplift but provide the pre-uplift figures as well.

In *Summers v Bundy* [2016] EWCA Civ 126 in a clinical negligence claim where the claimant had been legally aided throughout and where the claim form was issued in December 2013, the Court of Appeal made clear that the *Simmons v Castle* uplift of 10% on general damages for PSLA is not discretionary. It applies in all cases (after 1st April 2013) in which the claimant does not have a pre-LASPO CFA and the claimant was entitled to the uplift (notwithstanding he was legally aided).

Some examples of awards (in descending value):

HS v Lancashire (William Davis J) C was born with untreated streptococcal infection leading to meningitis and brain damage. 8 years old at trial and with a life expectancy to age 49. £305,000 inclusive of interest was agreed but approved by the judge notwithstanding the claimant's limited awareness of her predicament, but having regard to the scale of her disability.

Ellison (Warby J) £295,000. 8 years old at trial with a life expectancy to age 29.75. C contended for £300,000 and D for £280,000. The 12th ed bracket for very serious brain injury (3(A)(a)) with the *Simmons v Castle* uplift, was £227,975 to £326,700 (£235,270 - 337,154 with RPI uplift). D relied on what was said to be a short life span and a lack of insight on the part of C. C argued the life span (c.30 years in all) was not short (the judge agreed) and relied on the agonising and continuous painful

spasms suffered by C, alleviated only by hydrotherapy. Warby J's approach (para [52] *et seq*) was that C's condition did:

> 52. .....not match the "typical" case referred to in section 2 of the Guidelines. It includes several features characteristic of the upper end of the brackets for Tetraplegia and for Very Serious Brain Injury. There is a very significant effect on senses: there is no language function, and an inability to communicate meaningfully in any other way; her sight is gravely impaired; there is relatively little sign of response to environment (other than her propensity to get cold). Her physical limitations are very severe indeed, and she is wholly dependent on others; she is in need of full time care. Importantly, in my judgment, she suffers continual pain. It is likely that her present condition will persist throughout her life, that is, for a further 22 years. A lifetime of nearly 30 years, though short by comparison with average lifespans, is a considerable period over which to suffer frequent and evidently significant pain. It is not, in my judgment, a short lifespan for the purposes of the tetraplegia guidelines. It is within the band identified in the tetraplegia guidelines as a feature of the "typical" mid-range case.
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> 53. Against those factors I must take account [of] the mitigating impact of the pain relief likely to be achieved by hydrotherapy, and my findings on that issue, which are set out later in this judgment. I must also, importantly, bring into the calculation Ayla's intellectual impairment and consequent lack of insight into her condition. Dr Johnson's evidence, agreed as it is, is clear. It is, rightly, reflected in the case stated on her behalf in the Schedule of Loss, which asserts that "her cognitive and intellectual abilities are so low as to be immeasurable." I recognise that Mrs Ellison has, in her second witness statement, reported an improvement in Ayla's responsiveness since she was seen by the experts, but I have no evidence that this reflects an ability to understand her own condition. This is an important factor in the assessment of the nature and degree of Ayla's suffering, and necessarily reduces what would otherwise be the appropriate award.
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> 54. It does not, however, reduce the appropriate figure as low as the defendant's £280,000. That is very much towards the bottom end of the suggested bracket, and inapt in my view for a case involving almost total loss of physical amenity and almost 30 years of frequent physical pain and suffering. The sum claimed is, when inflation is taken into account, already below the mid-range for tetraplegia. Taking all these matters into account, I have concluded that the sum of **£295,000** represents an appropriate award of general damages for this claimant.

Robshaw (Foskett J): C 12 yrs old, brain damage arising from negligent birth management, hypoxic ischaemic encephalopathy, quadriplegic and learning disabilities; agreed at £290,000 (+ interest of £12,151)

Totham (Laing J): C was 7 years old with a life expectancy to age 47. PSLA £275,000 (to include *Simmons v Castle* uplift and RPI since the JC Guidelines 12th ed): peri-natal severe hypoxic ischaemic brain injury

leading to cerebral palsy. She was continent at night, was in a main stream school, could communicate with help and suffered from learning difficulties, but had insight into her condition. Epilepsy was controlled. There was great physical disability especially in the upper limbs. She could not self feed.

AB v Royal Devon & Exeter NHS Foundation Trust (Irwin J): £192,500 for a 50 year old suffering T7 paraplegia to reflect his disability, the limitations on his independence, the extensive impact on his psychological state, his age and his life expectancy (reduced to 15 years, from a notional 35 but other issues would have reduced this anyway) but allowing for a pre-existing shoulder disability which meant he suffered considerable pain in the shoulder as a secondary consequence of his spinal injury and was likely to undergo further surgery to the shoulder which he would otherwise have avoided. It allowed for severe and relentless spasms, which could not be relieved by intravenous Baclofen. The claimant had a complex history with psychological issues, previous head injuries and a history of drug abuse. The award was provisional (to allow for syringomyelia). This case fell within Section 44(6) of the Legal Aid Sentencing and Punishment of Offenders Act 2012, and thus was ineligible for the *Simmons v Castle* 10% uplift in general damages.

Tate v Ryder: £140,000: 11 year old boy knocked down by a bus and suffering "moderate brain damage" within the Judicial College Guidelines (£110,300-161,000), a fractured pelvis and contused lung (which healed). He had learning difficulties before the accident, but the injury caused a severe personality disorder. He lived in supported accommodation, lacked capacity and required 24 hour personalised care.

Reaney : £115,000 – a case where C was 67 at trial and already permanently paralysed below the mid-thoracic level. As a consequence of clinical negligence (from age 61) she developed a significantly worse condition: developed a number of deep (Grade 4) pressure sores with

consequent osteomyelitis, flexion contractures of her legs and a hip dislocation. But for the negligence C would have been wheelchair dependent but would have been largely independent until later in life, would not have experienced the additional pain and discomfort that resulted from the negligence and would not have had a significantly reduced life expectancy, now reduced to 10.75 years. The quality of life was also much diminished and she would continue to suffer a significant loss of dignity and privacy and would remain at risk of the pressure sores breaking down and episodes of septicaemia as a result of the osteomyelitis. She would never be able to sit for unlimited periods with ease in a wheelchair. Judicial College Guidelines put the general bracket for *paraplegia* between £177,100 to £229,900 with the 10% uplift and the judge had to assess the additional loss on top of the effective T7 paraplegia C already suffered.

This case went to appeal on the assessment of the additional care costs (see later) but not PSLA.

2. Interest on IPs

IPs are to be treated as on account of special damages unless agreed or specified to the contrary, and so only interest at the Special Account rate was set off and not at the General Damages rate: *Lamarieo Manna v Central Manchester University Hospitals*

3. Multipliers and Life Expectancy

The debate as to whether to employ Table 1 (or 2 for females) or Table 28 continues (for reasons that are unclear as the law seems established – although some commentators persist in championing Tables 1 and 2): Cox J in *Lamarieo Manna* (paras [183-185]) explains briefly why Table 28 is appropriate where the assessed life expectancy of C is made with reference to "this Claimant's mortality risks as a whole, not just those

associated with his" condition (in that case cerebral palsy), so the experts will have already factored in impairment of life and to use Table 1 (which includes mortality risks) will result in a double discount. In *Reaney* Foskett J again (in his supplemental judgment: paras [5-13]) reviews the authorities and, citing Swift J's judgment in *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB), explains why, where the evidence specifically assesses this claimant's life expectancy, Table 28 is appropriate.

The point is also addressed in *Farrugia v Burtenshaw* [2014] EWHC 1036 (QB) at paras [65-70]: the assessment of life expectancy should combine epidemiological (that is to say general) and clinical (that is to say specific) assessments, thus taking (in that case) the Shavelle figures for brain injured young people in California and then applying that proportionately to UK life expectancy (which is greater) and then applying C's personal characteristics and factors to further adjust the figure. Again Table 28 was employed (presumably given the specific nature of the assessment).

In *Robshaw* Foskett J addresses the issue at length at paras [33-137]. He adopts the reasoning in *Whiten* on the use of the California data (para [40-42]) and as to when the adjustments, due to the particular circumstances of the claimant, are to be made to the California data, to convert for the UK life expectancy. He concludes, tentatively, that the US figures should be converted to UK figures before adjustments are made in the light of UK experience and/or conditions (see para [91-100] *et seq* and the footnote to para [134]). The judgment reviews in detail the impact of self-feeding against PEG feeding, aspiration, swallow, mobility etc. It also addresses the question of the extent to which socio-economic factors and in particular the quality of care which C will receive as a result of the high quality care package to be provided by the damages award, will reduce some identifiable risks to life and therefore increase life expectancy. Foskett J takes the reasoning in this respect in spinal injury cases and applies it to this brain damage claim.

In *Robshaw*, although the experts disagreed on its relevance, the judge held (para 132) that this factor alone added 2 years (which he felt might be on the conservative side). The judge also makes the sensible point (para 101) that working in terms of a figure after the decimal point in what is acknowledged to be the world of an inexact science seems inappropriate.

In an interesting judgment delivered on 4th May 2016 *AB v Royal Devon & Exeter NHS Foundation Trust* [2016] EWHC 1024 (QB) Irwin J employs Table 28 without comment (its application was presumably agreed) after a lengthy analysis of the data on survival after SCI. He compares Frankel's 1998 paper with Strauss (2000 and 2006), Middleton (2012 – an Australian study which has been the subject of some controversy), and Shavelle (2015). He then addresses the cumulative impact of a number of co-morbidities (smoking, diabetes and illicit drug use).

3.2 Fatal Accident claims – multipliers

In *Knauer v Ministry of Justice* [2014] EWHC 2553 (QB) Bean J admitted sympathy with the Claimant's argument that the rule in *Cookson v Knowles* and *Graham v Dodds* should no longer apply and that the Law Commission's 1999 recommendation should be followed (to divide the claim into, in effect, special damages to trial and then calculate a multiplier for future loss from the date of the trial) but, following Nelson J in *White v ESAB Group (UK) Ltd* [2002] PIQR Q6, he accepted he was bound by those cases. In February 2015 C was given permission to leap frog to the Supreme Court.

The Court allowed the appeal ([2016] UKSC 9), employing the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, enabling it to depart from previous decisions of the House of Lords. The Court rejected the suggestion that the matter should be left to the legislature (despite the

Scottish law having been changed by statute[1]) on the basis that while the change would be a change in a matter of legal principle, it was a principle established by judge made law and, if it is shown to suffer from the defects from which the Court found it does suffer, then, unless there is a good reason to the contrary, it should be corrected or brought up to date by judges. The fact that (as the Defendant argued) there are elements of over compensation in fatal accident claims which arise from legislation (eg s. 3(3) of the Fatal Accidents Act 1976, which requires the court to ignore, not only the prospect but the actual remarriage of the claimant; and s. 4, which requires that benefits which will or may accrue to any person as a result of the death shall be disregarded) was not a good reason not to correct the *Cookson* defect.

The rule in *Cookson* has given rise to sometimes significant under compensation, and it was agreed in the instant case that on an award of some £1/2m the difference was over £50,000 or 10%. The problem (in the *Cookson* approach) lies in the need to fix a multiplier at the date of death, which gives rise to an actuarially calculated multiplier which is not only affected by the vicissitudes of life but also by the discount for accelerated receipt, and then the requirement to deduct the chronological number of years between the date of death and the date of trial. The claimant has therefor given a discount for accelerated receipt over a period (between the death and the trial) when he has not in fact received the award.

Where the dependent is a child, this can have a dramatic effect. In *Corbett v Barking Havering and Brentwood Health Authority* [1991] 2 QB 408 where the dependant child was two weeks old at the mother's death, the multiplier for the mother's care of the child was fixed by the trial judge at 12 years and there was a period of 11.5 years between the death and the award. The multiplier for the post trial period (when

[1] See section 7(1)(d) of the Damages (Scotland) Act 2011, enacted by the Scottish Parliament following the recommendation of the Scottish Law Commission in their *Report on Damages for Wrongful Death* (2008) (Scot Law Com No 213), to the effect that the multiplier should be fixed as at the date of trial.

the child was 11½ and would have been dependent for another 6½ years) was therefore only 6 months (12 – 11.5 yrs). While the Court of Appeal increased the multiplier (to 15) the result remained manifestly unjust.

This type of injustice resulted in courts adopting various devices such as seeking to apply full rates of interest to the whole award, but these were contrary to principle and had to be overturned by the Court of Appeal (eg *Fletcher v A Train and Sons Ltd* [2008] 4 All ER 699). The Supreme Court (para 9) observed that:

> "The temptation to react to a rule which appears to produce an unjust result by adopting artificial or distorted approaches should be resisted: it is better to adopt a rule which produces a just result."

This in turn also justified the use of the *Practice Statement* to overturn previous authority. While the Court was keen to underline the importance of precedent and the consistency and predictability which that brings, as Lord Hoffmann observed in *A v Hoare* [2008] AC 844, para 25 such injustice or illogicality arising out of binding decisions may encourage "courts … to distinguish them on inadequate grounds" which means that certainty and consistency are being undermined.

The Supreme Court asked the question why, if the problem and its resolution, now appears so clear, the House of Lords had twice reached the conclusion it did. The answer lay in the fact that there is now a wholly different legal landscape in personal injury and fatal accident litigation to that which then applied. Rather than reliance on judicial intuition and unscientific "feel", multipliers, and damages generally, are now calculated with a great deal more empiricism. Although, then, the use of actuarial tables or evidence was rejected or discouraged on the ground that they would give "a false appearance of accuracy and precision in a sphere where conjectural estimates have to play a large part", since the decision in *Wells v Wells* [1999] 1 AC 345 and the

adoption of the Ogden Tables, and the recognition (with which the judgment in *Knauer* in the Supreme Court opens) of the principle of full compensation, a different and much more sophisticated approach is applicable.

Following publication of the Law Commission's report (1999), the Ogden Tables have included fatal accident calculations based on the Law Commission's recommended approach, although until now they have not been able to be used. The principle is set out in para 65 of the Notes to the current edition of the Ogden Tables and there then follows a methodology for using the familiar Tables 1-26 which will work for most cases. There will (or at least may) of course be a need to apply a discount to the period from death to trial to reflect the risk that the deceased would have died during that period in any event. There may be room for argument over whether any other discount should be applied (for risks other than mortality). The Notes do suggest that in a complex case or where the multiplier is of crucial importance, the advice of an actuary should be sought.

The decision in *Knauer* was not unexpected but it is to be welcomed.

4. Issues and Categories of award

4.1 Full compensation principle

Several of the recent cases have re-stated this 100% recovery principle, derived from *Wells v Wells*, as the basis for the Court's approach. It is not new law but a helpful reminder of the underlying principle that in the words of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, at 39, the court should award:

> "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".

This will mean that if C proves (on a balance of probabilities) that he has sustained a past expense or loss and satisfies the Court that such an expense was reasonably incurred, he will recover it. In respect of future losses C will be entitled to such sums as are sufficient to meet such of his reasonable needs as he proves will arise from the injuries. The court will however have to assess the chances of those needs or events arising (so may discount for that chance).

4.2 What is reasonable? Or 'proportional'?

In *Wells v Wells* [1999] 1 AC 345 Lord Lloyd said: "Plaintiffs are entitled to a reasonable standard of care to meet their requirements, but that is all." He also said: "The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial scaling down."

As to what is reasonable, this has to be determined by reference to all relevant circumstances in each case: *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB) per Swift J para 4-5:

> 4. In assessing damages in this case, I have had in mind the principles set out by Lord Woolf M.R. giving the judgment of the Court of Appeal in *Heil v Rankin et al.* [2001] 2 QB 272 at paragraphs 22, 23 and 27:
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> > ".. 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".

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.

What has become more a matter of debate is the meaning of the requirement for 'proportionality' identified by Swift J in that case, between the cost to the defendant of any individual item and the extent of the benefit to be derived from it by the claimant.

In *Ellison* Warby J accepted that in determining whether C's reasonable needs require that a given item of expenditure be incurred, the court must consider whether the same or a similar result could be achieved by other, less expensive means (and he applied that test when considering the claim in that case for a hydrotherapy pool – which on the facts was the only way C could get relief from pain) but he rejected D's contention that C could not recover for the cost of an item which would achieve a result that other methods could not, if the cost of that item was disproportionately large by comparison with the benefit achieved. This analysis was approved (*obiter*) *by* Foskett J in *Robshaw*, while in *Network Rail Infrastructure v Handy and Others* [2015] EWHC 1175 (TCC) Akenhead J (in a non PI case) rejected the suggestion that there is an overarching or separate principle which requires damages to be "reasonable" or "proportionate" as between claimant and defendant. If the type of loss is foreseeable, the actual proven loss will be recoverable. This reflects the approach in *Wells* (above).

In Scotland *Wagner v (1) Grant (2) Arla Foods UK Plc* [2015] CSOH 51 concerned a debate as to whether to award the pursuer the package advanced by his expert for prostheses following a trans-tibial amputation which included a range of prostheses costing over £60K over 5 years and a BiOM powered limb at around £150,000, or D's package at around £20K over 5 years. The judge chose the latter on the grounds that the claimant's package was not reasonably necessary (rather than, expressly at least, on the basis of proportionality – however the matter is not closely reasoned). D's expert advised that the cost of the BiOM was in fact reasonable but would reduce with advances in technology. Ultimately both solutions would give C an effective prosthesis, but D's proposal was evidently regarded as the more practical. It is not clear that the issue of the reasonableness (or proportionality) of C's option was clearly debated.

4.3 <u>What is the test for 'reasonable'? On whom lies the burden of proving a regime is reasonable?</u>

In brief C must prove (1) that the loss was incurred, (2) that it arises from the injury and (3) that it falls within the range of what is reasonable – both as to the head of loss and the cost (per Laing J in *Totham* para [13]).

C's duty to mitigate his loss is a duty to take "reasonable" steps (eg by the provision of care or therapy). It is a foreseeable consequence of the negligence that C will do so, and if he suffers a loss (or cost) in doing so D will be liable for that loss, in the same way as D is entitled to benefit from a successful mitigation.

If the cost is greater than an alternative way of achieving the same aim, then the burden will fall upon C to prove why it is reasonable, but if, prima facie, the cost falls within a range of such reasonable alternatives, C is not obliged to choose the cheapest, and if D contends the choice is unreasonable, the burden falls on D (at least once C had

made a *prima facie* case. This was explained by Foskett J in *Robshaw* in this way at para [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".

Laing J in *Totham* (para [15]) also makes the point that the assessment of future losses involves an assessment of the chances of future events and that assessment of those chances must be reflected in the amount of damages.

In *Harman v E Kent* Turner J warned against equating the preferences of relatives with the regime of care and support the cost of which should be the basis of reasonable compensation, although he did observe that, in the circumstances of the case, a regime which met the aspirations of the parents was more likely to succeed than one which

did not. Thus whether C should return to live with the parents, or whether he should remain in an institution was a matter for expert evidence (and, on the evidence, which was the one most likely to work). However, the decision is that of the judge and not the experts and in *Reaney* Foskett J held that it was for the judge, assisted but not dictated to by the opinions of the experts, to come to a conclusion "on what was reasonably required". This is a narrow path to tread for, as the Court of Appeal observed in *Sowden v Lodge* [2004] EWCA Civ 1370, there is a difference between what a claimant can establish as reasonable and what a judge objectively concludes is in the best interests of the claimant. However, it is not the judge's function to decide on best interests. "In this context, paternalism does not replace the right of the claimant, or those with responsibility for the claimant, making a reasonable choice." If the choice is reasonable then it should attract an award accordingly.

The standard for judging the claimant's actions is not high[2]. There was a reminder in *Totham* (para [78]) that the question in respect of care, or equipment, or motor vehicles (in that case), is not whether (as D's expert suggested) it is "absolutely essential" but whether it is reasonably necessary (as a consequence of the injury).

Nevertheless, claims must be scrutinised. In *Farrugia*, while the Claimant's case on care was largely accepted, the totality of the claim for a 24/7 2 carer regime was not. C needed 2 to move/transfer him which meant he had to wait until two carers were available (or rely on family members). Jay J at para [94] did "not accept Mrs Sargent's evidence that Jack should, in effect, be free to do whatever he wishes at the spur of the moment. 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

[2] Per Stephenson LJ in *Rialis v Mitchell* (1984) Times, 17 July "… the court must not put the standard of reasonableness too high when considering what is being done to improve a [claimant's] condition or increase his enjoyment of life…"

of pre-planning and organisation. This, after all, reflects the realities of ordinary life." There were therefore periods when there would only be one carer in place, although for transfers and emergencies 2 would be needed. This is a difficult issue which (it is submitted) may depend on the extent of C's insight and ability to initiate. To what extent is it reasonable (if the object is to place C in the position in which he would have been but for D's negligence) to legislate for a regime which prevents C from moving or being moved when he wants, as opposed to when there are sufficient carers available? On the other hand to what extent is it reasonable (or proportionate) to have two carers available but idle against the possibility that C wants to move?

4.4 Effect of *Peters v East Midlands Strategic HA*

Harman v E Kent provided an illustration of the practical effect of *Peters.* In *Peters* Dyson LJ had said [53]:

> "...We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as of right"

In *Harman*, after a long battle with the LEA, C's parents had secured funding for the institution where it was hoped he would stay until age 25. The authority was now paying and would agree to continue to pay and D argued that the decisions in *Sowden* and *Crofton* meant D was not obliged to pay. Turner J disagreed and pointed out that *Peters* entitled C to pursue D rather than the LEA and that, moreover, the LEA would not continue funding if C (by those acting on his behalf) did not claim it. The judge was satisfied that the parents' wish to elect private funding was genuine and there was no need to adjudicate on whether that choice was reasonable. D's offer to provide an indemnity missed the point and could not dilute D's liability. Any double recovery would be avoided by the Deputy's indemnity. This decision merely applies and

upholds the *Peters* principle. D are seeking permission to appeal (the hearing due in June 2016).

4.5 Capital disregards

Another somewhat startling argument advanced by a local authority was quashed in judicial review proceedings in *R (on the application of ZYN) v Walsall Metropolitan BC* [2014] EWHC 1918 (Admin). They sought to avoid the effect of para 44(1)(a) and/or (b) of Sch 10 to the Income Support (General) Regulations 1987, SI 1987/1967 (para 44) [*qv*] on the basis that the reference to the CoP was a reference to the old CoP before the Mental Capacity Act, that because the deputy was administering P's funds it was not being administered by the CoP, and that because the deputy could expend up to £50K without the CoP's further permission, P had capital exceeding £23,250. The L/A failed on all counts (unsurprisingly).

4.6 Gratuitous care

In *Totham v Kings College Hospital*: Laing J applied the "ceiling principle" to cap the rate at which gratuitous care should be compensated at the equivalent commercial rate of that care. In this case (cerebral palsy arising from neonatal hypoxic ischaemic brain injury) the aggregate NJC rate was agreed (on the basis of 24/7 care including nights and weekends). The judge took the view the authorities suggested a range between 25-30% as a discount for gratuitous care. C argued there should be no discount since C's mother gave up a highly paid job and subsequently returned to work part time in order to care for C and manage her care package, and further the aggregate NJC rate did not in fact reflect London care rates. The second argument was rejected as inconsistent with the agreement that aggregate rates were applicable, and the first on the basis that it was

inconsistent with the ceiling principle. D argued for a 30% discount but the judge held 25% was more consistent with recent authority. The same decision was made in respect of the mother's gratuitous case management but interestingly the judge was attracted (in that context) by the argument that the small number of hours would not attract tax and NIC. It was rejected on the facts but in a case where the gratuitous care would be the carer's sole income and is less than the personal allowance a reduction in the discount might be justified.

In *Reaney* Foskett J said he thought the issue of a discount had been resolved by *Evans v Pontypridd Roofing* [2001] EWCA Civ 1657 and saw no reason to depart from 25%. In *HS v Lancashire* 25% was assumed following *Evans* and held by the judge to be "entirely appropriate". 25% has been taken as the conventional rate in very many recent cases.

In *Tate v Ryder* the rate of the discount does not seem to have been in issue but, on a different point, D had argued that the judge should not accept the care expert's assessment of the hours spent by the family without having heard from the people concerned. While recognising the potential force in the argument Kenneth Parker J held that the expert was very experienced and a shrewd assessor of what she had been told and he accepted her evidence and assessed the value of past care "on a conservative basis".

The discount rate, therefore, seems established at 25%, and the battle ground is more likely to be over the rate to be paid for gratuitous care, whether the basic rate or an enhanced rate such as the NJC aggregate rate (in the writer's experience the default rate in complex cases) to allow for anti-social hours or the demanding care needs of a seriously injured claimant, or even the "ceiling" of a commercial rate. There may be a different rate allowed in respect of future gratuitous care to that allowed for past care (eg *Farrugia*). In *Ali v Caton and MIB* [2013]

EWHC 1730 (QB)[3] Stuart-Smith adopted a figure (using C's expert's figures and discounting by 25% for all arguments) giving a rate between the basic and aggregate rates. There is no "right" answer and the rate will depend on the evidence and the judge.

4.7 Professional case management

The fall out from *Loughlin v Singh* [2013] EWHC 1641 (QB) and *Ali v Caton* continues, but in *Totham* neither case is mentioned in the judgment and the legal principles they raise were not analysed. D challenged their liability to meet the "grossly excessive and unreasonable" costs of the case management for which it was claimed the family did not get value for money. The judge found that aspects of the case management regime the claimant had received were to be criticised: the providers had been 'completely reactive', and the claimant's mother and litigation friend had specifically raised concerns with the professional deputy that the claimant was not receiving value for money. The judge nevertheless took the view that the starting point was that the charges had been paid (so were *prima facie* recoverable). She held that C's mother had acted reasonably in selecting the case manager and in challenging the poor service she got. The claim was allowed in full. In brief it would seem D would have to show not only unacceptable standards of case management but also unreasonable actions on the part of C's team in the choice of case manager and failing to challenge poor service. To decide otherwise would place a blameless claimant in a position where he would be obliged to pay the case manager while remaining uncompensated.

Other cases provide examples of awards, inevitably dependent on their circumstances. In *HS v Lancashire* the judge accepted the suggestion that case management costs would be less with an agency care regime

[3] The decision was appealed and upheld on the issue of C's capacity.

than with direct employment. This would seem obvious but it is understood that it may not inevitably follow.

4.8 Cost of future childcare

In *Totham* the claimant was physically capable of having children and a claim was made for the costs of child care should she do so. Laing J gave detailed consideration to the expert medical evidence in reaching her decision not to allow compensation under this head of loss. The chance of the claimant having children was 'fanciful'. She would always lack capacity and would never be able to make a decision over whether to have children. It was probable that a case manager or professional deputy would never deem it in the claimant's best interests for her to have children. In *Robshaw* a similar claim was also rejected. In both cases the claims had been discounted to reflect contingencies (such as the chance C would have no children or that the cost would be less than projected)

4.9 Holidays

HS v Lancs (William Davies J) – C's parents sought provision for regular holidays in their home state of Kerala, India. The judge assessed the probable additional cost of holidays with a broad brush, a factor being whether the difficulties of travel would make such trips more unlikely, and also the reduced cost of care in India on long stays there which could be set off against any extra costs of travel.

Robshaw – a motor home (cost: £96,000) was allowed given the established family history of camping and caravanning, and also the independence it would provide, given the absence of adequate disabled

facilities freely available. However, this meant a reduction in the frequency of long haul and European holidays and city breaks.

Ellison – treatment of holidays divided between pre- and post-age 19. Up to that age a figure was agreed for the extra cost to the family of taking C with them but thereafter the judge concluded that, but for the injuries, she would have holidayed independently, that due to her condition she would not now gain any equivalent benefit or pleasure from being away from home and there was no medical evidence to support a reasonable need for sunshine specifically as a means of giving her pleasure or enjoyment. In the circumstances no additional sum was awarded and the fair and just compensation for her loss was to be found in general damages for loss of amenity (and in the award for the hydrotherapy pool).

Lamarieo Manna – on the evidence 3 business class seats were justified (C + one carer + one carer/parent) with the rest of the family in economy, but the frequency of trips 'home' to the Caribbean was reduced to every 4 years and to Europe (+ accommodation) every 3.

Tate v Ryder Holdings - £2,900 pa for one 2 week annual foreign holiday with support workers (multiplier reduced for likely noncompliance with the care package from time to time)

The cases show a pragmatic approach to the assessment of additional holiday costs with a focus on the extent to which the claimed holidays will in fact be taken and on the specific factual matrix of the case.

4.10 Loss of earnings

4.10.1 Assessing earning potential in a child claimant

In *HS v Lancs* , after reviewing the difficulties of assessing the potential of a child injured at birth, noting the lack of evidence of family careers (as comparators), considering the likely ambition of the family, and

taking cognizance of median female earnings from ASHE, the judge took a "round view" between various figures advanced and assessed the loss at £300,000.

In *Robshaw*, (by comparison) the judge had the advantage of a good deal of evidence about the career paths of family members, and took account of the work ethic that was evidenced. He was thus able to identify a path in engineering and to project earnings of £42,000 gross pa from age 22. As to the multiplier, for a child of 12 and having regard to current trends, and assuming he would have done work which was not heavy, nor particularly stressful, it was more likely he would work to age 70 than 67 (although in the circumstances of the case this would involve a lost years claim that could not be pursued – see below)

In *Totham* (but for the lost years point) loss of earnings would have been assessed to age 70 "when, on current trends, I consider it likely Eva would have retired".

In *Tate v Ryder Holdings* the claimant came from a deprived background: his father was a violent and serious sexual offender, his mother an alcoholic who did not work and various family members were described in similar terms. There was no evidence that any living, adult relative of the claimant had been in paid employment. C himself had, before the accident, revealed significant learning difficulties and delayed language skills (etc), poor school attendance and was easily led. D contended that in the circumstances C would have had great difficulty in obtaining or retaining employment. The judge was however not prepared to write off an 11 year old boy. His potential earnings were assessed by reference to ASHE figures for elementary occupations, discounted by 33% (expressed to be on a *Doyle v Wallace* basis but a multiplier/multiplicand basis was employed) and given a multiplier to age 68 with a modest set off for potential earnings in future.

The lesson from these decisions is that (as ever) preparation is all and an earnings claim will stand or fall on the quality of the evidence that can be adduced. *Tate v Ryder* might be considered a surprising outcome (!)

4.10.2 Deduction of travel to work costs

Such a deduction was frowned upon in *HS v Lancs* (citing *Dew v NCB* in the House of Lords to the effect that such a deduction was not to be encouraged – *Eagle v Chambers* was said not to be authority the other way). But in *Robshaw* a small deduction of a few hundred pounds was made from the multiplicand to allow for potential expenses of employment (although D's contention for a deduction of £3,000 pa was rejected: C was likely to work around Lincoln). In *Totham* Laing J deducted £2,000 a year (having been referred to *Eagle* but not, it would seem, *Dew v NCB)* for travel costs in London but she set this off against the benefits in kind and pension C would have earned on top of salary (so ultimately made no deduction).

4.10.3 Pension Loss

In *Lamarieo Manna* C was a child but while a loss of earnings was agreed, loss of pension was not, with D arguing no additional sum should be allowed as C had not allowed for deduction of employee contributions. The judge held that the claim was in respect of the employer's (not employee's) contributions which the employer would be obliged to make, and allowed the claim.

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

5. Pre-existing care needs and those arising from the accident

Reaney v University Hospital of N. Staffordshire (Foskett J) – at the age of 61 C developed transverse myelitis causing damage to the spinal cord leaving her paralysed below the mid-thoracic level. She would, in medical parlance, be classified as a "T7 paraplegic". She was permanently in the same condition as she would have been if she had suffered a severe traumatic spinal cord injury at the mid-thoracic level. She had no feeling below that level and had no control over her bladder or bowels. As a consequence of the defendant hospital's negligent care she developed a number of deep (Grade 4) pressure sores with consequent osteomyelitis, flexion contractures of her legs and a hip dislocation. She was unable to use a standard wheelchair safely as a consequence of permanent damage to her seating posture. As a consequence her care needs became significantly and materially greater. The judge differentiated (and therefore did not limit himself to) what a local authority, "juggling limited resources", assessed as being required and compared with what he, within the proceedings, judged to be reasonably required.

Instead of the 7 hours a week of professional care from the LA and gratuitous care by her husband (at least until age 70 and then increasing to age 75, when C would have required hoisting and LA care would have been increased to some 31.5 hrs pw – but importantly not 24/7 care), C now required 24/7 care from 2 carers and specially adapted accommodation and a specialist vehicle. Whereas (but for D's negligence) she could have effected transfers and been largely independent in a number of daily activities including self propelling her wheelchair, now she could spend no more than 4 hours a day out of bed and was dependent on others for transfers and mobility. She could no longer manage her bladder and bowel needs. Importantly (given the subsequent comments of the Court of Appeal) the judge observed that C would have expended no personal money on this care (but for the negligence) because she had insufficient resources to do so.

D argued the limit of its liability was to compensate C for the difference between her care needs 'but for' the negligence (they also argued she had had such care needs that were not being met) and the needs she now had. The liability was thus essentially the cost of topping up C's care. C, however, argued that the D having added significantly to the effects of her pre-existing disability, certain costs associated with dealing with those effects were reasonably required, and should be met by D, apparently even if they met some needs which were pre-existing

At para [66] the judge said:

> There can, in my judgment, be no doubt that a Defendant cannot be held to be liable for loss or damage that it did not cause or to which it made no material contribution. Where, however, a Defendant has been shown to have done one or the other of these things in relation to an injury sustained by a Claimant, then that Claimant is entitled to full compensation in the manner encapsulated in the words of Lord Blackburn. The question of how aspects of that compensation fall to be evaluated in financial terms can present difficulties where, as in this case, one part of the Claimant's overall disability was not caused or contributed to by the only wrongdoer available as a compensator.

In seeking to explain the legal framework within which the case was to be decided Foskett J accepted that a tortfeasor may only be liable to compensate a Claimant for the damage it has caused him or to which it has materially contributed, but also observed that a tortfeasor takes his victim as he finds him, so that if the additional damage makes C's condition exponentially worse (*the author's expression – not the judge's, but see the CA's approach below*) because of the claimant's initial condition (eg damaging the one good eye of a one eyed man: cf *Paris v Stepney BC*) D must accept the consequences.

He concluded that the Defendants' negligence had made the Claimant's position materially and significantly worse than it would have been but for that negligence. She would not have required the

significant care package (and the accommodation consequent upon it) that she now required but for the negligence. At para [71] he expressed himself unclear about the extent to which D's counsel asserted that any 'credit' should be given against the value of the claim assessed on the basis he had indicated for the notional cost of meeting the Claimant's needs in the "'but for' scenario". In a supplemental judgment he repeated this uncertainty but "saw no basis....for some credit to be made.....It was not care that she would have had to pay for." It appears to be in this context that in the initial judgment he agreed "with the sensible, compassionate and principled approach to this kind of issue taken by Edwards-Stuart J" in *Sklair v. Haycock* ([2009] EWHC 3328). As a fall back position he suggested that he would have reached the same conclusion on the basis that D had made a 'material contribution" to C's condition (relying on *Bailey v Ministry of Defence* [2007] EWHC 2913 (QB) as upheld in the Court of Appeal: [2009] 1 WLR 1052).

The Court of Appeal [2015] EWCA Civ 1119 allowed the Defendant's appeal. If D's negligence resulted in loss and damage that was quantitatively different to that which existed before, then D was only liable for the difference between the two levels of need. If the needs caused by the negligence were qualitatively different from C's pre-existing needs, then those needs were caused in their entirety by the negligence and D would be liable for them.

In this the Court followed the decision in *Performance Cars Ltd v Abraham* [1962] 1 QB 33 and *Baker v Willoughby* [1970] AC 467 which were both referred to in *Steel v Joy* [2004] 1 WLR 3002 where C suffered from spinal stenosis, the symptoms of which were accelerated by one accident, caused by D1, by 7 to 10 years, and then by a second accident caused by D2, also by a factor of 7-10 years. The second accident also caused a brief flare up in C's condition for 3-6 months. D2 was only responsible for the flare up as C had already been

damaged by the first accident and D2 therefore damaged an already damaged claimant. Paragraph 70 of *Steel* sets out the rationale:

> "In our judgment, *Performance Cars* is still good law. It has been frequently referred to in the textbooks and, so far as we know, without disapproval. As a matter of logic and common sense, it is clearly correct. We do not consider that it produces an unjust result. The claimant is entitled to recover damages from the first defendant for the losses inflicted by him; and from the second defendant for any additional losses inflicted by him. It is true that, if the first defendant is not before the court or is insolvent, the claimant will not be fully compensated for all the losses that he has suffered as a result of the two accidents. But that is not a reason for making each defendant liable for the total loss. In *Baker*, the issue was whether the tortfeasor who had caused the first injury was liable for its consequences after they had arguably become merged in the consequences of the second injury. In the present case, the question is whether the second tortfeasor is responsible for the consequences of the first injury. To that question, the answer can only be: no. It is true that, but for the first accident, the second accident would have caused the same damage as the first accident. But that is irrelevant. Since the claimant had already suffered that damage, the second defendant did not cause it. This is not a case of concurrent tortfeasors."

The Court also rejected the 'material contribution' basis for Foskett J's decision (based on *Bailey*). The Master of the Rolls explains this at para [35]:

> 35. At para 46 [of *Bailey*], Waller LJ said:
>
> > "In my view one cannot draw a distinction between medical negligence cases and others. I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson's* case exemplifies such a situation. If the evidence demonstrates that "but for" the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened

> but can establish that the contribution of the negligent cause was more than negligible, the "but for" test is modified, and the claimant will succeed."
>
> 36. This was an accurate distillation of the law as set out in cases such as *Bonnington Castings Ltd v Wardlaw* [1956] AC 623 and *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32. In the present case, there was no doubt about Mrs Reaney's medical condition before the defendants' negligence occurred or about the injuries that she suffered as a result of the negligence. There was, therefore, no need to invoke the principle applied in *Bailey's* case. The issue was as to the cause of the needs to which these injuries gave rise. The concept of material contribution had no part to play in resolving that issue.

Further, the Master of the Rolls explains the decision in *Sklair* on the basis not (as Edwards-Stuart J appeared to do and as Foskett J had rationalised his decision in *Reaney*) on the basis that where C had not previously had to pay for his care but now would do, D must pay for all his needs (not just the extra ones), but rather on the basis that in *Sklair* the defendant's negligent driving had caused a loss represented by a 24 hour care regime supporting him in all aspects of his life, whereas previously, despite his Asperger's syndrome, he had lived an essentially independent life, albeit supervised by his father. Qualitatively there was a huge difference.

The question, therefore, is one of causation. What is <u>nature</u> of the difference in the care needs resulting from D's negligence? In *Reaney* (for instance) C would now need 18 sessions a year of physio compared with 6 before. Manifestly this is a quantitative and not a qualitative change.

Finally the Court made clear that insofar as the judge had implied that it might make a difference that C could not sue anyone for her pre-negligent state, this was an irrelevant consideration "If a person has caused the loss, he is liable to compensate the claimant for it. If he has not, then he is not liable."

In *Tate v Ryder Holdings Ltd* – C had learning difficulties before accident (then age 11, now 24 and noticeably more aggressive and impulsive). H lacked awareness of danger and was easily led. D argued that he would have had irregular employment, compounded by substance abuse and would have been vulnerable and susceptible to temptation in any event. The Court discounted the care costs for the time he would now be likely to spend in custody and by 20% to allow for the risk that he would not comply with the care regime. However the court did not accept that it would be reasonable, and found it would be wrong in principle, to discount the damages required to provide him with 24 hour care on the basis of a risk as to how his life might have turned out, but for the accident. He might have been in receipt of some services but it would not have been 24 hour care (in other words, there was a qualitative difference).

In *AB v Royal Devon & Exeter NHS Foundation Trust* C had been a life long drug abuser who, although he was largely "clean" at trial, the judge concluded was probably going to relapse. This drug use resulted in increased case management needs in the pre-trial period. It was accepted that in the period leading up to trial C did not have capacity to litigate but this lack of capacity was due to a concatenation of influences including his long term psychological condition arising from an adverse history starting with an abusive childhood, but exacerbated by the consequences of the consequences of the hospital's negligence which had left him (*inter alia*) with pain and spasm as well as paraplegia, and some historic head injuries, but the deciding influence was his long term drug abuse which had caused (or contributed to) organic brain damage. Such use was illegal and the claim for needs arising from this was therefore inadmissible as *ex turpi causa*. In the pre-trial period, however, treatment had weaned him off drugs and by the trial he had regained capacity. However, in the post trial period of about a year, while his care regime was established and important decisions were made as to how to use the damages award (of which he would only receive 60%), there would be complex issues to address

which he would not (even if free from the abuse of drugs) have the capacity to decide upon. For this period D would have to pay for case management and deputy costs. After this period, with the regime in place the judge found he would have capacity to handle his (notionally) simpler affairs, if he abjured drugs. The judge did not believe he would be able to do this but such abuse of drugs would be illegal and so he could not recover for the costs that would be incurred as a consequence of such drug induced incapacity. The interesting issue, therefore, arises that if a defendant injures a person who is borderline capacitous and can manage his run-of-the mill simple life, but the consequences of the injury render his life complex and he cannot manage the necessary decisions, although D has not damaged C's cognitive ability nevertheless D must take C as he finds him and pay for the accident related needs that arise.

In this case C also had a pre-existing shoulder problem which, as a paraplegic (due to the negligence) made transfers more difficult, and he would require additional surgery to the shoulder over and above what would otherwise be required. Both these problems (increased mobility issues and additional treatment needs) were recoverable.

6. The Form of the Award - PPOs

6.1.1 Indexation

While the indexation of care and case management costs met by a PPO is usually fixed by reference to ASHE SOC 6115 gross hourly pay for all employees, the indexation of future Court of Protection and Deputy's costs is more problematic and is frequently fixed against the default provision of RPI, but in *Farrugia v Burtenshaw & Others* [2014] EWHC 1036 (QB) Jay J followed the advice of Richard Cropper and used the Guideline Hourly Rates for Solicitors, since the majority of Court of Protection and Deputy's costs will be the Deputy's fees which are calculated and assessed by reference to the Guideline Hourly Rates.

Therapies are not often the subject of a PPO but where life expectancy is uncertain there is an obvious attraction. In *Robshaw* a PPO approach was apparently initially agreed but the index was not. One proposal was ASHE 222 as the closest match. In 2014 in the Royal Court in Jersey, ASHE 222 was accepted as the appropriate index for a case manager in *X v The estate of Y*. If the issue is one of substance expert evidence is probably indicated.

6.1.2 Stepped PPOs

In *Farrugia* C, a talented young footballer, was involved in a road traffic accident as a restrained front seat passenger. As a result of the accident he suffered catastrophic injuries. He was left with profound communication and physical disabilities and required 24-hour care. Jay J awarded a stepped PPO (increasing from about £250,000 per annum to £277,878 from December 2040 to meet increased care need for the last two years of life) rejecting D's argument that the increase in care needs for the last two years should be capitalised. Given that it will be impossible to tell when the last 2 years have started or will start, this seems a surprising decision since a capitalised sum (although subject to significant discount for accelerated receipt) would provide greater flexibility.

6.1.3 Reasonably secure

In *Farrugia* D sought to argue for a lump sum award rather than a PPO, in part on the basis that the insurers were in administration in Ireland and by 2016 would be likely to be in liquidation. The Court found that the Financial Services Compensation Scheme would meet the award and therefore the source of the payments was reasonably secure.

6.2 Variable PPOs

In *Farrugia* Jay J held that a risk of "no more than 2%" of established epilepsy becoming uncontrolled justified the making of a variable PPO

pursuant to The Damages (Variation of Periodical Payments) Order 2005 [2005 SI No 841] in light of the extra care needs which would eventuate. The authorities upon which he relied included chances of serious deterioration of around 1%. The barrier is not high.

In *Robshaw* the life long risk of developing recurrent epileptic seizures was 10%. The parties agreed provisional damages and variable periodical payments were appropriate.

7. Potential Reform – appeals to the Supreme Court

7.1 Procedure:

Until 14.4.15 the respondent party to a proposed leapfrog appeal (pursuant to a certificate under section 12 of the Administration of Justice Act 1969) had to agree to such an appeal. This is no longer the case (subject to the stringent conditions applied to a s.12 certificate): s.63 Criminal Justice and Courts Act 2015.

7.2 The Lost Years

In *Totham* Laing J found herself constrained by the Court of Appeal's reluctant acceptance in *Iqbal v Whipps Cross University Hospital NHS* Trust [2007] of the binding nature of decision in *Croke v Wiseman* [1982] 1 WLR 71, that a lost years claim for a child claimant cannot be sustained. However, she made clear she believed the policy justifications in *Croke* are inconsistent with two House of Lords decisions (*Pickett v BREL* and *Gammell v Wilson*) and that *Croke* is inconsistent with the full compensation principle. She would have wanted there to be an appeal direct to the Supreme Court but the Trust would not agree. As in *Iqbal* C would have to appeal to the CA which would be bound to dismiss the claim and if C proceeded to the Supreme Court the case would no doubt settle. The issue will thus remain undecided. In the event this appeal was compromised with D

continuing to pay PPs for loss of earnings to age of 70 if C lived beyond her life expectancy (age 47)

The Claimant's position in *Robshaw* was reserved should the case go further, Foskett J accepting he was bound by *Croke* and being aware of Laing J's comments in *Totham*. *Robshaw* too was compromised on similar terms to *Totham.*

7.3 Secondary victims

Seventeen years ago in *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 Lord Hoffmann observed: "It seems to me that in this area of the law, the search for principle was called off in *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310. No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle." Indeed the limitations on recovery by secondary victims appears to be policy driven. In 2013, in *Taylor v Novo* (UK) Ltd. [2014] QB 150 the Court of Appeal confirmed that the limitations on recovery in *Alcock* should be applied by Judges to limit the ambit of permissible secondary victim claims unless Parliament intervenes to change the law. In late 2014 three cases *Wild v Southend Hospital NHS Trust* [2014] EWHC 4053 (QB), *Brock v Northampton General Hospital NHS Trust & another* [2014] EWHC 4244 (QB), and *Berisha v Stone Superstore Ltd* (2014) LTL, 2nd December (Manchester CC; DJ Hassall) all resulted in secondary victim claimants not recovering. While there appear to be no current pending appeals, in the absence of any sign of legislation (which in the current political climate seems improbable), as in *Knauer* might their Lordships be persuaded that this was a judge made principle whose defects should be remedied by the judges?

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APPENDIX

Catastrophic Personal Injury Quantum Cases 2014/2015

1. *Tate v Ryder Holdings Ltd* [2014] EWHC 4256 (QB)
2. *Farrugia v Burtenshaw & Others* [2014] EWHC 1036 (QB)
3. *Christine Reaney v (1) University Hospital of North Staffordshire NHS Trust (2) Mid Staffordshire NHS Foundation Trust* [2014] EWHC 3016 (QB): Court of Appeal decision [2015] EWCA Civ 1119
4. *Knauer v Ministry of Justice* [2014] EWHC 2553 (QB), [2016] UKSC 9
5. *R (on the application of ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin)
6. *Sinclair v Joyner* [2015] EWHC 1800 (QB)
7. *Harman v East Kent Hospitals NHS Foundation Trust* [2015] EWHC 1662 (QB)
8. *HS v Lancashire* [2015] EWHC 1376 (QB)
9. *Lamarieo Manna (a child & protected party by his father & litigation friend Samuel Manna) v Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC 2279 (QB)
10. *Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB)
11. *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB)
12. *Ellison (a child and protected party by her mother and litigation friend, Carla Leanne Ellison) v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB).
13. *Summers v Bundy* [2016] EWCA Civ 126
14. *Kennedy v Cordia (Services) LLP* [2016] UKSC 6
15. *AB v Royal Devon & Exeter NHS Foundation Trust* [2016] EWHC 1024 (QB)