The care that would have been required in any event.....

'Topping-up' v. The full package?

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1. INTRODUCTION

1.1 The issue at the heart of the debate is the measure of damages when one considers what would have happened "but for" the accident.

1.2 What everybody concerned in the arguments before the courts all concede and recognise is that the underlying principle (and therefore the "starting point" for all computations of loss) is the one set out in the time-honoured statement by Lord Blackburn in the case of ***Livingstone v Rawyards Coal Company [1880]*** when the measure of damages is described as:

> *" That sum of money which will put the party who has been injured, or who was 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."*

1.3 When it comes to claimed ***losses*** (i.e. sums of money which the Claimant has lost out on or will not know receive because of the disabling effect of the injury for which the Defendant is liable), there appears to be little problem in practice for the courts with the approach to be taken. Take loss of earnings claims:

Example: Claimant "X" in a job paying £20,000 net a year after injury can only work in a job paying £10,000 net a year. There is no evidence that he would have lost that job and so the assumption is made that he stays in it but the

projection of the £20,000 a year into the future is not only discounted for accelerated receipt (which is merely an actuarial device to ensure the precise compensation for the projected loss is received) but also for the general risks of early mortality and the contingencies of working life. The other discount that is applied is that he will now go on earning something (and the calculation there may or may not be further discounted to reflect a greater risk of losing his job by virtue of a general population bases risk). These are all chance assessments but as long as the evidence of continuing employment but for the accident is strong enough, the projection of what would have happened is the corner stone of the computation.

If the Claimant has a pre-existing problem which either was already manifesting itself or would have manifested itself in future so that the assumption of continuing employment is now open to doubt, then the "but for" projection is discounted or entirely re-cast to reflect that, to ensure that the Claimant gets the right damages according to the principle.

Example: If now the Claimant who was earning £20,000 a year would have suffered crippling back pain within 5 years of the accident anyway because of a pre-existing condition, then the projected losses is based on a 5 year period of loss only if, for example, it would have either stopped him working altogether or reduced his income to £10,000 net a year (being the same as his residual capacity in the wake of the index accident).

1.4 The approach to claimed ***expenses*** should in principle be no different in the way it derives from the Lord Blackburn statement. This time however, to take the illustration of the claim for medical or care expenses, what the court has to be satisfied is proved is the type/nature and extent of the medical treatment or care that is and will be required. If the Claimant proves that his accident-related injuries give rise to a type of treatment or care and that this will persist for a defined period of time, *then* the court considers the cost of that treatment or care (and this may be the subject of a separate dispute because it is a separate issue to be evaluated and determined). The Claimant can say that this derives from the Blackburn statement as if he had not been injured, then he would not have had the ***need for treatment or care*** and therefore he would not have been faced with the expense of then purchasing that treatment or care so that the damages should allow him to meet that cost.

1.5 The question now arising in the ***Reaney*** case is what happens when the Claimant would have had a need for treatment or care by reference to an illness or disability irrespective of the accident. In most cases, it provides no great difficulty. To take the above illustration, if the Claimant's accident-related condition means he needs a gardener, a decorator and a cleaner as well as 60 hours of physiotherapy a year then that is an expense which he can claim from the Defendant (once the type of assistance is identified and found to be causally linked to the accident) but if he had a pre-accident back condition which would have caused him great disability within 5 years and he would have needed the gardener, decorator and cleaner but, say, no physiotherapy, then he would only have 5 years of claim for the expenses of the service providers but he would probably maintain his claim for the physiotherapy. The point seems trite because it is obvious and derives from first principles. If the disability causes a need to arise which would have arisen at some point anyway (or at least was a similar need if not exactly the same) then the Defendant should not be paying for the cost of meeting that need beyond that point.

1.6 One has to be careful with the analysis of the pre-accident "needs" to make sure that one is comparing the same entities. Take the case of ***Shearman v Folland*** **[1950] 2 KB 43** which was a Court of Appeal decision of over 60 years ago. The Defendant was there ordered to pay for a nursing home for the Claimant which he had to live in because of his accident-related injuries. The Defendant had evidence that the Claimant spent quite high sums of money every week before the accident on living in rather nice hotels and tried to argue that the "saving" there should be discounted off the nursing home fees. Asquith LJ rejected this idea:

"*The precise style in which she would probably or might well have lived is in our view a collateral matter and the two payments are not in pari materia*".

What *could* be set off by way of a deduction of a proportion of her weekly nursing home care costs which represented her board and lodging because these are costs she would have had to incur in any event but that was not the same thing. One can see the logic – the Claimant would have had to incur living costs but if she chose to spend her disposable income then on high living in posh hotels that was a matter for her, but it did not reflect on a **need** for care which she had before the accident even if in practical terms she was "better off" by not spending her money in those hotels because she was now in a care home. It is not simply a matter of looking at how much money the Claimant used to spend on "living" but one needs to look at how much was spent on meeting living needs.

2. HARDER CASES AND THE LEAD UP TO REANEY

2.1 *Sklair v Haycock* [2009] EWHC 3328 QB

Gideon Sklair had Asperger's Syndrome and OCD since childhood. He was cared for by his father but lead a fairly independent life. He was 46 at the time of his accident (his father was then 78) in which he suffered a spinal cord injury leading to a reduction in his mobility and dexterity and which also impacted adversely on his psychological state. It meant that he now needed 24 hour care and his father could not provide it (nor, it was found, could the family members who would have taken over his day to day care in the absence of the accident when his father became too old to provide it, which would have been relatively soon).

2.2 The Defendant advanced two arguments – one was that the Local Authority could provide the Claimant with care at little or no cost to him and so he should not get it paid for privately, which was disposed of by the ***Peters*** decision of course and the other was the argument that the Claimant would have required care and accommodation in any event once his father could not care for him and so the true loss was the difference between the care required in any event and that which he now needed. This was rejected by Edwards-Stuart J. Interestingly, he made the issue of funding the core of his approach to the argument. He did not think it was a matter of comparing ***needs before and after the index accident*** but of comparing the sources of funding. He said that he accepted that if the Claimant had had to pay for the care he would have had in his uninjured state (i.e. the "but for" position) then the set-off would have been appropriate but where the Local Authority would have met his need for care but for the accident at no cost to the Claimant then he had no costs which he would have met for which he had to give credit. It followed (on a separate argument) that if the pre-accident care would have been given out of love and affection as gratuitous care then there was "*no reason in logic or justice*" why he should have to put a value on that and then give credit for it (which might be viewed as little controversial where the obverse is not viewed that way at all – where a Claimant receives gratuitous care for injuries caused by a defendant he is then allowed to put a value on it and claim it).

2.3 In fact the court probably assuaged the Defendant to some extent by finding that within 10-15 years post-accident, the Claimant would have been forced into some form of supported living provided by the Local Authority but before that his family would have incurred some expenditure in buying in some care and he

estimated that figure at between £50,000 and £100,000 for that 5-10 year period. There was no apparent analysis of the difference in the *type* of care in reaching this conclusion – it was simply a matter of the fact of expenditure on care in general terms.

2.4 The author of **McGregor on Damages** summarised the case this way:

" *While it is clear that credit must be given for expenditure which a claimant would have incurred if the injury had not happened and which he will no longer incur, it was sensibly held in* **Sklair** *in the absence of authority that no deduction should be made in respect of gratuitous care that the Claimant had been receiving before the injury except to the extent that expenditure had been incurred by the carer*" .

2.5 Interestingly, the authors of *Kemp & Kemp* took a rather different view of the decision in the current thinking on this point:

" *The claimant with a pre-existing disability*.

It sometimes occurs that the Claimant who is injured had a pre-existing injury or disability which meant that he was not capable of independent existence in the first place, and the effect of the injury for which a claim is made has been to increase or enhance the Claimant's need for care. What is the correct approach in law? In principle, one would have thought that the correct approach would be to compare the Claimant's needs after the injury for which the claim is being made with his needs before he was injured, and make a valuation of the difference between the two. Suppose, for example, prior to the index injury, the Claimant needed 4 hours of assistance a day, but, since the injury, he needs 12 hours of care a day.

Instinctively, the correct approach is to say that the effect of the accident has been to increase the Claimant's needs by 8 hours a day, and the cost of an additional 8 hours a day represents the appropriate valuation of the injury which the Claimant has sustained. However, this was not the approach adopted by Edwards-Stuart J. in Sklair v. Haycock ([2009] EWHC 3328) ([2009] EWHC 3328 (QB).). The facts of the case were that at the time of the accident the Claimant was 46, 49 at trial. Since his childhood he had suffered from Asperger's Syndrome and Obsessive Compulsive Disorder ("OCD"), and from about the age of 24 he lived with his father who provided for his basic needs such as feeding him and doing his laundry. However, apart from that he was able to lead a fairly independent life and he would travel around London on his own and see his friends. But by the time of the trial, the father was over 80, and so even if the accident had not occurred he would not have been able to look after his son indefinitely. Since the accident, and as result of the injuries sustained, the

Claimant required 24 hour care. The issue that arose was to what extent the Claimant should give credit in his claim for the care that he would have required if the accident had not occurred. The learned judge held that no credit need be given for such care as the care which the Claimant would have required would have been provided by the local authority and, as such, would not have had to be paid for by the Claimant."

"*This approach appears to fail to assess the difference between the loss for which the claimant is being compensated and how that loss is evaluated. Thus, the claimant's compensation is assessed without any concern for his condition or needs at the time of the accident. The judge correctly considered Peters v. East Midlands SHA ([2009] EWCA Civ 145) when disregarding the ability to obtain care "but for" the accident paid for by the local authority, but went on to make what amounts to a "material contribution" assessment of care - on the basis the tortfeasor has made a material contribution to the care needs and so becomes liable for the whole.*

In practice a more commonly found approach follows two stages. First the court assesses the claimant's loss by comparing his needs before and after the relevant injury. Second that additional loss/care need is evaluated according to the principles laid down in Rialis v. Mitchell (Times, July 17, 1984), Sowden v. Lodge *([2004] EWCA Civ 1370) and Peters v. East Midlands SHA."*

2.6 Nobody has any problem with a case where the Defendant's attempts to procure a "set-off" or discount is rejected simply because the evidence is a little weak or speculative but where the principle of the set-off is applied correctly. The 2014 case of ***Tate v Ryder-Holdings Ltd*** **[2014] EWHC 4256 (QB)** is a case in point where the young Claimant was clearly not born with a silver spoon in his mouth and may well not have been looking at the greatest of futures because of his background but the court was very reluctant to begin speculating about the likely life ahead of him with a view to reducing his care package as the Defendant contended for.

2.7 In ***Tate*** that Claimant had been hit by a bus when he was aged 11. He suffered a fractured pelvis and a contused lung. T had learning difficulties before the accident and after the accident was more aggressive and impulsive and suffered from concentration and memory difficulties. The physical aspects of the injury settled but the cognitive and behavioural difficulties continued such that T could not live independently as an adult and required 24 hour care. By age 19, T was living in supported lodgings but encountering problems with drugs, alcohol and criminality. The Defendant accepted that T's personality disorder arose because of the brain injury but argued that he would have lived a chequered life in any event with irregular employment, substance abuse and likely associated anti-social and behavioural problems. In large part these arguments were based on

the evidence that no living adult relative of T had ever been in paid employment. Further, he had suffered an impoverished and benefit dependent childhood and educationally he had been a low achiever who was easily lead. The Defendant therefore argued that T's compensation should be discounted to take account of poor future prospects that existed even if the accident had not happened.

2.8 It was held that the need for 24 hour care arose directly by reason of the organic brain injury and therefore it would be wrong in principle to discount the amount of damages awarded in light of an alleged risk as to how life might have been absent the accident. It was extremely difficult for the court to evaluate in any acceptable or convincing way how T, who was only 11 when the accident occurred, would have developed and the speculation that the Defendant invited would be manifestly unfair to T. Interestingly however, the court did make a discount of £5,000 per year to the annual future care claim to reflect the fact that there may be periods when T was likely to be incarcerated either under he MHA 1983 or when in custody. There was a further 20% discount to reflect the fact that there was a substantial risk of non compliance with the suggested care regime.

3. REANEY v. UNIVERSITY HOSPITAL OF NORTH STAFFS NHS TRUST [2014] EWHC 3016 QB:

3.1 Mrs Reaney (R) was a lady who at 67 years of age experienced sudden onset of back pain with weakness in her legs. She was admitted to hospital and diagnosed with transverse myelitis, a rare inflammatory condition causing damage to the spinal cord. The condition rendered her permanently paralysed from her mid thoracic level. Pre-accident her condition put her in the same position as a T7 paraplegic and she was destined to be confined to a wheelchair for the rest of her life. Other co-morbidities in R's case included a past history of smoking, asthma, obesity, breathlessness and problems in the neck and left shoulder. In terms of care, R received gratuitous care from her husband and 7 hours per week of professional care from the LA.

3.2 Whilst in hospital R developed grade 4 pressure sores which in themselves lead to an infection of the bone marrow, flexion contractures of the legs and hip dislocation. The Defendant admitted responsibility for the pressure sores. R required 24 hours of care per day which was to be provided by 2 carers. She

needed adapted accommodation and was vulnerable to increased infection and spasms. She was only able to spend 4 hours per day out of bed.

3.3 Two issues arose in the case:

(a) To what extent did the pressure sores and their consequences make R's condition worse than it would have been but for their development?

(b) What damages should be paid as a consequence of any worsening, particularly in respect of care?

3.4 On the first issue a consideration of some aspects of the case is probably helpful. First, as to the consequences of the pressure sores, the Defendant's case was that the Claimant would not have been able to independently transfer from bed to wheelchair in any event. R's case was that but for the pressure sores she would have been able to transfer herself at least up to age 70. The court found that but for the pressure sores R would have transferred independently and her history of shoulder problems was not sufficiently current to have had any impact on this. The court also placed weight on R's willingness to improve and a keenness to be as independent as possible. Second, as to the amount of care needed, the Defendant sought to argue broadly that R would have needed 24/7 care in any event. R's case was that she would have been able to undertake some light housework and would have been able to get out and about and also manage her bladder and bowel needs. The court rejected the Defendant's assertion and found that but for the pressure sores there would have been a much better quality of life such that R would have spent her waking hours out of bed, in a wheelchair and able to self propel in her wheelchair. As a result of the pressure sores and consequent shortening of muscle tissue R was left in a vulnerable position and would fall if left unattended. So then as a matter of fact Foskett J found that but for the pressure sores there would have been a need for no more than 7 hours of care per week until age 70. Instead 24 hours of care per day was needed.

3.5 So then the nub of the issue was how the court should approach the valuation of damages in such situations where there is an underlying non negligently caused injury and the subsequent negligent injury dramatically increases the Claimant's care needs.

3.6 Before getting to the position decided by Foskett J it is important to summarise the arguments advanced on both sides. One might summarise this as D v. C / top up care v. the full care package....

3.7 For the Defendant it was argued that:

(a) If he Defendant was liable to compensate R for the full thrust of her care needs then they would be compensating her not only for the pressure sores but also for the underlying paraplegia.

(b) The Defendant's liability should be limited to 'topping-up' the care that R would have needed anyway absent the negligence.

(c) The court should assess the total care needs, give credit for care already being provided, take account of care that R required but may not have actually been receiving and then limit the recoverable damages to those linked to the additional care arising out the pressure sores. Note the difficult argument regarding the fact that R was in need of care pre-negligence that she was not actually receiving.

3.8 R's arguments were that:

(a) The court should look at the care and support that was actually being provided before the negligence and then look at what was now needed following the negligence.

(b) As a matter of fact the Defendant's negligence has caused the need for the care claim now advanced and that is a distinct claim that can be maintained irrespective of any pre-existing disability.

(c) Taking R as the Defendant found her, the Defendant has added significantly to the effects of her pre-existing disability such that certain costs dealing with those effects are reasonably required.

3.9 Turning then to the Judgment, Foskett J found:

(a) The Defendant's argument that they should essentially only top up the care and compensate for additional losses arising from the breach of duty would fail. Whilst he acknowledged that:

"..a Defendant cannot be held liable for loss or damage that it did not cause or to which it made no material contribution..."

He went on to say that once:

"..a Defendant has been shown to have done one or other of those things in relation to an injury sustained by a Claimant, then that Claimant is entitled to full compensation.. ".

(b) The Defendant's negligence had made R's position ***materially and significantly worse*** than it would have been but for that negligence and she would not have required the significant care package that she now requires. Causation is established by the more conventional 'but for' route but if he was wrong about that then he would have found that the Defendant had ***materially contributed*** to the condition that has led to the need for the 24/7 care as per ***Bailey v. MOD [2007] EWHC 2913 (QB) and [2008] EWCA Civ 883***.

(c) Following what was described as a 'sensible, compassionate and principled approach' taken by Edwards-Stuart J in ***Sklair***, no credit should be given for the but-for care provided by the LA and gratuitously. It seems that Foskett J implies at para 67 of the judgment that he would return in detail to the case of ***Sklair*** but in fact does not appear to do so when adopting the approach later at paragraph 72.

4. SOMETHING TO TALK ABOUT?

4.1 Plainly there is..... The Court of Appeal will hear the Defendant's appeal later this month.

4.2 What might me derive from the present state of affairs?

(a) Where you have a previously injured Claimant any assessment of additional damage and needs flowing from that is not a simple 'topping-up' exercise by the Defendant.

(b) There will need to be an objective evaluation of the 'but for' position looking at the factual state of affairs.

(c) Injuring someone who already has an injury is potentially equally or more serious than causing harm to an uninjured person. How well does this fit with ***Paris v. Stepney BC [1951] AC 367?***

(d) Following ***Sklair*** it seems to be suggested that if the Claimant would never have paid for pre-existing care needs then no credit should be given for this against the total care claim. The rationale for this appears to be based on whether or not the Claimant funded the previously required care or not. Is this right? Should this be the rationale? Consider the different outcome for two Claimants with the same needs pre and post negligence but one funded their pre-existing care and one did not. Should the Defendant compensate at different levels on this rationale alone?

(e) Is the real issue a focussed examination of the <u>type of care</u> provided as opposed to <u>how</u> the care is provided or paid for? Are the pre and post negligent care needs comparable?

(f) But for v. Material contribution..... It may be obiter but ***Reaney*** appears to suggest that if the Defendant materially contributes to the Claimant's injury then the Claimant will recover in full. Is it right for the liability principles in ***Bailey*** to be applied to quantum issues and in this case pressure sores which are a new condition and not likely considered as something that materially contributed to 'the condition'.

(g) Is this anything new or are we still just putting the Claimant back into the position that she would otherwise have been in?

(h) Pending the appeal, Claimants failing to appreciate and understand the implications of this decision could result in under valuation of claims for care, accommodation, transport, therapy etc.... This may be pertinent to the basis upon which your care reports is obtained, your schedule of loss and the assessment of quantum.

5. ANY OTHER RELEVANT CASES SINCE REANEY?

5.1 We can assume that the potential outcome of the appeal has put some cases on hold but in ***Simon v. Imperial College Healthcare NHS Trust [2015] QBD (4.6.15)*** Supperstone J refused to stay a clinical negligence claim pending the appeal in ***Reaney***.

5.2 The Claimant in ***Simon*** claims damages for sacral pressure sores developed as a result of clinical negligence by the Defendant. The Claimant is seeking significant damages for care on the basis that he spent an additional year in hospital because of his pressure sores and was under-rehabilitated for his spinal condition as he could not undergo the same level of rehabilitation that he would have done without vulnerable sacral skin. The Defendant argues that most of the Claimant's care needs would have been required anyway arising from his paraplegia.

5.3 The Claimant values his case on the basis of ***Sklair*** and ***Reaney*** contending that he need not give credit for the LA care he would have had but for the Defendant's negligence. The Defendant argued that the matter should be stayed pending the ***Reaney*** appeal. Their submissions were not met with favour.

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