Case Note: The care that would have been needed in any event.

In October 2015 Glyn Edwards and Emma Zeb spoke at the Cerebra national conference in Bristol about the first instance decision of Foskett J in Reaney. The Court of Appeal delivered their judgment on the Defendant's appeal on 2 November 2015. In this note Glyn and Emma explore the decision and provide some further thoughts on the matter.

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REANEY v. UNIVERSITY HOSPITAL OF NORTH STAFFS NHS TRUST [2015] EWCA Civ 119:

Background to the case:

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.

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.

The decision of Foskett J at first instance:

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? 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. The Defendant argued that they should compensate only for top up care and the Claimant sought the full care package.

4. 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.

The Court of Appeal's analysis and decision:

5. At para 70 of his judgment, Foskett J said that, if a tortfeasor makes the victim's current damaged condition worse, "*then he (the tortfeasor) must make full compensation for that worsened condition*". Lord Dyson MR, in the leading judgment for the Court of Appeal, states that if by that the judge meant that the tortfeasor must compensate for the condition in which the victim finds herself, he was wrong to do so. He must compensate for her condition only to the extent that it has been worsened by the negligence.

6. Lord Dyson MR continued. He said that the Defendant did not injure a previously fit and able-bodied person. It injured a woman who was a T7 paraplegic and who, as a result of her condition, already had considerable care and other needs. It was common ground that if the Defendants' negligence caused R to have care and other needs which were substantially of the same kind as her pre-existing needs, then the damage caused by the negligence was the *additional* needs. On the other hand, if the needs caused by the negligence were qualitatively different from her pre-existing needs, then those needs were caused *in their entirety* by the negligence.

7. Counsel for R tried to argue that the care required as result of the negligence was qualitatively different from the care that would have been required but for the negligence. It seems fairly clear in fact that the Claimant's Counsel was not disputing that the legal test as defined by the Defendant was correct and was instead seeking to defend the judgment on the factual findings (accepting that the analysis of the qualitative / quantitative difference was not present in Foskett J's judgment to any relevant extent). Claimant's Counsel accepted that if the post-tort care package was 'more of the same' then the Defendant only paid for the 'more' and not for the full package.

8. Lord Dyson MR disagreed with the Claimant's approach. In his view neither of the first two sentences in para 71 of Foskett J's judgment supported her submissions. They do not state or even imply that the significant care package required as a result of the negligence was qualitatively different from the care that would have been required but for the negligence. They are consistent with a finding that the significant care package was quantitatively, but not qualitatively, different from what would have been required but for the negligence (i.e. "more of the same").

9. Counsel for R attempted to supplement the finding of Foskett J in para 71 by reference to other parts of the judgment and the evidence (such as R's quality of life, the expertise of the carers and physiotherapy). Lord Dyson MR stated that if the judge had made a reasoned finding that the care package required

as a result of the negligence was different in kind from that which R would have required but for the negligence, it might have been difficult for the Defendants to challenge it. However, in his view the judge did not do so. He states that the undoubted fact that R's quality of life is now markedly worse than it would have been but for the negligence says nothing about whether the care that she now needs is qualitatively or quantitatively different from what she would have needed but for the negligence.

10. The question of whether or not the Claimant *would* have paid for the care package received on a 'but for' basis is irrelevant to causation. The Defendant should not have to pay for that element of the care that it did not cause even if the Claimant would not have had to pay for it but for the accident. The confusion between 'who pays' and the analysis of causation or 'who caused it' has been properly resolved as the former concept does not affect the latter.

11. The decision also squashes any suggestion that notions of 'material contribution' have any role to play here. Lord Dyson MR concluded that there was no doubt about R'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 the *Bailey* case. The issue was as to the cause of the needs to which these injuries gave rise.

Comment

12. The Court of Appeal seem to have taken a sensible step back in the right direction. They have tried to return us to the logical position of a tortfeasor only being liable to the extent that he has worsened a victim's condition. Nonetheless, where you have a previously injured Claimant, any assessment of additional damage and needs is still not a simple 'topping-up' exercise by the Defendant.

13. The decision introduces a 'Qualitative vs Quantitative Difference' test into the assessment of causation which had not been articulated so clearly before. This could have practical significance. The answer to this question in a case could lead to substantial differences in the claim's value, which will be important when obtaining care reports, schedules of loss and the assessment of quantum.

14. It will certainly be interesting to see how this test is applied in further cases. It is easy to imagine examples of cases which have resulted in clearly qualitatively or quantitatively different care needs. However, in those cases

which are less clear, the assessment becomes more difficult. Where do you draw the line? On the one hand, we can see from Lord Dyson MR's judgment that 'quality of life' is an irrelevant factor. But the future is less clear if: (i) different skills or expertise is required of carers; or (ii) physiotherapy sessions of a different character are required. It is disappointing that Foskett J did not make a specific finding on these aspects as it would have been interesting to see how it affected, if at all, the Court of Appeal's conclusion. He may yet have to do so as the matter has now been remitted to him for reconsideration in the light of the decision.

15. It also leaves open the question of whether or not the Claimant still has to give credit for the costs of care or treatment which would have been required even if qualitatively different from the care or treatment now required in the wake of the accident (which was one of the findings of fact actually made in the *Sklair* case).

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