X v Secretary of State for Health and Social Care: Valuing historic cases

Justin Valentine, Deputy Head of Clinical Negligence team,
St John's Chambers

Published January 2023

X, born in the mid-1960s, always considered she had a club foot (where a baby is born with a foot or feet that turn in and under). On reviewing her hospital medical records in her 50s for an entirely separate family-related reason she discovered that in fact she suffered drop foot due to a negligently-administered prophylactic injection of Vitamin K shortly after birth (frankly admitted in the contemporaneous medical records). Prophylactic Vitamin K should be given by intramuscular injection into the upper and outer quadrant of the buttock to avoid inadvertent sciatic nerve needle trauma but in X's case was given too low causing partial sciatic nerve lesion. The risk of this was well-known in the 1960s. She subsequently underwent a number of operations as a young child in an ultimately unsuccessful attempt to improve function.

Breach of duty and causation were admitted in the letter of response but limitation was raised as a preliminary issue. However, X's medical records (save those from shortly after birth) and her DWP records consistently referred to a congenital condition and there was no evidence that X was aware of the negligence. After acceptance by X that limitation should be tried as a preliminary issue, limitation was conceded on the basis both of date of knowledge and that there could be no prejudice since negligence was all but admitted in the contemporaneous medical records.

The case was unusual in that a significant element of X's loss was in the past. Though X accepted that she had a somewhat chaotic childhood, it is inevitable that had she not been disabled she would have followed an entirely different life-trajectory both in terms of her

employment and her life decisions. She had, for example, suffered low self-esteem as a teenager and was a victim of bullying on account of her use of a calliper. This, she said, was one of the reasons she left school early and then had children with a partner she may not otherwise have chosen.

To invite the court to map out a different life seems almost impossible. In the event, in relation to past loss of earnings, X adopted two scenarios, one of which applied the Ogden reduction factors from tables C-D to account for life events (usually only applicable in future loss claims), the other for actual life events (most importantly the birth of her children but also a period when she moved abroad and was not working). The typical life-term earnings of a woman born in the year of X's birth was utilised as her "but for" earnings. Remarkably, the two different approaches produced similar figures, corroborative of the statistically-robust Ogden methodology. This approach was assisted by the fact that all of X's children had done well academically, two of whom had degrees, supporting her claim that were it not for her disability she would have done much better at work. D's approach, as is still often the case, was to seek to ignore the Ogden methodology on the basis of anecdotal assertion. The D sought to turn the clock back to a time when claimants were consistently under-compensated by the statistically-uniformed opinions of parties, their experts and judges. We now have that evidence by way of comparison between tables C and D.

The case was supported by expert evidence from neurology, orthopaedics, psychology, pain management, accountancy (as to past and future loss of earnings), care & OT, physiotherapy, orthotics and accommodation.

The case settled shortly after a joint settlement meeting in October 2022 for damages in the region of £1.6 million. The most significant elements of loss were past and future loss of earnings/pension, future care/aids (including orthotics) and accommodation.

The case demonstrates that even very old cases can succeed if a claimant is totally unaware of the cause of injury. It is also noteworthy that historical medical records are far more open

as to what may have gone wrong. Duty of candour regulations are somewhat meaningless if medical entries themselves are so guarded. In this case, X's medical records, prepared at a time when patient access to the same was not common, were frank as to what had gone wrong and made arguments as to prejudice very difficult to run.

X's solicitors: Enable Law (Frances Letchford then Justin Goodman).
X's counsel: Justin Valentine, Barrister, St John's Chambers