Child brain injury claims: Avoiding pitfalls and achieving best results

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Published on 13 September 2023

1. We were asked to talk to you about avoiding the pitfalls and achieving best results in child brain injury claims. They are two sides of the same coin, and too many and varied to hope to discover in full in a lifetime of experience let alone to cover comprehensively in the short time we have.

2. The recent judgment of Mr Justice Ritchie in *C v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1770 (KB) is, however, an amazing resource in this field. It includes a wealth of material providing a potted handbook on the law relating to (e.g.) deductions from gratuitous care, the evaluation or treatment of accommodation for parents, the set-off of "but for" accommodation costs, and the basis for successfully claiming for a hydrotherapy pool.

3. As well as that, though, it provides some useful real-world examples of pitfalls and best practice in claims like these. I want to spend a short time highlighting some of those.

4. The Claimant (C) was an 8yr old girl (born Feb 2015) who suffered Cerebral Palsy (CP) as a result of the Defendant (D's) admitted negligence in failing to prevent hypoxic ischaemia before/during birth. C struggled for life and nearly died before she pulled through. But for D's negligence C would have lived a healthy life to a ripe old age. As it was, she was very severely disabled, with severe spastic quadriplegia and cognition functioning at an age equivalent of between 6 and 18 months. She could not communicate though she loved music.

5. When she was discharged home, her mum (M) spent more than four years as her sole carer, a colossal task terribly but vividly brought to life by the Judge in a paragraph of the judgment in which he refused to make any deduction against gratuitous care:

The rate used…is not for RGN nurses. It is for support workers based on the National Joint Council published rates. It is an aggregate rate for weekday and weekend work…This, in my opinion, undervalues those parts of the care M gave which were waking night care, nursing care, team leader care, case management and physiotherapy. The care was equivalent to nursing care for a not insubstantial fraction of the day. M was from time to time a team leader, a physiotherapist and a case manager, all of which roles are paid at higher hourly rates than the National Joint Council rates. I take into account the sleepless nights M has spent dealing with the Claimant's nappies full of diarrhoea, long after able-bodied babies would have been continent. I take into account the PEG feeding every day, the titration of drugs of a dangerous nature which she has carefully syringed into the Claimant and the heavy load she has carried up and down stairs and into and out of vehicles, as the Claimant grew older; the back pain and the psychological fears she has endured whilst caring alone, without the father, to keep the Claimant alive and healthy without commercial care or local authority care before liability was admitted and interim payments were made. I take into account the weekends, bank holidays and the national holidays when she laboured alone, whilst also caring for her son. I take into account the holidays M has forgone and the social life she has been deprived of. I take into account the battles she has had to take part in with schools and authorities to obtain services for the Claimant. I take into account that the Claimant has never had bed sores despite her disability and immobility. I have considered the fact that M has lived rent free in the new properties rented by her for the Claimant after they moved for which she pays no rent, but her claim for gratuitous care is limited and stops in March 2020, so this is barely relevant. I would have taken it into account if the claim had been run all the way up to trial. In all the circumstances of this case I consider that no deduction should be made from the gross figures agreed by the parties for gratuitous care by M.

6. This is just one of several very useful parts of a judgment in which Ritchie J summarises and illuminates the relevant law on some common key issues which are not the focus of this talk but nevertheless deserve mention:

    a. Recoverability of special damage. He provides a useful touchstone at [106-113] including...

    b. The relevance of proportionality to the assessment of future loss, which plays *"a limited role"* the correct question or test being:

        i. *"does C have a reasonable need for the expense as a result of injuries, pain, suffering and loss of amenity with the twin aims of gaining some benefits and taking steps towards putting her back into the same position she would have been in but for the injuries; and*

        ii. *is the claimed expense reasonable compared with other less expensive methods of satisfying the reasonable need and taking those steps*[1]*"*

    c. Failure to mitigate and the need for Ds to prove their assertions, at [114-116][2].

    d. Discounts on past gratuitous care. At [129-134] he reviews the authorities, involving discounts ranging from zero to 33%, and at [146] identifies six main factors to take into account when deciding the extent of any deduction (as to which, see f. below).

    e. Hydrotherapy. At [117-128] he reviews the eight Court of Appeal and High Court cases dealing with that issue. Then, at [185], he summarises the five main

[1] See [191] in relation to hydrotherapy: *"To consider the relative costs of the proposed at home pool against the cost of travel to and use of out of home pools in the local area they need to be properly costed. The Defendant, who makes the assertion of reasonable alternative provision, carried the burden of proving that it exists now and will do for her life at a* ***much*** *lower cost"* [emphasis added]

[2] Again, see [191] above.

factors to consider when deciding whether to allow such a claim and whether it should be at home or out of home.

f. Deductions from C's *accommodation* claims for parents' but-for accommodation costs: at [135-141] he summarises the authorities and concludes that (a) it cannot be done but (b) is a relevant *factor* to consider when deciding whether to make a deduction against *gratuitous care* (though note he made no such deduction here).

7. Some pitfalls and good practice arising from the judgment then:

a. At the outset of his judgment Ritchie J noted he had been given *"50 lever arch files of documents, skeleton arguments and two memory sticks of photos and videos.* ***No core bundle was provided****"*[3], which you might read as a nudge to do one.

b. The first part of the judgement dealt with a late application by C to rely on updating witness statements from existing witnesses and first statements from others, which D opposed on *Denton* principles (their opposition was described as **opportunistic**). The Court did not find that r.3.9 was engaged and allowed C permission partly on the basis that the original directions order required service of witness statements 18mths before trial, when the expert evidence was not complete:

"Thus a gap was left in relation to evidence relating to up to date factual events, which amounted to the most relevant 1 year and 8 months of the Claimant's life out of her 8 years and 4 months of life…I consider that [updating previous witness statements] *was a sensible and necessary step to take because the courts will always wish to have an updated view of the factual evidence rather than rely on factual evidence that is more than 18 months out of date, particularly when dealing with a severely injured child who is growing and whose needs change.* [As regards the new statements from C's carers] *I do not*

[3] [3]

regard that as a breach of the court's previous order but rather as a sensible decision to keep the Court properly informed of the up-to-date facts on the ground, in the light of the emerging issues for trial. ***The error here, in my judgment, was the parties' joint failure to build into the main directions a provision for up-to-date factual evidence, for which they both share responsibility.***[4]"

c. For four years from discharge M was C's sole carer. The LA then provided limited funding for 33hpw care (remember C needed 2:1 round-the-clock care). D's first interim payment was not paid until August 2019, even though liability was admitted in May 2019. Eventually a deputy was appointed, a case manager sourced, and private care was put in place from December 2019 – just as Covid hit. Staff or their families fell ill, and M became desperate, without support and short of funds, at times begging care providers to accept late payment. It was only after Covid that care really settled down. This demonstrates an important point (to be clear: this is no criticism of *C*'s solicitors, who may well have done all of this):

   i. Wherever possible C solicitors need to take the physical, emotional, and financial strain off parents by getting professional care in place early, especially where the parents are also injured, by proper **early use of interims.** Notify D insurers of the claim and C's immediate needs ASAP.

   ii. Legal teams should make time to visit and build relationships with the people they are representing, often over a period of many years, but you should **make good use of technology** like Zoom/Teams to stay in touch, *involving* the family in case management *without* upending their day-to-day.

   iii. Another smart use of technology was the creation of a 'day in the life' video for use at trial, showing the reality of C's injuries day-to-day and in particular the obvious benefit hydrotherapy sessions provided.

[4] [19]

iv. As well as being carers, you should think about whether already-stressed parents are best-placed to act as Litigation Friends, or whether somebody slightly more removed could take on that burden for them.

d. The Court criticised C's **choice of deputy**:

"I have reservations about Claimant solicitor firms appointing their own staff in maximum severity cases to act as Court deputies where the staff member does not have any experience of catastrophic injury cases...At the end of his evidence he accepted that he was not a Court of Protection approved deputy, he was a deputy for only three or four active cases and had never previously been a deputy for a catastrophic case of this size. Most of his work involved wills and probate and trusts. He had never handled a CP case before but he asserted that he thought that he was an appropriate deputy for the Claimant."

e. C's first **case manager** was also inexperienced in child brain injury, which had a small but significant impact on damages in the end, but it is not difficult to read between the lines of the judgment and see that things might have worked out significantly worse if C had not had the good fortune to switch to an experienced case manager. **A good case manager is vital.** If you are unsure as to their credentials you can refer to e.g. CMSUK, BABICM, or IRCM, who each to a greater or lesser extent certify their members according to experience.

f. Possibly the key issue running through the judgment is **choice of experts**. In cases involving children, paediatric experience is essential, and D's care/OT expert was excoriated for his lack of direct experience with children:

[He was] not an expert in constructing, designing and managing care packages for children with cerebral palsy. He did not have case management qualifications or experience and I do not consider that he was acting within his

CPR part 35 responsibilities professionally or properly in holding himself out to be an expert on maximum severity care packages or the costing thereof[5].

In cross-examination [he] accepted that his primary experience was with rehabilitation for adults over 18. He also admitted that he had finished NHS practice in 2019 and had been in private practice since but his CV for the case incorrectly stated that he is still in NHS practice. Under determined questioning he eventually admitted that the whole of his NHS practice related to adult rehabilitation. He also admitted that he worked in the neurology centre in South Yorkshire, which meant he was employed by the Defendant up until 2007. He then admitted that he had never worked in the construction of a maximum severity care package, or carried out recruitment and management of support workers as a case manager in his whole professional career[6].

g. Another very clear message was the **failure to visit C personally** (conducting remote assessments), a **failure to speak with M** who was providing so much hands-on care, and **failing to consider the overriding duty** to the court:

[He] could provide no explanation as to why he had not revisited the Claimant between March 2020 and October 2022 when he wrote his final report. He accepted the obvious point that children grow between age 5 and age 8 but tried to assert that there would be no major changes during that growth[7].

"When asked why M should provide gratuitous care for the next 11 years, 52 weeks pa he could not explain why he considered that she should. When asked whether he had asked M whether she wished to provide gratuitous care for the next 11 years, he accepted that he had not asked her."

"He admitted in evidence that some items that he put forwards were simply "the cheapest option" instead of the reasonable range for the Court."

[5] [90]
[6] [88]
[7] [88]

h. You will not be surprised to hear that the Court sided with C on the need for 2:1 waking night care, but it was not only the poor care/OT expert who was criticised. D's accommodation expert:

"is an architect, not a builder or a surveyor or a valuer. On neither occasion did he speak to M. Nor did he visit Sheffield for his first report. Nor did he ever view the Claimant's current accommodation. [He] produced a desktop report from his office in East Grinstead, having carried out internet research"

i. The Court made similar comment on D's physiotherapist, and specifically her approach to the relevant issues on hydrotherapy:
"I found [C's expert's] experience of CP children to be long and impressive. She was far more up-to-date than [D's expert], who had stopped NHS practice with cerebral palsy children 18 years ago and had concentrated on medico legal reporting since 2009, with some private physiotherapy[8]"

"I was impressed by the depth of research carried out by [C's expert] into hydrotherapy, travelling worldwide and discussing it with experts in Toronto, Israel and Europe. I was also impressed that she personally had visited the pools available to the Claimant around Rotherham and assessed them using her expertise in hydrotherapy. In contrast [D's expert] was out of date and was not prepared to accept that hydrotherapy had any benefits other than being enjoyable. It did not seem to me that she was **applying the test that this Court needs to apply, namely the balance of probabilities**. *Despite the substantial use of hydrotherapy for cerebral palsy children in the UK, in rehabilitation centres, in special educational needs schools and the research papers worldwide on it, [Ds expert] discarded it as worthless for anything other than orthopaedic post operative recovery. I do not consider her opinion to be either well informed or balanced in relation to hydrotherapy.[9]"*

[8] [101]
[9] [101]

j. Parties must therefore be careful to **engage experts who are *specialists* in paediatrics**[10] and remember that a **thorough, non-partisan approach is to be encouraged** if their evidence is to be accepted at trial.

k. That advice extends beyond selection of your *own* experts. In relation to a claim for the future cost of vehicles Ritchie J noted that *"the Defendant successfully opposed the Claimant's application for a vehicle expert before the Master and then asserted that [C's OT] was not an expert on the topic.* ***I found that approach unhelpful***[11]*"* - and accepted her evidence on the issue.

l. As to the cost of future holidays:

> *"I note that no medical "need" is required for these awards, they are pure enjoyment and of course follow the principle that the Claimant should be put back into the position that she would have been in had the injury not occurred in so far as that is possible.... I was* ***not impressed by [D's care expert's***[12]***] evidence on the cost of a 5 day cruise to Northern Spain, in the smallest cabin with the carers sharing beds***[13]*.*

m. Some further points. At trial a suitable house had already *been* purchased so it was D's burden to prove that that expense was an unreasonable failure to mitigate[14]. They could not do so. For C, the advice is to **buy the house during the life of the claim** if possible. It is better to resolve what is usually the biggest-

[10] Similarly it is important that in brain injury cases the expertise is neurologically focussed, as well as having paediatric experience, thus neuroradiologists for brain imaging, neuropsychiatrists and neuropsychologists with experience in developmental psychology, neurophysiotherapists with specialist experience of paediatric work, OTs and orthotists with specialist experience of children and their developing needs, educational psychologists, case managers with experience of managing a child's therapy team, and often a paediatrician to oversee the whole of the expert evidence and bring it together, and perhaps to convene an MDT meeting to tie all expertise into a coherent plan for therapy and case management.

[11] [200]
[12] Who else!?
[13] [202]
[14] [162]

ticket item on the basis of known costs. I am far more fearful of the prospect of under-settlement than I am excited by the prospect of over-settlement.

n. Among the other adaptation costs awarded was the cost of **reinstatement of the property when C dies**, to make the house saleable before it is sold in order to maximise value.

o. C loved music and was awarded the cost of some toys including one that allowed her to play music on the push of a button – it is essential to **make provision for C's hobbies**.

p. Interest: the Court did not award the normal 50% of the Special Account Rate on past items of expenditure because many of the big-ticket losses had been funded immediately when the need arose out of interim payments. C had not been kept out of her money, which was the purpose of interest, so a much reduced figure was allowed on a rough and ready basis (roughly 20% of the sum sought)[15].

q. Deductions for LA contributions to future care were (and are) better dealt with by a *Peters* undertaking from C than a rough-and-ready assessment by the Court[16].

Loss of earnings and the 'Lost Years'

1. An issue which can provide significant challenges is the claim for the loss of earnings which a brain damaged child will not now be able to realise, whether during her expected life span, or and more controversially, after an anticipated early death. As Ritchie J put it recently[17]

[15] [165-170]
[16] [180]
[17] *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB) (para 26) in which he dealt with the application for a 'leapfrog' appeal to the Supreme Court on this issue.

"Damages for lost years are awarded to injured, live Claimants who will die earlier than they would have, as a result of the Defendant's tortious acts or omissions. They are awarded for lost income during the lost years but the likely self-spend is deducted, leaving damages for the likely savings which the Claimant would have accrued and possibly left in his or her will. This head of loss has been contentious since the 1960s."

2. Where the child is very young there is little material upon which to build a model for a potential career, and where the child's life expectancy is reduced there is the added issue of whether any claim can be made for these 'lost years'.

3. So far as the latter is concerned, the binding authority of the CA in ***Croke v Wiseman*** [1982] 1 WLR 71 currently bars any action by a child claimant for earnings in the lost years, although an adult has been able to make such a claim for decades (***Pickett v British Rail Engineering*** [1980] AC 136) subject to a deduction for the estimated living expenses that C would have had (see eg *Harris v Empress Motors Ltd* [1984] 1 WLR 212). The basis for the rejection of a claim by a child in *Croke* was that such a claim involved inadmissible speculation by the court. Griffiths LJ (as then was) argued that compensation for the "lost years" was intended to form a fund which would be available to support a claimant's (then 'plaintiff's') actual or likely dependants but that a court should not speculate as to whether in future there might have been dependants when they will never exist. He also argued that such a situation differed from the surviving child who could claim for lost earnings (in principle) because "the money will be required to care for him", which in context must have meant to meet living expenses. This decision has been much criticised. In ***Iqbal v Whipps Cross University NHS Trust*** in CA [2007] EWCA Civ 1190 the CA made clear that they were reluctant in accepting that they were bound by *Croke.* Permission was given to appeal to the HoL but the appeal was compromised. In ***Totham v King's College Hospitals NHS Foundation Trust*** [2015] EWHC 97 (QB) Laing J and in ***JR v Sheffield Teaching Hospitals NHS Foundation Trust*** [2017] EWHC 1245 (QB) William Davis J both gave reasoned explanations for rejecting *Croke.* In *Totham* Laing J held she was bound by *Croke* but in *JR v Sheffield* William Davis J distinguished *Croke* (which he accepted was otherwise binding on him) on

the facts, in particular the claimant's age by the time of trial, and made an award. D appealed the decision which also addressed the issue of accommodation, but the appeal was compromised so that no authoritative judgment emerged.

4. In *Croke* and in *Totham* the child was aged 7 with a life expectancy of about 40 years, while in *Iqbal* the child was 9 at trial with a life expectancy to age 41. In *JR* the claimant was injured at birth but was 24 by the time of trial with a life expectancy to age 70. The judge was therefore able to find that there was no need for speculation as C had already reached adulthood. The principles in *Pickett,* therefore, applied.

5. The interesting discussions, therefore, are those in *Iqbal* and in *Totham* (para 46-47). In *Iqbal* the CA found that *Croke* had held a claim for earnings in the lost years by a catastrophically injured child was not permissible in principle because there would never be any dependents, but both *Pickett* and ***Gammell v Wilson*** [1981] 1 All ER 578 established that the absence of dependents is not in itself a bar to a 'lost years' claim for an adult. The claim for lost years is in respect of the claimant's own loss, not in respect of anyone else's. Thus, the decision in *Croke* was inconsistent with the previous HoL decisions (per Gage LJ para 46, and Rimer LJ at para 83 and 86). Further (in the writer's opinion at least) Griffiths LJ's argument differentiating a loss of earnings claim during life from a lost years claim fails since a lost years claim represents a claim for the loss of the surplus of earnings after living expenses have been met. There may be difficulties of proof (per Gage LJ at para 22 of Iqbal and per Lord Scarman in *Pickett*) but that does not bar the claim in principle. Further it would be illogical to allow claims for adolescents and adults who did not have dependants but disallow such claims by a child. These conclusions (said Gage LJ) were further supported by Lord Scarman's observations in *Gammell v Wilson.*

6. However, as was made clear in *Gammell* and stressed in *Croke,* although the claim is available, proving it and establishing more than a nominal award may prove very difficult (see eg *Connolly v. Camden and Islington Area Health Authority [1981] 3 All ER 250* where Comyn J on the evidence awarded nothing, while the indications given in both *Pickett* and *Gammell* were that the assessment exercise in the case of

a very young child was likely to be too speculative to justify more than a modest award, if any).

7. Nevertheless, the techniques of assessment have moved on since *Pickett* and *Gammell*, and loss of earnings can now be measured using the actuarial science behind the Ogden Tables. The principle of 100% recovery of damages for a victim of a tort, placing him in the position he would have been in but for the tort, enables a child to recover compensation for loss of earnings in the lost years and any additional uncertainty can be allowed for in the calculation. It should not prevent the calculation. It is in such a context that the exercise in *JR v Sheffield* is a useful example of how to establish the claim, albeit that was a case of a claimant who had achieved adulthood and the claim for the lost years was limited to pension loss.

8. Although it was impossible in *JR* to determine what the precise level of C's earnings would have been over his lifetime, had he not suffered brain damage at birth, nevertheless based on the earnings and careers of his brother and cousins, and – importantly in that case - taking into account his outgoing personality, it was likely that he would have earned in excess of the median figure for a skilled tradesman, and there was no reason why the loss of pension should not be recoverable on that basis. It is notable that there were many gaps in the evidence, such as his brother's payslips and what his cousins were earning (as opposed to what they had achieved or were achieving at university), and his father's less impressive earnings were ignored. **The lesson is that to avoid a defendant being able to complain that the exercise is too speculative to provide a rational and rigorous basis of assessment, all possible data should be obtained and presented, and the earnings model should be based on as empirical and comprehensive a basis as possible.**

9. Where the child is a little older, the school's pre-accident records will assist with building a picture of C's 'but for' potential. An educational psychologist may be instructed to provide an analysis of what these records reveal and the extent to which they enable a court to identify the difference between what C would have

and will now achieve. A defendant may also wish to analyse these records to illustrate limitations, including any evidence of behavioural issues which might have limited C's ability to succeed.

10. The issue may at last now reach the Supreme Court (assuming the appeal is not compromised again). In *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB) Ritchie J reviewed the case law at some length, noted that *Gammell v Wilson* allows a lost years claim on behalf of a teenager and noted the illogicality of refusing such a claim to an 8 year old but allowing her to claim if she does not bring her claim until she is 15. He found on his review of the case law that the Court of Appeal decision in *Croke* could be challenged on grounds which he found to be logical and to have a real prospect of success, certified the matter to be one of public importance and certified the appeal as satisfying the conditions for a leapfrog to the Supreme Court. The Supreme Court has (as of 16th August 2023) accepted the case.

Early settlement – or deferred trial? And the impact on Part 36 offers.

1. Inevitably, as a child grows, his or her body and brain changes. There will be growth spurts and physiological and emotional and psychological changes which may radically change the nature of their needs. Where there are issues of spasticity, surgery may be needed, and in particular there may be significant spinal scoliosis or kyphosis that requires surgery or treatment the outcome of which will determine equipment needs and may impact on care needs. Orthotics will have to be reviewed and the ultimate nature of what will be required will not necessarily be known for some (maybe many) years. Cognitive recovery (or deterioration) in future may be relevant to needs and to likely losses in terms of earnings or care.

2. For all these and other reasons, settlement at an early stage may be unwise, or even negligent on the part of the claimant's team, while the insurers will often be pressing for an early settlement to clear the case from their books and/or to secure a more modest award. The court will perhaps be looking to progress a case which

has perhaps been started primarily to secure early interim payments, rather than to rush to final settlement. What, then, can be done?

3. In an appropriate case it may be possible to obtain an award of provisional damages where a chance can be proved that there may be a serious deterioration in C's mental or physical condition, but the limitation on this is the extent to which the deterioration of which a chance is identified has to be specified and defined in a way which may be too constraining to allow a fair settlement. Another option is to assume a deterioration but allow a discount for it not happening, but then if it does C will be under compensated. Further, it may not be possible to foresee exactly what changes may develop.

4. Especially in the case of children not yet into their adolescence but where changes deriving from all the changes that adolescence brings may be important, it may be appropriate to defer at least some aspects of the case[18].

5. Part 3.1(2) of the CPR allows for a court to try some issues and adjourn others (3.1(2)b), direct a separate trial of an issue (3.1(2)(i)), stay aspects of a case (3.1(2)(f)) and generally manage the case flexibly. ***Cook v Cook*** [2011] PIQR P18, [2011] EWHC 1638 (QB) was such a case where the long-term prognosis for the 10-year-old claimant was speculative and uncertain. There was expert evidence that there were too many uncertainties and risk factors to attempt a final prognosis. Whilst recognising that it was a very exceptional course to take, Eady J, exercising the court's powers under r.3.1, directed that the forthcoming quantum trial should be confined to the determination of damages up to the claimant's 16th birthday, with the assessment of longer term losses being adjourned until such time as solid

[18] Dr Renee McCarter (neuropsychologist) observed in *IEH v Powell* [2023] EWHC 1037 (KB) that entering adolescence "is the period of final maturation of the brain and the time at which the most rapid developments in higher level thought, executive and adaptive function, and social and communication competence take place. These capacities are key to success as an autonomous, independent and competent member of adult society, to the success of interpersonal relationships, the maintenance of good mental health and they substantially contribute to ultimate educational success and employment outcome."

evidence becomes available, so avoiding the need for speculation and achieving a more accurate and realistic assessment of the claimant's actual needs.[19]

6. A more recent example is ***Benford (a child represented by her mother (as litigation friend)) v East and North Hertfordshire NHS Trust*** [2022] EWHC 3263 (KB), [2022] All ER (D) 65 (Dec) in which it was D, who admitted negligence, who sought a delay in the trial by 4 years on the basis that the assessment of future loss and expense arising from the C's injuries was either impossible or so speculative that it would be unjust to D[20]. Ritchie J refused the application in circumstances where the Trust had previously agreed to a trial in May 2023 and ruled that the overriding objective of achieving justice between the parties would be achieved by a trial taking place as agreed and that the general rule should be that the parties should stick to their choices. The court took account of, among other things: (i) D's delay in making the application; (ii) whether either party would suffer prejudice (from delaying or not delaying); (iii) the fact that 24 experts had assessed the claimant in the last year and that an adjournment would be likely to lead to at least 24 further assessments; (iv) the need for finality in litigation; (v) the need for justice to be done without unreasonable delay on behalf of insurance companies, the NHS Legal Authority, the tax payer and on behalf of claimants; and (vi) the wishes of the parents 'who carried the burden of caring for the claimant, running the litigation and being present at each assessment by experts'. The court held that, after balancing all of the factors, the trial date should stand, that the balance of prejudice did not favour the defendant and that the trial would not result in unfairness for the asserted reasons.

[19] See also *Smith v East and North Hertfordshire Hospitals NHS Trust* [2008] EWHC 2234 (QB). C was 7 at trial but there was an issue as to how her education would be funded which depended on the outcome of two tribunal appeals, the cost of which, discounted for accelerated receipt, amounted to £32,041. If the funding was not available the cost of schooling would be very considerable. The judge awarded the sum of £32,041 for the appeals but (para [49]) gave C liberty to apply within 12 months for a future trial of the issue of damages for school care and therapy fees to the age of 19 in the event of an appropriate education authority failing to meet the expenses of the appropriate school.

[20] Another example is *Small v North Bristol NHS Trust (LTL 24.2.13)* where D's application for an adjournment pending a trial of epilepsy medication failed.

7. It will be apparent that the decisions are fact specific and in *Cook* a very important aspect was the evidence that the long-term prognosis was speculative and uncertain. Such an application will need to recognise that it is an exception and will need to be adequately supported by evidence.

8. The problem with awaiting a child's condition to stabilise or develop is that an offer that D may have made at an early stage which on a 'worst case' basis looked too low, may begin to look more attractive if the child's condition improves. If the offer was made pursuant to Part 36, then there may be difficulties in accepting it out of time without costs consequences. Unsurprisingly this has given rise to a number of conflicting decisions. The cases are however extremely fact specific or fact sensitive (as has been pointed out several times, eg in *SG v Hewitt*) so that particular decisions (as opposed to statements of principle) can rarely if ever be treated as precedents.

9. As is well known the civil justice system places a great emphasis on early settlement. This makes a lot of sense because of the pressure on the existing court resources available but also because of the costs (both financial and emotional) which early settlement will save litigants. Thus CPR rule 1.1 – the overriding objective - emphasises (*inter alia*) saving expense, dealing with the case in ways which are proportionate, and allotting appropriate resources, while rule 1.4(2)(e) and (f) specifically identify as part of active case management encouraging the use of ADR (alternative dispute resolution) and helping the parties to settle the whole or part of the case (and see also rule 3.1(2)(m) – the taking of any step for furthering the overriding objective, including hearing an Early Neutral Evaluation (ENE) to help the parties settle the case).

10. The court will frequently include in a directions order a requirement for the parties to consider, at all times, the possibility of ADR, and for any party refusing to engage with ADR an obligation to give reasons for that refusal. A failure to engage with ADR or mediation will be likely to result in adverse costs consequences if that party is found to have acted unreasonably, even if they subsequently win the case: ***PGF II***

SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288[21]. As a general (albeit not invariable) rule silence in the face of an invitation to participate in ADR is of itself deemed unreasonable, regardless of whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. If there are reasonable grounds for declining the invitation, or for suggesting an alternative form or time for the ADR then it is incumbent on (and advisable for) a party to say so at the time. Insurers may seek to place pressure on a party to engage in early settlement discussions and therefore it is important to be able to articulate reasons why it is inappropriate, in the same way as seeking a stay or adjournment (as in *Cook*).

11. Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement. It may fairly be described as lying at the interface between litigation and ADR (see the ADR Handbook the 3rd edition of which was published in 2021). It is however also designed to provide parties with a measure of protection against costs risks: see ***Matthews v Metal Improvements Co. Inc*** [2007] EWCA Civ 215 and ***SG v Hewitt*** [2012] EWCA Civ 1053 at paragraph 75. BUT BEWARE these are both cases under the previous iteration of Part 36. In *Matthews* there had been a change of circumstances unconnected with the accident (C developed life limiting cancer so the offer became attractive) and this did not justify avoiding the consequences of Part 36. In *SG v Hewitt* the claimant was a child for whom there was for a long time an uncertain prognosis making any advice to the court by C's counsel that an offer should be accepted impossible. When a clear prognosis developed 2 years after the offer it was accepted. D was ordered to pay C's costs.

12. Part 36 offers are frequently made at a level below that which the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, a costs risk will encourage the claimant to settle for less than the claim is

[21] A landlord and tenant case: while ADR is voluntary and cannot be imposed by the court, in practice a failure to engage will have severe consequences in terms of costs sanctions as this case illustrated.

worth. This can be a powerful tool in the hands of insurers especially in personal injury cases. If you have a case involving an evolving medical condition you may not know what the ultimate condition of the claimant is going to be, and this is typically the case in a claim by a child (see eg the case of *SG v Hewitt*). An offer can be made at any stage, even before proceedings have been issued, so a realistic and possibly generous offer by a defendant at an early stage of the claim may put significant pressure on C. Can he afford to further explore the medical condition, instruct experts and prepare a detailed costed claim if all those costs may be disallowed or not recovered, and (*a fortiori*) if there were a danger of paying D's costs which is likely to be the case in other civil claims (where QOCS does not apply)? There may therefore appear to be some merit in keeping your cards close to your chest as a claimant, rather than giving the defendant too much information about the way your claim may be formulated and thus giving them the opportunity of framing a well-judged offer which may undervalue the potential of the claim but where you cannot take the risk of refusing it. In such circumstances it may be advisable to write a reasoned and detailed letter explaining why it is premature to consider the offer, so as to be able to resist a later argument that you have unreasonably rejected (or failed to accept) an early offer (which turned out to be realistic). Note, however, that a failure to keep the defendant's solicitors and insurers informed as to steps being taken, inquiries being made and the progress of the case may result in criticism that may sound in costs, especially in respect of late acceptance of offers (see further below – eg *IEH v Powell* [2023]).

13. It should be remembered that the consequences flowing from a Part 36 offer which is not accepted in time, or is beaten, will be mandatory unless the court considers it 'unjust'. The question of whether it is unjust to make such an order is decided after considering all the circumstances of the case but in particular the factors listed at r.36.17(5):

- the terms of any Part 36 offer;
- the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- the information available to the parties at the time when the Part 36 offer was made (*plainly this is relevant to whether it is appropriate to consider settlement)*;

- the conduct of the parties with regard to the giving of, or refusal to, give information for the purposes of enabling the offer to be made or evaluated (*may be relevant where a hospital trust is D and there are difficulties securing all the records*); and
- whether the offer was a genuine attempt to settle the proceedings (for instance offers are sometimes made at 95% or even 99% of the full value of the claim to try to get the benefit of these interest and penalty provisions but that is unlikely to be seen as a genuine attempt to settle). [22]

If the court decides that it would be unjust to make the usual order under Part 36, it has wide powers when exercising its discretion as to costs under CPR 44.2.

14. A recent decision illustrating the issue was ***IEH v Powell*** [2023] EWHC 1037 (KB) in which Senior Master Fontaine considered whether the normal Part 36 consequences should apply in the case of a brain damaged child (aged 8 at injury, 14 at settlement) who had accepted a Part 36 offer some 18 months after it was made, so that the provisions of CPR 36.13.(4), (5) and (6) applied and C was seeking the disapplication of CPR 36.13 (5)(b)[23]. It was held that the normal costs provisions

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[22] Some recent cases::
Chapman v Mid and South Essex NHS Foundation Trust (Re Costs) [2023] EWHC 1871 (KB) : C's offer to accept 90% of damages bit
Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd [2023] EWHC 1512 (Comm) : C's offer to accept 96% of full value did not bite.
Omya UK Ltd v Andrews Excavations Ltd & Anor [2022] EWHC 1882 (TCC) : C's offer to accept 98.85% of full value bit.
Sleaford Building Services Ltd v Isoplus Piping Systems Ltd [2023] EWHC 1643 (TCC) : C's offer to accept 99.9% of claim value did not bite.

[23] CPR 36.13(4)

Where -

> (a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or
> (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or
> (c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

would not apply. However, it is made clear that a party, even a child, asking for an exception to be made has to demonstrate that it was "unjust" for the normal costs consequences to apply. Contrast *Briggs v CEF Holdings Ltd* [2017] EWCA Civ 2363 where the claimant accepted an earlier offer following an improvement in the prognosis of his injuries, and the court concluded that such an improvement was merely part of the risks of litigation and he had not shown it was unjust to make the order

15. The circumstances that are relevant to the consideration as to whether it would be unjust to make the order specified in rule 36.13 (5) in this case, were found to be:

i) the fact that the Claimant is a child. While this may not always be relevant to an issue under CPR 36.13(5), in this case the relevance was, as stated in the medical evidence, that the long-term effects of a traumatic brain injury usually cannot be known until a child reaches and/or passes through puberty and adolescence. The uncertainty of the claimant's developing condition and prognosis was not "*simply one of the ordinary contingencies of litigation*" (which would otherwise be insufficient to satisfy the test of a costs order being 'unjust'), but took the case 'out of the norm' and pointed strongly in favour of injustice if the usual order as to costs were applied. This was because it was not the Claimant's fault that he sustained the accident when a child, and had to wait to pass through puberty before the long term effects of his injury could be assessed with more certainty. Nor was it the litigation friend's fault who, in exercising her duty to protect the child's interest, could not be expected to accept the offer in the light of the current medical evidence in November 2020 and the advice given by Leading Counsel. The simple fact that C is a child (or a person under a disability) is

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36.13(5) Where paragraph (4)(b) applies the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that -

> (a) the claimant be awarded costs up to the date on which the relevant period expired; and
> (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

not without more a reason to depart from the usual rule but Pill LJ in *SG v Hewitt* makes clear that it is at least a relevant factor.

ii) whether the litigation friend had sufficient evidence to enable an informed decision to be made in respect of the offer in November/December 2020; the medical evidence was not due to be served until 2022 (the offer having been made in 2020) and the expert advice was that C should be reassessed at ages 13, 16 and 18. The authorities make it clear that simply because a Claimant, or those advising them, has acted reasonably, is not sufficient, on its own, to make the usual order in CPR 36.13 (5) unjust, but it is of relevance when considering all the circumstances, see *SG v Hewitt* at [43]. Master Fontaine observed that it was extremely doubtful that the court would have been able to approve the Claimant's acceptance of the offer in late 2020, on the basis of the evidence as it was, and would have directed an adjournment. While this was not definitive it was a relevant consideration.

iii) whether the approach that the Claimant's solicitors took in responding to the offer was reasonable; the Master concluded their conduct of the case was reasonable and they were not to know how C's condition would develop or that he would (as happened) show an unexpected improvement in 2021 (but see (v) below);[24]

iv) the particular factual circumstances relating to the Claimant, namely the fact that he lived and was being educated in Morocco, the effect of the pandemic and the necessity for appointment of a new litigation friend, in place of his mother, who became psychiatrically unwell in 2021 and had to be replaced by the Official Solicitor; of these the impact of the pandemic had some relevance to the delay;

v) the Claimant's conduct in the litigation; C's solicitors had failed to keep the insurers informed of the further inquiries they had been making, the additional assessments that were being carried out and the advice received so that D was in the dark. C's solicitors were criticised for this and Master Fontaine observed that the costs incurred during the period of delay between September 2021 and May 2022 would be subject to the scrutiny

[24] See also Pill LJ at [93] where he observes that ~"an important factor" is whether C's advisors have acted "reasonably".

of the Senior Courts Costs Office on detailed assessment and C might not recover all his costs following the expiry of the Part 36 offer;

vi) the fact that the Part 36 costs regime is intended to encourage settlement and discourage disputes on costs was a relevant factor but equally the regime recognises that the application of rule 36.13 (5) has the potential to cause injustice, and provides a mechanism for avoiding any injustice in rule 36. 13(6), in appropriate cases.

16. The interaction between a Part 36 offer and CPR 21.10 was considered in *Wormald v Ahmed* [2021] EWHC 973 (QB), in which Clare Ambrose QC, sitting as a Deputy High Court judge, observed that, where the court was being asked to approve a settlement, and the party making the Part 36 offer wishes to resile, this may be easier to do than to asking the court to disapply the normal costs consequences of Part 36. She also made observations about the application of CPR 21.10 where the protected party has died prior to the approval of the settlement.

17. Changes to Part 36 and Part 44.14 (enforcement of costs orders by D)

In cases commenced after 6th April 2023 a significant change to Part 44.14 has resulted in the effect of the decisions in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 and *Ho v Adlelekun* [2021] UKSC 43 being reversed (those decisions having been to the effect that defendants could not enforce costs orders against damages unless there had been an order awarding them (and not a Tomlin order because an agreement contained in a schedule to a Tomlin order as it is not "an order for damages and interest"), and could not set off costs orders made in their favour against costs orders made in favour of the claimant).

18. The new wording of the rule is:

"*(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages or agreements to*

pay or settle a claim for, damages, costs and interest made in favour of the claimant.

(2) For the purposes of this Section, orders for costs include orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.

(3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.

(5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

It follows that a defendant can now enforce a costs order (in cases commenced after 6th April) where the claimant has accepted a Part 36 offer late and where the claim is concluded by a Tomlin order, as well as setting off costs orders against adverse costs orders (see Part 44.12). Part 44.14(2) refers to 'deemed' costs orders and that will cover orders made when a claimant accepts a Part 36 offer)

19. This is liable to have an important impact on a claimant's approach to interim applications where there is a risk of an adverse costs order. The need for ATE cover also becomes of increasing importance. It is also not difficult to envisage situations in which a conflict may arise between the claimant and his solicitors as to the application of the net recovered damages for instance if the CFA is interpreted as having achieved a 'success' but where the damages have been exhausted in satisfying D's costs, but C retains an obligation to pay his own solicitors.

20. Formulation of Part 36 offers

While a party may make an offer in whatever form they like and such offers may be relevant when the court considers costs in the context of Part 44, they will be irrelevant under Part 36 unless formulated correctly as a Part 36 offer and meeting the criteria giving such offers validity.

21. Importantly, Part 36 is a self-contained code. This is made clear in r.36.1(1) but case law also indicates that this code should not be subject to judicial glosses. See eg *Gibbon v Manchester City Council* [2010] EWCA Civ 726; *LG Blower Specialist Bricklayer Ltd v Reeves* [2010] EWCA Civ 726. It has been described as containing a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted, and the offeree fails to do better after a trial.

22. Many of the difficulties which arise in practice in respect of Part 36 offers arise because parties or their lawyers do not pay sufficient attention to the requirements of the rules as to the terms of the offer and what it must contain. As Pepperall J said in the *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC):

> "I consider that, as a matter of policy, the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers."

Most of these difficulties would be avoided if parties would only use form N242A to make their offers. The form sets out all the elements needed to make a valid offer (and acceptance). Attempts at "improving" it or trying to make an offer on more advantageous terms for the offeror frequently result in invalid offers and the loss not only of the benefits that are sought to be gained but also the benefits a valid offer would have provided. An important message, therefore, is "**Use the Form N242A**". Clarity is needed to decide whether the Claimant has satisfied the test under Part 36.17(2) namely is the order made "more advantageous" than the offer and "more advantageous" means better in money terms by any amount, however small, (and "at least as advantageous" shall be construed accordingly).

23. The recent decision in *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB)[25] provides an interesting example of assessing what is there referred to as "MTV" or money terms value, where the Part 36 offer was part lump sum and part PPO. If an offer only consists of a lump sum it is easy to establish if the offer has been beaten and what its MTV was, similarly if the offer solely consists of a PPO. But where it is a combined offer and represents a complete package which can only be accepted as such, then Ritchie J concluded that it is not acceptable to capitalise the PPO using the life expectancy multiplier (at least where the life expectancy had been in issue) and then add that to the lump sum to get a capitalised equivalent for the offer and for the award and compare the two. Rather he held (at [18]) that: "the MTV of a combined offer is simple and has two parts: the figure for the lump sum and the figure for the PPO. No capitalisation of the PPO is relevant to the MTV. For an offeror to beat her Part 36 combined offer, she has to beat both parts. If she wishes protection for each part, then individual offers can be made." At trial the Claimant beat the PPO part of the combined offer but failed to beat her lump sum offer, so the combined Part 36 offer was not beaten. Therefore, the Part 36 rewards and incentives were not appropriate, and the Claimant secured her costs simply on the standard basis for the claim.

Approval of Infant Settlement (Part 21.10)

1. This topic is one which could be addressed much more extensively and so the comments below are merely some observations. Note also that since April 2023 there have been amendments to Part 21.

2. The judge's (or master's) function on an approval hearing is inquisitorial, which is why the documents submitted for the approval of the court retain their privileged status. What the judge must have regard to and what therefore must guide the claimant's lawyers in their presentation of the application for approval, is the best interests of the (minor) claimant. Thus, a balanced view of the prospect of success

[25] NB this is a different reference to the substantive judgment

on contentious issues is important and hence the ability to refer to privileged material.

3. The application for approval may thus include medical or other expert reports (including financial advice) as well as witness statements and other evidence, which have not been served or disclosed and these all retain their privileged status (*IB v CB* [2010] EWHC 3815 (QB) Maddison J). It is appropriate that the court should be fully advised and that those representing a particular claimant should not feel inhibited in presenting all relevant materials, arguments, or considerations to the judge, by a fear that if they overstep the mark and actually send a material report to the judge then it loses its privileged status. Of course a separate bundle of disclosed material may be made available to D as well as to the judge.

4. It is important to remember that the provisions of Part 21 and the need for approval apply where a voluntary interim payment is made: CPR PD 25B para 1.2 (albeit that in practice it is often the case that the Master will approve such payments retrospectively), and also to the acceptance of a Part 36 offer (r.36.11(3)). Without this approval the settlement, compromise or payment of any claim is wholly invalid and unenforceable, and is made entirely at the risk of the parties and (importantly) their solicitors. See eg *Drinkwall v Whitwood* [2004] 1 WLR 462 where agreement was reached on liability in respect of a child claimant at 80:20 to allow for contributory negligence but no approval was sought and quantum remained to be resolved. Shortly before the child turned 18 the Defendant sought to resile from the agreement (and allege more contrib) and the CA held they were not prevented from doing so. C's solicitors should have applied for approval and an order. Likewise, a defendant will need protection as the well known case of *Burgin v Dunhill* [2014] 1 WLR 933 demonstrated (C transpired to be under a disability and was able to reopen an earlier unapproved and disadvantageous settlement).

5. The timing of the application for approval can be important. The court will be required to approve a settlement on liability, so that if (for instance) a contributory negligence issue is compromised, or in a clinical negligence claim an agreement is reached reflecting the less than 100% chance of success, the court must approve

this, and in the absence of approval a trial of that issue will be necessary, so that if the prognosis is uncertain and there would need to be a delay before quantifying the claim, or if very extensive medical evidence is going to be required, it will be important to get liability resolved and crystalised first, and so open the way to obtaining interim payments.

6. The judge should be provided (r.21.10(3)(h)) with a legal opinion (which may be from either counsel or a solicitor) on the merits of the settlement, except in very clear cases, together with any relevant instructions to counsel unless they are sufficiently set out in the opinion. As discussed above this is confidential to the judge.

7. The other documents supporting any application or request for approval must include (r.21.10(3)) –

(a) a draft consent order setting out the proposed settlement terms. This will need to provide for staying the proceedings (with permission to enforce without instituting separate proceedings). It will need to include permission for C to accept the sum or terms and in a Fatal Accident claim it will need to include the apportionment of damages in favour of children. It will need to include a discharge of the defendant from further liabilities on compliance with its terms;

(b) details of whether or to what extent liability is admitted;

(c) the age and occupation (if any) of the child or protected party (At an approval hearing in respect of a child, investment directions will usually be considered). The original of the claimant's birth certificate must be provided at the hearing and, assuming payment into court is requested, the courts funds form CFO320 should be provided, completed as appropriate. Form N292 transferring sums to the CoP may be required. The draft order may require a direction for the child to obtain the funds on obtaining his or her majority (assuming they have capacity). Note that Part 21.11 provides extensively for

investment and payment out while Part 21.12 deals with costs and expenses of the litigation friend and their recovery;

(d) confirmation that the litigation friend approves the settlement;

(e) a copy of any relevant medical, financial or other expert evidence or advice (which as we have seen may include undisclosed material which may explain why the claimant is being advised to accept a settlement which at first blush may not seem to meet her best interests);

(f) in a personal injury claim arising from an accident, details of the accident and of claimed loss and damage;

(g) any documents relevant to considerations of liability;

7. If settlement is reached before proceedings have been issued then the application will be made under Part 8. If settlement is reached after proceedings have been issued during the course of the case then Part 23 applies.

8. There are important provisions relating to costs in the case of a child. Part 46.4 deals with costs where money is payable by or to a child (or protected party) and provides that the Court must order a detailed assessment of costs payable by or out of any funds belonging to a child, and also to a child unless a default certificate is issued. This assessment may not be required where the only costs payable are C's solicitors' success fee.

8. If the claim includes damages for future financial loss, the court must be satisfied that the parties have considered whether the damages should wholly or partly comprise periodical payments, and the legal opinion should address the issues arising, which will be supported by the advice of the financial expert. In particular, rule 41.9 requires the court to be satisfied as to the continuity of the payment of a PPO, while PD 41B requires (inter alia) that consideration is given to the form of

order preferred by the claimant and the defendant and so far as the former is concerned the nature of any financial advice received by the claimant when considering the form of award. The legal opinion will need to address this issue.

8. The opinion will also, usually briefly, refer to the request for an anonymity order. The decision in *X v Dartford and Gravesham NHS Trust [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647, CA* means that unless it is judged unnecessary (in which case the judge should give a short judgment explaining the reasons) an anonymity order will normally be made without the need for a formal application. There may, however, be particular reasons for anonymity such as pressure on the claimant or their family from others and such circumstances will need to be set out.

9. Unless there is a professional deputy appointed, if it is proposed that the damages be held other than in court, the parties must provide financial advice in respect of the cost and benefit of the money being held in trust compared to it being held in the court funds office.

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