



Personal Injury and Medical Law Teams Case Note

Corbett v South Yorkshire Strategic Health Authority [2007] EWHC, Judge Bullimore QC sitting as a Deputy High Court Judge (handed down on 4th May 2007) unreported

This was a claim arising out of birth asphyxia that had left the C severely disabled with considerable motor dysfunction and cognitive deficit. He suffers from cerebral palsy, has the mental age of a 5 year old and requires aids to enable him to walk. He has a ventricular shunt because of hydrocephalus, loss of visual field on one side and epilepsy that has been poorly controlled.

Liability was admitted and all heads of loss save for care and Case Management had been agreed at £1,655,000 with a multiplier of 28.12 based on a life expectancy of 48, should a lump sum approach be adopted.

The issues before the court were

- i) the appropriate care regime and the impact of the Working Time Regulations
- ii) whether the wording of the Damages Act 1996 allowed a measure of indexation other than the RPI;
- iii) if so, the appropriate indexation of Periodical Payments: the Defendant contended for the RPI and the Claimant for ASHE 6115¹

D's position was that the decision in Flora was incorrect and that on the proper interpretation of s2(8) and s.2(9) of the Damages Act 1996 the court does not have the discretion found in that case of Thompstone [2006] EWHC, Swift J. Their experts nonetheless agreed (as they did in Thompstone) that the ASHE medium indexation was a more realistic reflection of the annual increase in professional care costs. The Defendant submitted that 'distributive justice' was to be distinguished from 'affordability' in that the NHS could 'afford' to meet a judgment to pay damages in respect of future financial losses at a rate higher than RPI but that this would be at the cost and detriment to the provision of adequate NHS resources to the public at large.

Held: Judgement for the Claimant

¹ as in Thompstone

Care

- 1) The parents' preference is the not the indicator of choice. On balance the judge preferred the recommendation of the Claimant's expert (Rosemary Statham) independently of the fact that there proposed by the D's expert (Joanne Douglas) breached the Working Time Regulations. Irrespective of such Regulations the judge accepted that the very willing and "experienced and highly motivated" carer "struggled" to provide 11 hours a day 4 days a week for a person of the C's needs and emotional disposition; he was described as a 5 year old boy in the body of a large and heavy man. Care was therefore allowed at £105,600 per annum subject to indexation
- 2) In rejecting the evidence of the D's experts on the costs of care, the judge found this "quite illogical" since the RPI does not measure labour costs or growth in earnings [paragraphs 161 164] and "it is likely that very soon [the Claimant] would be unable to pay from the periodical payments alone the actual costs of care". The RPI "is not a fair and appropriate indexation measure in this case" [paragraph 167]

Indexation

- 3) Making reference to Thompstone² and Flora v Wakom³ the judge reviewed the expert evidence of Victoria Wass and Richard Cropper for the Claimant and Doug Hall and Ray Story for the Defendant – Doug Hall being the only expert who did not give evidence in Thompstone. Like Caroline Swift J before him, the judge found Ms Wass "clear, measured and compelling". He rejected D's submission that the relevant sections of the Damages Act 1996 did not permit the court a discretion:
 - a. If there is a power, it arises under s2(9) and there is no suggestion in Flora that such a power does not exist
 - b. If stuck with the RPI which is shown not to be the correct measure, the intention of Parliament would be defeated
 - c. If the word 'modify' in s.2(9) does not refer to such a power then, rhetorically, what does it refer to? "Section 2(9)(a) allows for the indexation power to be disapplied completely" [paragraphs 111 and 112]:

"The two paragraphs [s.2(8) and s.2(9)] are of a piece ... allowing the court to adjust the indexation, or remove it⁴ so the award is fair and reasonable". The judge also noted that the new Part 36 regime relating to the contents of offers to settle where there are future financial losses, provides that the offeror must specify "that each amount shall vary by reference to RPI (or some other named index, or that it is not to vary by reference to any index)". He interpreted this as "a legislative view that another index than RPI may be used in appropriate cases" [paragraph 113]

- 4) Unlike Swift J, the judge had refused the Defendant permission to adduce evidence on the issue of distributive justice and how indexation other than RPI would affect

² digested and commented upon in the November 2006 13 KBW PIMLU and in a separate Case Note prepared by Deirdre Goodwin – available on the 13KBW website:

<http://www.13kbw.co.uk/new/members/pdf/26.pdf>

³ digested and commented upon in the July 2006 13 KBW PIMLU and in a separate Case Note prepared by Deirdre Goodwin – available on the 13KBW website: <http://www.13kbw.co.uk/new/members/pdf/47.pdf>

⁴ such as with regard to computer equipment where the annual cost is actually falling – an example given by the Claimant's counsel

the NHS. He referred to Swift J's view in Thompstone that it was neither just nor practicable to consider 'affordability' or an alternative measure of indexation where the Defendant happened to be the NHS or an insurer [paragraph 116]. He also rejected the D's purported distinction of "affordability" and "distributive justice" although he considered that both concepts had "an unhelpful degree of elasticity" [paragraph 131]

- 5) The decisions in White v Chief Constable of South Yorkshire , (1999) 2 AC, 455, HL; McFarlane v Tayside Health Authority (2002) 2 AC, 59, HL and Heil v Rankin (2001) 1 QB 260, CA were distinguished: in White Lord Hoffman was reluctant to create a special class of claimants and not treat litigants alike as this would be contrary to the principles of 'distributive justice'. A different view was taken by Lord Steyn in McFarlane and by the Court of Appeal in Heil v Rankin where the Court having heard submissions from interested bodies⁵ on the impact of the resultant high awards upon their resources, declined to set the levels of damages in accordance with the rise in inflation, recognising the "very significant repercussions to the insurance industry and [the] NHS" and how this would not be viewed as reasonable by society as a whole. The judge held that White and McFarlane were concerned with whether damages were recoverable at all and Heil with the assessment of non-pecuniary loss whereas in the instant case the question was whether an ascertainable loss by application of a different RPI should effectively be 'capped' on grounds of public policy [paragraphs 129].
- 6) Not only is it neither just nor practicable to adopt two levels of compensation depending upon the identity of the defendant but it is contrary to Court of Appeal authority: Heil v Rankin and Lim Poh Choo v Camden and Islington Area Health Authority (1980) AC 174 at page 373. It is also undesirable for a Defendant to deploy extensive evidence in individual cases to show why damages and would lead to uncertainty in the forecast of appropriate levels of damages [paragraph 133]. Moreover there is no meaningful measure about the perception of the public (a point made by in Flora by Brooke LJ and by Smith J in Thompstone) and "there is something inherently unattractive also about seeking public opinion on such a matter" [paragraph 136]. These issues raise complex decisions about social policy which the courts are ill-equipped to answer and which are divorced from the demands and pressures of individual cases [paragraph 137]. This would also breach the 100% principle: Wells v Wells [1999] 1 AC 345 considered (Lord Hope at page 390) [paragraphs 139 to 145]
- 7) The real issue is whether the Claimant has persuaded the court:
 - i. The RPI is an inappropriate indexation measure; and
 - ii. ASHE 6115 (or some alternative indexation) is an appropriate, fair and reasonable measure by which to replace it.

In determining these issues, "a consideration of the appropriateness, fairness and reasonableness of substituting another measure for the RPI must necessarily involve some examination of how the various measures compare with the other available measures" (*per* Smith J in Thompstone) What is being looked for is the measure that will best ensure that the costs of the C's care in the future for which the approach is one of logic and common sense rather than empirical evidence, assessment of the

⁵ insurers and the NHS

past care package or whether historically care costs have risen faster than the RPI. The future cannot be told with precision and "some degree of imprecision or imperfection must be tolerated" [paragraphs 147-151]

- 8) Since the RPI is built into the statutory scheme, the Defendant does not have to show that it is appropriate only that on balance the measure put forward by the Claimant is inappropriate [paragraph 153]. Having reviewed the various measures of indexation, the judge came to a similar view to Smith J in Thompstone, namely that ASHE 6115 was the appropriate measure and that the more evidence he heard on the topic from D's experts "the less I am impressed" [see paragraphs 168-177]:

"The Claimant's care package does not exist in a bubble, isolated from changes in the care market generally ... If others are paying more, he may need to pay more to retain staff or attract others of a suitable calibre. It seems to me that ASHE 6115 will track changes in the care market which will affect the Claimant's costs of purchasing care" [paragraph 179]

The Defendant's arguments on the 'volatility' of ASHE 6115 and 'pay drift' factors with National Joint Council [NJC] rates were well answered by Dr Wass

- 9) As to the "swings and roundabouts" argument, namely that under-compensation under one head of loss may be balanced by over-compensation on another, for example the increasing equity in the Claimant's accommodation⁶, the judge held that this was speculative and that any increase in the value of the equity will have been funded from his overall damages in which case he is entitled to the benefits of such increase [paragraph 198]

Comment: The Judge was invited to balance the needs of the Claimant with the needs of people requiring "a well-resourced and free health service" – a Benthamite moral dynamic intended to achieve the 'greatest happiness off the greatest number" albeit to the detriment of the individual⁷.

© DEIRDRE GOODWIN

13 King's Bench Walk
Temple EC4Y 7EN

May 2007

Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

⁶ considered at paragraph 74 of Smith J's judgment in Thompstone where she commented that any increase in the value of the Claimant's property was of little use to him in practical terms since it has been chosen to meet his lifelong needs

⁷ a view reflected in the response of the RCGP to recommendation 17 of *Making Amends* where it is quite clear that this august body expects those rendered vulnerable and disabled by iatrogenic acts should fight their corner with other patients competing for their share of lamentably stretched NHS resources and should in no way receive special treatment simply because a healthcare employee caused their need for access to such resources (see **Proposed further tort reform after the NHS Redress Act: a Trojan Horse from Making Amends** Peter Gooderham, *The AvMA Medical and Legal Journal* 2007, Volume 13, Number 1, pp25-30)