



Personal Injury and Medical Law Teams Case Note

Thompstone v Tameside & Glossop Acute Services NHS Trust [2006] EWHC, Swift J¹.

Facts: This was a birth asphyxia claim which had left the C grievously handicapped with spastic quadriplegia cerebral palsy. The sole issues were the appropriate awards for future care and future loss of earnings. The parties were agreed that life expectancy was likely to be to age 62 years. The case was adjourned to await the Court of Appeal decision in Flora v Wakom and upon resumption the sole issues were;

- i) the appropriate indexation of periodical payments for future care costs; and
- ii) whether the future care cost award should be by way of a lump sum or periodical payments.

C sought a periodical payments order but with a higher indexation than the RPI, namely the AEI or ASHE [Annual Survey of Hours and Earnings] (ASHE 80 6115). C relied upon independent financial evidence that RPI indexation would produce a shortfall in care provision and arguing that annual increases in care costs should be referable to some other index that better reflected the wages payable to carers. In so doing D sought to distinguish the observations on 'affordability' in Flora pointing out that in that case no evidence was heard upon impact and that the case involved insurers rather than the NHS.

D's argued that C bore the burden of proof and had to elect for a specific indexation otherwise the court was being asked to adopt a quasi-inquisitorial role. D further argued 'distributive justice' namely the likely financial impact on the NHS of a different level of indexation to the RPI. Evidence was given that this would result in a £1.678billion increase on existing open claims and reference was made to the House of Lords dicta on distributive justice in White and Others v Chief Constable of South Yorkshire [1999] 2 A.C. 455, at 501G-504D, 510C-F and 511A-D, and from the speech of Lord Steyn in McFarlane v Tayside Health Board [2000] 2 A.C. 59, at 82A-83E [paragraph 59]

Independent financial advice was given amongst others by Richard Cropper for C and Hugh Gregory for D². Other financial advice was also given including Dr Victoria Wass, an academic labour economist but all experts declined to express a preference for any particular index considering this to be an issue for the court. The D also relied upon Mr Jo Monk, consulting actuary to the NHS.

¹ for copies of this judgment please contact the clerks or dgoodwin@13kbw.co.uk

² the forensic accountant who advised the C in Aboul H'son which was one of the first structured settlements of a high damages award [DG]

The judge reviewed the advantages and disadvantages of lump sum award and the history of structured settlements (the precursor to periodical payments) as well as the decision in Wells v Wells [1999] 1 AC 345 at 384B which highlighted the shortcomings of lump sum awards. At paragraph 29 she rehearsed the “one hundred per cent” principle set out by Lord Hope in Wells v Wells and the consideration of this principle in Flora v Wakom by Brooke LJ (paragraph 19), in particular his observation at paragraph 35:

“In enacting s 2 of the 1998 (sic) Act, as substituted, it cannot have been Parliament's purpose to create a scheme which no properly advised claimant would ever wish to use.”

Like Lloyd-Jones she reviewed the relevant sections of the Damages Act 1996 and CPR 41 as well as the ‘security’ provisions. The Ds in the present case were bound by Flora but that court was alive to the fact that Flora expressed no views on the competing arguments on indexation but gave permission for these grounds to be pleaded and argued in the substantive claim [paragraphs 43 to 46].

Held:

- 1) The court's task is to decide what form of order will best meet C's needs and, so far as section 2(8) and (9) is concerned, to determine what is appropriate, fair and reasonable. These matters do not lend themselves to determination by the burden of proof [paragraph 52]

It seems to me highly desirable, in order to achieve a final resolution of this important issue as soon as possible, that this court and other courts should have the opportunity of examining the various potential alternatives to the RPI and of comparing their various characteristics. If, in every such case, the Claimant were to be restricted to putting forward (and the court to examining) only one alternative measure in isolation, this would seem to me to put artificial and unhelpful limitations on the decision-making process. [paragraph 53]

- 2) The Court in Flora was contemplating the possibility that one course open to the trial judge would be to replace indexation by reference to RPI with indexation by reference to some other measure. The substitution of one measure by another could, without straining the boundaries of language, constitute a ‘modification of the effect’ of section 2(8). To hold otherwise would very seriously restrict the application of s.2(9). Further the terms of CPR 41.8(1)(d) were entirely consistent with the wider interpretation of section 2(9) [paragraph 55]
- 3) D's argument on distributive justice was rejected and reference was made to paragraph 29 of the judgment of Brooke LJ in Flora where he specifically rejected the concept of considering ‘affordability’:

It does not seem to be just – or indeed practicable – for the courts to adopt different approaches as to the affordability of an alternative measure of indexation, depending on whether the defendant is the NHS or an insurer [paragraph 61]

Brooke LJ made it clear in Flora that this was not an issue of whether evidence of impact was before the court but rather that no meaningful evidence about the

perception of the public could ever be available to a court deciding this issue [paragraph 61]. The exercise being invited by the D was one "involving complex decisions about social policy which are not for the courts". Further an exercise based on distributive justice would have the potential to breach 'the 100% principle' [paragraph 62]³

- 4) As to the alleged £1.678 billion shortfall, this was rejected by the court in robust terms:

I do not accept the figure of £1.678 billion as being an accurate estimate of the increased liabilities of the NHS which would result from the use of a measure of indexation other than the RPI. I am bound to say that my confidence in the accuracy of the estimated sum was not increased by the casual – even dismissive – way in which Mr Monk gave his evidence. [paragraph 65]

Further, to be set against such impact is the cash-flow benefit to be derived from periodical payments by retaining the lump sum and replacing it with an annual stream of payments into the future as described by Mr Steve Walker, Chief Executive of the NHSLA in YM v Gloucestershire Hospital NHS Foundation Trust [2006] EWHC 820 (QB). [paragraph 70]

- 5) The Judge was also not amenable to the Defendant's 'swings and roundabouts' argument that any under-compensation in respect of future care was balanced by a likely over-compensation in respect of accommodation since property values are increasing at a far higher rate than the annual RPI. This argument was rejected on two bases:
- i. That to accept that compensation for accommodation costs exceeds the '100% principle' is tantamount to rejecting the Court of Appeal's approval of the Roberts v Johnstone formula in that case and subsequent in Wells v Wells as being in accordance with the '100% principle'. This was not open to a court of first instance.
 - ii. In practical terms the increase in value of the property is of little use to him since the intention is that this should meet his lifelong needs and should the annual cost of future care increase above the amount of the Claimant's periodical payments it would not be open to him to mortgage that property to release equity as there is no provision in place to fund mortgage payments. It is possible that certain equity release schemes might meet that need but no evidence was before the court concerning this. Thus any likely increase in the value of the Claimant's house above that of the annual RPI is unlikely to assist him to meet any shortfall in future care costs [paragraph 74]
- 6) The suggestion that in reality the Claimant would be able to invest in a way that will ensure a greater return than 2.5% was equally briskly dispatched: the reality is that the figures for each head of loss were calculated on the basis of the Claimant's

³ compare the decision of Lloyd-Jones J in **A v B Hospitals NHS Trust** [2006] All ER (D) 131 (Nov); EWHC 2833, 17th November where he considered that affordability was a legitimate consideration. This decision is summarised in Appendix 1 below

actual needs and the Court should not read into this an element of over-compensation.

- 7) In a pellucid exposition, Swift J set out and analysed the expert evidence in relation to the four relevant measures [paragraphs 76 to]. These are the RPI, AEI, ASHE (Median and Occupational earnings] as well as a review of the historical position [paragraphs 91 to 99]. These paragraphs repay close reading and do not benefit from summary. Whilst accepting that within the annual care costs (as largely agreed) there were elements such as food costs that would be properly referable to the RPI for annual increases, the Judge considered these were costs were unlikely to amount to more than 4-5% of the overall care costs and thus did not justify departing indexation on the earnings basis [paragraph 101]
- 8) It was nonetheless accepted that in terms of 'weighting' of care rates and other factors (on which detailed accountancy evidence was given) there are clear drawbacks in AEI indexation. This evidence is analysed at paragraphs 108 to 140 and Swift J concluded that:

"The most serious disadvantage of the AEI as a measure is the systematic overcompensation that is likely to result from its use. I accept that the potential overcompensation is likely to be considerably less than the under-compensation that would result from use of the RPI. Nevertheless, I find that, over a period of years, the extent of the over-compensation is likely to be significant" [paragraph 140] (see too paragraph 148)

- 9) ASHE 6115 (occupational however, is sufficiently sensitive to reflect changes affecting the earnings of carers [paragraph 143] and the weighted hourly rate as calculated by Dr Wass "provides a fair and reasonable estimate of the average way to be paid to the Claimant's carers" being based on pay rates agreed by the care experts and where any imprecision was likely to be negligible [paragraph 147]. ASHE 6115 therefore provides

" ... a reasonable and accurate indicator of the growth of the earnings of carers of the type to be employed by the Claimant and that it is therefore probable that it would fulfil the purpose of indexation as previously identified." [paragraph 143]

Rather than having to prepare a tailored and customized assessment for each case (as urged by the C) the court preferred the Defendant's approach for a simple method of assessment which could be applied in all cases and accordingly considered that the appropriate method for indexation purposes was the 75th percentile of ASHE 6115 [paragraph 146]. The proposed indexation method (as compiled by Mr Richard Cropper) was no more complicated than the operation of the conventional structured settlement [paragraph 149]

- 10) Accordingly, were a periodical payments order to be made:

"it would be appropriate, fair and reasonable, under the provisions of section 2(9) of the 1996 Act, to modify the effect of section 2(8) by providing for the amount of payments to vary by reference to the 75th percentile of ASHE occupational group 6115, published by the ONS, or to any equivalent or

comparable occupational group which from time to time may replace the ASHE occupational group 6115 as the appropriate occupational group for home carers. I find that a periodical payments order with such modification will best meet the Claimant's needs" [paragraph 150]

Comment:

This is one of the most significant judgments in PI and clinical negligence damages claims this century and should be mandatory reading for all those who practice regularly in these areas. It highlights the necessity for skilled forensic accountancy evidence on all heads of future loss.

Smith J gave immediate permission to appeal. This being rapidly progressed such that it is likely to overtake and trump Flora in being heard before the House of Lords. The concern must be that while the Court of Appeal is likely to feel constrained to follow its own decision in Wakom, the House of Lords will take a more political stance in relation to the 'affordability' argument and find a means of holding that in future, for the purpose of 'Distributive Justice' in all clinical negligence where the defendant is an NHS trust, damages will be payable by periodical payments with indexation limited to the RPI with no exceptions. This would also close the door on the judicial discretion to make a lump sum order: see **A v B Hospitals NHS Trust** [2006] All ER (D) 131 (Nov); EWHC 2833, 17th November (digested above). The arguments on over-compensation on other heads of loss clearly pave the way for such an argument to be advanced and debated by the HL.

Without wishing to sound unduly pessimistic, Lady Hale's distributive justice argument put paid to 'wrongful birth' claims (McFarlane) where the child was healthy and there is now a push by the NHSLA to extend this to cases where the child is disabled. Similarly, the decision in Sowden has understandably led to defendants, as a matter of course, to argue routinely that local authorities should fund care and to expect claimants to obtain a section 47 assessment as a matter of course. There are also indications that this concept is also to be raised at a political level whereby future care is removed from future loss claims in PI and clinical negligence cases.

In relation to appropriate indexation, there is a strong body of evidence available – including reports from the Government Actuary – that the RPI is unrealistic and will inevitably breach the "100% principle". Master Lush has recently provided illustrations of cases where grievously injured claimants will exhaust their future care funds by the mid 30s and thereafter be left with no financial cushion. It is not surprising that the draftsmen of CPR 41 Part II did not include 'change in financial circumstances' within the criteria for a Variable Payments PP Order as this debacle was both foreseeable and inevitable.

If upheld, this makes Defence submissions for future care costs to be met in whole or part by local authorities increasingly likely and reference is made to the decisions in Sowden v Lodge and Crookdake v Drury [2004] EWCA Civ 1370, Freeman v Lockett 2006] EWHC 102 (QB) and Crofton v NHSLA (2006) Lloyd's Rep Med 168⁴

On the other hand the argument advanced regarding the steep annual increase in house prices is a novel and interesting one which has enticing practice advantages although it does, as Swift J pointed out, disregard the (for the present) sacrosanct '100%

⁴ A 13 KBW PIMLU Casenote on Sowden v Lodge etc. is also available upon application to the Clerks or by request via our website

principle'. She has however left open two possible doors: firstly that the Court of Appeal will be able, if it wishes, to overrule its decision on this issue in Smith v Manchester and Wells v Wells (since this aspect was not the subject of the appeal to the House of Lords), and secondly, the possibility of ingenious creative accounting that is opened up by equity release schemes.

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Appendix 1

A v B Hospitals NHS Trust [2006] All ER (D) 131 (Nov); EWHC 2833 (Admin) Lloyd-Jones J, 17th November

Facts: This was a birth asphyxia claim resulting in the C suffering neurological injuries of the maximum severity with his life expectancy agreed at 42.5 years from birth (36.5 from trial). Liability was admitted and Lloyd-Jones J assessed total damages on a lump sum basis of just below £4m following a trial on the issue of the appropriate award for future care. The case was adjourned to allow C to take independent financial advice on the alternative forms of award. C sought a lump sum on the basis that the available options were periodical payments with an RPI indexation or a lump sum; an alternative form of indexation based on the AEI (or similar) was not sought. D, objected arguing that a periodical payments order linked to the RPI was the appropriate award. Expert accountancy and actuarial evidence was received but C did not wish to incur additional expense or delay matters by arguing for an alternative indexation basis to the RPI.

C submitted that all the merits of certainty that accompany a periodical payments order were outweighed by the 'certainty of under-provision' unless set by reference to the appropriate index. C's financial evidence on this issue was that in the long term the effect of RPI indexation would be that the AEI would increase at 1.5% – 2% per annum above the RPI

C's evidence was supported by evidence from the Government Actuary's Department at appendix A of the Ogden Tables where the assumed differential was the more modest 1%. When compounded over 42.5 years however this modest differential becomes a large divergence. This was considered to be a powerful consideration in C's favour in seeking a lump sum. C also argued that 'affordability' was no longer a relevant consideration (if indeed it ever was) following Flora v Wakom.

D submitted that investment of a conventional lump may well produce a shortfall greater than that of periodical payments with RPI indexation whereas any shortfall from that indexation could be met by the lump sum element of the award.

Held: Order as sought for lump sum award:

- 1) The judge considered ss.2(8) and (8) of the Damages Act 1996 and the requirements of CPR 47.7 and PD 41, and reviewed the benefits and drawbacks of lump sum provision having heard expert financial evidence [paragraph 14]. In particular he observed that:

“unless [periodical payments] were set by reference to an appropriate index, the certainty they may achieve may become certainty of under-provision”:

If periodical payments were calculated by reference to the RPI index, this was highly unlikely to meet C's actual care costs. Even with a figure of 1.7% p.a. above RPI, C would suffer increasing shortfall between his care costs and annual income [paragraph 21].

- 2) D's argument that any shortfall would be met by the lump sum provision (for example loss of future earnings or general damages for pain, suffering and loss of amenity) was rejected since the lump was earmarked for other expenditure, in particular increased accommodation costs [paragraph 25].
- 3) 'Affordability' was a consideration to be weighed in the balance when considering what order to make under CPR 41.6 but is not of itself decisive [paragraph 32]:

"the advantages which the Department of Health would undoubtedly derive from an award of periodical payments .. are legitimate considerations to be taken into account"

- 4) There was a very good prospect that a lump sum award for future care would yield investment returns that would meet and could even go substantially further than the level required to keep up with periodical payments linked to the index. If the divergence between the index and the actual increase was less than predicted, the investment of a lump sum would be more likely to meet the actual cost of care. Although medical experts had agreed on the life expectancy of C, it was only a prediction and one could not be confident that there would be no need to provide for future care after C reached the predicted age. C's family had been advised as to the risks inherent in a lump sum award and had expressly stated that they were prepared to accept them.
- 5) The court was required to have regard to the award preferred by the trust, but considering the case in the round it was clear that a lump sum award would provide the best provision for X's future care and meet his needs.

Comment: Desperate times call for desperate measures. D's objection was predictable but the Trust's acceptance in its submissions that there was a shortfall in the RPI indexation but that this was likely to be less than the shortfall produced by a mixed investment portfolio, does argue a desperation by Defendants not to pay the market value of future care (particularly by those who lobbied the government for the relevant legislation, including the NHSLA that handles most of these significant birth asphyxia claims). There is therefore a certain irony in this. This irony has been reinforced by the decision in Thompson and the court's resolute refusal to treat the NHS as a special case or to breach 'the 100% principle' which application of distributive justice effectively would do.

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Appendix 2

Cobbett v South Yorkshire Strategic Health Authority (2006) 6th December, CA [Laws, Leveson LJ]

The Court of Appeal rejected the Claimant's appeal against a case management decision not to adjourn the determination of the appropriate measure of indexation for periodical payments due to the claimant for his future care pending the outcome of an appeal to the Court of Appeal in Thompstone.

It was held that the judge in the substantive case could properly hear evidence concerning future care provision awarded on a periodical payments basis and the appropriate indexation in the normal way and adjudicate upon this according to the evidence.

Comment: This decision must be a matter of concern for practitioners and a cynic might be forgiven that judicial closing of the flood gates is already beginning. The glimmer of light however is that the CA directed that any appeal against the first instance decision could be conjoined with that of Thompstone. This case will be summarized and commented on in greater detail once the full transcript becomes available

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.