Personal Injury and Medical Law Teams
Case Note

Thompstone v Tameside & Glossop Acute Services NHS Trust; Corbett v South Yorkshire Strategic Health Authority; RH v United Bristol Healthcare NHS Trust' De Haas v South West London Strategic Health Authority [2008] EWCA Civ 6, [2006] All ER (D) 333 (Nov)[1]

All 4 claimants were young and had sustained catastrophic brain damage following birth asphyxia injuries for which liability had been admitted by the Defendants. Damages for future care were essentially agreed, the issues being:

i) whether these damages should be met by a lump sum award of damages or by periodical payments;

ii) if a periodical payments order was made, the appropriate level of indexation;

iii) whether on a true interpretation of s2(8) and s2(9) Damages Act 1996 the court had power to depart from the RPI (s2(8)) and substitute a different level of indexation;

iv) if so, whether that power should only be exercised in exceptional circumstances or whether the judge's discretion in this regard was unfettered

In each case the judge at first instance had regard to the authority of Flora v Wakom [2006] 4 All ER 982 which decided that s.2(9) of the Damages Act 1996 allowed judges to make orders for indexation other than RPI (as provided under s.2(8) of the Act) not simply in exceptional circumstances but wherever it appeared appropriate and fair to do so. Accordingly each judge made periodical payment orders by reference to the Annual Survey of Hours and Earnings (ASHE) for the occupational group of care assistants and home carers (Occupational Group 6115)[2] holding that it was fair and reasonable under the provisions of s.2(9) to modify the effect of s.2(8).

The Defendants appealed arguing that:

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[1] For digest and comment on the first instance decisions, please see 13 KBW PIMLUs: November 2006, pages 11 to 13 (**Thompstone**); June 2007, pages 10 to 12 (**RH**); April 2007, pages 5 to 7 (**Corbett**); (RH). A detailed **Case Note and Comment on Corbett** by **Deirdre Goodwin** can be downloaded as a pdf file from the 13 KBW website: URL **http://www.13kbw.co.uk/new/members/pdf/48.pdf**. An earlier **Case Note and Comment on Thompstone** (November 2006) is also available: URL **http://www.13kbw.co.uk/new/members/pdf/26.pdf**

[2] produced by the Office of National Statistics

i) the judgment in Flora had been decided *per incuriam* and therefore was not binding
ii) the word "modifying" in s.2(9) related to the "index" and therefore was limited to increasing or decreasing the RPI specified s.2(8)
iii) the principle of distributive justice required that s.2(9) should be used to disapply the RPI only in exceptional circumstances
iv) the C had the burden of showing that there was an appropriate alternative to the RPI
v) the use of an index or measure such as ASHE 6115 contravened the principle on which future losses should be assessed as set out in Cookson v Knowles (1979) AC 556 as this would lead to differences in compensation between the lump sum system and periodical payments
vi) ASHE 6115 was unsuitable as an instrument of indexation

Held: Appeals dismissed. Judgment of the court given by Waller LJ

i) Whether Flora had been decided *per incuriam*

The submission that Flora had been decided *per incuriam* was hopeless and could not be brought within the circumstances set out by Lord Green MR in Yong v Bristol Aeroplane Co Ltd [1944] 1 KB 718 or Bryers v Canadian Pacific Steamships Ltd [19157] 1 QB 134. The authority relied upon, namely Cooke v United Bristol Healthcare NHS Trust [2004] 1 WLR 251 had been cited and considered at length in Flora [paragraphs 24 to 38]. The court considered this question at length at the Ds' request in case the House of Lords had to consider the whole matter thereafter 'paragraph 39]

ii) Whether sections 2(8) and 2(9) Damages Act 1996 can only be modified in 'exceptional circumstances [considered at paragraph 22 onwards]

Applying the same reasoning as under i) above, it was accepted that the Flora v Wakom had rejected the argument that it was only in exceptional circumstances that s.2(9) could be used to modify s.2(8)[3]. The background to Cooke and Wells was traced; both cases were concerned with the discount rate to be applied to multipliers for future losses in lump sum awards. In Cooke Dyson LJ expressly observed that the compensation principle was not in issue and quoted Lord Steyn in Wells v Wells who spoke of an element of "*arbitrariness in any figure*" and that whilst a single rate was a somewhat crude instrument, it was adopted for public policy reasons that certainty was necessary in order facilitate settlements and save costs[4]. As observed by Brooke LJ in Flora, however, a periodical payments order is quite different[5]; in making a lump sum award it had to be hoped that "prudent investment policy would enable a seriously injured claimant to benefit fully from the award" where with a PPO the risk is taken away from the claimant [paragraph 34]

iii) Whether "modifying the effect of" can encompass and permit the RPI and/or its substitution by a measure based on Annual Earnings and converted to an index

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[3] The summary of Flora by Lloyd Jones J in Sarwar v Ali and MIB [2007] EWHC 1255 was quoted with approval at paragraph 23: see digest and comment on that decision in 13 KBW PIMLU May 2007, pages 8 to 10

[4] paragraph 42 of the judgment of Dyson LJ in Cooke and paragraphs14 of his judgment in Warriner v Warriner [2002] 1 WLR 1703

[5] paragraph 27 quoting from the judgment of Laws LJ in Cooke

Whilst a judge would be free to modify the RPI if that was the most accurate way to ensure 100% compensation, it was clear from Flora that this was not the limit of the judge's powers[6]. Further the evidence of Dr Wass – accepted in all four cases – advocated alternatives to RPI and not variation to RPI itself. S.2(9) in providing that an order for PPOs might include a provision *"modifying the effect of subsection (8)"* did not confine itself to *"modifying the index"* [paragraph 43]

iv) **Whether as a matter of law, alternatively discretion, the remedy of modification should be denied by application of the principle of Distributive Justice**
In this context, it was "corrective justice" not *distributive justice* with which the court was concerned. Affordability was a matter for Parliament and not for the court (quoting Brooke LJ in Flora at paragraph 29 of his judgment).

v) **Whether the party seeking to trigger s.2(9) must discharge a legal burden by identifying and proving that a specified alternative on its own merits can displace the presumed RPI**
The court was bound by s.2 Damages Act 1996 to consider whether nor not to make a PPO which was an inquisitorial role in which it was helpful to the court to have choices with the good and bad points exposed in a balanced way [paragraph 52]. The exercise should not be complicated by considerations of legal burdens. The question of whether or not the RPI would or should be replaced would depend on the alternatives available and was thus a comparative exercise with the claimant only having an evidential burden. Reference was again made to Lloyd Jones J in Sarwar who encapsulated the arguments and provided and answer with which the CA concurred [paragraph 55] as did Mackay J in RH [quoted at paragraph 56] with the criteria for the suitability of an index being:

a. The accuracy of match of the particular data series to the loss or expenditure being compensated
b. Authority of the collector of that data
c. Statistical reliability
d. Accessibility
e. Consistency over time
f. Reproducibility in the future
g. Simplicity and consistency in application

Assessment of these criteria led Mackay J to consider that ASHE 6115 was "*markedly superior*" to RPI

If an alternative was available, it had to be open to the court to accept that alternative even if some criticisms could be made of it [paragraph 58].

vi) **Whether as a matter of law any measure which operates as to rewrite the multiplicand when applying the element of pay drift in a reported earnings measure contravenes the requirement of Cookson v Knowles[7]**

[6] See again Sarwar. That decision was not appealed but Lloyd Jones J decided that RPI was not an appropriate measure by which to index PPOs covering losses relating to wages, and in relation to future care he too applied ASHE 6115; he used a wage-related measure to index a PPO covering the loss of future wages

[7] paragraph 59

The principle of Cookson is that in calculating future loss on a lump sum basis the court should take as a multiplicand the current annual loss as at the date of trial with no attempt being made to increase the multiplicand to take account of future inflation which is catered for through the selection of an appropriate multiplier. The submission was misconceived as Cookson was concerned with lump sum awards and a PPO was a wholly different creature [paragraph 61].

vii) Burden of Proof

Any burden borne by the claimant is an evidential burden [paragraph 67 quoting with approval Swift J in her judgment in Thompstone] The enquiry remains a task of evaluation for the court [paragraph 68]

viii) ASHE 6115

1) ASHE 6115 is not an index in itself but an annual earnings survey and thus a calculation was required of a weighted average of the claimant's hourly current cost of care. This was the evidence provided by Dr Wass. The Court carried out a careful analysis of the evidence [paragraphs 72 to 98] which only served to demonstrate that the RPI "did not even purport to reflect the wages paid to the claimant's carers" being in that context effectively an abstract index approved by Parliament. This made Ds' complaints counter-intuitive which is why they saw the burden of proof arguments as being their main hope of success [paragraph 80].

2) None of the objections to ASHE 6115 were well founded and it would not be appropriate to reopen the suitability of ASHE 6115 in future proceedings unless the D could produce evidence and argument significant different from, and more persuasive than, that which had been deployed in the instant cases:

> "We hope that as a result of these proceedings the National Health Service, and other defendants in proceedings that involve catastrophic injury, will now accept that the appropriateness of indexation on the basis of ASHE 6115 has been established after an exhaustive review of all the possible objections to its use, both in itself and as applied to the recovery of costs of care and case management. [paragraph 100]

ix) Indexation and the allocation of heads of damage between lump sum provision and periodical payments orders

1) The power to make a PPO without the consent of the parties is a radical new power (see Mackay J in RH):

> "The Court might think it appropriate that the claimant should have a lump sum which gives him the greatest possible degree of autonomy as to how he organises his future life; or it might conclude that it would be preferable that he should have a reduced degree of autonomy and a greater degree of security" [paragraph 103]

This was the first opportunity for the Court of Appeal to consider the correct approach to the exercise of this new power. There are two facets to the court's decision: how to allocate the heads of damage between lump sum provision and PPOs and how to index any PPO. Although the indexation of care and case managements were considered in the appeal as a discrete issue but allocation and indexation are interrelated and should be considered together: *"The judge cannot decide what form of order would be in the claimant's best interests without deciding how he would index a PPO if he were to make one"*. [paragraph 105]

2) The judge's overall aim must be to make whatever order best meets the claimant's needs and it was observed that CPR Part 41.7 *"might have been more clearly expressed"* in this regard [paragraph 107]. The claimant's "needs" were not limited to the needs that he demonstrated for the purpose of proving the various heads of damage, namely *"foreseeable necessities",* but must be considered in a wider and more general sense and included those things that he needed to enable him to organise his life in a practical way [paragraph 107].

3) It was for the judge to decide what order best met the claimant's needs. He should apply an objective test. His mind had to be focussed not on what the claimant preferred, but on what best would meet those needs and the two were not necessarily the same. In practice the C's preferences and wishes would usually carry great weight and the D's wishes very little. He had to have regard to the wishes and preferences of the parties and to all the circumstances, but ultimately it was for him to decide what order best met the claimant's needs [paragraph 108]

x) The use of expert evidence

1) The report of an independent financial adviser obtained by the claimant, was likely to help the judge. It was undesirable that cases should be unnecessarily burdened with evidence on satellite issues but judges should have regard to the defendant's general preferences advanced on instructions without the need for evidence to be called. Some evidence might be required, however, if a more specific point was to be made, such as where a defendant wished to avoid a PPO which it perceived was likely to be indexed to a measure other than RPI and wanted to argue that it would be impossible for it to make financial provision, consistent with regulatory requirement [paragraphs 109 to 110][8].

2) Although there was nothing in the legislation to suggest that a defendant should not be permitted to call its own expert evidence, if it was determined in advance that there was a set of proposals which would better meet the claimant's needs than the proposals advanced on the defendant's own behalf, it would rarely be appropriate for a defendant to argue that its proposals would be preferred on this issue. Moreover judges should require a demonstration that the point clearly arose before they permitted the evidence of a second independent financial adviser to be adduced [paragraph 111]

Comment: This is a powerful ruling being a unanimous decision which carefully considered the history of the unfairness produced by lump sum awards and the interrelation of s.2(8) and s.2(9) Damages Act 1996, and pointed to the "uphill struggle" facing the Defendants in seeking to persuade the Court to deflect from their judgment in Flora [paragraph 11] Reference was made to the *"major structural flaw in the present [lump sum] system"*[9] and the 100% principle which was *"fundament to the decision in Flora and to the decisions of all the trial judges who had to consider this matter"*

[8] this could become more than a theoretical argument given the report in *The Times* 14th February 2008 that some 'failing ' NHS Trusts could go bankrupt and be forced to close
[9] per Lord Steyn at 384B in Wells v Wells [1999] 1 AC 345

[paragraph 18]; in particular the detailed and cogent judgement of Swift J in Thompstone which it was felt seemed *"to reflect accurately the proper approach to subsections (8) and (9)"* [paragraph 19]

This analysis has led to an unambiguous ruling that pursuant to s2((8) Damages Act 1996, judges have a complete discretion to vary indexation rates to ensure that periodical payments are properly inflation-proofed and are fair and appropriate for the claimant's needs. The distributive justice argument of 'affordability' was given short shrift with the court sternly pointing out that what was required was "corrective justice". The Defendants relied upon decisions where this principle held sway including Frost v Chief Constable of Yorkshire [1999] 2 AC 455[10]; McFarlane v Tayside Health Board [2000] 2 AC 59; and Rees v Darlington Memorial NHS Trust [2004] 1 AC 309[11] and Heil v Rankin [2001] QB 272[12]. In what might be interpreted as a wind of change in the Court of Appeal and a powerful message to the House of Lords, it was emphasised that

> "'distributive justice' is not a principle of English law recently adopted so as to allow free rein to ignore basic principles long established. It may come into play when considering whether it is fair, just and reasonable to hold that a duty of care is owed (as in *Frost* and *Rees*) or in considering a public policy question such as damages for the birth of a healthy child (as in *McFarlane*). It is perhaps also understandable how it plays some part in considering the essentially judgemental question of whether the level of general damages should be increased (as in *Heil*), but this is all a far cry from seeking to influence the calculation of actual financial loss where the 100% recovery principle is fundamental. Once liability is established and once financial loss is being assessed, it is 'corrective justice' and not distributive justice with which the court should be concerned." [paragraph 47]

In the same vein, short measure was also given to any invitation to revisit the validity of the ASHE [Annual Survey of Hours and Earnings] index as a suitable alternative indexation measure for claimants' future care needs.

In any high value claim where there is a significant future care element Claimants will almost invariably find periodical payments linked to an earnings-based indexation, more advantageous than a lump sum payment and decisively outweighing the disadvantage of not having absolute control over the timing of expenditure of the total damages award (something which does not occur in practice in any event since the vast majority of such claims are administered by the Court of Protection) [see generally paragraph 103]. On the other hand, it is undoubtedly the position that this ruling has profound cost implications for the NHSLA and for defendant insurers which will find such claims significantly more expensive fund; equally re-insurers will need to examine their risk assessment criteria as these will now be more critical in respect of all claims but particularly those concerning catastrophic injury.

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[10] limiting the scope of the duty of care owed by an employer to his employee rescuer who will not automatically be considered to be a primary victim for the purpose of recovering damages for nervous shock

[11] both cases concerned with limiting the scope of damages in cases concerning the wrongful birth of a healthy child (in McFarlane this was to healthy parents and in Rees, the mother was disabled but the child healthy)

[12] a disregard of cogent statistical evidence of how general damages for PSLA had not kept apace with inflation as required by John McGregor and where the Court of Appeal substituted a sliding scale that effectively capped these damages thus heeding the concerns of Defendants that to do otherwise would result in significantly increased awards

Another important point arises that may lead to Wells v Wells being revisited. Not all claims– particularly the moderate value cases – will benefit from a periodical payments order. This then brings into focus the unsatisfactory position and running sore in conventional lump sum assessments in relation to the 2.5% discount rate applied in respect of multipliers for future loss. This has long been criticised by practitioners as being too high and not reflective of the true rate of return on notional investment of lump sum damages[13] and indeed this was a mainstay of the Defendants' argument in Thompstone that allowing substitution of a 'market-based' indexation would result in *"divergent systems of compensation producing different outcomes"* [paragraph 33]. Previous Lord Chancellors have remained inflexible on this issue (notably Lord Irvine) but perhaps the time has now come to reconsider this inflexible discount rate particularly in respect of moderate value claims where periodical payments may not be feasible, but nonetheless there is a need for lump sum assessments properly to reflect the claimant's needs on a 'fair and appropriate basis' in the years ahead through multipliers based on a realistic discount rate. [DG]

RH v United Bristol Healthcare NHS Trust

Two further issues rose for consideration on the discrete facts of this case:

i) The role of the judge when making an order for indexation and lump sum provision

1) This issue was considered this in the context of discrete issues arising out of the decision of Mackay J in RH where the parties had reached agreement on the quantum of each head of damage expressed either as a lump sum or as an annual sum and the appropriate multipliers. That agreement was approved by Owen J. The case subsequently came before Mackay J on the issue of indexation when C's IFA proposed that the capital contingency lump sum be increased to include a hydrotherapy pool which had not been agreed by D. D only agreed to a smaller capital contingency fund in addition to the agreed sum for immediate needs, contending that apart from general damages for PSLA, past losses, future loss of earnings and part of the accommodation award, all future losses should be catered for by a PPO which was preferable for cash flow reasons. C also contended that a hydrotherapy pool at home did not best meet the D's reasonable needs

2) The issue involved the extent to which, if at all, a D should be allowed to make detailed questions about allocation, C contending that D's role should be limited to e4xpressing a preference as to whether PPO was appropriate in principle. It was for the court then to make the order which best met the C's needs with the D, at most, submitting where appropriate that the allocation proposed by C was illogical or would fail to produce an order which was in his best interests.

[13] even more critical now given the downturn in the global economy and recent cuts in interest rates

3) D contended that Mackay J erred in that:

   a. He gave primacy to C's preferences over those of D

   b. He treated the process as being analogous to an approval of a compromise

   c. He held that D could not advance proposals merely on the ground that they suited it best financially

4) The CA held that Mackay J had not given primacy to C's preferences: he had noted that there was little between the two IFAs but that C's IFA had the advantage of a full discussion with the family and was entitled to conclude that C's IFA's proposals would best meet the C's needs in that they provided greater flexibility than would be available under D's IFA's proposals: *"Having given equal attention to the preferences expressed by both sides, the judge chose which proposals he thought best met the Claimant's needs"* [paragraph 121]

5) The processes of approval and a decision under section 2(1) Damages Act 1996 are distinct. In the former the court only has to declare itself satisfied that the agreement reached is in the C's interests and not whether the proposed agreement produces the best possible result or the result which best meets the C's needs. D will usually play no part in the process his voice having already been heard in the negotiations preceding the agreement.

   > By contrast, under s.2(1) the court is itself choosing what order to make and must choose the form of order which best meets the C's needs, whether it be the one advanced by one of the parties or one devised by the judge himself. The parties are not in agreement and the defendant's preferences must be considered. The process is different from approval" [paragraph 122].

   Mackay J recognised this.

6) It is open to a D to challenge a C's proposals and advance a counter-proposal merely because it suits his own interests better although only a counter-proposal which seeks to advance a better means of meeting the C's needs is likely to carry any weight with the judge. Mackay J had this test in mind and nothing of substance was achieved by D calling its own IFA in this case: *"it will only be in a rare case that such evidence should be called"*.

ii) The right of the judge in a s.2(1) consideration to see privileged material

1) This concerned whether the judge should be entitled to sight of C's counsel's opinion without D also having sight of this. Mackay J considered he could as his role was inquisitorial and a minor was involved. In the event he did not but invited the views of a higher court on the issue. D submitted that the judge was confusing the role of approver with the role of decision-maker.

2) The court held that the judge had both to approve and make a s.2(1) decision. Where the parties were in agreement, the judge had to consider approval but if he was in any way dissatisfied with the material put before him, he could

certainly resort to an inquisitorial process to gain further information and for this purpose could see privileged material without showing it to the D.

3) On issues where there was no agreement the judgment had to take decisions under what was primarily an adversarial process and for the purposes of that process, he was not entitled to see privileged material bellowing to one party without disclosure to an opposing party. In a rare situation where the judge was dissatisfied with the proposals of both parties and the information provided by them, it would be open to him to appoint an assessor and call for a report which would introduce an inquisitorial element into the proceedings but would not justify the judge in looking at privileged material not disclosed to the opposing party [paragraph 129]

Comment: As the CA observed, this was a unusual occurrence as in most cases the same judge will deal with the whole case in which case the D will have to put up with the fact that the judge has already seen C's counsel's opinion as part of the approval process. The court emphasised that if the parties are sensible, this will not be a real problem in practice and should it become necessary, it should be possible for the parties to agree that any sensitive passages be redacted and that the rest of the advice be shown to the judge and to the D [paragraph 130].

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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.

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