



Personal Injury Team Case Note¹

2 November 2004

Louise Sowden (a patient) v Joanne Lodge: David Drury v Philip Crookdake (a patient)
[2004] EWCA Civ 1370 CA (Pill LJ, Longmore LJ, Scott Baker LJ) 22/10/2004

The judgments of the Court of Appeal in both of these decisions are very important in the determination of accommodation and care provision and the manner in which the claims for these heads of loss should be pleaded by claimant and defendant practitioners. These judgments warrant reading in full.

Louise Sowden (a patient) v Joanne Lodge (Andrew Smith J.) [2003] EWHC 588 (QB); [2004] EWCA Civ 1370, CA

Facts

S (24 years at the date of trial) was 13 years old when she sustained a catastrophic closed head injury in a road accident. This caused very severe brain damage with cognitive, emotional and behavioural difficulties as well as epilepsy and spastic quadriparesis. Mrs Justice Smith had previously approved a settlement under which damages were to be assessed on the basis that S was contributorily negligent to the extent of 50 per cent. After the accident S had spent a long period in hospital and at a rehabilitation unit. She had then spent four years at a residential school before becoming resident at a Local Authority residential home. S submitted that she should live in her own accommodation adapted to her needs. L proposed that in future she should be housed in similar residential accommodation to be paid for by the local authority. The difference between future costs on a full liability basis was £5,419,849 (private arrangement) and £551,747 (residential arrangement) [see Table of agreed damages at Appendix to judgment],

Andrew Smith J decided it would be in S's 'best interests' (defined at paragraph 58 of his judgment with reference to *Rialas v Mitchell* [unreported, 6 July 1984 – details in Kemp & Kemp]) to be in residential accommodation and in applying the 'needs' test, quoted Wells v Wells [1999] AC 345 @ 384C and Lord Denning in Cunningham v Harrison [1993] QB 942 at 952C/E "*There should be moderation in all things even in a claim for personal injuries*".

¹ This amplifies the summary given in this month's 13KBW 'PI Update'

If there was a private arrangement, then this should not proceed on the basis that the Local Authority would provide the accommodation but if there was a 'residential arrangement', there was an assumption that the Local Authority would fulfil its duty under the National Assistance Act 1948 and provide accommodation suitable to S's needs together with other support i.e. "a social services care package" as per R v North & East Devon Health Authority ex.p Coughlan [2001] QB 213, CA, paragraph 30.

Accordingly the Judge awarded damages of £1,200,000 on the basis that the local authority would provide accommodation and social or welfare care under the National Assistance Act 1948 s.21 that would be augmented or topped up by a payment by the respondent (L) for further provision for care and attendance. He relied upon the first instance decisions in Firth v Geo Ackroyd Junior [2000] Lloyds Law Reports Medical 312, Bell v Todd [2002] Lloyds Law Report 12 and Ryan v Liverpool Health Authority [2002] Lloyds Law Reports Medical 23, as authority for the proposition that any award of damages for personal injuries and any income from a fund administered by the Court of Protection was to be disregarded in determining the liability of the patient to pay the Local Authority costs of residential care under the 1948 National Assistance Act.

S appealed submitting that:

- a) the judge's conclusion that a residential rather than a private arrangement was in her best interests was perverse because:
 - i) in so concluding he had insufficient regard for the uncertainties inherent in relying on local authority arrangements even when substantial further provision was to be made for their augmentation;
 - ii) the evidence as to what the local authority would provide was insufficiently clear
 - iii) the judge had insufficient regard for the greater amenity afforded by a private arrangement, e.g. privacy
 - iv) the judge had in effect imposed a duty on a claimant to look first at local authority provision when the victim of a tort has no such duty.
- b) the judge had applied the wrong test because the court's task was to award the sum to which the claimant was entitled and not to impose what the court thought was in the claimant's best interests; and
- c) the judge was not entitled to conclude on the evidence that the augmented residential arrangement met her reasonable needs i.e. the common law test: there was a paucity of evidence and the inclusion of a sum by way of augmentation demonstrated the inadequacy of the statutory provision.

L submitted that :

- a) a residential arrangement provided by the LQ, augmented as agreed is appropriate to satisfy the common law test and thus the claimant has suffered no loss under this head
- b) because S was to recover only half the damages (by reason of 50% contributory negligence) she was unlikely to be able to afford a private arrangement for the rest of her life and would not spend the assessed sum for future care on such arrangement; that accordingly, this was a

matter to be taken into account in comparing the merits of a private arrangement and a residential arrangement².

Held by CA

- (1) The nature and extent of LA duties under section 21 National Assistance Act 1948 and National Health Services Act 1977 were set out in *R v North and East Devon Health Authority* and *Wahid v Mayor and Burgesses of the London Borough of Tower Hamlets* [2002] EWCA Civ. 287, in particular the judgement of Hale LJ.
- (2) The general principle of award of damages at common law was as stated in the line of authority in *Rialas v Mitchell* and affirmed in *Wells v Wells*. In *Hodgson v Trapp* [1989] AC 807 Lord Bridge warned against double recovery and accordingly if the compensatory principle requires only accommodation and care provided by the local authority under Section 21 of the 1948 Act, damages cannot be awarded as if they were not provided. If, however, private arrangements are reasonably required in accordance with the compensatory principle, the need to pay for them will arise.
- (3) The correct question to be addressed in relation to the care element of S's claim was what was required to meet her 'reasonable needs' and not, as the judge had asked himself, what was in her 'best interests': "*paternalism does not replace the right of the claimant ... making a reasonable choice*" [paragraph 38] and the objective approach was rejected in *Rialis*.
- (4) However, the Judge was entitled to conclude that "undue weight" should not be given as to the evidence of the claimant's wishes and the appropriateness of a private arrangement. On the facts of S's case (the claimant's family showing no interest in her and life at home with her family not an option) the answer to the two questions was the same.
- (5) The judge had been entitled to conclude that S's reasonable needs would be met in a residential arrangement with additional care (paragraph 68). "*In general terms, the approach is to compare what a claimant can reasonably require with what a local authority, having regard to uncertainties which almost inevitably are present, are likely to provide in the discharge of their duty under Section 21. If the second falls significantly short of the first, as Owen J found in Crookdake it did, the tortfeasor must pay*" taking into account the fact that a court may have regard to the power to compel a local authority to perform its duties.
- (6) However, in this case the Judge did not properly assess the feasibility of augmenting residential care in the manner proposed. The case was remitted on a limited basis to the judge to consider whether the proposed augmentation was impracticable so that the balance tipped back towards a private arrangement (paragraphs 70 and 71).
- (7) In deciding whether a private arrangement or residential arrangement was appropriate the fact that damages would be reduced by contributory negligence should not be taken into account, *Kelly v Stockport Corp* [1949] 1 All ER 893 applied (NB Andrew

² analogy was made with the position under s2(4) Law Reform (Personal Injuries) Act 1948 where although D can claim it is unreasonable for the claimant to incur medical expenses provided privately, he is not entitled to claim for an expense he is not going to incur, see **Woodrup v Nicol** [1993] PIQR, Q104, 114 and **Eagle v Chambers (No 2)** [2004] EWCA Civ 1033. This point was specifically considered by Longmore LJ [paragraph 87].

Smith's comments in relation to contributory negligence were in any event *Obiter* as this was not something that he was called upon to adjudicate).

Comment on Sowden:

This lays to rest the argument that because the claimant is only getting, say, 25% of his damages due to contributory negligence, he would not in fact spend any of his award on care and case management and that therefore no award should be made in respect of these claims.

The outcome was fact-sensitive rather than establishing a legal principal in that the anecdotal evidence before the court objectively demonstrated that the claimant's reasonable needs were more likely to be met by residential care in that:

- a) following rehabilitation she had been in a residential school and then in a residential home consisting of bungalows each housing six residents
- b) she had had no contact with her mother since 2000 and little or no contact with her father
- c) the residential home where she currently resided had expressed a willingness to house her in similar accommodation
- d) the care evidence favoured such a regime, the claimant's expert's evidence having been considered to be "*very much influenced by a strong preference for disabled people to have a private arrangement*" without adequate consideration of any alternative
- e) the evidence of the claimant's own wishes was "*tenuous*"; in fact she had expressed a willingness to live with other disabled people in a residential arrangement

Crookdake v Drury (1999) [2004] Butterworths Medico-Legal Reports 99; [2004] EWCA Civ 1370 CA (Civ Div) (Pill LJ, Longmore LJ, Scott Baker LJ) 22/10/2004

Point – D's argument was essentially that most cases of serious injury, the appropriate route was local authority accommodation whereby D would not have to fund care. Robustly rejected by Owen J.

Facts

C, "*outstanding Petty Officer*" in the Royal Marines knocked off his bicycle by D's car. Liability admitted. Good physical recovery but left with profound cognitive and intellectual deficits with behavioural disturbance and verbal and physical aggression. He required residential care in a series of specialist rehabilitation units cared for on a one-to-one basis, funded either by the NHS or privately. Evidence adduced that he was ill-suited to life in a residential home and recommendation he live in his own accommodation, preferably in a rural setting, with appropriate one to one care staff (Prof. Barnes). D contended that LA under a statutory obligation to provide C with accommodation and ancillary services appropriate to his individual needs, that there was little material difference between that which the LA was obliged to supply and C's reasonable requirements as assessed in accordance with legal principles. Accordingly contended that as LA could not charge C for accommodation and ancillary services as his ability to pay was calculated excluding damages, then no loss had been sustained with regard to accommodation and care. D offered £840,000 as being the sum that would meet the need for care reasonably required which fell outside the scope of Section 21(5) 1948 Act as defined in *ex parte Coughlan*

Owen J. As to *care and case management*, It could not be said that there was no material difference between the provision a LA was obliged to make and C's reasonable requirements. In respect of

accommodation the test of accommodation “to meet the needs of the client” under the 1948 National Assistance Act was less demanding than that of the C’s ‘best interests’ by which C was entitled to the same choice and security of accommodation as he would have had had the accident not happened, including accommodation for his wife and children. There was no sound evidential basis to assess the shortfall between the needs under s47 NHS and Community Care Act 1990 and the C’s ‘reasonable requirements’ as assessed for the purposes of his claim against D: “There can be no certainty that provision by the local authority in the proper discharge of its duty, will match the accommodation that is the basis upon which his claims for future loss stands to be calculated” (paragraph 48 of judgment of Owen J.)

Specific findings included:

- a) C required a property that would also house his wife and daughter from time to time and the LA is not under any obligation to provide such a property
- b) C required a property close in proximity to his wife's home; the LA accepted that a quiet environment was required but does not otherwise specify the type or location: see the 1992 Directions: “There can be no certainty that provision by the local authority in the proper discharge of its duty, will match the accommodation that is the basis upon which his claim for future loss stands to be calculated”
- c) C was entitled to make long-term arrangements whereas it was open to the LA to discharge its obligations, subject to the preferred accommodation directions, by a series of short term placements in rented accommodation: “Had the accident not happened the Claimant could have looked forward to a secure future. He is entitled to the same degree of security”
- d) The freedom of choice as a family would be curtailed particularly if his wife wanted to move out of the area of the Devon County Council.

J referred to the “particularly demanding” nature of C’s care, that he required handling “with great sensitivity” and concluded that “unless it could be assumed with confidence that the local authority would find a care regime at a cost of the order or £85,000 per annum, then it cannot be said that there is no material difference in care to be provided by the local authority, and the requirement as assessed and agreed for the purposes of this claim ... it is not possible to make such an assumption on the material before me”

D appealed submitting that

- a) the Local Authority is under a statutory duty (s21 National Assistance Act 1948) to provide accommodation and ancillary services for the claimant appropriate to the claimant's individual needs
- b) the nature and standard of this provision is in reality no different from the claimant's reasonable requirements as to accommodation and care assessed in accordance with the applicable legal principles
- c) the LA cannot charge for this accommodation and services because his fund of damage and income that it generates is to be disregarded in assessing his ability to pay: (Firth v Geo Ackroyd etc.)
- d) as a consequence C had not sustained any loss with regard to accommodation and care.
- e) If this provision did not meet the reasonable requirements of the claimant, D could be required to pay an additional sum for care to augment or top up the provision by the LA

- f) no augmentation was required in this case (the reasons were fact-dependent and do not affect the discussion of the legal implications of such augmentation))
- g) the judge had either taken too limited a view of the duty upon the local authority or had assumed that the local authority would fail to discharge it.

Appeal heard by CA at same time as **Sowden v Lodge** (see above)

C's submissions included reliance upon Elias J in *Howarth v Whittaker* [2003] Lloyds Rep Med 235, paragraph 29, that the claimant "*should be allowed to have a single care regime in which the case manager can directly recruit the carers*" and the practical difficulties of attempting to manage and co-ordinate a care regime in which two different sets of carers, employed by separate employers, are expected to operate together: see too Cox J in *Neale v Queen Mary's Sidcup NHS Trust* [2003] EWHC 1471 QB, paragraph 62.

Held by CA

- 1) "*While the difficulties identified by the judge were not of the most substantial kind*" [paragraph 61] The judge had been entitled to find that a private arrangement was appropriate because it could not be assumed with confidence that the local authority would fund the necessary care regime and there was "*no sound evidential basis*" upon which to assess the proposal of top-up payments to meet any shortfall.
- 2) There was no evidence before the court as to what the local authority could have, or would be likely to have, provided "*which might, I put it no higher, have undermined the claimant's case*" [paragraph 62]
- 3) Damages are to be reduced having regard only to the "*claimant's share in the responsibility for the damage*" (s1(1) Law Reform (Contributory Negligence) Act 1945): "*The reduction takes account of share of responsibility for the damage but no how the damage are likely to be spent*" [paragraph 79]. "*A side effect of a contrary conclusion would be that, upon an appellant court altering the apportionment under the 1945 Act, a re-assessment of the damages recoverable might be necessary. It is most unlikely that Parliament intended that result*" [paragraph 84]³.

D's appeal was dismissed.

Comment on Crookdake

Again the outcome is largely fact-dependent, it having been shown that a private arrangement was the only one likely to meet the claimant's needs on the facts, due account having been taken of his need to be resident with his family and geographical proximity. One is however left with the distinct impression that but for this the Court would have been prepared to consider residential accommodation as meeting the claimant's 'reasonable needs' particularly if adequate information had been made available upon which to assess the defendant's proposal of augmenting local authority residential provision with 'top-up' payments.

³ Note that Longmore LJ considered **Kelly v Stockport Corporation** [1949] 1 All ER 893 to be decisive on this point and **Platform Home Loans Ltd v Oyston Shipways Ltd** [2000] 2 AC 190, HL, to be consistent with Pill LJ's analysis on this issue [paragraph 100]

Pill LJ in his opening remarks in **Sowden** observed that as the two cases had developed and concessions were made *"the resolution of the appeals does not involve consideration of some of the points of law of general importance which may have been contemplated. Both cases turn primarily on the application of the law to the facts of the case though an issue as to the test to be applied by the judge when considering the adequacy of the proposed provision of the claimant does arise in Sowden"*

It does, seem, however that the emphasis has changed as to how the Courts will in future approach the issue of future care with a greater responsibility being laid upon Claimant's to demonstrate that local authority residential provision would not be appropriate whether or not this is 'topped up'.

In particular, it was not disputed that:

- a) a judge is entitled to hold on appropriate evidence that the statutory provision for care and accommodation meets the claimant's reasonable requirements. In such circumstances the tortfeasor may not be required to pay for care and accommodation.
- b) Statutory provision for care and accommodation, augmented by payments on behalf of the tortfeasor for further care, may, on appropriate evidence, meet the reasonable requirements of a claimant.
- c) If under s21 of the 1948 Act care and accommodation is provided by the LA, it cannot recover its cost from the claimant's damages. *"The extension of that principle has had the effect of increasing the potential burden on local authorities under Section 21"*⁴

The 1992 Directions (National Assistance Act 1948 (Choice of Accommodation) Directions 1992) cited in Crookdake give guidance⁵ and do provide that the LA are under a duty to provide preferred accommodation if i) it appears suitable to the person's needs; ii) the costs would not require the authority to pay more; iii) the accommodation is available and iv) the person in charge is willing to provide the accommodation.

It is important to bear in mind the observation that although the victim or a tort has no duty to look first at local authority provision *"It may, of course, be prudent to call evidence ... as to why statutory provision is inadequate"* [paragraph 63]

Further, at paragraph 85 of **Sowden** Pill LJ observed:

"What emerges from the present cases is the importance, when dealing with cases involving very serious injuries, of placing before the court cogent evidence as to how the regimes proposed by the parties for the care and accommodation of claimants will operate" and referred to his comments at paragraphs 62 and 63 in **Crookdake**. *"Judges trying this type of case should not be put in the position the judge in Sowden was"*

Comment on both decisions

Claimants cannot take too much comfort from either of these decisions in that the Court of Appeal:

⁴ and it is strongly argued in McGregor on Damages (17th Edition (2003), paragraphs 35-205 to 209) that the law should be amended to ensure that the tortfeasor pays); on this point, see Longmore LJ at paragraphs 88 and 89 of the judgment.

⁵ updated as from September 2003 after the judgments in both actions had been given. The expression 'top-up' now appears for the first time in paragraph 4 of this September 2003 guidance.

- a) Pointed out (per Longmore LJ [paragraph 88]) that although local authorities have, since 1993, been obliged to give care to those in need of such care, there is no provision, equivalent to s2(4) of the 1948 Act, enacting that a defendant tortfeasor cannot allege that it would be unreasonable for a claimant to have incurred, or to incur in the future, the cost of care provided privately.
- b) accepted as a principle that a claimant's appropriate accommodation and care may well be met by the duty owed by Local Authorities under s21 NAA and subsequent Directions including the 1992 Choice of Accommodation Directions;
- c) that pursuant to the National Assistance (Assessment of Resources) (Amendment) Regulations 1998 that a local authority could not look to any award of damages for the purpose of recouping the cost of care provided: any such award was henceforth to be ring-fenced.
- d) considered that in appropriate cases any shortfall between the reasonable requirements under common law and the LA's duty to provide accommodation and care could be met by augmentation or top-up
- e) gave as the principal reason in **Sowden** for not making such an order with immediate effect, the absence of "*proper evidence before the court as to how the local authority would in fact discharge its statutory duty in providing 24-hour care*" such that the judge could not reach a conclusion and draw appropriate inferences.
- f) In similar vein, criticised the defendant for not having provided details of augmentation: "*I have been troubled by the paucity of the evidence as to how the augmented portion of the residential provision would work and the absence of a detailed care scheme on behalf of the defendant incorporating the augmented element*" per Pill LJ (paragraphs 66 and 70) No request was made for an adjournment to allow the question to be considered: "*Faced with the late and informal introduction of such a scheme, it was difficult for practicability to be investigated*" (paragraph 69)
- g) pointed out that In *Crookdake* the judge placed emphasis upon the "*particularly demanding*" needs and "*sensitivity*" of that particular claimant, the inference being that a claimant with less challenging problems might well have his 'reasonable needs' met by the LA, whether or not augmentation was required.
- h) voiced concern over "*astronomically high*" awards (see Longmore LJ [paragraph 90]): "*indeed the amount of such award might in itself become reason for holding that it is not reasonable for a claimant to use private care services*" whilst adding "*On the other hand experienced judges suspect that care provided or paid for by local authorities will not be of the same high quality as care paid for privately*".
- i) emphasized the importance in schedules for both parties to set out their case on 'reasonable needs' and that where a defendant asserts that a claimant should be content with local authority residential care and sets out precise top-up proposals, "*it will then be for the claimant to assert that top-up or further top-up in addition to that proposed by defendant will be required, if local authority residential accommodation is to be provided*" (per Longmore LJ [paragraph 99])
- j) accordingly, whilst acknowledging that the Claimant was not under a duty to investigate residential care where the care claim was predicated upon a private arrangement, nonetheless needed to be a position to call evidence to show that statutory residential provision was inadequate.

Conclusion

The shift of emphasis requiring closer consideration by the parties of the potential availability of local authority residential care, is a significant development. This arguably alters the basis upon which a court will consider future care claims in significant injury cases; hitherto most Judges proceeded on an

assumption that a claimant would be cared for in private accommodation whereas now it would appear to be incumbent upon a Claimant to show that statutory provision is inadequate (whether topped up or not) before being able to persuade the court to favour the significantly more expensive private provision. It is likely that many more serious and catastrophic injury claims will fight on this issue in future. Longmore LJ observed at paragraph 97 that this *"is a difficult and developing area of the law"* and Scott Baker LJ commented that *"It seems to me that only by legislation can any rationality be brought to this problem. Meanwhile the courts have to do their best to keep the anomalies to the minimum"*. Consideration also needs to be given as to how this future provision is to be catered for by any periodical payments order under section 100 Courts Act 2003 and the Part 40C Practice Direction report from a financial adviser.

All personal injury practitioners therefore need to remain alive to the actual and potential issues raised in the appeal of these two cases.

Note: the legal team for **Sowden** comment upon this decision in the NLJ 26 November 2004, p1734

DEIRDRE GOODWIN

2 November 2004.

Please note that this Casenote 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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