



Neutral Citation Number: [2006] EWHC 2833 (Admin)

Case No: TLQ/05/0641

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/11/2006

Before :

**MR. JUSTICE LLOYD JONES**

Between :

A  
(a child suing by his father and litigation friend C)

**Claimant**

- and -

B HOSPITALS NHS TRUST

**Defendant**

Ms. E. A. Gumbel QC (instructed by **Wolferstans**) for the **Claimant**  
Mr. Stephen Miller QC (instructed by **Bevan Brittan**) for the **Defendant**

Hearing date: 27<sup>th</sup> October 2006

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**Approved Judgment**

**MR. JUSTICE LLOYD JONES:**

1. During the birth of the Claimant, to whom I shall refer as A, at the Defendant's hospital in 1999, A suffered hypoxic ischaemic damage and, as a result, developed a neo-natal encephalopathy. His injuries were catastrophic.
2. In an action commenced in 2004, A, suing by his father as litigation friend, sued the Defendant. Liability for the Claimant's injuries was admitted in the Defence. Before the trial of issues relating to quantum of damages, the parties were able to reach agreement on all heads of claim other than the cost of future care.
3. On the 11<sup>th</sup> May 2006 I made an order by consent approving the award of a conventional lump sum of £2,516,385.00 to the Claimant in respect of all items of loss other than future care.
4. Following a trial on the issue of the appropriate award for the cost of future care, I delivered a judgment on the 26<sup>th</sup> May 2006. In that judgment I assessed damages in respect of the cost of future care on a lump sum basis in the total sum of £3,995,818.00. I indicated that I proposed to adjourn the proceedings in order to enable the Claimant to seek financial advice as to the relative merits of a lump sum award and an order for periodical payments.
5. The Claimant then took independent financial advice from an expert financial adviser, Miss Louise Claro. On the 21<sup>st</sup> June 2006 the Claimant sent to the court Miss Claro's report and an advice on approval. The financial advice examined the benefits and disadvantages to the Claimant of the alternative forms of award. The advice on approval asked the court to make a conventional lump sum order. This course had previously been approved by Master Lush of the Court of Protection.
6. On the 26<sup>th</sup> June 2006 the Claimant's solicitors wrote to the Defendant's solicitors inviting them to agree to the terms of a draft order making a lump sum award. However, on the 24<sup>th</sup> July 2006 the Claimant's solicitor was advised that the Defendant objected to the terms of the proposed final order.
7. At a telephone hearing on the 28<sup>th</sup> July 2006 I granted permission for the parties to put before the court expert accountancy and actuarial evidence and gave further directions. The question of the form of the award was argued before me at a hearing on the 27<sup>th</sup> October 2006.

Relevant provisions.

8. Section 2 of the Damages Act 1996 (as amended) provides in relevant part:

“2.- (1) A court awarding damages for future pecuniary loss in respect of personal injury –

(a) may order that the damages are wholly or partly to take the form of periodical payments, and

(b) shall consider whether to make that order.

...

(3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.

(4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if –

...  
(c) the source of payment is a government or health service body.

...  
(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.

(9) But an order for periodical payments may include provision –

- (a) disapplying subsection (8), or
- (b) modifying the effect of subsection (8).”

Section 2A Damages Act 1996 (as amended) provides in relevant part:

“2A.- (1) Civil Procedure Rules may require a court to take specified matters into account in considering –

(a) whether to order periodical payments;...

(2) For the purposes of section 2(4)(c) and (7)(d) “government or health service body” means a body designated as a government body or a health service body by order made by the Lord Chancellor

9. CPR 47.1 provides in relevant part:

“41.7 When considering –

(a)...

(b) whether to make an order under section 2 (1) (a) of the 1996 Act, the court shall have regard to all the circumstances of the case and in particular the form of award which best meets the claimant’s needs, having regard to the factors set out in the practice direction.”

10. Practice Direction B in Part 41 provides:

“1. The factors which the Court shall have regard to under rule 41.7 include-

- (1) the scale of the annual payments taking into account any deduction for contributory negligence;
- (2) the form of award preferred by the claimant including-
  - (a) the reasons for the claimant’s preference; and
  - (b) the nature of any financial advice received by the claimant when considering the form of award; and
- (3) the form of award preferred by the defendant including the reasons for the defendant’s preference.”

11. The purpose of the award of damages was stated by Lord Blackburn in *Livingstone v Rawyards Coal Company* (1880) 5 App. Cas. 25, 39. He referred to the

“... general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

More recently, the same principle was stated by Lord Hope in *Wells v Wells* [1999] 1 AC 345,390 A-B:

“...the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money that will amount to no more, and at the same time no less, than the net loss.”

12. By virtue of Section 2 (9) of the Damages Act 1996 (as amended) an order for periodical payments may include provision for the amount of payments to be varied by reference to an index other than the retail prices index (“RPI”). I have been told that the question whether and, if so, in what circumstances it may be appropriate to order periodical payments on a basis other than RPI is currently an issue in other proceedings. However, in the present case the Claimant has taken the view, on advice, that the expense and delay which would be occasioned by arguing that periodical payments should be awarded by reference to an index other than the RPI would not be justified. Accordingly, the Claimant has not sought to argue in favour of periodical payments on a basis other than RPI. Rather, the Claimant simply seeks a lump sum award. This approach is reflected in paragraph 11 of the order of 26<sup>th</sup> May 2006. By contrast, the Defendant contends that the appropriate award would be an order for periodical payments linked to RPI.
13. Before the Court can make an order for periodical payments it must be satisfied that the continuity of payment under the order is reasonably secure. (Section 2(3).) In the present case this precondition is satisfied because the source of payment is a health service body. (Section 2(4) (c)).
14. In general, the disadvantages which can accompany a lump sum award are well known. The inherent uncertainty in the variables used to determine the appropriate multiplier for future losses makes it unlikely that a lump sum award will ever provide exactly the right sum of money to restore a Claimant to the financial position he would have been in but for the accident. Estimates of life expectancy cannot be precise. Assumptions about the real return on investments are likely to be too high or too low. The Claimant has the risk of these uncertainties, in particular the risk that the fund may run out. This is a matter of particular concern in the context of future care. On the other hand, periodical payments possess the real merit of certainty of provision for life. However, unless they are set by reference to an appropriate index, the certainty they achieve may become certainty of under-provision.
15. In the particular circumstances of this case the Claimant maintains that if periodical payments by reference to RPI are ordered, the difference between RPI and the actual increase in the cost of providing care will lead to the result that there will be a

massive shortfall in provision for the future care the Claimant. The Claimant's financial adviser and accountant have both emphasized that if periodical payments are awarded linked to RPI they will not meet the Claimant's ongoing care needs year by year as care costs will increase by a greater amount than the increase in RPI.

16. Miss Claro, the Claimant's financial advisor, has examined the actual percentage changes in the RPI and the Average Earnings Index ("AEI") in the period January 1971 to December 2005. The figures on which AEI is based relate to earnings from employment in general. The data she produces shows fluctuations in real earnings growth over that time. The average real earnings growth rate, taken over the most recent period 2004-2005, is 1.99% per annum. However she considers that in order to obtain a useful bench mark to consider the impact of real earnings growth on an award of periodical payments, one needs to look at historic averages and consider economic forecasting for the future. She concludes that it is reasonable to assume that long term RPI would escalate at approximately 2.5% per annum and that long term AEI would escalate at approximately 4% to 4.5% per annum. The difference between the two rates would be 1.5% to 2% per annum. Accordingly, she carries out her calculations on the basis of a differential of 2% per annum. Some support for this approach in relation to wages in general is provided by the Commentary by the Government Actuary's Department at Appendix A of the Ogden Tables. However I note that that Commentary actually adopts the assumption that the cost of care would go up by 1% a year on average more than inflation as measured by the RPI.
17. Mr. Robert Parry, the independent expert accountant who gave evidence before me, has examined the data published by the Office for National Statistics for RPI and AEI for the last 36 years. He notes that in only three of the last 36 years did RPI increase by more than AEI. He demonstrates on the basis of the historic data that there has been an average real growth in earnings of around 1.9% per annum in excess of increases in RPI for the last 36 years. In the last ten years AEI increases have exceeded RPI increases in every year. Whilst the actual average RPI and AEI increases are lower over the last ten years than over the last 36 years, an average differential of 1.9% remains. These figures are, once again, concerned with general employment.
18. Mr. Parry has also examined the NHS pay cost index between 1994 and 2003. This shows a simple average increase in the NHS pay cost index of 5.1% compared with a simple average increase in AEI of 4.1% and a simple average increase in RPI of 2.6% over the same period. The average divergence between NHS pay cost index and RPI is 2.5%. Mr. Parry accepts that this is a relatively short period and may therefore include an element of catching up of NHS rates with private sector rates. Nevertheless it is clear that NHS pay costs have grown by more than AEI for the years for which the data is available.
19. Mr. Parry has also examined the rates of increase of wages of Crossroads care attendants between 1992 and 2006. The simple average increase in the wages of Crossroads care attendants over that period is 4.0% compared with a simple average increase in AEI of 4.4% and a simple average increase in RPI of 2.8% over the same period. An analysis of the last ten years shows a simple average increase in wages of Crossroads care attendants of 3.2% compared with a simple average increase of RPI

of 2.5% in the same period. Over this period the divergence between actual wage increases and RPI for these employees has been 0.7%.

20. I consider that the figures provided in respect of NHS employees and Crossroads care attendants are likely to give a fairer indication of the likely future cost of employing carers for the Claimant than figures relating to employment generally. Some of the provision for care of the Claimant is to be provided by qualified nurses although most of it will be provided by carers. However in view of the fact that the Claimant is at present six and a half years of age and he has an agreed life expectancy of 42.5 years, I consider that it is necessary to have regard to a longer historic period in assessing the likely increase in future costs of providing care. In these circumstances I consider that the figure of 1.7% per annum in excess of RPI, taken by Mr. Parry, is a fair basis on which to approach the matter.
21. It appears therefore that the Claimant's care costs will increase at rates faster than increases in RPI, the measure by which increases in periodical payments would be set. It is therefore likely that the Claimant will suffer increasing shortfalls between his costs of care and annual income if the award is in the form of periodical payments. On Mr. Parry's figures a differential of 1.7% per annum between the RPI and the increase in care rates would result in a periodical payment shortfall of £29,030 by year 10, £193,091 by year 27 and £347,015 by year 36.
22. It is apparent that the effect of the divergence of RPI and the actual increase in the cost of care will be intensified in the present case because the award in respect of future care is very large.
23. It is also significant that the shortfall in the ability of periodical payments to meet actual care costs would be apparent from the first anniversary of the award. Even if RPI and the rate of increase of actual care rates were to converge in future, because periodical payments would be assessed by applying RPI to the payment in the preceding period, the shortfall in periodical payments would come entrenched and would continue notwithstanding the fact that RPI and the actual rates of increase in care costs had come into line.
24. Accordingly, while the provision of periodical payments would provide a measure of security to the Claimant in this case, there is a high degree of likelihood that if they are calculated by reference to RPI they will not meet the actual cost of care and that the shortfall would be very substantial.
25. On behalf of the Defendant it is suggested that in circumstances where the cost of future care is the subject of the award of periodical payments, the Claimant will be able to resort to the lump sum element of his award in order to meet any shortfall which may arise from the periodical payments. While this will often be true in the case of a lump sum award in respect of pain and suffering and loss of future earnings, other parts of the lump sum award will have been intended to meet particular expenses. In the present case the lump sum award was £2,516,385. A major expense of which this took account was the acquisition of a property suitable to meet the Claimant's lifetime needs. It was agreed by the parties that £850,000 should be awarded in respect of this item. However, it now appears that a more realistic purchase price for such a property is in the region of £1.2 million to £1.5 million.

When one takes account of interim awards already spent and the cost of past care, this leaves an approximate lump sum balance of between £578,385 and £878,385. This is a substantial sum. Nevertheless, the increase in the likely cost of accommodation has reduced the sum which might otherwise have been available to meet any shortfall in provision for the Claimant's future care needs.

26. In these circumstances it is necessary, therefore, to consider whether a lump sum award is likely to meet the actual costs of care. This involves an assessment of the likely returns from investment. Here it is important to bear in mind that, unlike periodical payments during the lifetime of the Claimant, returns from investment will usually be subject to tax. Moreover, it becomes necessary to take account of the cost of investment and investment advice.
27. Miss Claro has calculated that the lump sum award relating to future care (£3,995,818) would need to earn a minimum of 5.25% per annum net of all tax and charges to match the periodical payment, on the assumption that all capital and interest earned would be spent over the Claimant's lifetime. She observes that in the current economic climate this would require a significant proportion of damages to be invested in equities with an attendant higher degree of risk. Applying Miss Claro's assumed differential of 2% between RPI and AEI, the Claimant would have to achieve a monetary return of 7.25% net of all tax and charges throughout the Claimant's lifetime in order to ensure that his care needs would be met. If one takes Mr. Parry's differential of 1.7%, the Claimant would have to achieve a monetary return of 6.71% net of all tax and charges throughout the Claimant's lifetime in order to meet his care needs.
28. A key question therefore is whether it is reasonable to expect the investment of the lump sum to achieve such a return. Miss Claro has produced calculations which show a median equity range forecast of a net rate of return of 4.34% per annum over the next 10 years. This leads Mr. Miller QC for the Defendant to submit that this gives no ground for optimism that the investment of the lump sum can match even the periodical payments. However, the maximum range forecast has a predicted rate of return of 8.07% net of tax and charges. Moreover, I note that the Lord Chancellor in setting the discount rate at 2.5% intended that this should reflect a reasonable rate of return on investment. I am told that this rate of real return is the equivalent of approximately 5.2% monetary return. Accordingly I consider that there is a very good prospect that investment returns will meet the level required to keep up with periodical payments linked to RPI. Moreover, I consider that there is a good prospect that investment returns will go substantially further than would periodical payments to meet the actual costs of the provision of care in this case.
29. In this regard I would draw attention to two other matters. First, the award of a lump sum would provide considerable flexibility to the Claimant's advisors. In particular, it would provide the opportunity to use capital to meet any shortfall in any given year. Secondly, if the divergence between RPI and the actual increase in the cost of care is less than Miss Claro and Mr. Parry predict, the investment of the lump sum would be correspondingly more likely to meet the actual cost of care.
30. A particular concern in the case of a lump sum award is the risk that the award will run out during the lifetime of the Claimant. On behalf of the Claimant, it is suggested

that this is of less significance in the present case because the two medical experts were able to agree on a life expectancy of 42.5 years. Accordingly, it is submitted, there is not the same degree of uncertainty as in some cases and the advantages of periodical payments are correspondingly reduced. To my mind, the agreement of the medical experts as to life expectancy must be approached with some caution. It remains only a prediction by doctors based on the published data. Clearly, we are still concerned with what is merely a prediction. One cannot be confident that there will be no need to provide for future care after the Claimant reaches the age of 42.5 years. The most one can say is that there is less uncertainty in the present case than in some other cases where there is a wide divergence between the estimates of life expectancy.

31. The Claimant's family have been advised as to the risks inherent in a lump sum award. I have been told that they have expressly stated that they would be prepared to accept a greater degree of capital risk in order to achieve the prospect of achieving growth that will keep pace with real earnings. I understand them here to refer to the proposal that there should be some investment in moderate risk equities.
32. I am required to have regard to the form of award preferred by the Defendant including the reasons for the Defendant's preference. To the extent that the Defendant has argued that periodical payments would be of greater benefit to the Claimant these submissions have been considered above. In addition, Mr. Miller QC on behalf of the Defendant submits that, leaving aside the arguments about the wisdom of awarding a lump sum in this particular case, there is a considerable benefit to the Department of Health and the National Health Service as a whole of retaining the benefit of the lump sum within the health care system and instead meeting its obligation to the Claimant with an annual stream of income. He also points to the fact that an award of periodical payments would remove the incidence of large settlements from the annual budget of the Department of Health. Miss Gumbel QC on behalf of the Claimant sought to characterise this as an argument of affordability and argued, by reference to the observations of Brooke L.J. in *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ. 1103 at paragraph 29, that this was an impermissible consideration. To my mind, however, Mr. Miller's submission is not one of affordability. Rather he points to the advantages which the Department of Health would undoubtedly derive from an award of periodical payments. It seems to me that these are legitimate considerations to be taken into account.
33. However, considering the matter in the round and having regard to all the considerations identified in the Practice Direction, I have come to the clear conclusion that the form of award which best meets this Claimant's needs in respect of the provision of future care is a lump sum award. For the reasons set out above I consider that it is most unlikely that periodical payments linked to RPI will meet the future care costs in this case. On the contrary, I consider that there is a very strong probability that divergence between RPI and the actual cost of the provision of care will result in a massive shortfall of provision. By contrast, I consider that there is, realistically, a good prospect of meeting actual care costs from the lump sum award.
34. For these reasons, the award in respect of the cost of future care will be in the form of a lump sum.