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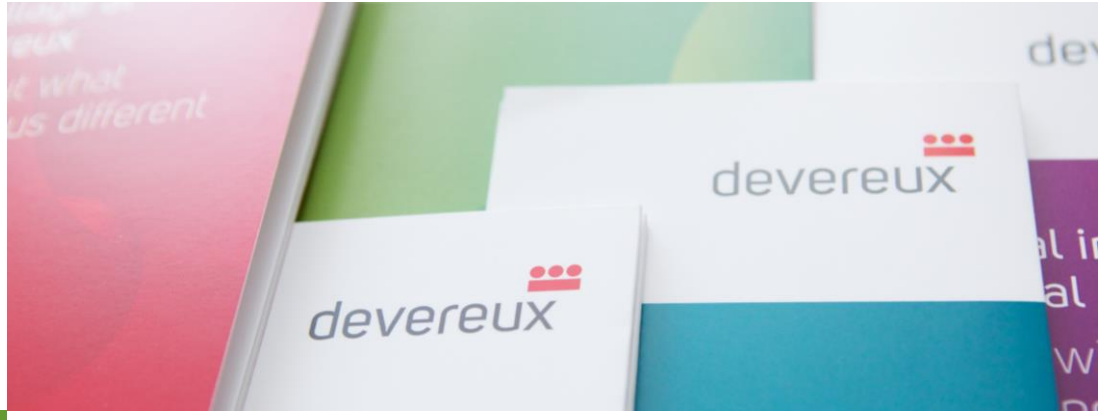

Our legal specialists review the latest developments in personal injury law and offer a practical insight on how these may affect you and your clients.

Now That's What I Call Quantum 2015!
by Rob Hunter

In this practical digest Rob Hunter reviews the major reported cases on quantum decided within the last twelve months and distils the key practice points for the busy personal injury practitioner.

The paper is designed for ease of reference: click on any of the cases listed below to skip to the relevant section; click on citations (in red text) for hyperlinks to the respective judgments on BAILII.

Rob reviews the following cases in alphabetical order:

Billett v Ministry of Defence

Ellison v University Hospitals of Morecambe Bay NHS Foundation Trust

Harman v East Kent Hospitals NHS Foundation Trust

HS v Lancashire Teaching Hospitals NHS Trust

Knauer v Ministry of Justice

Reaney v University Hospital of North Staffordshire NHS Trust and another

Robshaw v United Lincolnshire Hospitals NHS Trust

Billett v Ministry of Defence [2015] EWCA Civ 773

Loss of earnings – first consideration of Ogden Tables A-D by the Court of Appeal – definition of disability – Smith v Manchester

C, a driver for the Royal Logistics Corp, suffered non-freezing cold injury affecting his lower limbs in 2009 whilst serving in the army. He returned to civilian life in 2011 for reasons unrelated to his injury and found work as an HGV driver 7 days later.

The parties' employment experts – something of a rarity these days – agreed that C would be at a disadvantage on the open labour market even though he had he had been designated fit for full deployment by the Army following his injury. At the time of trial he was aged 29 and earning the same as he would have been uninjured.

The main issue at first instance was whether any disadvantage on the labour market should be compensated by means of a traditional Smith v Manchester award (D's contention) or by the application of the Ogden Tables (C's contention), with or without adjustment of the reduction factors. Practitioners will be familiar with the disparity between the awards resulting from these approaches.

The Judge at first instance, Andrew Edis QC (now Edis J), calculated damages by application of the Ogden Tables but using a reduction factor which was equal to the mid-point between the disabled and non-disabled reduction factors. He found that the claimant was "*only just*" disabled under the Equality Act 2010, which was perhaps not surprising given the award of £12,500 for PSLA. Although the Claimant was obliged to avoid working outside in cold conditions for appreciable periods of time, the overall effect of his injuries was minor.

The Judge engaged with the commentary of Dr Victoria Wass to the effect that adjustments should be made within the disabled subgroup by reference to educational attainment or employment status.[1] However, he felt a larger adjustment was warranted in this particular case in which it was hard to conceive of very many people who could be classified as disabled who were as fit and able as the claimant [59].

The Court of Appeal rejected the Defendant's appeal against the finding that the Claimant was disabled but allowed the appeal against the assessment of damages nonetheless. Jackson LJ gave the leading judgment; the other Lord Justices agreed.

Definition of Disability

In relation to what constitutes a "*substantial adverse effect*" on a person's "*ability to carry out normal day to day activities*", the Court of Appeal endorsed Langstaff J's statement of the test in Aderemi v London and South Eastern Railway Ltd [2012] UK EAT/0316/12 that unless the effect is trivial, it is to be treated as substantial. Accordingly, the finding of disability at first instance was not disturbed.

Application of Tables A-D

Although it was open to the Judge to categorise the Claimant as disabled, the Court of Appeal held that in this instance Tables A-D were not a valuable aid to the assessment of the Claimant's loss of earning capacity. This was because the Claimant was at the outer fringe of the spectrum of disability and his injuries affected his chosen career much less than activities outside work. At the heart of the decision was the suggestion that there was no rational basis for determining how the reduction factor should be adjusted.
In a nutshell [per Jackson LJ at 96]:

> "Determining an appropriate adjustment to the RF is a matter of broad judgment. In the present case that exercise is no more scientific than the broad brush judgment which the court makes when carrying out a Smith v Manchester assessment."

Outcome

In the circumstances, the Judge's award of £90,000 was substituted with a lump sum of £45,000, equivalent to slightly more than 2 years' loss of earnings. This might be regarded as towards the upper end of the scale of traditional Smith v Manchester awards.

Practice Points

Given the Court of Appeal's approach to disability status, the Tables will be of potential relevance in a large number of claims. Whether or not that will benefit the majority of claimants remains to be seen.

The second theme of the judgment is an emphasis on the breadth of the categories within the tables (see, for example, paragraphs 74-5 and 94). It will be even more difficult, in the writer's view, to persuade judges to accept the statistics at face value.

The frontline in litigation concerning the tables will involve arguments along the following lines:

(i) there is no reasoned basis for adjustment of the reduction factors;

(ii) a traditional Smith award (alternatively, a Blamire award) would be more appropriate.

Proponents of the statistics can take comfort from Jackson LJ's comment that "*in many instances the use of Tables A-D will be a valuable aid to valuing the claimant's loss of earning capacity*" [98].

If a traditional lump sum award is to be avoided, claimants will need to distinguish themselves from Mr Billett who, in the Court of Appeal's words, *"only just scrapes"* into Table B.

Further promotion of the tables will require judges to be persuaded that adjustment of reduction factors can be subjected to a rather more nuanced analysis than the Court of Appeal was prepared to engage with in Billett.

Recourse to published and forthcoming articles from Dr Wass is likely to be beneficial. She has written persuasively on the statistical significance of

disability status and the comparative significance of other factors such as education. An unsophisticated distillation of her view is that if the reduction factors must be adjusted, they should be adjusted with reference to the impact made by moving between different subgroups based on educational or employment status rather than a point between the disabled and non-disabled reduction factors.

A further signpost towards the type evidence that might be relevant appears in paragraph 94 of the judgment where the Court of Appeal noted evidence concerning the degree of disability. If those within any disabled group were categorised by severity of disablement on a scale of 1 (lowest) to 10 (highest) then: 42.9% of those classified as disabled fall within categories 1 to 3; 43.9% of those disabled fall within categories 4 to 7; and only 13.2 % of the disabled population fall within categories 8 to 10.[2]

Looking forward, might it be possible to place a claimant within a particular category? In any event, it is arguable that adjustments should reflect a distribution in which there are 3 times as many people at the lower end of disability than there are at the higher end.

What's Sauce for the Goose…

To the extent that there are factors which mitigate the impact of a disability in a way that is not recognised in the post-accident disabled reduction factor, it is soundly arguable that such factors should also be reflected in upward adjustment of the pre-accident non-disabled reduction factor.

Be Careful What You Wish For

At first glance, the fact that the Court of Appeal upheld the finding that Mr Billett was disabled might be seen as a victory for claimants because it makes the tables available to a large number of injured people.

However, there is a potential problem for claimants with such a wide definition of disabled. In simple terms, the lower the threshold for disability, the more varied the group. The risk is that the statistics will be seen as covering such a wide range of people that they have nothing to offer in an individual case.

It is notable that the view of Dr Wass – surely the leading labour economist in the field – is that the Court of Appeal wrongly applied a different test of disability to the one adopted in the Ogden tables, which are founded on the Labour Force Survey. Her view is that a claimant is "*disabled*" only if the effect of their disability broadly matches the examples set out in the guidance notes to the Disability Discrimination Act 1995 (as reproduced in the explanatory notes to the Ogden Tables at paragraph 35). Nonetheless, for the moment at least, the test is as formulated by the Court of Appeal.

Ellison v University Hospitals of Morecambe Bay NHS Foundation Trust [2015] EWHC 366 (QB)

Heavy quantum – birth injury – accommodation claims and credit for living rent free – hydrotherapy

C, a child born in 2007, sustained hypoxic ischaemic injury at birth leading to quadriplegic spastic cerebral palsy at the extreme end of the spectrum. There were profound physical and cognitive impairments and C suffered from frequent painful spasms in her limbs, occurring day and night, which left her screaming and crying for prolonged periods.

The severity of the Claimant's injuries was marked by the award of £295,000 in general damages, notwithstanding the total lack of insight into her condition.

By the time of trial, agreement had been reached, subject to court approval, on a substantial number of heads of loss. The agreed issues included future care and case management that was compromised on the basis of a PPO stepped as follows: £125,000 p.a. to December 2015; £225,000 p.a. until the age of 18 and 8 months; and £290,000 thereafter; indexed to ASHE 6115 at the 80th centile.

The points of interest considered below arise from the decision on future accommodation costs and in particular the requirement for a hydrotherapy pool. Certain other aspects of the judgment, including rulings on future holiday costs, transport costs and the legal basis of the assessment of damages (including rejection of the Defendant's interpretation of Swift J in Whiten), are beyond the scope of this paper.

Accommodation in London

The agreed figure for the sum reasonably required to purchase a London home capable of adaptation was £1,600,000, plus £135,000 to reflect the betterment that would be achieved from the adaptation works to be carried out. The Roberts v Johnstone calculation was therefore based on the capital sum of £1,735,000.

On adaptations, it was held that a reasonable level of interaction with family members did not require

the installation of a lift so that C could access the first floor in the two-storey home that was likely to be purchased [113-14].

Deduction for Accommodation Costs Saved by Parents

A further interesting aspect of Warby J's decision on accommodation was his refusal to offset a notional rent to be paid by Mr and Mrs Ellison not only against the Roberts v Johnstone element of capital provision (following the Whiten / Iqbal / Noble line of cases), but also from the claim for increased running costs. The impact of C's injuries on the lives of the parents would usually outweigh any incidental benefit gained by the parents and on the facts of the case the parents had sustained considerable undercompensated loss in any event [136-9] & [159]. By parity of reasoning, the saved running costs were also to be disregarded.

Hydrotherapy

The Court was invited to the rule on the principle of hydrotherapy rather than the recoverable costs. However, it was apparent that the proposed pool was substantial; the evidence indicated that the costs would approach half a million pounds over C's lifetime.

Warby J allowed the claim because of the "*exceptional*" circumstances of the case [119]. On the evidence, he found that there was no reasonable alternative means to provide similar relief from the "agony" of painful spasm; given a pool at home, professional carers could take the Claimant for total immersion in warm water even in the middle of the night [117]. Previous judicial comment that the costs of installing and maintaining a hydrotherapy pool in the home would only be allowed if necessary as part of the therapeutic treatment was accepted but only on the proviso that "*therapeutic treatment*" was not given too narrow a meaning.

It is apparent from the judgment that video evidence of C receiving hydrotherapy was persuasive. If this head is to be pursued, claimant representatives will need to consider whether similar evidence can be obtained.

Harman v East Kent Hospitals NHS Foundation Trust [2015] EWHC 1662 (QB)

Clinical negligence following birth – residential care – local authority funding – return to family home Turner J – 11 June 2015

C suffered from severe autism and significant cognitive impairment as a result of negligent post-birth management. In 2013, C moved to a residential care home that provided specialist services for those suffering from autism. In 2014, the local education authority agreed to fund the placement. C was expected to stay at the home until the age of 25 during which time it was expected that direct funding would remain available.

State Funding

C's parents had fought a difficult battle to obtain public funding and now wished to pay the care home fees from an award of damages against the Trust rather than continuing to seek direct payments from the local authority. The effect of Peters v East Midlands SHA [2009] EWCA Civ 145 was that a claimant was not obliged to rely on state funding for care [23]. The local authority would not continue funding if C did not claim funding and the parents were perfectly entitled to pursue the tortfeasor instead, irrespective of whether their preference was reasonable [24].

Return Home

After the age of 25, C would have to leave the care home. The Judge found that the determination of his parents to welcome him back to the family home was genuine and, in the particular circumstances, determinative [44]. Turner J was unimpressed by the experts – C's in particular – but reasonable compensation therefore required funding a private regime at home [41].

HS v Lancashire Teaching Hospitals NHS Trust [2015] EWHC 1376 (QB)

Heavy quantum – award for future care – issues of principle including number of carers, day/night division – parental contributions – loss of earnings – hydrotherapy -William Davies J – 15 May 2015

C, aged 8 at trial, sustained a catastrophic brain injury following the negligent failure to recognise and treat a streptococcal infection at birth that led to the development of meningitis. C was profoundly developmentally and cognitively impaired, had no speech and limited sight, and manifested serious behavioural problems.

Prior to trial, C had moved to an adapted home where she lived with parents and two younger siblings. The regime that had been implemented with interim payments involved two full-time carers during the day and one at night.

The Care Package

The findings concerning the principles of provision were as follows [27]:

(i) 'double up' care – the cost of two full time carers was awarded throughout C's childhood and teenage years (having been agreed between the parties in adulthood);

(ii) night-time care – two carers, one waking and one sleeping, would be necessary for life with a further allowance of 4 weeks a year until 19 and 2 weeks a year thereafter to reflect anticipated disturbance of the sleeping night carer;

(iii) the division between day and night care hours was to be 14 : 10 hours after C's 19th birthday (a division of 12 : 12 hours was agreed until that point).

The claim for an additional uplift of 5% to the established 60-week year[3] in order to provide a contingency for holidays, sickness and other unexpected absences was rejected: the 60-week calculation is premised on an allowance having been made for such matters.

Parental Contributions

The evidence of C's parents' was that they would stand back from the care regime. The Defendant met such evidence with the suggestion that, on reflection, they would choose to become involved again some time after trial.

Such arguments received short shrift with William Davies J commenting that the kind of care C required was "*light years away*" from the supervisory role that would ordinarily be required for a child between the ages of 8 and 11. Likewise, with regard to night care, it was said that:

> "Any parent who was disturbed to a significant degree by a child of 8 as often as HS requires two carers during the night would regard himself or herself as extraordinarily unfortunate. Moreover, the nature and extent of the disturbance on any given night is very different to that experienced by the parents of a normal healthy child even if that child's sleep is disturbed."

Loss of Earnings

It was clear that C was incapable of work but impossible to make any considered assessment of what she might have done but for her condition. Her case was properly put on the basis of the most recent ASHE figures. A relatively broad-brush approach lump sum was appropriate and an award of £300,000 was made.

No deduction would be made for the cost of travelling to and from work (Eagle v Chambers (No.2) [2004] EWCA Civ 1033 explained; Dews v National Coal Board [1988] A.C. 1 followed) [40].

Likewise, no deduction for the impact of student loan finance given uncertainty and 10-year period until tertiary education but comment that there would be different considerations for a claimant with a defined educational path who could be expected to attend university in the next few years [39].

Hydrotherapy Pool

Not allowed. No therapeutic benefit was asserted and a private hydrotherapy pool was available locally. Instead, an award of the costs of twice-weekly visits for life was made, capitalized to £125,000 [48].

Knauer v Ministry of Justice [2014] EWHC 2553 (QB)

Fatal Accidents Act – loss of services – multipliers
Bean J – 24 July 2014

The trial judge, Bean J (as he then was), found himself bound by Cookson v Knowles [1979] to calculate the multiplier at the date of death rather than the date of trial. He issued a 'leapfrog' certificate. In February 2015, the Supreme Court gave permission to the Claimant to appeal on the issue of the appropriate date for the assessment of the multiplier and it is understood that the issue will finally be before a Court competent to reconsider it in January 2016.

Other points of interest in the judgment include adoption of the aggregate rate (£8.98) for loss of services the deceased would have provided during the period of illness before death; multiplicands of £900 for gardening and £600 for decorating, both calculated on the basis of a notional hourly rate of £12 [34], and a multiplicand of £16,640 for household tasks such as cooking, cleaning and laundry based on an hourly rate of £16 per hour. The total multiplicand to the widower, who had no dependent children, was therefore £18,130, which is high by comparison with previous awards.

Reaney v University Hospital of North Staffordshire NHS Trust and another [2015] EWCA Civ 1119

Causation – assessment of damages – qualitative versus quantitative

C had sustained a transverse myelitis, a very rare inflammatory condition causing damage to the

spinal cord. The effect of the condition was to leave her paralysed below the mid-thorax with no control over her bladder and bowels.

During a period of hospitalisation and as a result of the Defendant's negligence, she developed a number of deep pressure sores, osteomyelitis and flexion contractures of her legs and a hip dislocation. The result was a "*significant and material difference*" to C's physical well-being and her care needs.

Having preferred the evidence of Mr Gardner over Mr Tromans, at first instance Foskett J found that but for the development of pressure sores in hospital and their consequences, C would have required no more than roughly seven hours of professional care each week until the age of 70 whereas she now required two carers on a 24/7 basis. A larger property and vehicle would also be required.

At first instance, Foskett decided that the Defendant was required to pay for the full care package (and other losses) in circumstances where prior to the accident the care she had received had been unpaid save to the extent that any state benefits would have been claimed from C.

The Defendant's appeal was successful. Where the care needs of a personal injury claimant were quantitatively, but not qualitatively, different from what would have been required but for the negligence of the defendant tortfeasor, the defendant was only liable for the additional needs. If the needs were qualitatively different, then they were caused entirely by the negligence. It was only in the latter scenario that full compensation would be payable and the matter was remitted to Foskett J for redetermination.

Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923 (QB)

Cerebral palsy quantum trial – principles of care provision - Foskett J – 1 April 2015

This was another interesting cerebral palsy quantum trial in the case of a Claimant aged 12 at trial. Foskett J was required to determine a number of issues including life expectancy, lost years claims, provisional damages (outside the scope of this paper), care, accommodation and hydrotherapy and loss of earnings (considered below).

Care Provision

The main points of interest on the principles of care provision were as follows.

(i) night care – 8 week contingency for waking night care;

(ii) team leader - 25 hours a week uplift for a team leader for life costed at an additional £5 per hour [183-5];

(iii) team meetings – costs of therapists attending a 2-hour multi-disciplinary meetings allowed but the case manager, team leader and support workers should be funded out of the normal working time already awarded [479]. 5 meetings allowed in the first year; 4 p.a. to age 18; and 3 p.a. to age 25 [476-7]. The claim was limited to 1 p.a. then for life but Foskett J would have awarded 2 [477];

(iv) childcare – the discount for contingencies would have to be so significant that it would reduce the figure to something that would bear no real relationship to that actual cost if the event itself materialized and would be artificial. Hence no award at all [191-2].[4]

Notably, the NHS LA did not seek a reduction from the full commercial cost of care while C was a teenager to reflect his parents' contributions.

Accommodation

Foskett J followed the line of first instance authority in refusing to reduce a claimant's damages on account of incidental benefit to third party family members [278]. C's previous home had been rented out and the proceeds paid to C's Mothers brother as repayment for his generosity so it would be difficult to suppose there was no financial benefit in the long term.

Hydrotherapy

The claim for a hydrotherapy pool succeeded but only in respect of a small swimming pool at home [299]. The was claim was made out on the basis of the real and tangible psychological and physical benefits that swimming will give to C which could not be obtained in a convenient local facility [296]. The guiding legal principle is whether the claim was required to meet C's reasonable requirements arising from her injuries; just providing pleasure would not ordinarily be sufficient [294].

Loss of Earnings

At [160] Foskett J resolved the issue of C's likely retirement age but for his injuries by accepting the contention on his behalf that he would have worked to age 70. It was not likely that he would have worked in heavy manual work or work with very considerable stresses beyond the normal stresses of everyday working life.

Footnotes

[1] See, for example, Latimer-Sayer W and Wass V "Ask the expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" *Journal of Personal Injury Law* (2015) 1 pp. 36-45

[2] Wass V "Ogden Reduction Factor adjustments since Conner v Bradman: Part 1" Journal of Personal Injury Law pp. 219-230

[3] Described in Farrugia by Jay J as "*standard practice*" [100].

[4] In another recent cerebral palsy case, Totham, Laing J was not satisfied that there was more than fanciful chance that C would have children [71].

Rob has recognised expertise in dealing with high value personal injury claims arising from serious injury or fatality. He is ranked as a leading junior for PI by both Chambers UK and Legal 500. For more information on his latest case highlights or Devereux's leading personal injury and clinical negligence team, please contact our practice managers on 020 7353 7534 or email clerks@devchambers.co.uk.
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