

ASSESSMENT OF DAMAGES IN SEVERE DISABILITY CASES

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By David Wilby QC

INTRODUCTION

1. This afternoon we are going to consider one of the most interesting and innovative areas of clinical negligence and personal injuries litigation. As recently as the early 1990s, only a decade ago, awards in this field were usually well below £1 million and general damages for pain, suffering and loss of amenity were usually under £100,000 even in the most severe cases. In *Nash v. Southmead Health Authority*¹ the award for a birth dyskinetic athetoid cerebral palsy was a total of £674,500 with general damages of £90,000, and in *Hogg v. Doyle*² the Court of Appeal in an incomplete C4 but complete below C6 with a life expectancy of twenty years the total award was £681,220 with general damages of £92,500. This must be compared with present day cases where the total award will be usually a minimum of £2 million and often up to and in some very serious cases exceeding £5 million

¹ (1993) PIQR Q156.

² Kemp & Kemp, *The Quantum of Damages*, A2-005.

where the award for pain, suffering and loss of amenity in the updated JSB Guideline figures for injuries involving paralysis (A) Quadriplegia and (2)(A) Brain Damage, (a) Very Severe Brain Damage are in the updated brackets of £171,280 - £212,810 or £150,000 - £212,810. In real terms, the latter have approximately doubled.

2. But these substantial changes reflect a number of individual elements which have affected our appreciation of damages.

Until the House of Lords' decision in *Wells v. Wells*³ the discount rate was 4.5 per cent. It was reduced to 3 per cent and then to 2.5 per cent by Lord Chancellor's Direction under Section 1 of the Damages Act on 21st June 2001.

This has had a dramatic impact on the value of future loss claims, meaning that in cases of 24 hour care or equivalent the future loss under that head alone may be in the order of £2 million or more. For a long time general damages for pain, suffering and loss of amenity were out of touch with contemporary values. The Law Commission considered that these awards required substantial increase. In *Heil v. Rankin*⁴ awards in this area were increased by 25 per cent to 33¹/₃ per cent. This has now led to the Sixth Edition of the Judicial Studies Board Guidelines. There have been a number of recent awards approaching and in two particular instances substantially exceeding

³ (1991) 1 AC 345 - Junior Counsel for Wells, Mathias Kelly QC.

⁴ (2001) QB 272.

the Guidelines. In the acquired brain injury cases of *C v. Crisp*⁵ a very severely brain damaged man aged 17 at the date of the accident and 24 at the date of trial was awarded £200,000. In *Sadler v. East Norfolk Health Authority*⁶, a birth asphyxia spastic quadriplegic cerebral palsy, the approved award as reported in Kemp & Kemp is £200,000, but in fact it reflected a reduction of about a fifth for litigation hazards so that true award on a full liability basis was £240,000. An award of £240,000 for pain, suffering and loss of amenity was made in *Jones v. Leeds Teaching Hospitals NHS Trust*⁷ the award was £240,000. The total award was about £3.4 million. The claimant, then in his late thirties, went to hospital for routine orthopaedic surgery. He suffered from sleep apnoea which was not considered as part of his post-operative care. He suffered a devastating brain injury that reduced him to being virtually bed-bound and unable to communicate save by noises translated by those who knew him. The true tragedy was that he had apparently an unaffected intellect and fully appreciated the nature of his disability. He was virtually totally blind.

3. It is only about fifteen years since the first Structured Settlement was made in Manchester with the innovation of Richard Cropper's former colleague, Mr Frenkel, and Leading Counsel, Raymond Machell.⁸ We have come a long way since then. Structured Settlements have gone through a high level of careful refinement and the basis on which Structured Settlements are provided

⁵ Kemp & Kemp, *The Quantum of Damages*, A4-001, 7th June 2000.

⁶ Kemp & Kemp, *The Quantum of Damages*, A4-001.1.1, 15th July 2002, Wright J.

⁷ May 2003, Ouselly J.

⁸ *Kelly v. Danvers* (1990), Times, 27th September, decided 14th July 1989.

has changed. Only as recently as 1996 with Section 6 of the Damages 1996 was the power given to Government Ministers to guarantee public sector settlements made on terms corresponding to those of a Structured Settlement so that they are paid by the Government and not received from a purchased annuity. So the “bottom-up” structure was born. We now accept them as part of our everyday working consideration of claims against hospitals involving birth asphyxia or severe injuries to those in the Armed Forces or otherwise employed by or injured by Government organisations. In the same year the Finance Act 1996 changed the basis of purchase of Structured Settlements by a defendant’s insurer and enabled the insurer to “shut its books” on the claim. By the late 1990s with the high level of return in the equities market, there were a large number of Structured Settlements. In that halcyon period the Structured Settlement based on the annuities market, the with profits Structured Settlement, was born. Indeed, I did what is arguably the first with Richard Cropper at Sheffield in 1999.

4. The greatest changes have been during the last two years. In July 2002 the Master of the Rolls Working Party on Structured Settlements reported that there were considerable advantages to a much wider use of a periodic payment basis of awards. Not least to ensure that since with the improvement in medical science and care claimants would live longer than the Courts’ and medical experts’ estimation of life expectancy the conventional actuarial approach to assessment of damages may well be and probably is in many cases inaccurate. Further, that it would provide a hedge against the reduction

in the value of awards over time because of inflation and the increased costs of wages, particularly of those caring for the severely disabled. Although their concerns about the use of RPI⁹ as the basis of calculation of periodical payments were ignored,¹⁰ they went on to recommend wide-ranging changes in how the Courts provide large awards to severely disabled people and to identify the considerable advantages of Structured Settlements. They highlighted the fact that such awards could not be imposed by the Courts which often led in the non-Government sphere to the absence of a Structured Settlement in a case in which it was obviously appropriate.

The first move to enforcement of a system of Structured Settlements came on 6th October 2003 with the new Practice Direction Part 40 which now requires those representing a claimant and the Court to consider a Structured Settlement where the award in respect of future loss will exceed £500,000. In November of that year the Courts Bill received Royal Assent and it is anticipated that the Act will be effective in November of this year. The Court will then have power to impose a periodical payments order on either or both parties in respect of the whole or part of the future pecuniary loss. Indeed, the NHSLA is ahead of the game and its changed policy made public in March 2004 is essentially consistent with the requirements of the Courts Act. As Richard Cropper will explain to you, we are about to enter a new era when the Courts' powers to impose Structured Settlements/periodic payments will

⁹ Retail Prices Index.

¹⁰ For a detailed consideration of this problem see para.34.20 of *The Law of Damages*, Butterworths.

be substantial and where the likelihood is that we will see a great increase in the provision of future awards on a periodic basis. Also, it is important to appreciate that Section 2(5)(d) of the Act provides that the order for periodical payments may include a power to vary the periodic payment award in the future. This is dealt with specifically in Section 2B which states that the Lord Chancellor may by order enable a Court which has made a periodical payments order to vary the order in specific circumstances. Presumably where there are significant changes, either up or down, in the rate of inflation, the cost of provision of the services that the award is designed to provide for or even in circumstances where the claimant's needs change. We must await the revised CPR Rules for detail.

5. Inevitably, these sea changes over the last ten years or so, and more particularly the changes imposed by the Part 40 Practice Direction and now by the Courts Act, will require us to re-think many of the ways in which we have conventionally approached the assessment particularly of future loss in cases of this type. For that reason, I am grateful for Richard for coming to speak to us this afternoon and to explain to you his understanding of these changes and how he believes they will affect Structured Settlement/periodical payments. An interesting innovation in a world where at present I believe there is only one insurance provider still giving quotes on Structured Settlements.
6. But this meeting is not just about Structured Settlements. It is about how we approach the preparation and presentation of large claims. It involves

necessarily many of the same skills that we employ in the assessment of much smaller awards of damages. We are equally concerned with obtaining the correct evidence from the correct experts to identify the nature of the claimant's true disability and long term prognosis and often the very difficult question of life expectancy - see eg in cerebral palsy cases the Strauss & Shavelle papers, cf Pharoah & Hutton. In *B v. RVI Newcastle* the Court of Appeal decided that issues of life expectancy were not simply statistics utilising the grounds from the Strauss & Shavelle paper, but rather also involved the important application of experience of paediatric neurologists. There are also the practical difficulties of assessing the accommodation needs of the claimant and calculating them¹¹ and the often unseemly disputes over valuation of gratuitous care. The latter is an area in which there has been quite a dramatic change in recent times. It is not long ago that defendants traditionally contended for a 33% reduction off gratuitous care and only as recently as 2002 that Lord Justice May in *Evans v. Pontypridd Roofing Ltd*¹² established that there is no conventional deduction for gratuitously provided care, whether past or future, but that it is a question of fact for a trial Judge balancing the quantitative and qualitative nature of the care provided by the parent or relative; a decision subsequently followed by Lord Justice Ward in *Newman v. Folkes*.¹³ There are the inevitable complications of transportation and whether it should be provided on a purchase and recurring cost basis or

¹¹ *M (a child) v. Leeds Health Authority* (2002) PIQR Q46.

¹² (2002) PIQR Q61 - particularly para.37.

¹³ (2002) EWCA CW 591.

whether the claimant is able to buy and run a suitable vehicle through the Motability lease scheme using his DLA benefits.

8. But perhaps the most interesting ongoing saga is whether it is permissible for the Courts to make awards in respect of investment advice because of the reduced rate of return on investments despite the speeches in the House of Lords in *Wells v. Wells*. In *Eagle v. Chambers*¹⁴ Cooke J awarded a one-off sum of £30,000 in respect of the cost of setting up a trust and initial investment advice. Since then I have appeared in two cases, one approved at Sheffield in February¹⁵ where the defendant agreed to £30,000 for initial investment advice, and another more recently¹⁶ before MacKay J which concluded on 27th April 2004, where the defendants not only agreed to £30,000 for initial investment advice but under a degree of pressure from the Judge also accepted an ongoing cost of approximately £2,450 per annum for the cost of administering a Special Needs Trust set up for a severely brain damaged adult who is also a patient. I understand that *Eagle v. Chambers* is still the subject of further litigation and prospectively an appeal. Nevertheless, this is very much an area where we must “watch this space” because investment advice and more particularly the cost of alternative trust provision are here at least to stay in the short to medium term. Indeed, I can foresee certain advantages of administering a person’s affairs with a Special Needs Trust where they are receiving periodic payments. Once the

¹⁴ Unreported, 19th December 2003.

¹⁵ *Evans v. Riley*, unreported, February 2004.

¹⁶ *Pike v. Vine*.

investment of the monies is not the province of the Court of Protection because there is a periodical payment, there would appear to be considerable advantage in a Special Needs Trust to deal with the rest of the award received as capital, preserve the claimant's entitlement to state benefits and keep the day-to-day administration of his financial affairs in the hands of those involved in his everyday welfare. It will also have the added advantage of avoiding much of the beurocratic administration which sadly is part of the use of the Court of Protection.

9. I hope that this short introduction has proved valuable both historically and briefly updating in some crucial areas. And if I may just once plug the efforts of those in the Clinical Law and Personal Injuries Groups in these Chambers, Daniel Bennett and I are the authors of the Personal Injuries section of *The Law of Damages* published by Lexis Nexis Butterworths. The last 150 pages of that book, Chapters 27-34, deal exclusively with the law in respect of the computation of all forms of damages and there are helpful passages in respect of how one approaches the assessment of damages and also as part of the text a helpful historical and basis consideration of Structured Settlements, both conventional "top-down" and Government provided "bottom-up" settlements. I hope that reference to that text in conjunction with the lectures you are to hear today will provide you with a greater understanding of this very interesting area.

Thank you.

DAVID WILBY QC was educated at Downing College, Cambridge from which he holds BA Hons and MA degrees. He is a Bencher of the Inner Temple, was appointed silk in 1998 and sits as a Recorder in Civil and Criminal work. He is head of Old Square Chambers' Clinical Law Group. He has been a member of the Bar Council and was Chairman of the Millennium Bar Conference. He is a member of the Executive Committee of the Professional Negligence Bar Association. He is the principal contributor to Volume 20 Atkins Court Forms Health and Safety at Work. He is an editor of the Professional Negligence and Liability Reports and one of the authors of the Professional Negligence Key Cases 1955-1995, both published by Sweet & Maxwell. He is also the co-author of Damages in the Butterworth's Common Law series. The Legal 500 2003/4 and Legal Experts 2004 identify him as a Leading Silk in Clinical Negligence. He writes and lectures regularly in the field of personal injuries, professional negligence and product liability. He has extensive experience of preparing and presenting claims for damages for catastrophic injury, clinical negligence, birth injury cases and in the CICA. He was one of the principal Counsel in the Opren and Steroid litigations and also has extensive experience in cerebral palsy and severe disability litigation. In addition to his practice in clinical negligence, David Wilby represented the Wainwrights in the House of Lords in *Wainwright v. The Home Office* and is accepted as having extensive knowledge of Human Rights and European issues.