

SERIOUS PERSONAL INJURY LITIGATION

- A QUANTUM UPDATE

JAMES ROWLEY QC¹

Abstract

Arguments concerning the indexation of periodical payments orders have led to many more cases than usual being tried out on numerous heads of damage. James Rowley QC brings together the judgments so that the trends in awards in the most serious litigation can be identified.

1. We are now bombarded with case reports by email and over the Internet. The reporting of 1st instance quantum decisions used to be a comparative rarity before 1992 and the PIQR. Even then there was a time lag in publication and many decisions were never covered. On one level, we are immensely fortunate now to be able to discern how the best counsel and 1st instance judges set about their respective tasks in serious personal injuries litigation; but with that opportunity comes the obligation on the serious practitioner to take the time really to get to grips with the lengthy judgments. We are grabbed by the head note on indexation of periodical payments or how a judge has got round the problems created in *Crofton v NHSLA* [2007] EWCA Civ 71. We never find time to read the whole judgment, still less to pause to think how it compares with other cases and how we might pick up the points for the benefit of our clients. This paper is the fruit of an exercise in remedying the general omission.
2. The emphasis in the review will be on awards for care and attendance, which is the largest part of any big claim. The major recent cases are set out in the accompanying table². Just reading the table and seeing the cases summarized along side each other goes a long way towards achieving my aim. In this commentary, consideration of [1] *Crofton* (supra)/local authority and [2] periodical payments points is left out account: if they were to be included, this paper would be so widened as to require a small book.

¹ James Rowley QC is a barrister at Byrom Street Chambers, 12 Byrom Street, Manchester and 42 Bedford Row, London. He can be contacted by email at clerks@byromstreet.com.

² Cases referred to first of all without their reference in this paper will be found in the table at the end, where the full case name and reference appear.

3. In order that I may retain the ability to argue points in future cases, I will limit what I write for the most part to a description of the various decisions without indorsement or opposition, concentrating on points of principle or at least relatively hard-edged points. Sometimes, where there is an interesting point, I may hazard a *suggestion* (as against a concluded view.)

Non-commercial care

Care while still in hospital

4. In *Tagg v Countess of Chester Hospital Foundation NHS Trust* [2007] EWHC 509 (QB) McCombe J allowed [85] the claim for the physical care provided by relatives while the claimant was still in hospital *without* the claimed companionship/emotional support element, thus cutting the number of hours from the total spent at the bedside. In making his decision he referred to no authority, which might be found back in *Havenhand v Jeffrey* (unrep 24.02.97 CA) quoted in *Evans v Pontypridd Roofing Limited* [2002] PIQR Q5 at [28]-[29.]

Non-commercial rate – aggregate or basic?

5. The PNBA *Facts & Figures* 2007/8 has been completely re-written in relation to the tables of rates for care and attendance. Gone are the British Nursing Association Marble Arch rates. There is now a table of the often used National Joint Council pay rates for local authorities, spinal point 8, which is much more useful. Some of the commentary at paragraph 7 [p254-5] may, however, be contentious when taken in conjunction with the *carer rates* commentary at paragraph 14 [p256.] The encouragement appears to be to take the *aggregate* or *composite* rate for non-commercial care rather than the *basic* weekday rate. Some nursing experts have quoted the aggregate rate or used ASHE annual figures (thus incorporating an aggregate element to cover higher rates for weekends and bank holidays) for some time. Others stick with the basic rates. Choice of appropriate rate surely remains with the court on the facts of the case.
6. Insofar as paragraph 7 of the usually impeccable *Facts & Figures* is capable of being read as if Lloyd Jones J, in *A v B*, and Sir Rodger Bell, in *Iqbal*, lend their support to the choice of the aggregate or composite rate in respect of an award for non-commercial care, such is not discernible in the reported judgments. The rate for *past* non-commercial care was not in point in either case, the overall sums having been agreed.

7. Insofar as a non-commercial rate was involved for *future* parental care in *A v B*, Lloyd Jones J refused to award the aggregate rate and stuck with the basic rate [56] - [57.] While the defendant did not try to discount the rate for the non-commercial element in the future (perhaps following the line of the Court of Appeal in *Willbye v Gibbons* [2003] EWCA Civ 372 in which future contingencies which might cause the break down in non-commercial care were properly taken into account by not making a non-commercial discount – see [12]-[16]) Lloyd Jones J did not see any logical force in the claimant’s argument to the effect that, because a rate was later to be discounted for tax, national insurance etc, those discounts were somehow relevant to choice of the correct rate in the first place.
8. Sir Rodger Bell made no adjudication on a non-commercial rate for future care in the reported judgment. He made no award on the basis of a composite hourly rate at all (*pace Facts & Figures* at paragraph 7) taking £10 per hour for the weekday rate and £12 per hour as the weekend rate, valuing the night sleeper option at £60 and £72 per night respectively – no use of a composite rate.
9. The case to which *Facts & Figures* should refer for an enhanced rate for non-commercial care is *Massey v Tameside & Glossop Acute Services NHS Trust*. On the specific facts (see the accompanying table) Teare J, who was referred to *Fairhurst v St Helens & Knowsley Health Authority* [1995] PIQR 1 and to Lloyd Jones J in *A v B* supra (see [42]), awarded an enhanced aggregate rate derived from spinal point 8:

The Spinal Point 8 rate is a flat rate which does not take account of the anti-social hours (nights and weekends) during which much of the care provided by Joseph’s mother has been provided. Nor is it a rate which takes any particular account of the intensive care required of a person caring for someone with Joseph’s needs which, it is common ground, are at the most serious end of the spectrum of sufferers from athetoid cerebral palsy. Whilst any rate for voluntary care is in one sense artificial I have difficulty in accepting that the Spinal Point 8 flat rate is a rate which enables Joseph’s mother to receive proper recompense for her services when much of her services were provided during the night or at weekends and were particularly demanding because Joseph’s needs are and were particularly demanding. For the same reason I have difficulty in accepting that the Spinal Point 8 flat rate is a rate which is appropriate in this case or which can produce a fair result in this case. In order to be appropriate and produce a fair result the Spinal Point 8 flat rate requires some enhancement to reflect the particular circumstances of the care provided by Joseph’s mother. [40]

10. It must be said that in nearly all really serious cases since *Fairhurst* there have been the twin elements of care at anti-social hours and in demanding circumstances; and yet the courts have generally allowed only the basic rate. It remains to be seen how many judges will follow the lead of Teare J. Field J distinguished *Massey* on its severity and allowed only the basic rate in a substantial but not catastrophic case: see *Noble v Owens* [2008] EWHC 359 (QB) at [77.] Where the care has truly been at anti-social hours and/or in the most demanding circumstances, those acting for claimants should surely see to it that the aggregate rate is available to the court at least as an option.

Carer's Allowance – deductibility?

11. Teare J in *Massey* also heard argument on the deductibility of past Carer's Allowance from the claim in respect of family, non commercial care and found:

To the extent that the carer has received benefits in respect of his or her voluntary care the claimant does not need a sum of money to give proper recompense for that care. It therefore seems to me that the Defendant's contention is right in principle. [52]

Commercial care

Number of notional weeks in the year

12. The courts have alighted pretty heavily in 2006-7 on a 58 week notional year to take into account (for directly employed carers) an allowance in respect of i) paid holidays ii) higher hourly rates paid on bank holidays iii) sick leave and iv) down time in the package for training days.
13. It was Sir Rodger Bell in *Iqbal* who, first in the recent reports, heard evidence and ruled on the point [33] - [34.] The allowances made by Mrs Sargent previously [4 weeks for holiday, 8 days bank holidays at double time effectively adding on a further 8 days, and 6 further days for sick leave and training combined, making a total of 6 extra weeks on top of the 52] were sufficient. If split between school term times and holidays for a child, the logical split of the 58 weeks was found [35] to be 43.5:14.5 = 58 weeks in all.

ERNIC

14. Earnings related national insurance contributions [ERNIC] by the employer have to be added on to the total figures once calculated [58 weeks+.]
15. Expert reports have seldom condescended to how the ERNIC element is calculated; but this is beginning to change. When packages have to be re-evaluated in negotiation, it is useful to know how to do it. It is nothing to do with the personal allowances for income tax. Rather we need to look to the primary threshold for employer's National Insurance contributions [£5,475 pa: £105 per week x 365/7 – for tax year 2008/9.] Up to this threshold the employer pays no contribution. After this level is reached for each worker, 12.8% is payable and there is no upper limit. So, if there are 8 full time workers in a £200,000 p.a. package, there will be 8 x £5,475 primary thresholds available (£43,800) upon which NI contributions will not be payable, leaving 12.8% on the balance (£156,200) or £19,994 as the annual cost. Calculations are made difficult because care reports often do not relate precisely how many workers there are to be in the team; and if part time workers are an element, with earnings from elsewhere, things can get complicated. An approximation can be made, however, if the number of people envisaged in the package is known.

27% uplift on 52 weeks rejected

16. Sir Rodger Bell rejected the defendant's approach (Mrs Conradie: 52 weeks in the year + a notional 27% for the rest to include ERNIC) on the basis that she was unable to explain how the percentage was reached. This had also been the decision of Lloyd Jones J in *A v B* [81], based on the 58 weeks + solution being *more likely to reflect actual costs*.
17. The 58 weeks+ solution, though not binding as the *only* possible approach, was given the imprimatur of Lloyd Jones J in *Sarwar No.2* where he heard the point afresh [30] – [33.] HHJ Mackie QC in *Wakeling* followed *Iqbal* without detailed further ruling. In the recent case of *Burton*, the Claimant's care expert had calculated the costs by reference to the now out of favour 52 weeks + 27% method (but with higher allowances for training and induction – some swings and roundabouts); and so Flaux J never had to make any decision.
18. It appears that regulations have changed again; and the fight for the 59 week solution is being renewed. In *A v Ponnys* Lloyd Jones J approved [54] an agreed calculation based on 59 weeks on the express provisos that it was based on Irish conditions of employment and was necessarily

broad brush. Without any detailed ruling, Field J in *Noble v Owens supra* allowed 59 weeks in the year; and he rejected Mrs Conradie's 52 weeks + 27% solution, which is now looking more than a little tired. See [91] – [92³.]

Add on costs

19. The table setting out the major decisions summarizes the *add on* costs allowed and rejected on the facts of each case. These are in addition to the 58 weeks + ERNIC, except in the case of *Burton*.

Hourly rates

20. The correct hourly rates for commercial care are again principally issues of fact depending on the area where the care package is to be set up and the calibre of carer reasonably required.
21. The lowest rates in the table were in *Massey* (location unclear and there had been difficulty in recruiting at the rate which was based on that paid under the Direct Payments Scheme – see [73]-[74].) The Claimant's expert did well on everything else; but Homer may have nodded on hourly rates and the rate for *making* night care.
22. The next lowest (*Wakeling*) were for Hackney in London and involved the court largely splitting the difference between the experts, based on their experience of what would have to be paid. It is probably important in practice that this was in respect of care which had never been tried and the market rates never tested.
23. For, as Sir Rodger Bell found in *Iqbal* (the higher end of the cases) where the market had been tested in Epsom and the evidence was available:

The proper hourly rates for day and waking night care were in issue. Mrs Sargent allowed £10 an hour during the week and £12 an hour at weekends, which are the rates which Mr and Mrs Iqbal pay now. Mrs Sargent said that those were the rates she was paying in the area where the family lived. Mrs Conradie thought those rates were too high. She advises a family in Chelsea, who pay £9.50 and £10.50, and those were the rates which the defendant argued to be reasonable. However, Mrs Iqbal said that they had been unable to recruit and keep carers at £8.50 and £9.50, so they went straight to £10 and £12 and they had a good response and got carers with whom they were happy. Mrs Theresa Messenger

³ The hourly rates used were Mrs Sargent's at £9.50 for weekdays, £11 for weekends and £44.16 for an 8 hour night shift (paid for 4 hours work.)

who has been Mr and Mrs Iqbal's case manager for several months said: "It would be nice if one could do it for £9.50 and £10.50 in Epsom, but you can't do it". There had been two attempts at recruiting since she had been involved with Khazar. She had not been involved in an attempt to recruit at less than £10 and £12, but it had been "good" since they offered those rates. Mr Spencer pointed out that no attempt had been made to engage staff at £9.50 and £10.50, but I do not believe that there is any obligation on parents in the position of Mr and Mrs Iqbal to creep up pound by pound in the hope of saving the defendant a pound or so an hour. They are entitled to shorten the process by offering a good rate. **In my judgment, the evidence of practical experience points overwhelmingly to £10 and £12 being reasonable rates which it is necessary to pay in order confidently to achieve the required continuity of competent, willing carers.**

24. As in all matters requiring close decision in this sphere, a little bit of evidence goes a long way. Incidentally, and as a precursor to a section below introducing controversial issues on the legal basis of the claim for care, Sir Rodger made a primary finding that the rates were reasonable (in the bold section beginning *In my judgment ...*.) Since the rates were in fact reasonable, there was no prima facie unreasonable element to the claim upon which notions of reasonable attempts at mitigation (heralded to a certain extent in the previous sentences) might have had to bite.

Future parental contributions to the care package

25. HHJ MacDuff QC (as he then was) said the following about future parental contributions in *Lewis* [207], apparently on the basis that it was agreed as the right approach. It is, at any rate, a familiar approach.

At this point it is necessary to say a word or two about the parents. Up to this point, they have been providing gratuitous care. They are to be compensated for what they have done in the past. An, of course, that award is in respect of the *extra* care provided over and above that which they would have provided for Katie if she had not been injured. As time moves on, during Katie's teenage years, they will continue to assist. If Katie had not been injured, they would, as normal parents, have continued to supply care and support in many different ways. The support and care they will provide over the next eight or nine years will not sound in damages because it is acknowledged that, now that a properly funded care regime is to be set up, their contributions will be the equivalent of what they would have done if Katie had not been injured. In fact they will help the paid carers by assisting with the bathing, the nappy changing, the feeding, the lifting and the repositioning etc. If Katie had not been injured they would, as normal parents, have done other things – given lifts to school or to parties, helped with homework, provided support in all the ways that a parent provides to a healthy teenager. It is accepted

and acknowledged that they will continue to provide assistance to the paid carers in lieu of what they would otherwise have done.

26. Sir Rodger Bell considered this topic in *Iqbal*, in a passage beginning at [15] which is too lengthy to reproduce here but well worth reading. He acknowledged that the approach embodied in earlier cases (along the lines of that in *Levis*) was a well established one in practice but decided at [20] that it was wrong in principle on the facts of *Iqbal* where the parents wanted to retreat from being part of the formal care package and to take part on a looser basis *qua* parents.

However, bad practice should not be honoured by time, and on reflection it seems to me that it is consistent with both *Evans* and *Stephens* and, regardless of authority, only fair and sensible, that the need for paid care for Khazar must not be reduced simply by the number of hours of normal, voluntary parental care which would have been given to Khazar were he not disabled, regardless of whether Mr or Mrs Iqbal will in fact voluntarily look after Khazar for particular periods. The fact is that Khazar has been seriously disabled as the result of the defendant's negligence to the extent that he will always need 24-hour care from one or more carers. It follows that he is entitled to recover the cost of that care and the cost of it will only be reduced to the extent that his parents will willingly take it upon themselves thereby becoming part of his care package. It is obvious that care for a child with Khazar's problems is in large part more wearing than care for a child with no disabilities, and it must not be assumed that even the most devoted parents will be willing or able to render the same amount of care, in terms of time, to a disabled child as to one who has not been injured, once they are provided with the funds to employ the necessary care beyond their own voluntary help. Even then the need for outside, paid care can only be reduced to the extent that the number of parental hours falls within the number of hours of normal parental care which they would have given but for the injury. If and to the extent that Mr and Mrs Iqbal want to look after Khazar for periods in excess of what would have been periods of normal parental care, they can be incorporated as paid carers at a lesser rate than employed carers, but they cannot be constrained to do so, and there was no evidence that they do want to contribute to Khazar's care beyond the bounds, in terms of time, of normal parental care. That is not what they meant by expressing a wish to continue to be involved in Khazar's care, in my view. They were simply expressing a wish to help care for Khazar to some real extent; there was nothing in the evidence which indicated an intention to spend more time caring for him than they would have done but for his disabilities. Such an intention is inconsistent with their patent relief at being able afford paid help to allow them to return to something like a normal life and to have another child.

27. Even though often likely to be on hand and actually to help, the parents in *Iqbal* were not legitimately to be bound to assist with transfers and replace the role of paid carers. Sir Rodger Bell [50]:

I do not doubt that Mr and Mrs Iqbal will find themselves willingly involved in some “two carer” activities, including some transfers where their part will be to reassure Khazar if he becomes agitated, as they do at present, and that the time spent doing this will be no more than the time they would spend reassuring or helping an uninjured child in one situation or another. But I do not consider it legitimate to incorporate them in the care plan as paid carers, beyond this. I consider it reasonable for Mrs Sargent to allow for a second paid carer for 4 of the 10 Saturday and Sunday and holiday hours which the first carer will be working.

28. Again in *Iqbal* the parents were not to be forced to continue with night care even while the claimant was still a child (10 at trial.) Sir Rodger Bell [44]:

In my judgment the reluctance to reassume night care which Mrs Iqbal expressed for herself and her husband is perfectly reasonable, however much Khazar’s sleeping has improved. It follows from the evidence which I have summarised that although Khazar may have many undisturbed nights there will always be a risk that he will wake and require attention once or twice. This will require whoever is responsible for him to get up and tend to him. The disturbances will probably be short, but I do not consider it reasonable that Mr or Mrs Iqbal be constrained to bear the burden of them against their wishes. I therefore find that Khazar is entitled indefinitely to an outside, paid, sleep-in night carer after the next year of waking night care.

29. Teare J put the matter pithily in *Massey* at [64]:

Mrs Massey is not obliged to assume any role in Joseph’s life other than that of parent. If funding is available she is not obliged to act as one of his carers or as his case manager.

30. Lloyd Jones J in *A v Poms* refused to reduce the commercial care in the future on account of the possibility of parental input [57]:

While I have no doubt that they will be willing to assist in meeting A’s needs, as and when appropriate, it may well be that they wish to return to the role of parents and to place disability-related care into the hands of professional carers. In these circumstances, I can see no justification for a reduction in the amount of professional care to be provided. (See *Stephens v Doncaster Health Authority* [1996] Med LR 357 per Buxton J at p367.)

31. Returning to *Lewis*, HH Judge MacDuff QC had rather different evidence, or at any rate a very different feel for the case than the other Judges in their cases – see [214] in respect of the adult

package, where he speculated that, even though he would award damages for commercial care, the parents would still be major planks in the provision in later life.

32. The practical lesson for practitioners/nursing experts is to discern the true intentions of the family shortly prior to trial (neither during it, as in some of the above cases; nor too early on, before the reality of the daily grind of care has been hammered home) and make sure that the future packages and rates truly reflect those intentions. Family members can be incorporated into the formal future package if they really want to be part of it on a formal basis. And if Sir Rodger Bell is right, they can be paid an appropriate rate for that role. Many will want to resume the role of parent or spouse only; but few will be so cold or calculating as to say they will not take some role in caring for their injured child or spouse after the trial. Where the care is to be given occasionally on that basis *qua the family relationship* rather than *qua formal carer*, recent judicial opinion has generally ignored that contribution when evaluating the future care package and provided the hours commercially.

Directly employed v agency residential carers

33. 2006/7 has surely heard the death knell for the residential carer argument in *really serious* cases. When argued in *Iqbal, Massey, Corbett* and *Burton* the decision has been in favour of a directly employed package under case management supervision.
34. In *Corbett* the claimant was ambulant in callipers and the care package did not require two carers in attendance, either during the day or at night. The CPA agency residential care package (£70,690 pa in total) was rejected by HHJ Bullimore in favour of the directly employed package (£105,625.) This was on 2 main grounds. Firstly, while within the capabilities of one carer alone, the care would be arduous; it would be unattractive to individuals of the outstanding nature required and likely to deteriorate in quality and continuity if attempted on a “1-2 weeks on : 1-2 weeks off” basis [83]-[89.] Secondly, the resident carer regime fell foul of the Working Time Regulations. The *domestic servant in a private household* exemption (Regulation 19) did not apply since the work was of the nature of *personal* rather than *domestic service* [70.] The exemption (Regulation 20) under which *the duration of the working time ... can be determined by the worker himself* did not apply either because the necessary degree of autonomy in the worker was not there; for instance the claimant needed toileting when he required it, not when the carer decided to do it [72.] Finally, the exemption under Regulation 21 did not apply: the claimant’s home was not a *private hospital or similar*

establishment; and the need for personal care at night was not an exceptional event, the consequences of which could not have been avoided despite the exercise of all due care by the employer since the need was hardly exceptional ...sometimes 2 or 3 nights together, and usually a couple of times a week. It is not unexpected [73.]

35. In *Iqbal* Sir Rodger Bell found along similar lines in respect of the adult package [67]:

In my judgment, Khazar's parents will continue to use directly employed carers throughout his adult years after leaving residential college, continuing to want to retain the control over his carers, which they will have become accustomed to over the years. In any event, there are real difficulties with the scheme of agency care which Mrs Conradie promoted. First, although the agency which she approached considered that it could provide residential care which conformed with The Working Time Regulations 1998 and The Working Time (Amendment) Regulations 2006, I do not believe that this is so in all respects, even if the carer works for 7 rather than 14 days at a time, opts out of regulation 4 (the 48 hour maximum working week), and is relieved by an employed or local authority carer for a few hours each day. In particular, the agency carer will not receive a rest period of not less than 11 consecutive hours in each 24 hour period as required by regulation 10(1); the night hours will not count towards this rest period as the carer will be on duty, and I do not share the agency's view that it would be saved from this provision because the carer would be working unmeasured working time for the purpose of regulation 20. I cannot fit an agency carer into the definition of unmeasured working time in the particular circumstances of Khazar's case. Second, and even if I am wrong in my construction of the regulations, the agency's own terms and conditions for "live-in Personal Assistants" provide for an 8 hour sleep period with no disturbances, and there will be night-time disturbances from time to time in Khazar's case. Third, and in any event, I do not believe that a 7 day carer would survive 7 days and nights in a row, even with some day relief, with the high dependency attention which Khazar will require, without becoming weary to the point of leaving or not returning for any further tours of duty or at least showing less energy and efficiency than he is entitled to.

36. In *Burton* a resident carer package (directly employed, not agency, at a premium rate of £90 a day to try to attract quality applicants) was proposed by the defendant, supplemented by ad hoc agency staff for 2 hours a day overlap care *if it proved necessary* (or requiring the Claimant's wife to muck into the formal package at a non-commercial rate.) Flaux J had little difficulty in rejecting the package in favour of a directly employed hourly daytime package (14 + 4 hours overlap) on the grounds of lack of safety in transfers; unreasonable reliance on the claimant's wife; doubtful availability and unacceptable turn over in agency overlap carers; even with enhanced rates, the resident carer package would not attract the right sort of carer [65.]

Miscellaneous care decisions

2 carers throughout the day – unplanned transfers

37. In *A v B* (contrast *Sarwar No.2* with 8 hours overlap) the same judge, Lloyd Jones J, found that *total overlap* was required (14 + 14 hours) on the facts during the day [44.]

Moreover, I consider that any attempt to reduce the number of transfers would seriously damage A's quality of life and would therefore be unreasonable. It will be necessary for A to be transferred for his health and comfort throughout each day. In particular, as long as he remains incontinent it will be necessary to transfer him to clean him, change his nappies and pads and replace soiled clothing ... Moreover, in any event, [even as an adult] whereas certain transfers can be planned to take place at particular times, this will not always be the case. I consider that this makes it necessary that two carers should be available throughout the day so that transfers can be carried out immediately, as and when required.

38. The matter was put rather differently on the facts in *Massey* to lead to a similar result of total overlap care (14 + 14 hours.) The Claimant was cognitively intact (or almost so) but grievously injured. Anything less than total overlap care to enable transfers at all times of the day would adversely affect his autonomy.

[87] However, the care regime suggested by Mrs. Daykin will not wholly restore to Joseph that independence, freedom of choice, autonomy and mobility which non-disabled people have. Counsel for the Defendant correctly observed that if Joseph expresses a wish to go to bed unexpectedly late after the second carer has left that wish will not be fulfilled. When he is out with carers it is unlikely that there will be a facility in which to change his pads. This might well curtail his freedom of choice as to what he wishes to do during a day out. But it does not follow, as suggested by Counsel for the Defendant, that Mrs. Daykin's approach is flawed. The fact that it is not possible to restore full autonomy to Joseph does not appear to me to be a good reason for not adopting that care regime which restores autonomy so far as is possible or realistic. ...

[91] The care regime suggested by Mrs. Bingham is clearly cheaper; but that, on the authorities, is not the test. The Defendant needs to show that Mrs. Daykin's care regime is unreasonable. I do not consider that the Defendant can show this. Moreover, Mrs. Bingham's care regime would leave Joseph with only one carer for about 1 and half hours in the morning and for two periods of 2 and half hours in the afternoon. During these periods transfers could not be effected. This seems to me unreasonable. I am not satisfied that it is more likely than not that patterns may emerge over time in Joseph's toileting behaviour, as suggested by Mrs. Bingham, but even if they did, the restrictions on Joseph's freedom of

movement would still be unreasonable. I am not satisfied that, as submitted by counsel on behalf of the Defendant, they would only have a limited impact on the quality of Joseph's life. [91]

39. In *A v Ponnys*, in what appears may have been a close run thing, Lloyd Jones J found that 2 carers would be needed throughout the day from age 18 – [67]-[87.]

Night care

40. Recent cases (*Sarwar No.2* at age 47 [55]; and *Burton* at age 50 [69]-[72]) have been astute to consider the possibility of increased intervention in later life with aging/deterioration and a stepping up of the package from a *sleeping* to a *waking* carer at the appropriate time. In *Sarwar No.2* Lloyd Jones J accepted that sleeping night carers are not expected to provide assistance more than once in a night, which slid towards the end of the paragraph [54] to accepting the following evidence: *carers are alive to the difference between sleeping care and waking care rates and they would not tolerate being woken up more than **once or twice** a night if they were paid at the lower rate.* In *A v Ponnys*, while it was accepted as reasonable that the parents continue to provide *sleep-in* cover at nights until the claimant left for university, Lloyd Jones J allowed them at [59] 2 nights off, one in the week and one at weekend rates, with commercial cover .

On call

41. It was held unreasonable on the facts to provide for the additional carer required for relatively frequent transfers during the day through an *on call* system (rather than having a true overlap carer available 8 hours a day) – *Sarwar No.2* [41.] By contrast, in *A v B on call* was a reasonable answer to an occasional need for an extra pair of hands to supplement the night sleeper while the parents were away from the home for only 4 weeks per year [78] when their non-commercial input was to be covered by additional commercial care during the day [79.]

Off set for day centre / play scheme attendance

42. In *Iqbal*, despite medical evidence that feeding through a gastrostomy was easy, on the facts there was *no guarantee* that play scheme attendants would be willing to do it; and the claimant would have to be accompanied by his own carer for the 4 weeks of attendance each year, particularly given the shortness of the period and the need to get acquainted with him [28.] In adult life, on the evidence the claimant would be able to *dip in and out* of the use of day centres on an *irregular basis*; and there was insufficient confidence in the arrangements to reduce the commercial package for

potential savings [73.]

43. Contrast the situation in *Lewis* where the Judge found as the proper assumption that attendance at a day centre for 3 days a week would happen for roughly 2/3rds of the time in the future, saving on the need for hourly paid care and discounting the hours for 2 days as an average per week overall accordingly [199.]
44. In *Massey* the argument developed rather differently and cleverly on its facts. The evidence for likely attendance at a day centre in adult life collapsed to a chance of 6-8 hours a week at best - the defendant's submission at [81.] Here the point was not analysed as one of a chance based on *third party* (local authority) action and the availability of day centre care. Rather the point came to depend on whether the claimant (cognitively intact but grievously disabled) would actually wish to go to a centre where there were likely to be many with cognitive disabilities, unlike him [88] – a matter of the claimant's own intent and motivation and not *loss of chance* at all. Teare J made no deduction from the commercial package.

I do not consider that it can presently be said to be more likely than not that he will wish to spend 6-8 hours a week at a day centre and therefore I do not consider it appropriate to deduct those hours from the appropriate domestic care regime. [88]

Mrs Massey had given evidence to the effect that she did not think the claimant would wish to attend a day centre in adult life [83.]

Joseph is not (yet) able to express his own views as to the manner in which he will wish to spend his adult life. But there is no reason to think that he disagrees (or will disagree) with his mother's evidence. Indeed, from what the Court has learnt of his character from the evidence in this case it is unlikely that he would disagree. [85]

This is a very neat solution where a claimant can form an intention, even if he is too young and disabled to communicate it. In fact, Teare J also found that what was said by mother was reasonable and *autonomy* featured again:

It is very difficult to see why, in principle, a preference to lead as normal a life as possible can be said to be other than reasonable. The brain injury Joseph suffered at birth has deprived him of that independence, freedom of choice, autonomy and mobility which non-disabled people have and take for

granted. It has also limited his ability to use his unimpaired cognitive abilities to enrich his life. The care regime advised by Mrs. Daykin aims to give him that independence, freedom of choice, autonomy and mobility and to maximise the extent to which he can use his unimpaired cognitive abilities to enrich his life in so far as that can be achieved by a care regime. For example, the regime will enable him to have his pads changed whenever necessary during the day whilst he is at home and will enable him to change position or go out of the house to pursue his interests when he wishes.

Residential college

45. In *Iqbal* (as in other recent cases) the experts agreed that the fees would be met *unless there is a significant change in government policy* by the Learning and Skills Council [LSC] and there was no evidence that the claimant would require to take his own carer with him, which would be the responsibility of the local authority and the LSC together [60.] The period taken (thereby reducing the future employed care package) was 2 not 3 years: while there was sense in the notion that the claimant might develop slowly over a 3 year stay, there was no evidence that the public funding criteria with a view to his development over longer than 2 years would be met [59.]
46. In *Massey* Teare J found on the evidence that the claimant would continue in education to age 21. One should be alert to what generally happens to a directly employed, elaborate care package when at age 19 the claimant is shunted off to college. The care package is destroyed; expensive agency care is often required at weekends and holidays when the claimant comes home; and it is very expensive and difficult to start the whole thing off again at 21 or 22.
47. In *A v Ponys*, Lloyd Jones J held that the commercial package (2 carers throughout the day) would be needed at university: there was no satisfactory evidence that the authorities would provide care at university in Ireland [62.].

Nursing rates

48. On the facts it was unreasonable in *A v B* to have a qualified nurse as a hands on member of the care team, attracting higher rates for a substantial number of hours each week; a consultancy role was found reasonable (3 hours a week at £17.50.)

Monthly liaison meetings

49. A 2 hour monthly *entire team* meeting was held unnecessary on the facts in *A v B*: liaison was part of the function of the case manager (already costed and allowed); and there was also a small

nursing supervision/consultancy role already built into the package: [74] – [76.] An extra hour a day was allowed for handovers (3 x 20 minutes each) between shifts in *Massey* [93.]

Team leaders

50. The reasonable requirement for an employed carer being paid at team leader's rates was rejected in *Iqbal* [64] in favour of the mother (who was capable and willing on the facts) continuing in the role of organizer with the support of a case manager (for which allowance had already been made.) The mother's role as organiser would be minimal in the adult phase anyway. The parents were not, however, incorporated into the future care package while the claimant remained a child – see above. In *Massey*, by contrast, Teare J allowed one of the carers to have an enhanced rate of pay by £1 per hour [71] – [73] on account of team leader duties.

Case management costs

51. Rates have generally been agreed or uncontroversial in 2006/7 – see the table. Judges have generally compromised the hours allowed between the positions of the respective experts (even when a claimant has otherwise won clearly on the care package) with barely reasoned decisions. Where possible, theoretical travelling times have been reduced to make savings.

Personal assistant

52. In *A v Ponnys* the claimant argued that although she was not a protected party or beneficiary, her physical disabilities (severe dyskinetic cerebral palsy and dysarthria) and vulnerability made it reasonable that she have a personal assistant to help her manage her large award. The claim was largely rejected on the basis that Lloyd Jones J found that she was no more vulnerable than many other claimants in serious cases [158.] Moreover, much of the role was to be covered by the case manager and OT (and already costed under other heads of damage)[159.] Premium banking facilities were allowed, however, at an annual cost of €500 [161.]

The legal basis of claims for personal injuries

53. Leaving aside the detail of the awards for a while, the very nature of the assessment of damages for personal injuries has come under first instance scrutiny in recent months.
54. The first decision was in *Iqbal*. The Claimant suggested that while the legal test in relation to allowing claims was *reasonableness*, there may be a range of reasonable options to meet a claimant's

care needs and that, provided the care package for which the claimant contends falls within this range, it should be accepted by the Court; to mount an acceptable attack on a claimant's case a defendant has to do a good deal more than show that the odd element is a little higher than might be paid in some circumstances; and reliance was placed on Buxton J, as he then was, in *Stephens v Doncaster HA* [1996] Med LR 357. Sir Rodger Bell rejected the argument [14]:

It comes too close to saying that there is a rebuttable presumption that the care package put forward on behalf of a claimant should be accepted. It does not seem to me to be supported by *Stephens*, where Buxton J. did no more than find that the care programme put forward on behalf of the plaintiff was reasonable, for the carefully analysed reasons which he gave. In *Wells* at page 390 A-B, Lord Hope reminded us that:

“ . . . 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.”

In a case like the present where the issues on future care are numerous, it should not matter whether one starts with the claimant's care plan, although that may be a convenient approach, or simply looks at the plans of the defendant and claimant together, before deciding in detail what is reasonably necessary for the proper care of the claimant. My preference for the view of one expert rather than the other, or a solution somewhere between the two on any particular issue, boils down to a personal judgment on the strength of the experts' reasoning and my own view of the reality of [the claimant's] likely situation in the light of the whole body of evidence.

55. Next came the decision of Teare J in *Massey*. The same point was put before him, derived this time from *Sowden v Lodge* [2004] EWCA Civ 1370 rather than *Stephens* supra, without knowledge of the previous decision in *Iqbal*. He followed the claimant's suggested line at [59] without contrary argument from the defendants being apparent from the judgment.

In resolving the differences of opinion on these matters [care] I have sought to apply the principles stated and explained in *Sowden v Lodge* [2004] EWCA Civ 1370 and [2005] 1 WLR 2129 which were in turn derived from *Rialis v Mitchell* (unreported 6 July 1984.) In the former case Pill LJ approved statements of Stephenson LJ and O'Connor LJ in the latter case to the effect that the claimant was entitled to the reasonable cost of caring for him in the manner chosen by him, or by those with responsibility for the claimant, so long as that choice was reasonable. A lesser sum would only be payable if the claimant's choice of care was unreasonable and another form of care was reasonable; see paragraphs 10-11 and 38. Longmore LJ agreed with Pill LJ that the correct question to be addressed in

relation to care was “What is required to meet the claimant’s reasonable needs?”; see paragraph 94. Scott Baker LJ agreed with both judgments; see paragraph 101.

56. Teare J then decided the care regime on the basis of a reverse burden of proof. He explicitly found that the claimant’s suggested future care package was reasonable at various points *because* the defendant could not show that it was unreasonable e.g. at [91]:

The care regime suggested by Mrs Bingham is clearly cheaper; but that, on the authorities, is not the test. The Defendant needs to show that Mrs Daykin’s care regime is unreasonable. I do not consider that the Defendant can show this. ...

57. Next came the case of *Corbett*, where the legal test was put in dispute. HHJ Bullimore dealt with the point very briefly at [80] in favour of the defendants (and it is unclear how the argument was put):

Merits of the rival regimes

This is the third area of contention. I accept Mr Porter’s argument that the preference of Mrs Corbett and Mrs Jones for the Rosemary Statham regime is in itself irrelevant. The benefits and disadvantages of the two schemes are for the court to assess, although the evidence of those two witnesses as to what experience has shown as to what [the claimant’s] needs are, and how they are best met, is highly relevant.

58. The line of decisions then swings back to the claimant in *Taylor v Chesworth & MIB* [2007] EWHC 1001 (QB.) Again the point was run by the claimant relying on *Sowden* (in its turn relying on *Rialis*.) After referring to the now well-trodden passages in *Sowden*, and without apparent counter argument from the defendants, Ramsay J found at [84]:

I accept that the test therefore ... is to consider what course the claimant proposes to adopt and to consider whether it is reasonable having regard to the nature and extent of the claimant’s needs, not to consider objectively what approach is reasonable. However, the logical way of approaching the issue must, in my judgment, be to make findings as to the nature and extent of the claimant’s needs and then to consider whether what is proposed by the claimant is reasonable having regard to those needs.

59. The same point was trailed without dispute before HHJ Mackie QC in *Wakeling*, again going the claimant’s way at [45.]

The legal approach is not in dispute having been restated by the House of Lords in *Wells v Wells* [1999] AC 345 carried through by the Court of Appeal in *Sowden v Lodge* and *Crookdake v Drury* [2005] 1WLR 2129. The Court of Appeal in effect reiterated the principle that the court is first concerned not with whether other identified treatment is reasonable but whether that chosen by the Claimant is reasonable recognizing that a Claimant or those looking after him are entitled to make a choice. This is an aspect of the basic principle that a Defendant is obliged to put the Claimant back so far as money can, into the position he would have been in but for the negligence.

60. The point has recently split over from *care & attendance* into another head of damage. In *A v Ponnys Local Health Board* [2007] EWHC 2996 (QB), it does not appear that the *claimant* arguments were run in the area of *care & attendance*; but Lloyd Jones J said this at [94] in the introduction to his judgment on *aids & equipment*:

The basis of assessment is the test of reasonableness as stated in *Rialis v Mitchell* (Court of Appeal, 6th July 1984) and *Sowden v Lodge* [2005] 1 WLR 2129. The claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. Accordingly, if the treatment claimed by the claimant is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable. *Rialis* and *Sowden* were concerned with the appropriate care regime. However, the principles stated in those cases apply equally to the assessment of damages in respect of aids and equipment. In determining what is required to meet the claimant's reasonable needs it is necessary to make findings as to the nature and extent of the claimant's needs and then to consider whether what is proposed by the claimant is reasonable having regard to those needs. (*Massey v Tameside and Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB), Teare J at para. 59; *Taylor v Chesworth and MIB* [2007] EWHC 1001 (QB) Ramsay J at para 84.)

61. Lloyd Jones J continued to decide between the competing equipment submissions, stating the cost of the items and considering the claimant's needs, but never considering if [1] the defendant's suggestion also met the reasonable needs and [2] the claimant's choice represented reasonable value for the additional cost. Thus, for example at [110]:

Mrs Ho considers that A should have a three quarter size or double bed because of her involuntary movements. This is now agreed by Ms Page. Mrs Ho recommends a Theraposture bed at a cost of £3,500. Ms Page, on the other hand recommends a Bakare bed at a cost of £1,945. I am satisfied that

the Theraposture bed recommended by Mrs Ho possesses all of the features which A requires and does not possess any features which exceed her needs. Furthermore, I accept Mrs Ho's evidence that the Theraposture bed has better mechanics and as a result has smoother movement and makes less noise. Accordingly, I consider that the Theraposture bed reasonably meets A's needs. *Following the approach to reasonableness which I have outlined above, I consider that, in the light of this conclusion, the fact that A's needs may be satisfied by a cheaper bed is **irrelevant**.* [Emphasis, including double emphasis, added to highlight a point to be made below.]

62. Until *Sowden* threw up the unreported and largely forgotten authority of *Rialis*, few would have seriously suggested, when considering the reasonableness of the equipment claimed, that comparing the prices of alternatives with the incremental improvements was not at the very heart of the exercise. I venture to suggest that most experienced PI practitioners, rightly or wrongly, would previously have instinctively given a response along the lines of that given by Sir Rodger Bell in *Iqbal*, to the effect that it is for the court to decide, objectively, what is reasonable, on the basis of all the evidence. This instinct would have followed the decision in *Campbell v Mylchreest* [1999] PIQR Q17 CA: the court holds the ring on what is a claimant's reasonable need however an interim payment may have been spent in the exercise of choice.
63. Sir Rodger Bell disposed of the Claimant's argument in *Iqbal* perfectly well, based as it then was on *Stephens*. Since then, the *Rialis/Sowden* argument has taken over, with scarcely a peep from the defendant's side according to the judgments. Some will have found this rather disorienting; and an attempt should be made at least to sketch some potential objection. I particularly do not express any concluded view in what follows; but arguments might be mounted from first principles as follows:
 - a) No one has dared to suggest in any of the above cases that the claimant does not still formally bear the legal burden in proving what is reasonable.
 - b) The finessing of the burden of proof involves the notion that the court must first consider what the claimant suggests is the reasonable need (and the answer to it) before considering what the defendant has to say. This led Lloyd Jones J (*A v Pomyis*) so far as to say that the defendant's contentions for a reasonable, cheaper alternative were irrelevant; and Teare J (*Massey*) to place a burden on the defendant to prove the claimant's suggestion unreasonable. The reality of the finesse, while paying lip service to retaining the formal burden of proof on

a claimant, is to push the case *through the looking glass* into a back to front world, at least compared with the old world we thought we had come to know. The attempt is to get the court to approach the issue of reasonableness from the point of view of the claimant subjectively (his *choice*) and place the tactical burden on a defendant to make all the running against that subjective position (if he is allowed to make headway at all and his evidence not ignored as irrelevant.)

- c) The overall effect is familiar to us in a different situation: when the court is considering failure to mitigate arguments and a defendant bears the burden of proving a claimant's past conduct unreasonable, with the standard of what is reasonable and unreasonable being a generous one in favour of the claimant. In the recent cases, however, the issue at stake has not been a question of past fact in mitigation (e.g. was the expenditure on the accommodation/case manager/team leader/carer unreasonable in all the circumstances? – all true questions of mitigation if the prior assessment of the normal measure of damage has led to a decision that the loss claimed is, at first blush, unreasonable.) Rather, the real question has been a future hypothetical one, turned only into a pseudo-question of mitigation by equating the fine tuning of a claimant's long term care package with an issue of past or fundamental current *choice*. The questions are, in effect, put: would it be an unreasonable expenditure in mitigation if the claimant were to spend "x" on a case manager/team leader/etc? Future hypothetical questions of this sort, it may be objected, are impermissible reformulations of questions which really concern the *normal measure of damage* (what is the reasonable need of the claimant for case management etc?) and not *mitigation of loss*.
- d) Now, the normal measure of damage is not in dispute – reasonable care/accommodation/equipment/etc to meet the need. It was put pithily by Lord Lloyd in *Wells v Wells* [1999] 1 AC 345 at 377F in just 17 words:

Plaintiffs are entitled to a reasonable standard of care to meet their requirements, but that is all.

- e) Indeed, in *Rialis* and the judgment of Stephenson LJ which is the source of the claimant's finesse, Stephenson LJ took great pains in the early pages of his judgment to trace the origin of awards of damages for personal injuries back to the Victorian railway cases. If one considers those cases, as with other types of damages *so clear is the way of mitigation that it often*

tends to become incorporated into the normal measure of damages. When this happens it loses its identity and does not expressly appear as a separate issue⁴. ... The practical importance of defining the normal measure in this way lies in the burden of proof⁵. This is the very point at issue in the recent cases; and the mitigating step has already been incorporated into the normal measure of personal injury damages, the burden of which lies on a claimant.

f) Stephenson LJ himself said at 24A-C:

But though the means of the wrongdoer are, in my judgment, irrelevant to the assessment of compensation for the injured, that assessment is properly to be moderated by what is reasonable. A judge must resist the temptation to make the wrongdoer pay for the best possible treatment, regardless of whether the injured party will in fact receive such treatment or *whether it is reasonable for him to receive less expensive treatment.* [Emphasis added.]

g) There is every reason to believe, based on the emphasized section, that Stephenson LJ would have found the recent notion - that an alternative cost, for what is basically a reasonable option, put forward by the defendant is irrelevant, or somehow second rate – as puzzling as most of us.

h) The finesse goes back to a passage in *Rialis* not much further on in the judgment at 24Gff where Stephenson LJ introduced the concept of *mitigation of injury and damage* as being the basis of the claim in damages. This was unfortunate terminology since it may well have led him down the path by the end of the next page to the now often quoted passage at 25H: ... *what has to be first considered by the court is not whether other treatment is reasonable but whether the treatment chosen and claimed for is reasonable.*

i) O'Connor LJ did not decide *Rialis* on the basis of *choice* but because, on the facts/agreement of the parties, *everyone agrees that for his own sake the plaintiff ought to be accommodated at home* – 16C. On that footing the defendant's suggested costing, based on care in an institution (on policy grounds) was clearly irrelevant (once the policy grounds themselves were rejected.)

⁴ See McGregor on Damages, 19th edition at 7-032ff

⁵ McGregor at 7-034

There may well be cases in which it would be right to conclude that it is unreasonable for a plaintiff to insist on being cared for at home, but I am quite satisfied that this is not such a case, and once it is concluded that it is reasonable for the infant plaintiff to remain at home then I can find no acceptable ground for saying that the defendant should not pay the reasonable cost of caring for him at home, but pay only a lesser sum which would be appropriate only if it was unreasonable for him to live home and reasonable for him to be in an institution. [16D-G]

- j) *On the facts of Rialis* it is easy to see the origin of the notion that the defendant's suggested costs were irrelevant. O'Connor LJ said nothing to the effect that the defendant's alternative costs of a care package *at home* would have been irrelevant if put forward; only that the costs in an institution were irrelevant, because care in an institution was irrelevant, because agreed to be unreasonable. Nor did Stephenson LJ say anything as explicit and startling as that alternative costs *at home* would have been irrelevant if presented to the court.
- k) *Rialis* was clearly correctly decided on its facts. The claimant had been back at home for many years. The decision/*choice* that he go home was not attacked as *then* being unreasonable (a true mitigation question); and the future care/accommodation package had to be considered in the light of the established situation at home. At the heart of the real point in *Rialis* (not argued because hopeless for the defendant, but it gives the clue as to why the judgments were expressed as they were) was a *choice/mitigation* issue about the past decision to go home. Stephenson LJ did not need to decide the nature of personal injury damages in *Rialis*; and the quotation of apparent wider principle, picked up in *Sowden*, was at best obiter insofar as it may be read as applying to future losses rather than the past choice to go home. More likely, if capable of being read this way it was inconsistent with axiomatic principles and the authorities he had already cited on the normal measure of damage.
- l) Sir Denys Buckley agreed with both judgments in *Rialis*; and the same points apply.
- m) The distinction between the factual situation in *Rialis* and that concerning the double sized profiling bed in *A v Ponys* is now obvious. If Lloyd Jones J had found against the defendants contending (counter-factually) that a *single* bed was reasonable for the claimant's needs (and they only put forward the cost of a single bed) he could legitimately have rejected their costing as irrelevant to the required double bed (as was the defendant's costing in *Rialis* for

care in an institution.) When the need for a double profiling bed is agreed as reasonable, the question may be raised: how can the court properly dismiss the cost of an item fitting that description, when suggested by the defendant, as *irrelevant*?

- n) *Sowden*, like *Rialis*, revolved around a decision whether to care for the claimant at home or in an institution. It was not an argument about the fine tuning of an essentially reasonable future care regime, agreed to be appropriate at home. Those responsible for the claimant made an immediate current *choice* to cover the claimant's future on the fundamental issue of whether she could live in her own home or had to remain in an institution. Logically, that issue had to be decided first; and the decision on its facts is impeccable. The Court of Appeal did not need to invoke *Rialis* to reach its decision; and anyway it did not reverse the burden of proof or reject the defendants' evidence as irrelevant.
- o) And it makes no difference to invoke the concept of *full compensation* (as did HHJ Mackie QC in *Wakeling*) which has become common recently (and appropriately in a different context concerning the correct indexation of periodical payments.) If the normal measure of damage is *reasonable* compensation, reasonable compensation *is* full compensation.

Life expectancy

- 64. The courts have consistently applied *Royal Victoria Infirmary v B (a child)* [2002] Lloyd's Law Rep. (Med.) 282. The decisions in *Sarwar No.1* and *Lewis* came out at roughly the same time and were arrived at independently of each other. *Burton* was decided along similar lines in knowledge of *Sarwar No.1* but after further detailed evidence and argument.
- 65. There appear to be the following practical propositions in approaching life expectancy, which I have assembled as there is insufficient space to derive everything from the passages in the cases themselves.
 - a) In the first place it is for the clinicians to derive what they can from the medical/statistical literature and use it to inform their overall opinion on life expectancy. Clinical experts who claim to be unable to unravel and apply the scientific literature will normally be looked at askance. Strauss and Hutton should not be the first port of call.

In my judgment it is in the spirit in the decision of the Court of Appeal in *Royal v Victoria* that

the clinician experts should be the normal and primary route through which such statistical evidence should be put before the court. It is only if there is disagreement between them on a statistical matter that the evidence of a statistician, such as Professor Strauss, ought normally to be required. Tugendhat J in *Arden v Malcom* [2007] EWHC 404 (QB) at [36]

- b) Only if the dispute between the clinicians relates to a statistical matter (as against their clinical judgment) should it be necessary to obtain statistical evidence.
- c) There is no supremacy of clinical over statistical evidence (or vice versa) once the evidence is before the court. All the evidence must be considered and given appropriate weight.
- d) The *top-down* or *bottom-up* argument is an irrelevance as a point of principle. The court will decide, guided by the experts, where the best starting point is on the facts of each case.
- e) Where the medical literature and statistical evidence use a common starting point for the analysis, it may well be that this should be the starting point from which the doctors apply their clinical judgment.
- f) Where the literature tends to an analysis in terms of a *reduction of a number of years* or *percentage reduction in survival* from normal (as appears to be so in the spinal injuries literature – see *Sarwar No.1* and *Burton*), the analysis will conveniently use normal life expectancy (Ogden 6) as the starting point. It will then apply the *prima facie* appropriate statistical variation from the cohort(s) exhibiting the closest match(es) to the Claimant. Then it will refine the variation for the clinical considerations (often listed as *positives* and *negatives*) of the particular claimant which may tend to place him in a particular part of a cohort (or even outside it.)
- g) Where the literature is not defined as above but relates to length of survival from an event or death at a certain age (as appears to be the primary literature on cerebral palsy and traumatic brain injury – see *Lewis* and general experience of Strauss and Hutton reports), *normal life expectancy* as a starting point *has nothing to offer* – Thorpe LJ in the *Royal Victoria* case at page 289, applied by HHJ MacDuff QC in *Lewis* [57.] The approach will therefore miss the first stage in the previous paragraph by reference to normal life expectancy and simply find a starting point from the closest matching cohort(s) in the literature. This will then require

clinical variation as before.

- h) Where a claimant's individual condition is closely matched by the cohort(s)/database, it should come as no surprise if the variation from the statistical evidence for clinical condition is very small whichever starting point is being used.
- i) The arguments must have some basis in evidence and logic (*pace* Professor Barnes in *Lewis*.)
- j) If the medical analysis takes into account all medical conditions and considerations (whether related to the accident or not) to reach a medical *prediction* (in the word of Lord Lloyd in *Wells*), it is arguable that Ogden table 28 arithmetical discounting should be used to fix the multiplier from that prediction - Lloyd Jones J in *Sarwar No.1*. To work from Table 1, the argument runs, where there is effectively an agreed (or found) life expectancy is to double discount.
- k) If the medical analysis does not go so far as to reach a fully balance life expectancy but simply arrives at reductions in life expectancy for specific conditions, it may well be right to use Ogden table 1, adjusting the age of the claimant upwards for the reduction in life expectancy – see for example Leveson J (as he then was) in *Tinsley v Sarkar* [2006] PIQR Q1, distinguished by Lloyd Jones J on the above grounds in *Sarwar No.1*.
- l) Even where the doctors had not factored in chance events such as falling under a bus, Lloyd Jones J decided to follow the arithmetical method under Table 28 in *Sarwar No.1* [30.]

However, in view of the fact that by far the greater proportion of risks to this Claimant's life have already been taken into account by the experts in their assessment of life expectancy, and in the absence of any evidence as to what apportionment between Tables would be appropriate, I conclude that the appropriate multiplier should be calculated by reference to Table 28

- m) While the above paragraphs have derived from recent cases and are faithfully reproduced, the use of table 28 and arithmetical multipliers should now be approached in any case with considerable caution. The Introduction to Ogden 6th edition at paragraph 20 is much

expanded from that available to Lloyd Jones J in the 5th edition when deciding *Sarwar*. The approach using arithmetical multipliers from table 28 is said to be

... likely to give a multiplier which is too high since [it] does not allow for the distribution of deaths around the expected length of life. For a group of similarly impaired lives of the same age, some will die before the average life expectancy and some after; allowing for this spread of deaths results in a lower multiplier than assuming payment for a term certain equal to life expectancy.

66. The effect of HHJ MacDuff QC's findings in *Lewis* was that the Strauss populations were so close to the specific, traumatically brain-injured claimant there should be little variation from the statistical starting point. Normal life expectancy had nothing to offer: the literature did not use it as a reliable yardstick. He increased the overall life expectancy [146] by 3 years from age 37 to 40 - an admittedly arbitrary amount - on account of one point of distinction only: the claimant receiving a *first class care package* [144] and better than those in the cohorts used for comparison.
67. In *Sarwar No.1* and *Burton* (both spinal injuries), a statistical variation was applied from a starting point of normal life expectancy, which was then refined through clinical judgment. On the evidence before the courts, they were both satisfied that socio-economic factors (the same *first class care* point in different clothing) were substantial reasons for altering the initial statistical estimate upwards.

Lost years

68. In *Lewis*, *Iqbal*, *Massey* and *Sarwar No.2* arguments were run on behalf of seriously injured, infant claimants (who are now most unlikely ever to have dependents following their injuries) for damages in the *lost years* between the expected date of death and what would have been their normal life expectancies. There were different outcomes, with the cases running at about the same time without the arguments and results known in the others. I simplify the reasoning significantly for reasons of space.
69. In *Lewis* [166], HHJ MacDuff QC (as he then was) found himself bound by the ratio in *Croke v Wiseman* [1982] 1WLR 71 CA; and it would have been better if he had simply left matters there as it turned out. He also came to his own view, however, that justice did not demand payment to non-existent dependents during a period when the claimant would not be alive. He did not remind himself, when articulating his own reasons, that such claims for lost years are allowed in

respect of *adults* without dependents; nor that the House of Lords in *Pickett v British Rail Engineering Ltd* [1980] A.C. 136 had approved the award in the lost years irrespective of whether there were in fact dependents. McGregor on Damages has long criticised the arbitrary result of the *lost years* reasoning, leaving genuine dependents under-compensated and the estates of confirmed bachelors enriched.

70. Sir Rodger Bell in *Iqbal* [95]–[106] took the opposite stand point to HHJ MacDuff QC. Essentially, he spotted the inequality between the position of infants and adults, and the inconsistency between *Croke* and *Pickett*. In the light of changed circumstances in the assessment of damages since 1982 (Ogden tables, no arbitrary discounting, children’s cases taken seriously etc.), he found that he was not bound to follow *Croke*. If the claim for loss of earnings before death is not to be discounted for the lack of dependents in the badly injured infant claimant, why should the lack of dependents suddenly become determinative against a claim the day after death? While the uncertainties implicit in evaluating an award for a child are real, they are to be accounted for at the stage of assessing the loss rather than by denying the claim altogether.
71. In *Sarwar No.2* the point was taken by the claimant for a lost years’ claim between the ages of 72 and 85 for notional loss of *pension*. The *Croke* point appears not to have been taken. Lloyd Jones J followed an old fashioned approach, allowing the claim by simply increasing the claim for loss of *earnings* by 0.5 on the multiplier to take account of the lost years’ pension deficit [27] – [29.] The same approach (to enhance the multiplier) was urged upon Teare J in *Massey*; but he refused relying on *Croke* [109] – [111.]
72. *Iqbal* was successfully appealed by the Defendants. Sir Rodger Bell had made a mistake in considering that he could validly distinguish *Croke* on the basis of change in circumstance: *Croke* had decided a point of general principle and he was bound by it. He had been broadly right, however, on the *merits*. The issue became one surrounding the proper application of *stare decisis* and the circumstances in which the Court of Appeal is allowed to depart from its own earlier decision. All 3 Members of the Court considered that *Croke* was probably decided inconsistently with *Pickett* and with *Gammell v Wilson* [1982] AC 27; but since it was decided in full knowledge of the *previous* decision of the House of Lords and was not strictly *per incuriam*, the inconsistency had to be corrected by the House itself. If it were otherwise, there would be no end to the Court of Appeal tinkering with its own previous decisions. Contrast the situation in which a *subsequent*

decision of the House raises the inconsistency, when it is the Court of Appeal's duty to correct the situation.

73. Let us now leave issues of wider principle and return to gallop through some of the illuminating detail of various cases. Much of the time there will be reference to the table and the commentary brief.

Accommodation

Capital offset

74. Some useful detail appears in the table concerning the way in which courts are approaching the issue of what credit to give under *Roberts v Johnstone* for the capital cost of the accommodation the claimant would have had anyway. Where the reports show that a point has been taken (*Sarwar No.2* and *Iqbal*), only a proportion (1/2 or 2/3) of the cost has been offset on the basis of likely shared equity with a partner; and only from the claimant's mid 20s (range 23-28.)

Credit for parental rent against infant's accommodation claim

75. Again, this issue has been considered in both *Lewis* and *Iqbal* but on rather different facts.
76. In *Lewis* the parents still had their former property (to which HHJ MacDuff QC found they were unlikely to return even when the claimant became an adult.) Their avowed plan was to rent it out at £5,400 pa and the costs of doing so would be about 10%, leaving them in profit to the tune of £4,860 pa. Acknowledging that the parents' entitlement to rent was difficult to offset from the claimant's own claim for accommodation, the Judge nevertheless told the parties at [171] to find a way of setting it off when they calculated the damages following judgment. His primary reasoning [170] was that the value of the parent's free accommodation in the Claimant's property should be deducted from the claim in respect of their non-commercial care; and the value of that was taken to be equivalent to the profit they were making on renting out the former home. Perhaps realising but not articulating the problem that would soon occur (when the parents no longer had a claim for non-commercial care from which to offset), he then articulated a reason [171] (but without actually making a finding) why the parents' rent should still be offset (namely that the defendants had had to fund the extra adaptation of the property, beyond that required for the claimant, to make it a family property and yet they were still paying for care.) Readers will have to compare

this solution with the reasoning in the next case.

77. In *Iqbal* the parents had previously lived in rented accommodation, the cost of which was covered by Housing Benefit. The passage of Sir Rodger Bell's judgment is worth reading from [81] but is too long to reproduce here. Paragraph [83] is now set out.

In my view, Mr Spencer's argument fails for practical reasons in the circumstances of the present case. The fact is that Mr and Mrs Iqbal are not paying rent to Khazar or his receiver, whereas parents naturally tend to volunteer the proceeds of sale of any existing home towards the purchase of a more expensive, suitable house in which to live with the claimant, as Mr and Mrs Woodward did in *Roberts v. Johnstone*. Both *M* and *Parkhouse* remind us that the claim is the claimant's claim, not that of his parents, and the allowance which Mr Spencer claims could only be justified, in a round about way, by finding that Khazar had (via the Court of Protection or his receiver) failed to take reasonable steps to mitigate his loss in relation to accommodation by, in turn, failing to demand "rent" from his parents. In my view the failure to demand rent cannot be castigated as unreasonable. In the specific circumstances of this case it would involve granting some form of licence or demanding "rent" in order to try to achieve the handing over of money in the form of Housing Benefit from one public body simply to save another public body the same amount. More generally, it is not just to deprive parents of the incidental benefit of living rent free, when there are so many sacrifices on their part, most obviously the detriment to their quality of life, which must go uncompensated under our law of tort, however high the award in their child's favour.

78. There is a narrow determination on the facts and a wider statement of principle in the above passage. Neither *Lewis* nor *Iqbal* illustrate, beyond the apparently wide statement of principle in *Iqbal*, what to do if the parents owned a previous property, have sold it and, unlike in *Roberts v Johnstone*, chose not to re-invest in the new property.

79. In *Noble v Owens supra* Field J had to decide what to do when, if the accident had not occurred, the claimant would have lived in his partner's house, without contributing (on his findings) to the equity or paying rent. After the accident, the claimant now was to purchase the property for adaptation; and the partner to live with him under similar conditions. Field J *with a degree of reluctance* rejected the defendant's submissions that the claimant should give credit for a *deemed* contribution he would have made to the couple's expenses if the accident had not happened [109.] This notion of a *deemed* contribution was a dodge to make the set off appear to be against the

claimant's own claim when the real profit was, in fact, to the partner under the new regime. There was no basis in law to order this profit to another to be set off from the claimant's own damages; and Field J cited *Iqbal*. Further, there was a real chance that the partner might leave; and although not a formal part of the care regime, while she stayed she would continue to be of assistance in a range of small matters so that it would not be reasonable for the claimant to charge her formal rent. *Lewis* was also cited but distinguished on its facts.

Contingency fund on adaptation works

80. In *Iqbal* a 5% contingency fund was allowed for the adaptation works over and above those which could be specifically articulated in the schedule of works [90.]

Adaptations - *reasonable* and *full* compensation

81. It was contended in *Iqbal* that there should be provided access up to a raised area of the garden where, it was said, visiting cousins went to play, in the form of a step-lift at a cost of £10,000. The claim was rejected.

I find this claim more difficult than the spa pool, but I have come to the conclusion that the claimant's case for it has not been made out **because the areas to which Khazar does have access are enough to make the bungalow suitable for his needs without access to the grassy area**. It follows that the defendant should not have to pay for access to the grassy area.

82. Where the injury gives rise to a requirement for accommodation, reasonable accommodation to meet the requirement *is* full compensation.

Hydrotherapy at home

83. Hydrotherapy is now often called aquatic physiotherapy. The table reveals what has happened in the various cases. Much depends on the experts in the case and how the issue is apparently formulated. Very rarely has there been a detailed consideration of what is at stake.

84. As with other heads of damage, the question is one of the *reasonableness* in provision to meet *the need*. What the need is on the score of physiotherapy should be defined for any particular claimant. The answer to the claim for domiciliary hydrotherapy should logically involve evaluating, first of all, the benefits towards the need which will be obtained through the physiotherapy and exercise regime already to be instigated, with the equipment to be provided and

including such hydrotherapy as might be reasonably available outside the home. Then one should evaluate the *additional* benefits aimed at the need to be delivered by a hydrotherapy pool at home, balanced against the *additional* cost of the provision.

Transport

85. See the table for some recent awards.
86. Only in *Sarwar No.2* (and more recently with the same Judge in *A v Pomy's*) does there appear to have been a really thorough presentation of the potential claim. Note the substantially increased insurance for a large team of carers in which it was the fair assumption that there would always be someone under the age of 25 to increase the premium – *Sarwar* [65]-[68] cf *A v Pomy's* where the evidence was lacking. A point of comparative general application in the calculation was also covered in *Iqbal*, which was resolved on the basis of the evidence. Should the cost of the Entervan⁶ (wheelchair side access) conversion be treated as part of the capital cost (to depreciate in line with the tables in PNBA *Facts & Figures* but adding something to the resale value); or should it be treated as an immediate cost thrown away as in the conversion and adaptation of a property? On the evidence available in *Iqbal*, the conversion added nothing to the resale value compared with an unconverted vehicle. Disabled people would be wary of buying a second hand vehicle (which the disabled claimant would reasonably be changing); and it would be difficult to sell to the uninjured who had no need of the conversion. Hence it was a cost thrown away on each purchase [64.]

Holidays

87. See the table for recent awards. The evidence in any given case is crucial; and awards range considerably.
88. In *Sarwar No.2*, outward bound courses at £800 pa were not allowed [77] on top of £10,000 pa already allowed for the additional cost of holidays [72]-[76.] Contrast *Lewis*, where on the facts expensive foreign travel was not found to be a useful benchmark, rather holidays in the UK and Northern Europe, using the Caravelle and equipment taken from home with very little extra cost - £1,250 pa [221.] Contrast again *Burton* in which foreign holidays in the past were allowed subject to offset for what would have been spent [191.] £5,000 pa was the award in *A v Pomy's*. Field J in

⁶ The Chrysler Entervan solution was again the reasonable solution in *Noble v Owens* [2008] EWHC 359 (QB.)

Noble v Owens supra awarded [115] – [119]: £4,000 for the travel and holiday costs of 2 carers + £750 extra for the accommodation of the Claimant and his partner + additional costs of 3 weekend breaks at £500 each = £6,250 pa.

Miscellaneous items

Credit against interest for interim payments

89. In *Massey* the defendant wanted credit at the full rate of interest for interim payments; the claimant offered credit at only the half rate. On the facts the half rate was appropriate:

The payment on account was not, so far as I am aware, attributed to any particular item of expenditure though it was spent on his needs. The logic of giving credit for the notional interest accruing on this payment from the date of payment until judgment is that the Claimant has not been deprived of the use of that money from the date on which it was paid. Since almost all of the past losses consist of recurring expenditure on which interest is awarded at half rate the fair approach appears to me to give credit at the half rate as contended by the Claimant. [56]

The old case of *Bristow v Judd* [1993] PIQR Q117 could have been cited; but even without it the result was in accordance with its tenor. Note that the PIBA Personal Injuries Handbook in the 3rd edition, while mentioning *Bristow*, takes an opposite stance.

Travelling expenses

90. The cost of travel to medico-legal examination was disallowed in *Lane v Personal Representatives of Deborah Lake (Deceased)* Lawtel 2007 by John Leighton Williams QC sitting as a Deputy High Court Judge on the basis that it was properly a matter of costs [41.] In *Tagg v Countess of Chester Hospital Foundation NHS Trust* [2007] EWHC 509 (QB) mileage for visiting in hospital in 1999 was awarded by McCombe J at 36p per mile bearing in mind depreciation as well as basic running costs [84.] Similarly in *Burton*, Flaux J rejected the defendant's lower rate and awarded 35p per mile at 2004 rates [199.]

Finally - earnings

Ogden 6

91. The introduction of the 6th edition Ogden tables requires a paper on its own. For interesting recent cases giving an insight into how the new introduction may be applied for contingencies, consider: *A v Ponys* at [42]-[43]; *Conner v Bradman & Co Ltd* [2007] EWHC 2789 (QB); and *Hunter v MoD* [2007] NIQB 43.

Discount to multiplier for unrelated medical conditions

92. In *Lane* para 65 supra, where there was evidence of raised blood pressure in the claimant and a family history of ischaemic heart disease, the Judge refused to discount the earnings multiplier without medical evidence specifically to the effect that such risk factors went beyond those already taken into account in the general population under the Ogden tables. He would have been sympathetic to the argument, he said, if there had been such evidence available [47.]

Stepped multiplicands or flat average earnings?

93. Sometimes future loss of earnings calculations can become complicated by reason of many steps in the multiplicand. This is difficult to avoid in actions involving the Armed Forces or elsewhere with there is sliding scale of earnings based upon promotion and seniority. In *Sarwar No.2* Lloyd Jones J considered whether to take a single average multiplicand for loss of earnings over a whole career or to take a fluctuating multiplicand. The claimant had not yet embarked on a career. The exercise was seeking to attain the unattainable in terms of precision. Unless higher than average earnings were included in the middle years of the career trajectory, it would be unfair to include the lower multiplicands in the early years (and possibly in the final years.) Use of the average figure across the whole career was the fair approach on the facts [19.] Teare J adopted the same method in *Massy* [106.] Lloyd Jones J followed his earlier approach more recently in *A v Ponnys* where the claimant was still only 16 – see [35] – [36.]

Retirement age

94. In *Sarwar No.2* the point was also taken under the White Paper “Security and Retirement: Towards a New Pension System” May 2006 that 65 was most unlikely to be the retirement age for the claimant’s generation (he being aged 10.) While he would not have been unduly motivated by the availability of a State Retirement Pension in terms of when he retired, Lloyd Jones J held that *the expectation in his generation is that people will go on working longer because of the ability and need to do so.* He fixed the fair assumption for age at retirement as 68 in line with the recommendation in the White Paper [21]-[22.] The same Judge found retirement at 68 for a young woman in *A v Ponnys* – see [41.]
95. While not in the judgment in *Sarwar No.2* I now set out the table for expected retirements under the White Paper in section 4.21.

Figure 4.v Future eligibility for State Pension		
Age on 5 April 2006		Eligible for State Pension from
Women	Men	
56		60th birthday
51–55		between 60th and 65th birthday
47–50	47 or older	65th birthday
	46	between 65th and 66th birthday
	38–45	66th birthday
	37	between 66th and 67th birthday
	29–36	67th birthday
	28	between 67th and 68th birthday
	27 or younger	68th birthday

Note: Women's State Pension age is already gradually due to increase to 65 between 2010 and 2020

96. The Introduction to the Ogden Tables at paragraphs 13 and 14 gives the best method for reaching a multiplier for an age of retirement between the tables calculated to 65 and 70. The rather involved and theoretical explanation amounts to this. If the fair assumption is for a claimant aged 52 to retire at 67, 15 years on, he can be seen as approximating to a man aged 50 retiring at 65 (but the actuarial adjustment for mortality will be slightly too small for the younger age since the risks of mortality increase with age.) The man can also be compared to one aged 55 retiring at 70 (but this time his actuarial adjustment for mortality will have been overdone.) If one takes a weighted average between the ordinary Ogden multipliers for the two comparables (here 3 x the multiplier to 65 as against 2 x the multiplier to 70, given the Claimant is closer to the younger assumption than the older in proportion 3:2), the error for over or under estimate of mortality using one of the comparables only is evened out.

Blamire

97. In *Wees v Karkour and Walsh* [2007] EWHC 165 (QB), Langstaff J came to a *Blamire* award of £850,000. While the information was too nebulous to use a detailed multiplier/ multiplicand

approach on a formal basis with confidence in the result, he approached the task by taking broad brush multipliers and multiplicands to inform the lump sum award he should make - £100,000 pa net x 16 = £1,600,000 less £750,000 residual earning capacity (broadly equating to £50,000 pa x >16 but reduced for the time it would take the claimant to progress from her present income.) Just because a *Blamire* award is appropriate does not mean that the award cannot be very substantial.

Equal pay for women

98. Also in *Wees* a point was argued as to whether the claimant, a woman, should have her earnings linked to average female earnings (the reality being that there is still a discrepancy notwithstanding the legislation on equal pay), male earnings or a combination of the two. Langstaff J used female earnings for the present and immediate future; but made the assumption that the situation would not endure forever.

139 I accept that without evidence that she had an effective claim for equal pay which would increase her level of earnings, I should acknowledge that the claimant would, at present, be disadvantaged in the salaried market because she is female (and, therefore, would earn less than the average or median Insead graduate, if it is assumed that it is the male Insead graduates who receive the higher salaries currently paid). However, the court must be entitled to take note of the fact that throughout the professions greater numbers of woman are achieving high positions, and with them commensurate salaries; that equal pay claims have been prominent in the recent past, particularly in the professions and amongst high earners in the city; and that the future is one in which the gap is narrowing. It must take account of the fact that in those positions in which men and women are doing equal work, a woman may not be paid a lesser salary without her having a claim for the shortfall against her employer (the contract of every woman includes a term to that effect, inserted by the Equal Pay Act 1970, section 1.) Accordingly, I think it right to reflect in the sum which I shall award the fact that the claimant has (at present) the lower salary expectations of a woman, but within a few years should earn commensurately with a man. To take any other approach would be to enshrine current differences in pay which are gender based, rather than recognize their continuing and gradual attrition.

99. Lloyd Jones J in *A v Ponys* did not go quite so far [39] as Langstaff J; but he used the argument to bolster his decision not to discount the *female* earnings multiplicand any further for general unspecified contingencies.

Conclusion

100. The exercise of writing this paper was never to put forward a comprehensive overview of the law of personal injury damages, only to introduce busy practitioners to what has been going on recently. Aside from the interesting detail, there are two main conclusions. Fighting out entire cases has been an expensive exercise for insurers. There is unfinished business on legal principle over the application of the test of *reasonableness*.