



Neutral Citation Number: [2019] EWHC 801 (QB)

Case No: IHQ18/0676

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2019

Before :

MR JUSTICE NICOL

Between :

(1) Joshua Folkes (by his litigation friend Patrick Folkes)

Claimant

(2) Patrick Folkes

(3) Ferrelyn Folkes

(4) Cairo Folkes

- and -

Generali Assurances

Defendant

Bernard Doherty (instructed by Anthony Gold) for the Claimants
Sarah Crowther QC (instructed by DWF LLP) for the Defendant

Hearing dates: 21 & 22 February 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE NICOL

Mr Justice Nicol :

1. The 1st Claimant in these proceedings was the victim of a road traffic accident in France. He was struck by a car while crossing the road near his home in Aix-en-Provence. He was taken to a hospital in Marseille where he was placed in a medically induced coma for four weeks.
2. It is the Claimants' case that the 1st Claimant suffered extremely serious injuries including very severe traumatic brain injury in consequence of the accident. It is their case that he suffered extradural and subarachnoid haemorrhages and multiple contusions especially in the frontal areas and temporo-occipital region.
3. The Claim Form was issued originally on 11th July 2017. At that stage, there was only one Claimant, Joshua Folkes, the direct victim of the accident. Because of his injuries, he lacks capacity to litigate on his own behalf. His father, Patrick Folkes is his litigation friend. There is (at least now) no dispute that this court has jurisdiction to decide the claim. But, as I shall explain, the substantive law which determines liability and the recoverable damages, is the law of France, where the accident happened.
4. Relatively recently, on 29th January 2019, the Claim Form was amended to add his father as 2nd Claimant, his mother as 3rd Claimant and his brother as 4th Claimant. That was done by a consent order of 29th January 2019. The Particulars of Claim were also amended on 29th January 2019. Had the accident happened in England, Joshua could have included in his claim expenditure consequential on the accident which had been incurred by other members of his family. He would then have held those parts of his recovered damages on trust for the family members concerned. French law, I am told, is different. To the extent that such expenditure is recoverable, the family members concerned have their own cause of action and that cause of action can be pursued only by them; not by the direct victim of the accident. That is why the family members have been added as additional claimants.
5. The driver of the car which struck the 1st Claimant was a Madame Charpentier-Delahaye. She was insured for liability to third parties by the Defendant in these proceedings. Again, it is not disputed that French law allows the victim of a road traffic accident to bring a claim directly against the insurer for the loss for which the insured driver would be liable. French law imposes strict liability on the part of the owner and driver of a motor vehicle where injury is caused to a pedestrian by an accident involving the use of a motor vehicle. There is no question of contributory negligence in French law in such circumstances (and consequently the usual duty in CPR r.25.7(5) to take any likely reduction because of contributory negligence into account in assessing an interim payment has no material effect). In its defence dated 7th December 2017 (and so served prior to the recent amendment to the Claim Form) the Defendant admits liability (at least to the 1st Claimant). No admission is made as to the injuries which the 1st Claimant suffered in consequence of the accident.
6. The principal, indeed now only, issue for my decision is whether to order the Defendant to make a further interim payment. Other matters, concerning directions for the further conduct of litigation were sensibly agreed between the parties and have already been embodied in an order of the Court.

The role of French law

7. I have said that it is not disputed that French law will determine liability and recoverable compensation. That is in consequence of Regulation (EC) No.864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) – ('the Regulation').
8. Article 4 of the Regulation provides that the general rule for the determination of the applicable law to a non-contractual obligation is the law of the country in which the damage occurs. There is no dispute that that was France in this case and it is not suggested that any of the qualifications to the general rule apply.
9. Article 1(3) of the Regulation says,

‘This Regulation shall not apply to evidence and procedure without prejudice to Articles 21 and 22.’
10. Article 21 is not material. Article 22 says,

‘1. The law governing non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.’
11. Article 15 of the Regulation is headed ‘Scope of the Applicable law’. It says,

‘The law applicable to non-contractual obligations under this Regulation shall govern in particular:

 - (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
 - (b) the grounds for exemption from liability, any limitation of liability and any diversion of liability;
 - (c) the existence, the nature and the assessment of damage or the remedy claimed;
 - (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
 - (e) the question whether a right to claim damages or a remedy may be transferred including by inheritance;
 - (f) persons entitled to compensation for damage sustained personally
 - (g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of limitation.’

12. In *Marshall (deceased) v Motor Insurers’ Bureau* [2015] EWHC 3421 (QB), [2016] PIQR Q5 Dingemans J. held that, while Article 22 of the Regulation provides that the applicable law governed the *burden of proof*, it was the law of the forum which determined the applicable *standard of proof* – see [25]. I respectfully agree. I agree also that this is consistent with Article 1(3) which makes clear that the law of the forum governs evidence and procedure. As Dingemans J. said also at [25],

‘Rome II was not intended to deal with the manner in which matters are proved, which remains for national courts applying their own rules of evidence and procedure.’

13. *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263 also concerned a road traffic accident in France which was the subject of litigation in England. The principal issue was whether the Judge had been wrong to decide that the assessment of damages should be resolved by the conventional English method of each side calling its expert witnesses, rather than by adopting the French method of relying on one or more medico-legal experts to assist the judge. The Court of Appeal was clear that the Judge had been correct. As Longmore LJ said at [11],

‘Nothing in the Regulation mandates a court, trying a case to which a foreign law applies pursuant to the Regulation, to award the same amount of damages as the foreign court would award.’

14. Since the court of the foreign forum would follow its own law regarding evidence and procedure, it was inevitable that there might not be uniformity of outcomes - see [11] and [12]. The other members of the Court (Jackson and Christopher Clarke LJJ) came to the same conclusions.
15. The Court did, however, agree that, in fixing damages, the English court should have regard to such guidelines as would be used by a French court in assessing damages, with the same margin of discretion as a French judge would have in applying them. The Court was referred to a table prepared by M. Dintilhac, President of the second Chamber of Court of Cassation, which it regarded as comparable to guidelines on damages prepared by the Judicial College – see Longmore LJ at [28], Jackson LJ at [45] and Christopher Clarke LJ at [54].

The power to order an interim payment under CPR Part 25

16. Since the process for making an order for an interim payment is part of the ‘procedure’ which Article 1(3) and Article 15(d) leave to be determined by the law of the forum, I agree with Mr Doherty that it is to English law that I must look. For this reason, I did not find helpful the references which Ms Crowther QC, for the defendant, made, on this topic, to the report of the Defendant’s expert on French law, Madame Witvoet. Thus the standard of proof which French law would set for interim payments, (to be made only for matters which are not challenged by a grounded defence or where the Judge can identify ‘what goes without saying’ or is beyond reasonable challenge) is strictly

speaking immaterial. That said, perhaps unsurprisingly, English and French procedural law in this regard are very similar.

17. The Senior Courts Act 1981 s.32 allows rules of court to provide for interim payments, meaning payments on account of damages, debt or other sums (other than costs) which the defendant may be liable to pay.

18. CPR r.25.7(1) prescribes the conditions, one of which must be fulfilled before the Court may make an order for interim payment. In this case, Mr Doherty, for the Claimants, relies on r.25.7(1)(a), namely,

‘the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant.’

19. As I have already said, the defence was served at a time when the only Claimant was Joshua. It admitted liability to pay him damages. At the hearing, Mr Doherty confirmed that the order he sought was for an interim payment to Joshua (or, strictly speaking, his deputy). I agree that the condition in r.25.7(1)(a) is fulfilled. Of course, even if the condition is fulfilled, the Court has a discretion as to whether or not to accede to the application for an interim payment but must abide by the restrictions in the Rules.

20. CPR r.25.7(4) provides,

‘The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.’

21. As the note at paragraph 25.7.1 of the 2018 edition of the White Book says,

‘The jurisdiction to order an interim payment is an exception to the general principle that a defendant has a right not to be held liable to pay until liability has been established by a final judgment’.

22. It is because the defendant’s liability has not yet been established (and also because the evidence is incomplete), that a cautious approach is required. Thus r.25.7(4) contains two important limits: (i) the court must have regard to what is ‘likely’ to be the final judgment; and (ii) an interim payment may not be more than a ‘reasonable proportion’ of that likely final judgment.

23. Further notes on interim remedies are included in Volume 2 of the White Book. Ms Crowther QC, for the defendant, drew my attention to the note at paragraph 15-100 which says,

‘It is undesirable that an application for an interim payment should become a “mini-trial”, the procedure is not suitable where the factual issues are complicated or where difficult points of law arise, but an application may properly be entertained in relation to an “irreducible minimum part” of a claim where that part is capable of being established without venturing into disputed areas of fact or law and provided that it is substantial enough to justify the trouble and expense of the application (*Schott Kem Ltd v Bentley* [1991] 1 QB 61 CA, *Chiron Corporation v Murex Diagnostics Ltd (No.13)* [1996] FSR 578 (Robert Walker J.), *Bovis Lend Lease Ltd. v Braehead Glasgow Ltd* (2000) 71 Con. LR. 208 (Dyson J.), *Trebor*

Bassett Holdings Ltd. v ADT Fire and Security Plc [2012] EWHC 3365 (TCC Coulson J.).’

24. In English law, the final award can take the form of a capital sum, a periodical payments order or a combination of the two. I understand that a similar set of alternatives exists in French law. In English law, the Damages Act 1996 s.2(3) stipulates that

‘a court may not make an order for periodical payments unless satisfied that that the continuity of payment under the order is reasonably secure.’
25. Because the defendant is a French company there will be complications in demonstrating that that condition can be fulfilled, but Mr Doherty accepted that they were not necessarily insuperable. Accordingly, he accepted that I should follow the guidance in *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204, [2010] 1 WLR 409 CA and, in assessing the ‘likely final sum’, I should have regard only to that part of the final judgment likely to be given in the form of a capital sum.
26. The power to award damages in the form of a periodical payments order is limited to ‘future pecuniary loss’ – see Damages Act 1996 s.2(2). The division between past and future pecuniary losses will be determined by the trial date. Mr Doherty argued that, because to some extent Joshua’s prognosis remained uncertain, the trial of quantum could not take place until 2020 at the earliest. I did not understand Ms Crowther to disagree with that submission. That means, as Mr Doherty submitted, that expenses incurred in 2019 will, by the trial date, be past losses and will be included in any capital sum. So far, I agree. However, Mr Doherty further argued that expenses incurred between now and the trial date could therefore be taken into account in judging whether the interim payment now sought is a reasonable proportion of that capital sum. I find this last step conceptually difficult. An order for interim payment is an order ‘for payment by a defendant on account of any damages...’ – see CPR r.25.1(1)(k). It is difficult to see how there can be payment on account of damages for loss which has not (at the time of the order for interim payment) been incurred. I recognise that in *TTT v Kingston Hospital NHS Trust* [2011] EWHC 2917 (QB) [11] Owen J. did take into account losses which were likely to accrue between the date of the order for interim payment and the likely trial. However, as far as I can see, the difficulty which I have identified was not canvassed before him. I record these views but, it is fair to say that this particular matter was not argued before me and a judge of Owen J’s experience did not take the point. In the circumstances, I consider it fair to set aside my doubts and adopt the approach which the parties mutually assumed before me.

The background to this application for an interim payment

27. Joshua was 19 at the time of his accident. He is now 22. He had just passed his A levels. Although he had been offered a conditional place at Newcastle University, it was thought that he had failed to meet the necessary conditions of the offer, although later this was corrected. He was instead intending to take a degree at a business school in Grenoble.
28. After the accident, Joshua stayed in hospital in France until July 2016. Then between September 2016 – May 2017 he began to undertake rehabilitation at various of the Hobbs neurological Rehabilitation centres in England. He then moved into a flat with his family which they rented in Wandsworth.

29. On 23rd July 2018 he began a trial of independent living in a rented flat in Imperial Wharf, Fulham. The present application for a further interim payment is, essentially, Mr Doherty says, to allow that trial of independent living to continue.
30. Joshua attends college at Point Blank Music School in Hoxton where he is studying music production. He also has a number of therapies.
31. Joshua is said to continue to suffer from serious impairments. Mr Doherty summarises them in this way.
- a. There are serious cognitive impairments. Dr Leng [the Claimant’s expert neuropsychologist] found significant decrements with memory, language, attention and delayed memory... He has memory problems and problems processing information (for example, he sometimes cannot follow the story of a film.) Joshua has passed all tests of effort.
 - b. There was frontal lobe damage and there are executive deficits ... Joshua’s behaviour tends to be impulsive. He sometimes drinks alcohol to excess (it does not take much to make him drunk) and puts himself in dangerous situations. He has difficulty initiating, with planning and problem solving...
 - c. There are problems with fatigue, reduced insight, disorganisation and poor planning, neglecting to eat, and vulnerability in his interactions with others (over-trusting, sharing personal information, trying to buy friendships, etc) Even a modest amount of alcohol has a marked effect on him and greatly increases his vulnerability.
 - d. He has marked ataxia and a wide gait. His balance is poor and he is often at risk of falling.
 - e. His speech is seriously affected. He has difficulties with expressive language and comprehension as well as moderately severe dysarthria (poor articulation) so that speech intelligibility without context has been assessed at 36% and with context at 86%. He will have real difficulty being understood against background noise.’
32. The Claimant’s expert neurologist is Dr Michael Gross, a consultant neurologist. In his report of 15th January 2018 he said,
- ‘With such severe injury leading to neurocognitive deficiency and weakness down the left side with ataxia it is apparent that Mr Folkes requires on-going and long-term neurorehabilitation.’
- He recommended a trial of independent living with 24 hour care support.
33. Dr Gross provided a further report on 22nd October 2018 in which he said,
- ’18. It would seem that the beginning of the independent living trial for Mr Folkes has been relatively successful with regard to the opinion of Dr Parrett [the Claimant’s lead treating neuropsychologist] Dr Parrett as a rehabilitation specialist in the field of clinical psychology didn’t perceive that there was anything inappropriate with the trial of independent living with a full support package. It

would seem obvious from the neurological perspective that this trial of independent living needs to continue with a full care support package and buddy assistance and the input of the case manager albeit an individual who will be new to the needs of Mr. Folkes.

19. I cannot think of any circumstances whereby independent living should be withdrawn. My own experience of independent living trials when they are ended prematurely is that this can have a seriously negative impact on the brain injured or suffering individual, such that they may end to a significant downward spiral. It would seem reasonable for a neurological review of Mr Folkes to take place sometime between the spring and autumn of 2019. At that time, it will be expected that Dr Parrett, Ms Ongley-Deller [the Claimant's case manager], the support team and the other neuroscientists instructed will be able to guide as to the success of the independent living trial and where this should go into the future.'

34. Dr Leng in his report of 5th June 2017 had said that a rehabilitation programme would typically need to operate for 12-24 months. In his letter of 17th October 2018 he added,

'It is envisaged that now with an independent living trial support workers will be able to deliver interventions more intensively. Dr Parrett has identified a number of potential risks, namely physical injury in the community, being vulnerable to exploitation, depression and drug relapse and make a number of recommendations, including advising against too rapid a reduction in support which could well lead to deterioration and undermine the approach.

Without the recommended intervention his progress and the final outcome are in my view likely to be sub-optimal. Indeed in my clinical experience in similar cases there will be significant risk of psychological deterioration without sufficient rehabilitation and subsequent support. I would therefore support an ongoing rehabilitation programme.'

35. Dr Parrett does indeed recommend continuing the present arrangements. In his letter or report of 6th January 2019 he said,

'Given the success of the support worker input in the last 3 months, it would seem premature and risky to start rolling it back until such a time as Josh has demonstrated some consistent ability to retain and implement strategies independently. More importantly, to stop placing himself in potentially dangerous situations.

Rolling back support, particularly at night will undoubtedly lead to more impulsive nights out and late nights. Whilst risky in themselves, they will also impact on his sleep and fatigue, which in turn will affect his mood and ability to complete the work required for his music production course on which so much of his self-esteem is currently resting.

I continue to recommend intensive independent living trial until the new team is fully trained and confident in following the guidance of the MDT [multi-disciplinary team]. At the point it would seem sensible to trial reductions in support.'

36. The Claimant's independent care expert is Caroline Ferber. In her letter of 16th January 2019, she said that there was a 'clear need for night time care'. On the need for continuing 24/7 report, she said,
- ‘I consider this is essential during this immediate period. I note that in his report Dr Jacobsen has suggested that there is no need for night time support. I strongly disagree. Indeed, in my opinion, Joshua is at his most vulnerable during the late evening and overnight periods, when he would otherwise be out in the community unsupported and inviting strangers back to his home. He is at greatest risk during these times due to his poor insight and poor self-monitoring. He also needs support early each morning to make sure he is up ready for the day, and undertakes his morning strategies effectively. His poor road safety currently necessitates support when he is out and about using public transport. He requires support to ensure he feeds himself across the day. Trying to pare away hours of support at this stage will only serve to reduce the effectiveness of the rehabilitation programme which is aiming to provide him with timely support and avoid him making repeated errors and inadvertently learning from them.’
37. She listed nine risks if her recommendations were not implemented. They included, ‘His mental health is already fragile. If the rehab programme is withdrawn or radically downgraded at this stage, I consider there is a significant risk that his mental health will deteriorate.’
38. Mr Doherty relies on the witness statement of Patrick Folkes, the 2nd Claimant, as to the family's straitened financial circumstances. Mr Doherty submits that, without the further interim payment, the independent living trial for Joshua will have to come to an end.

The nature of the present application

39. When the application notice was issued on 13th November 2018 it was for an interim payment of £300,000.
40. The application first came before Stewart J. on 5th December 2018. He was unable to hear the matter, but he did order an interim payment of £60,000 with the balance to be considered in the future – see the sealed order of 7th December 2018.
41. Thus, I am being asked to order a further interim payment of £240,000.
42. The application has to be seen in the context of interim payments which have already been made. Some of those were in Euros. When those are converted into sterling and added to the sterling interim payments they total £351,788.00. That means that if the present application is successful, interim payments made by the Defendant will have totalled £591,788.
43. Mr Doherty argues that there should be deducted from this the amount of £103,767.03 which the Deputy has paid over to Joshua's parents as reimbursement for costs which they have incurred for goods and services on Joshua's behalf. As I have said previously, while those sums could, as a matter of English law, be claimed by the accident victim, as a matter of French law, they have to be claimed (and can only be claimed) by those who actually incurred the expenditure. Mr Doherty argues, that these sums should be

regarded as money paid on account of the claims now brought by the 2nd and 3rd Claimants, rather than on behalf of Joshua. If this approach was followed, the net amount already paid on account of Joshua's claim would be £248,020.97 and, with the further interim payment now sought would be £488,020.97.

44. Ms Crowther does not accept that I should deduct the amounts paid over to 2nd and 3rd Claimants. She argues that the Court's duty to protected parties (such as Joshua) under CPR r.21.10 precludes the type of pragmatic approach which Mr Doherty advocated. Accordingly, (a) in deciding whether the total interim payments would exceed a reasonable proportion of the likely final award, I should have in mind the total sums which have been paid to Joshua i.e. £591,788 and (b) in deciding whether the trial of independent living really would have to come to an end if the application for a further interim payment was unsuccessful, I should take into account the £103,767.03 paid over to his parents.
45. I agree with Ms Crowther's first argument which makes the second redundant. Since there was only one claimant when the earlier interim payment orders were made (including that ordered by Stewart J.), it must follow that the order was for an interim payment to him. As I have said above, Mr Doherty confirmed that the present application was for a further interim payment to be made to the 1st Claimant. If the present application is granted, there will therefore have been, in total interim payments of £591,788. Mr Doherty made quite clear that there was no intention on the part of the Claimants to obtain double recovery. He said that, to the extent the payments over to Joshua's parents duplicated their own claims, then his parents would give credit for that. However, as Ms Crowther submitted, the Court's approval is required since Joshua is a protected party (see CPR rr.21.10 and 21. 11). It may be that in due course the Court's permission will be given, but that permission has not yet been given, is not now being sought and I anyway lack the information or evidence which would be necessary to give consent.

The Defendant's position

46. Ms Crowther observes that M. Ricard, the Claimants' expert on French law, comments that the causal link between the damage and the harmful event has to be 'certain', not in the sense of established beyond reasonable doubt (i.e. to the criminal standard) but on the balance of probabilities. In French legal procedure, a medico-legal assessor plays a critical role in deciding whether that necessary link has been established. In assessing damages, a critical factor is the 'date of consolidation'. M. Ricard says that this
- 'is a medical term corresponding to the stabilization of the victim's state of health i.e. when the condition of the claimant cannot get neither worse nor better and the state of health is to be considered as definitive and permanent.'
47. The Dintilhac guidelines (referred to in *Wall v Mutuelle de Poitiers*) distinguish between (a) (i) pecuniary loss before the date of consolidation, (ii) non-pecuniary loss before the date of consolidation, (b) (i) pecuniary loss after the date of consolidation and (ii) non-pecuniary loss after the date of consolidation.
48. In her later report dated 8th February 2019, Madame Witvoet says that, because Joshua is still in the process of recovery, the date of consolidation has not yet been reached and any assessment of permanent damage is premature. In those circumstances, she argues,

the precise assessment of his pain and suffering, temporary functional disability, permanent functional disability and aesthetic damage cannot be gauged.

49. Ms Crowther submits that, while Joshua had suffered a very severe brain injury, that can lead to a wide variety of outcomes. On the Claimant's own case it was difficult to say what he needed in terms of care and support. She argued that there was not sufficient evidence to say that the Claimants would recover the costs of the package which had so far been delivered.
50. Ms Crowther refers me to the report of the consultant neuropsychiatrist instructed on behalf of the Defendant, Dr R. Jacobson. In his report of 26th March 2018, he accepted that there would need to be a period of about 9-12 months of rehabilitation. Joshua would probably require the input of a brain injury support worker to provide personal trainer type activities and to implement the strategies recommended by a neuropsychologist, but the support worker's input would be modest. Dr Jacobson did not agree that 24/7 support was required. He said,
- ‘There is no evidence hitherto of vulnerability or difficulty responding to an emergency at night, although I appreciate that he still lives within the family home with his parents and brother present. The proposed high level of support does not appear to be justified by a risk analysis. The recommendation of 24/7 support seems to be founded on a high level of risk avoidance in the apparent absence of estimation of risk and despite the good progress reports from Hobbs Rehabilitation.’
51. The Defendant has instructed a care expert, Natalie Fraser. She has not yet prepared a report, but I have a letter from her dated 8th February 2019. Ms Fraser's comments include the following:
- i) The flat which the 1st Claimant has “is of superior quality and has generous open plan living”. Ms Fraser considered this an unusual choice for a young man of Mr Folkes' age and not in keeping with that which would normally be occupied particularly had he been at University.
 - ii) The 1st Claimant would be unlikely to manage a flat of this size and therefore it is not conducive of a move towards independent living.
 - iii) The school of music which Joshua attends is about 50 minutes away by public transport.
 - iv) To get to his parents' home, Joshua had to travel about 20 minutes on public transport.
 - v) While Ms Fraser agreed with Dr Jacobsen that 24 hour support care was not necessary, it would not seem unreasonable for the first 3 – 4 months
 - vi) More could have been done to prepare Joshua for a trial of independent living.
 - vii) Problems with Cairo (the 4th Claimant and Joshua 's brother) may have been part of the reason why Joshua moved out of his family home.

- viii) There were no reports of overnight waking or care interventions and there could have been a managed reduction of the number of nights where a support worker stayed overnight after about 4 months.
 - ix) Ongoing support is required but should be assessed on a lower level than at present
 - x) The number of hours spent by the case manager has been excessive.
52. Consequently, Ms Crowther submits, the Defendant's opposition to the interim payment application is well-founded on the evidence. In short:
- i) 24 hour support worker attendance is not necessary.
 - ii) It is the presence of an overnight support worker which makes a 2 bedroom property necessary. Without that, a 1 bedroom property would be sufficient.
 - iii) In any case, the flat (in Fulham) is of unnecessarily high quality and is not particularly convenient either for his parents' home (in Wandsworth) or for his college (in East London).
 - iv) For these reasons, there are reasonable grounds for concluding that the costs of the support worker and accommodation could not be recovered as a matter of French law.
 - v) Credit would need to be given for the accommodation costs which have been saved.
 - vi) The Defendant does not accept that Joshua would have worked while a student and does not therefore accept that lost earnings should be included at this stage
 - vii) The Deputyship costs are excessive.
53. So far as non-pecuniary loss is concerned, as already indicated the date of consolidation is of first importance. It is too early to say when that will be, or what the 1st Claimant's position will be thereafter. Madame Witvoet considers a range within the Dintilhac tables as low as 10%. M. Ricard goes as high as 80%. It is a matter of speculation as to what the 1st Claimant's permanent disability will finally be. Ms Crowther comments that there is not a straight-line progression as the degree of disability increases. It is closer to a logarithmic effect.

Discussion

54. As the notes to the White Book say, it is not appropriate for an application for an interim payment to become a mini-trial. The evidence at this stage is incomplete. Mr Doherty was critical of the Defendant for not permitting Dr Jacobsen to review his earlier report (of March 2018) in the light of the more recent reports from Dr Gross, Dr Leng and Dr Parrett. There will, no doubt, come a time when the experts in the different fields will need to meet and to prepare a joint report identifying their areas of agreement and disagreement. However, that stage is not yet.

55. Ms Fraser's evidence at the moment is in the form of a letter exhibited to the witness statement of the Defendant's solicitor. That has the weaknesses and shortcomings which her formal report may not. However, as at the time of the hearing of the application for an interim payment before me, the time for service of the Defendant's expert evidence had not yet arrived.
56. What Dr Jacobson's report and Ms Fraser's letter do provide is some identification of the issues which separate the parties and which, unless the gap is closed, will need to be determined at the trial of quantum.
57. I have said above that, although the English and French tests for determining interim payments differ in their wording, in substance they are very similar. English law (which, I repeat, is what I am applying to matters of procedure including the determination of interim payments) requires a cautious approach. In my view that is particularly appropriate where the final award will be assessed according to French legal principles and taking appropriate assistance from the Dintilhac guidelines.
58. Even Ms Fraser accepts that the trial of independent living with 24 hour care was appropriate for the first 3-4 months. I will therefore assume that the cost of that is likely to be part of the final award.
59. It may well be that the Claimants are able to establish that a longer trial of independent living was a consequence of Joshua's accident in the sense that it was an appropriate aid to his rehabilitation (or, at least, partial rehabilitation), but I agree with Ms Crowther, that this is a matter for debate at trial. At the present stage, I cannot say with the necessary confidence that a period of a trial of independent living beyond 3-4 months would be likely to be included in the final award of damages.
60. The same point can be made as to whether the assistance of a 24 hour support worker for more than the initial 3-4 months is a proper head of damages. The medical evidence presently before me makes a powerful case as to why it is. But, I say again, the evidence is presently incomplete and the Claimants cannot turn the present application into the mini-trial which would be necessary for such an issue to be resolved.
61. I take a different view as to the Defendant's criticisms of the choice of flat and its location. A two bedroom flat was necessary for the first 3-4 months because the support worker and Joshua both needed a bedroom. The flat in Fulham is within reach of Joshua's parents, but not too close. It is some distance from Joshua's college, but that is accessible by public transport. So, too, is the nightclub which Joshua enjoys going to. That may seem a curious factor to take into account, but those treating Joshua emphasise the importance of him regaining his self-confidence and socialising with the help of a support worker or friends will aid that process. The location of the flat inevitably involves compromises. Ms Crowther accepted that it would not be open to the Defendant to resist this head of claim on the basis that a cheaper flat could have been found if the choice of flat by the Claimants was reasonable. I recognise that Ms Fraser said that the flat was of a higher quality than a student would normally expect, but the need for the flat arises, not because Joshua is a normal student: he is not; but because of the injuries he has suffered. Joshua's ataxia and other physical difficulties mean that it is important that he have a flat with reliable lifts. The Fulham flat has that.

62. Setting to one side the cost of the trial of independent living, there will be other elements of the final award which can and should be taken into account in deciding whether the interim payment now sought would exceed a reasonable proportion of the final likely award. The use which French law makes of the date of consolidation is a complication. But, as Mr Doherty submitted, it, like other procedural matters will be determined in the English manner. As *Wall v Poitiers Mutuelle* established, Rome 2 does not require our courts to have recourse to medico-legal experts, rather than the Court itself making a decision based on the evidence including such expert and other evidence as is adduced in the usual, English, manner
63. Ms Crowther accepted that Joshua had suffered a significant brain injury. Nonetheless, she argued, as must be right, that there can be a broad spectrum of long-term outcomes from such an injury. That would mean, in English terms that a cautious approach to the final figure for pain and suffering was appropriate. No less is required if a French model is adopted in contemplating likely recovery for losses before and after the date of consolidation.
64. The expression ‘reasonable proportion’ is not further elaborated in the Rules. In *Eeles v Cobham* (above at [43]) Smith LJ said that,
- ‘A “reasonable proportion” may well be a high proportion provided the assessment has been a conservative one. The objective is not to keep the Claimant out of his money but to avoid the risk of over-payment.’
65. There have been cases where an interim payment of 90% of the likely judgment has been ordered. See for instance *TTT v Hospital NHS Trust* [2011] EWHC 3917 (QB) Owen J. at [5]. Taking the sum now sought, together with the interim payments already made, I would have to consider that the likely award would be, at least, in the region of £660,000. Of course, in brain injury cases damages often run into millions. However, as I have explained, I must exclude that part of the final award which might be made in the form of a periodical payments order.

The figures

66. The parties’ respective positions were not entirely easy to follow. Mr Doherty had prepared a helpful table, setting out the Claimant’s position and what the position of the Defendant appeared to him to be. I have the Defendant’s preliminary counter-schedule dated 8th February 2019. However, in the course of her oral submission, I understood Ms Crowther to make some further concessions as to the basis on which I should approach the likely capital sum part of the damages.
67. At the hearing the parties agreed that I could work on a figure of 14,421 Euros for temporary functional disability.
68. A figure for permanent functional disability is hard to give at this stage. Since French law treats the date of consolidation as critical, since Joshua’s prognosis is still unclear and therefore since it cannot be said that the date of consolidation has yet been reached, the difficulties are particularly acute. I recognise, as Ms Crowther submitted that the severity of the initial brain injury does not necessarily enable a prediction to be made of his likely final condition. In my view, the right course in these circumstances is, as Ms Crowther submitted, to take a figure towards the bottom end of the likely scale. Ms

Witvoet goes as low as 10%. Given the scale of damage to Joshua, that seems unduly optimistic. I will adopt a figure of 20% which is still a conservative estimate of Joshua's likely permanent functional disability. The age at which Joshua will reach consolidation is also somewhat uncertain. Here, however, the exercise is made easier because there is in the Bareme Guidelines (another tool which I understand is commonly used in assessing damages in France) a band between 21 and 30 years of age at the date of consolidation. It is reasonable to assume for present purposes that Joshua will still be within this age bracket at the date of consolidation.

69. As I understand the evidence of M. Ricard the appropriate figure in the Bareme table (2,590) is then multiplied by the percentage degree of permanent functional disability (here 20%) which results in a figure of 51,800 Euros.
70. The Defendant argues that it is too soon to say whether there will be any permanent aesthetic damage to Joshua. That, too, seems unduly optimistic given the ataxia and visible walking problems from which Joshua at least presently suffers. While this may improve, it would seem that it is unlikely to do so to a greater extent than the middle of the 'moderate' band which would lead to compensation of 4,500 Euros.
71. Loss of amenity: I note that the Claimant's French law expert, M. Ricard says at paragraph 98 of his report.

'However, I must stress that the Claimant must bring evidence to support his claim, such as sport licenses, membership of association or witness evidence that he was actually practising on a regular basis those activities. Otherwise this loss is already compensated under the permanent functional disability head of loss. I must also point out that under French law, no compensation can be awarded solely on the basis of the Claimant's statement.'

I recognise that there is in this paragraph a blurring of the distinction between recoverable head of loss (to be determined by French law) and the mode of proof (a matter of English law). Nonetheless, there is substance in M. Ricard's warning that this separate head of loss is dependent on proof of loss over and above what is already compensated for by permanent functional disability (and, to some extent, temporary functional disability).

While, as M. Ricard also says, Joshua enjoyed kite surfing, skate boarding and skiing, I have not seen the evidence that would justify a separate award under this head over and above what the permanent functional disability award is intended to cover. Consequently, I agree with the Defendant that no separate amount should, at this stage be allowed for this possible head of damage.

72. On this basis, the total in Euros would be 70,721 Euros.
73. Ms Crowther was content for me to use Mr Doherty's conversion rate of £1 = 0.875Euros. so 75,221 Euros at this rate is equivalent to £61,880.88.
74. The Claimants submit that Joshua would have had to work while a student and that he would have worked part time for 38 weeks a year at the minimum wage. They claim that his past loss of earnings would therefore have been Euros 16,672 or £14,580.12. They rely on the statement of the 2nd Claimant for the proposition that Joshua would

have needed to contribute to his maintenance costs. The Defendant submits that there is no evidence that Joshua would have worked, at least while he was at university. An additional factor is whether, even if Joshua had wanted to work, he would have been able to find employment. In a university city such as Grenoble, there is an abundant supply of students wanting the same kind of part time work. I shall assume that, at trial, the Claimants would be able to recover half of this sum, i.e. £7,290.

75. Medical rehabilitation costs: I understood that Ms Crowther was content for me to assume that a conservative estimate would be in the region of £137,000.
76. Past care: The claim under this head is for the costs to December 2018, excluding the gratuitous care provided by Joshua's parents (and which are the subject of their separate claims). Since this would, broadly, cover the first 3-4 months of 24 hour support worker which Ms Fraser agreed was likely to be necessary, the Defendant accepted that this was likely to be recovered. The amount is £42,208.
77. Future care: Mr Doherty argues that this should be included up to the end of 2019. Based on the cost of providing 24 hour support worker support arranged through an agency (as has been done in the past, Ms Ongley-Deller considers that the cost would be £150,702. However, with support workers employed directly, the cost would come down to about £121, 000. For the reasons which I have already given, I agree with Ms Crowther that the recoverability of this head of loss is controversial. I cannot agree that the final capital sum is likely to include this amount and I will not include it for the purpose of calculating the likely final capital award. That said, Ms Crowther agreed that it would not be reasonable to include nothing for future care and an annual figure of £30,000 (after deducting 25% for gratuitous care) would not be disputed.
78. Ms Crowther argued that the case management costs (some £72,000 in total when past and future heads are added) were excessive and no more than £20,000 should be allowed. Mr Doherty submitted that the costs had been high because of the work involved in setting up the trial of independent living. He argues that the Deputy has considered the costs and believes them to be justified. Mr Doherty may be right, but the costs are quite high and it may be that they cannot all be justified at trial. I consider that £50,000 is an appropriate conservative estimate of this likely head of loss.
79. The past and future Deputyship costs total some £70,000. Mr Doherty argues that the past costs are the actual costs to 30 August 2018 and the projected costs are those through to the end of 2019. Ms Crowther argues that these are excessive, especially in view of Joshua's ability and capacity to undertake some activities and make some decisions on his own behalf. Ms Crowther submits that in total £37,500 should be allowed. Again, it seems to me that an appropriately conservative estimate lies between these figures and I shall assume £50,000.
80. For past accommodation costs approximately £36,000 is claimed. I have agreed that the choice of flat is likely to be accepted. I am not entirely clear how much of this represents the 3-4 months which the Defendant has accepted was a reasonable independent living trial with 24 hour support. I shall assume that it is one third or some £12,000. I am told that credit is already given for the costs of accommodation which would have been incurred in any event.

81. Credit would need to be given by the 1st Claimant for social security benefits. No CRU certificate has yet been obtained. Mr Doherty submitted that, in due course, it would be the Defendant's task to obtain a certificate. However, he accepted that approximately £20,000 should be allowed (by deduction) in this respect.
82. Taken together the figures which I have accepted total about £370,378. This is substantially below the figure of £660,000 which I have identified as necessary to be the likely capital sum of damages awarded to the 1st Claimant for the interim payment now sought, when added to the previous interim payments to be a reasonable proportion of that capital sum.

Conclusion

83. It follows that the present application for an interim payment in the amount sought is refused.