

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

Royal Courts of Justice
The Strand
London
WC2A 2LL
Wednesday, 20 April 2005

Before:

MR JUSTICE MITTING
B E T W E E N:

PETER GODBOLD

Claimant

- v -

RASHID MAHMOOD

Defendant

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**MR N HILLIER (instructed by Messrs Thompsons, Ilford) appeared on behalf of THE CLAIMANT
MR M KENT QC and MR J WOOD (instructed by Messrs Jacobs, London EC1) appeared on behalf
of THE RESPONDENT**

HTML VERSION OF JUDGMENT (AS APPROVED BY THE COURT)

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Mr Justice Mitting:

Introduction

1. The claimant was born on 9 October 1946 and is now 58. On 24 December 1998 he was struck and seriously injured while using a pedestrian crossing by a motor car driven by the first defendant. Liability is not in dispute. He sustained serious head and orthopaedic injuries for which general damages for pain, suffering and loss of amenity are agreed at £110,000. My task is to assess the major elements of future recurring costs and losses. The remaining heads of claim will either be agreed between the parties or determined by me in a separate judgment later today.

Heads of Loss

2. The heads of loss to be determined are, first, future lost earnings; second, care and accommodation costs; third, transport; fourth, the receiver's costs.

3. The injury with the greatest impact upon the claimant's life now and in the future is the head injury -- at least one depressed skull fracture, multiple facial fractures and an intracerebral haematoma. He developed epilepsy. The first fit occurred in February 2000. It is controlled by medication if he remembers or is prompted to remember to take it. He has an organic brain syndrome which has affected an already limited mental capacity. Before the accident Professor Beaumont estimates that he had a full scale IQ of 70 and performed at a level no higher, and possibly lower, than the low-average range, 80-89. It is the shared opinion of Professor Beaumont and Dr Halstrom, respectively clinical psychologist and psychiatrist, that he has "relatively mild deficits which occurred in a man already compromised", which have had a large impact upon him, placing him in the abnormal range for many functions. There is no likelihood of change in his mental condition beyond that produced by normal ageing. His principal difficulties are a poor memory (described by Professor Trimble, a consultant neurologist as "a dense amnesiac state") and de-motivation. The combined effect is that he requires round the clock supervision.
4. His most significant orthopaedic injuries were fractures of the neck of the left femur and at the proximal ends of the right tibia and fibula. The fractures to the right lower leg have united with 15 degree valgus deformity. The medial and posterior cruciate ligaments are lax. Degenerative changes in the right knee, possibly requiring a total knee replacement, will occur. The left hip is stiff. He sustained bilateral multiple rib fractures and pneumothoraces, which have caused a persistent breathlessness on activity - a condition exacerbated by his heavy smoking habit.
5. The consequence of this collection of conditions is that his mobility is restricted. He can walk unaided, but only slowly and for short distances at a time. He is totally incapable of work. One of the unhappy consequences of his injuries is that he has been deprived of the opportunity of returning to work -- a hope which sustained him through many months of treatment and rehabilitation, but which was finally dashed when he attempted it, unsuccessfully, in December 2001.

Future Loss of Earnings

6. The claimant worked full time as a road sweeper for the London Borough of Waltham Forest. All agree that work was an important activity for him which gave purpose to his life and which he greatly enjoyed. He worked long hours of overtime. His weekly earnings in the 39 weeks to 28 December 1999 averaged £314.07. Percentage increases have been awarded to employees on his grade in the years since the accident. All but the most recent are proved by documentary evidence provided by the London Borough of Waltham Forest. The most recent increase is claimed, conservatively in my judgment, at 3%. There is no real dispute about any of those figures. On that basis his current net earnings would be £20,692.45 per year. The defendants contend that this figure overstates the multiplicand because it assumes wrongly that the claimant would have continued to work overtime at the same rate until he retired at 65. I disagree. All that I have read and heard demonstrates that the claimant was dedicated to his work, hence the long hours of overtime worked. He does not appear to have had any pressing need for the extra pay. There is no evidence of ill-health, which would have prevented him from continuing to work at the same rate, or of a fall in demand for his work by his employers. His heavy smoking would not have impaired his working capacity before 65. I am satisfied that his pre-accident earnings are representative of what he would have achieved but for the accident and award him the sum claimed, calculated on the basis indicated by the multiplier claimed of 5.73. The resulting sum is £118,568.

Future Care and Accommodation

7. It is common ground that in the immediate future the claimant will continue to live with his elder sister Shirley Wraith, now 66, and her husband Mick Wraith, now 61. The claimant is a life-long bachelor and has lived with them since leaving his parents' home in about 1982. He has never performed household tasks, beyond helping with washing up. His life was work and socialising at the local pub on Friday nights and fishing.
8. On his discharge from hospital in September 1999 he returned to live with the Wraiths. They and they only were prepared to house and care for him. They had to cope with incontinence (now no longer a problem), memory loss, and, since February 2000, epileptic fits. They describe, plainly accurately, being "cooped up" with him in their home, a three-bedroomed flat, and finding this stressful. Neither is in good health. In July 2003 Mick Wraith had a stroke, which limited his mobility and the use of his left arm. Shirley Wraith broke her hip at least once and suffers from osteoporosis. The long-term ability of each to provide a home and the ordinary rudiments of living for the claimant are plainly in doubt.

9. The care provided for him by Mr and Mrs Wraith has been the subject of criticism by independent professionals who have responsibility for him. Mick Wraith is no longer the claimant's litigation friend because of concerns that he was not spending or accounting for money intended for the claimant's benefit as he should. A professional receiver and solicitor, Michael Sturton, was appointed by the Court of Protection in his stead. As best as he was able, he confirmed those suspicions. A car, provided for the claimant's benefit under the Motability Scheme, was used instead by Mich Wraith's daughter and son-in-law and more recently by a lodger. The flat is dirty and smoke-ridden. Until the employment of a support worker, Marcia Ferdinand, in May 2004, the claimant's clothing was old and shabby, and he had lost a worrying amount of weight.
10. Carolyn Archibold, his case manager since January 2002, and Tony Bonfield, manager of the Headway Centre, which he has attended twice a week since May 2002, believe that he is intimidated by the Wraiths. Marcia Ferdinand has said that she thinks he is frightened of them. She has witnessed one occasion when they shouted at and humiliated him. She is certainly unwilling to enter their home and arranges to meet the claimant at the threshold. There is an unproven suggestion that the claimant may have received a "slap" at the hands of Mick Wraith.
11. Despite all of that, I have the clear impression that the claimant does not wish to leave their home -- his home for the last 23 or so years. He is not a man who makes friends easily. When he does, he sticks to them. Marcia Ferdinand has proved a godsend. Carolyn Archibold, a sympathetic and shrewd judge of the situation, was surprised at how well she has got on. Marcia Ferdinand says that her relationship with the claimant is good. She takes him out four times a week now and has taken him fishing again, which he greatly enjoys. Understandably, Miss Archibold has not sought to discuss with him in detail what the future may hold. She has twice asked him, in June and August 2003, if he would like to live in his own flat supported by others. His response was that he had not considered this option, but would consider it. She told me in evidence that when she asked this question he became "animated", by which she meant he focused his attention on her. Ordinarily he displays no interest in questions from professionals.
12. Probably influenced by the Wraiths, who are wholeheartedly opposed to his leaving their home, he has given Angela Kerr (the case manager retained to advise and give evidence for the defendants) the firm impression that he would not leave to live on his own.
13. Despite all of the shortcomings in his present circumstances, I am satisfied that, unless compelled to do so, the claimant would not wish to leave his current home. It will be circumstances beyond the control of Mr and Mrs Wraith, let alone the claimant, which will force him to do so -- their ill-health, ageing, inability to care for him or the death of one of them. My task is not to decide objectively what is in his best interests, but to look at the circumstances which obtain or which are proposed by those with responsibility for him and to assess their reasonableness. No one proposes that he should be forcibly removed from his and the Wraiths' home yet. My task is therefore simply to estimate for how long current circumstances will last. The best estimate which I can make is that they will last for between three and six years. The width of this bracket is dictated by the many uncertainties which exist. The mid-point is four-and-a-half years, by which time Mick Wraith will be 65 and Shirley Wraith 69 (if each is still living), and the claimant will be 63.
14. The annual costs incurred during that time at current prices will be £35,035.33, made up as follows: family care, £1,661.66; a support worker, £14,944.99; a case manager, £7,772; Headway, £8,441.68; and transport, £2,710. All but the cost of the case manager and transport are agreed. There are two issues on the case manager's fees -- whether they should be for 72 hours, as claimed, or 60 hours, as claimed by the defendants, and whether they should carry VAT. I am satisfied that the claimant's case is unusually difficult for a case manager to supervise in the light of the circumstances which I have already outlined. I accept Miss Booth's figure in preference to that of Miss Kerr.
15. The claimant claims that an allowance should be made for the possibility that VAT will be charged on the case manager's fee. No VAT is charged now. The basis for the claim is that Her Majesty's Customs and Excise may change their approach to this question in the future. Cox J was persuaded to award 50% of the VAT which might be payable in *Mitchell v Alacia* [2005] EWHC 11 QB, paragraph 71, to reflect that chance. I do not accept that that is the right approach. The question is one of law. The law is to be applied as it stands today, unless prospectively repealed by primary or secondary legislation already passed.
16. Section 31 of the Value Added Tax Act 1994 provides that a supply of services is exempt if it falls within Schedule 9. Schedule 9, group 7, item 9 lists

"the supply by

(b)a state regulated private welfare agency of welfare services."

Note 6 defines "welfare services" as

"Services which are directly concerned with --

(a)the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly or disabled persons."

Note 8 defines "state regulated" as

"... registered by any minister or other authority pursuant to a provision of a public general Act."

17. Miss Archibold's employers, Arctic Case Management Limited, are an agency which is directly concerned in the provision of care and instruction designed to promote the mental welfare of elderly and disabled persons. Their letter heading says that they are "a service for people with acquired or traumatic brain injury". They define care packages and recruit and supervise support workers to implement them, hence their "direct concern" in the provision of care, etc. They are required to register as a "domiciliary care agency" as defined by section 4(3) of the Care Standards Act 2000, by section 11 of the Act. They satisfy the requirements of both note 6 and 8 and so fall within item 9 of group 7. They are VAT exempt. I therefore allow no VAT on their fee.
18. Transport costs were initially challenged, but Mr Kent QC now concedes that even if the far less satisfactory alternative of multiple taxi journeys were to be adopted, the cost would not be much different. I am satisfied that this is, and will continue to be, a reasonable requirement to help reduce the isolation into which the claimant might otherwise fall and to facilitate pleasurable activities such as fishing. I allow the item as claimed.
19. Mr Sturton estimates that ongoing receivership costs, including miscellaneous fees, an allowance for the preparation and revision of a statutory will and VAT during this period will be £14,959. The figure is significantly higher than average because of the difficulties he has experienced with the rates. This estimate is consistent with the receivership costs incurred to date and I am satisfied that it represents a fair estimate of the costs likely to be incurred during this period. The annual cost at current prices for the next four-and-a-half years is therefore £35,035, plus receivership costs of £14,959, a total of £49,994, which I round up to £50,000.
20. Mr Hillier for the claimant contends that, when he leaves the Wraiths, he will go into his own two-bedroomed flat and be afforded round-the-clock care by a care agency. This proposal resurfaced late in the day. It was canvassed as a possibility by Miss Booth in her report of 5 March 2004, but at a joint discussion between Miss Booth and Miss Kerr on 20 September 2004 it was agreed that residential care (ie residence in a care home) would be the appropriate long-term option. Miss Booth now feels that, given a choice, the claimant would opt for care in his own flat. She is concerned that he will feel isolated in a care home occupied mainly by the elderly. It is common ground that it would not be appropriate to care for the claimant in a home occupied principally by people of all ages with learning difficulties produced by, for example, Down's Syndrome or autism.
21. While I do not criticise Miss Booth for changing her mind, I do not share her revised opinion. The claimant has never lived as a wholly independent adult. He left his parents' home for the home of his elder sister. He has no useful domestic ability. He would require constant supervision. But even the best-organised agency service sometime breaks down. He would lack the ability to bridge the gap if, due to illness, accident or staff shortage, his agency carer were not to turn up. The cast of agency carers would be likely to be constantly changing. He would find it difficult to relate to new faces. I do not share Miss Booth's view that in a care home with staff and occupiers whose faces would soon become well known to the claimant, he would be more isolated than in his own flat in the circumstances which I have described. On the contrary, it is more likely that his experience at Headway, where he participates in and pays attention to what is going on (though not always directly) and enjoys it, according to Mr Bonfield, is more likely to be replicated. Further, and conclusively, it is wholly undesirable that he should move twice. Once he leaves the Wraiths it should, if possible, be to a home in which he will live for the rest of his life.

22. The claimant's preference, which should be met, is to live in Walthamstow. Miss Kerr's evidence suggests that there are a sufficient number of suitable homes in Walthamstow to meet his needs. For those reasons I do not accept that he will wish to live in an independent flat supported by agency carers, or if that were to be his expressed wish it would be reasonable to fulfil it, given the near certainty that the arrangements would from time to time break down with uncertain but potentially harmful consequences for him.
23. I am satisfied that when the claimant leaves the Wraiths' home it will be to a care home. The costs of a care home are agreed at current prices at £40,009 a year. From this must be deducted an estimate of board and lodging saved. This has been £360 a month (see paragraph 13 of Mr Sturton's witness statement). I see no reason to allow for a different figure now. The yearly figure is £4,320. The resulting annual sum is therefore £35,689 a year, subject to an argument of principle advanced by Mr Kent. He submits that the London Borough of Waltham Forest are obliged to, and will in fact, provide residential care for the claimant free of charge when he leaves the Wraiths.
24. The starting point is section 21 of the National Assistance Act 1948 which provides:

"(1) Subject to and in accordance with the provisions of this Act, a local authority may, with the approval of the Secretary of State and to such extent as he may direct shall, make arrangements for providing --

(a) residential accommodation for persons aged 18 or over who, by reason of age, illness, disability or any other circumstances, are in need of care and attention which is not otherwise available to them."

Section 21 accordingly affords a power to a local authority to make such arrangements, not a duty, unless the Secretary of State directs. Mr Kent was unable to trace the Secretary of State's direction. This is unsurprising as it is not given in secondary legislation but only in a Local Authority Circular No 10 of 1993, which is not published in the Encyclopedia of Local Government Law. He referred me instead to a passage in *Sowden v Lodge* [2005] 1 All ER 581, in which Pill LJ cited the National Assistance 1948 (Choice of Accommodation) Directions 1992. These directions concern the local authority's obligation to meet a person's preference for accommodation, provided that it satisfies local authority standards and requirements. It does not deal with the obligation to provide or to pay for accommodation in the first place.

25. By chance I heard a claim for judicial review in February 2005 in which the duty of a local authority to provide accommodation was in issue. I was referred to Local Authority Circular No 10 of 1993 which provides in Appendix 1, paragraph 2(1):

"The Secretary of State hereby

(b) directs local authorities to make arrangements under section 21(1)(a) of the Act in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof to provide residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstance are in need of care and attention not otherwise available to them."

The Secretary of State has, therefore, made a direction under section 21(1)(a) of the 1948 Act. He has also issued guidance under section 7(1) of the Social Services Act 1970. He has not as far as I know issued any directions under section 7A of the same Act. Mr Kent refers to those guidelines. The guidance can be summarised as follows. Councils must assess needs and promote them (paragraph 3). To enable them to do so they should establish eligibility criteria. Proposed criteria from critical to low are set out in paragraph 16. Paragraphs 18 and 19 advise that councils should take account of their resources year by year in setting eligibility criteria. Once eligible needs have been assessed they should be met (paragraph 43). Mr Kent submits that the London Borough of Waltham Forest is bound to accept that the claimant is in critical need and so meet that need by the provision of accommodation in a care home for him.

26. I do not share that view for the following reasons. First, the London Borough of Waltham Forest's eligibility criteria are unknown. Though in theory they should be published (see paragraph 20 of the guidance), no copy has been produced to me and Miss Booth and Miss Kerr have been unable to obtain one. Secondly, there is no evidence of the London Borough of Waltham Forest's resources now

or in the future relevant to the setting of its criteria. Thirdly, there is no factual evidence of how and to what extent the London Borough of Waltham Forest discharges its statutory duty. I do not regard Miss Kerr's "gut feeling" or "confidence" that it would do so by providing or funding accommodation for the claimant as reliable or expert evidence. Fourthly, local authorities have shown some reluctance to fulfil that duty in cases in the Administrative Court. For example, in *Hughes v Liverpool City Council* [2005] EWHC 428, in what seemed to me a plain case the local authority submitted that no duty under section 21 arose. As I understand the position, an application for permission to appeal my judgment, which I refused, is pending in the Court of Appeal. Fifthly, even if the London Borough of Waltham Forest did accept an obligation to provide accommodation, it is wholly unclear whether such accommodation would be acceptable to the claimant; or if he were unable to make an informed and rational decision to those responsible for his care. If it was the impact of regulation 3 of the National Assistance Act 1948, (Choice of Accommodation) Directions 1992, cited in *Sowden v Lodge* at paragraph 8, would have to be considered. There is no evidence as to the type of accommodation which would be considered by the London Borough of Waltham Forest to be suitable, nor as to the amount "they would usually expect to pay". Further, I have no confidence that the duty currently imposed by ministerial direction will exist at a time relevant to this claimant's needs. The duty is imposed not by primary legislation or even by secondary legislation, but by a combination of primary legislation and ministerial direction. The ministerial direction can be changed or withdrawn at any time without recourse to Parliament. It is notorious that the burden of providing for the elderly and disabled, which since 1990 has fallen on local authorities, has increased and is increasing. It is not beyond question that local authorities will persuade a future Secretary of State that the burden is insupportable and should be modified, reduced or even in certain circumstances withdrawn.

27. I follow the approach set out by Pill LJ in *Sowden v Lodge* at paragraphs 62-63:

"62. In written submissions on behalf of the defendant reliance was sought to be placed on the absence of proper evidence before the court as to how the local authority would in fact discharge its statutory duty of providing 24 hour care. That absence does not assist the defendant. The judge must reach a conclusion on the evidence before him, drawing inferences where appropriate. That is what the judge did and I see no fault in the way in which he did it. The defendant did not call evidence of what the local authority would have or would be likely to have provided evidence which might -- I put it no higher than undermine the claimant's case.

63. While claimants and those advising them must be expected to co-operate with local authorities discharging their statutory duties, they claim in the action that to which they believe the claimant is entitled and there is no legal burden on them, first, to disprove the statutory provision will be adequate. It may of course be prudent to call evidence as in any situation where a judgment upon the facts is to be made as to why statutory provision is inadequate."

The defendants have failed, in my view, to discharge the burden which is on them of showing that the option proposed by those who advise the claimant, a privately funded care home, is unreasonable. I therefore award its estimated cost.

28. For the sake of completeness, I add that if I had been persuaded that local authority funded accommodation was the appropriate method of meeting this aspect of the claimant's needs, I am satisfied that it would be provided at no cost to the claimant. This is the result of the combined effect of Regulation 16(5) and Schedule 3, paragraph 10(3) of the National Assistance (Assessment of Resources) Regulations 1992, as inserted by the National Assistance (Assessment of Resources) (Amendment No 2, England) Regulations 2002.
29. Two subsidiary issues remain. First, in relation to the number of hours of case management required, I am satisfied that once the claimant is settled in a care home they will fall from 72 to no more than the 60 conceded by the defendants. Case management costs during this period are therefore £6,408 a year, excluding VAT for reasons set out above.
30. Secondly, in relation to Headway, Miss Archibold considers that twice-weekly trips to the Headway Centre will remain a desirable feature of the claimant's care regime. The object of the centre is to rehabilitate people with brain injuries. I am satisfied from paragraph 7 of the claimant's draft, unsigned witness statement that the claimant enjoys his visits there. Miss Archibold considers that he needs the support and limited social interaction which he enjoys there and will continue to do so when he leaves the Wraiths. I accept her evidence and consider that continue visits to Headway after the claimant has

taken up residence in a care home are a necessary and reasonable element of his care regime. The annual cost is £8,441.68.

31. The receivers' fees during this period are agreed at £7,709, including VAT. Transport costs will be £2,710. Annual expenditure on these items during this period will therefore be £60,957, made up as follows: (1) the cost of accommodation and a support worker, less board and lodging saved, £35,689; (2) case manager, £6,408; (3) Headway, £8,441; (4) transport, £2,710; (5) receivers' costs, £7,709. I round this sum up to £61,000.
32. Since 4 April 2005, section 2(1)(b) of the Damages Act 1996 requires a court awarding damages for future pecuniary loss to consider whether to order that the damages should, wholly or partly, take the form of periodical payments. Section 2(3) prohibits a court from doing so unless satisfied that the continuity of payment under the order is reasonably secure. Continuity of payment is reasonably secure if it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000, as modified by section 4 of the Damages Act 1996, itself inserted by section 101 of the Courts' Act 2003 (see section 2(4)(b) of the amended Damages Act). As thus modified, section 213 protects periodical payments ordered to be paid under section 2(1)(a) as to 100 per cent of the payments ordered. I am therefore satisfied that continuity of payment would be reasonably secure.
33. I am required by CPR Part 41.6 to indicate to the parties that I consider that a periodical payments order for recurring care and related costs should be made, but that damages for future lost earnings should be awarded as a lump sum. I have done so and neither counsel has indicated any opposition to those suggestions. I am satisfied that a periodical payments order for recurring costs best meets the claimant's needs, having regard to the factors set out in paragraph of the Practice Direction PD41B.
34. The factors which have influenced me in favour of making a periodical payments order are: first, uncertainty as to the claimant's life expectancy. It is common ground that his life expectancy is reduced by his heavy smoking habit and by epilepsy, but the extent of the reduction is not agreed. It is in any event unknowable. A periodical payments order eliminates uncertainty and so the risk of unfairness either to the claimant or to the defendant. Secondly, Mr Sturton's preference for a periodical payments order because it is easier to match expense to income and because the income stream is secure and not dependent on investment returns. I share his view. Pursuant to section 2(8) the periodical payments order will be indexed with annual rests on 1 April of each year by reference to the increase in the retail price index in the twelve months preceding the previous January.
35. As far as future lost earnings are concerned, uncertainties are within a very small compass and are fairly accommodated within the conventional multiplier-multiplicand approach. Further, this element of the award, if awarded as a lump sum, will provide a substantial cushion against unexpected future events and expenditure.
36. Damages for the chance that the claimant will require a knee replacement operation should also be dealt with by a conventional lump sum. There is no practical means of accommodating this small head of loss within a periodical payments order.
37. Subject to errors and omissions, that I think deals with the matters which you asked me to determine in the first instance.

(The followed a discussion as to the remaining issues)