Neutral Citation Number: [2021] EWHC 806 (QB)

Claim No. D90MA338

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 31st March 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

SGJJ **(A child by his mother an litigation friend, SGCH)**	**Claimant**
- and -	
UNIVERSITY HOSPITALS OF DERBY AND BURTON NHS FOUNDATION TRUST	**Defendant**

- -
- -

Darryl Allen QC (instructed by Fieldfisher) for the **Claimant**
Richard Booth QC (instructed by Browne Jacobson) for the **Defendant**

Hearing date: 31.3.21

Judgment as delivered in open court at the hearing

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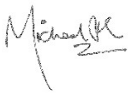
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

1. The purpose of today's hearing is for me to consider whether the proposed settlement of the damages claim in this case is in the best interests of the person who I will call "the Claimant". The Claimant is a protected party. He brings these proceedings by his mother – who I will call "mum" – who is also his litigation friend; "dad" is also present at this morning's hearing. A Deputy has been appointed. An anonymity order was made in this case on 18 December 2017. No challenge has been made today to the continuation of that order and I am satisfied, having regard to the principles in X v Dartford and Gravesham NHS Trust [2015] 1 WLR 3647, that anonymity is and remains necessary. That does mean I will be describing people using impersonal labels (like "the Claimant", "mum" and "dad"), to ensure watertight protection. The mode of hearing was a remote hearing by MS Teams, which I am satisfied was necessary and justified during the pandemic. By having a remote hearing we eliminated any risk to any person, whether associated with the parties or a member of the press or public, in having to travel to a court room or be present in a court room. The open justice principle was secured by publication of this case and its start time in the cause list, together with an email address usable by any member of the press of public wishing to observe the hearing.

2. It is not necessary for me to go into a lot of detail. The Claimant is aged 11. He sustained brain injuries at birth in circumstances where no senior obstetric review was sought, that failure being one which the defendant Trust accepts was negligent. The case advanced for the Claimant, in proceedings commenced on 24 November 2017, was that he should have been delivered 2 or 2½ hours earlier than the emergency caesarean which was in due course conducted, which negligent management of his birth led to acute profound asphyxia due to delayed delivery. The Claimant suffered a devastating brain injury. He suffers from quadriplegic cerebral palsy. He cannot sit or stand independently. He is doubly incontinent and has no speech or non-verbal communication. He has severe cortical visual impairment and bilateral hearing impairment. He is fed both orally and via a gastrostomy. He suffers from severe cognitive impairment, has profound and multiple learning difficulties and suffers from epilepsy. He has a significantly reduced life expectancy. Mum's evidence tells me that the Claimant is able to lift his head, something which I can see right now as I look at him, but remains unable to roll from back to front although he could roll onto his side from his back until he had spinal surgery in 2018. He is wheelchair dependent. It is dependent on others for all of his needs and requires care throughout the day and night.

3. On 18 December 2017 this Court declined to approve a settlement at that stage put forward by the parties for approval, the Court considering that it was appropriate in this case that there be expert quantum evidence. After a mediation in February 2019 by order dated 15 March 2019 O'Farrell J approved a settlement dealing with liability and causation. The complications as to causation in the case related to disputes about the extent to which the Claimant's injuries were caused or materially contributed to by the delay in delivery. The March 2019 order was that: "Judgment be entered on the part of the Claimant for 67.5% of his damages to be assessed, such damages to be assessed by comparison of the Claimant in his present condition with the condition in which he would have been had he not sustained brain injury and remained neurologically intact and developing normally".

4. Following a joint settlement meeting in February 2021 the parties have reached a settlement in relation to quantum, approached on the basis set out in the March 2019 order of O'Farrell J, subject to the approval of this Court. What is proposed is that there should be a lump sum award and periodical payments.

5. The lump sum involves a transfer of £3,161,649 to the Claimant's deputyship account and handled by the Deputy as a fund of a protected beneficiary and as the Deputy in their discretion shall think fit. That sum is arrived at based on an agreed settlement of £3.7m but with deductions, which are as follows. A sum of £400,000 reflecting interim payments already made by the defendant; a sum of £22,463 compensation recovery unit reflecting payment made by the defendant to the DWP. There is also a sum of £115,888 in respect of damages held in trust for the Claimant's parents in respect of past gratuitous care. That sum also falls within the £3.7 million agreed settlement . It is to be paid separately to the claimant's solicitors Those four figures combined add up to £3.7m which was the settlement agreed between the parties.

6. The periodical payments in respect of future care and case management are dealt with in a schedule. First, there is a sum (described by Mr Allen QC as a "bridging payment") of £172,500 which is to be included within the transfer of £3,161,649 (again, as was agreed in the settlement). I raised some questions with both Counsel as to whether the order could more clearly spell out the interrelationship between the bridging payment and the lump sum payment, particularly in circumstances where the draft order uses the language of "retained lump sum". They have jointly persuaded me that it is not necessary and would not be appropriate for this Court to seek to enhance the clarity of what I am told is a model order used in hundreds if not thousands of cases and long since approved by very experienced judges in this field. In any event I have explained in this ruling the way in which the figures fit together and if any party considers that there is any error or lack of clarity on what I have said they will be able to invite a correction on having received this judgment in written form as a draft.

7. There is then the set of ongoing periodical payments detailed in Part 2 of the schedule. They are the sum of £172,500 payable annually from 15 December 2021, changing to an annual sum of £202,500 from 15 December 2028 for the rest of the Claimant's life. All of those ongoing December payments are to be indexed under the well-known ASHE-6115 formula.

8. I have had the benefit of reading the confidential Approval Opinion of Darryl Allen QC which sets out the reasons why the Claimant's legal team consider that a settlement in this form and in these figures is in his best interests. I have also read a report on the structure of the settlement by a financial planner Richard Cropper. Having considered those materials, together with the other documents in the case, to which I have been referred, I agree that this is a sensible settlement from the Claimant's point of view. I am happy to give my approval to the settlement and make an order in the form proposed.

9. Mr Allen QC, very properly, raised with the Court the question of whether it was appropriate to omit from the Order the bank account details for the account of the Deputy. His concern was as to the risks which can arise from financial details being set out in an Order of the Court which is a publicly available document. He also drew attention to the other information which might be available through the general right of access to the court file. The concern he raised was as to whether there was a

financial risk that financial information could be used for nefarious purposes putting the financial position of the Deputy, and possibly therefore of the Claimant, at risk. In my judgment there is in before the Court no sufficiently strong basis for concern for me to modify what is a model order, used habitually in cases such as the present, designed to provide certainty and clarity, in circumstances where the Deputy account details are one input expressly envisaged by the model order. There are no circumstances particular to the present case that would justify taking a special course. Nor, in my judgment, is it necessary or proper or appropriate to make any order or direction restricting access to this order. The point was properly raised and it may be that one which is worthy of general consideration in another forum. But I see no basis to disturb the well-established practice, which exists for good reason, remembering that it is the account of the Deputy which is detailed in the order.

10. One point which I raised with the parties is whether I should formally record in a recital that I am satisfied that the ASHE-6115 formula constitutes a modification of section 2(8) of the Damages Act 1996. Mr Booth QC resists any such recital on the following basis. This is a model order used in hundreds if not thousands of cases having been judicially approved and which is found within the online White Book. There has been no consultation on changing the model order; certainty is necessary; judges should not interfere by inserting their own preferred clauses or recitals and to do so would stand to open the door for other judges making other changes or hearing other arguments. No recital is necessary since the position is obvious and I should leave the order well alone. It is obvious that the court is ordering "otherwise" (CPR 41.8(1)(d)) and exercising the power in section 2(9) and, even if interpreted strictly a recital were justified, the terms of the order in fact still suffice.

11. I confess I would have preferred to include a recital "AND UPON the Court further considering it appropriate in this case, for the avoidance of any doubt, to record that the Ashe 6115-linked 'indexation' mechanism in the schedule to this order operates to disapply section 2(8) of the Damages Act 1996 pursuant to section 2(9)". However, the point made by Mr Booth QC by reference to CPR 41.8(1)(d) has persuaded me that ordering "otherwise" – as the model order clearly does – is of itself sufficient. I am able to leave it there, particularly given that I have now been able to explain the point.

12. Mr Allen QC has today paid a public tribute to the Claimant, to mum, and to dad. He reminds the Court that he is today the Claimant's voice, poignantly in a case in which the Claimant is not able to speak to him, or to me, or even to mum, or to dad. Mr Allen QC has acknowledged the huge, love and devotion and care which mum, and dad, have shown the Claimant I will continue to show him; the love and care and support that the claimant has, from both of his parents, and from the extended families. As Mr Allen QC puts it, the settlement today sets the foundations for mum, and dad, to be able to secure safe care, the right therapies the right environment and the right equipment, and the best quality-of-life for the claimant that this money can deliver.

13. Mr Booth QC on behalf of the defendant Trust has repeated publicly at this hearing the apology conveyed already to mum and to dad in letters written by the Trust. Through Mr Booth QC, the Trust has apologised wholeheartedly and unreservedly to the Claimant and to his parents, for the failings in this case. The Trust, through Mr

Booth QC, has paid its own tribute to the amazing and unstinting care and devotion which mum, and dad, and the families have all shown.

14. I am now able to add my voice to theirs. What this approved settlement will do is to enable the Claimant to enjoy his life with his family members around – at both of the locations where he spends time – cared for in safety and with access to what he needs by way of accommodation, equipment, transport and holidays. Everybody in this case recognises, as do I, the shortfall in compensation dictated by the Court-approved liability compromise. I have read in the papers about the love and devotion shown by mum and dad, and their families. I have read in the papers about the Claimant. He is a very happy, loving and sociable eleven year old. Here are some of the things that he loves: family; mum and dad; brothers and sisters; the outdoors; cuddles; going for walks; moving his fingers through the dog's fur; the cat who sleeps on his bed; going to concerts (and we will all look forward to the days ahead when he is able to resume doing that); painting; the hot tub; the hot sunshine; his lightbox; yoghurt and his iPad. I am happy to be able to approve the settlement as being in his best interests. Finally, I feel confident that I can now speak for him in thanking his mum, and dad, his brothers and his sisters, and his team of supporters, lawyers and experts. I wish him well.

31.3.21