

SERIOUS PERSONAL INJURY LITIGATION

- A QUANTUM UPDATE

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Abstract

Arguments concerning the indexation of periodical payments orders triggered many more cases than usual being tried out on numerous heads of damage. Further cases have followed after the issue of indexation was decided.

James Rowley QC brings together the judgments so that trends in awards in the most serious litigation can be identified.

We are now bombarded with case reports by email and over the Internet². 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 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.

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 tables³. Just reading the tables and seeing the cases summarized alongside each other goes a long way towards achieving my aim. In this commentary, consideration of [1] *Crofton*/local authority and [2] periodical payments points is left out

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² Major PI quantum decisions reported by Lawtel up to 27 October 2010 have been taken into account when writing this update. Not all cases are necessarily referred to on all points, however, by reason of lack of space.

³ Cases referred to first of all without their reference will be found in the tables, where the case references appear if they have been allotted.

account: if they were to be included, this paper would be so widened as to require a small book.

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 endorsement or opposition, concentrating on points of principle or at least relatively hard-edged points. Occasionally, where there is an interesting issue, I may hazard an alternative argument as a *suggestion* (and not a concluded view.)

Non-commercial care

Care while still in hospital

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.] Following these decisions, Underhill J in *Huntley v Simmons* disallowed the claim for non-commercial care comprising hours of visiting in hospital at [65]. As to the submission that the family were at the bedside because of concern that the Claimant might pull out his tubes when unattended (as happened once after he came out of a coma), he found (footnote to [65]) that he could not on that evidence alone justify awarding the costs of their attendance as, in effect, a precaution against negligence on the part of hospital.

Non-commercial rate – aggregate or basic?

The PNBA *Facts & Figures* 2007/8⁴ was 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 [p286-7 in the 2009/10 edition] may, however, be contentious when taken in conjunction with the *carer rates* commentary at paragraph 14 [p288.] 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.

⁴ Unfortunately, the 2008/9, 2009/10 and even 2010/11 editions have repeated the same text.

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.

As to the appropriate non-commercial rate 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.

In *C v Dixon* the Defendant did take the point about a discount from non-commercial care in the future and 25% was deducted by King J at [74]. The contingencies for commercial care were already catered for in the detailed approach on the facts; so there is no conflict with *Willbye* *ibid*.

Returning to aggregate or basic rates, Sir Rodger Bell in *Iqbal* 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.

The leading 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]

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 generally allowed only the basic rate. 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.

In *Noble* Field J distinguished *Massey* on the basis that the case before him was less severe and allowed only the basic rate [77.] It was, nevertheless, a serious case.

In *Crofts*, HH Judge Collender QC allowed £8 an hour for the non-commercial care in the immediate period prior to trial (1.01.07-4.07.08 - cf £8.68 as the aggregate rate and £6.62 as the basic rate from April 2007.) The case involved a very demanding, one-armed, brain-injured Claimant; and the award was in respect of the high quality care from his wife. A discount of 25% was applied for the non-commercial element in the past. £8 an hour was also the allowed figure in respect of future non-commercial care, which he found would have to diminish with stepped increases in commercial care over time [124.] No non-commercial discount is articulated in the judgment for the future.

In *Smith v East & North Hertfordshire Hospitals NHS Trust*, Penry-Davey J awarded the aggregate rate with a 25% non-commercial discount. This was a serious case of autistic spectrum disorder with severe learning difficulties, no expressive communication, night incontinence, temper and impulsivity in a child.

Thus, the seeds sown by Teare J in *Massey* have germinated and are taking root in really serious cases.

Carer's Allowance – deductibility?

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 – 58 weeks+

The courts alighted pretty heavily in 2006-7 on a 58 week notional year⁵ 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.

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

Earnings related national insurance contributions [ERNIC] by the employer have to be added on to the total figures once calculated as do *add on* costs.

Expert reports seldom condescended to how the ERNIC element is calculated; but this is changing. 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 [£5,715 pa – no movement for tax year 2010/11.] 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 limit⁶. So, if there are 8 full time workers in a £200,000 p.a. package, there will be 8 x £5,715 primary thresholds available (£45,720) upon which NI contributions

⁵ The commentary in *Facts & Figures* has become stuck here, again without updating, in all later editions.

⁶ This rate applies if *contracted in*. See tax tables for the full position.

will not be payable, leaving 12.8% on the balance (£154,280) or £19,748 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

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*.

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 later 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.

59 weeks+

The regulations governing statutory holiday pay changed on 1 April 2008⁷, increasing entitlement by 0.8 of a week; and the fight for the 59 week solution was renewed. In *A v Ponys* 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* 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: [91] – [92.] Penry-Davy J allowed 59 weeks in *Smith* with the following findings without reference to the new Regulations on holiday pay [emphasis added]:

As to (3), the issue as to whether calculation should be based on 58 or 59 weeks, Ms Slawson's view of 3 days for training and team meetings was based on the standard ICCM package but did not include on the job supernumerary training, which would still have to be paid for. Mrs Sargent's view that the appropriate figure was 7 days was **based on her experience and on the specific specialist nature of the care required by**

⁷ SI 2007 No. 2079 The Working Time (Amendment) Regulations 2007

the Claimant. Her view that the appropriate figure for paid sick leave was 6 days, again **based on her experience**, was that that number of days was **necessary as an incentive for staff retention**. Ms Slawson's view that 3 days was appropriate was based upon the standard ICCM approach. In my judgment Mrs Sargent's approach was reasonable and appropriate and **for the reasons she gave** I conclude that 59 weeks is the appropriate number of weeks per annum to form the basis of calculation of the figures.

Thus, in the serious case where detailed training and staff retention are particularly important, the *59 weeks* point won the day without recourse to the increased holiday entitlement.

60 weeks+

More recently in *XXX v A Strategic Health Authority*, the claim for 60 weeks with add on costs and ERNIC was allowed. The change introduced on 1 April 2008 was only phase 1 of an overall increase of 1.6 weeks from the original 4 weeks entitlement; the second increase of 0.8 of a week was to start on 1 April 2009. Jack J found as follows at [24]:

I am satisfied that, if training time is now included – as it is now agreed on the claimant's behalf that it should be, it is appropriate to calculate the annual cost of care on the basis of a 60 week year to take account of the time when they are entitled to be paid but will not be actually caring for the claimant. In previous cases either 58 or 59 weeks have been used. On 1 April 2009 the statutory entitlement to holiday pay will increase from 4.8 weeks to 5.6 weeks. It had previously been 4 weeks.

Thus, the point has most recently come to revolve not around training and retention but holiday pay. And this is where the debate currently rests, the earlier 58 week cases distinguished logically by the increase in statutory holidays (1.6 weeks when fully implemented) and rounded up by 0.4 of a week (probably for better training standards.) Without undermining the logic of the original cases at 58 weeks, change of circumstance now leaves us inexorably with a 60 weeks+ solution⁸.

Add on costs

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 - 60 weeks + ERNIC, except in the case of *Burton*.

⁸ The case of *C v Dixon* was heard before *XXX* but judgment delivered after it. The 60 week point was not taken by the Claimant.

Employer's compulsory pension contributions

In XXX the Claimant argued that the Pensions Bill 2006 envisaged the introduction by 2012 of compulsory contributions from employers into new *personal account* pension schemes for employees, which will run alongside the current inadequate system of State pension provision. Jack J, finding for the Claimant contending for the additional cost of this contribution, said only the following about this issue at [39]:

The claimant's father introduced this claim on the basis that it was proper for an employer to contribute to pensions for his employees and that it would make a position with the claimant more attractive. The case is on firmer ground in its reliance on the Pensions Bill and the compulsory contributions which it will require from 2012 if it becomes law. There is no reason to think that it will not: I was told that it had secured the approval of the House of Lords. The probability is clearly that contributions of 3% of pay within limits as set out in the Bill will be required. The award should accordingly provide for this.

Jack J was evidently correct when he considered that the proposals were likely to pass into law: the Pensions Act 2008 received Royal Assent on 26 November 2008. The latest information on implementation at the time of writing is at <http://www.nestpensions.org.uk/employers.aspx> and linked pages. The scheme will be known as the National Employment Savings Trust [NEST] and will cover workers from the age of 22. Employers are likely to be able to enroll employees from the spring of 2011 (and it might be an attractive way to enroll good candidates if recruiting next year to offer a pension.) The main duties will apply from October 2012; but there is still said to be a staged introduction of the duties depending on the size of the employer⁹, the detail of which is unclear. Once the duties have bitten on an employer, the full impact of the contributions is also to be will be phased (for those who join in the early stages at least.)

⁹ "The date when the new legal duties apply to your organisation will depend on the size of your largest PAYE scheme, with the largest employers affected first. This process is known as staging."

	Minimum percentage of qualifying earnings that must be paid in total	Minimum percentage of qualifying earnings that employers must pay
October 2012 to September 2016	2%	1%
October 2016 to September 2017	5%	2%
October 2017 onwards	8%	3%

It is speculation but, assuming that employers in domiciliary care packages are among the smallest group, relevant implementation for our purposes could well be as follows: 1% October 2015; 2% October 2016; 3% October 2017. Contributions are payable between the threshold of £5,035 pa (at 2006/7 levels) and the ceiling of £33,540 (again at 2006/7 levels.) The values will be updated in 2012 when the scheme is implemented; but they were set at the equivalent of the primary threshold and upper earnings limit for ERNIC calculations in 2006/7, which are now (2010/11) £5,715 pa and £43,875 pa respectively. Thus, we have a framework identical to that for the calculation of ERNIC – see above – as long as no individual worker is to earn more than £43,875 pa: and the 12.8% rate for ERNIC contributions can be bumped up to 15.8% in the one calculation to include the additional pension contributions after October 2017. In order to simplify calculations of special damages, a reasonable approximation would be to stick to 12.8% for ERNIC alone October 2016, when charge from then on (in one step in the middle year of staged implementation as an average) 15.8% for combined ERNIC and pension contributions.

Hourly rates

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.

The lowest rates in the table were in *Massey* (location unclear and there had been difficulty in recruiting at the rates which were based on those 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 *waking* night care. Certainly, looking at the table of awards, this case is the odd one out.

The next lowest rates (*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.

For, as Sir Rodger Bell found in *Iqbal* (towards the higher end of the cases, but perhaps becoming the norm as one looks to the right side of the table and the more recent 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 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.

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 in the final sentence of the quotation from *Iqbal* that the rates were reasonable. 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.

In *Crofts*, Mrs Johnson (Claimant) and Ms Palmer (Defendant) agreed £12 an hour in Hertfordshire. The judgment is not explicit but it looks to have been a composite rate to apply to all days of the year, daytime and evening. The calculation [124] in the long term future [taking *14 hours a day for 7 days a week – total annual care 5096 hours*] shows that only 52 weeks in the year were being allowed at the £12 an hour flat rate. The experts appear to have presented calculations in a rather different format from the now common 58-60 weeks+ solution; or the Judge approached matters in his own way.

In *Smith* (and in Hertfordshire again), Penry-Davey J allowed £10 and £12 an hour (weekday/weekend.)

In the more recent case of *XXX*, Jack J had to decide the reasonable hourly rates in Guildford, acknowledged to be an expensive area in respect of recruitment. The requirement for care was described as being of the following order [13]:

It was emphasised on the claimant's behalf that he will need a high quality of carer, in particular because of combination of his physical disability and his mental ability. He will need people who are thoughtful, sensitive and stimulating in addition to being able to provide physical care. It was emphasised that because of the needs which his mental ability gives rise to looking after him will be far more challenging than with a person who has little mental ability. I accept that the work will also be for that reason the more interesting.

The Claimant suggested £12/£14 an hour and provided apparently general supporting evidence from care providers/case managers in the area, including Mrs Sargent and Associates (she was not the expert witness in the case.) The Defendants countered with £10/£12 an hour and little evidence in response other than by reference to some local agency rates (when the care package was to be directly employed.) Jack J had this to say at [16]:

I have not found this evidence satisfactory. I would like to have had some specific examples of who was being paid what for doing what in the Guildford area. But my job is to make a decision on the basis of the evidence that has been adduced. The complete evidence suggests that there is a wide range in the pay of carers. In this context the difference between the parties is not large even though when it is multiplied up over years it becomes significant. The figures provided on behalf of the claimant relate to what two case management providers are actually having to pay, and they are the same. They are supported by Mr. Young. Mr. Pace has made an estimate based on agency pay. In these circumstances I should accept the former as the better guide to what it will be necessary to pay to obtain appropriate carers for the claimant.

As in all matters requiring close decision in this sphere, a little bit of evidence goes a long way. £12/£14 an hour, based on general evidence which was better than nothing, won the day in Guildford in late 2008.

By way of contrast with the position in *Iqbal*, King J in *C v Dixon* at [90]–[93] found that the hourly rates paid in the historical package (Barnsley) had been allowed to run away with themselves. Having started at £7/£7.50 an hour, they were increased to £9/£10 an hour in February 2004; to £11.50/£13.50 (a 28% increase in one go) in May 2005 and then £11.80/£13.85 in April 2006. The Claimant was found *not* to be in need of the *most experienced support workers*. King J said at [90]

I accept the Defendant's submissions that there has been no evidence justifying the increases in February 2004 or May 2005 or the present rates by reference to any market testing/advertising or evidence of the support workers requiring such rates on threat of leaving and no evidence explaining how any of the hourly rates have been arrived at by JSP.

The award for future care (past care having been agreed) was pulled back to £10 /£11 an hour for weekdays/weekends.

Future parental contributions to the care package

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 way of looking at things.

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. And, 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.

Sir Rodger Bell considered this topic in *Iqbal*, in a passage beginning at [15] which is too lengthy to reproduce here but worth reading. He acknowledged that the approach embodied in earlier cases

(along the lines of that in *Lewis*) 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 formal care duties 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.

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.

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.

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.

Lloyd Jones J in *A v Ponnys* 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.)

HHJ Collender QC in *Crofts* quoted from *Iqbal* and *Massey* at [120] to the effect that a family member is not obliged to carry on as carer or case manager in the future. The rate he allowed for future non-commercial care was the same as the pre-trial rate - £8 an hour – but without non-commercial discount.

Returning to *Lewis*, HH Judge MacDuff QC had rather different evidence, or at any rate a very different feel for the case – see [214] in respect of the adult package, where he speculated that, even

though he would award damages for future commercial care, the parents would still be major planks in the provision in later life.

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 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 relative 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

2006/7 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. Only in the later partial tetraplegia case of *Davies* was the *residential carer* an appropriate option, and only for a short period of time – between the ages of 70 and 75.

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.]

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.

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.]

The only recent reported big case in which a *resident carer* figures as part of the decided solution is that of *Davies*.

***Davies* – some physical risk outweighed by benefits of self-reliance and an active life**

The Claimant was a partial tetraplegic. The resident carer package already installed was rejected by Wilkie J as being unreasonable for the immediate future – the Claimant was aged 63 and it was reasonable for her to live with a lesser package until aged 70. A resident carer was the reasonable solution, however, to the need for care with aging and deterioration between the ages of 70 and 75, after which double up care would have to be added. Thus, a resident carer package can still be viable in cases below those of the utmost severity where a lighter touch is reasonable.

Davies is also interesting because in Wilkie J's judgment it was unreasonable to wrap the Claimant in cotton wool so far as the care provision was concerned. Only with some risk could the benefits won through self-reliance and an active life be attained.

107. I accept the evidence that she is at risk of falling and has fallen on a number of occasions including recently. I accept that when the carer is present or other people are present she benefits from their assistance in getting up. I do not accept that when she is at home she would be unable to get herself up, though obviously with some difficulty. Whilst falling, for someone with the claimant's condition, is potentially hazardous in terms of exacerbating her injuries or causing new ones I accept the assessment of Dr Burt that the present enhanced risk of falling is not, on its own, sufficient to justify live in care. ...

110. In this respect, whilst I understand the clinical judgment made by Mr Jamil from his specialist perspective concerning the inadvisability of persons with the claimant's injuries trying to walk for the sake of it, in my judgment he fails sufficiently to take account of the contribution which a person's sense of worth and well-being makes to their functioning and the extent to which physical activity, contributing to a general state of fitness and stamina, has a positive impact upon their functioning which overrides in the patient's mind and objectively the clinical risks to which he refers. I note that, in expressing the views which he has, he has effectively been in a minority of one amongst all the experts and that he acknowledges that his advice is ignored by many of his patients.

111. In my judgment, the current provision of live in care, whilst it has undoubtedly helped the claimant and her husband to restore a more normal relationship than when he was undertaking the vast preponderance of the care regime, constitutes significant over provision and I conclude that, currently,

provision for a live in carer is not a reasonable amount of provision. I consider below what amount of care would constitute a reasonable amount.

***C v Dixon* – management of risk versus the Claimant’s need and right to independence**

The Claimant was suffering organic personality change and dysexecutive syndrome following severe brain injury. His claim was advanced for 24 hour care with very extensive case management and some double up time. The defence contentions were that the proposed package went beyond what was reasonably necessary to meet his needs and would be positively harmful in not promoting the independence to which he was entitled. The evidence suggested that the Claimant could be resentful of the care provided; and there had been *free time* periods in his care package which had been successful in the past.

King J found that the Claimant did reasonably require 24 care of some sort; but this could include non-commercial support from his partner overnight and in the evenings; some *free time* while the partner was at work with a commercial carer available on the telephone, an arrangement which had worked previously; and if the partner was not available (which he found as a fair balanced assumption should be taken to be in 10 years’ time) a night sleeper would be required and some *free time/telephone support* could still be incorporated in the 14 hours of daytime care. The balance of risk was discussed thus at [35]:

... The Claimant must be entitled to adequate protection from the real risks, even if small, if the effects if they materialise would be potentially catastrophic for him. I have no doubt that such risks are very real in this case given the inherent unpredictability of the Claimant’s behaviour arising out of his permanent cognitive impairments and personality disorders if suddenly confronted by the unfamiliar or that which makes him angry. As Dr Scheepers said in a telling piece of evidence in my judgment, it is not a question of numbers, and all the good days can be negated by one very bad day. “*One can’t wrap (the Claimant) in cotton wool but the risks are very high.*”

Thus, although the Claimant won the issue of 24 hour care in its widest sense, the reasonable package allowed was significantly lower in terms of cost than was contended for (especially given that the hourly rates were cut as well – see above.)

Miscellaneous care decisions

2 carers throughout the day – unplanned transfers

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.

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]

In *A v Poyys*, 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.]

In XXX Jack J found for 2 carers throughout the day, even though for long periods of time the Claimant would simply need somebody at hand.

19. This was also given the heading ‘doubling up’. It was suggested by Mr Pace that the day care might be scheduled so that, for example, there were two periods in the day of an hour when there would be one carer on duty. This was not supported by the claimant’s witnesses. The main point to be made on the claimant’s behalf is that it takes two people to move him. Moving covers moving him in and out of his wheel chair, whether to go to the toilet or for any other reason. It includes moving him into the correct position in his chair, which is something which has to be done every hour. His parents have been meticulous about that, which has played a large part in maintaining a straight posture. The claimant is mainly continent, but is incontinent of urine, particularly if he is made to laugh, about once a week, and is incontinent of faeces about once a month. It takes two to deal with this. He can only go out on any sort of visit or trip with two attendants.

20. The contrary argument is that the claimant does not require the attention of two people for much of the time, and that there will be periods such as when he is watching television, reading, listening to music, and perhaps when using his keyboard, that he will not require any attention at all, but will only need somebody at hand. I accept that this will be so.

21. Nonetheless I have concluded that, save for the 8 hours of the night, it is appropriate and reasonable for the claimant to have two carers. The matters I have listed in the previous paragraph but one carry the day.

Night care

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 [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 Ponys*, 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 [59] 2 nights off, one in the week and one at weekend rates, with commercial cover.

On call

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

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.]

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.]

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.

88. ... 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.

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.]

85. 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.

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:

86. 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

In *Iqbal* 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.]

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.

In *A v Ponnys*, 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

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.)

Liaison meetings and hand over time

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.] 1½ hour team meetings every 4 months (as an average) were allowed in XXX [30.] An extra hour a day was allowed for handovers (3 x 20 minutes each) between shifts in *Massey* [93]; but the same point was rejected *without hesitation* in XXX [25.] King J in *C v Dixon* allowed 1 hour of case management time a month for meetings/direct communication between the case manager and support workers [83]; but it is unclear what if any allowance was made for the support workers.

Team leaders

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.

The principle of enhanced pay for a team leader was conceded in XXX in the sum of an additional £2 an hour [26.] The Court there also ruled in favour of 2 additional team leader hours per month for *out of hours* work [27.] Further, 1 hour a year was allowed for *out of hours* liaison between the team leader

and each member of the team [31.] The claim for a team leader was rejected on the facts in *C v Dixon*.

Case management costs

Rates have generally been agreed or uncontroversial – see the table. Judges have tended to compromise 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. More recently the claimant’s rate has been winning, but usually with rather reduced hours. Experience shows care experts usually agree the hourly rates, which have been creeping up slightly.

Personal assistant

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 the 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.]

In *Noble*, while the Claimant was not a patient, the parties agreed £500 pa for *future management of the award* in later life beyond the help which the case manager would provide [149.] The legal basis for the agreement is not made clear.

The legal basis of claims for personal injuries

Leaving aside the detail of the awards for a while, the very nature of the assessment of damages for personal injuries has come under 1st instance scrutiny in recent times.

The recent cases

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.

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.

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. ...

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.

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.

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 *Crookedake 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.

The point has spilt over from *care & attendance* into another head of damage. In *A v Poyys*, 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.)

Lloyd Jones J then decided 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.]

Discussion

Until *Sowden* threw up the unreported and largely forgotten authority of *Rialis*, few would have seriously suggested, when considering the reasonableness of the care or 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 given an instinctive response along the lines of that given by Sir Rodger Bell in *Iqbal*, 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.

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* rationale 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 here; but arguments might be mounted from first principles as follow.

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.

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 Ponys*) so far as to declare 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.)

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 in the future an unreasonable expenditure in mitigation if the claimant were to spend £2 an hour more on a team leader; or pay for 14 hours double up time rather than 10 each day; and so on? 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 care and its reasonable cost?) and not *mitigation of loss*.

Now, the normal measure of damage is not in dispute – reasonable care/accommodation/equipment/etc to meet the need. It was put succinctly 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.

Indeed, in *Rialis* 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 issue*¹⁰. ... *The practical importance of defining the normal measure in this way lies in the burden of proof*¹¹. 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.

¹⁰ See McGregor on Damages, 18th edition at 7-033ff

¹¹ McGregor at 7-035

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.]

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.

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*.

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.)

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]

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.

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.

Sir Denys Buckley agreed with both judgments in *Rialis*; and the same points apply.

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*?

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.

And it really should make no difference to invoke the concept of *full compensation* or the 100% principle 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 or 100% compensation.

Cases revisited

Since the above section was first published, the saga has continued without a definitive full argument and ruling. When submissions were deployed by the defence in line with the above discussion in *C v Dixon*, a strong legal team for the Claimant decided to withdraw the argument rather than risk a full determination by King J who said this at [5]:

I accept as a matter of principle the question for the court is its assessment on all the evidence of what is reasonably necessary to meet the Claimant's likely future care needs rather than asking whether the existing regime is within the range of reasonable options. However in making this assessment the Court cannot ignore entirely aspects of the existing regime for example the existence of an already established committed and loyal team of support workers.

And yet, it appears that still claimants put forward the *Rialis/Sowden* line without opposition, as appears to have happened in *Pankhurst* [10.1 ff] and *Smith v LC Window Fashions Ltd* [2009] EWHC 1532 (QB) at [37] – [39.] Underhill J in *Huntley* [107] directed himself on the approach to the level of care required *in accordance with the decision of the Court of Appeal in Sowden v Lodge*; but he then went on to consider the strength of the expert reasoning on both sides, rejecting the extremes of both and making his own determination, as Sir Rodger Bell had suggested was the right approach in *Iqbal* supra. The Court of Appeal firmly upheld the decision.

Chance assessment of damages within a PPO regime

Huntley is also interesting because it illustrates that the essential *chance* assessment of damages for future loss has survived the new PPO regime which purports to trace everything back to a claimant's *needs*. There the claimant, who had suffered a frontal lobe injury and whose rehabilitation had not gone well up to trial, contended for 24 hours of care per day as the long term solution: the defendant submitted for 21 hours per week. Underhill J approached matters by evaluating first of all the hard core *minimum level* which he thought was reasonable, which he assessed at 6 hours a day [109.] This hard core cost he would have put within a PPO [114] but not the full *chance* reasonable amount which he went on to evaluate as follows. He uplifted the package by 50% from 6 hours to 9 hours a day with a broad brush *for all the possibilities* of needing greater care. He then discounted that back by 1 hour to 8 hours a day

for the chance that the Claimant would not in fact engage all the care that he might reasonably require. There was a real chance that he would reject care (as he would if he entered a stable relationship) and small chances of imprisonment and detention under the Mental Health Act. This additional 2 hours beyond the core 6 hours Underhill J would have provided within an additional lump sum award; but the whole PPO submission was withdrawn when the claimant did not recover for 24 hour care.

Pre-existing conditions – credit for care anyway?

In *Huntley* the claimant's pre-accident problems had not led to any requirement for formal care and attendance. In *Skclair v Haycock*, the claimant (49 and looked after informally by his *Bohemian* father) had suffered with Asperger's Syndrome and Obsessive Compulsive Disorder. The defence focussed on and valued what were described as merely the *few extra hours* of care required by the accident.

The narrow approach of the defence was rejected. Edwards-Stuart J found that the claimant's elderly father would have continued to look after him for 5-10 years longer, when his wider family would have looked after him at a financial cost to them of £150-£200 per week for 5-10 years, after which a residential placement in local authority care would have been likely. The accident had turned the Claimant's need for this lower level of care (as a matter of fact) into a reasonable need for 24 hour commercial care [80.] There was no question in the Judge's mind [78] after *Peters v East Midlands SHA* [2009] 3 WLR 737 of the Claimant now having to mitigate into local authority care: he could pursue the tortfeasor as of right. In a legitimate application of *Rialis* and *Sowden* at [80], the claimant had made a proper choice, not as to the fine tuning of a home care package, but as to the fundamental point of being cared for in his own home as against an institution. The only real question, therefore, was how, if at all, to credit the mixture of family non-commercial care and family-funded commercial care he would have received anyway against the full cost of 24 hour commercial care.

As to family non-commercial care, Edwards-Stuart J rejected any offset at all – [89.]

... where the Claimant would have continued to enjoy care and attention given out of love and affection which he now cannot enjoy because of the accident, I see no reason in either logic or justice why he should be required to place a value on that care and attention and then be made to give credit for it against his claim. In this case the Claimant has not gained by the absence of his father's care and attention – indeed he would say that he is now worse off because he is without it – and I do not believe for one moment that his father would feel that he has achieved a saving as a result of the accident: far from it, I am sure that he would have much preferred to continue to care for the claimant as long as he

is able to do so. I therefore reject the submission of the Defendant that I should place a value on these services and give the Defendant the benefit of it. To do that would be to add insult to injury.

As to family expenditure on commercial care, Edwards-Stuart J gave credit for its net value, reasoning at [91] that if the family had lent the Claimant money to pay for care (and he had paid for it himself) he would have had to give credit for the value of that care. It should make no difference whether the family channel the money through the claimant or pay for the care directly. He continued at [92]:

It seems to me that there is a difference in principle between services that are provided in kind and provision of cash. If, but for the accident, expenditure would have been incurred on the Claimant's behalf by members of his family who felt responsible for his wellbeing, then I consider that the fact that such expenditure will now be avoided should be taken into account when assessing the net value of the financial loss sustained as a result of the accident. In reaching this conclusion I have considered the impressive judgment of Tomlinson J in *Freeman v Lockett* [2006] EWHC 102, which might be read as suggesting that no account should be taken of any contribution by the family. However, I consider that the situation that he was considering in that case was significantly different from the circumstances of the present case – apart from anything else, Tomlinson J was not considering expenditure avoided that would have been incurred in the “but for” situation. In addition, I have already rejected any suggestion that the Claimant is obliged to look to the local authority for future support.

Life expectancy

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.

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]

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.

b) 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.

c) 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.

d) 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.

e) 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.)

f) 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.

g) 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.

h) The arguments must have some basis in evidence and logic (*pace* Professor Barnes in *Lewis*.)

i) 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 was until recently 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 ran, where there is effectively an agreed (or found) life expectancy is to double discount.

j) 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

k) While the above paragraphs have derived from relatively recent cases, the use of table 28 and arithmetical multipliers should now be approached in the light of later ones. The Introduction to the 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 by the Ogden collaboration 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.

l) HHJ Collender QC considered argument in *Crofts* on whether to apply table 1 or table 28 to a life expectancy reduced by 5 years. He decided that he had *not* made a ruling on *how long the Claimant was*

likely to live (when table 28, he said, would be appropriate to avoid double discounting¹².) Rather, he had decided the Claimant's life expectancy was reduced by 5 years from *his pre-morbid statistical life expectancy, whatever that was* [97.] Hence, he applied Ogden table 1, taking the Claimant at a theoretical age 5 years older than he was to reach the proper life multiplier [100.]

m) Cranston J in *Smith v LC Window Fashions Ltd* [2009] EWHC 1532 (QB) followed the reasoning in *Crofts* and applied table 1, citing the passage already copied from the Ogden Introduction in addition.

n) The effect of HHJ MacDuff QC's findings in *Levis* 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.

o) Readers should be aware that the result in *Levis* would probably now be substantially higher for the Claimant if re-argued with further medical evidence on account of one important matter. Strauss has himself published in the context of cerebral palsy claims¹³ conceding that the life expectancies in his earlier work (based on cohorts of past American patients using *historical* mortality as the basis for PI claims) should be adjusted for current longer UK life expectancy and for the fact that the UK Courts apply tables for *projected* life expectancy. It is beyond the scope of this paper to go further but specialists in this field should refer to the methodology set out in the paper itself, which surely applies to traumatic brain injuries¹⁴ as well as birth injuries. Strauss et al have also argued in both papers that evidence does not actually support the line that *quality of care* – the only distinguishing feature found by HHJ MacDuff QC on the evidence before him – makes any significant difference. However, if significant enhancements are made for modern projected mortality in the UK, the perceived need for any sleight of hand disappears.

p) 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

¹² But this is doubtful and *obiter* on the findings actually made.

¹³ *Life expectancy in cerebral palsy: an update* Developmental Medicine & Child Neurology 2008, 50: 487- 493 at 493, Strauss, Brooks, Rosenbloom & Shavelle.

¹⁴ See Shavelle, Strauss, Day, Ojdana *Life Expectancy* in: *Zasler, Katz, Zafonte editors*. Brain injury medicine: principles and practice. New York: Demos Medical Publishing, 2007: 247-61

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. In *Pankhurst*, MacDuff J, as he by then was, enhanced his findings on the statistical life expectancy of 18 years to 19 years [from age 53] for the first class care package the Claimant would have – see [7.17.]

Lost years

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. Sometimes *Croke v Wiseman* [1982] 1WLR 71 CA (disallowing infant claims in the lost years) was followed; sometimes it was ignored; and sometimes it was distinguished.

Given the Court of Appeal decision in *Iqbal*, discussion of the 1st instance authorities is now removed from this draft¹⁵. Sir Rodger Bell had made a slip 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 v British Rail Engineering Ltd* [1980] A.C. 136 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.

In *Crofts* HHJ Collender QC had to consider the correct percentage to allow for the *lost years* in an adult claimant who was not caught by *Croke*. On the facts of the Claimant's lifestyle, he deducted 40% for his own living expenses during the lost years' pension claim [158.]

¹⁵ Anyone still interested can find the discussion in [2008] JPIL 109.

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 tables and the commentary brief.

Accommodation

Capital offset

Some useful detail appears in the tables 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

Again, this issue has been considered in both *Lewis* and *Iqbal* but on rather different facts.

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.

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 roundabout 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.

There is a narrow determination on the facts and a wider statement of principle in the above passage. Neither *Lewis* nor *Iqbal* illustrates, 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* and *Smith* recently, chose not to re-invest in the new property.

In *Noble* 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

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

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.

93. ... 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.

Where the injury gives rise to a need for adapted accommodation, reasonable adaptation to meet the need *is* full compensation. It does not mean disabled access to every conceivable nook and cranny in house and garden.

Failure to mitigate

Even acknowledging that the standard for judging a claimant's actions was not a high one [10.3], MacDuff J in *Pankhurst* found that the Claimant had purchased (£450,000) an unreasonable property. It was subject to subsidence (known before the purchase) and ultimately demolished and essentially rebuilt, with the finest of fittings and a heat pump, to about twice the floor space originally specified as reasonable by the Claimant's own expert witness. In the end the "adaptation" cost £924,000 against the original estimate at £190,000. Finding the purchase to be unreasonable, MacDuff J disallowed the figures as claimed and substituted £500,000 as a reasonable theoretical purchase price, with £235,000 for adaptations and £20,000 enhancement in value through the work.

Hydrotherapy at home

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

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.

Housing in mild brain injury and with separation of partners

In *Edwards v Martin* [2010] EWHC 570 (QB), the defendant argued that a claimant with organic personality disorder arising out of brain injury should not be regarded as having a reasonable need for alternative accommodation flowing from that injury in the following circumstances. He had separated from his partner and young child after the injury but required only an average of 10 hours a week support worker input with 80 hours pa case management. Rather, it was said, the need for alternative accommodation flowed from the breakdown of the relationship and was too remote from the injury [42.] David Clarke J rejected this argument [43]:

I consider this takes too narrow a view. ... the psychiatric effects of the Claimant's head injury have made it impracticable for him to continue to live with his family. Such a situation was reasonably foreseeable as a consequence of an injury such as this. The sum claimed is recoverable.

Calculations in respect of the additional property and half of the original one (his partner funded half) were allowed [80], albeit the multiplier was reduced from just over 25 [74] to 20 [79] for the chance of separation anyway. In addition, though challenged as being even more remote than the accommodation claim, the Judge allowed the reasonable costs of the Family Court proceedings as part of the damages: the former partner had not been acting unreasonably in resisting access to such a young child; and the claimant's pursuit of the claim was factually a manifestation of his brain damage (rigid thinking and lack of insight) [44.]

Transport

See the table for some recent awards. The Chrysler Voyager¹⁶ is in vogue and a relatively consistent line has been emerging. Unless there is a high mileage, while a claimant gets the more expensive Voyager, it will be changed every 5 years rather than more often. The recent case of *Smith* is the odd one out on the period between changes (6½ years); but on the agreement of the parties.

Only in *Sarwar No.2* (and more recently with the same Judge in *A v Ponys*) does there appear to have been a really thorough presentation of the potential claim (although *Smith* comes close more recently.) 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 Ponys* (where the evidence was lacking) and *Smith* (where the claim was at a much lower level for an ordinary car.) A point of comparative general application in the calculation was also covered in *Sarwar*, which was resolved on the basis of the evidence. Should the cost of the Entervan¹⁷ (wheelchair side access) conversion be treated as part of the capital cost (to depreciate in line with the tables in PNBA *Facts & Figures* and so 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 *Sarwar*, 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

See the table for recent awards. The evidence in any given case is crucial; and awards range considerably.

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 Ponys*. Field J in *Noble* awarded

¹⁶ This was the agreed vehicle in the recent case of *Pankhurst*.

¹⁷ The Chrysler Entervan solution was again the reasonable solution in *Noble v Owens* [2008] EWHC 359 (QB).

[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. Penry-Davey J in *Smith* was only persuaded to £3,000 and one holiday a year.

In *Pankhurst* the Claimant (a C4 tetraplegic) had, before the accident, spent about 6 months of the year (during the winter months) touring Europe in a luxury motor home. The claim was for £51,500 pa to try to replicate 4 months of the year in a villa in Europe, involving flying out 2 teams of carers on a fortnightly rota to wherever the Claimant happened to be. The claim was rejected for many reasons, most notably that it was unreasonably expensive; and unworkable since a team of staff could never be recruited (all female at the Claimant's insistence) in the rural area where the Claimant lived who would endure such working/travel conditions.

The quality of preparation and evidence appears to be particularly important in claims for increased costs of holidays.

Miscellaneous items

Credit against interest for interim payments

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.

Travelling expenses

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

The introduction of the 6th edition Ogden tables requires a paper on its own. For interesting cases giving an insight into how the new introduction may be applied for contingencies, consider: *A v Ponnys* 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

In *Lane 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 if there had been such evidence available [47.]

In *Edwards v Martin* [2010] EWHC 570 (QB), David Clarke J refused to depart from the Ogden tables in respect of life expectancy where the adverse risks were said to arise not from the brain injury (agreed) but from a recently acquired, moderate smoking habit in a 41 year old man also subject to episodes of depressive illness [71.] The DEALE methodology [70] of Dr Walker, Consultant Physician was inappropriate since, applying the wording in the Ogden Introduction [69], there was no *clear evidence to support the view that he is atypical and will enjoy a longer or shorter expectation of life* [than the Ogden cohort which *includes smokers and non-smokers and includes people with and without depressive illness.*]

Stepped multiplicands or flat average earnings?

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 where there is a 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 *Massey* [106.] Lloyd Jones J followed his earlier approach more recently in *A v Ponnys* where the claimant was still only 16 – see [35] – [36.] Penry-Davey J took average earnings over a whole career in *Smith* rather than stepped multiplicands. Somewhat strangely, perhaps, when the tables in the Ogden Introduction allow for time off for child birth etc, he was persuaded to take an age of starting work as a female teacher at 25 and reduced the multiplier by 40% for contingencies (well beyond those in the Ogden Introduction.)

Retirement age

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.]

While not in the judgment in *Sarwar No. 2*, the table for expected retirements under the White Paper in section 4.21 was as follows:

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

The recent Comprehensive Spending Review has proposed accelerating the increase to age 66 for both men and women. From December 2018 the State Pension age for both men and women will start to increase to reach 66 by April 2020. This will mean women's State Pension age will increase more quickly to 65 between April 2016 and November 2018. The change to the timetable will need the approval of Parliament. The Government is also considering revising the timetable for future increases to the State Pension age from 66 to 68.

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.

In *Edwards v Martin* [2010] EWHC 570 (QB) again, David Clarke J [47] refused to base a multiplier on retirement at 67½ (66½ would probably have been the age applying the above table, but the Claimant's precise date of birth is unclear) for an HGV driver; but he took a midpoint multiplier between there and 65, thus indirectly applying the table for later retirement age.

Blamire

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

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 inequality 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.

Lloyd Jones J in *A v Powys* 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. It would, of course, add substantially to wages' inflation and cost a great deal if the pay of all women moved to the equivalent presently of men (without some downward movement in male earnings to meet the additional cost.)

Conclusion

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 three main conclusions. [1] Fighting out entire cases has been an expensive exercise for insurers. [2] Claimants are not resting on the gains achieved in the

2006/7 cases: they are pressing on with arguments for further increases in damages, sometimes now stretching the claim beyond breaking point. [3] There is still unfinished business on legal principle over the application of the test of *reasonableness*.