

THE TAMESIDE & GLOSSOP ACUTE SERVICES NHS TRUST
SOUTH WEST LONDON STRATEGIC HEALTH AUTHORITY
SOUTH YORKSHIRE STRATEGIC HEALTH AUTHORITY
UNITED BRISTOL HEALTHCARE NHS TRUST

Appellant/Defendants

-and-

(1) LEE CARL THOMPSTONE

(An infant by his Mother and Litigation Friend Heather J Brindley)

(2) JOHANNA ELLEN DE HAAS

(The Claimant proceeds by her Father and Litigation Friend, Paul de Haas)

(3) JOHN PAUL CORBETT

(By his Mother and Litigation Friend Catherine Elizabeth Corbett)

(4) RH

(A child by his Mother and Litigation Friend LW)

Respondents/Claimants

NOTE ON JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal has now handed down the long-awaited judgment in these appeals which concerns the topical issues:
 - a. whether a Court can apply a measure other than RPI as an index by which to increase annual periodical payments for the costs of future care and case management, and
 - b. what approach the Court should take where the parties do not agree which heads of future loss should be included in a periodical payments order ['PPO'].
2. The Respondent Claimants in all four appeals had suffered devastating brain injury as a result of avoidable hypoxia at or around the time of their birth and who, in consequence, had very considerable lifelong care requirements. The damages for future care and case management were effectively agreed and the principal issues were whether a PPO should be made and, if so, what the appropriate index should be and what form the order should take.
3. Following the decision in *Flora v Wakom (Heathrow) Ltd [2006] EWCA 1103* all four Respondent Claimants were obliged at trial to raise the issue of the appropriate index and the court was similarly required to consider the form of order. Three different judges had heard expert evidence in *Thompstone*, *Corbett* and *RH* and each had independently arrived at the same conclusion that she/he was not bound to apply the Retail Prices Index ['RPI'] as the index in the absence of exceptional circumstances and that, on the evidence, the most appropriate measure to be applied as an index was The Annual Study of Hours and Earnings: Occupational Earnings for Care Assistants and Home Carers [ASHE 6115].

4. Notwithstanding that the Appellant Defendants were separately named, the reality was that the appeals were brought at the instance of the National Health Service Litigation Authority ['NHSLA'].
5. The Ministry of Defence and Medical Protection Society sought to intervene and were permitted to make written submissions.
6. The unanimous judgment is that of the whole court to which all three members contributed.

The indexation issues

7. In essence, the issues raised on the appeals in *Thompstone*, *Corbett* and *RH* and their resolution were as follows:

- 7.1 Whether, as a matter of construction or, alternatively, as a matter of precedent, section 2(8) of the Damages Act 1996 [which treats an order for periodical payments as providing for variation by reference to the RPI] can only be modified in 'exceptional circumstances'.

The Court of Appeal held that it was bound by the earlier decision of the Court in *Flora*, as summarised by Lloyd Jones J in *Sarwar v Ali and MIB [2007] EWHC 1255*, in which the same arguments had been rejected. The Appellant's submission that *Flora* was decided *per incuriam* because an argument readily available to a party in that case was not developed before the court was roundly rejected as 'hopeless'.

- 7.2 Whether the words 'modifying the effect of' in section 2(9)(b) of the Damages Act 1996 can encompass and permit the deletion of the RPI and its substitution by a measure based on ASHE and converted to an index.

The Court of Appeal held again that it was bound by *Flora* on this issue. The Appellants' submission that section 2(9)(b) only permits a modification of RPI itself and not the application of an alternative to RPI was rejected. A clear distinction was drawn by the Court between 'modifying the effect of subsection (8)' [the language of the statute] and 'modifying the index' [the Appellants' gloss on the wording of the section]. The language of the statute permitted the orders made at first instance.

- 7.3 Whether the remedy of modification should be denied by the application of the principle of distributive justice.

The Court of Appeal held again that it was bound by *Flora* on this issue where Brooke LJ had held that there was no basis for reducing compensation for pecuniary losses simply on grounds of affordability. The Respondent in *Thompstone* had accepted and had not appealed the

finding of Swift J that the cost to the NHS of indexing periodical payments to an earnings-related measure if that measure were to increase at a faster rate than RPI would be 'very significant'. Whilst the Court of Appeal accepted that in a few instances distributive justice had been invoked by the court to determine whether it was fair, just and reasonable to impose a duty of care and also in relation to the 'essentially judgmental question' whether the level of general damages should be increased it was of no consequence once liability was established and the court was proceeding to quantify future losses; at that point the court was solely concerned with corrective justice and the application of the 100% recovery principle.

- 7.4 Whether a party seeking modification of the effect of section 2(9)(b) must discharge a legal burden by identifying and proving that a specified alternative on its own merits should displace RPI or whether the court was engaged in a quasi-inquisitorial review.

The Court of Appeal held that the contention that a claimant must make a specific choice, and not merely advance a number of possible alternatives to RPI, was 'always bad'. The court noted that section 2 required the court positively to consider whether to make a PPO. There was therefore an inquisitorial role with the court examining choices, both good and bad. It was appropriate that the court should carry out a comparative exercise and not merely take a 'stand alone' decision in relation to a single index and that duty should not be complicated by considerations of legal burdens.

- 7.5 Whether the use of an index such as ASHE 6115 or any index which is based on actual earnings in the market contravenes the principle in *Cookson v Knowles [1979] AC 556* that the multiplicand must be determined at the date of trial and must not take account of future inflation because such an index would then operate as an infinitely variable periodical payment.

The Court of Appeal held that whereas *Cookson* was concerned with conventional lump sum awards the appeals were concerned with a PPO which was 'a wholly different creature' where there is neither a multiplicand nor a multiplier, but an annual sum which Parliament had decided should be index-linked either by reference to RPI or as modified under section 2(9).

- 7.6 Whether ASHE 6115 was a suitable measure to be used as an index.

The Appellants again contended that the effect of section 2(9) was to create a proviso such that a party seeking to persuade a court to apply ASHE 6115 had to discharge the legal burden of proof to the standard of the balance of probabilities that it was a properly useable index. The

Appellants' other contention was that ASHE 6115 was open to so many objections that it could not properly be used as an index.

The Court of Appeal held that the issues in relation to ASHE 6115 were not pure issues of fact and did not lend themselves to being determined by reference to the burden and standard of proof. Notwithstanding that the findings made by the judges as to the appropriateness and usability of ASHE 6115 had not been appealed and that the objections taken by the Appellants were not matters of law the Court embarked on a review of ASHE 6115 'because it is of general importance that there should be a definitive statement on these issues at appellate level'. In summary, the Court rejected the objections taken by the Appellants which were as follows:

- that ASHE 6115 did not contain exclusively care costs and did not accurately target the particular carers in issue;
- that the application of a weighted average wage rate did not relate to the actual position of any single carer;
- that reclassification of care workers in ASHE would prove an insuperable difficulty because the uplifted weighted rate could be extracted from the last version of ASHE 6115 and re-positioned at the appropriate percentile in the new category;
- that there was a risk of compositional change because large numbers of higher paid workers might enter the ASHE 6115 cohort and distort the remuneration covered while the actual care costs did not increase at all. The Court described this as a 'highly theoretical' possibility which, if it were to occur, would probably anyway result in an increase in the claimants' care costs;
- that changes in the skill mix and increased professionalism within the population of care workers will increase the overall costs of care. The Court considered that the application of ASHE 6115 would not re-write the Claimant's care needs but merely reflect the increasing costs of meeting them.
- that, as ASHE 6115 captured actual wages including wages drift resulting from overtime and bonus payments, this would distort the picture and would not reflect agreed pay rates. The Court of Appeal stated that it was concerned with measuring the actual, not the theoretical, costs of care; '...claimants pay money, not rates.'
- that the fact that growth rates in levels of income varied considerably from year to year meant that ASHE 6115 [this was

referred to as ‘volatility’] was a theoretical construct which could not be relied on to measure change over time. The Court of Appeal held that the key thing was whether the index measured carers’ pay reliably and if it did, then it was irrelevant whether the growth rates were steady or fluctuated considerably.

- that the application of ASHE 6115 as an index was not workable. The Court of Appeal referred to and agreed with the separate findings of each of the judges at first instance and endorsed the conclusion of Mackay J in *RH* that while initially some expert advice would be required to operate the process of indexation, the relevant material and approach will over a short period of time appear in practitioners’ works and become readily familiar to all specialist practitioners.

8 Thus, the Appellants’ many objections to ASHE 6115 failed before the Court of Appeal as they had failed in each case at first instance. The Court of Appeal made plain that it hoped that the NHSLA and all other defendants in catastrophic injury cases would now accept that there had been an exhaustive review of the objections. Unless a defendant in the future is able to adduce evidence and argument significantly different from and more persuasive than that deployed in the present cases it will not be appropriate to re-open the issue in any future proceedings. Defences which do not meet this requirement should be struck out.

The format issues

9. In essence, the issues raised on the appeal in *RH* and *de Haas* and their resolution were as follows:

9.1 Whether the correct test to determine the format of a PPO is a two stage test [first, to determine whether any head of future loss is to be in the form of a periodical payment and, secondly, which heads should constitute the overall periodic figure] and whether at each stage which solution best meet the claimant’s needs is solely to be determined by the ‘better solution’ or is the format to be interfered with by the Court only if the claimant’s choice can be said to be ‘Wednesbury unreasonable’ and whether the preferences of the claimant should be given any greater weight than the preferences of the defendant;

9.2 Whether either of the two stages is part of a prolonged approval process undertaken by the Court and whether the Court can look at a confidential approval document sight of which is denied to the defendant.

10. The Court of Appeal acknowledged that section 2 of the Damages Act 1996 provided a radical new power to impose a PPO against the wishes of one or both parties. The decision whether to do so involved decisions as to allocation and

indexation which were inter-related and had to be considered together. A judge cannot decide what form of order would be in a claimant's best interests without deciding how he would index a PPO if he were to make one.

11. The reference within CPR part 41.7 to a claimant's 'needs' was to be construed in a wider and more general sense and not limited to the provision of those things which are foreseeable necessities. His 'needs' includes those things that he requires in order to enable him to organise his life in a practical way.
12. It is for the judge to decide objectively what order best meets a claimant's needs and not what the claimant prefers. The defendant's preferences are to be given equal consideration to those of the claimant. The judge should have regard to the defendant's general preferences advanced on instructions without the need for evidence to be called as to whether there was any financial advantage to the Defendant from a PPO although, if a defendant wished to argue that a PPO should not be made because, for example, the security provisions could not be complied with, then some evidence might be required. Although it was open to a defendant to challenge a claimant's proposals and advance counter-proposals merely because it suited this own interests better is unlikely to carry any weight with the judge because it would not satisfy the essential test, namely that it was a better means of meeting the claimant's needs.
13. However, it will rarely be appropriate for a defendant to argue that its proposal will meet the claimant's need better than the proposals being advanced on the claimant's behalf because, in practice, the claimant will be advised by an experienced and responsible expert to whose advice great weight will be given. Only in a rare case will it be appropriate for the defendant to call expert evidence to seek to demonstrate that the form of order preferred by the claimant will not best meet his needs. The trial judge should not permit the evidence of a second IFA to be adduced unless it has first been demonstrated that the point clearly arises.
14. The mere fact that Mackay J in *RH* concluded that the independent financial advisor, Richard Cropper advising the claimant was giving responsible financial advice and decide to act on that did not mean that he was giving primacy to the claimant's preferences. He had given equal weight to the preferences expressed by both sides but in the end had to make a choice and he had chosen the proposals which he thought best met the claimant's needs. In *de Haas* the Court of Appeal held that Nelson J had recognised that he was obliged to consider the preferences of each party but that did not mean that he was not free to prefer the proposals of one side to the other. His task was to choose the proposals which best met the claimant's needs. Unless he rejected the proposals of both parties – which would be a rare situation – he would in the end have to prefer one set of proposals to the other.
15. The process under section 2(1) of the Damages Act 1996 is not analogous to an approval process because the parties are not agreed and the court itself is choosing what order to make and must choose the form of order which best meets the claimant's needs. Thus, the defendant's preferences must be considered.

16. Where the parties are agreed and the judge's approval is being sought to a form of order he is plainly entitled to see privileged material which has not been disclosed to the defendant. Where the parties are not agreed and a decision is being made by the judge under section 2(1) of the 1996 Act he is not justified in looking at privileged material not disclosed to the defendant. In a case where certain heads of claim are agreed and have been approved by the first judge and others are not and are the subject of a hearing before a second judge under section 2(1) then the parties should adopt a sensible approach and the second judge should see counsel's advice with any sensitive passages redacted and the balance of the advice should be shown to the judge and the defendant. In a case where the judge is not satisfied with the information provided by either party he would be entitled to adopt an inquisitorial approach and appoint an assessor and call for a report.
17. The Court of Appeal also considered in *de Haas* whether it was illogical to hold that not all future losses should be allocated to a PPO. While there were real advantages to a claimant in a PPO because his money cannot run out if he lives longer than expected there were countervailing arguments such as the need for a capital sum for contingencies. The defendant's stance in *de Haas* contrasted with the stance taken in *Thompsonstone* where it had agreed that the only heads of future loss which should be subject to a PPO were care and case management. The defendant in *Thompsonstone* must be taken to have accepted that that course was in the claimant's best interests and it was illogical for the NHSLA now to argue in favour of such a stance.

Will there be a further appeal to the House of Lords?

18. This is a comprehensive judgment which provides practical guidance both to the judiciary and practitioners.
19. The Appellants have sought permission from the Court of Appeal to appeal to the House of Lords on two points:
 - 18.1 Whether as a matter of law and (1) of statutory construction and/or (2) of precedent the effect of section 2(8) of the Damages Act 1996 can only be modified in exceptional circumstances;
 - 18.2 Whether, when deciding whether to exercise its discretion under section 2(9)(b) so as to modify the effect of section 2(8) the Court (1) is entitled in law to take account of the principle of distributive justice and (2) should take account of that principle in these appeals.
- 19 The Respondents have opposed the granting of permission to appeal.
- 20 It is not yet known whether the Court of Appeal will grant or refuse permission.
- 21 If permission to appeal is refused by the Court of Appeal it is almost certain that the Appellants will petition the House of Lords.

22 In *Flora* the House of Lords refused the defendant permission to appeal on the basis that any appeal was premature before judgment had been given in a case where evidence had been adduced and argument heard.

DAVID ALLAN QC
DAVID HEATON

12 Byrom Street Chambers
Manchester
M3 4PP

and

42 Bedford Row
London
WC1R 4LL