John Meredith-Hardy

SPECIAL EDUCATIONAL NEEDS – A PRACTICAL GUIDE FOR THE PI PRACTITIONER

1. When children and young persons ("C") are seriously injured, their educational needs and how they can be met is an immediate concern for their parents and carers.

2. For defendants, educational needs are an issue of early concern and interest - life chances and outcomes can be affected by early intervention and these may have a significant effect on future independence, employability and consequently the value of the claim.

3. In the appendices are summaries of cases where provision for education has been ordered and a list of specialist publications.

Characterisation of the loss

4. The changed educational need may fall into a number of different categories dependent on C's age at the time of accident and there can be overlap with the claim for care:-

Pre-school

a. Pre-school Portage (a mix of SaLT & OT)
b. Pre-school respite

Primary & secondary school

c. Mainstream state school but with j. to o. supplements
d. Mainstream independent school but with j. to o. supplements
e. Special day primary / secondary school provision (state / independent)
f. Special residential primary / secondary school provision (state / independent)

Further education & training

g. Mainstream college / university but with j. to o. supplements
h. Special day college / FE provision (state or independent)
i. Special residential college / FE provision (state or independent)

At all ages – delivery of education

j. Teaching assistant/s in school / college
k. Specialist teaching staff
l. Training for school / college staff (i) medical (ii) educational
m. SaLT & specialist SaLT in school / college
n. Occupational therapy & specialist OT in school / college
o. Transport & chaperone to / from school / college

At all ages – securing education delivery

p. Deputy administrative overhead for educational need
q. Case manager for overview & maintaining educational provision
r. Legal advice & assistance on EHC Plans & SEND Appeals
s. Expert evidence (educational psychologist; SaLT; OT etc.)

Timeline

5. The timeline for the incurring of the above and for their characterisation as educational costs is no different from an uninjured child or young person i.e. from birth through to the end of tertiary education.

6. This is now recognised in the state support for Special Educational Needs in England following the Children and Families Act 2014, s.46 that provides for Education and Health Care Plans ("EHC Plans") to be maintained to the end of the academic year in C's 25th birthday year.

Basis for recovery

7. The usual principles for the recovery of education costs in consequence of personal injury apply[1].

8. A claimant is concerned to identify the increased cost of the provision of education whilst giving credit for what costs would have been incurred anyway.

[1] Lord Blackburn in Livingstone v Rawyards Coal Company [1880] 5 App Cas.25 at p.99: *"... where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong"*

9. Where there is a need and likely benefit, a claimant is entitled to recover the cost of provision even though it may make no difference to the future cost of care or loss of earnings etc. In **Eagle v Chambers** [2003] EWHC 3135 the cost of beneficial rehabilitation was recoverable notwithstanding that it would make no difference to the future care regime.

10. Whilst a defendant may have difficulty in pushing back on the principle of recovery, a defendant will be keen to identify what provision is likely to be made by the state and the costs that will not, in fact, be incurred.

11. Consequently, the issue of the recovery of educational costs is foreshadowed by the similar debate over the provision of care by the NHS and Local Authorities.

State provision as a bar to recovery as personal injury damages

12. Historically, defendants had offered indemnities against future educational costs e.g. **L (a child) v Berkshire HA** 1999 (Lawtel) – up to £50,000 p.a. index linked.

13. For claimants indemnities are usually unattractive as there is substantial risk of future dispute and being tied to the defendant, maybe over many years. Further, and of course, a court cannot order an indemnity (in the context of care, see **Burton v Kingsbury** [2007] EWHC 2091 (Flaux J) para 107).

14. Alternative resolutions have been for defendants to agree or be ordered to pay the costs of SEN appeals (e.g. **Whiten v St George's Healthcare NHS Trust** [2011] EWHC 2066 (Swift J) at paras 301 & 302 - £20,000 for appeals and £7,500 for the risk of no one-to-one assistant on appeal).

15. However, where these solutions have not provided the answer, the issues were nicely synthesised and addressed in **Harman (A Child) v East Kent Hospitals NHS Foundation Trust** [2015] EWHC 1662 by Turner J:-

> 21 The defendant in this case concedes that if the payment of the Prior's Court fees by the local authority were simply a potential entitlement which might or might not eventuate, then it could not ask the Court to take the same into account in its award of damages. However, it is contended that where, as here, the firm and agreed evidence is that such payments are being made and will continue to be made into the future then the effect of Sowden and Crofton is clear and is entirely unaffected by Peters. The Court should take that evidence into account and should not require the defendant to assume responsibility for those fees.
>
> 22 I disagree.
>
> 23 Ben's parents have unequivocally expressed a preference that the Prior's Court fees should be paid from an award of damages against the defendant. That is how they would fund Ben's placement in the event that the Court made provision for the same in adjudicating on this issue. The effect of Peters is to confirm that Ben is entitled to pursue the defendant for these sums rather than have to rely on the statutory obligations of the LEA.
>
> 24 By presenting the situation on the basis that the local authority will continue to pay for Prior's Court the defendant is misstating the position. The local authority will not continue funding if Ben, through those acting on his behalf, does not claim funding. Peters gives claimants the option to elect to pursue the tortfeasor for such funding. Simply because such funding is already being paid and would continue to be available if a claimant were to choose to take advantage of it does not avail a defendant. Indeed, in Peters the claimant was at the time of the hearing living in a private care home which was being jointly funded by the local authority and the Primary Care Trust.
>
> 25 In this case, Ben's parents fought a long and difficult battle to obtain public funding for Prior's Court. This struggle took a predictable toll and the issue was resolved only by taking the matter to a tribunal. I am satisfied that Ben's parents' expressed wish to elect to take private funding is entirely genuine and evidences a settled intention in this regard. There is no need for me to adjudicate on whether or not their

> preference is reasonable. To do so would effectively reintroduce the question of mitigation of loss which was so firmly rejected in Peters.
>
> 26 The defendant suggests that if, contrary to its primary case, I were to find that there is a real chance that statutory funding might falter after Ben reaches the age of 19 then they would offer a capped educational indemnity. Again, this misses the point. The right of recovery against the tortfeasor in this category of case cannot be diluted by the offer of an indemnity. Of course, it would be entirely wrong for Ben to receive double recovery and his advisers have indicated that they will preclude this by the deployment of an appropriately worded indemnity from his Deputy. I will make no comment at this stage as to the appropriate form or content of any such safeguard against double recovery. That may be agreed between the parties subject to my approval or, if necessary, resolved following further argument.
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> 27 In the light of my findings on this issue it would not be appropriate for Ben to be paid any sum towards the cost of potential appeals to the tribunal and this contingency figure should be deducted from the lump sum which has otherwise been agreed.

16. By reference to my researches, **Harman** represents the only case where the **Sowden v Lodge** [2005] 1 WLR 2129, **Crofton v NHS Litigation Authority** [2007] 1 WLR 923 and **Peters v East Midlands Strategic Health Authority** [2009] EWCA Civ 14 issues have been argued through in the context of future educational need.

17. In summary, it comes down to parental / carer choice and what is likely to happen. A 'reality' check is required to consider what the state may provide, and what alternative provision there may be that can be acquired by paying fees for an independent mainstream or special school or college.

18. In order to be able to undertake the 'reality' check, an understanding of how the SEN system works is required.

State provision for SEN

19. The provision of state funded education is a creature of statute namely the Children and Families Act 2014 ("CFA 2014") and, where it survives the CFA 2014, the Education Act 1996 ("EA 1996"); and the Human Rights Act 1998[2].

20. The Special Educational Needs and Disability Regulations 2014 SI No 1530 address a large number of issues relating to the implementing of CFA 2014.

21. The CFA 2014 is also accompanied by a code of practice *"Special educational needs and disability code of practice: 0 to 25 years"* that has statutory force for the purposes of appeals. Local Authorities, schools and others concerned with the implementation of CFA 2014 will be expected to follow the Code and if not, to explain any departure from it.

22. The CFA 2014 provides a re-think of education for those with Special Educational Needs in England[3]. Of significance is the seamless approach to the SEN jurisdiction from birth to age 25 and consequently continuity between being a child (to age 16) to a young person in education or training to age 25.

23. Special educational needs is defined as, inter alia *"if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her"*[4].

24. Up to the age of 16, parents or persons with parental responsibility will act on behalf of the child. Young people who are 16 or over will, unless they lack

[2] Human Rights Act 1998, Protocol 1, Article 2: Right to education *"No person shall be denied a right to an education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions"*
[3] Part 3 of the CFA 2014 replaces and extends Part IV of the EA 1996; Part IV remains in force in Wales.
[4] CFA 2014 s.20(1)

capacity, act on their own accounts or by their representatives. Where there is an absence of capacity, *"an alternative"* person will act on C's behalf who will be the *"representative"* of the young person, or if none, his or her parent[5].

25. What was formally a Statement of Special Educational Needs is now an Education and Health Care Plan ("EHC Plans"). The child's parents, the young person or someone acting on their behalf, or a post-16 institution can request EHC needs assessment[6].

26. The EHC Plan must specify[7]:-

(a) the child's or young person's special educational needs;
(b) the outcomes sought for him or her;
(c) the special educational provision required by him or her;
(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
(e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);
(f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

27. The EHC Plan will also, most importantly, identify the placement.

28. The potential for dispute with the LA with responsibility for the child or young person arises, inter alia, at every level as LAs are extremely protective of their budgets and will choose the cheapest option that, in the experience of many parents and carers, is regardless of whether their educational needs are properly met.

[5] SEND Regs 2014, r.64(2)
[6] CFA 2014 s.37(1)
[7] CFA 2014 s.37(2)

29. EHC needs assessments and draft EHC Plans are usually prepared without expert input from educational psychologists, SaLT or OH experts and are put together by 'in-house' 'Special Needs Officers' whose competence can vary. Where the LA commissions reports from 'experts' they tend to be 'short form', incomplete and not address the issues with a degree of thoroughness.

30. Consequently, it is essential for parents or carers to obtain a report from an educational psychologist and from other specialists usually including SaLT and OH. Without this expert in-put it will not be possible to make judgments as to whether the draft EHC Plan has addressed the issues needed.

31. The key areas of dispute arise in consequence of the following:-
    a. assessment:- whether the threshold following a EHC needs assessment has been crossed for an EHC Plan.
    b. draft EHC Plans:-
        i. accurate descriptions of 'Views of the parents, child or young person', 'Special Educational Needs'
        ii. accurate description of 'Special educational provision':-
            1. the educational need and goals
            2. one to one teaching assistant/s
            3. training for school staff
            4. SaLT
            5. OH
        iii. placement.
    c. annual reviews.
    d. change of placement.

32. When disputes arise, and assuming the parties are unable to agree to amendment[8] (usually the LA's position if the amendment has a financial consequence), the EHC Plan or the decision that is disputed can be appealed to the Special Educational Needs & Disability Tribunal ("SEND").

33. Appeals must be brought within two months of the decision appealed and usually take about 4 to 6 months to be heard.

34. The complexity of the process of challenging EHC plans is beyond this paper and is full of technical difficulty. For example, Section F (the educational provision required) of the EHC Plan should identify the special education provision to meet the educational and training needs identified in Section B (the Special Educational Needs), CFA 2014, s.37(2) and the Code, para 9.69[9] (p.166). Draft EHC Plans usually fail to do so and need to be re-written.

35. Section F should also include the needs for health and social care that are treated as special educational provision, the Code, para 9.69 (p.166) and 9.73 et seq (p.170) and *"the provision should be specific and clear and leave no room for doubt as to what has been decided as necessary"*[10]. An absence of clarity and specifics is the norm and re-writing is necessary.

36. As a matter of law the wording of the EHC Plan matters, and where within the plan it is stated. As a matter of practicality, unless the LA's obligations that have financial consequences are unambiguously stated, there is little or no chance of delivery. Even where it is clearly stated, LAs are often forgetful of their obligations, and often delay in delivery.

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[8] whether at face-to-face meetings or by mediation (Code chapter 11)
[9] *"9.69 Provision **must** be detailed and specific and should normally be quantified … in terms of type, hours and frequency of support and level of expertise … for each and every need specified in Section B"*
[10] L v Somerset CC 1998 ELR 129 and London Borough of Bromley v Special Educational Needs Tribunal CA [1999] E.L.R. 260

37. SaLT and OH are educational needs and should be expressed as such (and not just identified under health care needs, even if delivered by the NHS as is often the case)[11]. It is essential the EHC Plan is *"detailed and specific and ... quantified ... in terms of type, hours and frequency of support and level of expertise"*[12] otherwise it is defective and of no use. Again, absent specifics, there will be inadequate delivery.

38. Placement arguments present the greatest difficulty[13]. Notwithstanding that there is a EHC Plan, this is no bar to the child or young person from being educated in an independent school, a non-maintained special school or a special post-16 institution, if the cost is not to be met by the LA[14].

39. If the parental / carers or young person's choice is an independent school and the only placement that can meet the educational needs then this trumps all other arguments[15].

40. However, the LA will almost always be able to identify a maintained placement that is 'suitable' and costs less than the parental choice, this choice being likely to trump the parental choice on account of their choice being incompatible with the efficient use of resources[16].

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[11] London Borough of Bromley v Special Educational Needs Tribunal CA [1999] E.L.R. 260
[12] Code, para 9.69 (p.166)
[13] the choices being (i) mainstream maintained (state) primary or secondary school (ii) maintained (state) primary or secondary special school (iii) independent primary or secondary school approved by the Secretary of State (iv) post 16 institutions.
[14] CFA 2014, s.33(6)
[15] Dudley v JS [2011] UKUT 67 at para 38 *"First, if the tribunal concludes that the nearer school or schools or type of school put forward by the LA are unsuitable for the child and his special educational needs, then there is no dispute as to the consequence. The parents' preferred school alone must then be specified in Part 4 of the statement ..."*
[16] CFA 2014, s.39(4)(b) *"the attendance of the child or young person at the requested school or other institution would be incompatible with (ii) the efficient use of resources"*; EA 1996, s.9 *Pupils to be educated in accordance with parents' wishes. In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local education authorities]shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.*

41. What is and is not taken into account for determining the costs comparison for determining incompatibility with the efficient use of resources is of importance and can be subject to dispute[17]. Further, the test is evaluative by reference to statute, the Code and case law[18].

42. This is in contradistinction to when the choice is between a mainstream maintained school and a maintained special school – the cost of provision is irrelevant. Further, the default is a mainstream maintained school subject to this not being incompatible with the education of others or the wishes of the parents / young person[19] and the LA is under an absolute obligation to make it suitable in these circumstances[20].

43. In these regards, the approach to choice of schools or college placements to meet SEN needs, and their cost, is different from the approach taken in a personal injury claim and is governed statute, SIs, Code of Practice and case law, the provisions of which are complex and bear no relationship to the operation of the common law or tort damages.

Practical considerations for the personal injury practitioner

44. Addressing the issues in turn.

(1) **<u>Primary school</u>**

45. All parents and carers will want the best educational setting for their children and young people.

[17] Haining v Warrington Borough Council [2014] EWCA Civ 398 & for a more recent analysis in the context of the CFA 2014, see KE v Lancashire County Council (SEN) [2017] UKUT 468 (AAC)
[18] EC v North East Lincolnshire Local Authority Upper Tribunal [2016] ELR at para 23 "*The fact that the school chosen by the parents is more expensive than the local authority's choice is not, in and of itself, determinative of whether the extra cost of sending the child there would amount to unreasonable public expenditure. The benefits provided by the more costly school (judged in light of the legislative framework in which SEN tribunals operate) must be looked at holistically and the full picture may justify the extra cost ...*"
[19] CFA 2014, s.33(2)
[20] Harrow Council v AM [2013] UKUT 0157 (AAC)

46. However, it is likely that the choice of school will be limited for children in their younger years to day schools in their locality. Independent day schools with experience of SEN are rare; if parents wish to take advantage of this provision they may need to move house to be close to it.

47. Placing a child with SEN in an independent school without specific experience of SEN is likely to result in failure; unlike maintained primary schools, independent schools have no experience of dealing with EHC Plan annual reviews, how to address challenging behaviour or provide additional support such as one-to-one teaching assistants or SaLT.

48. The consequence, therefore, is that most children with SEN of primary school age will be educated in the maintained (state) schools for their primary school years and regardless of whether there is potential for independent school fees to be paid by a defendant in a personal injury claim.

49. Providing privately paid-for 'add ons' in a maintained primary school (e.g. SaLT, teaching assistant/s etc.) is not permissible – at least by providing supplemental funding to the school. Whether a school will permit an independently paid person (e.g. SaLT) to deliver therapy, training or additional specialist teaching provision on school premises will need to be individually negotiated with the school and/or LA.

50. Notwithstanding the statutory obligations on the LA and schools, the LA will push back on all additional costs over and above a non-SEN pupil and consequently if appropriate provision is to be obtained, an appeal is inevitable. It is only with an appeal pending that LAs are likely to be persuaded to compromise on a reasonable level of provision assuming parents are properly advised and know what this is.

51. The choice of maintained school is important – primary schools vary considerably and some are protective of their league table position and make little or no effort to nurture those with SEN[21]. Some are incompetent whilst many are expert and highly skilled. The problem is never with the children – they are accepting of others with differences – teachers and other parents, however, can be another matter.

52. Consequently, finding a sympathetic head teacher with an able and interested SENCO[22], and a school with experience of successfully managing SEN, is essential for parents and carers. Expert in-put on choice of school is essential (visits by the educational psychologist and SaLT, for example) to act as a filter and double-check that what the parents are told is of some substance.

53. For the personal injury practitioner, consideration should be given to claiming the costs of at least one SEND appeal for a child of primary school age, the cost of expert evidence required for the appeal and for the cost of oversight educational psychology, SaLT and OT. The costs of appeal are circa £10,000 to £15,000 per completed appeal, and less if settled.

54. As part of settlement of an appeal, the LA may be persuaded to permit delivery of privately paid SaLT and OT on school premises. A number of other solutions to properly providing for SEN may be negotiated, as SaLT and OT, delivered by the LA is usually NHS generalist and not specialist, and consequently unlikely to be as good (or any good at all) as that obtainable when privately paying.

[21] hoping that either they will not be chosen by parents, or once there, the child will be moved
[22] Special Educational Needs Coordinator

55. Parents can seek to avoid this necessity by identifying areas of specific expertise in the EHC Plan (e.g. *"SaLT delivered by a therapist with specialist training in brain injured children"*). However, unfortunately, even specific provision does not always filter through to delivery.

56. Therefore, the personal injury practitioner may wish to include a claim for these therapies on a privately paying basis even where the school is maintained with a view to negotiating an arrangement for privately paid delivery of therapies.

57. The cost of annual reviews of the EHC Plan and contingencies arising during the primary school years needs to be provided for. Annual reviews are important opportunities to stock take and check that the provision is meeting expectations. Further, annual reviews may result in a reduction of LA support from which there is a right of appeal.

58. The personal injury practitioner will need to consider making provision for in-put and/or attendance by the case manager at all annual reviews, and legal adviser, educational psychologist, SaLT and OT at some. A contingency for the costs of an appeal from an annual review may also be sensible.

(2) **Secondary school**

59. Whilst mainstream maintained primary schools can often provide a suitable and best setting for children with SEN giving them an opportunity to have school experiences the same or similar to all children (school plays, music, playground interaction etc.), by the age of 11 the gap between children with SEN and those without can result in sub-optimal outcomes and social exclusion.

60. Parents and carers' choices are then between maintained special schools and independent special schools. Whilst there is more choice of secondary independent special schools than at the primary level, these schools are few and residential / boarding is the norm. Parents and carers may need to move to be close to day provision if residential is not a preference; the cost of moving could be a recoverable cost in a PI claim.

61. If moving is not an option, parents and carers face difficult choices. Many maintained special schools have been closed as the default has moved to mainstream for children with SEN. Those that still exist may provide for severe ("SLD") and mild ("MLD") learning difficultly in one setting with mixed classes that result in sub-optimal outcomes. The peer group may also be unsuitable on account to the prevalence of behavioural issues making it difficult for learning progress to be made. Further, children with SEN, like all children, are affected by adolescence giving rise to pressures at home and conflict between siblings.

62. The combination of these factors may point to residential secondary school, almost all of which are independent[23].

63. Therefore, the outcomes may be maintained mainstream or maintained special school to (say) age 14, and then independent residential school to age 19. The costs of independent residential school including specialist SaLT, OT etc. are in the range of £60,000 to £70,000 p.a.

64. The personal injury practitioner will need to consider the costs of a SEND appeal to secure the appropriate provision for maintained secondary day school for (say) age 11 to 14. From age 14 to 19, the full cost of

[23] e.g. St Mary's School & College, Bexhill-on-Sea, East Sussex

independent residential school will need to be claimed if this is the parental or carer's choice and is supported by the educational psychologist.

65. As for primary school, provision should be made for the cost of annual reviews and the contingency for appeal.

(3) **Further education**

66. There is a wider choice of further education in LA controlled colleges for young people with SEN following the implementation of CFA 2014 – colleges are 'following the money' that comes with a EHC Plan.

67. The types of course available and suitable for young people with SEN includes life skills, independent living, literacy and numeracy and a range of other provision dependent on the college and whether it is land based (horticulture, animal care etc.) or not (vocational skills such as hairdressing, hospitality, catering etc.).

68. LA controlled further education colleges are day attended and usually only for three days a week. Days are usually short and consequently, after-college provision and for activities and / or education for the remaining 2 days needs to be planned and costed.

69. The alternatives to day provision is residential college attendance. There are a number choices around the country such as Hereward College, Coventry, and Treloar College, Hampshire.

70. The Education Funding Agency make a per pupil contribution towards fees[24] that in 2015/16 was £4,660 for a SEN pupil in a personal injury case who

[24] www.gov.uk/government/publications/16-to-19-funding-funding-for-academic-year-2018-to-2019

attended a residential independent post-19 college placement. If these sums are likely to be paid, the annual fees recoverable in the PI claim will need to reduced accordingly.

71. If LA finance for non-educational provision is sought for college attendees with SEN, an adult social care assessment will be needed. This usually occurs at any time between the ages of 16 and 19. Parents and carers then have the unenviable task of having to deal with two LA departments, education and social care.

72. For the personal injury practitioner, if a LA controlled further education college is the route there should be an expectation of the need for a SEND appeal in the year of proposed entry (age 19 / 20) and for the concomitant costs of expert evidence, legal advice and support.

73. The costs of attendance at annual reviews throughout a college placement by the case manager, and occasional input / attendance by the education psychologist and SaLT / OT when needed should be accounted for in the claim.

(4) **Buddy / personal assistant**

74. Whilst it is technically a part of the care claim, the employment of a buddy or personal assistant to facilitate independence away from the family after school or college hours, at weekends and during school and college holidays is a necessary adjunct to school / college placements (from say age 15 / 16 onwards).

75. Swimming, tennis and other sporting activities, or accompanying the young person to recreational or entertainment of their choice, is an essential part of

growing up for those with SEN and in preparing for a future away from family life, assuming this is the expectation.

76. The cost of filling-in the parts of the day, week and holidays needs to be costed as part of the overall planning by the personal injury practitioner in the presentation of the claim.

(5) **Transport to & from school / college**

77. Children and young people of school age (to age 16) are entitled to free school transport from the LA. Door to door taxi or minibus services can be provided and where needed, with a chaperone.

78. There can be substantial argument with the LA over the type and quality of the transport provided and whilst the SEND appeal cannot make orders with regard to transport, transport cost is relevant to the issue of the efficient use of resources.

79. LAs are entitled to claim a contribution towards travel for post-16 EHC Plan college attenders[25].

80. Provision in SEND appeals needs to be made for addressing transport issues due to its relevance to the efficient use of resources. For the personal injury practitioner, this issue and the complications arising, can be avoided altogether by claiming the cost of travel by a suitable means to / from school or college.

[25] e.g. Hampshire charges for up to 5 miles £600; 5.01 miles to 7.5 miles £831; 7.51 miles to 10 miles £1,164; Over 10 miles £1,330

Credits

81. Claimants should give credit against their claims for education costs that would have been incurred by them anyway. Student loans may fall into this category though arguably as a set off against a claim for a future loss of earnings on the like-for-like principle.

82. A defendant may also argue private school fees that would have been incurred in any event should be off-set against the claim as was agreed in **Ryan-Ngegwa v Kings College Hospital NHS Trust** 2002 (Lawtel) and where the claim comprised the difference between the 'but for' private school fees and those for specialist education.

Interim payments

83. Where defendants co-operate in providing interim payments claimants maybe able to work their way through the multiple contingencies of the educational process without having to significantly plan.

84. Where, however, this proves impossible proceedings may have to be issued and interim payments sought. The preference for a claimant may then be for a stay of proceedings to the young person's 21st birthday by which time all but college provision would already have been catered for.

85. If the above are not possible, then the claimant personal injury practitioner will need to thoroughly plan for the likely steps and costs of educational provision and to guard against the multiple contingencies of SEN, SEND and childhood that is complex and unpredictable enough without SEN, let alone with it.

The defendant's riposte

86. Kemp & Kemp at para 27-047 floats arguments that a defendant should not have to pay for education that the state has a statutory obligation to provide and that the process for evaluating and adjudicating on SEN is best left to specialist tribunals rather than personal injury litigation.

87. Putting to one side the Peters points and parental / carers' choice for the moment, the difficulty with these arguments is the unreality of the comparison between the recovery of damages in tort and the entitlement to the provision of SEN through the EHC Plan process and by SEND appeal.

88. Most importantly, personal injury claims do not have to consider the efficient use of resources and the complexity surrounding what is, and is not, included for the purposes of comparison between the costs of one placement and another, when a SEND appeal is being considered.

89. Consequently, as interesting as the arguments presented in Kemp are, care should be taken before deploying them that there is a true comparison between what is recoverable in a PI claim and by reason of CFA 2014.

90. A better argument may be where the burden of proof lies. In care claims, the burden is on the defendant to prove that state provision is adequate. Kemp queries at para 27-065 whether this arises with education considering the complexity of the provisions for education and the statutory obligation to consult with parents.

91. The numbers of SEND appeals and the experience of parents, however, would suggest that notwithstanding the completeness of the obligations, LA's approach to care and education are similar i.e. its all a matter of cost.

CONCLUSION

92. Whilst there are strong similarities between state provision of care and education, and the significance of parental and carer choice, there the comparison ends as most parents and carers do not have a choice between state and private funding, at least for all of a child's education.

93. The reality of education for children and young people with SEN is that much of what is available and suitable is only from maintained and state funded sources. This applies in particular to primary and secondary school provision before parents and carers are able to contemplate residential placements.

94. Consequently, most severely injured children will receive some (and probably the majority) of their education from the maintained sector and with an EHC Plan[26]. The costs of recovering legal, case manager and expert assistance during these years, and for top-up in-put for SaLT and OT are likely to be necessary.

95. At the secondary and college levels, independent schools and colleges provide real alternatives and their costs are prima facie recoverable in PI claims. As ever, everything turns on expert evidence. Whichever side you may be on, I suggest that Albert Reid's services are secured 'early doors' as good educational psychologists are like 'hens teeth'.

JOHN MEREDITH-HARDY

Farrar's Building
Temple

LONDON

[26] at this stage, if parents are not properly advised, or by choice, many defendants escape the costs of assisting with the process of the inevitable challenge of the LA's assessment and provision.

APPENDIX 1 - REPORTED & UN-REPORTED AWARDS

L (a child) v Berkshire HA 1999 (Lawtel) – birth brain injury; D agreed at trial to fund L's day education to the age of 19 up to a maximum of £50,000 index linked; past education costs £37,850.

Newman v Royal Berkshire & Battle Hospital NHS Trust 2000 (Lawtel) – birth brain injury; the defendant had offered an indemnity in relation to further educational costs. The schedule of damages made an assumption that the claimant would attend a school (the school) at which she had been offered a two-year placement commencing September 2000. However the school could not confirm that the claimant would be accepted following this period and the claimant could in turn not confirm that a local education authority (LEA) would fund continuing education at the school. The claimant made a claim which valued at £45,000 for private education on the basis that the LEA would not fund the claimant's attendance at the school. For those reasons private education on the basis that the LEA would not fund the claimant's attendance at the school. For those reasons the defendant offered an indemnity in respect of these costs. The claimant rejected the offer of the indemnity on the basis that it was capped at £200,000, that the indemnity offered did not bring any finality and therefore the terms of the proposed indemnity would have lead to future litigation. There was also the overriding point that it was likely that the LEA would provide funding of the claimant's education if not at the school then at another establishment. The defendant withdrew the offer of the indemnity and offered it as part of the immediate settlement which overcame the difficulty arising from the terms of the indemnity on offer.

Johnson v Hillingdon Primary Care Trust 2000 (Lawtel) – birth brain injury; settlement break down estimated by C's sols including future education costs of £2,000 & SaLT of £2,350.

Ryan-Ngegwa v Kings College Hospital NHS Trust 2002 (Lawtel) – birth brain injury; the amount for future loss of earnings was agreed between the parties on the basis that both the claimant's parents were successful in their chosen careers and the extended family were all high achieving. The figure of £510,000 took into account that the claimant would have been likely to have had a similar career. The claimant would also need special private education, however it was agreed between the parties that the claimant would have been privately educated anyway and that the claim would comprise of the difference between the normal private school fees and those for specialist education. The claimant's local education authority agreed to pay £10,000 towards the claimant's education, leaving the parents with a shortfall of £3,000. The claimant's parents are appealing the decision and as a consequence the settlement did not include damages in respect of the cost of the claimant's education.

Harrington v South Buckinghamshire NHS Trust 2004 (Lawtel) – birth brain injury; settlement break down estimated by C's sols including Past SaLT £4,346; Past education & travel costs £27,053; Future education costs of £200,000; Future SaLT of £175,000.

R v Cambridgeshire & Huntingdon HA 2004 (Lawtel) – birth brain injury; settlement break down estimated by C's sols including future education costs of £65,000.

Johnson v North Glamorgan NHS Trust 2007 (Lawtel) – birth brain injury; settlement break down estimated by C's sols including future education costs of £21,200.

B v Royal Cornwall Hospitals NHS Trust 2007 (Lawtel) – birth aftercare brain injury; settlement break down estimated by C's sols including future education costs of £100,000.

Smith v East and North Hertfordshire Hospitals NHS Trust [2008] EWHC 2234 (Penry-Davey J)

Education 49 Mr and Mrs Smith want the Claimant to attend Radlett Lodge School but the issue of funding is unlikely to be resolved before the outcome of 2 tribunal appeals, the cost of which, discounted for accelerated receipt, amounts to £32,041. In the light of that uncertainty and having regard to the very considerable cost of schooling if funding is not available, the Claimant submits that the court should award the sum of £32,041 now, that representing the cost of the 2 necessary appeals, a sum which is conceded by the Defendant and adjourn the remainder of the claim under this head. Because there are potentially large sums involved in my judgment it is appropriate that I give liberty to the Claimant to apply for a future trial of the issue of damages for school care and therapy fees to the age of 19 in the event of an appropriate education authority failing to meet the expenses of the appropriate school. The sum of £32,041 is recoverable under this head in any event but I make clear that including this figure in the overall amount for which judgment is to be given cannot operate in any way as a bar to the Claimant applying for a future trial of the issue of damages for school care and therapy fees to the age of 19. Such application must however be made within 12 months.

Whiten v St George's Healthcare NHS Trust [2011] EWHC 2066 (Swift J) provision for the cost of legal representation at a Disability and Special Needs Tribunal and the cost of employing a one to one education assistant was ordered thus:-

301 In the event, the defendant having now accepted the need for the claimant to move out of the Borough of Wandsworth school catchment area at a time when the claimant is still of school age, I accept also that there is a risk that a different local education authority might not accept his need for a one to one assistant and that his parents might have to incur the legal costs of taking the issue to a Tribunal. The claim for £20,000 is therefore agreed, subject to discounting for accelerated receipt.

302 The claim for the cost of employing a one to one assistant privately is not agreed. This cost would be incurred only if both the local education authority and the Tribunal were to take the view that the claimant did not require a one to one assistant. His physical and cognitive needs are so severe that it seems improbable that this would happen. However, given the current economic stringencies, the risk cannot be discounted entirely. I shall therefore make an award of £7,500 to reflect that risk. That figure takes into account a discount for accelerated receipt.

LC v Tameside & Glossop Acute Services NHS Trust 2012 (Lawtel) – birth aftercare brain injury. Up until the age of 11, C attended a primary school that adequately met his needs. Alternative arrangements were then made for C to be educated at home under a Home Education Programme, under which he made significant progress. The cost of this was provided for in the overall settlement of the claim.

M v Barnet & Chase Hospitals NHS Trust 2015 (Lawtel) – birth brain injury; with appropriate access and a communication aid, C might be able to pass some lower-ranked GCSEs. Past education costs included engaging an education co-ordinator to assist with locating a suitable secondary school and to assist with C's SEN including putting together an education, health and care plan. Future education costs included paying for a full-time learning support assistant when C moved to secondary school, counselling sessions and a specialist education co-ordinator to manage the numerous aspects of her education provision. Past speech and language therapy costs: £13,500; Past education costs: £11,700; Future speech and language therapy costs: £222,800; Future occupational therapy costs: £21,000; Future education costs; £169,000; Future assistive technology costs: £199,000.

KEA v University Hospitals of Leicester NHS Trust 2015 (Lawtel) – birth brain injury; it was expected that K's ultimate level of intellectual functioning would be within the low end of the moderate range of intellectual disability (IQ 35-50). However, it was expected that with increased assistive communication, he would be better able to communicate and his cognitive abilities would significantly progress. speech and language therapy costs: £84,169; aid and equipment costs: £171,322; communication aid and assistive technology costs: £135,292; education costs: £12,500.

FKB v Lampitt 2015 (Lawtel) – psychiatric injury caused by sexual abuse. C was socially withdrawn, lacking in drive and had a limited degree of enjoyment in life. Her education was also affected and she did poorly in her GCSEs. Past education costs: £17,895.

Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923 (Foskett J) – birth brain injury; Future Education agreed at £150,000 taking unto account on-going private one-to-one care, legal fees for a further SENDIST appeal and possible JR.

Harman (A Child) v East Kent Hospitals NHS Foundation Trust [2015] EWHC 1662 (Turner J)

21 The defendant in this case concedes that if the payment of the Prior's Court fees by the local authority were simply a potential entitlement which might or might not eventuate, then it could not ask the Court to take the same into account in its award of damages. However, it is contended that where, as here, the firm and agreed evidence is that such payments are being made and will continue to be made into the future then the effect of Sowden and Crofton is clear and is entirely unaffected by Peters. The Court should take that evidence into account and should not require the defendant to assume responsibility for those fees.

22 I disagree.

23 Ben's parents have unequivocally expressed a preference that the Prior's Court fees should be paid from an award of damages against the defendant. That is how they would fund Ben's placement in the event that the Court made provision for the same in adjudicating on this issue. The effect of Peters is to confirm that Ben is entitled to pursue the defendant for these sums rather than have to rely on the statutory obligations of the LEA.

24 By presenting the situation on the basis that the local authority will continue to pay for Prior's Court the defendant is misstating the position. The local authority will not continue funding if Ben, through those acting on his behalf, does not claim funding. Peters gives claimants the option to elect to pursue the tortfeasor for such funding. Simply because such funding is already being paid and would continue to be available if a claimant were to choose to take advantage of it does not avail a defendant. Indeed, in Peters the claimant was at the time of the hearing living in a private care home which was being jointly funded by the local authority and the Primary Care Trust.

25 In this case, Ben's parents fought a long and difficult battle to obtain public funding for Prior's Court. This struggle took a predictable toll and the issue was resolved only by taking the matter to a tribunal. I am satisfied that Ben's parents' expressed wish to elect to take private funding is entirely genuine and evidences a settled intention in this regard. There is no need for me to adjudicate on whether or not their preference is reasonable. To do so would effectively reintroduce the question of mitigation of loss which was so firmly rejected in Peters .

26 The defendant suggests that if, contrary to its primary case, I were to find that there is a real chance that statutory funding might falter after Ben reaches the age of 19 then they would offer a capped educational indemnity. Again, this misses the point. The right of recovery against the tortfeasor in this category of case cannot be diluted by the offer of an indemnity. Of course, it would be entirely wrong for Ben to receive double recovery and his advisers have indicated that they will preclude this by the deployment of an appropriately worded indemnity from his Deputy. I will make

no comment at this stage as to the appropriate form or content of any such safeguard against double recovery. That may be agreed between the parties subject to my approval or, if necessary, resolved following further argument.

27 In the light of my findings on this issue it would not be appropriate for Ben to be paid any sum towards the cost of potential appeals to the tribunal and this contingency figure should be deducted from the lump sum which has otherwise been agreed.

H v Taunton & Somerset NHS Foundation Trust 2016 (Lawtel) – birth aftercare brain injury; settlement break down estimated by C's sols including Past education costs: £30,000; Future education costs: £181,000; Future loss of earnings: £175,000; Future assistive technology costs: £35,000; Future speech and language therapy costs: £35,000.

BZR v East Kent Hospitals University NHS Foundation Trust 2016 (Lawtel) – birth aftercare brain injury; settlement break down estimated by C's sols including future education costs of £31,000.

AAA v (1) XXX (2) MIB 2016 (unreported; approved settlement; Edis J 19.7.16) – damages estimated at settlement:- Past education £303,846.38; Past transport to / from school £53,878.92; Future education & support worker costs £135,535; Future SaLT £20,000; Future transport to / from college £4,200.

C v Great Western Hospitals NHS Foundation Trust 2017 (Lawtel) – birth brain injury; settlement break down estimated by C's sols including future education costs of £25,500.

MXM v Norfolk & Norwich University Hospitals NHS Foundation Trust 2017 (Lawtel) – birth brain injury; severe learning difficulties; Future assistive technology costs: £43,000; Future education costs: £55,000; Future audiological costs: £40,000.

CXC v XHX 2018 (Lawtel) – age 7 clinical negligence resulting in amputation of left lower limb & psychological trauma; settlement break down estimated by C's sols including future education costs of £28,072.

APPENDIX 2 – REFERENCES

Personal injury & education
Kemp & Kemp chapter 27
Personal Injury Schedules (4th Ed) paras F216 & H390

Education
Special Needs & Legal Entitlement (Nettleton & Friel)
Law of Education (Lexis Nexis)
Special Educational Needs (Whitbourn)

For parents and carers, IPSEA is an excellent provider of free advice & assistance