

Quantum Update

PIBA
March 2019



1



ABC V (1) XCC (2) Churchill Insurance Co (2016)

- 2001 RTA Claimant's Mother injured whilst pregnant
- Claimant born prematurely and developed kernicterus= led to Cerebral Palsy
- Very severe disability. In need of 24 hour care for life (life expectancy of 32)



2



Pleaded Claim

- Loss of Earnings
- Care (Past and Future)
- The Accommodation Claim (*Roberts v Johnstone*)
- Hydrotherapy
- Educational Needs

3



Loss of Earnings



- Difficulty with Claimant who has never worked
- Factors to consider:
 - Family work history
 - Sibling educational attainment
 - Average earnings

4



Care and Case Management



- Past Gratuitous Care
- Separating out “but for” care from care required as a result of injury
- 25%/ 33%
- Aggregate Rate/ Basic Rate

5



Care and Case Management

- Gratuitous Case Management
- Time family taken arranging hospital visits and dealing with health professionals
- Defendant’s stance – parents would have been involved in extensive liaison work and activities for a healthy child so no loss.
- Significant qualitative difference between hospital appointments and arranging and participating in healthy child’s life

6



Care and Case Management

- Future Care
- How many weeks in a year? – 60
- *XXX v A Strategic Health Authority*
- ERNIC
- NEST
- Hourly rates

7



Accommodation

- *Roberts v Johnstone*
- Cost of Suitable accommodation - £720,000
- Life time multiplier 13.61
- The calculation $£720,000 \times 2.5\% = £18,000$
- $£18,000 \times 13.61 = £244,980$
- Shortfall £475,020



8



Potential Alternatives to R v J

- Defendant buys a property and allows the Claimant and family to live rent free
- Defendant makes up the capital by way of loan repayable upon sale of the property after the Claimant's death
- Mortgage taken out on the Claimant's behalf and then paid by the Defendant by way of PPO
- Rental of property

9



The Discount Rate Change

- The RvJ problems have been compounded by the change in the discount rate.
- Claimants cannot recover under the formula when the discount rate is negative.
- An alternative formula based on mortgage interest?
- *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB) and *Porter v Barts Health NHS Trust* [2017] EWHC 3205 (QB)

10



Accommodation Claims

LP v Wye Valley NHS Trust [2018] EWHC 3039

- D's position was zero capital award (cf *JR v Sheffield Teaching Hospitals* [2017])
- C's position was:
 - 4% (SVR on an interest only mortgage)
 - Or 1.3% for 'conservative rate of rtn if investing over 30 years as identified by the Government Actuarial Department in its PI discount rate analysis document dated 19.7.17'.

11



Accommodation

Credit to be given for:

- Past rental of old family home
- Future rental of old family home
- *Ellison v United University Hospitals of Morecambe Bay NHS Foundation Trust*
- *Iqbal v Whipps Cross University Hospital NHS Trust*

12



The Discount Rate

- The Lord Chancellor must:
 - start his review within 90 days (of the bill receiving Royal Assent)
 - set rate within 140 days thereafter (day 230) –
 - i.e. by 6th August 2019 at the latest.

13



Water-based Physiotherapy

- Claim for £220,000 for installation of hydrotherapy pool
- Need to show “clinical requirement”
- *Whiten*
- However, hope in the cases of *Ellison* and *Robshaw*
- *HS v Lancashire Teaching Hospitals NHS Trust*

14



THE LORD CHANCELLOR'S GUIDANCE

- **Aim:** Enable the damages to meet the losses sustained, and be exhausted at the end of the period for which they are awarded.
- **Assumptions:** *‘a diversified portfolio ... more than a very low level of risk, but less risk than would ordinarily be accepted by a prudent and properly advised individual investor’.*

15



Cont...

- The LC must have regard to:
 - the actual returns that are available to investors,
 - the actual investments made by investors of relevant damages,
 - make an appropriate allowance for taxation, inflation and investment management costs
- The consultation in respect of the issues above closes on 30/01/19

16



The Likely Rate

- 2017 Statement - 0 to 1 %
- Lord Keen rowed back from that somewhat ...
- Many insurer's settling at between 0.5% -1%
- Some speculation of 1.25% (although no apparent basis)
- The Aim – *'reduce the burden of over-compensation on defendants, in particular the NHS'*

17



Elsewhere

Jersey – Draft Bill

where the lump sum is to cover a period of up to 20 years, +0.5%; and

where the damages will cover a period of more than 20 years, +1.8% (applicable to the whole of the award, not just the costs arising after the first 20 years).

18



Water Based Physio

- Claim for £220,000 for installation of hydrotherapy pool
- Need to show “clinical requirement”
- *Whiten*
- However, hope in the cases of *Ellison* and *Robshaw*
- *HS v Lancashire Teaching Hospitals NHS Trust*

19



Educational contingency

- Children and Families Act 2014
- Education available up to 25 years
- Risk of education authority changing chosen school at age 16
- Need to appeal any decision
- Indemnity?
- Contingency

20
