QUANTUM UPDATE

(A CASE STUDY)

ABC v (1) XCC (2) CHURCHILL INSURANCE CO (2016)

(Settlement approved by Mitting J 15th June 2016)

1. In 2001 following a modest road traffic accident in which she was a passenger, the Claimant's mother was injured. The Claimant's mother was pregnant with him at the time. As a result of that injury she was taken to hospital and the Claimant was born prematurely. At the time of settlement of his claim, the Claimant was 15 years old.

2. As a consequence of his prematurity and likely mishandling by the Hospital Trust – who were an additional party to the claim – the Claimant developed kernicterus. This left him severely damaged so that he presented with dyskinetic athetoid cerebral palsy (CP). He was unable to speak, was wholly dependent on others for his care, was fed through gastrostomy and (only partially) fed with sieved or pureed food. His life had been wholly blighted; he will never marry, he is unable satisfactorily to communicate, unable to walk nor will he engage in meaningful adult relationships. The Claimant lacked capacity and has no prospect of ever gaining capacity. He had a severe scoliosis and a reduced life expectancy. The evidence of the paediatric neurologist/paediatric neurodevelopmental experts identified that the Claimant had a life expectancy to between 32 and 34 years of age. The respiratory physicians instructed in the case felt that a further year needed to be deducted

for the Claimant's respiratory state. This meant an agreed life expectancy to 32 years.

3. The effect of this was that the lifetime multiplier using table 28 Ogden Tables was 13.61.

4. The claim was pleaded as follows:

1. PSLA - £300,000

PAST LOSSES:

2. Care: £413,031
3. Case Management: £71,800
4. Medical Treatment & Therapies: £22,844
5. Aids & Equipment: £59,715
6. Travelling Expenses: £42,109
7. Accommodation: £166,501
8. Holiday & Leisure: £15,733
9. Deputy Costs: £60,515
10. Miscellaneous Costs: TBA

FUTURE LOSSES:

11. Loss of Earnings: £294,250
12. Accommodation: £806,994 (subject to adaptation costs being confirmed)
13. Roberts v Johnstone: £240,330 (although Claimant seeks an alternative measure as set out)
14. Care: £3,533,716
15. Case Management: £233,448
16. Physiotherapy: £192,508
17. Occupational Therapy: £464,859
18. SALT: £45,602
19. Technology & Equipment: £78,584
20. Vehicle Costs: £216,676

21. Deputy Costs: £182,696
22. Dental Costs: £3,137
23. Music Therapy: £51,906
24. Hydrotherapy: £219,129
25. Education: Contingency £244,529/ Indemnity Sought
26. Dietary Costs: £212,232
27. Future Surgery: £15,000

CAPITALISED GRAND TOTAL: £8,187,844

Loss of Earnings

5. Such a head of claim is always difficult with a young Claimant who of course has had no track record in employment.

6. The Claimant's claim in the Schedule of Loss was to:
   (a) Identify the Claimant securing employment at 18, and;
   (b) Earning £25,000 net per annum
   (c) That it was acknowledged he *might have* earned at a lesser sum but that as time passed – he may have improved his income - so that to take £25,000 was a reasonable approach.

7. The Defendants' contention by contrast was to assume that at age 18 the Claimant would have an earning capacity at £20,000 gross per annum or £16,687 net per annum.

8. The factors employed to argue for a higher award were as follows:

(a) The Claimant's father had earned approximately £28,000 per annum gross prior to the Claimant's birth;

(b) He had reached the level of earnings by the time he was 29;

(c) The Claimant's step mother worked full-time earning £20,000 per annum until she stopped work to care for the Claimant;

(d) She was therefore earning £20,000 in her 20s;

(e) The Claimant's siblings and half siblings were achieving well at school and hence could be anticipated to perform well when they reached the employment market.

Past Gratuitous Care and Case Management

9. This proved a difficult issue in this case because (a) some of the care had been provided by the tortfeasor, (b) the care was over a long period of time and (c) there were the usual arguments about separating out what level of care would have been provided for an able bodied child in any event.

10. Very important to ensure that the care expert understands the individual Claimant's disability and therefore addresses how the Claimant's care needs have exceeded that of an able bodied child.

25% or 33% reduction?

Spinal Column Point 8 - Aggregate or basic rate?

11. These issues seemed to have been largely resolved in recent years but sometimes still argued. All recent large cases support 25% reduction for the gratuitous care although still some scope for argument on whether full aggregate rate or somewhere between aggregate rate and basic rate. See for example:

    Ali v Caton & MIB [2013] EWHC 1730 (QB)

    Farrugia v Burtenshaw & MIB & Quinn Insurance Limited [2014] EWHC 1036

    Tate v Ryder Holdings Limited [2014] EWHC 4256

    Ellison v University Hospitals of Morecombe Bay NHS Foundation Trust [2015] EWHC 366 (QB)

    Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923 (QB)

12. The Defendant disputed the case management:

13. The Defendant pleaded pointedly "*if the claimant was being taken to hospital appointments and his parents were caring for him then that care has already been allowed.* ***The liaison activities claim is also denied. The Defendants do not deny that such liaison took place but the Claimant's parents would have had a wide range of other liaison work and activities with a healthy child which has not taken place because of the Claimant's injury. In short there is no extra loss***."

14. Harsh as this may seem – it seems that there is some traction in this argument. Indeed we dropped the claim for past case management from our final calculations when negotiating settlement.

Future Care

15. In the case this was relatively straightforward and was merely a matter of compromising on relatively small difference between care experts.

How many weeks in a year?

60 weeks per year was accepted as number of notional weeks in the year (to reflect paid holidays, sick leave, training days).

XXX v A Strategic Health Authority [2008] EWHC 2727 (QB) Per Jack J

"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 actually be caring for the Claimant. In previous cases 58 or 59 weeks have been used"

By 2014 in *Farrugia* Jay J described using a 60 week year as *"standard practice"*.

In addition Earnings Related National Insurance Contribution (ERNIC) and compulsory pension contributions (NEST) must be added.

Hourly rates for commercial care were agreed at £12 weekdays and £14 weekends. This is broadly in line with reported cases for this level of injury and care requirements. Ranges appear to be £9/ £10 *(Streeter v Hughes & MIB* [2013] EWHC 2841*)* to £13/ £15 *(Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB)).

The Accommodation Claim

16. This was the most contentious part of the claim and caused most difficulty between the parties.

17. The Claimant had been cared for in his grandmother's house until 2013. That house was far too small for the Claimant's needs and there was no room for the 24 hour carers that he required. Once the claim was up and running and liability had been admitted, interim payments were obtained allowing the Claimant's parents to put in place a care regime. They also moved out and rented a much larger premises. This property had ample space for carers and was equipped with a swimming pool. In addition the landlord was planning extensive redevelopment in the future and hence was relaxed about the various adaptations required by the Claimant being made to the property.

18. The rental of this property was plainly a source of some concern from the Defendants who appeared to believe that it was causing the Claimant's family to have unrealistic expectations as to what sort of property they might be able to purchase in the long term.

19. Initially the parties were a long way apart in their estimates of what an appropriate property for the long term would look like and cost. Eventually the experts reached a band of £675,000 - £765,000 (midpoint £720,000) for an appropriate property. No property had been identified at the point of the settlement conference.

20. The *Roberts v Johnstone* calculation was therefore as follows:

    (a) Midpoint of valuations for appropriate property - £720,000;

    (b) The life multiplier to 32 is: 13.61;

    (c) £720,000 x 2.5% is £18,000 x 13.61 = £244,980;

21. Given the limited life expectancy that this Claimant had, it is obvious that there is a problem with the *Roberts v Johnstone* claim as in all cases such as this – because there will always be a capital shortfall between the cost of purchase of a property and the amount of money that the *Roberts v Johnstone* enables the Claimant to make that purchase.

22. The only way to fill that capital void is to 'steal' money from other heads of loss.

23. There are limited alternative options available to a *Roberts v Johnstone* calculation. First, one could seek to have the Defendant buy a property and enable the Claimant and his family to live their rent-free. Upon the Claimant's

demise and a period of say 12 months thereafter, the Defendants would take the property back and the family would have to move out.

24. The second is that the Defendants effectively make up the capital cap by lending the family the money and enabling the Claimant to purchase the property. Whichever proportion is put into the capital outlay, upon the Claimant's demise (and after a period of say 12 months), when the property is sold, the Defendants recover their percentage proportion.

25. However, in this case these options were not viable because the Claimant's family were absolutely adamant that they wished to sever all ties with the Defendants. That was of vital and great importance to them. There was a huge emotional burden that had gone with not just living day-to-day in straitened circumstances prior to moving into the rental accommodation – but the punishing nature of ongoing litigation.

26. The third option – one which was mentioned to the Defendants and one in which they were unsurprisingly not willing to take up the challenge was for-

    (a) A property to be identified;

    (b) A mortgage to be obtained if at all possible (and that would have to be a fixed rate type mortgage), whereupon;

    (c) The mortgage is paid by way of PPO for as long as the Claimant is alive.

27. The difficulty with this was as follows: in essence to raise that mortgage from a lender – any lender would have to be willing to be very aware of the circumstances of this claim which are unusual and to know precisely which property the money is being lent against. It cannot be lent against a notional property but one which is identified. None had been identified at the time of the JSM nor the Approval.

28. Yet further, under the *Roberts v Johnstone* calculation the Defendant effectively gains the benefit as it were of a 2.5% rate of return. If the Defendants have to pay a PPO index linked to LIBOR there would be a 4.5% levy upon them. One which they would not be prepared to adopt.

29. Renting a property and having rent paid by way of PPO.

30. If one is to challenge *Roberts v Johnstone* one would need the right case to do it and be prepared to either win or lose at first instance and then challenge it in the higher courts.

31. This would be to prolong the litigation further and hence is very difficult in cases where Claimant's are usually very seriously injured and in need of early settlement of their claims.

32. Since this case was settled, indeed since this paper was originally written, the whole *Roberts v Johnstone* argument has been somewhat overtaken by the

change in the discount rate. A negative discount rate means the calculation result in a nil loss.

33. This means that the job of searching for an alternative to *Roberts v Johnstone* is now even more urgent. An alternative formulation of the calculation, based not on the discount rate, but on the extra interest payments on the mortgage seems to be the new favoured method. Indeed this option is also consistent with the Court of Appeal's comments in George v Pinnock [1973] 1 WLR 118 where Orr LJ said:

"An alternative argument advanced was, however, that as a result of the particular needs arising from her injuries, the plaintiff has been involved in greater annual expenses of accommodation than she would have incurred if the accident had not happened. In my judgment, this argument is well founded, and I do not think it makes any difference for this purpose whether the matter is considered in terms of a loss of income from the capital expended on the bungalow or in terms of annual mortgage interest which would have been payable if capital to buy the bungalow had not been available. The plaintiff is, in my judgment, entitled to be compensated to the extent that this loss of income or notional outlay by way of mortgage interest exceeds what the cost of her accommodation would have been but for the accident"

34. See *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB), *Porter v Barts Health NHS Trust* [2017] EWHC 3205 (QB), *Swift*

v Carpenter [2018] EWHC (QB) and *LP v Wye Valley NHS Trust* [2018] EWHC 3039.

35. There were two other areas of attack by the Defendants. The first was whether there needs to be any credit given for:

    (a) Past rent realised from the old family home;

    (b) Future credit given for rental income which they receive in respect of the former family home, if necessary, against the gratuitous care claim (as an example).

36. These arguments are answered resoundingly at least as the future in a variety of cases which are as follows:

    (a) *Ellison v. United University Hospitals of Morecambe Bay NHS Foundation Trust (2015) EWHC 366 (QB),* see the commentary at paragraph 16-016.4 in Kemp;

    (b) *Iqbal v. Whipps Cross University Hospital NHS Trust* in Kemp at 16-016.2.

37. If the test is, in effect, that it is "*wrong in principle for the value of a property that would have been owned by the Claimant's parents to be deducted from the value of the new property be owned by him. To make such a deduction would also be unfair to the Claimant. It will inevitably result in him being inadequately compensated for the loss of investment income on the capital value of the new property*."

38. This, it would seem must equally apply with regard to the past deduction for rental by the parents against the cost of the rent which the Claimant has paid for the new property.

39. To allow a deduction from the rental income which the parents have earned against the rent that the Claimant has paid out of his damages would leave the Claimant out of pocket. He does not take the benefit of the rental income but suffers the consequences of it because it reduces his damages and does not allow him properly to cover the cost of rent- which results in his loss.

Water Based Physiotherapy/Hydrotherapy

40. This was another very contentious issue. The claim for getting on for £220,000 was based on the installation of a small hydrotherapy pool at the Claimant's home.

41. The difficulty we faced is that the medical evidence did not support a "clinical requirement" for hydrotherapy. The best that could be said was that the Claimant enjoyed being immersed in water and was more relaxed both during and immediately after hydrotherapy sessions. Videos were obtained to show him enjoying this therapy.

42. The established legal position was set out in *Whiten* Per Swift J:

"...I have no doubt that the Claimant enjoys his aquatic physiotherapy sessions, just as he enjoys his visits to the swimming pool with his family and/or carers. I readily accept that exercising in water is generally beneficial

for him. However, I am not satisfied that the Claimant has established a clinical need which cannot adequately be met by physiotherapy exercises carried out in an ordinary swimming pool with suitably trained carers and occasionally, his treating physiotherapist. Consequently I make no award for the costs of future aquatic physiotherapy".

43. A claim for a pool was successful in *Ellison* because of the *exceptional circumstances of the case* where the evidence suggested that the pool provided significant pain relief to the Claimant and was the only way to console the Claimant who would otherwise continue to scream.

44. In *Robshaw* a small pool was allowed as the Court found that it provided a *real and tangible psychological and physical benefit*. Foskett J reiterated that just providing pleasure was not sufficient and that this decision should not be considered a *green light* for claiming pools in these type of cases.

45. *HS v Lancashire Teaching Hospitals NHS Trust* [2015] EWHC 1376 Davis J allowed the costs of hiring and travelling to a local pool.

46. In this case we settled on the basis of the *HS v Lancs* approach.

Educational Contingency

47. The whole issue of the Claimant's education was a difficult one. The position is that the family wanted the Claimant to attend a school or an educational establishment until age 19 but not beyond that age.

48. The Defendants were aware that there is now in place potential provision (through the new Children and Families Act 2014) for educational establishments arguably to be available to the Claimant from 19 to 25.

49. It was argued that, if the Claimant either;

    (a) Undertakes education between 19 to 25 on a full-time basis or;

    (b) On a part-time basis (a few days a week);

    there ***must be*** that for the time he is in this educational establishment – his care needs reduce in the day.

50. The other potential issue raised in relation to education was the risk that the education authority could change the parents chosen school. The placement that the parents wanted could not be guaranteed between aged 16 and 19 as the education authority may simply decide they want to send him elsewhere (because it is more convenient and cheaper for them).

51. If that is the position, then the Claimant would either;

    (a) Have to have funds to challenge this by way of appeal or;

    (b) He might find that he withdraws from school and spends more time at home – in which case he has greater care needs and to be catered for certain periods between 16 and 19.

52. Indemnity?

53. In this case the Defendants had no interest in providing an indemnity nor did it appear likely that a Court would Order such an indemnity.

54. In the circumstances, in order to protect against the risk a contingency was built into the settlement figure.