TRAVEL / TRANSPORT & AIDS / EQUIPMENT

Countering a Schedule with such claims

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1. How does *Sowden v Lodge* impact on our approach to damages?

2. Is there a tension between “Full Compensation” and “Reasonableness”?

3. What does “reasonable” mean in this context?

4. What are the contrary arguments?

5. Consideration of our approach to the claims in the Schedule for:

    a. Mileage

    b. Transport

    c. Equipment

    d. Holidays

In two recent High Court cases an approach has been adopted to measuring the Claimant's loss which might seem unfamiliar to most of us:

Taylor v Chesworth & MIB [2007] EWHC 1001

Ramsay J was referred by the claimant to *Sowden*. He concluded:

"I accept that the test therefore … is to consider what course the claimant proposes to adopt and to consider whether it is reasonable having regard to the nature and extent of the claimant's needs, not to consider objectively what approach is reasonable. However, the logical way of approaching the issue must, in my judgment, be to make findings as to the nature and extent of the claimant's needs and then to consider whether what is proposed by the claimant is reasonable having regard to those needs."

A v Powys Local Health Board [2007] EWHC 2996

Lloyd Jones J was here dealing with aids and equipment, but the same type of argument was advanced on behalf of the claimant. He referred to the test of reasonableness and *Sowden*:

" The claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. Accordingly, if the treatment claimed is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable ….. In determining what is required to meet the claimant's reasonable needs it is necessary to make findings as to the nature and extent of the claimant's needs and then to consider whether what is proposed by the claimant is reasonable having regard to those needs."

This introduces an element of subjectivity (the Claimant can "chose" what is best for him) coupled with a restraint on how the "objective" element of "reasonable" is to be applied (you do not test whether "objectively it is reasonable").

The Claimant gets to choose what he wants, as long as:

a) it is needed as a result of his injuries; and
b) he can show that it is "reasonable".

If he can satisfy those two elements then it is "irrelevant"[1] that the Defendant can show a "reasonable" but less expensive alternative.

How has this come about?

The Claimants have turned to the Court of Appeal judgment in *Sowden v Lodge* [2004] EWCA Civ 1370 and the Court of Appeal's reliance on an unreported CA decision of *Rialis v Mitchell*.

§11 "The relevance of *Rialis* is that the issue was whether the tortfeasor was required to pay for a twelve year old boy to be cared for at home or whether he should live in an institution. That is a question similar to those in the present cases. On the facts of that case, the cost of caring for him in an institution was lower. Stephenson LJ stated, at page 25, that "what has to be first considered by the court is not whether other treatment is reasonable but whether the treatment chosen and claimed for is reasonable".

O'Connor LJ stated, at page 16:
"There may well be cases in which it would be right to conclude that it is unreasonable for a plaintiff to insist on being cared for at home but I am quite satisfied that this is not such a case and once it is concluded that it is reasonable for the infant plaintiff to remain at home then I can find no acceptable ground for saying that the defendant should not pay the reasonable cost of

[1] Quoted from Lloyd Jones J in *A v Powys* Para 110

caring for him at home but pay only a lesser sum which would be appropriate only if it was unreasonable for him to live at home and reasonable for him to be in an institution".

Sir Denys Buckley agreed with both judgments and added a postscript as to the criteria by which reasonableness should be assessed."

§38 "The test to be applied is in my judgment that expressed by O'Connor LJ and Stephenson LJ in *Rialis.* That is different from the test applied by the judge who repeatedly used the expression "best interests" though he equated that with a position which "most nearly restores her to the position in which she would be but for the accident". The judge's good intentions with respect to the claimant's welfare are not of course in question and neither, in my view, is the perceptiveness with which he approached the medical evidence but there is a difference between what a claimant can establish as reasonable in the circumstances and what a judge objectively concludes is in the best interests of the claimant. In this context, paternalism does not replace the right of a claimant, or those with responsibility for the claimant, making a reasonable choice. It was when dealing with a somewhat different argument but the objective approach was rejected in *Rialis* (Sir Denys Buckley at page 29A)."

"Full Compensation" and "Reasonableness"

No one doubts that "Full Compensation" remains the touchstone of damages.

Livingstone v Raywards Coal Company (1880) 5 App Cas 25

> " ... 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 in if he has not sustained the wrong for which he is now getting his compensation or reparation*." [italics added]

Wells v Wells [1990] AC 345

> " ... to arrive a lump sum which represents as nearly as possible *full compensation* for the injury ... suffered." [?] [italics added]
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> " .. . to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss." [Lord Hope 390A]
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> How does "reasonableness" fit in?
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> The concept has been clear in the law of mitigation of damage, equally applicable to Tort as it is in Contract.

Banco de Portugal v Waterlow [1932] AC 452, @ 506

> " The law is satisfied if the party placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."
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> However, the burden of proof in establishing a failure to comply with the "duty" to mitigate is on the Defendant.
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> Thus, a Claimant will not be entitled to claim a loss which he could have avoided if he had acted reasonably; the corollary is that if the action taken was reasonable, then it is recoverable, even if a cheaper option might have been available.
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> In relation to medical expenses the courts can rely upon the Law Reform (Personal Injuries) Act 1948 at § S.2(4):
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> "in an action for damages for personal injuries ... there shall be disregarded, *in determining the reasonableness of any expenses*, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the NHS." [italics added]
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> Relied upon explicitly by Hale LJ in *Briody v St Helen's & Knowsley HA* [2002] QB 856 CA, @ [19]
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> "Reasonable" does not explicitly mean "cheapest" or even "best value for money". It is axiomatic that what is "reasonable" must be for that Claimant.

How should Defendants prepare to combat this argument?

1. **The burden of proof remains with the Claimant**. We must strain to ensure that the court does not, in fact, shove the burden of proving that the Claimant's claim is unreasonable onto the Defendant. The approach should not be one of "mitigation of damage".

2. What if he does not prove that the scheme (s)he has advanced is "reasonable" – has his case on that claim failed altogether? What other case is (s)he then allowed to advance?

3. **Is the claim necessarily arising out of the injury?** The cornerstone of the claim is still what is necessary arising from the injury. It is essential to concentrate on establishing on whether an aid or the cost of a holiday is necessary because of the injury before considering whether what is proposed is reasonable.

4. **Choice cannot supersede what is reasonable**. In many cases relating to aids & equipment the price differential will be because of a relevant factor – durability, quality, aesthetics, design, associated benefits. The real argument is not often about price itself. If the two items of equipment (or two care pacakages) are identical in all respects then, surely, it can never be "reasonable" to purchase the more expensive model.

5. **Is the expenditure "certain"?** As was expressed by Stephenson LJ in *Rialis*:
"A Judge must resist the temptation to make the wrongdoer pay for the best possible treatment, regardless of whether the injured party will in fact receive such treatment or whether it is reasonable for him to receive less expensive treatment."
All too often, too little attention is paid to forcing the Claimant to prove he will purchase what he has claimed for.

6. ***Rialis* was not a case where "choice" was at issue; the issue was between institutional or home care which was why the Defendant's position became "irrelevant" once the Judge had decided on home care – but is not authority for ignoring the Defendant's case otherwise.**

The Effect of the Counter Schedule

Travel

1) Hospital visits immediately after the accident – Often wrapped up with a claim for care. Indeed, tactically the best thing for a claimant to do.

2) In *Tagg v Countess of Chester Hospital Foundation NHS Trust* [2007] EWHC 509, McCombe J declined to allow a claim for care and travel "in respect of the provision of companionship". Kemp has long referred to the unreported decision of *Havenhand v Jeffrey* [13-005] where a clear distinction was made between *physical services* and emotional support (which was not allowed). The approach in *Havenhand* was approved by the Court of Appeal in *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657. *Giambrone v JMC Holidays Ltd* [2004] EWCA Civ 158 also provides useful material in support.

3) Warning: I suspect that claimants may seek evidence that such support aids recovery; alternatively that it will be put on a footing of providing not emotional support, but psychological support. Defendant will need to get back to arguing that care claims should be restricted to physical services.

4) Mileage Rates – On the other hand *Tagg* and *Burton v Kingsbury* [2007] EWHC 2091 both provide support for a mileage rate that does not simply cover "running" costs alone. In *Tagg* McCombe J referred to depreciation as an additional factor over "running" costs; in *Burton* Flaux J referred to the Inland Revenue tax free allowances.

5) The Defendant position is difficult and less and less likely to succeed. Whether in respect of a Taxi or a Bus, the cost covers the overheads of both "running" and "standing" expenses. We should concentrate on showing that there is a cheaper way to travel, if that is available – mitigation of loss.

6) Expenses v Litigation Costs – Very frequently now, claimants include the cost of travel to experts. It is not an "expense" which is recoverable as damages, it is a litigation cost. If allowed the Claimant not only benefits in not having to prove it in the costs schedule, but gets the statutory interest as well. John Leighton Williams QC (Dep HC) in *Lane v PR of Deborah Lake (Deceased)* in 2007 agreed.

Transport Claims

7) Capital cost of Voyager + Entervan – First, does the medical evidence prove a need for such a large and expensive vehicle? Is it right that (a) the Claimant needs his carer to accompany him, and (b) that actually the carer will accompany him? If he proves the "need" then the claimant is likely also to prove that it is "reasonable".

8) Secondly, are both items capital costs or does the Entervan addition add value to the Voyager on resale. See *Sarwar No2.* [2007] EWHC 1255 – where Lloyd Jones J treated it as providing no resale value. If the contrary is to be argued then evidence will be necessary.

9) Insurance – Here the Claimant has not claimed for the increased cost of insurance in travelling with a Carer. He has also failed to claim for any extra running costs.

10) Adaptations – In relation to the claim for adaptations to drive from his wheelchair: again, is this necessary ?

11) Annual Cost – The Claim is for change every 3 years – but on what is that figure based? Usually, the argument centres on the number of miles which he is likely to do each year. There is an upper limit (usually 5 years – see the evidence of Miss Ho in *Sarwar No 2* [60]).

12) Why has no allowance been made for the cost of the car which the Claimant would have changed regardless of this accident?

13) Multiplier – Why is a whole-life multiplier used. Will this Claimant still be driving a vehicle at the end of his life – or will he be reliant on other transport by then?

Holidays

14) An increasingly popular claim (along with Hydrotherapy). There are two important points to consider: first, whether the injury justifies extra holiday cost at all; secondly, whether what is being claimed is genuinely the "extra" cost?

15) Extra discomfort can be compensated in greater PSLA awards; is extra annual cost really justified? This really means focussing on the injury and its effect. If the Claimant could travel without a wheelchair and a carer that would make a significant difference. Otherwise it is business class travel for 2 (but the wife can still travel in economy as she would have done anyway). Cf *Sarwar No 2* [72 onwards] and *Noble v Owens* [2008] EWHC 359.

Aids & Equipment

16) There is no intention to deal with this on an individual basis. The point is to consider two factors here: first, whether the wheelchairs can be justified on grounds of both reasonability and certainty of use. The argument is intertwined.

17) Sport Wheelchair – Clearly the claimant has not yet started the sport, despite the gap between being fit enough and trial. It is a very significant cost so justifiable only if likely to be used for some time.

18) In any event, can the whole-life approach to the multiplier be justified? No!

19) Spare Wheelchair – How long does it take to get the wheelchair repaired? How often do they breakdown? It is a significant amount of money to be tied up if really unused.

20) Focus the attention of your expert on answering such points.

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