

COMPENSATION FOR CARE

Abigail Stamp and Sophie Holme



Guildhall
CHAMBERS

Pre-existing Conditions

- How do you determine causation and quantum in cases where a pre-existing condition would have led to a requirement for care in any event?



Reaney B is the answer...

- *Sklair v Haycock [2009] EWHC 3328 (QB)*
- *A. Reaney v University Hospital of North Staffs. NHS Trust [2014] EWHC 3016 (QB)*
- *B. Reaney v University Hospital of North Staffs. NHS Trust [2015] EWCA Civ 1119*
- *C. Reaney v University Hospital of North Staffs. NHS Trust [2016] EWHC 1676 (QB)*

It all started with Sklair...

Background History

- 46 year old, Asperger's Syndrome and Obsessive Compulsive Disorder;
- Lived with his father from age 24;
- Provided with Basic Needs – cooking, laundry;
- Otherwise independent.

Sklair contd...

Accident

Pedestrian in Road Traffic Accident 18/04/07

Injuries

Cervical Spine Injury – preventing fine manipulative tasks, shuffling gait, clumsiness, risk of falling.

Chronic Adjustment Disorder – anxiety and worsening of OCD

Care “but for” accident

- 3-5 years gratuitous care from Father
- 10-15 years family funded commercial care
15-20 hours in father’s flat;
- Thereafter, local authority living arrangement.

Claimant's Actual Future Need for Care

- Accepted C needed 24 hour care by trained person;
- Sleep in carer paid for 6 hours present for 10;
- Essentially a *continuation of his arrangements at trial - slightly modified.*

Extent of Credit - 'very little authority'

First Principles

- Damages are purely 'compensatory'

'If Claimant would have incurred expenditure if the accident had not occurred, being expenditure which he will not now incur, then it is only fair and reasonable for such expenditure to be taken into account' at 88

Para. 89

‘However, where the Claimant would have continued to enjoy care and attention given out of love and affection which he now cannot enjoy because of the accident, I see no reason in either logic or justice why he should be required to place a value on that care and attention and then be made to give credit for it.’

‘...I do not believe for one moment that his father would feel that he has achieved a saving as a result of the accident: far from it, I am sure that he would have much preferred to continue to care for the Claimant for as long as he is able to do so.’

Extent of Credit

Gratuitous 'but for' care

- No deduction for any gratuitous or LA 'but for' care against commercial care now required;
- Full recovery for all commercial care for first 3-5 years.

Commercial 'but for' care

- Expenditure of family for 10-15 years now avoided so must give credit in full;

Sklair – Causation as Quantification

First Question

What the Claimant would have paid for ‘but for’ the accident?

Second Question

What will the Claimant (choose to) pay for, in respect of his post-accident condition?

A Reaney: High Court, First Instance

Factual Background

Non-Negligent Injury

- Claimant (DOB 14/05/47) suffered transverse myelitis -> permanently paralysed below mid-thoracic level

Negligent Injury

- Grade 4 pressure sores, osteomyelitis, flexion contractures of legs and hip dislocation

The “but for scenario”

- Normal “T7 paraplegic aged 61”
- Waking hours out of bed in standard wheelchair self-propelling with good posture and balance;
- Basic household chores, out and about with family support
- Hands on support with lower half activities;
- Transfers: independent-ish -> 70
70 -75 with one carer;
75 -> hoisting two carers.



“but for scenario” Reaney contd.

Care

- Most manage with family support alone;
- 1 hour per day local authority assistance supplemented by modest family transfer supervision;
- Increasing with ageing process to 31.5 hours per week initially one carer then at 75 2 carers

Future Actual Care Needs – Reaney

- 24/7 commercial carers;
- Transfers, regular repositioning by 2 experienced people – risk of shearing injury; urine/faecal damage.
- Accommodation for 2 carers.

Legal Framework

- It is worse to be totally deaf than half deaf...
- If a Defendant worsens an existing condition, the consequence of the initial impairment may be greater.

So....Extent of Credit?

- Court initial decision ‘unclear’ as to extent Defendant contending credit should be given for “but for scenario”
- Court endorsed *Sklair encouraging parties to resolve along same lines.*

The Second First Instance Decision...

‘My conclusion was that she requires 24/7 care from two carers for the rest of her life which was materially different from what she would have required but for the development of the pressure sores and their sequelae...I saw no basis for some credit to be made by the Claimant for the notional cost of the care she would have required in any event. It was not care that she would have paid for’ at 21

REANEY - THE COURT OF APPEAL

- It had never been disputed that D was only liable for the additional loss caused.
- The question was HOW that principle should be reflected in the damages awarded.
- And C's 'suggested answer' changed following receipt of the notice of appeal

C'S APPROACH AT FIRST INSTANCE

A	Factual assessment of what C would have paid for pre pressure sore care	NIL
B	Objective assessment of post pressure sore need	£2.6 M
Loss	Subtract A from B	£2.6m

The Defendant's Objection

- 1) The question of **causation** had been blurred with the question of **quantification**.
- 2) The judge should have
 - a) assessed the additional **care need** and
 - b) quantified the cost flowing from the additional **care need**
- 3) Comparing the **cost** of pre accident care with the cost of post accident care was not a 'like for like' assessment

THE LIKE FOR LIKE PROBLEM

- Assessing reasonable need without consideration of D's resources

Cf

- Competing demands on SS resources
- 'Make Do' care regimes

The Claimant's Revised Approach

- *.... if the Defendants' negligence caused Mrs Reaney to have care and other needs which were substantially the same kind as her pre-existing needs, then the damage caused by the negligence was the additional needs.*
- *.... if the needs caused by the negligence were qualitatively different from her pre-existing needs, then those needs were caused in their entirety by the negligence.'*

What is the Difference?

A quantitative difference - *'more of the same'*,
even substantially more of the same.

A qualitative difference – *'different in kind'*

What might be qualitative?

Sklair v Haycock

- Supervisory care v 24 hours personal support
- *‘the care regime required after the accident could properly be described as qualitatively different from that which previously had been needed (and would have been needed in due course)’*
- *The right decision for the wrong reason*

Shearman v Folland

- *Hotel cf Care Home*

Mrs Reaney – A Qualitative Change?

- We will never know!
- Not addressed by Foskett J
- *It may be that the significance of the difference between quantitative and qualitative care was not spelled out at trial*
- *'If the judge had made a finding that the care package required was different in kind ... it might have been difficult to challenge it'*
- Insufficient evidential basis for this proposition to be advanced
- Remitted to Foskett J

C's Submissions

- **Foskett J** - C's position was *'materially and significantly worse'*
- **Foskett J**- *She would not have required 'the significant care package she now requires'*
- **Foskett J** - *'a much better quality of life' cf 'now very much worse'*
- *Inexpert handling could result in a shearing injury*
- *Care staff should be trained by a neuro physiotherapist.*
- *Occasional bursts of physiotherapy cf assistance with a stretching programme*

How do you assess the difference?

Social Care Needs v Health Care Needs?

- 1) **Nature** – considers the physical, mental and psychological effects of the need on the individual, and the type of intervention required to manage these effects
- 2) **Intensity** – consider quantity, degree and continuity of need/ intervention
- 3) **Complexity** – how the needs present and interact and the skill required to manage them
- 4) **Unpredictability** – This gives rise to challenges in management and risk

Back to Foskett J

- CA had not ruled on how to quantify the pre accident care need
- Foskett J – *‘the right comparison is between what is reasonably required in the post accident scenario and what is reasonably required in the pre accident scenario, both being objectively assessed.’*

Back to Foskett J

- There was a dispute between parties as to whether an objective assessment could take place on the findings within the first instance judgment.
- The transcript should be reviewed by the parties and further submissions made.

Still no answer ...

C valued at c. 2.5 million and
D valued at c. 1 million

*Foskett J - 'it would be far better if the parties
could resolve their issues by agreement'*

The matter was settled for an undisclosed sum
following negotiations

Proof of Expenditure

‘given there is no claim for the first carer and no funds available to fund such a carer, the likelihood is that the Claimant will remain dependant upon the local authority for her basic care needs ... the Claimant will only suffer loss to the extent that she must pay additional charges to the Local Authority.’

A Further Thought

Is there any scope for the Defendant to argue that there should be a credit note in cases where there is a qualitative change in care?

- *Sklair* – a qualitative case with a credit note
- *'Adding Insult to Injury'*, Andrew Lewis QC - JPIL [2016] 3 (establishing the qualitative difference is a matter of causation, at the quantification stage D can still argue for a credit note)

Instructing a Care Expert

- 1) Provide an objective assessment of the care needs prior to the negligence?
- 2) Provide an assessment of the current care needs?
- 3) To what extent are the care needs qualitatively different from what happened before? To what extent are they quantitatively different from what happened before?
- 4) Is it all or nothing? E.g. All care is quantitatively different except continence care which?

Problem Question – Pre Accident

Jeremy (17) had learning difficulties and diabetes. He lived in 'low support' residential accommodation which cost the local authority £500 p/w. He attended to his own personal care. Carers performed his household chores and checked his blood sugar levels every 4 hours (day and night). Whilst he could access the community independently he preferred to go out with his parents who visited him for 2 hours p/d. The nature of his diabetes is such that he was and is likely to develop diabetic foot ulcers in 10 years time.

Problem Question - Post Accident

Jeremy was then involved in a surgical mishap and sustained a brain injury. He became angry and irritable and needed to be moved to a 'medium support' unit. The nearest suitable unit was 50 miles away and so Jeremy's parents decided to care for him at home. He required assistance with diabetes management and domestic chores as before. In addition, he required assistance with mood management during the day time but was usually well behaved at night. He needed two people with him (who were trained in restraint) when accessing the community.

Jeremy's Care Plan

Carer	Hours	Tasks	Cost
Day time carer	12 hours per day	Diabetes management, mood management, accessing the community	£1250
Waking Nights	12 hours per day	Diabetes management	£750
Parental Care	10 hours per week chores 14 hours per week accessing the community	Cleaning, cooking, accessing the community	Gratis us

Questions

What was the pre accident care need?

What is the current care need?

Is it qualitatively different?

Is it still qualitatively different in 10 years time?
(Foot ulcers/ parents wish to place in private home)

Are there any arguments on credit?

What evidence do you need?

Have the care needs qualitatively changed?

Consider: Type of care, Frequency of intervention, Intensity of intervention, Skills of carer (training /restraint), Stress to gratuitous carer

Claimant's Arguments

Defendant's Arguments

Practice Points

- Ask your care expert to cost up the reasonable care needs attributable to the pre existing condition
- Call evidence on why/whether there is a qualitative difference in care
- Dissect the care regimes and emphasise the similarities/ differences