Martin v Salford Royal NHS Foundation Trust:
Variable PPOs and statutory funding

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Martin v Salford Royal: the background facts & procedural history

- [2018] EWHC 1824 (QB)
- [2022] PIQR Q2
- [2022] 4 WLR 56

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Variable PPOs – the statutory background

- S2(1) Damages Act 1996
- CPR 41.7
- Damages (Variation of Periodical Payments) Order 2005 (SI 2005/841), specifically:
  - Article 2 (giving the power to make a variable PPO);
  - Article 5 (the Order must specify the relevant disease or type of deterioration or improvement and must provide that permission is required for an application to vary);
  - Article 7 (only one application can be made);
  - Article 10 (any application to vary must be accompanied by evidence; and addresses, alongside Article 11, the application for permission)
  - Article 14 (unless inconsistent with the provisions of the Order, the CPR will apply)

Variable PPOs v Provisional Damages

- *"This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the [claimant] will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition"*
- Was the judge right to find the wording essentially identical?
- Kotula v EDF Energy Networks (EPN) plc [2011] EWHC 1546 (QB)
- N.B. see Chewings v Williams [2010] PIQR Q1 re. amputations & provisional damages

Variable PPOs – application in Martin

- Medical evidence as to the chance of institutional care (Mr Worlock & Dr Basu).
- Points highlighted by the judge (relevant to the discretion):
  - C wants certainty with no further applications or chance to lose her award; she doesn't trust D.
  - The making of a variable PPO shouldn't be a run-of-the-mill occurrence. The general rule is that damages should be assessed once and for all.
  - The need for caution is underlined by the fact that only one application may be made to vary the PPO.
  - If an order were made and the variation activated, there would be a benefit to the public purse but no consequential detriment to C.
- Order permitted an application to vary at any time during C's lifetime.

Martin – statutory funding

- Transport and the Motability Scheme (paras. 73 to 78 and see Eagle v Chambers)
- The general approach to statutory funding of care (Sowden, Tinsley & Peters).
- Care regime in place (at trial) – *"electively incontinent"* at night
- S117 (Mental Capacity Act 2005) aftercare
- Care needs included psychiatric (non-compensatable) and physical (compensatable)
- Judge's conclusions required consideration of:
  - Whether the split care package would be detrimental to C
  - Whether the care provided under s117 was adequate
  - C's views

Learning points

- Evidence always trumps legal argument.
- Statutory funding should always be considered at an early stage, with the case prepared accordingly.
- In any case with a changing future picture, consider provisional damages and a variable PPO at an early stage and formulate your evidence accordingly.

Queen's Bench Division

Martin *v* Salford Royal NHS Foundation Trust

[2022] EWHC 532 (QB)

2022 Jan 12–14; March 11 Judge Bird sitting as a High Court judge

Damages — Personal injuries — Assessment — Personal injury trust — Claimant awarded damages for personal injuries — Claimant having capacity albeit vulnerable to exploitation and at risk of suicide — Claimant seeking to recover costs of setting up and maintaining personal injury trust to manage damages award — Whether court under positive operational duty to award such costs for protection of claimant — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 2[1]

The claimant had been awarded damages in respect of neurological and physical injuries caused by the negligence of the defendant NHS trust. She lived with emotionally unstable personality disorder ("EUPD") and paranoid schizophrenia and had an extensive psychiatric history which pre-dated the trust's negligence and included previous attempted suicides and long periods of time detained in mental health facilities. It was accepted that the claimant was vulnerable to suggestion and at risk of being influenced to spend her money in inappropriate ways as a result of her EUPD, and she had previously expressed a desire to have the award managed by others. During the trial of quantum the claimant had been held to have capacity, and thus she was not entitled to claim any damages in respect of Court of Protection costs or the costs of a deputy to manage the award. With permission of the court, the claimant amended her schedule of loss contending, inter alia, that the court had a protective jurisdiction and a positive duty to protect her as she was vulnerable and at risk of suicide, which duty ought to be discharged by awarding her the costs of setting up and maintaining a personal injury trust.

On the personal injury trust issue—

Held, that the established principle that the court was not concerned with how a claimant dealt with damages after they were awarded showed that the court did not adopt a protective role in general; that, although the High Court could exercise a protective or supervisory jurisdiction, that was most commonly invoked to compensate a claimant who lacked capacity for the cost of managing a compensation fund, or as part of the court's inherent general jurisdiction in relation to children; that outside of those fields, a positive or "operational" duty to protect the fundamental rights of other vulnerable individuals might arise under article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, making it appropriate for the court in the present case to consider whether it was under an operational duty to take steps to counter the risk that the claimant might commit suicide; that while the evidence established a real and immediate risk of the claimant committing suicide, a real and immediate risk to life was not sufficient on its own for the operational duty to arise; that it was relevant that the claimant, not being an in-patient or a protected party, was not under the direct supervision of the state, the NHS trust, or the court and, while the class of persons who might benefit from the article 2 operational duty could extend to those who were "voluntary" psychiatric in-patients, to extend the class of potential beneficiaries even further to someone in the position of the claimant would be going too far and would not be in accordance with principle; that while the claimant was vulnerable to exploitation, which vulnerability had been "amplified" by her injuries and by the award of damages she had received, she had support and the evidence suggested that the risk of suicide was not high; that it was further relevant that the suicide risk did not entirely arise as a result of the trust's negligence, but rather from a number of factors exacerbated by the claimant's pre-existing mental health issues; that, taking all those factors into account, no operational duty arose on the facts of the present case; and that, accordingly, in the absence of a protective jurisdiction over the claimant's affairs, and consistently with the overriding principle that the court was not concerned with the future management of the compensatory fund, it was

[1] Human Rights Act 1998, Sch 1, Pt I, art 2: "(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. …"

not open to the court to award damages in respect of a personal injury trust (post, paras 66–73, 77, 86).

Rabone v Pennine Care NHS Trust [2012] 2 AC 72, SC(E) considered.

CLAIM for damages

By a claim form the claimant, Celine Martin (formerly known as Vicky Kathleen Higgins), brought an action for clinical negligence against the defendant, Salford Royal NHS Foundation Trust, in respect of the injuries she had sustained in hospital during 2010 whilst detained under section 38 of the Mental Health Act 1983. Liability was established following trial before Andrews, J in June 2018 ([2018] EWHC 1824 (QB)). On 12 November 2021 Judge Bird sitting as a High Court judge assessed the damages payable ([2021] EWHC 3058 (QB)), and found that the expert evidence fell short of the evidence required to displace the presumption that the claimant had capacity to manage and control her damages. However, Judge Bird allowed a late amendment to the original claim to include damages to cover the cost of establishment and maintenance of a personal injury trust, with the issue of whether such damages ought to be awarded to be determined together with the arrangements for payment of future damages, ie whether they were to be paid as a lump sum or by periodical payments.

The facts are stated in the judgment, post, paras 1, 2.

Mary Ruck (instructed by *Slater and Gordon UK Ltd, Liverpool*) for the claimant.

Charles Feeny (instructed by *Hill Dickinson, Liverpool*) for the NHS trust.

The court took time for consideration.

11 March 2022. **JUDGE BIRD** handed down the following judgment.

1 This hearing follows my assessment of damages in this case. I am to determine how the damages are to be paid: by a lump sum order or by a periodical payments order and if periodical payments are appropriate whether that order should be variable. I am also to determine (after allowing permission to amend the original claim at the end of the quantum trial) whether the claimant (whom I found to have capacity) should receive damages to reflect the set-up and running costs of a personal injury trust.

2 The background to the claim is set out in the liability judgment of Andrews J (as she then was) reported at [2018] EWHC 1824 (QB) and the quantum judgment reported at [2021] EWHC 3058 (QB); [2022] PIQR Q2.

Lump sum or periodical payments order

3 By section 2(1) of the Damages Act 1996 a court awarding damages for future pecuniary loss in respect of personal injury is required to consider making an order that the damages are wholly or partly to take the form of periodical payments.

4 CPR r 41.7 requires the court to have regard to all the circumstances of the case and in particular to consider the form of order which best meets the claimant's needs having regard to the following factors:

(a) the scale of the annual payments taking into account any deduction for contributory negligence.

(b) the form of award preferred by the claimant including (i) the reasons for the claimant's preference; and (ii) the nature of any financial advice received by the claimant when considering the form of award; and

(c) the form of award preferred by the defendant including the reasons for the defendant's preference.

5 The claimant has received financial advice from Richard Cropper. He has prepared three reports and I heard oral evidence from him. His evidence was, given the size of annual payments, that the claimant's needs would be best met by a periodical payments order. In summary, he was concerned that uncertainty in the performance of future investments meant that there was a risk that returns anticipated by the discount rate would not be achieved. His view was that the risk of under-performance should not be borne by the claimant. Mr Feeny (who appears for the defendant) did not challenge that conclusion.

6 Miss Ruck who appeared for the claimant confirmed that the claimant accepted Mr Cropper's advice and was content that she should receive a periodical payments order.

7 I have considered the claimant's detailed witness statement dated 22 October 2021. In that statement she confirms that she has discussed the matter with her father. Her position is summarised at paragraph 3:

> "… I have really considered hard whether it would be better to have the lump sum myself and I think it should be my decision. However, my dad and my legal representatives have concerns about that, given what Mr Cropper says in his report. They all agree with Mr Cropper's advice that an annual payment is the best way forward. Having listened to them and discussed it all, I agree with the conclusion reached by Mr Cropper. It is my preference to have my damages awarded in respect of future care and case management paid by way of periodical payments."

8 Taking into account the factors set out in CPR Pt 41 I have come to the clear conclusion that I should order that the claimant's damages for future pecuniary loss should take the form of periodical payments.

Variation of the periodical payments order

9 Article 2 of the Damages (Variation of Periodical Payments) Order 2005 (SI 2005/841) ("the 2005 Order") gives the court power to include as part of an order for periodical payments provision that the periodical payments may be varied (such an order is referred to as a "variable order").

10 The power arises:

> "If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will— (a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or (b) enjoy some significant improvement, in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission."

The mechanism envisaged by the Order

11 If such an order is made, article 5 of the 2005 Order provides that it "must specify" the relevant disease or type of deterioration or improvement and "must provide" that a party "must obtain the court's permission to apply for it to be varied unless the court otherwise orders".

12 The requirement to specify the relevant disease or type of deterioration or improvement is central to the operation of the 2005 Order. See in particular:

(a) Article 7 which provides that a party may only make one application to vary a variable order in respect of each specified disease or type of deterioration or improvement.

(b) Article 10 which requires an application for permission to vary the order (which is required by article 5 unless the court dispenses with the requirement) to be accompanied by evidence that "the disease, deterioration or improvement specified in the order … has occurred".

(c) Article 13 which allows the court to vary the order if satisfied that "the disease, deterioration or improvement specified in the order … has occurred"

13 The need for permission to apply to vary the order introduces a gate-keeping step into the process (similar to the permission stage built into most appeals and into judicial review proceedings). Article 10 deals with the application for permission and provides (article 10(5)) that it will be dealt with "without a hearing" after consideration of the applicant's evidence and any representations made by the respondent. If permission is refused the applicant has the right to have the refusal reconsidered at a hearing where any decision is final (article 11). If permission is granted the court will give directions for the final determination of the application.

14 Article 14 provides that unless the provisions of the 2005 Order are inconsistent with them, the Civil Procedure Rules ("CPR") will apply. CPR Pt 41 (which deals with damages) makes no specific reference to the variation of periodical payments. CPR r 39.2 provides that the general rule is that interim or final decisions made by the court are to be made at a public hearing. CPR r 23.8 sets out certain instances in which the court may make an order on an application without a hearing. The application to vary the variable order (the substantive application) will therefore generally take place at a public hearing in the usual way. CPR Pt 52 and its Practice Directions will govern rights of appeal.

15 There was some suggestion in the course of argument that the application to vary might be dealt with on paper without any right of appeal. For the reasons set out above I reject that contention.

The power to vary

16 There are clear similarities between the terms of the 2005 Order and the terms of section 32A(1) of the Senior Courts Act 1981 which authorises the court to award provisional damages:

> "This section applies to an action for damages for personal injuries in which there is proved or admitted *to be* a chance that at some definite or indefinite time in the future the [claimant] will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration *in his physical or mental condition*."

17 With the exception of the emphasised words, article 2(a) follows section 32A(1). It follows that judicial guidance on the application of section 32A(1) will assist with the application of article 2(a). In *Kotula v EDF Energy Networks (EPN) plc* [2011] EWHC 1546 (QB), Irwin J accepted the submission that the basis for variation of periodical payments is in law "identical for all essential purposes" to the test under the amended Damages Act 1996.

18 In my view the power to vary an order under article 2(a) covers physical and mental conditions. Such an interpretation is consistent with the view taken by Irwin J in *Kotula* that the 2005 order does not mark a change on legal policy. The omission in the 2005 Order of the underlined words in the Statute seems to me to be simply a matter of drafting. The underlined words have been removed because they are not necessary.

19 The effect of Scott Baker J's decision in *Willson v Ministry of Defence* [1991] ICR 595 (and the subsequent decision of the Court of Appeal in *Curi v Colina* The Times, 14 October 1998 and also the decision of Slade J in *Chewings v Williams* [2009] EWHC 2490 (QB); [2010] PIQR Q1, para 12) is that before the power arises there has first to be proved or admitted a chance (ie something that is measurable rather than fanciful) that the claimant will develop some serious disease or suffer some serious deterioration to her physical (or mental) condition.

20 In *Willson*, the learned judge found on the evidence that no "chance of a serious deterioration" had been established and so no order could be made.

The evidence

21 The application for a variable order is made by the defendant because the serious deterioration for which it contends will lead to a decrease in the cost of the claimant's day-to-day care. The relevant deterioration identified by the defendant falls under two heads, the first identified by the claimant's own orthopaedic expert Mr Worlock (see para 22 of the quantum judgment) and the second from the jointly instructed neurorehabilitation expert Dr Basu (see para 25 of the same judgment).

22 Mr Worlock suspects that the combination of the claimant's long standing psychiatric problems (not attributable to the defendant's negligence), the profound weakness of her left arm/leg and problems with her right hip will mean that she will require to move to a nursing home at some point in the future probably during her 60s or 70s. Dr Basu felt that it was likely that the claimant would suffer from significant limb stiffness from about the age of 60 at which point it might be necessary to transfer her to institutional care.

23 The defendant's position is therefore that there is a sufficient "chance" that the claimant will in the future (when she is in her 60s) suffer a deterioration in her physical condition as a result of its negligence which (either alone or as a result of her pre-existing mental health condition) will result in a need to move her to an institutional care environment. Such a deterioration would be serious because it would mean that the claimant's home-based care regime, no matter how comprehensive, would not be sufficient to meet her care needs. In other words, she could no longer live at home and would require "institutional" care.

24 Whether that chance (which I find exists) eventuates is a matter for the court in due course on any application for a variation.

25 I am satisfied that the defendant has established on the evidence that there is a more than fanciful prospect (a chance) that at some time in the future, the claimant will, as a result of the act or omission which gave rise to the cause of action, suffer a serious deterioration in her condition.

26 I am therefore satisfied that the power to make a variable periodical payments order arises. I have a discretion. In exercising the discretion, I bear in mind the following points:

(a) The claimant has expressed a desire for certainty going forward. She does not want to worry about further applications to court or about the risk of losing some of her award. The claimant does not trust the defendant.

(b) The making of a variable order should not be a run-of-the-mill occurrence. The general principle remains that damages should be assessed once and for all at the date of the relevant court hearing.

(c) The need for caution in approaching the issue of variation is underlined by the fact that the order allows for only one application to vary.

(d) If the order is made and the variation activated there would be a benefit to the public purse because the defendant would pay a reduced annual bill. At the same time, because for the variation to be made it would need to be established that the claimant's care needs could not be met at home, there would be no consequential detriment to her.

27 I have come to the conclusion that I ought to exercise the discretion in the defendant's favour and make a variable order. I accept that such orders are not everyday orders but note that the Order allows me a wide discretion. The claimant will be disappointed by this conclusion. I am satisfied however that it is the appropriate order to make. In making it I am simply permitting an application for a variation to be made in due course in accordance with the terms of the Order. Whether one is permitted will be a matter for the court in due course.

28 It was suggested that any order should prevent an application to vary being made before the claimant's 60th birthday. Although the evidence refers to the likelihood or probability of the deterioration occurring once the claimant is in her 60's, it does not exclude the chance that it will occur earlier. For that reason, the order should permit the application to vary at any time during the claimant's lifetime.

29 Since hearing argument an amended draft variable order has been prepared. The terms of the draft are not agreed. If there are further submissions on the precise form of order, I will hear them when this judgment is handed down.

Damages in respect of the cost of a PIT

30 At the end of the quantum trial, I gave permission to the claimant to amend her schedule of loss to include the cost of setting up and running a personal injury trust ("the PIT"). There has been no amendment of the particulars of claim and so no new cause of action has been added. I now deal with the outcome of the trial of that issue.

31 In summary the claimant submits that there is a reasonable need for an award of damages to cover the costs of the PIT so as to restore the claimant to the position she would have been in had the defendant not been negligent. The claimant relies on her vulnerability to justify such an order. In effect she calls on the court to make an order designed to protect her from the consequences of that vulnerability. The amended schedule of loss puts the claim in this way:

> "the claimant will require a professional trustee and the shelter of a Personal Injury Trust to provide the necessary protection, structure and security for the claimant's funds. She is vulnerable to financial exploitation, by reason of her mental health and the receipt of funds will make her a target for such exploitation. A trust puts a shield between her and the money, so as to impede unrestricted access."

32 I will deal with the particular circumstances of the claimant which render her vulnerable and so establish a reasonable need for a PIT. I will then consider the evidence of how a PIT would work in practice and how effective it would be as a mechanism to protect the claimant against her vulnerabilities and then consider the law, first by reference to specific authorities and then by considering the proper approach to an award of damages of this type first as a matter of principal and then on the facts of the case as I have found them to be.

The claimant

33 The experts (Dr Adshead and Dr Ramzan) agree that by reason of her EUPD diagnosis, the claimant is at risk of "getting into the kind of interpersonal relationship in which she is vulnerable to exploitation by an intimate or dependent".

34 I have accepted that evidence and found that the claimant is vulnerable to suggestion and at risk of being influenced to spend her money in inappropriate ways as a result of her EUPD. On the other hand, I have found that she has capacity and that she seeks and acts on advice, in particular from her father. The claimant told me in evidence during the quantum trial that she would seek advice on how to deal with her fund and it was clear from her evidence that she had some insight into her vulnerability.

35 Specific instances of how others have taken advantage of her vulnerability or attempted to do so are set out in her latest witness statement of 22 October 2021. There the claimant talks about Tinisha Cotterell's request to borrow £10,000. I refer to this incident in the quantum judgment. Dr Qureshi (whose report I refer to below, and whose assessment of the claim is the most up to date I have) refers to requests from family for money once she has received her damages award.

36 I accept, as the experts point out, that the claimant's schizophrenia is not subject to complete recovery and both schizophrenia and EUPD are "enduring in nature". In June 2020 when Dr Ramzan prepared his report on the claimant (as her instructed expert in psychiatry) he concluded that her schizophrenia was stable, and that the claimant was taking prescribed drugs

appropriately. At the same time her EUPD was in "relative remission" following a "gradual amelioration of the claimant's presentation over time".

37 I note that the expert evidence refers to a close link between the claimant's physical care regime and her mental health. Dr Adshead and Dr Ramzan have agreed that "a proper and comprehensive approach to meeting her physical health needs is likely to have a beneficial effect on her mental health". In my view this link is important. Going forward the claimant will have in place a suitable and appropriate physical care regime as a result of the damages award. She will have the benefit of a periodical payments order to cover her future care needs and she will soon receive a substantial capital payment to allow her to purchase and adapt a property in which she can live comfortably. All of these factors will, as the experts have agreed "have a beneficial effect on her mental health".

38 Because it was relied on by the claimant it is necessary to consider the claimant's risk of suicide. I briefly referred in the quantum judgment to suicide attempts before 2010.

39 Between April 2013 and May 2016, the claimant lived at Agricola House. Whilst there it appears that she experienced some suicidal ideation and may have attempted suicide by tying a cord around her neck. She told Mr Ford (her care and equipment expert) that the episode was a "blip" and that by July 2017 she had no suicidal thoughts although there were reports of such thoughts in February 2017. Dr Ramzan describes that in 2018 the claimant again had suicidal thoughts and had taken overdoses of cocaine in August and November 2018. In 2019 (at a time when the claimant was in hospital having been recalled under the terms of the hospital order) she was assessed as being a suicide risk and presented with "suicidal thoughts, plans and intent". She remained at risk of suicide in 2019 whilst still in hospital. After release from hospital in March 2020 it appears from a report compiled by Dr Qureshi on 16 April 2021 that she continued to have some suicidal thoughts. In August 2020 she was admitted to hospital following an overdose and released shortly thereafter.

40 Dr Qureshi concluded in April 2021 that the claimant's then current risk to herself was low but could escalate quickly if her mental health deteriorates. I have seen no new expert evidence since the reports prepared for the quantum trial in May 2021. Dr Qureshi's report is the most up to date I have been taken to.

The evidence of protection afforded by a PIT

41 It is notable that despite detailed evidence from very experienced experts I have not seen a proposed or standard form trust deed. I do however have the benefit of a helpful explanation of how a PIT might be constituted from Elizabeth Hughes, the defendant's expert and, albeit to a lesser extent, Mr Knott, the claimant's expert. Miss Hughes is a solicitor and director of Hugh Jones Solicitors where she is head of Court of Protection work. She deals with PITs at paras 14 to 19 of her statement dated 18 October 2021. Mr Knott is a solicitor and a Senior Practice Director at the claimant's solicitors.

42 Miss Hughes' evidence is that the usual vehicle for a PIT is a "bare trust". *Snell's Equity*, 34th ed (2019), para 21–027 describes a bare trust in this way:

> "A bare (or simple) trust is one where property is vested in one person on trust for another, but where the trustee owes no active duties arising from his status as trustee. His sole duty is to convey the trust property as the beneficiary directs him. An example is where property is transferred to T 'on trust for B absolutely'. In such a case, T's sole duty is to allow B to enjoy the property and to obey any direction he may give as to how the property should be disposed of."

43 As the claimant has been found to have capacity, Miss Hughes points out that trustees will have "extremely limited duties". Miss Hughes bases her assessment of future costs of a PIT on such a limited involvement. At para 17 she says:

> "in the event that an adult claimant with capacity requests access to her money, her trustees cannot stand in her way. If she asks for the trust to be wound up and for the assets held within it to be transferred to her, the trustees will be duty-bound to comply with her instruction. The claimant will be making her own decisions. The trustees will be powerless to prevent the claimant from spending her money in any way that she chooses."

44 At paragraph 4(b) of his statement of 13 May 2021, Mr Knott agrees that the most suitable form of trust in these circumstances is a bare trust.

45 In the joint statement prepared by the experts, Miss Hughes noted that the PIT gives "some protection against vulnerability because it gives the trustee the opportunity to discuss a decision with the beneficiary but if the beneficiary retains capacity to make the decision even if they are vulnerable the trust cannot withhold funds". Both experts agree that the "level of costs" is "reasonably necessary" to manage the claimant's award.

The case law on the general approach to awards which compensate the claimant for the cost of managing a compensation fund

46 Such awards are routinely made when a claimant lacks capacity. In those cases, the award would cover deputyship and Court of Protection costs. Such cases represent the paradigm invocation of the court's protective jurisdiction. Where a claimant has capacity, awards to cover this type of loss have (at least in the past) not been made.

47 The general approach to an award of damages to cover the cost of taking advice on the investment of a compensatory fund (and managing that fund) is summarised in *Eagle v Chambers (No 2)* [2004] EWCA Civ 1033; [2004] 1 WLR 3081, para 88 onwards. The Court of Appeal there discuss the first instance decision of Davis J in *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB); [2004] 3 All ER 367 decided two months earlier. The following points appear:

(a) The claimant in *Eagle* was a protected party. There was no issue that the costs of a "receiver" (or Deputy) were recoverable, but there was an issue about investment advice that would be provided by experts selected from a court of protection panel.

(b) Damages in respect of such costs were not awarded because Investment costs are "within the territory" of the applicable discount rate. In other words, the cost of investment advice is taken into account when the discount rate is set (*Wells v Wells* [1999] 1 AC 345 and *Page v Plymouth Hospitals NHS Trust*) and so awarding such sums would lead to double recovery (see also *A v Powys Local Health Board* [2007] EWHC 2996 (QB) at [157]). The principle applies to protected parties and parties of full capacity.

(c) Fund management charges fall to be treated in the same way as investment advice. *Page v Plymouth Hospitals NHS Trust* concerned claims for investment charges and fund management costs.

48 It is common ground (the experts having so agreed) that the PIT sums sought will not cover investment advice.

49 In *A v Powys Local Health Board* Lloyd-Jones J (as he then was) dealt with the issue of future management of a large award at para 155 onwards. The claimant, who was vulnerable but of full capacity, had sought an award to cover the cost of a professional trustee to carry out administrative tasks and "to act in protection of [her] interests". The Learned Judge rejected the claim on the basis that the claimant had no reasonable need for a trustee to protect her interests. The Judge attributed particular weight to the fact that the claimant was of full capacity and was no more vulnerable than any other severely physically disabled claimant. She had the benefit of "devoted and protective family". On this basis the court left open the question of whether it would "ever be appropriate to make an award in the case of someone who is not and will not be a patient for the cost of a trustee performing a protective role similar to that of a court appointed deputy in the case of a patient".

50 I was referred to a Scottish decision of the Outer House of the Court of Session in *Good v Lanarkshire Health Board* [2015] CSOH 75; 2015 Rep LR 99. At paras 15 to 17 Lord Uist deals with the recoverability of PIT costs. The court refused to award PIT costs on the basis that a PIT was not "necessary".

Where a claimant has a particular vulnerability

51 The claimant argues that the court has a positive duty to protect the vulnerable which requires it to award the PIT costs the claimant seeks. *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 AC 72 is cited as authority for that proposition.

52 The claimant points to a number of claims which lead to the House of Lords decision in *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 AC 373 as an instance of the court acting to protect the vulnerable. The report concerns three joined appeals. In each, parents sought to bring negligence claims against doctors and social workers who had negligently concluded that the parents had abused or harmed their children. In one case a child brought an action. In each case, after the trial of a preliminary issue, the claims had been struck out on the ground that no duty was owed to parents or to children applying principles set out in the House of Lords decisions of *X (Minors) v Bedfordshire County Council* and *M (A Minor) v Newham London Borough Council* [1995] 2 AC 633.

53 The Court of Appeal (whose decision is reported at [2003] EWCA Civ 1151; [2004] QB 558) noted that the facts of each claim had arisen before October 2000 when the Human Rights 1998 came into force. No claim could therefore be brought under the Act. The Court of Appeal concluded at paras 83 and 84 that, insofar as they concerned the rights of a child, the *Bedfordshire* and *Newham* decisions of the House of Lords "cannot survive the Human Rights Act" and therefore that

> "It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings".

The position was "very different" in respect of claims brought by parents. The Court of Appeal concluded that no common law duty of care was owed to parents.

54 The appeal to the House of Lords was concerned only with the question of whether a duty was owed to parents. Lord Bingham would have allowed the appeal, expressing a clear preference for the law of tort to "evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems". The majority however (Lords Nicholls, Rodger and Brown) dismissed the appeal.

55 The claimant also relies on *In re T (A Child)* [2021] UKSC 35; [2021] 3 WLR 643 a case which concerns the court's power to invoke its inherent jurisdiction to deprive a child of her liberty when to do so appears to run contrary to statute and to article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In short, the majority of the Justices agreed with the view expressed by Lady Black, at para 141, that

> "it is unthinkable that the High Court, with its long-established role in protecting children, should have no means to keep these unfortunate children (and others who may be at risk from them) safe from extreme harm, in some cases death. If the local authority cannot apply for an order under section 25 because there is no section 25 compliant secure accommodation available, I would accept that the inherent jurisdiction can, and will have to be, used to fill that gap, without clashing impermissibly with the statutory scheme".

56 At para 175 Lord Stephens JSC (with whom the majority agreed) felt that the use of the inherent jurisdiction in these circumstances was "supported by the operational duty" which arises under article 2:

> "The positive operational duty to protect life under article 2 arises where the state, or in this case the High Court as a public authority, has actual or constructive knowledge that there is a real and immediate risk to the life of an identified individual or individuals. If the duty arises then it falls to be discharged by public authorities, including by the High Court but this does not necessarily mean that action, or any particular action, needs to be taken. Rather the nature of the action depends on the nature and degree of the risk and what, in the light of the many relevant considerations, the public authorities, including the High Court, might reasonably be expected to do to prevent it. In this way the positive operational measures must be chosen with a view to offering an adequate and effective response to the risk to life as identified."

57 The *Rabone* decision is relied upon to establish that the court has a protective jurisdiction and a duty to protect the claimant from the risk of suicide. It is submitted that the duty should be discharged by requiring the defendant to pay damages to allow the PIT to be established. Before dealing with the argument, I note that the claimant has not expressly pleaded reliance on article 2 of the Convention (the right to life) and so does not seek to argue that article 2 can be used to provide any remedy. At paragraph 12 of the claimant's skeleton argument Miss Ruck, relying on *Rabone*, submits that "the court, as an emanation of the State, has an operational duty to safeguard life where there is a real and immediate risk to life".

58 In *Rabone*, The parents of an adult child who committed suicide whilst on home leave from hospital where she was a voluntary patient receiving psychiatric care after a recent serious attempt at suicide argued that the defendant trust owed them a duty ("the operational duty") to take steps to prevent their daughter's suicide. The claim was dismissed at first instance and in the Court of Appeal but upheld in the Supreme Court.

59 The following points arise from *Rabone*:

(a) Article 2 may, in certain well-defined circumstances, give rise to a positive duty to protect life. The duty will be breached if there is a known "real and immediate risk" to the life of an identified individual and the relevant authority has failed to take appropriate steps which might have avoided the risk (para 12).

(b) It is not every "real and immediate risk" to life that gives rise to the duty. The risk of a patient dying whilst undergoing heart surgery is likely to be "real and immediate", but no operational duty arises. The risks in such cases are simply "casual risks" (see paras 18–21).

(c) The following factors may be relevant ("but not necessarily provide a sure guide" see para 25) in determining whether the operational duty exists (where there is "real and immediate risk"): (i) Whether the state has assumed responsibility for the individual's welfare. The paradigm case being where the state has detained an individual (para 22). (ii) The vulnerability of the individual (para 23). (iii) The nature of the risk (para 24) where a distinction is drawn between ordinary risks (inherent for example in a soldier's working life or treatment as a patient) and exceptional risks.

(d) The steps an authority would need to take to discharge its duty depend on "the extent of the risk" (para 98 Baroness Hale of Richmond JSC) and the standard demanded is one of reasonableness (para 43). The authority is not required to take on a disproportionate burden in discharging the duty (para 12 and Baroness Hale JSC at para 86).

Bars on recovery and other reasons to require recovery

60 In granting the claimant permission to amend to plead a claim for PIT losses, I expressed the view that simple, factual "but for" causation was made out. "But for" causation is generally seen to serve an exclusionary purpose. Save in special circumstances (which do not arise here) a claim will fail if the claimant cannot establish that "but for" the defendant's wrong the loss would not have been suffered. Establishing "but for" causation is often simply a first step in the enquiry into the extent of recoverable damages.

61 The general aim of an award in damages is to restore the claimant to the position they would have been in "but for" the defendant's wrong. The general aim is however subject to restrictions. As *McGregor on Damages*, 21st ed (2020) puts in at para 6–001:

> "To award damages so as to put claimants, as far as money can do, entirely in the position they would have been in had the tort or breach of contract never occurred, would place too great a burden upon defendants. Some limits must be imposed upon this starting figure, and the defining and refining of these limits by the courts over the years have produced the most difficult, and hence the most interesting, problems in the whole field of damages."

62 Damages that are too "remote" are not recoverable. *McGregor* explains that remoteness is a portmanteau term covering a spectrum of reasons for denying what might be seen as "full" recovery.

63 It follows from these statements of principle that even if the claimant establishes that there is a reasonable need for her to receive damages to cover the costs of the PIT so as to restore her to the position, she would have been in had the defendant not been negligent, a right to recovery does not follow.

Discussion

64 I regard the absence of any reported decision where the court has decided to award the costs of managing an award to a claimant of full capacity as instructive. As Lloyd-Jones J (as he then was) noted in *A*, the absence of authority is not in itself a bar to recovery as long as the claim is in accordance with legal principle and other authority.

65 The claimant seeks to invoke the protective jurisdiction of the court. The presence (or absence) of a relevant protective jurisdiction is in my judgment of central importance to the outcome of the claim.

Does the court have a protective function here?

66 The court's protective (or supervisory) jurisdiction arises most obviously where a party lacks capacity. In such circumstances the party is a "protected party", or a "protected beneficiary" and the protector is the court. The costs of managing a compensation fund (deputyship costs and court of protection costs but not the cost of taking investment advice) are awarded in such cases as a matter of course.

67 The High Court has an inherent general jurisdiction in relation to children (and others who are unable to protect themselves) which is protective in nature (see the decision of Macdonald J in *Tameside Metropolitan Borough Council v AM* [2021] EWHC 2472 (Fam)). In some circumstances a positive duty (an "operational duty") arises to protect the fundamental rights of a vulnerable individual. The cases of *D* and *In re T (A Child)* are cases where this protective jurisdiction is invoked to protect children.

68 Save where children and protected parties or protected beneficiaries are involved, the court does not generally adopt a protective role. This is illustrated by the established principle that the court is not concerned with how a claimant deals with damages after they are awarded. A person who is of full capacity is entitled to take his or her own view of things. There will be no separate award in respect of the cost of investment advice and a successful claimant will be free to invest, gamble or otherwise squander his damages.

Discussion

69 Although there is no claim based on article 2 (the right to life) I accept that it is appropriate to consider if the court comes under an operational duty to take steps to counter the risk that the claimant might commit suicide. Such a duty is protective in its nature.

70 I am prepared to proceed on the basis that the claimant's risk of suicide is both real and immediate. Dr Qureshi's report of April 2021 (now eight months old but the most recent I have) clearly considers that the risk of suicide is not remote or fanciful. I note that in *Rabone* the judge at first instance described the risk of suicide as "low to moderate" (see paras 35 and 38). Dr Qureshi's evidence in my view is that the risk of suicide was "present and continuing" in April 2021. This is enough for me to conclude that the risk is "immediate" (see para 39 of *Rabone*).

71 I did not hear evidence from Dr Qureshi and so the conclusions I draw from his report (which was not prepared for these proceedings but for a different but important purpose) are necessarily not as robust as they would be had his view been tested in cross examination.

72 It is plain from *Rabone* that the presence of a real and immediate risk to life is not sufficient for the operational duty to arise. In considering if the duty does in fact arise, I take the following factors into account:

(a) The claimant is not under the direct supervision of the state (or the defendant) or the court. She is not an in-patient and she is not a protected party. In *Rabone* the Supreme Court extended the class of persons who might benefit from the article 2 operational duty to those who were "voluntary" psychiatric in-patients. To extend the class of potential beneficiaries even further to someone in the position of the claimant would in my view be going too far and would not be in accordance with principle.

(b) I accept the claimant is vulnerable to exploitation. That vulnerability has been "amplified" by her injuries and by the award of damages she has received. But she has support from her father and takes his advice. Her position is improving, and her continued stability will be assisted by the care package and accommodation that will be put in place.

(c) In considering the nature of the risk it is necessary to consider likelihood of the risk eventuating as well as whether the risk is "exceptional" or "ordinary".

(d) The risk of the claimant committing suicide is, on the evidence, not a high risk. Dr Qureshi has expressed the view that the claimant's self-harming is "a lot better" and reports that she is "collaborative and co-operative" when dealing with mental health support. These factors, combined with the award of damages designed to address her physical needs for the rest of her life (which will have a "beneficial effect" on her mental health (see para 35 above), are all pointers to a low risk.

(e) As to the nature of the risk, it arises from a number of factors including substance abuse and relationship breakdowns and feelings of desperation arising out of her injuries, all of which are exacerbated by pre-existing mental health issues. I would class the risk as exceptional rather than ordinary because it cannot be said to be something the claimant has consented to or acquiesced in. I consider it relevant that the suicide risk has not been created solely by the defendant's negligence.

73 Taking all of these factors into account I have come to the conclusion that the operational duty does not arise.

74 If I am wrong and the duty does arise, I have come to the conclusion, bearing in mind the extent of the risk, that the duty has been discharged and if I am wrong about that, that there are no reasonable and proportionate steps the court (or the defendant) should be required to take to deal with the risk. In reaching that conclusion I take the following into account:

(a) A substantial award of damages has been made to deal with the claimant's physical health and care needs going forward. The care package she will receive is holistic and includes agreed

provision for holidays, transport and accommodation. No provision within the damages award was made for mental health care because no issues were raised with the state-funded psychiatric care she is receiving. The provision of a state-funded suitable mental health care package (which addresses her risk of suicide and self-harm) is a very strong indicator that any operational duty owed to her is being discharged.

(b) I am not persuaded on the evidence that requiring the defendant to fund a PIT would address the risk faced by the claimant in any meaningful way. The claimant is free to choose to have a PIT if that is how she chooses to manage the fund and for the reasons I set out below I am not persuaded that the PIT is in any event an effective mechanism to protect the claimant from her vulnerability.

75 A further point arises in my view from the cases. In *In re T (A Child)* the court was invited to authorise a local authority to deprive a child of their liberty. The court sanctioned the steps taken by the local authority and in effect declared the steps they had taken to be lawful. In *D* the court used the Human Rights Act to conclude that a duty of care was owed to a child. In neither of those cases was the court's direct answer to the call to act an award of damages. Here the claimant seeks an award of damages. Even if the court owes an operational duty it seems to me that an award of damages would not be a reasonable response to the risk.

76 I therefore conclude that no protective jurisdiction arises, whether by reason of an operational duty or otherwise.

The consequences of an absence of protective jurisdiction

77 In the absence of a protective jurisdiction over her affairs in my view it is not open to me to award damages in respect of a PIT. This is consistent with the absence of any reported case where damages to fund a PIT have been awarded to a claimant with capacity. The overriding principle is that the court is not concerned with the future management of the compensatory fund. Save for the points I have dealt with and dismissed, there is no principled basis on which I can conclude that an award should be made.

Taking the claimant as the defendant finds her

78 In my view this also adds nothing to the argument. Taking the defendant as a vulnerable person is the starting point. The real issue is what steps should be taken to deal with the vulnerability. Where the court lacks a protective jurisdiction (as explained above) the answer in my judgment is that the court has no power to protect the claimant.

79 For these reasons I have come to the conclusion that no award should be made under this head on the facts of this case.

Alternatives

80 In case I am wrong in my conclusion, and it is open to me on the facts as a matter of principle, to make an award I would in any event decline to do so.

81 I am not satisfied that the claimant's vulnerability is such that an award of damages to fund a PIT is reasonably necessary or indeed appropriate. I come to that conclusion for a number of reasons:

(a) As Miss Hughes's evidence make plain a bare trust could be unravelled at any time by the claimant. If she is determined to make unwise gifts, investments or purchases that is a matter for her, and such a determination would not be foiled by a PIT. It may be that other mechanisms could be worked into the trust to introduce a cooling off period or other protections, but such mechanisms were not explained to me and could not interfere with the overriding purpose and principle of a bare trust. A trustee of a bare trust seeking to frustrate the will of the beneficiary would be acting in breach of trust. In any event a limited cooling off period in my judgment adds nothing. A bare trust offers little (if any) protection against the claimant's vulnerability.

(b) Whilst the claimant is vulnerable her future care regime is likely to lead to a better mental health outcome than would have been the case if there had been no such package. The care package is itself to be funded by way of variable periodical payments. There is therefore some comfort that her vulnerability will not become worse as time moves on. She has an insight into her vulnerability and the support of her father and others around her including a case manager.

82 The fact that the experts have agreed that PIT damages are reasonably necessary to manage her award deals with a different point. I agree with the experts that if it was appropriate to award damages to fund the management of the award, the sums they have agreed would be appropriate. However, I have concluded that that is not the case. The principle of whether to award damages is a question for the judge, not for the experts.

83 If I am wrong in every respect of the conclusions I have expressed and damages should be awarded, I would have awarded the following sums (all heads save (d) are agreed):

(a) Setting up the trust £1,200
(b) Year 1 costs £14,700
(c) Year 2 costs £11,300
(d) Annual costs after year 2 in the annual amount of £7,500
(e) The one-off cost on respect of future contingencies £24,000 and
(f) Winding-up costs of £900.

84 A multiplier would need to be applied to the annual costs. I agree there would need to be a small reduction in the multiplier agreed for the quantum trial because almost a year has passed since that trial took place. I would not make any award in respect of the annual cost of the trust employing support workers. I do not consider such a cost would be reasonably necessary to meet the claimant's needs as a vulnerable person. Neither do I make any allowance for the prospect of a reduction of costs if the claimant moves to residential care. I have dealt with the prospect of residential care in the quantum judgment and above in this judgment dealing with variation of the periodical payments order. I would award £7,500 in respect of ongoing costs because I prefer Miss Hughes's view on costs over that of Mr Knott whose initial report set out substantially higher costs than those now agreed.

85 Before the claimant reaches any conclusion about a PIT it will be vital that the guidance given by Norris J in *AKB v Willerton* [2016] EWHC 3146 (QB); [2017] 4 WLR 25 is followed.

Conclusion

86 For the reasons I have set out I will make a variable periodical payments order and award no sums in respect of the amended claim for the costs of setting up and running a PIT.

87 I am grateful to both counsel.

Orders accordingly.

Jo Moore, Barrister

MARTIN v SALFORD ROYAL NHS FOUNDATION TRUST

QUEEN'S BENCH DIVISION

HH Judge Bird: 12 November 2021

[2021] EWHC 3058 (QB); [2022] P.I.Q.R. Q2

LT Capacity; Care costs; Clinical negligence; Future loss; Measure of damages; Mental patients; Personal injury trustssti

H1 *Quantum—clinical negligence resulting in permanent physical and cognitive disabilities—care funded under s.117—whether adequate—whether double recovery—split care package—transport—capacity—personal injury trust—late amendment of claim—award*

H2 M was detained in hospital under s.37 of the Mental Health Act 1983, following her conviction for arson. As a result of the negligence of the Salford NHS Foundation Trust, M suffered a number of injuries which left her permanently physically incapacitated. She also suffered brain injury resulting in severe neurological impairment. It was not disputed that she would need support and care for the rest of her life. She received care funded under s.117 and the Defendant submitted that there was a very significant prospect of double recovery and that a split care package was undesirable. There was a hearing as to quantum. M's capacity to manage and control her damages was in issue. Expert neuropsychiatric evidence was called to address the issue of M's cognitive deficit. In the event that she was found to have capacity, M sought leave to amend her claim to include damages to cover the cost of the establishment of a personal injury trust. The Defendant objected to the late amendment.

H3 **Held,** that there was no reason why M's care package should not be split between physical and mental health providers, provided there was oversight and communication. The care regime under s.117 was inadequate and did not place her in the position she would have been but for the Defendant's negligence. An award for future care was appropriate and the possibility that M would continue to take advantage of the s.117 provision was not sufficient to justify an adjustment to the award of damages. Her accommodation was unsuitable and a new home must be acquired, with an award calculated applying *Swift v Carpenter*. The Claimant also required transport provision, but having expressed a willingness t use the Motability Scheme, damages for a private car were inappropriate. A modest sum for future loss of earnings was appropriate.

H4 The evidence of cognitive deficit fell short of that needed to displace the presumption of capacity, and no award would be made in respect of the cost of a

Deputy or Court of Protection costs. M's application to amend her claim to include an application for damages for the establishment of a trust would be granted.

H5 **Cases referred to:**
Crofton v NHS Litigation Authority [2007] EWCA Civ 71; [2007] 1 W.L.R. 923; [2007] B.L.G.R. 507
Eagle v Chambers (No.2) [2004] EWCA Civ 1033; [2004] 1 W.L.R. 3081; [2005] P.I.Q.R. Q2
Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795; [2014] B.L.R. 89
Nesbit Law Group LLP v Acasta European Insurance Co Ltd [2018] EWCA Civ 268
Quah v Goldman Sachs International [2015] EWHC 759 (Comm)
R. (on the application of Tinsley) v Manchester City Council [2017] EWCA Civ 1704; [2018] Q.B. 767; [2018] 2 W.L.R. 973
Swift v Carpenter [2020] EWCA Civ 1295; [2021] Q.B. 339; [2021] 2 W.L.R. 248

H6 **Legislation referred to:**
The Mental Capacity Act 2005

H7 Decision of HH Judge Bird, sitting as a Judge in the Manchester District Registry of the Queen's Bench Division on 12 November 2021, making an award of damages to Celine Martin, a protected party, by her father and litigation friend Kevin Finbarr Higgins, in her action against the Salford Royal NHS Foundation Trust.

H8 *M. Ruck* (instructed by Slater and Gordon UK Ltd) for the Claimant.
C. Feeny (instructed by Hill Dickinson) for the Defendant.

JUDGMENT

BEFORE HIS HONOUR JUDGE BIRD:

Introduction

1 This judgment deals with the assessment of damages payable to Celine Martin by way of compensation for loss and damage arising from the Defendant's negligence in 2010. Liability was established followed trial before Mrs Justice Andrews (as she then was) in June 2018 (the decision is reported at [2018] EWHC 1824). Before me, the Claimant was represented by Miss Ruck of counsel and the Defendant by Mr Feeny of counsel. Miss Ruck did not appear at the liability trial, Mr Feeny did. I am grateful to both for the sensible and collaborative manner in which they conducted the case.

Before the Defendant's negligence

2 Miss Martin is 47 years old. She was born and grew up in Cork in Ireland. She has a large family. The evidence suggests that she attended university in Dublin and played Gaelic Football for the national team. She travelled extensively in America and South Africa. After graduating she ran a hostel for a number of years

and moved to Manchester in 2001. In 2004 she worked for a short period as a hotel receptionist.

3 She has an extensive psychiatric history which began before the Defendant's negligence. She lives with Emotionally Unstable Personality Disorder ("EUPD") and paranoid schizophrenia and has a history of substance abuse. She has in the past attempted suicide and has been detained at mental health facilities for long periods. The schizophrenia remains under control for as long as Miss Martin takes appropriate medication. EUPD leads to a propensity to become involved in intense and unstable relationships with emotional crises, excessive efforts to avoid abandonment and suicidal threats.

4 From 2002 Miss Martin was regularly admitted to hospital for mental health assessments under section 2 of the Mental Health Act 1983 ("the Act"). Treatment orders were made under section 3 of the Act in 2003, 2004, 2005 and 2006. There were further section 2 assessments in 2007 and 2008 and a further treatment order in 2009.

5 In June 2009 an order was made under section 38 of the Act detaining Miss Martin following conviction for arson pending sentence. In February 2010 a section 37 hospital order was made with section 41 conditions attached. That order has now been discharged. Miss Martin suffered the injuries described below (as a result of the Defendant's negligence) whilst detained under section 37.

Since the Defendant's negligence (a summary)

6 As a result of the Defendant's negligence in 2010 Miss Martin is dependent on others for all aspects of her daily life. She uses an electric wheelchair to get around and relies on carers. She requires hoisting to move from her chair. Her left leg is shortened, and she has footdrop. She has restricted movement in all limbs and has very poor sitting balance. Miss Martin also suffered a brain injury which has resulted in severe neurological impairment. I deal with the brain injury below under the separate heading of capacity.

Miss Martin's mental and general health since 2010 (a summary)

7 In January 2013 the Claimant was discharged from the section 37 hospital order by direction of the Mental Health Tribunal. She remained subject to section 41 conditions. If the conditions were breached Miss Martin would be liable to a recall. She was permitted to live at Agricola House a unit comprising specialist accommodation for adults with acquired brain injuries near Bury. She moved in in April 2013.

8 In May 2016 Miss Martin left Agricola House and went to live at Wellington Road in Whalley Range. She remained subject to section 41 conditions. On 27 November 2018, because her mental health had deteriorated, she was recalled to hospital. The facilities and support available to her in hospital did not allow her to shower, so that she had to return to her flat on a regular basis to wash. On 25 March 2020, Miss Martin was discharged back to her flat at Wellington Road. Conditions remained in place. They are set out in Dr Ramzan's report of 24 June 2020. Miss Martin was to:

a. Reside at Flat 28b, Wellington Road, Whalley Range, Manchester, M16 8EX.

b. Allow access to the accommodation, as reasonably required by the Responsible Clinician and Social Supervisor.
c. Comply with all elements of her care plan, agreed as necessary by her inpatient and community mental health teams prior to her discharge.
d. Comply with prescribed medication for her mental disorder, as directed by the Responsible Clinician and Social Supervisor.
e. Engage with and meet the clinical team, as directed by the Responsible Clinician and Social Supervisor.
f. Abstain from illicit drugs.
g. Submit to random urine and alcohol testing as directed by the Responsible Clinician and Social Supervisor.
h. Not smoke any cigarette or ignitable substance within her flat (she can smoke in the designated area in her outside courtyard)

9 There was a brief further voluntary admission to hospital in August 2020 after a further deterioration in her mental health.

10 Since the trial of this action and before a draft judgment was circulated the section 37 and Section 41 orders were discharged. Miss Martin is therefore no longer subject to conditions and is no longer at risk of recall to hospital.

The care the Claimant has received since 2010

11 Miss Martin enjoyed her time at Agricola House but had no mental health support there. As Miss Laverty, the jointly instructed neurological physiotherapy expert notes, she received physiotherapy at Agricola house which concentrated on her trunk alignment and stability in sitting. She received some community physiotherapy when she first moved to Wellington Road. The absence of mental health support motivated her move to the Wellington Road which is managed by "Creative Support" a mental health charity. Initially Creative Support provided night care to her if she needed it on a "call for help" basis, but she had no entitlement to 24-hour care. Creative Support also provided a support worker to drive (but see below at paragraph 30 – Creative support were unable to provide a driver as often as she would like) and take her shopping as well as provide her meals. Here daytime physical care needs were met by an independent care agency "iCare Solutions".

12 When first at Wellington Road (before her recall to hospital in 2018) Miss Martin had 4 care visits per day at 9am, 1pm, 5pm and 8pm (these are described in Miss Laverty's 2017 report).

13 She told me that when she was recalled to hospital her care package was stopped. When Miss Martin moved back to Wellington Road in March 2020 Creative Support ceased to provide any night care. She had applied for funding for night care but that was refused on 25 February 2020. Instead, the Claimant was offered "assistive technology" in case she needed night-time help with a monitoring and response line in place with a seizure alarm.

14 Her present package of care providing mental health support (through Creative Support) and physical care (through iCare solutions) represents "after-care services" funded under the statutory duty set out at section 117 of the Act.

15 Miss Martin has had a care co-ordinator since March 2020. In fact, she has had 3: Helen Davies who did the job for a matter of months and left at short notice, Natalie Vassiliou who also left at short notice and Michelle Ahmed. The job of a care co-ordinator is to co-ordinate mental health support. She has no neurological

case manager whose job would be to co-ordinate her physical needs arising out of her neurological condition.

16 I heard very little evidence about the mental health support provided to Miss Martin. She is content with that support and wishes for it to continue as section 117 aftercare. She told me that she has a positive relationship with Michelle Ahmed and feels that her mental health has been quite good over the past few months. The fact that she has been discharged from the section 37 and section 41 orders supports this view.

17 Detail of the physical care provided to accommodate Miss Martin's neurological deficit and physical difficulties caused by the Defendant's negligence is set out in an updated care plan dated 18 July 2020. The plan caters for personal care, domestic support, companion duties, laundry and meal preparation. There is no physiotherapy. Five daily visits over 7 days per week are planned out. On each day there will be 4 or 5 visits covering 4 hours. The package is to all intents and purposes inflexible. The time carers can give Miss Martin is limited to the programmed visits (now at approximately, 7.30am, 1.30pm, 4.30pm and 9pm each for 30 minutes and 9.30am for 2 hours). These visits are an improvement on the 2017 regime described above when the last visit was at 8pm.

18 There is still no night cover. In February 2021 Miss Martin reviewed the totality of her care plan with Miss Ahmed. The absence of overnight care was discussed. A note of the review records that Miss Martin has said that she did not need a carer to stay with her overnight and was in effect content with the alternative technological provision.

19 On 24 February this year, Miss Martin was granted funding for a Personal Assistant. She told me that her PA, Michelle Culliney, who worked with her at Agricola House, stays at the flat one night every week and buys food for her when family visit from Cork. She told me she gets on well with Michelle.

The Evidence

20 The complexities of Miss Martin's health issues will have a long-lasting impact.

21 Mr Ford and Ms O'Farrell, the care experts, agree that Miss Martin's physical health care needs are likely to increase as she ages. They also agree that her mental health care needs will fluctuate.

22 Mr Worlock, the Claimant's orthopaedic expert in his report of 6 August 2014 "suspected" that Miss Martin would need to move to a nursing home at some point in her 60s or 70s as a result of mental health and physical issues.

23 Dr Ramzan and Dr Adshead agreed that Miss Martin is likely to be re-admitted as in-patient for mental health care in the future. Before she was discharged, they agreed that if she was recalled under section 37 that any time in hospital would have been measured in months rather than weeks. They also agreed that if Miss Martin was in receipt of a holistic needs-based care package including suitable accommodation and equipment it would reduce or mitigate the need for in-patient psychiatric treatment. This is because an appropriate package of care would reduce or mitigate her stress levels which are known to have been a destabilizing factor and are associated with the need for admission. But, if there was an admission its duration would be unaffected by the care package provided.

24 Dr Crawford and Dr Goulding agreed that "*muscle strength is unlikely [to be regained] before the age of 70, when there will be gradual worsening because of*

the effects of ageing. We agree that this is unlikely to necessitate additional care because the Claimant is already in receipt of care for the majority of her physical needs."

25 Dr Basu is the jointly instructed expert in rehabilitation, he expresses the view that it is likely that Miss Martin's endurance and independence will reduce from around 60 years of age and onwards. It might be necessary to transfer her care from home-based care to nursing home/care home-based care at around the age of early 60s.

26 Miss Martin's wish to live as independent a life as possible was clear. She showed clear insight into her EUPD and accepted that over-dependence on others was detrimental to her mental health. Both psychiatric experts (Dr Ramzan and Dr Adshead) emphasised the importance of autonomy and independent living for Miss Martin's mental health. The care experts (Mr Ford and Miss O'Farrell) agreed that Miss Martin needs to be able to do more for herself. Mr Ford was clear that having 2 carers (at least during the day) would increase her autonomy rather than make her reliant. Miss O'Farrell felt that once in suitable accommodation Miss Martin's present level of care would be appropriate.

27 It was suggested to Miss Martin that when, in February 2021 (see paragraph 18 above), she told the care co-ordinator that she was content to accept assistive technology instead of night care, the reason was concern over becoming over-dependent. Miss Martin was adamant that that was not the case and said she was prepared to accept assistive technology in place of night care because funding for it had been refused and she had little choice in the matter.

28 The principal reason put forward for night care is to support Miss Martin's night time toileting. At present she wears pads in bed, but she told me she would prefer not to and that the pads made her sore. The problem of toileting is exacerbated because the present care regime (although better than the 2017 care regime which required her to go to bed at 8pm) means she needs to go to bed earlier than she would like (she told me she was "put to bed" early). She told me that she wakes at about 4 am needing a bedpan and might wake once or twice during the night.

29 Mr Ford's view was that it was "wholly unacceptable" to leave Miss Martin in soiled incontinence pads through the night. When that happens, he told me that "*the care regime forces her to be electively incontinent through a lack of provision*". Miss O'Farrell agreed that Miss Martin should be able to toilet at will, but felt that having 2 carers 24 hours per day was not a reasonable way of bringing that about.

30 Miss Martin talked of a desire to visit museums and go to the Trafford Centre and to be able to do so at times of her choosing just as she had before her injuries. She told me that it was sometimes difficult (her chair is too wide for some cabs) and embarrassing (a taxi driver had told her she would be too heavy for his ramp) to use taxis but accepted that she could use the local tram network without too much difficulty. She told me that she had had a Motability vehicle, but that Creative Support were unable to provide a driver as often as she would like. She returned the car because it was taking up her Motability allowance. She told me that she would have no issue using Motability in the future.

31 Miss Martin was clear in her view that her carers did a good job, at least within the confines of the physical care package available to her. I was able to see at first hand (and cannot ignore) the extent to which she is required to fit her life around the care regime; a taxi had been booked at 3pm to take her from Liverpool (where the trial was heard) to Wellington Road. The time had been fixed so that she would

arrive home in time for the carers' 4.30pm visit. At a little before 3pm, and even though her evidence had not finished, she told me that she would need to leave because the cab was waiting. I formed the clear view that her desire to leave was not to avoid the taxi driver having to wait, rather it was because if she was not home for 4.30pm she would not have the opportunity to be toileted or have her pads changed or to wash and freshen up until 9pm or even the next morning (because the 9pm visit was for only 30 minutes).

32 Claire Laverty prepared 2 reports: one in October 2017 and the other in September 2020. It is plain that Miss Martin's physical condition had deteriorated between the visits. Miss Laverty recommends the following programme of physiotherapy but defers to accommodation experts as to the "potential for a therapy room". She recommends that a physiotherapy plinth (or table) be purchased but notes that "it would be difficult to have this within the current home environment due to limited space":

a. Year 1: 78 physiotherapy sessions with a further 4 sessions working with the occupational therapist and a further 6 sessions for cardiovascular support training for carers and 12 hydrotherapy sessions
b. Year 2: 24 physiotherapy sessions with a further 4 sessions working with the occupational therapist and a further 6 sessions for cardiovascular support training for carers
c. From Year 3 onwards: 12 physiotherapy sessions with a further 6 sessions for cardiovascular support training for carers

The proper approach to damages

33 There was no real dispute between the parties as to the approach I should adopt. The aim of an award in damages is to put the Claimant in the position she would have been in had the Defendant's negligence not injured her. The process is not a scientific or precise one. The injured person is entitled to "*fair and reasonable, but not excessive, compensation*" (see *Swift v Carpenter* [2020] EWCA Civ 1295 at paragraph 206). The court should adopt a pragmatic approach and here, make a fair and reasonable award while at the same time taking reasonable steps to avoid over-compensation.

Agreed damages and other agreements

34 The parties have agreed the following in the total sum of £554,190 as follows:

a. PSLA including interest: £311,190
b. Past losses: £30,000
c. Life multiplier: 19.46
d. Agreed future losses:

Aids & Equipment	£60,000
Orthotics	£10,000
Occupational therapy	£15,000
Chiropody	£3,000
Holidays	£75,000

Physiotherapy	£50,000

The remaining issues

35 The remainder of this judgment deals with the following issues:

a. Physical Care (at paragraphs 36 to 64): The extent of Miss Martin's future physical care needs and case management needs is in issue as is the extent to which damages in respect of such needs are recoverable. I deal below with the following issues under this heading: the principle of recoverability where physical care is provided under non-means tested state funding, Miss Martin's hopes and intentions in respect of the provision of future care. I then deal with what care provision should be made and the need (or not) for a case manager.
b. Accommodation (at paragraphs 65 to 72): It is accepted that Miss Martin's damages should include a sum in respect of accommodation. An issue remains as to the size of accommodation, whether a separate therapy room needs to be built on and whether the property should have a garage or if a carport would suffice.
c. Transport (at paragraphs 73 to 80): How future travel requirements are to be dealt with
d. Loss of Earnings (at paragraphs 81 to 83): Whether Miss Martin has a loss of earnings claim
e. PPO (at paragraph 84)
f. Capacity (at paragraphs 85 to 113): If Miss Martin has capacity
g. Amendment (at paragraphs 114 to 130): Should I allow her claim to be amended to include a claim for the cost of a PI Trust?

Physical Care

The Principle

36 It is clear, and not disputed, that Miss Martin requires support and care for the rest of her life. Her needs fall into 2 broad categories: first, those that arise as a result of her mental health needs and secondly, those that arise as result of her physical needs. The first category represents a longstanding need which does not arise as a result of the Defendant's negligence. The second category does arise as a result of the Defendant's negligence. Because I am concerned only with losses that have arisen as a result of the Defendant's negligence, I must approach damages by reference to the second category not the first. In effect, the first category must be hived off.

37 Miss Martin's present care and support package (which I have described above) is funded through section 117 and covers both categories of care. Because I am told that Miss Martin will continue to receive state funded mental health support the hiving off of physical care is, at least in the abstract, not a difficult exercise.

38 An issue does however arise. In short, Miss Martin will continue to have a right to access section 117 funded physical care support whatever damages award I

make. The funding is not means tested and her need is ongoing and cannot be displaced (see *Tinsley v Manchester City Council & South Manchester CCG* [2017] EWCA Civ 1704). If Miss Martin were to continue to rely on section 117 funding to meet her physical care needs, she would not be entitled to recover the cost of that care from the Defendant (see *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71). To award damages to allow Miss Martin to pay for care she would receive from the state at no cost would be to overcompensate her. In *Tinsley* Longmore LJ (with whom other members of the Court agreed) said at paragraph 26:

> *"It is, of course, the case that courts will seek to avoid double recovery by a Claimant at the time they assess damages against a negligent tortfeasor. If therefore it is clear at trial that a Claimant will seek to rely on a local authority's provision of after-care services, he will not be able to recover the cost of providing such after-care services from the tortfeasor. Crofton's case [2007] 1 WLR 923 is itself authority for that proposition*."

39 The principal of whether future care costs should be recovered at all needs to be resolved. The Defendant submits that there is here a "very significant prospect" of double recovery.

40 The Defendant submits that it is clear that Miss Martin will continue to receive section 117 funded care to cover her physical needs primarily because Miss Martin appears satisfied with her care and it would not be appropriate to separate out physical care and make private provision for it.

Is it clear that Miss Martin will continue to take physical care funded through section 117?

41 This is a question of fact. To resolve it, I need to consider the following points:

a. Would a split care package be detrimental to Miss Martin?
b. Is the care provided under section 117 adequate?
c. What does Miss Martin say about this?

Would a split care package be detrimental?

42 The Defendant argued that the section 41 conditions to which Miss Martin was subject (see paragraph 8 above) required her to maintain the totality of the section 117 care package and that I should therefore proceed on the basis that Miss Martin would (necessarily) continue to rely on section 117 funding so that the cost of such care would not be recoverable. As the section 41 conditions no longer apply, I can deal with this point very briefly. Dr Ramzan told me that the section 41 conditions allowed flexibility. The content of the care plan was a matter for the clinical team not for the MoJ. The conditions are designed to ensure that the appropriate care plan (whatever it may be) is adhered to, not to make it difficult to alter a care plan. Dr Ramzan told me that the MoJ would have no interest in the identity of the care provider. Had it been necessary to receive the issue I would have accepted this evidence and found the section 41 conditions were no bar to a new (and possibly split) care package.

43 Dr Ramzan, Miss Martin's forensic psychiatry expert, told me that as long as there was good communication and a degree of overlap between physical and

mental health care that "it would not make any difference" if the provision of physical and mental health care was split.

44 Dr Adshead, the Defendant's expert in forensic psychiatry agreed that there was no inherent difficulty in mental health care and physical care being provided by 2 providers. She pointed out that that is what happens now and agreed with Dr Ramzan that the key to successfully achieving appropriate care would be oversight to ensure "coherent holistic care".

45 I can see no reason why the separation out of physical care would cause any issue provided there is appropriate oversight and communication. I accept the experts' views on this point.

46 The Defendant also argued that the physical care regime presently in place was adequate for Miss Martin's needs so that there was basis on which damages for physical care might be awarded.

Is the care provided under section 117 adequate?

47 Having heard the evidence I am satisfied that Miss Martin's present care regime is not adequate. The care regime is insufficient to put her in the position she would have been in had she not been injured as a result of the Defendant's negligence.

48 I have outlined the present care package at paragraphs 11 to 19 above and set out the salient aspects of Miss Martin's evidence. The absence of any real flexibility in the timing of care visits and the absence of overnight in-person support are prime examples of inadequacy. I accept Miss Martin's evidence that she expressed satisfaction with the night care routine only because that was all that was available to her. I agree with Mr Ford that it is "wholly unacceptable" to leave Miss Martin in soiled incontinence pads over-night.

49 The Defendant argues that the physical care package, even if it does not meet all of Miss Martin's needs is adequate and appropriate because it achieves the right balance between providing support and supporting autonomy on the one hand and avoiding dependence and reliance on the other. Too much care would make Miss Martin reliant and dependent. That would be harmful to her mental health.

50 I reject that argument. I accept Miss Ruck's submission that I would need far better evidence if I was to conclude that a fuller care package would be detrimental to Miss Martin.

Miss Martin's views

51 Miss Martin spoke of a desire to regain her dignity and independence. Whilst she expressed no concern about the professionalism of her carers it is clear that she regards the physical care package itself as wholly inadequate.

52 Hospital records from 2019 show a clear pattern of Miss Martin expressing a desire to have paid carers support her at home. A report written by Dr Caroline Hoult, Miss Martin's treating consultant forensic psychiatrist in July 2019 when Miss Martin was in hospital refers to Miss Martin talking about a desire to buy a bungalow and "have carers come in and look after her" and a belief that "compensation she is due to receive from the NHS would be able to pay for this". A similar point was made in a report compiled at the hospital on 16 April 2019 by another treating clinician Dr Hyde "longer term plans include buying a bungalow when she receives her compensation and having a homecare package set up there".

53 I understood her evidence to be that she got on well with her carers, trusted them and treated them like family. This approach seems to be a continuation of Miss Martin's general trust and confidence in most people she meets. But getting on well with carers is very different to accepting the adequacy of the care package. On the evidence I do not accept the Defendant's submission that Miss Martin is content with the care package she receives. Far from it.

54 In any event, Miss Martin's happiness with the care package would not mean (if I accepted it) that I should find that she would continue to receive it.

Conclusion on future care in principle

55 On balance, taking all of these points into account, I am satisfied that, in principle, an award for future care should be made. I am not satisfied that Miss Martin will accept the section 117 physical care provision as sufficient to meet her care needs. It is plain from her evidence that she wants more support than the package provides her with.

56 I am satisfied that any possibility that Miss Martin might continue to take advantage of section 117 provision for her physical care, whilst it cannot be entirely discounted, is not sufficient for me to make any adjustment to the award.

What care provision should be made?

57 In my view Miss Martin should be compensated to the extent needed for her to have 2 day-time carers/support workers, a personal assistant and one night-time sleeping carer. I reach that conclusion for these reasons. Two daytime carers/support workers are needed to give Miss Martin flexibility to leave her home when she wishes and to toilet, shower and be supported as and when needed.

58 I accept Mr Ford's opinion that the day support provision should be for 14 hours each day and for 7 days each week (196 hours per week) at an hourly rate of £12. I also accept that one of the support workers should be paid at an enhanced rate (an additional £5 per hour for 36 hours) to act as a team leader. I do not accept Ms O'Farrell's opinion that the present care regime is adequate or would be in a suitable property. I accept Mr Ford's unchallenged evidence that the ancillary costs of employing carers (to cover for example, national insurance, tax and holiday pay) must be added. Those costs amount to 36% of the base costs.

59 I find that Miss Martin's night time needs will be met by a sleep-in carer because at present she requires assistance (as she told me) once or twice in the night. I accept Ms O'Farrell's evidence on this.

60 I have set out the expert view on Miss Martin's future care needs above. In short, her physical health is likely to decline over time and there is a prospect that she will require nursing home care in later life. The likelihood of such care falls short of a probability and if the risk is realised it is likely (given the agreed lifetime multiplier of less than 20) to be relatively short-lived. A good care package will help to protect Miss Martin from stress and in turn that will help to keep her mental health issues in check.

61 There is a risk that an award of damages on a lifetime multiplier basis in the amounts I have set out might over-compensate Miss Martin if she is hospitalised for long periods, or her night time care needs increase, or because (contrary to the view I have already expressed, and although the possibility is in my view small) at some point in the future she seeks section 117 assistance. Equally there is a

prospect that an award might under-compensate if her physical needs increase over time, but she can be cared for at home. Such an award in my judgment takes account of the small potential that she will be required to pay residential care in later life.

62 I have come to the conclusion that an award of damages for care and support as I have set out over the entirety of the Claimant's expected lifetime is appropriate. Such an award is in my judgment the best way to address the risk of under-compensation or over-compensation.

Case manager

63 The expert evidence was clear that communication between those providing physical care and mental health care is key. It would in effect turn 2 separate care packages into the sought-after holistic package.

64 In my judgment the appointment of a case manager (to oversee physical neurological care) is key to the success of the overall package. In the absence of such a manager communication between the 2 sides of the package would be difficult and probably impossible. I am satisfied that the cost of a case manager is recoverable as part of the damages to be paid by the Defendant. I note the costs advanced by Mr Ford are relatively modest. I approve those amounts at £8,886 per annum with a one-off set-up cost of £15,188.62.

Accommodation

65 The accommodation experts were Ms Heath for Miss Martin and Mr Brack for the Defendant (the care experts have also commented on accommodation issues). They agreed that Miss Martin's present accommodation is not suitable and there was no issue that a new home should be acquired. The amount of damages to be awarded will be calculated in accordance with the formula set by the Court of Appeal in *Swift v Carpenter*. Three issues arise:

a) The size of the property (it is agreed that there are 2 options: a smaller property with a notional value of £283,333 or a larger property with a notional value of £474,950);
b) Whether a dedicated room is required to house the physiotherapy plinth required for at-home physiotherapy sessions as set out by Miss Laverty and rehearsed above;
c) Should the property have the benefit of a car port or garage.

66 The larger property cost is the value of a notional 4-bedroom property with an approximate internal area of 225 sq.m (according to Mr Feeny's closing submissions). The smaller property is based on a 3-bedroom property with an approximate internal area of 115 sq.m. I remind myself that the properties are simply examples. My task is not to identify a suitable property or approve a suitable scheme of adaptations but to arrive at an award in damages, by reference to the examples, which is sufficient to allow Miss Martin (as far as possible) to put herself in the position she would have been in had she not been injured.

67 Miss Laverty defers to the accommodation experts on the question of need for a therapy room in new accommodation. The physiotherapy plinth she recommends measures 1020mm x 1890mm and would need a doorway of 900 mm to enable it to be moved from one room to another. It will be used intensively for the first year (approximately 88 sessions), less so in the second year (approximately 34 sessions)

and thereafter for around 18 sessions per year. These sessions recommended by Miss Laverty are the minimum. Nonetheless they indicate that after year 3 Miss Martin's reasonable physiotherapy needs can be met by relatively infrequent use of the plinth. I agree with Mr Brack that it would not be reasonable to provide a dedicated therapy room to deal with the treatment Miss Martin reasonably needs.

68 Ms Heath accepted during cross examination that it would be feasible to convert a 3-bedroom property into suitable accommodation with a guest room and a room for a carer to sleep overnight and to allow some physiotherapy in the property. Mr Brack suggested that a 3-bedroom property would be adequate.

69 As far as a car port or garage is concerned, Mr Brack suggested that a car port covering 24 sq.m would represent perfectly reasonable provision. It would allow Miss Martin access to a vehicle from the house under cover and so without exposure to rain. Ms Heath agreed that exposure to the elements was a key concern and told me that a garage would, in effect, provide extra storage space. She and Mr Ford expressed the view that a garage would be preferable.

70 In my view, a car port would represent perfectly reasonable provision. In reaching that conclusion I bear in mind that if Ms Martin is taken to museums (as she said she would like) or to shopping centres, she would almost certainly have no choice but to be exposed to the elements when she left the vehicle. In my view a suitable car port would provide better all-round access to a vehicle for Miss Martin.

71 A range has been provided for the cost of a car port from £8,868 to £11,800. I propose to allow the larger figure proposed by Ms Heath in the joint report of 7 December 2020. That sum allows for fees and VAT for a large 24 sq.m car port. The experts have not explained where the difference between the sums comes from. It seems to me that, looking at the matter in the round, it is appropriate to err on the side of caution and allow the (slightly) higher amount.

72 On figures helpfully agreed by the experts I therefore award the following:

a) Purchase price of £283,333 to be reduced by applying the *Swift v Carpenter* calculation
b) Adaptation costs (without therapy room): £131,463.32
c) Car port costs £11,800
d) Relocation costs £10,000
e) Increased running costs of £4,500 per annum

Transport

73 There is a clear need for Miss Martin to have access to a car. Public transport is limited and less convenient for her and taxis are not always accessible. Miss Martin must have appropriate and reasonable freedom to travel when she wants to. In my judgment a car is the best way to provide that. I understood Miss O'Farrell to accept that Miss Martin needed to have access to a wheelchair accessible vehicle. Mr Ford felt that future Motability funding cannot be guaranteed.

74 Miss Martin's schedule of loss seeks the sum of £322,298 over her lifetime in respect of the provision of a car. This is based on an initial cost of £18,495 with a replacement vehicle every 3 years and includes the annual cost of insurance for a carer to drive the car (and any other vehicle) at £10,794. The Defendant submits these costs are manifestly excessive.

75 Miss Martin told me (as I have set out above) that in the past she had a Motability vehicle but had returned it because she had no one to drive her and it was eating into her benefit. She told me that she "had no reason not to use Motability in the future".

76 I was referred to *Eagle v Chambers (No.2)* [2004] EWCA Civ 1033. At paragraphs 55 to 59 the Court of Appeal concluded that a person in receipt of a relevant mobility benefit could not be required to mitigate her loss by investing a portion of that benefit in the Motability scheme. It is not therefore open to the Defendant to argue that Miss Martin can be required to mitigate her loss by relying on the mobility scheme.

77 The Defendant's argument is however different. It submits that Miss Martin has expressed a willingness to use the scheme in the future and so it would in principle be wrong to make an award of damages in respect of a benefit that will be provided to Miss Martin by the State (albeit with a nominal charge). In closing submissions, the Claimant recognised the practical benefits of the Motability scheme. It was not argued, as Mr Ford had suggested, that future funding for a vehicle through the Motability scheme "could not be guaranteed".

78 I am satisfied, given the evidence that Miss Martin will use Motability in the future, that an award of damages for the privately funded provision of a car would be inappropriate and amount to double recovery.

79 The Claimant argues for an additional sum to reflect additional travel expenses which arise as a result of her disability. The Defendant accepts the principle ("the Claimant will have additional expenses by reason of her physical disability to include additional journeys") and suggests a figure in the region of £8,000 in total would be appropriate. This sum is an approximation; it is based on a concession that in the absence of provision for a car, Miss Martin would have been entitled to a reasonable sum for taxi travel put at £1,000 per year with a multiplier of 8. Miss Martin suggests that the sum of £43,785 is appropriate, arrived at my applying the lifetime multiplier to and annual allowance of 5,000 "disability related miles" at the rate of 45p per mile.

80 In my judgment the Defendant's concession that some allowance for disability related mileage ("DRM") should be allowed is appropriate. In my judgment, accepting that there is little evidence on the point (but doing the best I can) it would be appropriate to make an award on the basis, as the Defendant suggests, of 1,000 miles per year but not on a multiplier of 8. Taking account of the possibility of future admission for mental health care which would reduce the period for which DRM might be claimed and bearing in mind the agreed lifetime multiplier is 19.46 I propose to apply a multiplier of 16 and so award the sum of £16,000 in respect of travel.

Loss of Earnings

81 The claim is pleaded as loss of congenial employment. It is accepted that, as no congenial employment was lost, there can be no award under that head. However, Miss Martin argues that she should be compensated for simple loss of future earnings. It is accepted that any such award would be modest.

82 Miss Martin had worked in the past but has no established history of work. The schedule of loss suggests that (but for the injury caused by the Defendant) "it is likely that the Claimant would have been able to seek supported remunerative

work, for example, working in a charity shop." There is no evidence to suggest what might have been earned. The Defendant suggested that employment would have been therapeutic only.

83 I accept, having heard her evidence, that Miss Martin would have been able to find some, limited, low paid, short term remunerated work but for the Defendant's negligence. She appears to have enjoyed work and certainly has a desire to work with others. In the absence of any evidence as to her earning capacity I am obliged to take a cautious approach to assessing an appropriate sum. In my judgment an award of £5,000 would be appropriate.

PPO

84 The parties agree that consideration of whether or not a PPO should be made, should be dealt with after the circulation of this judgment.

Capacity

85 Miss Martin's capacity to manage and control any money recovered by her in these proceedings is in issue.

The test

86 The Mental Capacity Act 2005 (supplemented by the Code of Practice published in accordance with sections 42 and 43 of the Act) sets out the statutory framework against which an individual's capacity is to be judged. The starting point (the first of 5 statutory principles) is that an adult is to be presumed to have full legal capacity to make decisions for themselves unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be taken (see para. 1.2 of the Code). The second statutory principle is that a person is not to be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success. The third statutory principle is that a person is not to be treated as unable to make a decision merely because she makes an unwise decision.

87 Practical steps to support a person in decision making include the provision of advice. Professor Wang readily accepted that such advice may need to be given slowly and in a deliberate manner and may need to be repeated.

88 Chapter 4 of the Code provides practical guidance on how capacity should be assessed. There is a 2-stage test (see section 2(1) of the Act): first, does the person have an impairment of the mind or brain? Secondly (and if so), does that impairment mean that the person is unable to make the decision in question at the time it needs to be made? A person is unable to make a decision if (see para. 4.14 of the Code) they cannot:

a) Understand relevant information about the decision to be made (such information must be appropriately presented and includes the nature of the decision, the reason the decision is needed and the likely effects of deciding one way or the other)
b) Retain that information in their mind to the extent necessary to make a decision
c) Use or weigh that information as part of the decision-making process or
d) Communicate their decision

The evidence on capacity

Impairment of the mind or brain

89 Miss Martin underwent an MRI scan of the brain on 5 November 2010. It is agreed (and recorded in the joint report of Dr Das and Dr Birchall consultant neuroradiologists instructed respectively by Miss Martin and the Defendant) that the scan demonstrates evidence of cortical and subcortical white matter hyperintensity involving the right frontal, right parietal and left frontal lobe. It is also agreed that Miss Martin's neurological status is unlikely to worsen during her lifetime and that the brain injury has not caused significant cognitive deficit. The potential that the brain injury has caused some cognitive deficit remains open.

90 It is therefore accepted that Miss Martin has an impairment of the mind or brain. The issue in dispute is whether that impairment means that she is unable to make the relevant decision at the time it needs to be made.

Does the impairment mean that Miss Martin is unable to make the decisions necessary to manage her award?

Dr Dilley and Professor Wang the Claimant's experts

91 The field of expertise best suited to provide assistance with capacity (and in particular cognitive and executive impairment) is neuropsychology. I turn to the evidence of the neuropsychologists below, but first will deal with Dr Dilley's evidence.

92 Dr Dilley, a consultant neuropsychiatrist instructed as an expert by Miss Martin, saw her in Agricola House on 21 September 2015. He was instructed to prepare a condition and prognosis report and advise on the counterfactual position had Miss Martin not suffered injury. As part of his investigation, he conducted what he described as "a few basic tests" into her cognitive state. He noted that Miss Martin scored 82/100 in the Addenbrooke's Cognitive Examination and told me that this was the cut-off point for dementia but accepted that cognitive function is not part of the test of capacity set out in the 2005 Act. He told me that the score led him to suspect some cognitive impairment. The conclusion expressed in his report was that Miss Martin had capacity to manage finances, conduct litigation and had testamentary capacity.

93 Dr Dilley recommended further neuropsychological assessment to determine the extent of any executive impairment/dysfunction and any cognitive deficit.

94 Professor Wang saw Miss Martin on 10 December 2019 at Wythenshawe hospital. He told me that he interviewed Miss Martin over a 90-minute period after psychometric tests had been carried out by an experienced colleague over some 6 hours and following discussion. His report is dated 6 February 2020. He noted that Miss Martin had failed effort tests (the Test of Memory Malingering ("TOMM") and the Reliable Digit Span ("RDS") test) but told me that was not unusual for frontal lobe patients. The score did not suggest deliberate malingering and Professor Wang was clear that there was no suggestion of deliberate underperformance. He was however clear that the results did imply poor effort.

95 Dealing with cognitive and functional impairment (as mentioned by Dr Dilley) he expressed the opinion that Miss Martin had demonstrable cognitive impairment caused by her brain injury which compromised her assimilation of information, an impairment of memory which limited her ability to retain information and executive

impairment which comprised her ability to weigh issues. Professor Wang and Dr Dilley importantly agreed that the best way to assess executive dysfunction was to observe a real-world setting.

96 Dr Dilley saw Miss Martin again on 25 September 2019 at Wythenshawe Hospital (after she had been recalled). This time he was specifically asked to comment on her capacity to manage her own financial affairs and specifically to manage a large award. By the time he wrote his report on 26 March 2020 (I note some 6 months later) he had seen and considered the report of Professor Wang from 6 February 2020 (referred to above). Dr Dilley questioned Miss Martin about how she would manage a large award, she said she would seek advice from independent professionals and from trusted family members and wanted to "investigate other opportunities for investment" when asked how she would assess competing advice she said she would "go by [her] gut not [her] heart" and expressed a preference to have any monies managed in a trust.

97 Dr Dilley felt when completing his report as he did during his evidence that executive dysfunction was important. To put it simply Miss Martin could persuade an observer that she was quite capable of understanding the mechanics of appropriate decision making but would be potentially incapable (by reason of her abnormality of brain at the front left lobe) of actually weighing factors before taking a decision. There would be a potential for a mismatch between her intention as she described it and her actions. He accepted that the presence of executive dysfunction does not lead inexorably to the conclusion that a patient lacks capacity. A fair summary of his position is that an absence of executive ability might mean there is a lack of capacity. It certainly means that an ability to describe the processes of decision making is not a sure indicator of capacity.

98 Professor Wang provided a further report on 4 May 2021, shortly before trial. He confirmed his view that Miss Martin lacks capacity and "this relates to an interaction between impairment of executive function which compromises the ability to make and weigh judgements, combined with variable and unpredictable mood state due to her psychiatric condition: episodes of low mood will worsen her cognitive function."

Dr Clarke – the Defendant's expert

99 Dr Clarke carried out psychometric tests on 22 September 2020 at the Wellington Road flat. He was instructed to comment on any impairment of Miss Martin's cognitive or executive function and in particular on her capacity to manage her financial affairs.

100 He describes in his report Miss Martin's general fluency, coherence and good recall. He describes for example that Miss Martin was able to give clear and accurate guidance to carers who arrived at lunchtime about the correct preparation of a microwave meal and the need to differentiate between the "cook from frozen" and "cook from chilled" instructions. He also describes Miss Martin's ability to organise a medical visit whilst Dr Clarke was present at a time that did not clash with her carers. He reports that he found Miss Martin to be "fully financially competent" noting that he had "no areas of doubt".

101 In his evidence Dr Clarke accepted that Miss Martin had some history of making poor decisions (including financial decisions). He felt that those decisions might be a function of her personality disorder and what he described as her "traumatic life" rather than a sign of cognitive impairment. He pointed out that there was a

long history of such decision making and that the pattern was well established before the injury. His view was the psychometric test results relied on by Professor Wang as the basis of his view that Miss Martin lacked financial capacity were unreliable for a number of reasons: he was concerned about low scores on the effort test (but did not suggest that the lack of effort was deliberate) and concerned about inconsistency in the outcome of tests he carried out and those relied on by Professor Wang.

102 His main concerns, however, were that Professor Wang's test results did not reflect his observations of Miss Martin in a real-world setting over 6 hours and that the variable test scores were not reliable. He felt that her traumatic background was key and that she had learnt that "certain behaviours will result in greater levels of support" and told me that his observations of her were "of a very competent individual". His evidence was that in a clinical environment, persons with executive dysfunction can do well. But that changes when new issues are introduced (he told me that he would expect a person with executive dysfunction to be unable to cope with the complexities of everyday life. He said that such complexities would produce "cracks and deficits"), for example Dr Clarke interviewing her at home, Miss Martin's interaction with carers and her GP would highlight dysfunction. In fact, from his observations, he reported that Miss Martin interacted well, and dealt with complex situations well, he told me that he had questioned her about finances and that she had dealt well with them. It was suggested to him that he had based his view on a simple snapshot in time. He disagreed and told me that in assessing capacity he had "used all tools at his disposal".

103 Dr Clarke provided a further report on 7 May 2021. He noted that Professor Wang had not provided examples "from his assessment of the Claimant having a 'compromised ability to make and weigh judgements'. Rather, he refers to "clear examples of her poor judgement of character in her recent history" (paragraph 7). I agree that there are examples of poor decision making and poor mental health, but in my opinion, these do not equate to lacking Capacity according to the guidance set out in the Mental Capacity Act (2005). I also acknowledge that during acute phases of poor mental health the Claimant will lack Capacity, and I defer to the expert Psychiatry opinion on this matter. However, during assessment with this writer there was no evidence of her lacking Capacity with regard to finance or legal proceedings, and this was specifically tested with the Claimant. The Mental Capacity Act (2005) requires assessments to focus on specific decisions and to refer to specific times".

Other evidence

104 I heard evidence from Mr Higgins, Miss Martin's father. He told me that he was concerned that Miss Martin would not take advice about how to invest money and is particularly vulnerable. He was "astonished" to learn that the Defendant felt that Miss Martin had capacity. In his third and most recent witness statement, Mr Higgins recalls that Miss Martin had had dealings with a third party, Tinisha Cotterill, who owned (or worked in) a local shop. Tinisha provided some care after Miss Martin's discharge from hospital in March 2020 and had been paid a carer's allowance. Miss Martin described in her evidence how Tinisha had become increasingly unreliable until it ceased completely. Mr Higgins recalls that he was "suspicious of" Tinisha. He said that Miss Martin: "*once mentioned to me that Tinisha had asked her to loan her a large sum of money, around £10,000, so that*

she could invest in a business. This was around the same time that Celine's interim payment of £10,000 had been approved. I told Celine that under no circumstances should she be providing Tinisha with any money, as Celine's money should be used to purchase items to assist Celine with her injuries."

105 I also heard from Miss Martin and had an opportunity to observe how she responded to questions. She recalled Dr Clarke's visit and recalled that her GP had visited that day. She assured me that she was tried to deal with all psychometric tests as best she could. She was very clear that she was trying to do her best. She told me that she is "a trier; I never give up". She told me that she understood she is vulnerable to exploitation and told me that she prefers to have the court manage her settlement. She was clear that she would seek advice.

Discussion

106 Both Professor Wang and Dr Clarke gave their evidence with care and the professionalism I would expect of well-respected and experienced experts. The same applies to Dr Dilley. I have come to the conclusion on the totality of the evidence that I must generally prefer Dr Clarke's evidence over that of Professor Wang and Dr Dilley.

107 It is important to note that Dr Dilley's initial view that Miss Martin had financial capacity was only displaced after he had seen Professor Wang's assessment. On balance I think that Dr Dilley's evidence adds little to the resolution of the question of capacity.

108 It seems to me that Professor Wang had far less an opportunity than Dr Clarke to assess (in an admittedly important "real world setting") Miss Martin's executive function. Dr Clarke saw Miss Martin in the midst of real life, not in a clinical controlled setting. He observed her balance demands on her time, recall details, juggle facts and make decisions in the manner he described. I can well understand why when expressing his professional opinion about capacity he had "no areas of doubt".

109 I am satisfied that Dr Clarke's "real-life" observations of Miss Martin are of greater evidential value than the results of psychometric testing. I accept that the poor effort scores further undermine the validity of the tests. Professor Wang placed a great deal of store on the test results, once they are (as I find them to be) undermined, Professor Wang's position becomes difficult to sustain.

110 I accept (as she did) that Miss Martin is vulnerable to suggestion by others. On the balance of probabilities, I am satisfied however that the vulnerability does not arise from her brain injury but rather, as Dr Clarke suggested, from her personality disorder.

111 I noted that Mr Higgins had advised his daughter not to lend £10,000 to Tinisha. It seems to me that this is a good example of a potentially difficult situation in which Miss Martin sought advice and acted on it. In other words, although she has a vulnerability to exploitation arising from her personality disorder, she has (in the past, but since discharge from hospital in March 2020) shown herself capable of retaining information (relaying Tinisha's request for a loan to her father), recognising the need to take soundings or advice from a trusted person (not simply handing money over to Tinisha) and capable of listening to and acting on advice. There was no suggestion that the £10,000 was handed over.

112 In my judgment, the evidence falls short of that needed to displace the presumption of capacity.

113 The consequence of my finding in respect of capacity is that Miss Martin is not entitled to any damages in respect of the costs of a Deputy or Court of Protection costs. The present schedule of loss pleaded such losses at between £74,288.90 and £147,325.70. Had I concluded that Miss Martin lacked capacity there would have been an application to amend the schedule of loss to increase the claim to between £195,747 and £464,470.

Application to amend

114 Miss Martin has in the past expressed a desire to have the damages she is awarded managed by others. There are numerous references in the trial bundle to such discussions and I have set out above that the point was raised specifically by her with Dr Dilley. During opening the possibility of a personal injury trust was canvassed as an alternative, in the event that I found Miss Martin to have capacity, to the Deputyship claim. No such claim had been pleaded. An application to amend to include it was made at the conclusion of the trial.

115 The application is supported by the evidence of Helen Lewis, Miss Martin's solicitor. It exhibits a further witness statement (provided by Mr Michael Knott) detailing the costs involved in the establishment and running of a personal injury trust. The exhibited statement is dated 13 May 2021 and is supported by a statement of truth signed by Mr Knott. Mr Knott has already provided a statement to deal with deputyship costs. For my part I do not think it is ever necessary to exhibit a signed witness statement to another witness statement. CPR PD 32 paragraph 13.2 makes good the general proposition that if a document is self-providing (like a court document and in my view a witness statement) it need not be exhibited.

116 Mr Knott suggests that the first-year management cost would be £26,400. The year 2 costs £24,000 and the annual costs thereafter £19,200. With appropriate multipliers the potential total claim for damages payable in respect of a personal injury trust amounts to £385,680. I am invited to allow an amendment to the schedule of loss to include that sum. I am also invited to give permission for Miss Martin to rely on Mr Knott's statement.

The applicable principles applying to amendment

117 Summarising the position at paragraph 41 of *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268, Sir Geoffrey Vos (then as Chancellor of the High Court) said:

> "*In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it*."

118 The parties referred to *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) a decision of Carr J (as she then was). The salient points (in addition to those referred to above) are:

a. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus, the applicant has to have a case which is better than merely arguable.
b. A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.
c. Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users require him to be able to pursue it.

The arguments

119 Mr Feeny resists the application. His main submission was that the need for a personal injury trust does not arise as a result of the Defendant's negligence and so the amendment should not be permitted. He also submitted that there was no good reason why the amendment was not sought much earlier (in effect the need to plead an alternative case which would arise if Miss Martin was found to have capacity had been overlooked) and suggested that I should apply principles similar to those that apply when an application is "very late". He conceded that if the application had been made earlier the course of the trial would have been no different.

120 In response Miss Ruck submits that the balance referred to by the then Chancellor in *Nesbit* strongly favours the grant of permission. She points out that the parties have been aware of the issue for some time (the need for a personal injury trust is referred to at paragraph 1.29 of the original schedule and the Defendant engages with the principle in the counter-schedule. Also, the point was raised at a joint settlement meeting on 26 March 2021 as explained by Mrs Lewis at paragraph 16 of her statement) and that the application would survive a summary judgment test and so is sufficiently meritorious to be permitted. Miss Ruck accepts that the application is late by reason of oversight.

121 No point is taken on limitation.

Determination

122 I am satisfied that the claim for damages sought to be advanced by the proposed amendment is one that would survive an application for summary judgment without too much difficulty. In my judgment it is clear that "but for" the Defendant's negligence, there would be no need for a personal injury trust. The requirement that Miss Martin take control of a large fund of money, and so be exposed to the risk of pressure from others to fritter away the fund, would not arise if the Defendant had not been negligent.

123 The amendment is not a "very late" amendment in the sense outlined in *Quah Su-Ling* because the trial has proceeded. Nonetheless, in exercising my discretion I must take into account the late stage at which the application is made and the

reasons for the lateness. Mr Feeny's sensible concession that the trial would not have progressed differently if the application had been allowed before trial is important, but is not a complete answer.

124 I accept the frank explanation provided by Miss Ruck that the claim was omitted from the schedule by simple oversight. However, I must also accept Mr Feeny's submission that such an error (although entirely understandable) does not amount to a good reason for the lateness of the amendment. The reasons given by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at paragraph 41 in respect of failure to comply with procedural deadlines apply with equal force here. I accept that the absence of a good reason for the lateness is a factor which militates against the grant of permission.

125 In considering the interest of justice, it is helpful to look at what would happen if the amendment is allowed and if it is not allowed.

126 If the amendment is not allowed, Miss Martin would be deprived of the opportunity to argue for full compensation in respect of the loss she suffered as a result of the Defendant's negligence. She would be undercompensated (because she would on the balance of probabilities use compensation intended for other purposes to pay for a personal injuries trust). To address that under compensation she may need to consider further litigation and the instruction of new solicitors. That would inevitably lead to a delay and carry its own risks. If the amendment is not allowed it might fairly be said that the Defendant would benefit from a windfall.

127 If the amendment is allowed the Defendant will suffer no real prejudice (the avoidance of a windfall is not in my view prejudice). Mr Feeny does not suggest otherwise.

128 Taking account of the strength of the claim to be advanced if the amendment is allowed and bearing in mind the absence of a good reason for failing the plead the claim earlier, I have come to the clear view that the amendment should be allowed.

Consequences of allowing the amendment

129 The Claimant relies on the second statement of Mr Knott. I will grant permission to rely on that statement in the amended claim.

130 The parties invite me to make further directions in respect of the next steps following amendment. I invite the parties to agree directions if possible. If there is no agreement I will deal with directions as part of the consequential orders following hand down of this judgment.

Conclusion

131 I invite the parties to agree an order to reflect the conclusions I have reached in this judgment. In summary, I award damages on the following basis:

a. Care (paragraphs 57 to 59): Miss Martin should have 2 day-time carers or support workers for 14 hours per day 7 days per week at an hourly rate of £12 with one carer/support worker to be paid an enhanced rate of an additional £5 per hour for 36 hours and one night-time sleeping carer and a personal assistant. In addition the costs of employing carers ("on-costs") should be added to this in the amount provided for by Mr Ford, that is 36% of the base cost.

b. Miss Martin should have a case manager with a one-off set up cost of £15,188.62 and an annual cost of £8,886 (paragraph 64).
c. Accommodation as set out at paragraph 72 above
d. Transport: (paragraph 80): £16,000
e. Loss of Earnings (paragraph 83) a one-off award of £5,000

Periodical payments, statutory funding and the reverse indemnity

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EXCHANGE CHAMBERS

1

Why does this matter?

- *The Claimant has a duty to mitigate his loss. He should seek regular assessments under Section 47(1) of the National Health Service and Community Care Act 1990, section 21 of the National Assistance Act 1948 (or such comparable legislation as may hereafter be enacted) or through Continuing Healthcare Funding (or such comparable funding scheme as may in the future be created).*
- *Further, the relevant statutory bodies are under an obligation to support and to fund the Claimant's appropriate needs. If, and only if, there is a shortfall is any supplement required. Acting reasonably, the Claimant should access assessments together with funding.*
- *In compliance with the decisions in **Sowden -v- Lodge [2004] EWCA Civ 1370** and **Crofton v NHSLA [2007] EWCA Civ 71**, the function of the Court in determining the award for the future is to compare what a Claimant will reasonably require with what is likely to be provided by the above agencies pursuant to their duties.*
- *The Defendant should be liable for providing for the Claimant's reasonable future needs only to the extent that such needs are not likely to be met as above.*

• WRONG

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EXCHANGE CHAMBERS

2

Double recovery – who cares?

- The court:
- It is trite law that the claimant cannot recover twice for the same loss (Peters @ para. 57)
- In principle, payments by third parties which a claimant would not have received but for his injuries have to be taken into account in carrying out the assessment of damages unless they come within one of the established exceptions. It is not suggested that direct payments made by a local authority in the exercise of its statutory functions to make care arrangements under section 29 NAA and section 2 CSDPA may not in principle be taken into account. If the court is satisfied that a claimant will seek and obtain payments which will enable him to pay for some or all of the services for which he needs care, there can be no doubt that those payments must be taken into account in the assessment of his loss. Otherwise, the claimant will enjoy a double recovery. (Crofton @ para. 91)
- Defendants – really?

Statutory funding generally

- Social security benefits – CRU (not taken into account post-5 yrs or post-trial); non-CRU (taken into account per Hodgson v Trapp/Clanshaw v Tanner pre AND post-trial, subject to proof); entitlement can be protected by a special needs trust or through the Court of Protection.
- Local authority funding.
- Continuing healthcare funding.

Why might a claimant need or seek to rely on statutory funding?

- While the claim is ongoing/when interim funding is difficult.
- Contributory negligence
- Unexpected change in circumstances
- Litigation risks/poor claimant experts/poor outcome to litigated issues

We are NOT seeking to game the system or to double recover; the priority remains ensuring that a claimant's reasonable needs are met, from whatever source.

Is there a duty on claimants to claim statutory benefits? Can a failure to do so amount to a failure to mitigate?

- Peters v East Midlands Strategic HA [2010] QB 48

53. We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. There is no dispute as to what that should be and the Council currently arranges for its provision at The Spinnies. The only issue is whether the defendant wrongdoers or the Council and the PCT should pay for it in the future.

Peters – failure to mitigate

54. It is difficult to see on what basis the present case can in principle be distinguished from the case where a claimant has a right of action against more than one wrongdoer or a case such as *The Liverpool (No 2)* where a claimant has a right of action against a wrongdoer and an innocent party. In *The Liverpool (No 2),* those two cases were treated alike. In our judgment, the present case should be treated in the same way. It is true that in the present case, the claimant's right against the Council is the statutory right to receive accommodation and care. But the fact that there is a statutory right in the claimant to have his or her loss made good in kind, rather than by payment of compensation, is not a sufficient reason for treating the cases differently.

56. In our judgment, therefore, provided that there was no real risk of double recovery, the judge was right to hold that there was no reason in principle why the claimant should give up her right to damages to meet her wish to pay for her care needs herself rather than to become dependent on the State.

Application to other areas/issues?

Peters – certainty of continued funding

85. The final element of the reasoning that led the judge to conclude that it would be "folly" for the claimant to make herself dependent on State resources was the possibility of future legislative change. He expressed the point in this way at [66] in these terms:

"In addition to the constraints on the Local Authority budget, if C has to rely on State provision she is, in my judgment, exposed to far greater uncertainty in terms of funding. The rules on what if any contribution C has to pay for her care are Byzantine and inconsistent. They are plainly ripe for reform. Judges have repeatedly drawn attention to the wholly unsatisfactory nature of the statutes and regulations under which the contribution to be made by someone in C's position are calculated. It is quite possible that the rules will change so that her award is brought into account in the future. She could thus lose other elements of her award intended for different purposes simply in order to fund her placement."

Peters – certainty of continued funding

87. In our judgment, the judge was right to have regard to the possibility of legislative change as a relevant factor in deciding whether it was reasonable for those representing the claimant to opt for private funding rather than rely on the Council. The judge was doing no more than applying what this court said in *Crofton* at [105] and [107]. At [107], Dyson LJ giving the judgment of the court said: "It is by no means far-fetched to suggest that, at some time in the future, the ministerial policy of ring-fencing personal injury damages and/or the Council's approach to that policy will change".

88. It may well be that Mr Faulks' predictions prove to be justified by what happens. But, to put the matter at its lowest, the possibility that he is wrong cannot be ruled out. There is no reason why the claimant should take the risk that the policy of ring-fencing personal injury damages is changed and with immediate effect.

- Putting into context..

Peters – the moral high ground

89. There is much to be said for the view that it is reasonable for a claimant to prefer self- funding and damages rather than provision at public expense, on the simple ground that he or she believes that the wrongdoer should pay rather than the taxpayer and/or council tax payer. In other words, it is not open to a defendant to say that a claimant who does not wish to rely on the State cannot recover damages because he or she has acted unreasonably. In *Freeman,* Tomlinson J came close to embracing this view at [6]. We heard no argument on this approach to the mitigation issue and we express no concluded view about it.

Peters – reducing the multiplier to reflect the possibility of state funding

90. Mr Faulks submits that, if the court decides the other issues in favour of the claimant (as we have done), nevertheless a lower multiplier should be applied to reflect the fact that the claimant would be entitled to State-funded care for at least a period into the future.

91. …In any event, it would be "quite impossible to form any concluded view on even the most tentative basis on the length of time that [the claimant] may stay at The Spinnies". In other words, the judge was not willing to reduce the multiplier on the basis of speculation.

92. If it were necessary to do so, we would uphold the judge's reasons for not dealing with the point. In our judgment, however, there is a more fundamental reason for not reducing the multiplier. It is that the passage in *Crofton* relied on by Mr Faulks has no application in this case. As Mr Godsmark points out, that passage deals with the position where a claimant *will* receive State provision (in that case direct payments) for at least a certain period of time and possibly much longer. That is not the case here. It is not envisaged that the claimant will receive State-funded care at all unless the Deputy is authorised by the Court of Protection to apply for public funding.

The caveat to Peters – double recovery

- The "duty" on the deputy and case manager to seek state funding:

60. Mr Faulks adopts the submission recorded at [35] in *Sowden* and contends that the Deputy would be under a duty to "secure and maximise funding available form public funds. They must ensure that such benefits as are available are obtained". He also relies on certain evidence in the present case. Ms Helen Ainsworth is the claimant's case manager. She told the judge that it was her duty as case manager to do her best to ensure that the claimant had available to her "all services, equipment or funding that could be made available from whatever source, whether it was the local authority, the health authority or whatever". This was also the view of the defendants' care expert, Ms Joanna Douglas.

61. We doubt whether this evidence as to the *general* nature of the duty of a case manager (or indeed Deputy) carries much weight. The scope of the duty of a case manager and Deputy is a question of law. More importantly, neither Ms Ainsworth nor Ms Douglas was addressing the specific question of the scope of the duty in circumstances where a court has awarded 100% of the care costs that are necessary to meet a claimant's needs. We do not accept that, in such circumstances, there is a duty on the case manager or Deputy to seek full public funding so as to achieve a double recovery. There is no basis in law, fairness or common sense for such a duty.

Mechanisms to avoid double recovery

- Freeman v Lockett [2006] PIQR P23
- Peters v East Midlands HA [2008] EWHC 778 (QB) – first instance
- Peters v East Midlands HA [2010] QB 48 – Court of Appeal
- R (Tinsley) v Manchester CC [2018] QB 767

Freeman

32. The Claimant in the present case is now 38 and I have concluded that she is expected to live to the age of 71. I am therefore invited to reduce her damages to reflect a confidence that Hertfordshire County Council or presumably some equivalent body will more than 20 and even 30 years hence be making financial provision for her at a level comparable to that which currently obtains. At the very least I am urged to find that there is a substantial prospect that for a significant proportion of the next 33 years the Claimant will continue to receive some sizeable contribution to her care costs. Using the approach established by cases such as *Mallett v McMonagle* [1972] A.C. 166 and *Allied Maples v Simmons and Simmons* [1995] 1 W.L.R. 1610 I am invited to make an estimate as to the chances that this state of affairs will continue to obtain, and to reflect those chances in the award of damages. This strikes me as a long way removed from the reduction to reflect statutory benefits payable as of right under consideration in *Hodgson v Trapp*, a reduction which I note has in any event subsequently been confined by statute to one limited to a maximum of five years from injury—see the Social Security (Recovery of Benefits) Act 1997. It also strikes me as an utterly unsatisfactory and unprincipled way of approaching the exercise of quantifying the cost of the Claimant's future care requirement, or perhaps more relevantly the manner in which that cost can be met.

In that regard Mr Davies submitted that the notion that this Claimant should not bear any risk whatsoever, however small, is out of keeping with the normal principles for the assessment of damages for future loss and is unsustainable. However, the Claimant will in any event bear the risk of increased care requirements, care cost increases not or not adequately catered for by her award and unexpectedly poor returns on capital invested. I can see absolutely no justification whatever for additionally and quite unnecessarily imposing upon her a risk which relates not to the possible deterioration in her own condition or to other matters wholly outside any normal control but rather as to the availability or source of funds to meet her needs. Funds can be secured now to meet her reasonable needs as best they can currently be assessed. Why, having assessed those needs, and being in a position to make an award to meet them, should the court relegate the Claimant to a state of uncertainty, however small be the uncertainty, whether there will be available the funds assessed as necessary to meet her needs? The notion that the Claimant should in that respect bear any risk seems to me contrary to all principle.

Freeman – the solution to avoid double recovery

34. In the event that no deduction is made from her award for future care on account of the possible receipt of local authority funding, the Claimant is willing to give some sort of undertaking to the court to the effect that she will withdraw her application for local authority funding and will not make such application in the future unless, as Mr Westcott put it, she should find that she has no realistic alternative to reliance upon the state as a result of, for example, poor investment returns, increased care requirements or care cost increases not catered for by her award. Whilst I believe, and find, that the Claimant's intention to cooperate with any proper mechanism intended to prevent double recovery is entirely genuine, I regard any such undertaking as impractical and undesirable.

I suppose that it would be possible to envisage some sort of undertaking from the terms of which the Claimant could be released by the Master of the Court of Protection but I do not think that it is in principle sensible to attempt to devise an undertaking dealing with the circumstances in which a long term seriously disabled person is or is not permitted to avail herself of assistance offered by organs of the state. On the other hand I am able to find and do find that, provided no deduction on account of the possible receipt of state or local authority funding is made from her award of damages, the Claimant will upon receipt of payment of the award withdraw her application for local authority funding and will not renew that application or make a similar application in the future at any rate in the absence of some unexpected development which compels her to abandon her stated intention not to resort to state or local authority funding to pay for her care.

Peters – first instance

76. It is of course trite law that the claimant cannot recover twice for the same loss. Those representing the claimant were well aware of this potential problem. They sought to overcome it by offering to the court, through Mrs Miles the Deputy, an undertaking. She gave evidence that she was prepared to give an undertaking as Deputy not to seek statutory funding for C's care, such undertaking to be qualified on whatever terms were appropriate. But when that proposition was explored it became apparent that it was fraught with difficulty. Mrs Miles had not identified the terms of any qualification to the undertaking, such as the circumstances in which she might be released from it, nor was she even sure that her terms of appointment as Deputy entitled her to offer it. She further accepted that any undertaking she gave would be personal to her and that she could not bind her successors. It was later suggested on behalf of the claimant that a suitable undertaking would be "*not to make any claim for public funding of the care of the claimant under section 21 of the National Assistance Act 1948 or any equivalent subsequent legislation without leave of the Court or the Court of Protection.*"

77. I am far from satisfied that there is any proper legal basis for Mrs Miles to give the undertaking she offers, and it would certainly not bind her successors. In any event I regard any such undertaking as impractical and undesirable..

It cannot be right to devise an undertaking dealing with the circumstances in which a gravely disabled person is or is not permitted to avail herself of assistance offered by the Local Authority even with the caveat proposed.

78. On the other hand, I have the evidence of Mrs Miles, which I unhesitatingly accept, that she, the Deputy in effective control of the management of C's financial affairs, is very much of the view that C's future care should be privately funded. In those circumstances I find that, providing the court orders that the tortfeasors meet the cost of future care, Mrs Miles will not require the Local Authority to provide the claimant with care under its statutory obligations in the future, at any rate in the absence of some wholly unexpected development which compels hers to abandon her stated intention to rely on private funding. I am further confident that I can rely on any future Deputy taking precisely the same view. Such successor will be appointed by the Court of Protection and will unquestionably be a person of probity and integrity entirely fitted to be trusted not to abuse their position.

Peters – Court of Appeal

62. If it had been necessary to do so, we would have held that the judge was entitled to take the view that the possibility of double recovery was effectively eliminated by his finding that, if the tortfeasors paid the care and accommodation costs, Mrs Miles and her successor(s) would not require the Council to discharge its statutory duty under section 21 of the NAA "in the absence of some wholly unexpected development which compels her to abandon her stated intention to rely on private funding".

63. But during the course of argument in this court, it became clear that there is an effective way of policing the matter and controlling any future application by Mrs Miles for the provision of care and accommodation by the Council. It can be achieved by amending the terms of the court order pursuant to which she is acting. The Court of Protection Order made on 28 January 2006 sets out in considerable detail the scope of her authority. Paragraph 6 of the order provides that the Receiver (now Deputy) is not authorised to do any of the acts or things stated in subparagraph (a) to (p) "unless expressly authorised to do so by the court by further order, direction or authority".

64. Mrs Miles has offered an undertaking to this court in her capacity as Deputy for the claimant that she would (i) notify the senior judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of this court and that of Butterfield J; and (ii) seek from the Court of Protection (a) a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under section 21 of the NAA can be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public finding of the claimant's care under section 21 of the NAA and be given the opportunity to make representations in relation thereto.

65. In our judgment, this is an effective way of dealing with the risk of double recovery in cases where the affairs of the claimant are being administered by the Court of Protection. It places the control over the Deputy's ability to make an application for the provision of a claimant's care and accommodation at public expense in the hands of a court. If a Deputy wishes to apply for public provision even where damages have been awarded on the basis that no public provision will be sought, the requirement that the defendant is to be notified of any such application will enable a defendant who wishes to do so to seek to persuade that the Court of Protection should not allow the application to be made because it is unnecessary and contrary to the intendment of the assessment of damages. The court accordingly accepts the undertaking that has been offered.

The Tinsley "gloss" on Peters undertakings

- Generally – a claimant who has recovered damages for care does not need to exhaust them before applying to the local authority for assistance.
- And, as to Peters undertakings:

32. I doubt if it can be right, by requiring the deputy to give undertakings of the sort proffered by Mrs Miles, to transfer the burden of deciding whether a claimant is entitled to claim local authority provision to the Court of Protection. That court looks after the interests of its patients and is not usually required to decide substantive rights against third parties. Indeed it could be said that to decide that a local authority is not obliged to provide after-care services would not be to promote the interests of the patient.

Where does this leave the Claimant practically?

- Is the defendant really concerned about double recovery?
- Is there compelling evidence to justify a finding as made in Freeman or Peters (at first instance)?
- In the case of a protected party, would the deputy want to give a formal Peters undertaking (and would the court accept it)?
- In other cases, would a claimant want to give an undertaking himself/ herself?
- Timing.
- Contributory negligence.

A modified Peters approach/undertaking?

- *I shall seek from the Court of Protection a limit on my authority as the Applicant's Deputy whereby no application for public funding of the Applicant's care under section 21 or 29 of the National Assistance Act 1948, section 4 of the Chronically Sick and Disabled Person's Act 1970 and/or sections 18 or 19 of the Care Act 2014 or any statutory successor can be made unless it is in her best interests either because the funds provided by the CICA for her future care no longer provide for her reasonable care needs or because the restriction is contrary to her best interests for some other reason.*

An alternative to the Peters undertaking – the reverse indemnity

- What is a reverse indemnity?
- Passive v active reverse indemnities.
- Mechanism – PPOs; non-PPO cases? Available by negotiation only.
- Potentially the key to sizeable PPOs.
- Is it morally right or appropriate?

The contributory negligence conundrum

C recovers 50% of the value of his claim. He has care needs totalling £200,000/yr. He can obtain statutory funding of £120,000/yr. Can he meet his needs?

Sowden v Lodge [2005] 1 WLR 2129:

83. Thus the "damages recoverable" are first to be assessed; in Kelly the county court maximum, in the present case damages applying ordinary tortious principles, and it is the sum so assessed which is to be reduced for contributory negligence. It is then for the claimant to decide how the sum awarded should be applied.

- Care costs 200,000/yr, less statutory funding of 120,000 = 80,000.
- 50% recovery = £40,000.
- Claimant recovers 120,000 + 40,000 = 160,000.
- Claimant potentially faces a shortfall of £40,000.
- The solution – "top up" and remit the balance (by negotiation).
- At trial???