Case No: HQ12X02461

Neutral Citation Number: [2016] EWHC 1676 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2016

Before:

THE HON MR JUSTICE FOSKETT

- -

Between:

CHRISTINE REANEY	**Claimant**
- and -	
UNIVERSITY HOSPITAL OF NORTH STAFFORDSHIRE NHS TRUST (1)	**Defendants**
-and-	
MID STAFFORDSHIRE NHS FOUNDATION TRUST (2)	

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Angus Moon QC and Caroline Hallissey (instructed by **Henmans Freeth**) for the **Claimant**
David Westcott QC and Charles Feeny (instructed by **Hill Dickinson LLP**) for the **Defendants**

Hearing date: 16 June 2016
Further written submissions thereafter.

- -

Judgment

Judgment (No. 2)

Mr Justice Foskett:

Introduction

1. The hearing that took place before me on 16 June 2016 was a sequel to the trial that took place before me in July 2014 and the principal judgment and a supplemental judgment I gave following that trial handed down on 19 September 2014 and 31 October 2014 respectively: see [2014] EWHC 3016 (QB). The case was taken by the Defendants to the Court of Appeal and the appeal was allowed: see [2015] EWCA Civ 1119. The case was remitted to me for further consideration in light of the Court of Appeal's decision and that represented the focus of the hearing on 16 June 2016 and some further written submissions subsequent to that hearing.

2. The proceedings have a chequered and, in some respects, unhappy history. I must accept some responsibility for that which I regret. I was persuaded (see [71] of my original judgment) that the Claimant's situation after the development of the bed sores for which the Defendants accepted liability was, on the evidence, "materially and significantly worse than it would have been but for that negligence", that "[she] would not have required the significant care package (and the accommodation consequent upon it) that she now requires but for the negligence" and in consequence that she was entitled to damages representing compensation for the full extent of her needs rather than simply compensation for the additional needs arising from the consequences of the bed sores over and above the needs arising from her pre-existing condition.

3. The Court of Appeal said that I was wrong to do so. In his judgment, the Master of the Rolls said this at [19]:

> "It was … common ground that if the defendants' negligence caused [the Claimant] to have care and other needs which were substantially of the same kind as her pre-existing needs, then the damage caused by the negligence was the *additional* needs. On the other hand, if the needs caused by the negligence were qualitatively different from her pre-existing needs, then those needs were caused *in their entirety* by the negligence." (Emphasis as in original.)

4. Mr Angus Moon QC, who represented the Claimant in the Court of Appeal, had sought to persuade that court, by reference to other findings I made and the evidence put before me, that I was justified in concluding that "the care required as a result of the negligence was <u>qualitatively different</u> from the care that would have been required but for the negligence" (my emphasis) by reference to the findings I made or otherwise supported by all the evidence. However, the court held that he was not justified in making that submission. It was said that I had not found that "the significant care package required as a result of the negligence was qualitatively different from the care that would have been required but for the negligence." It was said that my conclusions "were consistent with a finding that the significant care

package was quantitatively, but not qualitatively, different from what would have been required but for the negligence." (My emphasis again.)

5. The case was remitted to me "to assess damages in respect of the claimant's heads of loss in the light of this judgment." [37]

6. For reasons I will have to develop below, neither side was wholly happy that it understood the judgment of the Court of Appeal in its entirety or that it dealt with all the arguments addressed. Each addressed written requests for re-consideration by and/or guidance from the court. In those circumstances Counsel were unable to agree the terms of the order. I will have to refer to the eventual guidance on the terms of the order actually made, given by the Master of the Rolls in an e-mail sent on his behalf. Whilst the parties seem to be agreed on the literal interpretation of that guidance, neither seems wholly comfortable with its consequences and, as will appear (see paragraph 35 below), each arrives at vastly different conclusions as to quantification by purporting to follow it. This leaves me in the wholly unenviable and invidious position of addressing the question of whether the guidance was intended to be as restrictive in its impact as, on a literal interpretation, it appears to be before I can proceed to a task which, at face value, seemed a relatively straightforward exercise in the light of the judgment of the Court of Appeal as I have read it.

The effect of the Court of Appeal's decision and its subsequent guidance

7. The distinction between needs that were "quantitatively, but not qualitatively, different from what would have been required but for the negligence" was reflected in a shorthand used in the Court of Appeal, namely, that the former simply meant "more of the same" rather than something that was "different in kind", a description to be applied to the latter. It was said that even if the care package the Claimant needed was "significantly or substantially more of the same" then it would be wrong to hold that the need for it was attributable to the negligence.

8. As I have indicated above, Mr Moon sought to argue that I was justified in finding that the care needs caused by the negligence "were different in kind from what [the Claimant] would have required but for the negligence", but the Court of Appeal said that I was not so justified. The finding mentioned in paragraph 2 above was described as a "sparse finding" and it was said, for example, that in relation to the carers themselves I made no finding that the Claimant now required "specialist carers who have skills which are not possessed by carers of the kind who would have sufficed to satisfy her pre-existing needs." Mr Moon also sought to argue before the court, as he was entitled to do, that there was other evidence before me that, had I addressed it expressly, would have supported the conclusion at which I arrived, but the Court of Appeal rejected that submission.

9. It seems to me plain that the Court of Appeal took the view that there was insufficient evidence, whether referred to by me directly in my judgment or to be found in the rest of the evidence adduced at the trial, that the Claimant's needs were "qualitatively different" in the post-negligence scenario from those that existed prior thereto. It was, therefore, on that court's analysis, a "more of the same" case. The Court of Appeal observed at [26] the following:

> "It may be that the significance of the difference between needs which are quantitatively different and those which are qualitatively different was not spelt out during the course of the trial."

10. If I may respectfully say so, it also seems plain to me, having read the judgment, that what the Court of Appeal was expecting me to do on the return of the case to me was to address each of the various heads of damage specified in the judgment at [26] (care, physiotherapy, accommodation, equipment, transport and holidays) and to determine in respect of each the additional needs in terms of its quantity compared with the Claimant's pre-existing needs and to make an award of damages on that basis. In other words, I was to determine how much "more of the same" was needed in her present condition compared with her pre-existing position and to place a monetary value upon it. It is equally plain, in my view, that the Court of Appeal must have thought that the material existed to enable me to do so when the matter came back before me. The court referred to the "undoubted fact that [the Claimant's] quality of life is now markedly worse than it would have been but for the negligence" and presumably anticipated that, approaching the issue correctly in accordance with its judgment, I would have been able readily to make the relevant assessment and award damages accordingly. If that was the view of the Court of Appeal, I would respectfully have shared it. According to the submissions of the parties, that is not so.

11. I will return to this below, but I do need to trace the history of events after the parties received the draft judgment from the Court of Appeal because it has affected the way the arguments before me have unfolded. The draft judgment was circulated on 27 October 2015 and its final paragraph invited "counsel to agree the terms of an order which give effect to this decision." However, for the reasons already foreshadowed (see paragraph 6 above) in the short period between the receipt of the draft judgment and the handing down of the final judgment each party had made some representations to which I need to refer. Before doing so I should, perhaps, say that I have been told that the final form of the judgment was no different in substance from the draft judgment: the only changes were typographical or of no substantive consequence save that I infer, in the light of the representations to which I will refer below (see paragraph 13), that the final sentence of paragraph 26 of the judgment was added to that which had appeared in the draft.

12. The Appellants in the appeal (and thus the Defendants in the action) apparently alerted the Clerk to the Master of the Rolls by email to certain issues they had with the draft judgment and then submitted a document prepared by Mr Westcott and Mr Feeny entitled "Appellants' Supplementary Submissions" dated 30 October 2015. That was the Friday before the final judgment was due to be handed down on Monday, 2 November 2015. I can only assume that the substance of what the Appellants wished to put forward had been reflected in the previous email because the Respondent to the appeal (the Claimant) also advanced a written submission dated 30 October 2015 which, in broad terms, addressed the issues raised in the Appellants' Supplementary Submissions without answering that document directly. At all events, the position taken by each side at that time is tolerably clear from those two documents.

13. The Appellants were anxious about the following matters: (i) that certain concessions made during the hearing of the appeal and certain arguments addressed by Mr

Westcott were not "accurately set out and/or dealt with in the judgment"; (ii) that paragraph 26 needed alteration to include the heads of claim in relation to accommodation, equipment, transport and holidays; and (iii) the terms in which the case should be remitted to me. As I have indicated (see paragraph 11 above), (ii) seems to have been acted upon prior to the final judgment being handed down.

14. As to (i), the Appellants' written submission ran to 5 pages. In the first instance, the Appellants sought to challenge the view of the court that what was recorded in [19] of the judgment (see paragraph 3 above) was indeed "common ground" and asserted that what was recorded in [19] was not an accurate account of what was said on behalf of the Appellants. In particular, it was asserted that at no stage in the argument did Mr Westcott use or accept the phrase "qualitatively different". Although other points were made in this connection by the Appellants, as I have indicated, nothing was changed in the final form of the judgment. The second aspect referred to under this part of the Appellants' submissions related to the way in which, given the court's overall conclusion, the relative needs (i.e. the Claimant's present needs compared with her pre-existing needs) should be compared. What was said on the Appellants' behalf was that this should be done on the basis of identifying the "objectively assessed needs" both pre- and post- the Defendants' negligence. It was said by the Appellants that in relation to the pre-negligence needs I had focused on what support would actually have been made available (largely, if not exclusively, through local authority support) and did not focus on what the Claimant's "objectively assessed reasonable needs" were: those may have been different from what she had to "make do with" through the local authority. As I understand it, the Appellants accepted in the pre-appeal material it put before the Court of Appeal that "the evidence was available" by which this objective analysis could have been undertaken and it was referred to in Appendix 1 of the Skeleton Argument lodged in support of the appeal. Reference to that Appendix shows what was described as "Scenario B" which sets out the Appellants' contentions on the basis of the evidence called at the trial before me of the difference between the objectively assessed reasonable needs of the Claimant pre- and post- the Defendants' negligence. The words that introduce Scenario B are as follows:

> "In the alternative, if the Court rejects the appellants' case as to the necessity of proving actual expenditure but nonetheless accepts the appellants' principal legal argument that they can only be liable for the consequences of such additional loss as they have caused, then the valuation of loss as set out in Scenario B below would reasonably apply."

15. The case as to "proving actual expenditure" is a shorthand for the case advanced by the Defendants as Scenario A in the above Appendix (albeit now not pursued: see paragraph 36 below) that the Claimant was required to prove that "any additional loss is likely to be incurred." This is the way the argument was summarised in paragraph 6 of the Counter-schedule:

> "In respect of future loss, and in particular care, the Defendants will contend that the Claimant must prove that any additional loss is likely to be incurred. Specifically given that there is no claim for the first carer and no funds available to fund such a carer, the likelihood is that the Claimant will remain dependent

> on the Local Authority for her basic care needs. In the circumstances as it appears below, the Claimant will only suffer loss to the extent that she must pay additional charges to the Local Authority."

16. As will become apparent, the Court of Appeal expressed no view on the case thus advanced but, of course, did accept the Appellants' principal legal argument. However, it is clear that the Appellants were prepared to accept that the exercise they say I should have carried out could be carried out by reference to the evidence I received at the trial and indeed were prepared for the Court of Appeal to entertain submissions concerning this approach.

17. The written submissions made concerning the draft judgment also suggested that the Court of Appeal had not adjudicated on the Appellants' argument that the correct exercise was to compare the "objectively assessed reasonable needs" of the Claimant pre- and post- the Defendants' negligence. Those submissions also recorded that the court had intimated during the course of the argument that it was not minded to go into the issues raised by Appendix 1 to the Skeleton Argument (see paragraph 14 above).

18. I will return below to the final issue raised by the Appellants concerning the procedural approach when the matter would come back to me for further consideration (see paragraphs 20-30).

19. Before turning to the order made by the Court of Appeal, I need to record the Claimant's response to those foregoing points. As to (i), it was suggested that [19] of the draft judgment reflected the position as it developed during the course of the hearing before the Court of Appeal and that there was no need for any modification. It appears to have been accepted on the Claimant's behalf that the court did not rule on the "objectively assessed" argument because the court had discouraged development of the argument. It was described on behalf of the Claimant as a "secondary issue" and that it would not be acceptable to rule upon it since it had not been addressed by the Claimant in oral argument. It is plain that Mr Moon contemplated that this is an issue that would be addressed by me if it arose. I say "if it arose" because his position at that stage was that it was still open to him, on the Claimant's behalf, to argue before me that her needs were indeed "qualitatively different from her pre-existing care needs" and that, accordingly, if that contention could be sustained she should be awarded the full claim, doubtless much along the lines of the award I had made originally. The position he was maintaining at that stage was that it would be open to me to decide whether further evidence was necessary and, if so, what it should be. He asserted that if it became necessary for me to consider an "objective assessment" of the Claimant's pre-existing needs, I would need to consider further evidence because there was "little evidence before the court below to enable it to quantify such an 'objective assessment'."

20. Mr Moon's position in relation to the calling of further evidence was resisted by Mr Westcott on behalf of the Appellants. The Appellants' Supplemental Submissions contended that the Claimant should not "have a second bite at the cherry by securing a fresh opportunity to evidence differential needs or costs", that there was "no justification at this stage for permitting her to seek directions to rely upon further evidence or to advance a different factual case as to the differences between the nature

of care she would have needed and the care she now needs" (my emphasis) and that the quantification of her loss should "be dealt with following written submissions confined to calculation of the cost of meeting her additional needs under the heads of claim … as properly identified pursuant to the principles established by the judgment of the Court of Appeal, on the basis of the evidence called at the trial and the findings of fact made by the judge." (My emphasis.)

21. It is to be noted that at that stage the Appellants appeared to contemplate the possibility of the need to refer "to the evidence called at the trial" (as is plain from their willingness to engage in the issues raised in their Appendix 1: see paragraph 14 above) , but obviously only within the relatively narrow confines of the issue of quantification as identified. As will be clear from the foregoing, the Claimant's position at that stage was that wider evidence than that ought to be permitted.

22. The final judgment was handed down on Monday, 2 November 2015, and the material parts of the order made on 12 November (not, I understand, as formulated by and agreed between Counsel, but as drafted by the Appellants' Counsel) were as follows:

> "2. The action be remitted to Foskett J to decide the amount of damages to be paid to the Claimant … in accordance with the judgment on liability dated 11 January 2013, the directions on the law of this court and the findings of fact made in the judgment dated 19 September 2014.
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> …
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> 4. The parties shall file written submissions on quantum to Foskett J by 30 November 2015 on receipt of which the matter shall be listed for further oral submissions if Foskett J so desires or a written judgment shall be produced. Such written and oral submissions shall be limited to the quantification of the damages payable for the additional loss caused to the claimant by the defendants' admitted breach under the following heads of loss:
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> (a) Care
>
> (b) Accommodation
>
> (c) Equipment
>
> (d) Transport
>
> (e) Physiotherapy
>
> (f) Holidays"

23. I do note that the order does not refer to the Supplemental Judgment I handed down on 31 October 2014 (see paragraph 1 above), but I assume that any findings of fact made in that judgment would also be available for consideration. The order makes no reference at all to evidence, merely "the findings of fact made in the judgment dated 19 September 2014".

24. Nonetheless and importantly, the order does make it clear that the focus of the enquiry was to be upon establishing "the additional loss caused to the claimant by the defendants' admitted breach under" (my emphasis) the specified heads of loss. That being so, it was, in my view, somewhat ambitious for the Claimant's legal team to prepare an initial written submission for my benefit (as part of the process of the case being remitted to me) in which they sought to argue that it was still open to them to contend before me that her needs were "qualitatively different" following the negligence from what they were prior thereto. However, that was the effect of the initial written submission they prepared for my benefit and they pointed to evidence that I had received that, they submitted, would lead to that conclusion. That initial submission was dated 27 November and was intended to comply with the deadline set out in paragraph 4 of the order sealed on 12 November.

25. The Defendants, through Mr Feeny, also prepared written submissions for my benefit consequent upon the order of the Court of Appeal. The document was also dated 27 November 2015 and presumably was prepared without having seen the submission prepared by the Claimant's legal team to which I have referred above. It makes the following assertion in paragraph 3:

> "It is submitted that the Claimant … must face the consequences of having advanced at first instance a case which the Court of Appeal have considered to be wrong in law. The evidence adduced by the Claimant at trial reflected the Claimant's approach in law and was not specific to loss arising from additional needs. Having regard to the terms of the order of the Court of Appeal, the Claimant cannot re-open the facts or invite the court to make findings on a different factual basis to that set out in the judgment of September 2014. It is only where there is evidence and factual findings supporting a basis for loss caused by additional needs that the Claimant can ask the court now to quantify damages." (My emphasis)

26. It is to be noted that the expression "evidence and factual findings" was used (my emphasis again). Mr Feeny also contended, in paragraph 5, that it was not open to the Claimant to advance a case based upon the argument deployed in the Court of Appeal, namely, that her needs are now "qualitatively different" from her pre-existing needs. He asserted that, having regard to the terms of the order made by the Court of Appeal, it was not open to the Claimant to invite me to re-visit that issue which would "in effect require the re-opening of the evidence and further factual findings" which, he said, were precluded by the terms of the order. I need not refer further at this stage to the rest of the submissions he sought to make because the paragraphs to which I have referred indicate that there was a divergence of view between the Defendants' team and the Claimant's team about what was available for consideration before me when the matter was remitted to me.

27. As a result of that Mr Moon prepared a Note for the Court of Appeal seeking clarification of the order of 12 November. That note was dated 9 December 2015. It indicated that the view on the Claimant's side was that the Court of Appeal's order entitled the Claimant to contend, on the basis of evidence put before me at the initial trial, that her needs were qualitatively different from her pre-existing needs. Various matters were advanced in support of this proposition and it was argued that it would

be unjust not to permit me to consider the evidence available and reach a conclusion in accordance with the guidance of the Court of Appeal. It must be emphasised that this was being put forward in the context of the argument that I should be able, in effect, to revisit the issue of whether her post-negligence needs were indeed "qualitatively different" from the needs prior thereto.

28. The Appellants' response to this was dated 16 December. Referring to the order made by the Court of Appeal, the final two paragraphs of the response were as follows:

> "5. The order of the court:
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> a. offered the Respondent no opportunity to call further evidence upon the remission of the case to the Judge; and
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> b. properly required the assessment of damages to be effected by reference to the findings of fact already made by the Judge.
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> 6. Indeed, the Respondent's approach to the appeal was to argue, inter alia, that the evidence (to the transcripts of which reference was made) supported a conclusion that the care etc. now needed was sufficiently different from that which would have been required in any event, to warrant full recovery. The Court of Appeal declined to find that the evidence supported such a conclusion; so the question which the Respondent now wishes to ask the Judge to resolve has already been decided.

29. In the preceding paragraph of this response, the Appellants explained their reference in their earlier submissions to the "evidence called at the trial and the findings of fact made by the Judge" (see paragraph 20) as being a compendious expression and that the expression "findings of fact made by the Judge" was "plainly a reference to the findings already made … and it is apparent (and was evidently understood by the Court of Appeal) that the Appellants were proposing that there should be no opportunity to elicit further findings of fact from the Judge." All the contentions advanced by the Defendants at that point were made in the context of the suggestion that the Claimant might take a further opportunity of sustaining the "qualitatively different" nature of the care required in the post-negligence scenario.

30. Against that background, on 18 December 2015, via his Clerk, the Master of the Rolls sent a short message to the parties in the following terms:

> "The court accepts the submissions in the Appellants' response. The wording of para 2 of the order is clear and unambiguous: the assessment is to be done on the basis of the findings of fact already made by the Judge and no other findings."

The competing positions taken in response to that clarification

31. The literal interpretation of the clarification to which I have referred is that the only material to which I may make reference in carrying out the exercise provided for in paragraph 4 of the order is the series of findings of fact already made and, at least arguably, only those findings made in the main judgment and not those made in the Supplemental Judgment. It does not appear that reference to and review of any evidence previously called is to be permitted. (Reference to and reviewing the existing evidence is, of course, to be contrasted with hearing further evidence.)

32. What this would mean in practical terms, of course, is that if I had not made findings in my original judgment which, either directly or indirectly, enabled the assessment ordered under paragraph 4 of the Court of Appeal's order to be made, the actual task allotted to me would be impossible – or at least only to the extent that I had made such findings. Where, for that reason, it was not going to be possible, the Defendants submission is that I must make a nil award (unless they have made some specific concession).

33. That, of course, could have been the intention of the Court of Appeal, but I very much doubt it: the appellate process in this case involved considering how to provide the Claimant with appropriate and full compensation within the law which is to what the Appellants' arguments before that court were directed. The appellate process had no "disciplinary" function other than to prevent the Claimant from "having another try" at establishing before me what was her principal case and which the Court of Appeal had decided could not succeed. It is absolutely plain in that context that the Court of Appeal was not prepared to permit the Claimant a "second bite at the cherry" of establishing that her post-negligence needs were "qualitatively different" from those that existed hitherto, whether on the basis of the existing evidence or, as was suggested may be necessary, calling further evidence. As will be apparent, that is what her advisers had been seeking to do right up until their Note dated 9 December 2015. Indeed it is emphasised in a footnote to the Defendants' Supplementary Submissions on Quantum dated 31 May 2016 which reads as follows:

> "It is to be noted that the clarification provided by the Court of Appeal of the scope of this Court to make further findings of fact arose in the context of the Claimant's attempts to (a) adduce fresh evidence as to her current position; and (b) argue before this Court that her current needs are 'qualitatively different' to those which would have existed 'but for' the Defendants' admitted negligence."

It was, as I have observed, a very ambitious position for the Claimant's advisers to take given the terms of the Court of Appeal's judgment and the terms of paragraph 4 of its order.

34. If I may respectfully say so, my perception is that the message from the Master of the Rolls sent on 18 December 2015 was simply intended firmly to shut the door on that possibility once and for all. Again, if I may say so, I quite understand why: her legal team had taken their chance of establishing that case before me and, whilst I did accept it, it was shown not to have been a justified conclusion and, accordingly, that is the end of that way of putting the Claimant's case. However, on the basis of the Court of Appeal's decision, the proper way of dealing with her case is still to be dealt with and, more importantly, it must have been contemplated that I would be able to deal

with it justly when the matter came back to me. If the precise terms of the order actually made had the effect, by a side wind, of preventing that occurring then I have no doubt that it was not intended.

35. Subject to certain matters to which I will return, each party has started from the position that the effect of the order is that there can be no reference at all to any of the evidence in the exercise I am to undertake. They arrive at hugely different figures on this approach. The Claimant's team contend that rather than the total sum of £2,640,572 for the 6 heads of claim that was awarded in consequence of my first judgment, the sum should now be £2,469,175 (a difference of £171,397) whereas the Defendants' team say that such an exercise would lead to awards of £31,907 for future care (with no case management provision), £12,785 for physiotherapy and £4,871.95 for holidays (totalling £49,654), but nil awards for the other 3 heads of claim. The total award, if this approach is adopted would be £266,637. (Their alternative approach, if reference to the evidence is permitted, is suggested to be over £1 million: see paragraph 41 below).

36. Before moving on, I should record that the overall figure for which, on their primary case as presently advanced, the Defendants contend as the proper award is identical to the figure said to be payable under the "proving actual expenditure" case to which I referred above (see paragraph 15). Regrettably, I have found the twists and turns in this case difficult to follow at times and, whilst I had noted during the submissions made on 16 June that this way of advancing the Defendants' case was no longer pursued, when re-reading my notes for the purposes of preparing this judgment I felt I needed further clarification. Mr Westcott provided it in the following terms:

> "Scenario A represented a calculation of the damages recoverable by the Claimant in the event that the Court accepted the Defendants' argument that no damages should be recoverable for future expenditures that the Claimant had not demonstrated were likely to be incurred. The calculation represented a combination of General Damages, past losses, some items of future loss specifically proven by the evidence, and concessions made by the Defendants.
>
> Scenario A itself became redundant once the Defendants decided not to pursue the argument that the Claimant was required to prove that future expenditures would be likely to be met. Counsel explained to the Court at the oral hearing that the Defendants did not intend to contend that this argument, albeit that it was a proper principle, should be deployed to restrict the Claimant's damages in this case, partly in light of the terms of remission.
>
> However the figures in Scenario A do identify the sums that ought to be ordered [on the basis that I am bound solely by findings appearing in the judgment of 14 September 2014]. This is because the directions of the Court of Appeal permit only the re-assessment of heads of loss on essentially the same basis as had been set out in Scenario A: viz., General Damages, past losses, some items of future loss specifically identified by

> the Court, and concessions made by the Defendants – because these are the only elements of the claim that are not disqualified from calculation because of the lack of the building blocks of assessment (i.e. findings about what the Claimant's reasonable needs would have been in any event assessed on an objective basis, as opposed to an assessment of the provision which would have been made as a matter of fact).
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> Accordingly …:
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> a) it would have been open to the Defendants to continue to pursue the legal argument underpinning Scenario A (the need to prove the likelihood of future expenditure) as described in Appendix 1, but they have chosen not to do so in the circumstances of this case
>
> however
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> b) the figures in Scenario A do, for the reasons explained above, coincidentally represent the figures which, subject to the caveat below, the Defendants say should be awarded, since the Judge is bound by the directions of the Court of Appeal to make an award solely by reference to findings of fact which he has already made."

37. The "caveat below" referred to the "pragmatic approach" to which I will refer below (see paragraph 40). The equivalence of the awards by virtue of the two approaches to the assessment of the Claimant's loss contended for by the Defendants is thus explained as "coincidental".

38. The Defendants' principal argument is that I must assess objectively the Claimant's pre-existing reasonable needs under each of the identified heads of damage and then in effect reduce her existing reasonable needs by reference to that assessment in order to establish the extent of the compensatable needs. Once that task has been fulfilled, it is a matter of applying the relevant arithmetic. They say that I did not make the assessment of the Claimant's pre-existing needs on that basis in my original judgment and since I am precluded from looking further than the findings I did make I am not in a position to make any award under such head of damage. It is said that, whilst this is very unsatisfactory from the Claimant's point of view (because the award of damages would be "very significantly less than" what she would be entitled to on a "conventional basis"[1]), it is a function of the fact that her legal team adopted "a bullish approach at first instance". It is asserted that in the long term she is unlikely to be the loser because any shortfall in her award is likely to be "made good in further proceedings", a reference to potential negligence proceedings against her legal team.

39. It hardly needs stating that this is an extremely unattractive position to adopt and I am bound to observe that the Court of Appeal, so far as I can judge, at no stage had this potential consequence of its order drawn to its attention. Nonetheless, if it is what was intended by the terms of the order made by the Court of Appeal, it is, of course,

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[1] Presumably, £266,000 odd compared with over £1 million.

entirely proper for the position to be taken. However, as Mr Moon correctly submitted, it means that the Defendants' current stance is that, whilst they accept that in principle the Claimant is entitled to compensation for the consequences they caused, she is precluded from obtaining the correct amount of such compensation because there were no or insufficient appropriate findings at first instance.

40. Although the position I have described is maintained as their primary stance, the Defendants offered on an open basis what they described as a "pragmatic approach" in the up-to-date submissions lodged prior to the hearing before me on 16 June. It is set out in the following paragraphs of the document entitled "Defendants Supplementary Submissions on quantum" dated 31 May 2016. The paragraphs are as follows:

> "20. However, the Defendants are willing to make a proposal that would permit the Court to make an informed estimate of the sort of award that would have been made if a conventional approach to the quantification of loss had been adopted.
>
> 21. It is possible to discern from the judgment that there is evidence that the Court would have accepted had it thought that the evidence was relevant to the assessment. Thus, by way of example, the Court regarded Mr Gardner as a credible and authoritative expert – and if it had thought that there was any relevance to his opinions about what would have been regarded as a reasonable need in the event that a claim had been brought in relation to [the Claimant's] pre-existing paraplegia, the Court would have made findings of fact on the basis of them.
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> 22. The Defendants would be prepared to consent to the admissibility of such evidence as a basis for fresh findings of fact (ie evidence that the Court would have accepted had it thought it relevant) provided that it is understood that the enquiry upon which the Court is embarking is to make an objective assessment of reasonable 'but-for' needs and the damages payable for exacerbation of her condition …
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> 23. To deploy such evidence, and to rely upon such findings of fact, would be to range beyond the scope of the enquiry ordered by the Court of Appeal – but the Defendants contemplate that the Court could do this with the consent of the parties.
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> 24. If such an approach were agreed, the Defendants' contentions as to the sums justified by the evidence are set out in Appendix I (attached to these Supplementary Submissions for convenience).
>
> 25. In the absence of any such agreement the Defendants will stand on (what they will argue are) their rights; and they

will insist upon an assessment of quantum consistent with the requirements of the judgment of the Court of Appeal."

41. Appendix 1 is in very similar terms to the Appendix 1 put before the Court of Appeal (see paragraph 14 above), with some additional explanations given of Scenario B. The total award on the basis of Scenario B in this document is £1,063,207.60 (rather than £1,141,567.40 in the original version). (I should say that had the Court of Appeal embarked on resolving the issues raised by Scenario B, the Claimant's response would have been that the Defendants' calculations were based on the false premise that she would have required one carer 24 hours a day in her pre-negligence situation. That premise is said to be contradicted by a finding I made and, if that is so, it affected other aspects of the damages claim, including the accommodation claim.)

42. I will return to how I should respond to the invitation (offered by the Defendants on the alternative basis to which I have referred) to consider the evidence at the original trial shortly, but I should indicate briefly why the Claimant's team come forward with such a radically different figure from that put forward by the Defendants in the scenario in which I am not permitted to look at the evidence.

43. In the first place, they say that the Defendants can point to no findings in the original judgment as to what the funding position would be in relation to the Claimant's pre-negligence condition if I had awarded her damages based solely upon her additional needs. There was no finding of fact as to what the local authority would have provided in that situation in the future and no finding that the claimant would not spend her (albeit more modest) compensation on privately funded care in the future or in the purchase of more suitable accommodation, all of which would have been necessary, it is said, for the defendants to be able to sustain their "prove expenditure" case (see paragraph 15 above). That case, of course, is no longer pursued as such: see paragraph 36 above. In the second place, they say that I did assess the Claimant's pre-negligence reasonable needs on an objective basis in relation to the care she would have required and, from that, it is possible to draw conclusions about her requirements for case management, accommodation, transport and holidays. (I can leave physiotherapy out of this because a figure is now agreed.)

44. I make no comment at this stage about the merits or otherwise of these competing positions, but each bears the hallmarks of the taking of some tactical position designed to assist each party as far as possible within the strict confines of the wording of the order of the Court of Appeal. I do not believe either side believes that the position it adopts now is the one it would have expected to adopt at the current stage of the proceedings immediately after reading the judgment of the Court of Appeal. There can be no doubt that the guidance and clarifications sought about that judgment were not sought in the best of circumstances and the clarification of the order made was sought when the Claimant's side was pursuing far too ambitious an approach. All this makes me pause before proceeding with evaluating either case as currently advanced.

45. Returning for the moment to the suggestion that I could look at the evidence, I should say immediately that I am troubled about the propriety of the parties to agreeing to invite me to approach the current part of the proceedings on a basis different from what the Court of Appeal has apparently ordered. It is really for that court to resolve any remaining uncertainties. However, any further request for assistance would be

very difficult for that court to give and the kind of impasse currently reached in the case must be resolved if at all possible without further costly and time consuming proceedings and with a view to bringing to an end what I am sure must be a continuing distressing uncertainty for the Claimant and her family. Before I indicate my conclusion, I should note how the Claimant has responded to the invitation from the Defendants to agree their proposal.

46. In summary, the Claimant's position is that it is not appropriate for the Defendants to put this forward as an offer for acceptance or rejection by her: it is suggested that the approach is one that is open for me to adopt if persuaded that it is the correct way of giving effect to the intentions of the Court of Appeal. To that extent the "offer" was not accepted.

47. That, as I have said, is the way the Claimant has responded to this "pragmatic approach" of the Defendants. The primary stance taken on her behalf, on the basis that the order of the Court of Appeal prevents reference even to the transcripts of the evidence called at the trial, is to try to respond to the way the Defendants suggest that the claim should now be quantified within the strict terms of the order and its subsequent clarification. However, it is also submitted that, if I am persuaded that reference to the transcripts is permitted, then (and this is agreed by Mr Westcott) the issue should be postponed for possible resolution following discussion or a further hearing.

How should the present stage of the proceedings be dealt with?

48. It will, I am sure, be understood that I do not find having to resolve the current situation a comfortable exercise. However, it is impossible for me to avoid it and I will try to address it head on. A number of propositions seem to me to be clear:

(1) The Court of Appeal endorsed the approach to the evaluation of the Claimant's damages as that set out in *Kemp and Kemp*, a passage to which the Appellants had drawn the court's attention: see [15] of its judgment.

(2) In part of the argument before me, the damages payable by a defendant who was responsible for all the present needs of the Claimant were identified as £Z (leaving out damages for pain, suffering and loss of amenity) and the amount of damages that would have been payable by a defendant who was responsible for all her needs in the pre-existing situation as £X. It was asserted by the Defendants that the amount of damages payable by a defendant who caused the additional needs would be £Z - £X pounds = £Y. That is what the Defendants say they should pay to the Claimant. The Claimant agrees and Mr Moon has confirmed that, in the present state of the proceedings, she seeks no more than £Y.

(3) The Court of Appeal sent the case back to me to assess the amounts payable under the six heads of claim identified in paragraph 4 of the order on the foregoing basis.

(4) The Court of Appeal decided not to deal with the issue of whether the needs of the Claimant in the pre- and post- negligence situations had to be "objectively assessed", did not consider the submissions of the Defendants on this basis and did not consider the competing submissions about Scenario B (see paragraph 14 above). I

have to infer that it took this position either because it felt that the issue of the correct approach was covered in its existing judgment and/or that, in any event, my judgment contained sufficient findings to enable me readily to readjust the relevant calculations in accordance with the correct approach as ordained by the Court of Appeal and that it was thus not necessary to descend itself into the details of the quantification. That would be consistent with that court's understanding of what the Defendants had put forward in Scenario B in Appendix 1. That is why, in my view, the order made by the Court of Appeal was in the terms it was. (I would add that I must regard the omission to mention the Supplemental Judgment in the order as an oversight and I can only assume it was not referred to because it was not mentioned in the draft sent to the court by the Appellants.)

(5) When the Court of Appeal (through the message of the Master of the Rolls of 18 December 2015) described paragraph 2 of the order in the terms that it did, it was intending to close the doors firmly and finally on the Claimant's attempt to re-open the factual issue of whether her needs in the post-negligence scenario were "qualitatively different" from those in the pre-negligence scenario. However, it was not intending to restrict the ambit of the further proceedings before me such that I could not carry out fully and fairly the task set out in paragraph 4 of the order, the perception remaining that I could carry out that task without revisiting any part of evidence given at the trial and on the basis of the findings I had made.

(6) Following on from (5), if the consequences of not being able to review the transcript of the evidence for the purposes of carrying out the exercise set in paragraph 4 of the order had been spelt out by the parties in the Notes sent to the Master of the Rolls (which they were not), the clarification would have been in less apparently rigid terms.

49. I have identified above (see paragraphs 32 and 35) what the Defendants say is the current position. In the written submissions advanced before the hearing before me the "critical question" they identified was as follows:

> "… whether the Claimant is entitled to damages in respect of her reasonable needs which exceed
>
> (a) the reasonable needs for which provision would in fact have been made in the 'but-for' situation; or
>
> (b) the reasonable needs which she would have had in the 'but-for' situation."

50. I confess that, when I read that in advance of the hearing, I had some difficulty in understanding it, just as I had difficulty in understanding the paragraph in the first set of submissions prepared for my benefit after the order of the Court of Appeal was made (see paragraph 25 above) which referred to the issue of whether at the trial I "(a) ought objectively to have assessed the extent of [the Claimant's] reasonable needs but for the tort, or (b) was entitled to concentrate on a subjective assessment of how she would have 'made do' with limited resources". I am afraid I did not find at that stage the suggestion that one should be comparing "apples with apples" any more illuminating. I had thought, having re-read my judgment, that I had indeed made the "objective assessment" that was required because, as the judgment itself reveals, at

the forefront of what I had to decide was the issue of the Claimant's reasonable requirements in the "but for" situation: see, e.g., [5] of my principal judgment where I said this -

> "… it is accepted on both sides that I should consider the "but for scenario" (namely, what would have been the Claimant's likely position but for the pressure sores and their consequences) and then the "post-pressure sores scenario"."

51. For strict accuracy the words "in respect of her reasonable requirements" ought to have been added after the words "likely position", but the essential task was thus outlined. That being so I could not follow how it was that I was said to have been in error. Furthermore, since the Court of Appeal did not address this issue, I did not have the benefit of an authoritative view on the point. It was not until some way through Mr Westcott's oral argument that I could finally see what was being said.

52. It is accepted by the Defendants that in all relevant instances I did make an objective assessment of the Claimant's reasonable needs in her post-negligence position. It follows that, in effect, £Z is either established or can be assessed readily. However, what is contended is that when referring to the "but for" scenario (and thus the pre-negligence scenario), in some instances I focused on what the Claimant would in fact have received (largely, by way of local authority support) which may have been less than her "objectively assessed" needs and, accordingly, the foundation for the calculation of £X was incorrect. By way of simple illustration, if all expert evidence suggested that, in the pre-negligence scenario, the Claimant required 20 hours a week of care, but the local authority's resources were so stretched that only 10 hours per week could be provided, it would be wrong to base the calculation of £X on 10 hours a week - it should be based on 20 hours a week. The Defendant would not, as a matter of causation, have been responsible for the "missing" 10 hours.

53. The passage that gives the Defendants the basis for the proposition that I may not have performed the exercise that I thought I had performed in relation to the Claimant's pre-existing reasonable requirements is at paragraph 68(v) of my principal judgment. It reads as follows:

> "But for the admitted negligence, the Claimant would have required approximately 7 hours of professional care each week (supplemented by a very modest level of family support at the time of transfers) until the age of 70, whereafter until the age of 75 she would have required gradually increasing visits from one local authority carer until from the age of 75 onwards when, as now, a total of about 31½ hours per week would be provided by the local authority based upon the attendance of two carers. Again, a modest (though somewhat increased) additional family input would probably have been required, but the significant feature of this period is that the professional care provided (in reality through the local authority) would not have been on a 24/7 basis."

54. When dealing with the post-negligence scenario a little earlier in paragraph 68 (at 68(i)) I had made this observation:

> "… The objective analysis of the position (which, for this purpose, has to be seen as yielding a different result from what the local authority, juggling limited resources, assessed as being required) shows that she required henceforth two carers on a 24/7 basis, a requirement that will continue for the rest of her life."

55. What is being said by the Defendants is that in paragraph 68(v) I was setting the standard for the "but for scenario" by reference to what the Local Authority would have provided rather than by reference to what, leaving the availability of resources to one side, was reasonably required by the Claimant. This does, of course, presuppose that the two are different and it may be that on full analysis in this case they are not. However, I will assume for the purposes solely of the argument that they are. If they are, then I agree that the right comparison (which I believe is the comparison reflected in the approach in *Kemp & Kemp*) is between what is reasonably required in the post-negligence scenario and what was reasonably required in the pre-negligence scenario, both being objectively assessed (as, of course, the word "reasonably" connotes). Unless I have misunderstood the Claimant's present position, this is not (certainly now) in dispute as a point of principle. What is in dispute is whether, as the Defendants contend, I made no findings on this basis in my original judgment and am thus precluded by the Court of Appeal's order from going further and assessing the "additional loss" on the correct basis, or whether, as the Claimant argues, I did approach the issue on the correct basis or that my conclusions had I done so can be inferred from the existing findings. The Claimant's argument would mean that I should take account also of the findings made in the Supplemental Judgment which, on an absolutely strict interpretation of the Court of Appeal's order, I am not entitled to do.

56. Having now reviewed the way in which I expressed myself, I can see that I did in some areas indicate what the Local Authority might have provided in some respects in the "but for scenario" and also made reference (in hindsight, wrongly) to areas where the issue of some "notional credit" fell to be considered for what might have been the cost of making reasonable provision in the "but for" position. At this remove, some two years from preparing the original judgment, I am not entirely sure why I expressed myself in this way and, whilst there must have been some reason for doing so based upon the way the arguments were addressed, of course, I accept responsibility for the phraseology of the judgment. However, in terms of that phraseology, I can see that it is arguable at least that I strayed "off course" by mentioning the Local Authority provision and the potential "notional credit".

57. If paragraph 68(v) had read as follows and the evidence I accepted, or inferences that could be drawn from it, supported it, then there could have been no complaint and thus no existing complaint:

> "But for the admitted negligence, the Claimant would have required approximately 7 hours of professional care each week (supplemented by a very modest level of family support at the time of transfers) until the age of 70, whereafter until the age of 75 she would have required gradually increasing day-time care such that from the age of 75 onwards she would have required a total of about 31½ hours per week based upon the attendance of

> two carers. Again, a modest (though somewhat increased) additional family input would probably have been required, but the significant feature of this period is that the professional care provided would not have been on a 24/7 basis."

Such a conclusion could have had an impact on some of the other heads of claim.

58. However, I cannot judge now whether that is the way I would have expressed myself had I left out of the picture reference to the Local Authority support unless I am reminded of the evidence and the relevant parts of the transcript. Any other approach is, in my view, going to be artificial. Furthermore, if I do not have this opportunity, there is a risk that injustice will be caused to one or other party: either the Claimant may not receive the damages to which she is properly entitled pursuant to the approach established by the Court of Appeal's judgment or, if I took the view that the Court of Appeal had considered that my existing findings were sufficient to enable the assessment required by paragraph 4 of its order, the Defendants might be required to pay more than they should. The difference between the respective calculations of the parties on the basis that I look no further than the findings in the judgment of 18 September 2014 is, as I have observed, enormous: see paragraph 35 above.

59. I do not wish to attempt the exercise set by paragraph 4 of the order with an artificially constrained approach. I am prepared to conclude that the Court of Appeal would not have wanted me to do so and I am prepared to say that, had the full position been made plain to the Court of Appeal, the order or its clarification might have been expressed differently.

Conclusion

60. It follows that before I can come to a final decision on the competing arguments in this case, I will need to receive from the parties their submissions, by reference to the evidence given at the trial before me (whether expert or otherwise), on what the objectively assessed reasonable needs of the Claimant were in the pre-negligence situation in respect of the six heads of loss identified in the Court of Appeal's order. I shall want them to refer to the relevant paragraphs in the various experts' reports, to the passages in the evidence that I heard, to the submissions made to me and to any paragraphs in my principal judgment or the Supplemental Judgment that impact on the issue.

61. This is essentially the exercise contemplated in the Defendants' "pragmatic approach" to which I have referred. However, I should make it absolutely plain that I am not, at this stage, saying that that approach is correct or incorrect; I am simply saying that I want to know where the contentions on such a basis lead given the evidence heard at the trial before coming to a final conclusion. If this case is not resolved by agreement in the meantime, I will have to reach an overall decision based upon the submissions I have already received, but at least at that stage those submissions will have been informed by the consequences of referring to the evidence that I received at the trial.

62. I regret very much that I cannot reach a final conclusion at this stage, but the position is much less clear than I would have thought it ought to have been. The landscape I am required or permitted to survey is unclear and I do need to have the fullest picture

before proceeding further. I am, therefore, taking my own pragmatic course at this stage before considering the issues raised finally.

63. Not unnaturally, it would be far better if the parties could resolve their differences by agreement. The Defendants have established what they will regard as a point of principle. It is to be hoped that, for the sake of a severely disadvantaged Claimant with a limited life expectancy, some satisfactory settlement could now be achieved. If it cannot, I will need the material I have requested before dealing with the case finally. In that event, I would hope to be able to deal with the remaining issues on the basis of written submissions, but I had better leave open the possibility of a further oral hearing if absolutely necessary.

64. I will leave the parties to try to agree a timetable for providing this further material, but I would contemplate that the Claimant's team puts forward its submissions first to which the Defendants then reply, with the final response being available to the Claimant.