CATASTROPHIC INJURY CLAIMS:

PERIODICAL PAYMENTS AND DOUBLE RECOVERY

PRESENTATION BY TIM HORLOCK QC

This presentation will focus upon the history of periodical payments and double recovery issues, the current state of play and residual issues.

A BRIEF HISTORY

1. The development of periodical payments orders.

   (i) Structured settlements.

   (ii) Sections 100 and 101 of the Courts Act 2003 and the amendment to the Damages Act 1996.

   (iii) The indexation argument. How ***Thompstone*** and economic changes have changed the landscape.

2. The development of the double recovery argument in respect of statutory funding and assistance.

   (i) the fundamental principle of compensatory damages.

   (ii) "Ring-fencing" and statutory provision. The fundamental argument on behalf of the Defendants .

   (iii) Judicial attitudes.

   (iv) So-called "reverse indemnities" (Thacker's case and beyond.

   (v) ***Crofton v NHS LA*** and the case of ***Chantelle Peters***

B **THE CURRENT STATE OF PLAY**

1. Periodical payments:

(i) Judicial attitudes.

(ii) Claimants' attitudes.

(iii) The Defendants' attitude and independent financial advice.

(iv) The "Model order". (ASHE 6115)

In the present economic climate, in a substantial claim without a high level of reduction for contributory negligence the Court will be highly likely to award a PPO. The arguments against will include:

- security of position (but see the O'Brien issue below);
- variability of future needs;
- overloading of the capital element by reason of interim payments.

(Can the Defendant rely upon the opinion of an independent financial adviser? See the comments of the CA in ***Thompstone***)

2. The double recovery argument:

(i) Peters provides the likely solution in any 100% protected party case;

(ii) a modified form of "reverse indemnity" is the likely solution in any other case (see the Order in C's case.)

(iii) Arguments on reduction of damages are unlikely to succeed but some form of indemnity may be attractive to a Defendant. (See below).

C RESIDUAL ISSUES

1. The form of the periodical payments order

This is largely settled but

? indexation of items other than care and case management

? are additional clauses needed to address double recovery issues.

2. Should a Claimant be entitled to recover costs for reviewing the variation year on year?

3. How to cater for the variation in annual payments? See the Damages (Variation of Periodical Payments) Order and remember stepped PPas.

But

What about cases where the date or circumstances of increased need are hard to predict?

(Contingency appears to be the most attractive solution.)

4. How to indemnify the statutorily funded Claimant against loss of funding? See the Order in G's case, and consider fiscal implications.

5. The issue concerning the MIB as a fund of last resort in pre 1st January 2004 cases (Syndicates were granted FSCS protection, from 1.1.04. Without such protection, a Defendant is said not to be a secure provider therefore any judgment will be unsatisfied, therefore MIB is liable! So the argument in favour of a declaration against MIB.)

6. Reserve implications

- Market availability and
- self-funding.

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(c) subsection (5) does not apply.

(8) If subsection (6) ceases to apply to a body corporate as a result of the termination (for any reason) of the agreement, the Lord Chancellor may require the information contained in the entries in the register to be transferred to such person as he may direct.

99 High Court writs of execution

(1) Schedule 7 contains provisions about High Court writs of execution.

(2) Any rule of law requiring a writ of execution issued from the High Court to be directed to a sheriff is abolished.

Damages

100 Periodical payments

(1) For section 2 of the Damages Act 1996 (c. 48) (periodical payments by consent) substitute–

"**2 Periodical payments**

(1) A court awarding damages for future pecuniary loss in respect of personal injury–

(a) may order that the damages are wholly or partly to take the form of periodical payments, and

(b) shall consider whether to make that order.

(2) A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.

(3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.

(4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if–

(a) it is protected by a guarantee given under section 6 of or the Schedule to this Act,

(b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

(c) the source of payment is a government or health service body.

(5) An order for periodical payments may include provision–

(a) requiring the party responsible for the payments to use a method (selected or to be selected by him) under which the continuity of payment is reasonably secure by virtue of subsection (4);

(b) about how the payments are to be made, if not by a method under which the continuity of payment is reasonably secure by virtue of subsection (4);

(c) requiring the party responsible for the payments to take specified action to secure continuity of payment, where continuity is not reasonably secure by virtue of subsection (4);

(d) enabling a party to apply for a variation of provision included under paragraph (a), (b) or (c).

(6) Where a person has a right to receive payments under an order for periodical payments, or where an arrangement is entered into in satisfaction of an order which gives a person a right to receive periodical payments, that person's right under the order or arrangement may not be assigned or charged without the approval of the court which made the order; and—

(a) a court shall not approve an assignment or charge unless satisfied that special circumstances make it necessary, and

(b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

(7) Where an order is made for periodical payments, an alteration of the method by which the payments are made shall be treated as a breach of the order (whether or not the method was specified under subsection (5)(b)) unless—

(a) the court which made the order declares its satisfaction that the continuity of payment under the new method is reasonably secure,

(b) the new method is protected by a guarantee given under section 6 of or the Schedule to this Act,

(c) the new method is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

(d) the source of payment under the new method is a government or health service body.

(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.

(9) But an order for periodical payments may include provision—

(a) disapplying subsection (8), or

(b) modifying the effect of subsection (8).

2A Periodical payments: supplementary

(1) Civil Procedure Rules may require a court to take specified matters into account in considering—

(a) whether to order periodical payments;

(b) the security of the continuity of payment;

(c) whether to approve an assignment or charge.

(2) For the purposes of section 2(4)(c) and (7)(d) "government or health service body" means a body designated as a government body or a health service body by order made by the Lord Chancellor.

(3) An order under subsection (2)—

(a) shall be made by statutory instrument, and

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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(4) Section 2(6) is without prejudice to a person's power to assign a right to the scheme manager established under section 212 of the Financial Services and Markets Act 2000.

(5) In section 2 "damages" includes an interim payment which a court orders a defendant to make to a claimant.

(6) In the application of this section to Northern Ireland—

(a) a reference to Civil Procedure Rules shall be taken as a reference to rules of court, and

(b) a reference to a claimant shall be taken as a reference to a plaintiff.

(7) Section 2 is without prejudice to any power exercisable apart from that section.

2B Variation of orders and settlements

(1) The Lord Chancellor may by order enable a court which has made an order for periodical payments to vary the order in specified circumstances (otherwise than in accordance with section 2(5)(d)).

(2) The Lord Chancellor may by order enable a court in specified circumstances to vary the terms on which a claim or action for damages for personal injury is settled by agreement between the parties if the agreement—

(a) provides for periodical payments, and

(b) expressly permits a party to apply to a court for variation in those circumstances.

(3) An order under this section may make provision—

(a) which operates wholly or partly by reference to a condition or other term of the court's order or of the agreement;

(b) about the nature of an order which may be made by a court on a variation;

(c) about the matters to be taken into account on considering variation;

(d) of a kind that could be made by Civil Procedure Rules or, in relation to Northern Ireland, rules of court (and which may be expressed to be with or without prejudice to the power to make those rules).

(4) An order under this section may apply (with or without modification) or amend an enactment about provisional or further damages.

(5) An order under this section shall be subject to any order under section 1 of the Courts and Legal Services Act 1990 (allocation between High Court and county courts).

(6) An order under this section—

(a) shall be made by statutory instrument,

(b) may not be made unless the Lord Chancellor has consulted such persons as he thinks appropriate,

(c) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament, and

(d) may include transitional, consequential or incidental provision.

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VII of the Mental Health Act 1983 or of Part VIII of the Mental Health (Northern Ireland) Order 1986, the court will take into account the defendant's likely future financial resources in considering whether to make a variable order.

ard of provisional damages

4. The court may make a variable order in addition to an order an award of provisional damages made by virtue of section 32A the Supreme Court Act 1981[1] or section 51 of the County Courts 1984 or, in relation to Northern Ireland, paragraph 10(2)(a) of edule 6 to the Administration of Justice Act 1982.

ents of variable order

5. Where the court makes a variable order–

(a) the damages must be assessed or agreed on the assumption that the disease, deterioration or improvement will not occur;

(b) the order must specify the disease or type of deterioration or improvement;

(c) the order may specify a period within which an application for it to be varied may be made;

(d) the order may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made;

(e) the order must provide that a party must obtain the court's permission to apply for it to be varied, unless the court otherwise orders.

sions to extend period for applying for permission to vary

6. Where a period is specified under Article 5(c) or (d)–

(a) a party may make more than one application to extend the period, and such an application is not to be treated as an application to vary a variable order for the purposes of Article 7;

(b) a party may not make an application for the variable order to be varied after the end of the period specified or such period as extended by the court.

on number of applications to vary

7. A party may make only one application to vary a variable order spect of each specified disease or type of deterioration or rovement.

file

8.–(1) Where the court makes a variable order, the case file ments must be preserved by the court until the end of the period or periods specified under Article 5(c) or (d) or of any exten-

[1] Section 32A was inserted by the Administration of Justice Act 1982 (c. 53), section

(2) In this Order–

(a) "the Act" means the Damages Act 1996;

(b) "agreement" means an agreement by parties to a claim or action for damages which settles the claim or action and which provides for periodical payments;

(c) "damages" means damages for future pecuniary loss in respect of personal injury;

(d) "defence society" means the Medical Defence Union or the Medical Protection Society;

(e) "variable agreement" means an agreement which contains a provision referred to in Article 9(1);

(f) "variable order" means an order for periodical payments which contains a provision referred to in Article 2.

(3) In the application of this Order to Northern Ireland–

(a) "claimant" means plaintiff;

(b) "permission" means leave;

(c) "statements of case" means, in the High Court, the writ and pleadings and, in the county court, the civil bill and any notice of intention to defend, defence, notice for particulars, replies and counterclaim.

(4) This Order extends to England and Wales and Northern Ireland.

(5) This Order applies to proceedings begun on or after the date on which it comes into force.

Power to make variable orders

2. 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 court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

Defendant's financial resources

3. Unless–

(a) the defendant is insured in respect of the claim,

(b) the source of payment under the order for periodical payments is a government or health service body within the meaning of section 2A(2) of the Act,

(c) the payment is guaranteed under section 6 of or the Schedule to the Act, or

(d) the order is made by consent and the claimant is neither a child, nor a patient within the meaning of Part

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Contents of variable order

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Case file

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[10] Section 32A was inserted by the A
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2. the Claimant brought these proceedings against the Defendant claiming damages for personal injury as a result of a road accident on 29th January 2007; and

3. judgment has been entered for the Claimant against the Defendant; and

4. the Claimant and the Defendant have reached agreement on the quantum of damages and interest as set out below in full and final satisfaction of the Defendant's liability; and

5. the Court approves the said agreement and considers that it is appropriate to order that the damages awarded in this case should take the form of periodical payments, pursuant to section 2(1)(a) of the Damages Act 1996; and

BY CONSENT, IT IS ORDERED THAT:

1. The Defendant shall pay the following sums in full satisfaction of the Defendant's liability for damages to the Claimant:

   (i) Lump Sum

      (a) The Defendant shall pay to the Claimant a lump sum of £210,000;

      (b) The Claimant will give credit against the lump sum for £nil payable to the Compensation Recovery Unit;

      (c) The Claimant will also give credit for interim payments made and totalling £40,000;

      (d) the balance, namely £170,000 shall be paid to ..... by 4 p.m. on ..... 2009.

   (ii) Periodical Payments:-

      In addition, the Defendant shall pay to the Claimant periodical payments as follows:

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(a) the amount of each periodical payment shall be calculated to the nearest penny in accordance with the Schedule to this Order;

(b) the first periodical payment shall be made on 1st December 2009 and shall be in respect of the period 1st December 2009 to 30th November 2010;

(c) thereafter periodical payments shall be paid annually on 1st December of each year in respect of the period 1st December for the year in question to 30th November of the following year;

(d) the periodical payments shall be paid for the duration of the Claimant's life;

(e) the payments shall be made by direct transfer into an account to be nominated by the Claimant or those acting on her behalf. No payment shall be made until such account has been nominated;

(f) no minimum or maximum number of periodical payments shall be made;

(g) payment of the periodical payments shall cease upon the death of the Claimant;

(h) the Claimant and those acting on her behalf shall by 1st November immediately preceding the falling due of the periodical payment provide to the Defendant a certificate or letter from the Claimant's General Practitioner confirming that the Claimant is still alive and those acting on behalf of the Claimant shall immediately notify the Defendant upon her death. In the event that such a certificate or letter is not provided as aforesaid the Defendant shall be entitled to withhold

payment until such certificate or letter is provided, but upon such provision the whole of the sum shall be paid;

(i) the Claimant or those acting on her behalf shall by 1st November immediately preceding the falling due of the periodical payment notify the Defendant of any change in the details of the nominated bank account;

(j) the Defendant shall by 1st December each year provide the Claimant with details explaining how the periodical payment for that year has been calculated;

(k) when the Claimant dies, a proportionate part only (i.e. the number of days the Claimant survives beyond 1st December, divided by 365) of the payment due for the year ending the following 30th November shall be payable and accordingly the Claimant's estate will be liable to refund any overpayment, subject only to deduction by the Claimant's estate of such sums as the Claimant's estate may be liable for in respect of the termination of the employment of any persons employed to care for the Claimant. If such refund is not made within 56 days of the Claimant's death, her estate will be liable to pay interest on the outstanding sum at the basic rate of interest paid by the Court Funds Office on funds in court from time to time (currently 4% p.a.) from the 56th day after the Claimant' death;

(l) save in the event of the Claimant failing to provide suitable confirmation that she is still alive or details of her nominated bank account as set out above or reasonable documentary evidence or

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confirmation as referred to in paragraph 5 below, in default of the full periodical payment that is due being paid to the Claimant by 1st December each year, the Defendant will be liable to pay interest at the basic rate of interest paid by the Court Funds Office on funds in Court from time to time on any outstanding periodical payment until full payment has been made

2. For the period from (1st July 2009) to 30th November 2009 inclusive to represent the periodical payment for that period, the Defendant shall pay the sum of £..... and that sum shall be paid by ..... to ..... by 4 pm on ..... 2009.

3. The Defendant shall pay the Claimant's costs of the action on the standard basis subject to a detailed assessment in default of agreement.

4. The Claimant and those acting on her behalf will forgo an entitlement to an annual payment greater than £2,000.00 unless the Claimant is required to meet the cost of any part of her care and accommodation needs arising as a result of the accident.

5. Those acting on behalf of the Claimant (including her Case Manager, Deputy, Solicitor or whosoever) shall not take any steps to cease to claim or to accept statutory funding or assistance from her Primary Care Trust and/or Local Authority.

6. The Claimant or those acting on her behalf shall give to the Defendant written notice as soon as possible but in any event within 14 days upon receipt by the Claimant or those acting on her behalf of any indication on the part of the Primary Care Trust, Guardian Care, the Local Authority or whoever that the Claimant or those acting on her behalf to meet the cost of any part of her care and accommodation needs arising as a result of the accident.

7. Following receipt of any such notice referred to in paragraph 6 above and in the event that the Claimant is required to meet such cost as referred to in paragraph 6, the Defendant shall pay (subject to clause 4 above) such part of the cost of the Claimant's care and accommodation needs arising as a result of the said accident up to a maximum present value annual sum of £40,560.00. The Defendant will make payment of such costs within 6 weeks of receipt from the Claimant or those acting on her behalf of documentary proof of such cost that the Defendant is to pay and to whom and of the fact that the Claimant is required to meet such cost. (In the absence of such documentary proof, the Defendant is under no obligation to make any such payment.)

8. In the event that the Defendant should seek to challenge the fact or extent of any cessation of or reduction in funding as referred it in paragraph 4 above, it is agreed that the Defendant shall be entitled to do so in the name of the Claimant and that the Claimant and those acting on her behalf will co-operate and provide all reasonable assistance to the Defendant in making any such challenge.

9. In the event that the Defendant nominates a representative to discuss with the relevant authorities matters of statutory funding of the Claimant's needs, such representative will have authority from the Claimant or those acting on her behalf to discuss such matters of statutory funding with the relevant authority and will be permitted access to all documents and records relevant to issues of statutory funding and the Claimant or those acting on her behalf shall co-operate with any such representatives nominated by the Defendant.

10. In the event that any dispute or issue arises as to the meaning or implementation of this Order or its Schedule, the Claimant or the Defendant may apply for that issue to be heard and determined by a Judge of the High Court for which purpose the parties each have permission to apply to the Court and also for the purpose of enforcing the terms of the Order and its Schedule.

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SCHEDULE

1. The present value annual sum of £40,560.00 (forty thousand five hundred and sixty pounds) shall be payable annually on 1st day of December each year with the first such payment to be made on 1st December 2009.

2. The relevant earnings data are the gross hourly pay for "all" employees given by the present Standard Occupational Category ['*SOC*'] for care assistants and home carers '*6115*' at the relevant percentile shown below (currently in table 14.5a at the tab for "All" Employees) of the Annual Survey of Hours and Earnings in the United Kingdom ['*ASHE*'] published by the ONS. Both the initial "first release" and the final "revised" data are used below. The original relevant percentiles are:

   2.1. The 75th percentile shall be applied to paragraph 2 above.

3. The annual periodical payments referred to in paragraph 1 above shall be recalculated in November prior to payment on the 1st December of the same year until reclassification from November 2009 in accordance with the following formula

$$PP = C \times \frac{NP}{A}$$

   3.1 Where

      3.1.1 '*PP*' = the amount payable by way of periodical payment in each year being calculated in November and paid on the 1st of December the first '*PP*' being the payment on the 1st of December 2009,

      3.1.2 '*C*' = the relevant annual sum set out in paragraph 1 above respectively,

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3.1.3 *'NP'* = the first release hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "all" employees for the year in which the calculation is being carried out, the first *NP* being the figure applicable to the year 2009 published in or around October 2009,

3.1.4 *'A'* = the revised hourly gross wage rate for the relevant percentile of ASHE SOC 6115 for all employees applicable to 2008 and published by the ONS in or around October 2009. In the event of a revision by the ONS it will be the replacement final figure issued by the ONS retrospectively.

4. The annual periodical payment referred to in paragraph 1 above shall be recalculated annually in subsequent years in November in each year prior to payment on the 1st December of the same year until reclassification from November 2010 in accordance with the following formula

$$PP = C \times \frac{NP + (NF - OP)}{A}$$

4.1. Where in addition to the definitions previously set out

4.1.1. *'NF'* = the revised hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "all" employees for the year prior to the year in which the calculation is being carried out, the first *NF* being that applicable to the year 2009 and published in or around October 2010,

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4.1.2. *'OP'* = the first release hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "all" employees for the year prior to the year in which the calculation is being carried out, the first *OP* being the figure applicable to the year 2009 published in or around October 2010.

5. If, in any year, the ONS reclassifies ASHE SOC 6115 and collects data for both the current SOC and the reclassified SOC in or about April of that year the new SOC shall be the reclassified SOC which includes home carers.

6. The relevant annual sum referable to the sums at paragraph 1 above following reclassification shall be known as *'CR'* and shall be calculated in the year of reclassification only as follows

$$CR = C \times \frac{AF}{A}$$

6.1. Where in addition to the definitions previously set out

6.1.1. *'AF'* = the final published revised hourly gross wage rate for the relevant percentile of the previously applied SOC for "all" employees.

7. The first payment only following the publication of the reclassified revised data shall be

$$PPR = \left[CR \times \frac{NPR}{AR} \right] + \left[C \times \frac{AF - OPF}{A} \right]$$

7.1. Where in addition to the definitions previously set out

7.1.1. 'PPR' = the amount payable by way of periodical payment in each year following reclassification,

7.1.2. 'NPR' = the first release hourly gross wage rate published for the new relevant percentile of the new SOC following reclassification for the year in which the calculation is being carried out,

7.1.3. 'OPF' = the final first release hourly gross wage rate published for the relevant percentile of the previously applied SOC for "all" employees,

7.1.4. *'AR'* = the revised hourly gross wage rate for the percentile of the new SOC, when first published, which is closest to *AF*, and the relevant new percentile shall be the percentile to which *AR* corresponds.

8. Until further reclassification the formula for calculating subsequent values of *PPR* shall be

$$PPR = CR \times \frac{NPR + (NFR - OPR)}{AR}$$

8.1. Where in addition to the definitions previously set out

8.1.1. 'NFR' = the revised hourly gross wage rate published for the new relevant percentile of the new SOC following reclassification for the year prior to the year in which the calculation is being carried out,

8.1.2. 'OPR' = the first release hourly gross wage rate published for the new percentile in the new SOC following reclassification for the year prior to the year in which the calculation is being carried out.

9. Further reclassifications shall be dealt with in the same way by the application of paragraphs 5-8 above.

10. In the event that a change of methodology creates a discontinuity in the data in the applied SOC resulting in the ONS publishing two sets of data for that applied SOC, then the same process as set out in paragraphs 5-8 above shall be undertaken. However, in these circumstances all references to a '*new SOC*' shall be treated as being a reference to the '*new methodology for the existing SOC*', *AR* shall represent the data under the new methodology and *AF* shall represent the data under the old methodology.

SCHEDULE TO THE ORDER

Part 3 of the Schedule to the order

1. The Claimant and the Second Defendant have reached agreement based upon the Claimant having an assessed need in respect of care/support and case management equal to £131,250.00 per annum as at 1st December 2008 and thereafter equal to the said sum as recalculated in the same manner that the annual periodical payments, referred to in paragraph 1 of Part 2 to the Schedule to this Order, are to be recalculated according to the provisions of Part 2 of the Schedule to this Order; the amount of such assessed need as at any time is referred to in this Order as "the Assessed Need".

2. The Claimant and those acting on her behalf (including her solicitors, Deputy and Litigation Friend) shall co-operate to ensure that they claim and receive all such statutory funding, provision and assistance of and towards her needs resulting from the accident and continue to do so henceforth, including, if necessary, the establishment of an appropriate independent user trust or other vehicle to facilitate direct payments) from her Local Authority, the National Health Service, any Primary Care Trust or any of their successors or agents to which the Claimant may be or become entitled.

3. If the Claimant or those acting on her behalf receive any statutory funding, provision or assistance referred to in (2) above during the 12 months preceding 1st December in any particular calendar year, she or they shall pay to the Second Defendant (the Motor Insurers' Bureau) on 31st December immediately after the expiry of the said 12 months, the Repayable Sum. The Repayable Sum is a sum equivalent to the amount, cost or value of any such statutory funding, provision or assistance received during

the 12 month period preceding the previous 1st December to the extent, if at all, that such, when added to the Periodical Payment for the same period, exceeds the Assessed Need as at the date of commencement of such period. The Repayable Sum, if any, due on 31st December 2009 shall relate to the period 21st March 2009 to 30th November 2009 as shall the Assessed Need covering the same period. For the avoidance of doubt references to receipt by the Claimant of any statutory funding, provision or assistance shall include provision of the same to, by or via any trust or similar vehicle (including an Independent User Trust, an Independent Living Trust or Trust Circle). In the event that the Repayable Sum referred to above is not paid to the Second Defendant in full by 31st December in any calendar year, the Claimant or those acting on her behalf shall pay interest at the then applicable Judgment Act rate on any outstanding Repayable Sum or part thereof until full payment is made.

4. By 4 pm on the 30th day of November each year the Claimant, her Case Manager, Litigation Friend or Deputy shall certify to the Second Defendant the level and extent of any statutory funding, provision or assistance (as set out in paragraph 2 above) by the National Health Service, any Primary Care Trust or any Local Authority to or for the benefit of the Claimant during the previous calendar year. In the event that such certification is not provided as aforesaid the Second Defendant shall be entitled to withhold payment of the periodical payment due on the 1st December immediately thereafter until such certification is provided, but upon provision of such the whole sum due by way of periodical payment shall be paid. Further, if requested to do so by the Second Defendant in writing and at it's expense the Claimant, her Case Manager, Litigation Friend or Deputy shall by 31st December in any calendar year provide such reasonable documentary evidence or confirmation as is requested by the Second Defendant as to the level and extent of any statutory funding, provision or assistance

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made during the 12 month period preceding the previous 1st December (or lack of such if none has been made). In the event that such reasonable documentary evidence or confirmation is not provided as aforesaid, the Second Defendant shall have liberty to apply upon the giving of reasonable notice to seek any interest penalty which the court considers just and equitable.

5. The Claimant shall within 14 days of receiving notice that any assessment of her community care needs pursuant to Section 47 of the National Health Service and Community Care Act 1990 (or such comparable legislation as may be enacted) is intended, inform the Second Defendant of that fact.

6. The Claimant shall promptly, and in any event within 14 days of receipt thereof, provide the Second Defendant with details of any assessment referred to in 5 above including all relevant documentation deriving from or related to it emanating from the relevant body or bodies.

7. In the event that the Second Defendant nominates a representative to discuss with the relevant authorities matters of statutory funding, provision or assistance as referred to in paragraphs 2 and 4 above, such representative will have authority from the Claimant or those acting on her behalf to discuss such matters with the relevant authority and will be permitted access to all relevant documents and records.

8. In the event that the Second Defendant seeks to challenge the fact or extent of any such statutory funding, provision or assistance as referred to above, the Claimant and those acting on her behalf agree that the Second Defendant shall be entitled to do so in the name of the Claimant provided that the Second Defendant shall indemnify the Claimant as to any costs which she may incur as a result of any such challenge and as to any costs to be paid by her as a result of any such challenge.

LINDA CARR
(a protected party by her
Litigation Friend Robert Carr) **Claimant**

and

DAVID CARMON **First Defendant**

and

MOTOR INSURERS BUREAU **Second Defendant**

SCHEDULES TO THE ORDER

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MH/234724

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Neutral Citation Number: [2009] EWCA Civ 145

Case No: B3/2008/1440 & B3/2008/1281

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
Butterfield J.
90P02879

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2009

Before :

MASTER OF THE ROLLS
PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
LORD JUSTICE DYSON

- -

Between :

Chantelle Peters (By her Litigation Friend Susan Mary Miles)	**Claimant/ Respondent**
- and -	
East Midlands Strategic Health Authority and Dr P Halstead	**Defendants/ Appellants**
-and-	
Nottingham City Council	**Part 20 Defendant/ Appellant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr Nigel Godsmark QC (instructed by Messrs Hempsons) for the Claimant/Respondent
Mr Edward Faulks QC and Paul Stagg (instructed by **Messrs Freeth Cartwright LLP**) for the Defendants/Appellants
Ms Olivia Chaffin-Laird (instructed by **Nottingham City Council**) for the **Defendant/Appellant**

Hearing dates: Tuesday 10 and Wednesday 11 February 2009

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Judgment
As Approved by the Court

Lord Justice Dyson: this is the judgment of the court.

Introduction

1. The claimant is a patient who sues by her litigation friend. She was born on 11 April 1988. She claims damages for personal injuries, loss and damage suffered by her as a result of the negligent failure of the defendants to ensure that her mother received a rubella vaccination before she became pregnant with the claimant. As a result, the claimant was born with congenital rubella syndrome. She has had a difficult family background and when she was 12 years of age, she was placed in a local authority care home for children with learning difficulties. Under the terms of an order of the Court of Protection made on 3 June 2003, Mrs Susan Miles was appointed as Receiver (now Deputy) to manage the claimant's property and affairs. In February 2007, the claimant was placed at The Spinnies, a private care home run by Creative Care Limited where she remains pursuant to a contract between that company and Nottingham City Council ("the Council"). The cost of her accommodation and care is borne 50:50 by the Council and the Primary Care Trust ("PCT").

2. The claimant is severely disabled with a low IQ and significant behavioural problems. She has a vocabulary of no more than a few words and is able to sign a few more. She is effectively blind. She has made some progress since moving into The Spinnies, particularly in relation to her aggressive and destructive behaviour. But as Butterfield J from whom this appeal is brought put it at [51], "she will continue to remain someone who requires intensive, compassionate and carefully structured care for the rest of her life". Her life expectancy is to the age of 68.5 years.

3. Proceedings were issued in 1990. On 7 February 2000, an order was made by consent with the approval of the court that there be judgment for the claimant against both defendants. Damages were assessed by the judge after a 3 day hearing. Many of the heads of loss were agreed (subject to the approval of the judge). It is a measure of the seriousness of the claimant's injuries that the approved agreed sum for pain, suffering and loss of amenity was £180,000. Applying the agreed whole life multiplier of 28.94, the judge awarded the total sum of £3,893,766 in respect of the cost of the claimant's future accommodation and care. This was based on the current annual cost of providing accommodation and care for her at The Spinnies, which, it was agreed, was the accommodation and care that reasonably met her needs. It is this element of the award that has given rise to the appeal.

4. This case raises once again the question of whether a claimant's care and accommodation costs should be borne by the tortfeasor or by the local authority that is charged with the statutory duty of making arrangements for providing care and accommodation for the claimant.

5. The judge himself gave permission to appeal. He held that there should be no reduction in the claimant's damages to reflect the Council's duty. The defendants appeal against that decision. He also accepted the defendants' submission that, on a proper construction of the relevant statutory material, all of the damages awarded to the claimant for personal injury fell to be disregarded by the Council when determining whether it had a duty to provide accommodation and care for the claimant. The Council maintained before the judge that the cost of providing

accommodation and care did not fall to be disregarded. It appeals against the judge's rejection of its argument on this point.

The relevant statutory provisions

6. Section 21(1) of the National Assistance Act 1948 ("NAA") provides that a local authority "may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them." Section 21(4) provides that accommodation can be provided in premises managed by the responsible or another local authority. That provision is, however, subject to section 26, which permits arrangements to be made with voluntary organisations or profit-making organisations for the provision of the accommodation. Board and other services such as personal care may be provided in conjunction with the accommodation: see sections 21 (5) and 26(4A).

7. In determining for the purposes of section 21(1) whether care and attention are "otherwise available" to a person, sections (2A) and (2B) require a local authority to disregard so much of the person's resources as may be specified in, or determined in accordance with, regulations made by the Secretary of State.

8. The relevant regulations are the National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations 2001 ("NARADRER"). Regulation 2(1) of NARADRER provides that capital shall be disregarded if it does not exceed the capital limit for the purposes of section 22 of the NAA. The capital limit is currently £22,250. Regulation 2(2) provides that a person's capital is to be calculated in accordance with the National Assistance (Assessment of Resources) Regulations 1992 (as amended) ("NAARR").

9. As regards charging, the general rule is that a person must pay the full cost to the authority of the accommodation provided for him (section 22(1) and (2)). Where accommodation is provided under section 26, the obligation is ordinarily to refund the payments made by the local authority to the provider instead of having to pay for the accommodation (section 26(3)). Arrangements may, however, be made for payments to be made by the service user direct to the provider if everyone agrees (section 26(3A)).

10. A person does not have to pay the full cost of the services, however, if he satisfies the local authority that he is unable to pay or refund (as the case may be) at the "standard" or "full" rate (sections 22(3) and 26(3)). In determining whether the service user is able to pay, the local authority is required to carry out a means-test under the NAARR (section 22(5) and 26(3))

11. The NAARR divides resources, for the purpose of the means-test, into income and capital. Generally the whole of a resident's capital is taken into account, including income generated by capital (regulation 21(1)). However, capital falling into one of the categories in Schedule 4 is to be disregarded (regulation 21(2)). The following categories are material for present purposes:

"**10.** Any amount which would be disregarded under paragraph 12 of Schedule 10 to the Income Support Regulations (personal injury trusts).

10A. Any amount which would be disregarded under paragraph 12A of Schedule 10 to the Income Support Regulations (personal injury payments) with the exception of any payment or any part of any payment that has been specifically identified by a court to deal with the cost of providing care.

19. Any amount which would be disregarded under paragraph 44(a) or 45(a) of Schedule 10 to the Income Support Regulations (compensation for personal injuries which is administered by the Court)."

12. Since the hearing before the judge, the wording of paragraph 19 of Schedule 4 to the NAARR has been amended with effect from April 2008. It now reads as follows:

"**19.** Any amount which-

(a) falls within paragraph 44(2)(a), and would be disregarded under paragraph 44(1)(a) or (b), of Schedule 10 to the Income Support Regulations; or

(b) would be disregarded under paragraph 45(a) of that Schedule."

13. The reference to "Income Support Regulations" in the NAARR is a reference to the Income Support (General) Regulations 1987 ("ISR"). The paragraphs of Schedule 10 to the ISR referred to in the provisions from the NAARR quoted above read as follows:

"**12.** Where the funds of a trust are derived from a payment made in consequence of any personal injury to the claimant, the value of the trust fund and the value of the right to receive any payment under that trust.

12A. (1) Any payment made to the claimant or the claimant's partner in consequence of any personal injury to the claimant or, as the case may be, the claimant's partner.

(2) But sub-paragraph (1)-

(a) applies only for the period of 52 weeks beginning with the day on which the claimant first receives any payment in consequence of that personal injury;

(b) does not apply to any subsequent payment made to him in consequence of that injury (whether it is made by the same person or another):

> **44.** (1) Any sum of capital to which sub-paragraph (2) applies and-
>
> (a) which is administered on behalf of a person by the High Court or the County Court under Rule 21.11(1) of the Civil Procedure Rules 1998 or by the Court of Protection;
>
> (b) which can only be disposed of by order or direction of any such court; or
>
> (c) where the person concerned is under the age of 18, which can only be disposed of by order or direction prior to that person attaining age 18.
>
> (2) This sub-paragraph applies to a sum of capital which is derived from-
>
> (a) an award of damages for a personal injury to that person; or
>
> (b) compensation for the death of one or both parents where the person concerned is under the age of 18."

The judgment

14. The judge started with an analysis of the statutory material. Of paragraph 44(a) of Schedule 10 to the ISR as amended, the judge said at [32] that the question was whether the words "an award of damages for personal injury" include all sums awarded in consequence of such an injury, or whether (as was contended on behalf of the Council) they are restricted to damages in respect of pain, suffering and loss of amenity. The judge was sympathetic to the Council's argument, but he felt constrained to reject it for the reasons given by HH Judge Taylor in *Firth v Geo Ackroyd Junior Ltd* [2001] PIQR Q4. In short, there was no basis for holding that pain, suffering and loss of amenity were the only head of loss compensated by an award of damages "for personal injury".

15. The judge described The Spinnies in some detail. It can accommodate 4 residents. He found that it satisfies the claimant's care needs at the present time. That was common ground in the court below. Unsurprisingly, there is no challenge to this finding. The director and owner of The Spinnies is Richard Wass who gave evidence at the hearing. Mr Wass, who is in his early 30s, told the judge that he intends to expand his care homes business. At [54], the judge said that notwithstanding what he accepted was the genuine view of Mr Wass as to his intentions, he had "considerable doubts that The Spinnies, certainly in its present form, could or would provide a home for [the claimant] for life".

16. At [55] to [66], the judge gave a number of reasons for concluding that, although The Spinnies was ideal for the claimant at the present time, it was unlikely to be her home for the rest of her life. Since this reasoning is the subject of challenge by the defendants, we will return to this part of the judgment when we consider the defendants' grounds of appeal.

17. At [69] to [71], the judge set out what he considered to be the correct approach to the assessment of damages where there is a possibility that future provision will be made by the State:

> "69. Having considered the submissions of the parties and the authorities drawn to my attention I consider that the proper approach to the assessment of damages for future care where there is a possibility that future provision will be made by the State is as follows. First, C is clearly entitled to damages to satisfy her reasonable needs for care in the future. It is for the Court to determine what is reasonable. Where a Claimant is sentient and able to express a view then the wishes of the Claimant will be very important and may even be determinative on the question of what is reasonable. However where, as here, the Claimant is incapable of expressing any wish or at least where it is not possible reliably to ascertain what her wishes are I must consider what is reasonable in terms of the competing proposals being put forward by the parties.
>
> 70. If the statutory provision meets and, on the balance of probabilities, will continue to meet, the Claimant's reasonable needs then the Claimant will not have to pay for private provision in the future and she establishes no loss under this head. Such a conclusion is so even though it might be thought that it should be the tortfeasor rather than a public body that should be required to meet the costs of future care. Further, in deciding whether statutory provision will be made in the future I am entitled to have regard to the right to enforce the statutory duties of the public authority.
>
> 71. Relying on those principles the defendants submit that if the evidence demonstrates that care which satisfies the Claimant's reasonable needs will be available free of charge in the future then she will in fact sustain no loss and cannot recover for the cost of future care. However the burden of proof is on the defendants to prove that the claimant would have access to State funded care in the future which will provide her for the rest of her life with her reasonable needs for care."

18. He expressed his conclusions in the following terms:

> "72. In the light of my findings of fact, together with my view about the probabilities of C remaining at The Spinnies indefinitely even if funding was available, I am satisfied that the defendants fail to establish that C's reasonable needs for care in the future will be provided by the Local Authority. Whilst as the law presently stands C will have access to State-funded care in the future, that care is unlikely to provide her with the quality of care she presently enjoys for the rest of her life. The only way to ensure that she does receive such care in the future is for her to be self-funding.

> 73. In my judgment there is no reason in principle why she should give up that option at the behest of the tortfeasor defendants and make herself dependent on the State. She has an immediate right to full compensation from the tortfeasor. She is entitled to look to the tortfeasor for such compensation. She is not obliged to make herself dependent on State resources. On the evidence it would be folly for her to do so if the aim is to ensure, as all the experts agree is appropriate, that she stays at The Spinnies or at some comparable establishment. For the avoidance of doubt I find that it is reasonable for C to choose to be self-funding as opposed to relying to any extent on state provision for her care, and reasonable for her to make that choice immediately. No one suggests that there is any half-way house available in the circumstances of this case, whereby for example the Local Authority met part of the necessary care costs with the tortfeasors topping up any shortfall. In those circumstances and in the light of my findings of fact I conclude that the defendants are liable to pay the costs of past care, to the limited extent indicated, and the costs of future care to the claimant subject to the question of mitigation of damages and double recovery. "

19. The judge then addressed the defendants' submission that, by failing to invoke her statutory right to require the Council to provide accommodation and care for her, the claimant was failing to mitigate her loss. As to this, the judge said:

> "75. But the loss sustained by the claimant here is fixed and established. It is, for present purposes, the cost of her future care. She cannot avoid or reduce or mitigate any part of that loss. The question here is not one of mitigation of loss, but who should pay for it. In any event, as I have made clear, in my judgment it is entirely reasonable for the claimant not to rely on the statutory obligation of the Local Authority to provide for her where the alternative of recovery from the defendants is available to her for all the reasons articulated in this judgment. Even if matters were otherwise equal as between relying on the Local Authority and recovering from the defendants – which they are not – the claimant would be fully entitled as a matter of law to choose to pursue the tortfeasors. The argument of the defendants is simply unsustainable. The loss of the claimant remains the same whoever foots the bill. I am quite satisfied that there is here no question that the claimant will recover for avoidable loss."

20. Finally, the judge turned to the question of double recovery. He said that it was trite law that the claimant could not recover twice for the same loss. Those representing the claimant had sought to overcome this problem by offering to the court, through Mrs Miles, an undertaking not to seek statutory funding for the claimant's care. But the judge identified problems with such an undertaking. He said that he was far from satisfied that there was any proper legal basis for Mrs Miles to give the undertaking

that she offered, which was in any event impractical and undesirable. He dealt with the issue of double recovery in the following way:

> "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.
>
> 79. In those circumstances no question of double recovery arises. The claimant will recover her loss from the tortfeasors *instead of* recovering from the Local Authority, not *as well as* recovering from them."

The issues

21. The following issues arise. The first is whether the judge was right to hold that the words "an award of damages for personal injury" in paragraph 44(2)(a) of Schedule 10 to the ISR as amended refer to *all* sums awarded in consequence of such an injury, or are restricted to general damages awarded in respect of pain, suffering and loss of amenity. This is the issue raised by the Council's appeal.

22. The other issues are raised by the defendants' appeal. The second issue is whether the judge was right to hold ([73] and [75]) that, "even if matters were otherwise equal as between relying on the local authority and recovering from the defendants...the claimant would be fully entitled as a matter of law to choose to pursue the tortfeasors".

23. The third issue (the mitigation issue) is whether the judge was right to find that it was reasonable for the claimant (through Mrs Miles) to choose her care accommodation to be self-funded rather than provided by the Council. In particular, they submit that the judge was wrong to hold that (i) there were doubts as to whether The Spinnies in its present form could or would provide a home for the claimant for life ([54] to [56]); (ii) it was unlikely, in the light of budgetary pressures, that the Council would provide the claimant with a home for life at The Spinnies if she remained funded by it and the PCT ([57] to [65]); and (iii) there was the possibility of legislative changes which would enable or require the Council to charge the claimant for her accommodation and care ([66]).

24. The fourth issue is whether, if the other issues are decided in favour of the claimant, the agreed whole life multiplier of 28.94 should be reduced to reflect the fact that the claimant would be entitled to State-funded care for at least a period into the future.

The first issue: true construction of para 44(2)(a) of schedule 10 to ISR

25. It is convenient to take this issue first. If the Council's argument were right, then the claimant would fall to be treated as having capital substantially in excess of £22,250. In that event, it would be required to charge her the full cost of her accommodation and care which could only be met from her award of damages. It is accepted on behalf of the defendants that, if that were the position, the claimant would reasonably be entitled to opt for care costs as damages rather than seek provision from the Council.

26. The narrow question raised by this issue is whether, in calculating the capital of a person who has recovered damages for personal injury, there is to be disregarded (a) the whole of the damages (b) the whole of the damages except that part awarded in respect of the cost of providing accommodation and care or (c) merely the award of general damages for pain, suffering and loss of amenity. It is common ground that this is an issue as to the correct interpretation of para 44(2) (a) of Schedule 10 to the ISR which is imported by para 21(2) and Schedule 4 para 19 of the NAARR as amended. The relevant words are that there are to be disregarded any sum of capital "which is derived from—(a) an award of damages for a personal injury...". In construing this provision, it is also necessary to consider two other provisions. First, para 10 of Schedule 4 of the NAARR which imports para 12 of Schedule 10 to the ISR. This provides that there is to be disregarded the value of a trust fund and the value of the right to receive any payment under the trust "where the funds of a trust are derived from a payment made in consequence of any personal injury to the claimant...". Secondly, para 10A (which came into force in April 2008) provides that there is to be disregarded any amount which would be disregarded under para 12A of Schedule 10 to the ISR "with the exception of any payment or any part of any payment that has been specifically identified by a court to deal with the cost of providing care". Para 12A refers to any payment made to the claimant or the claimant's partner "in consequence of any personal injury..."

27. The primary submission of Miss Chaffin-Laird is that the words "an award of damages for personal injury" in para 44(2)(a) of Schedule 10 to the ISR should be construed as excluding from the disregard only damages awarded for pain, suffering and loss of amenity. As we understand it, her alternative submission is that it should be construed as excluding from the disregard all of the damages awarded in consequence of a personal injury except those awarded in respect of accommodation and care costs. She submits that the interpretation adopted by the judge is wholly unreasonable. Its effect is that a tortfeasor cannot be made liable for the cost of the accommodation and care paid for by a local authority and this cannot have been intended by Parliament.

28. This very argument was considered by HH Judge Taylor (sitting as a deputy high court judge) in *Firth v Ackroyd*. In that case, the claimant was living at a residential home operated on behalf of the local authority and it was envisaged that the existing arrangement whereby the local authority provided care for the claimant would continue indefinitely. The local authority was joined as a party to the proceedings

between claimant and defendant. An issue arose as to whether the local authority was entitled to charge the claimant for the cost of his care and accommodation out of any damages awarded in the action, so that the damages should include compensation for such costs. HH Judge Taylor held that the effect of the legislation was that in any assessment of the claimant's capital, for the purpose of determining the claimant's liability to reimburse the local authority with the cost of the accommodation and care, the whole of the amount of damages awarded would have to be disregarded. He said:

> "38. I accept the submissions of Miss Swift and Mr Leveson in preference to those of Mr Kelly. Ultimately the second defendant's contentions depend upon the assertion that the words "an award of damages for a personal injury" in paragraph 44(a) of Schedule 10 to the Income Support (General) Regulations 1987, as amended, are necessarily confined to damages for pain, suffering and loss of amenity and do not include any other head of damage. Despite Mr Kelly's persuasive advocacy, there does not appear to me to be any semantic or legal support for this assertion. If an injured claimant recovers damages for (a) the pain, suffering and loss of amenity he has endured because of his injury; (b) the earnings he has lost because his injury has prevented him from working; and (c) the costs of the care provided for him while recovering from his injury, it seems to me that (b) and (c) are just as much damages "for" the injury as (a). All three heads of damage equally flow from the injury. It may be that the pain and suffering will normally be so closely connected with the injury as to be capable of being regarded as being part of the injury itself; but the element of loss of amenity might well include matters which – *in terms of cause and effect* – are no different from loss of earnings (*e.g.* loss of the ability to pursue a pre-accident hobby). Indeed, it is interesting to note that in *Moeliker v. A. Reyrolle & Co Ltd* [1977] 1 W.L.R. 132, Browne L.J. said (at page 140D):
>
> > "It may well be, as suggested in argument, that damages for loss of earning capacity were in the past usually included as an unspecified part of the general damages for pain, suffering and loss of amenity."
>
> 39. I cannot see any significant difference between damages "for" a personal injury and damages "in consequence of" such an injury. If one looks at another type of claim, it is customary to use the words "damages *for* breach of contract" to cover both immediate and consequential losses resulting from the breach. I cannot see any reason why different consequences should follow from whether a person's capital is being assessed under paragraph 12 of Schedule 10 of the 1987 Income Support Regulations or under paragraph 44(a) of the same Schedule.
>
> 40. However, what seem to me to put this point beyond doubt are the various legislative provisions cited by Miss Swift in

> which the words "damages for personal injuries [or a personal injury]"are used in contexts which clearly show them to be referring to heads of damage other than those for pain, suffering and loss of amenity (*e.g.* loss of earnings or profits, as in section 2 of the Law Reform (Personal Injuries) Act 1948)."

29. In our judgment, there is no answer to this reasoning and we would endorse it. Miss Chaffin-Laird does not seek to argue that there is a difference between damages "for" a personal injury and damages "in consequence of" a personal injury. She does not advance any linguistic arguments in support of her submission. Her argument is simply that a construction which requires the whole of an award of damages for personal injury to be disregarded is so unreasonable that it cannot have been intended by Parliament and the court should find a way to construe the provision so as to avoid that result.

30. The phrase "an award of damages for a personal injury" is clear, unambiguous and unqualified. We find it impossible to construe it as referring only to some heads of an award of damages for personal injury. We can see no basis for construing the phrase as referring only to general damages for pain, suffering and loss of amenity to the exclusion of other heads of loss, such as damages for loss of earnings. Of course, we can see the good sense and fairness of excluding from the disregard provision any sum awarded by a court in respect of the cost of providing accommodation and care. Such an exclusion is to be found in para 10A of Schedule 4 to the NAARR. But it is impossible to construe para 44(2)(a) of Schedule 10 to the ISR as importing such an exclusion.

31. It is of some significance that, in para 10A of Schedule 4 (in relation to any payment made to a claimant or a claimant's partner "in consequence of" of a personal injury), Parliament decided expressly to exclude from the disregard any payment "specifically identified by a court to deal with the cost of providing care". It is a reasonable inference that Parliament considered that, but for such express exclusion, the *whole* of the damages awarded in consequence of a personal injury would fall to be disregarded. In our judgment, the express exclusion in para 10A fortifies the conclusion that we have reached as to the true meaning of para 44(2)(a) of Schedule 10 to the ISR. This conclusion accords with [18] of the decision of Mr Commissioner Rowland in *R(IS) 15/96*.

32. We conclude, therefore, that the judge construed para 44(2)(a) correctly and we dismiss the Council's appeal.

The second issue: is the claimant entitled as of right to choose damages rather than provision by the Council?

33. It is trite law that, if a claimant has distinct rights of action against more than one wrongdoer in respect of the same loss, he can recover against them all, provided that he does not recover in total more than the amount of the loss. So far as we are aware, this principle has never been expressed as having anything to do with the rule that a claimant must take all reasonable steps to mitigate the loss caused to him by the defendant's wrong and that he cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable inaction, to avoid: for the rule, see *McGregor on Damages* 17th edition para 7-004.

34. This principle has also been applied to cases where the claimant has a right of action against the wrongdoer and a statutory right to recover the same loss against an innocent public authority. An example of such a case is *The Liverpool (No 2)* [1963] P 64. We discuss this case below.

35. The question raised by this appeal is whether the principle also applies where the claimant has both a right of action against the wrongdoer to recover damages in respect of a head of loss and a statutory right to have the loss made good in kind by the provision of services by a public authority. In such a case, is the claimant entitled to recover damages from the wrongdoer as a matter of right, or can he do so only if, in all the circumstances of the case, it is reasonable for him not to enforce his statutory right against the public authority?

36. No authority has been cited to us which decides this question in the context of a claim for damages for the cost of accommodation and care where the claimant has a statutory right to receive an equivalent provision from the local authority. There are many cases where the courts have awarded a claimant care costs as a head of loss, not on the grounds that the claimant is entitled to the costs as of right, but because local authority care has been ruled out as inadequate, uncertain or unavailable: see *McGregor* para 35-159E. That is what the judge did in the present case and whether he was right to do so is the third issue raised on this appeal.

37. Although there are no previous authorities which decide the question raised by the second issue, there are several that are relevant to it. In *The Liverpool,* The *Ousel* was sunk in the port of Liverpool as a result of a collision with the *Liverpool.* The Mersey Docks and Harbour Board ("the Board") took possession of the *Ousel* under its statutory powers. The Board made a common law claim in tort against the limitation fund founded on the admitted negligence of the *Liverpool* in causing the wreck of the *Ousel.* The Board made no deduction from this claim for the sum of approximately £10,000 which was the limit of the amount prescribed by the Merchant Shipping Act 1894 which the Board were entitled to claim from the *Ousel* under section 3(3) of the Mersey Docks and Harbour Act 1954.

38. An issue arose as to whether the Board was obliged to reduce its claim against the fund by giving credit for the £10,000. Lord Merriman P held that the Board ought to mitigate its loss by enforcing its statutory claim against the *Ousel* and that its failure to do so was unreasonable. This court disagreed. The judgment of the court was given by Harman LJ. At p 84, he said:

> "Let it be conceded that if the board had recovered the £10,000 from the *Ousel* under its statutory power that would have been satisfaction pro tanto of the damages; still the fact is that the board has not recovered this sum, and, in our judgment, there is no duty upon it to do so. It is true that at the trial of the issue the *Ousel* owners declared themselves ready to pay and in fact tendered the money, which is now on deposit with stakeholders, but we cannot see that this makes any difference, for the tender has never been accepted. The passage from the judgment of Lord Goddard in *Morris Ltd.* v. *Perrott and Boulton* cited by the President shows quite clearly that even if the board had obtained judgment against the *Ousel* there would

> have been no duty upon it to proceed to execution in alleviation of the *Liverpool,* which is a tortfeasor. Here, in fact, no claim for payment has ever been made. The letter of January 26, 1959 (from which I have read), is merely an intimation that a claim may be made hereafter. As to the second part of the President's decision, this case, in our judgment, has nothing to do with the duty to mitigate damages. It concerns the board's legal rights, and no duty rests on it at the demand of a tortfeasor to satisfy part of the damages by resorting to another tortfeasor; still less by resorting to an innocent party made liable merely by statute.
>
> If it were otherwise there would be no necessity for the Law Reform (Married Women) and Tortfeasors Act, 1935, and the law about contributions between tortfeasors, for any tortfeasor could oblige the creditor to sue the other debtors in order to alleviate his burden. The President in fact recognises this in his judgment in these words. "Let me say at once that this is not a question of one tortfeasor making the hopeless attempt to insist that another tortfeasor shall be sued first, or at all, as a condition of determining his own liability; or, indeed, of the tortfeasor dictating to the board whom else they shall sue, or in what order."

39. In *London Building Society v Stone* [1983] 1 WLR 1242, this court had to consider a claim by lenders against valuers for a negligent valuation in reliance on which they had advanced money to borrowers on mortgage. The valuers failed to advise that works of repair were necessary. The lenders had the benefit of a covenant by the borrowers in the legal charge that they would repay all moneys spent by the lenders in repairing or improving the property. It was held (Sir Denys Buckley dissenting) that the existence of the borrowers' covenant provided no defence to the claim for damages against the valuers. The majority (Stephenson and O'Connor LJJ) considered whether the lenders should have mitigated their loss by claiming against the borrowers. O'Connor LJ said at p 1257A that he could see "no justification for the suggestion that the lenders were under any duty to the valuer to mitigate this loss by trying to extract money from the borrowers".

40. Stephenson LJ applied the principles established by such cases as *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506 to the particular facts of the case. Thus, he said, the lenders need not take the risk of starting uncertain litigation against a third party, need not act so as to injure innocent persons etc. Included in the list of principles stated at p 1263A-C was: "(2) a plaintiff need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him, for which *The Liverpool (No 2)* P [1963] 64 is authority". Applying these principles, Stephenson LJ concluded at p 1263H that he could "see nothing unreasonable in the lenders' waiver of their contractual right to recover their loss from the borrowers on the evidence and in the circumstances of this case."

41. We have difficulty in seeing how Stephenson LJ was able to say that *The Liverpool (No 2)* is authority for any proposition in relation to mitigation of damages. As we have seen, Harman LJ expressly said that the decision had "nothing to do with the duty to mitigate damages": it was a decision about the plaintiff's legal right to recover

from whichever liable party it wished. The principle that a claimant is free to choose from whom to recover compensation has nothing to do with the mitigation of loss.

42. Mr Faulks QC seeks support from *Sowden v Lodge* [2004] EWCA Civ 1370, [2005] 1 WLR 2129 for his submission that a claimant who acts unreasonably in not enforcing a local authority's statutory duty to provide care is not entitled to recover the cost of care and accommodation as damages from the wrongdoer who has caused the loss. This decision needs to be analysed with some care. It should be noted at the outset that (i) the question raised by the second issue in the present case does not seem to have been argued in *Sowden* and (ii) an important concession was made by counsel for the claimants which is recorded by Pill LJ at [13] of his judgment.

43. At [13], Pill LJ said:

> "In *Hodgson v Trapp* [1989] AC 807, 819 Lord Bridge of Harwich warned against double recovery and it was held that statutory benefits received by way of attendance and mobility allowances ought to be deducted from the sum awarded because they were available to meet the cost of care and mitigated damages recoverable in respect of the cost of that care. I agree with Miss Gumbel that the decision was intended to address that specific problem. An earlier statutory regime had been more tolerant to claimants in this respect. It is, however, conceded on behalf of the claimants in these cases that, if the compensatory principle requires only accommodation and care provided by the local authority under section 21 of the 1948 Act, damages cannot be awarded as if they were not so provided."

44. The scope of the concession made by Miss Gumbel is not entirely clear, since the paragraph seems to be directed to the problem of double recovery rather than the question whether damages must be assessed on the basis that a claimant will accept provision by the local authority if it is reasonable to do so. It may be that the concession goes no further than to accept that, if accommodation and care *actually provided* by the local authority is sufficient to satisfy the "compensatory principle", then damages cannot be assessed as if it is not being provided, since otherwise there would be double recovery. But it can be read as conceding that, if accommodation and care provided at public expense is sufficient to satisfy the "compensation principle", a claimant is not entitled to damages in lieu of such provision.

45. The next paragraph which needs to be considered is [35], where Pill LJ said:

> "Mr Hunter accepts that the tortfeasor is liable to make good losses he has caused. However, if the losses will in fact be met from a source other than the tortfeasor, the claimant has no claim to the extent that the losses are made good from that other source. Double recovery is to be prevented. Local authorities are under the statutory duty imposed by Section 21 of the 1948 Act and regulations provide that they cannot charge for facilities provided. The claimant, and those responsible for the claimant's welfare, such as a receiver, are under a duty to

> secure and maximise funding available from public funds. They must ensure that such benefits as are available are obtained. To the extent that needs are met by local authorities, and it is reasonable for support from the local authority to be sought, there is no loss for the tortfeasor to make good."

46. Mr Faulks relies on this paragraph as support for the propositions that (i) a claimant and those responsible for the claimant's welfare are under a duty to secure and maximise funding available from public funds and (ii) to the extent that it is reasonable for support from the local authority to be sought, there is no loss for the tortfeasor to make good. In our judgment, however, this paragraph (as well as the two following paragraphs) are recording the submissions of counsel for the defendants. The conclusions of Pill LJ start at [38] where he starts "The test to be applied is in my judgment...".

47. For present purposes, the most important part of the judgment of Pill LJ is the following:

> "40. The judge was entitled, in the circumstances, to conclude that "undue weight" should not be given to the evidence as to the claimant's wishes and to have doubts about other evidence called on her behalf as to the appropriateness of a private arrangement. He was entitled to make his own assessment. A judicial assessment of what can be claimed and required does involve an assessment of the nature and extent of the claimant's needs. The claimant's family were showing no interest in her and life at home with her family was not an option. The difference between "best interests" and "the reasonableness of the treatment chosen and claimed for" is considerably reduced. This was a case in which the judge in his analysis was entitled to treat what was in her best interests, as he assessed them, as what was the reasonable requirement in all the circumstances. The judge approached the evidence with great care. He considered the possibilities for the future. I find nothing perverse about his approach or his conclusion.
>
> 41. In general terms, the approach is to compare what a claimant can reasonably require with what a local authority, having regard to uncertainties which almost inevitably are present, are likely to provide in the discharge of their duty under Section 21. If the second falls significantly short of the first, as Owen J found in *Crookdake* it did, the tortfeasor must pay, subject to the argument raised in both cases that Section 21 provision augmented by contribution from the tortfeasor meets the reasonable requirements. If it is the statutory provision which meets the claimant's reasonable requirements, as assessed by the judge, the tortfeasor does not have to pay for a different regime. I accept that in making the comparison a court may have regard to the power to compel a local authority to perform its duties."

48. Pill LJ was not dealing with the argument that a claimant is entitled as of right to opt for damages and self-funding in preference to his right to care and accommodation under the NAA. As we have said, there is no indication that that issue was before the court. It is possible to read the last two sentences of para of [41] as providing support for Mr Faulks' submissions. But it is also possible to read them as being predicated on the assumption that the local authority will actually provide care which meets the claimant's reasonable requirements. There is the further point that it is at the very least possible that [41] was influenced by the concession recorded by Pill LJ at [13]. In short, we are not compelled by [41] to decide that a claimant is not entitled as of right to opt for self-funding and damages.

49. We should also, however, refer to [88] in the judgment of Longmore LJ who said:

> "The position in relation to care expenses is different. Although local authorities have, since 1993, been obliged to give care to those in need of such care, there is no provision, equivalent to section 2(4) of the 1948 Act, enacting that a defendant tortfeasor cannot allege that it would be unreasonable for a claimant to have incurred, or to incur in the future, the cost of care provided privately. It is, therefore, always an issue in such cases whether private expenses of care which have been incurred have been reasonably incurred and whether it would be reasonable to incur such private expenses in the future."

50. We accept that this paragraph does afford support to the submission of Mr Faulks. We do not, however, consider it to be binding on us for the reasons already given: (i) the question whether the claimant was entitled as of right to damages was not before the court and (ii) the views expressed by the court may well have been influenced by the concession recorded at [13].

51. We conclude, therefore, that the answer to the question raised by the second issue is not compelled by *Sowden*. The final authority to which we should refer is *Eley v Bedford* [1972] 1 QB 155. The plaintiff was injured by the negligence of the defendant and she suffered loss of earnings. A claim by her for disablement benefits and special hardship allowances was disallowed as being out of time. The defendant admitted that a sum fell to be deducted under section 2(1) of the Law Reform (Personal Injuries) Act 1948 in respect of certain benefits she had in fact received. He contended inter alia that, because of her failure to mitigate her loss, the damages should be reduced by the amount that she would have received if she had made a timeous claim. MacKenna J rejected this argument for two reasons. First, the benefits and allowances did not fall within section 2: the plaintiff would not have had to give credit for them even if they had been received. Secondly, the plaintiff's failure to claim the benefits and allowances was due to her ignorance. He said at p 158C: "It is true that a plaintiff must always do what is reasonable to mitigate his loss, but in deciding what was reasonable for him to do one must have regard to his actual knowledge..."

52. It can be seen that the judge's first reason was sufficient to dispose of the argument. As regards the second reason, it is clear that it was common ground that the issue was whether the plaintiff had failed to act reasonably to mitigate her loss. The question raised by the second issue in the present case was therefore not before the judge.

53. Having reviewed these authorities, we can now express our conclusion on this issue. 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.

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.

55. Mr Faulks also submits that there is support for his submission in *Crofton v National Health Service Litigation Authority* [2007] EWCA Civ 71, [2007] 1 WLR 923 at [88] and [89]. We do not propose to set out these paragraphs. Suffice it to say that the whole of [87] to [95] of *Crofton* is predicated on the judge's finding that the council would in fact make direct payments to the claimant to enable him to pay for his care. *Crofton* provides no support for Mr Faulks.

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. The judge was right to be concerned about the possibility of double recovery to which we now turn.

Double recovery

57. As the judge recorded at [76], it is trite law that the claimant cannot recover twice for the same loss. That is why those representing her offered an undertaking through Mrs Miles, the Deputy (previously, the claimant's receiver). In her evidence, she said that she was prepared to give an undertaking as Deputy (qualified on whatever terms were appropriate) not to seek statutory funding for the claimant's care and accommodation. But as the judge pointed out, 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 the terms of her appointment gave her the authority to give such an undertaking. She further accepted that any undertaking that she offered would be personal to her and could not bind her successor(s) as Deputy.

58. The judge concluded that he was not satisfied that there was any proper legal basis for the undertaking that Mrs Miles was offering to give and it certainly could not bind her successor(s). He regarded any such undertaking as impractical and undesirable. There is no challenge to the judge's conclusion on this point by the claimant. In our

view, the judge was right. The undertaking was unsatisfactory for the reasons that he gave.

59. Despite his rejection of the undertaking that Mrs Miles was offering to give, the judge made the findings in [78] and reached the conclusion at [79] to which we have referred at [21] above.

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.

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". Such a finding was made in *Freeman v Lockett* [2006] EWHC 102 (QB), [2006] PIQR P23 and was said in *Crofton* at [92] to be a proper finding to make. We can see, however, that this is not an entirely satisfactory way of dealing with the possibility of double recovery. Take the present case. For example, what would happen if (contrary to the judge's expectation), Mrs Miles or her successor(s) did seek provision of care and accommodation from the Council in circumstances which were not "wholly unexpected"? What is a "wholly unexpected development"? Who would be the judge of whether a wholly unexpected development had occurred? It is not at all obvious how this would be policed and what right of recourse, if any, the defendants would have if Mrs Miles or her successor(s) did seek provision from the Council in circumstances which were not "wholly unexpected".

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 subparagraphs

(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.

66. In these circumstances, we do not see the risk of double recovery as a reason for rejecting the judge's decision to award the claimant the full cost of care and accommodation. We therefore uphold his conclusion on the second issue. In these circumstances, it is not strictly necessary to decide the third issue. But we propose to do so in case our conclusion on the second issue is wrong and, in any event, because it was the subject of full argument before us.

The third issue: was the judge right to find that it was reasonable for the claimant to opt for self-funding rather than provision by the Council?

The Spinnies as a suitable home for life for the claimant

67. The judge concluded at [54] that he had "considerable doubts that The Spinnies, certainly in its present form, could or would provide a home for the claimant for life". There were three strands to his reasoning. First, there was no prospect of the claimant forming any significant relationships with other residents and it would be wrong to approach her future on the basis that she would in some way "become part of a happy family group in which she could comfortably grow into young adulthood, middle age and old age" [55]. We accept the criticism of Mr Faulks that it is difficult to see the relevance of this point. The judge did not explain why it suggests that The Spinnies could and would not provide the claimant with a home for life. The claimant's position would be the same wherever she was cared for and whoever paid the cost of her care.

68. Secondly, the judge said at [56] that there will come a time when no further progress can be made and, at that time, what the claimant will need is "a comfortable and supportive environment in which C's needs can best be managed: that will require a different form of care". We accept the criticism of Mr Faulks that the judge gave no reasons for this conclusion and it was not supported by the evidence. Indeed, such evidence as there was on this point suggested the contrary. The psychiatrists' joint report (paras 18 and 21) stated that the claimant needed to be cared for "in a placement that is autism-specific" and that this would need "24 hour care in a residential group setting" rather than in her own home or otherwise without the stimulus of other peers/staff. In any event, it is unclear why the fact that no further progress can be made and that the claimant needs a comfortable and supportive environment should lead to the conclusion that she should not be cared for in The Spinnies.

69. Thirdly, the judge found that Mr Wass has a real facility for dealing with young people and that it is in dealing with young adults that he is particularly gifted. The other homes that he presently operates and the further properties that he intends to acquire will all deal with older children and young adults. The judge said at [57] that he was satisfied that "her present placement, ideal as it is for C at present, is unlikely to offer a home for life even if funding was available." Mr Faulks submits that, if the judge was saying that Mr Wass would lose interest in the residents as they got older, that was inconsistent with his unchallenged evidence (recorded by the judge at [53]) that

> "He is in the process of changing his registration to Young Person's Service, which will permit him to care for residents up to the age of 24. He considers that at that stage he will probably change his registration to Adult Services which would entitled him to provide care for residents up to the age of 65. He told me that his aim, at least at present, is to continue to provide a home for the young people now resident at The Spinnies for the rest of their lives and if necessary be would seek to alter his registration beyond the age of 65 if necessary."

70. Mr Godsmark QC accepts that the subject of the first and second of these strands of the judge's reasoning was not canvassed by the parties, although the first was touched on by the judge himself in questions he put to Mr Wass. In our judgment, the criticisms of the reasons given by the judge for his conclusion that The Spinnies was unlikely to offer a home for life even if funding was available are well-founded. Their relevance is not explained and they are not supported by the evidence. The judge would, however, have been entitled to say that, however well-meaning the current intentions of Mr Wass may be, there was no certainty that he would remain the owner of The Spinnies for the rest of the claimant's life or indeed the The Spinnies would not change over time.

Would the Council and the PCT provide the claimant with a home for life at The Spinnies or an equivalent institution?

71. The judge reviewed the evidence of Ms Doreen Harty who is Head of the Council's Business Unit for Health and Disability and has overall conduct of the provision of care to the claimant. He found at [65] that it was "highly unlikely that The Spinnies

will provide a home for life for C if she remains funded by the Local Authority and the PCT. It is far from certain that she will have a home for life there even if privately funded, but her chances of achieving that or its equivalent are much greater if she is able privately to fund her care." Mr Faulks submits that this finding is flawed for a number of reasons.

72. His first criticism is that the judge failed to have regard to the Council's statutory duties. The Council was required to meet the claimant's assessed needs regardless of the cost. At para 13 of her witness statement, Ms Harty says:

> "The Spinnies is a privately owned residential care home and there can be no guarantee it will remain on option for [the claimant] for the indefinite future. In the event she remains within the care of the Local Authority, her support package will be continually monitored, revised and assessed so as to balance the provision of appropriate care with the best financial option."

73. Mr Faulks submits that this is the wrong approach. The claimant was assessed as being "critical" in four of the seven eligibility criteria in one assessment and as having the highest level of need in an extended community care assessment. He says that there can, therefore, be no question of any "balance" between the "provision of appropriate care with the best financial option". The claimant's needs must be met regardless of cost. If they are not met, it is open to those representing the claimant to seek judicial review to require the Council to perform its statutory duties.

74. In our judgment, this criticism of the judge is not justified. We accept that, if the Council does not discharge its statutory duties, it will be amenable to judicial review. But the assessment of the claimant's needs and what care is required to meet them calls for a difficult exercise of judgment. There is likely to be considerable scope for a difference of view as to precisely what care the Council must provide in order to discharge its statutory duties. A claim for judicial review would only succeed if the care being provided was at a level that could not reasonably be considered to be sufficient to discharge these duties. We reject the submission that any reduction in provision from what is currently being provided or that the provision of care somewhere other than at The Spinnies would necessarily amount to a breach of duty so as to expose the Council to a successful judicial review challenge.

75. The second criticism made by Mr Faulks is of the judge's finding at [62] that when the claimant was placed at The Spinnies "it was not then considered that she would be there for the rest of her life". Mr Faulks submits that this finding is contradicted by the terms of the contract which the Council signed with Creative Care Ltd which was described as a "long term" contract and provided: "It is the intention of the [Council] that the placement be on a permanent basis for as long as is required by the Service User, unless otherwise specified in the Care Plan".

76. In our view, there is nothing in this criticism. The contract was terminable by either party on 28 days' notice. It is clear from the evidence of Mrs Harty (who was accepted by the judge as an honest and objective witness) that the Council did not consider that the claimant would necessarily remain at The Spinnies for the rest of her life. She said that the Council "has always to be aware that they are spending public

money and they must ensure that they get the best value for that money". She also said that in the reasonably near future there would be viable alternatives to The Spinnies. It was expected that there would be a number of new providers offering care which was suitable for the claimant in the Nottinghamshire area. These units were likely to be considerably larger than The Spinnies with significantly lower placement costs (about £1600 per week as compared with £2500 per week). The judge summarised Mrs Harty's evidence in the following terms:

> "...Everyone agrees that C should stay at The Spinnies or an equivalent establishment for life if possible. That can be achieved if she is self-funding. However, C is in a high cost placement and is a substantial drain on hard-pressed resources. Ms Harty has no choice but to seek to minimise those costs. That may mean trying to negotiate a reduction in the fees for The Spinnies with consequent compromise in the quality of care and facilities provided to C or it may mean moving her. New, cheaper, larger and untested care provision is shortly to become available. Ms Harty will have to consider that for C. She would like to be able to say that the Local Authority would not have to move her but she is quite unable to commit herself to that proposition. She has had to make hard decisions in the past and accept second best by reason of limited resources. She may have to do the same with C. C's best chance of staying at The Spinnies or an equivalent would be if she was self-funding."

77. The third criticism made by Mr Faulks is that, in saying that "in the reasonably near future there will be viable alternatives" to The Spinnies, the judge overstated the effect of Mrs Harty's evidence. But even if her evidence was less categoric than as stated by the judge, this would not avail the defendants. At the very least, Mrs Harty was saying that new facilities would become available in the relatively near future and it was possible that the claimant would be moved from The Spinnies to one of them. Indeed, she referred to a new 8 bedroom facility that would soon come on stream and which the Council contracts' officers were considering as a possibility for the claimant. Crucially, Mrs Harty said (and the judge accepted) that the chances of the claimant staying at The Spinnies (or an equivalent) were greater if she were able to fund her care privately than if she were to rely on the Council. This piece of evidence formed an important basis for the judge's conclusion at [73] that it would be "folly" for the claimant to make herself dependent on State resources. Even if the judge did to some extent overstate the effect of Mrs Harty's evidence about future alternatives, he did not do so by much. Such overstatement as he made did not undermine his overall reasoning and conclusion.

78. The fourth criticism is that the judge overlooked the fact that Mrs Harty said that the new facilities were being commissioned in an attempt to meet vastly increased demand for such facilities. As Mr Faulks puts it, if the claimant were moved by the Council, her new placement would not be available for another user. But the judge did not overlook the fact that there were increasing numbers of people who require to be supported by the Council. At [62], he referred to this very point and the fact that the number of people with learning disabilities was rising all the time, increasing

pressure on the Council's finite resources. Despite this increase in demand, Mrs Harty said that the chances of the claimant remaining at The Spinnies (or equivalent) were greater if she were able to fund her care privately than if she relied on the Council. It is clear, therefore, that Mrs Harty did not believe that the increase in demand for accommodation for people with learning and other disabilities reduced the likelihood of the Council moving the claimant from The Spinnies to other accommodation.

79. The fifth criticism is that the judge stated that an attempt to reduce the cost of a placement at The Spinnies would "inevitably" lead to a reduction in the level of care and facilities available. Mr Faulks submits that this overlooks the fact that (i) there was no evidence that a reduction in care would result in provision below what was reasonable; and (ii) in any event, there was some scope for a reduction in fees without impinging on the quality and level of service provided.

80. In our view, the judge did not need to go so far as to say that a reduction in costs would "inevitably" lead to a reduction in the level of care and facilities provided. At the very least, it was likely that a reduction in costs would lead to a reduction in care and facilities and to a level which would not expose the Council to a real danger of a successful judicial review challenge: see [62] above. Mrs Harty made it clear that she would be looking to make savings.

81. The sixth criticism made by Mr Faulks is that the judge ignored the numerous other obstacles to moving the claimant. Thus, the evidence was that a move would be traumatic for the claimant and for that reason her need to stay at The Spinnies might well make any attempt to move her legally impossible because her needs could only be met there.

82. This criticism has no foundation in the evidence. The evidence came nowhere near to supporting the conclusion that a move would be so traumatic for the claimant that for that reason alone she had to stay at The Spinnies for the rest of her life. Nor was there evidence that the claimant's need could only be met at The Spinnies.

83. Finally, Mr Faulks advanced a criticism which did not appear in his skeleton argument. He submitted that there was no evidence that there is any market for homes providing care and accommodation for persons who are privately- funded and whose needs are as great and as expensive as those of the claimant. In reality, the only purchasers of such services at institutions like The Spinnies are local authorities and PCTs. If these authorities do not make arrangements for accommodation and care of the kind needed by the claimant in such institutions, then these institutions are unlikely to be able to continue to provide it for anyone, whether privately-funded or not.

84. It is true that the judge did not deal with this argument. But the simple answer to it is that Mrs Harty said that the best chance the claimant would have of finding a placement equivalent to The Spinnies would be if she were self-funding. It is clear, therefore, that Mrs Harty saw no difficulty. If the defendants wished to contend that there was no "private market" for the care required by the claimant, they should have adduced evidence to that effect. They did not do so. In these circumstances, it is not surprising that the judge accepted the evidence of Mrs Harty.

Future legislative changes?

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."

86. Mr Faulks submits that there was no basis for the judge to find that it was "quite possible" that the legislation would change so as suddenly to impose a liability on claimants whose damages were held in the Court of Protection. He points out that the relevant legislation has been amended on a number of occasions to deal with the position of personal injury claimants. Each change has enhanced and protected the rights of such claimants rather than prejudiced them. He submits that there is no evidence of any intention on the part of government to change current policy. Finally, if the policy does change, it is highly probable that transitional protection will be conferred on those whose damages have already been awarded and that any new provision will apply only to those to whom awards of damages for the cost of care have not been made.

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.

Postscript on the mitigation issue

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.

The fourth issue: the multiplier

90. As we have said, a whole life multiplier of 28.94 was agreed between the parties. 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. He relies on [96] in *Crofton*:

> "We would accept that there may be cases where the possibility of a claimant receiving direct payments is so uncertain that they should be disregarded altogether in the assessment of damages. It will depend on the facts of the particular case. But if the court finds that a claimant will receive direct payments for at least a certain period of time and possibly for much longer, it seems to us that this finding must be taken into account in the assessment. In such a case, the correct way to reflect the uncertainties to which Tomlinson J referred is to discount the multiplier. We did not understand Mr Taylor to contend otherwise."

91. This issue was raised for the first time before the judge after he had circulated his draft judgment. He refused to deal with it on the grounds that it was too late to raise the point. It would require matters to be re-investigated which could have been explored in evidence during the trial. 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.

Overall conclusion

93. For the reasons we have given, the judge was right to hold that the claimant was entitled as of right to damages in preference to dependence on the statutory obligations of the Council. Further and alternatively, he was also right to conclude that it was reasonable for the claimant to opt for self-funding and damages rather than seek provision of care and accommodation at public expense

94. It follows that this appeal must be dismissed.