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Welcome to the first edition of our Personal Injury e-bulletin for 2012.

Inside, **Christopher Walker** and **Rosalie Snocken** take stock of the significant cases of 2011 on quantum issues in serious personal injury litigation.

The cases are grouped in sections dealing with interim payment applications, approaches to the Ogden tables and specific other issues of principle.

Please get in touch if you would like to discuss any of the cases or issues covered inside.

2011 cases

Kirby	*Kirby v Ashford and St Peter's Hospital NHS Trust* (No 2) [2011] EWHC 624 (QB) (HHJ Robinson)
Walton	*Walton v AXA Belgium* [2011] PIQR P12 (Hickinbottom J)
FP	*FP v Taunton & Somerset NHS Trust* [2011] EWHC 3380 (QB) (Hickinbottom J)
Wilson	*Wilson v Dummett MIB,* (25/11/2011, unreported) (HHJ Seys Llewellyn QC)
TTT	*TTT v Kingston Hospital NHS Trust* (25/11/2011, unreported) [2011] EWHC (full text of judgment unavailable at time of writing) (Owen J)
Crispin	*Crispin v Webster* (4/11/2011, unreported) [2011] EWHC (full text of judgment unavailable at time of writing) (Haddon - Cave J)
Brown	*Brown v Guy's and St Thomas' NHS Foundation Trust* [2011] Med LR 387 (HHJ Leighton Williams QC)
Mabiriizi	*Mabiriizi v HSBC Insurance Ltd* [2011] Med LR 379 (Sharp J)
PZC	*PZC v Gloucestershire Hospitals NHS Trust* [2011] PIQR P17 (HHJ Leighton Williams QC)
Berry	*Berry v Ashtead Plant Hire Co Ltd*, CA [2012] PIQR P6 (Longmore LJ, Rimer LJ, Warren J)
Sharma	*Sharma v Noon Products* (HHJ Yelton)
Connery	*Connery v PHS* [2011] EWHC 1685 (HHJ Platts)
Higgs	*Higgs v Pickles* [2011] PIQR P15 (HHJ Ellis)
XYZ	*XYZ v Portsmouth Hospitals NHS Trust* [2011] 121 BMLR 13 (Spencer J)
Johnson	*Johnson v Le Roux Fourie* [2011] 155(21) SJLB 31 (Owen J)
Dalling	*Dallingv RJ Heale & Co Ltd* [2011] EWCA Civ 365 (Smith LJ and Aikens LJ)
Cook	*Cook v Cook* [2011] PIQR P18 (Eady J)
Smithurst	*Smithurst v Sealant Construction Services Ltd* [2011] EWCA Civ 1277 (Wall LJ, Rix LJ and Moore-Bick LJ)
Sadler	*Sadler v Filipiak* [2011] EWCA Civ 1728 (Ward LJ, Etherton LJ and Pitchford LJ)
Kotula	*Kotula v EDF Energy Networks* (EPN) Plc [2011] EWHC 1546 (Irwin J)
McDonald	*R* (*on the application of McDonald*) *v Kensington & Chelsea Royal London Borough Council* [2011] PTSR 1266 (Lord Walker JSC, Baroness Hale JSC, Lord Brown JSC, Lord Kerr JSC and Lord Dyson JSC)
Whiten	*Whiten v St George's Healthcare Trust* [2011] 108(33) LSG 28 (Swift J)

Other cited cases

Eeles	*Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204, [2010] 1 WLR 409
Langford	*Langford v Hebran* [2001] PIQR Q13
Collett	*Collett v Smith* [2008] EWHC 1692
Clarke	*Clarke v Maltby* [2010] EWHC 1201
Allied Maples	*Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602
Corr	*Corr v IBC Vehicles* [2008] AC 884
Willson	*Willson v MOD* [1991] 1 All ER 638
Barry	*R v Gloucester CC ex p. Barry* [1997] AC 584
Roberts	*Roberts v Johnstone* [1989] QB 878

Interim payments following Eeles

There was a proliferation of reported decisions on interim payments in 2011. In the majority of the cases reported, the claimant either failed to obtain an interim payment at all, or was awarded a significantly lesser sum than requested. In none of the reported cases was the claimant successful in an interim payment application for money to purchase a property. The nine bedroomed Brightlingsea House casts a long shadow.

IP granted

- **Kirby** - £150,000 granted (£250,000 sought) – 6 ½ months until trial
- **Walton** - £70,000 (as sought) – fewer than 3 months until trial
- **FP** - £500,000 granted (£643,500 sought) – stay of 9 months until next CMC agreed
- **Wilson** - £250,000 granted (£400,000 sought) – approximately 8 months until trial
- **TTT** - £400,000 – at least 2 years until trial (next CMC not until Oct 2014)

IP refused

- **Crispin**– £250,000 granted but second application for £750,000 refused – 1 year until trial
- **Brown**–£1,750,000 –8 months until trial
- **Mabiriizi** - £670,000 (originally £1,780,000) – 17 months until trial
- **PZC** - £845,000 (further £85,000 agreed) -just over 5 months until trial, JSM 4 months
- **Berry** - £175,000 share of £250,000 – (appeal against IP successful)

A general observation

The judgments reiterate that the approach in **Eeles** must be followed in all interim payment applications.

This (as discussed in **FP**) can create difficulties for a claimant where the judgment in favour of the claimant on liability is only partial or the multiplier for **Roberts v Johnstone** purposes is so low that there will inevitably be a substantial shortfall between the amount recoverable for accommodation costs and the actual costs of accommodation necessary to meet the claimant's needs.

The Eeles 1 Test

On an application for an interim payment, the court is primarily focused on ensuring that a claimant is not kept out of the damages to which he is entitled, without incurring a real risk of over-compensating a claimant or prejudging matters that are properly the province of the trial judge.

Needs only become necessarily relevant if the Eeles 1 test is not met (ie where the interim award sought is more than is a reasonable proportion of the likely capital sum on a final award).

Losses to date considered as losses to trial

In **Wilson**, HHJ Seys Llewellyn QC found that "losses to date" could be considered as losses extending to the date of trial, but only where he could be satisfied that the losses claimed would have accrued by that date.

Where there is an established regime and it is clear that costs will continue to accrue at the same rate, it would be appropriate to include these under the calculations for Eeles 1.

Care must be taken not to pre-judge the main issue of the interim payment: one cannot assume that expenses for which money is claimed will be rubber-stamped by the trial judge.

"Losses to date" have been taken as meaning losses to trial date in three other decisions in which the relevant date was specified: **Mabiriizi, Kirby** and **FP**.

Accommodation as part of Eeles 1

In Eeles, it was said that:

> *"…the judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both.*
>
> *However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award…".*

Exceptionally, in **Wilson** and **Mabiriizi**, the defendants successfully argued that future accommodation costs should not be included.

In **Wilson**, the defendants argued that they should not be included because there were particularly acute difficulties in predicting the claimant's life expectation.

HHJ Seys Llewellyn QC noted that the difficulties in predicting life expectancy had led to the introduction of the power to award periodical payments. He went on to observe that in Miss Wilson's case they were particularly profound, and concluded that:

> *"…Whilst the practice of awarding accommodation costs as a lump sum will usually be appropriate as a matter of generality, on a conservative basis, and with only my interim judge assessment available to me of what may or may not be the case at trial, I do not think that I can treat it as to be assumed that the practice will be applied in this case."*

In **Mabiriizi**, the defendants were to argue at trial that the claimant should continue to be cared for in a residential unit and not in his own home.

Sharp J, having found that she could not dismiss the defendants' argument on this point as plainly wrong, acceded to their consequential argument that to factor in an accommodation claim to the Eeles 1 calculation would fail to maintain a "level playing field" between the parties before the trial judge.

Reasonable proportion of conservative estimate

There have been a range of opinions expressed in the recent cases as to what percentage constitutes a 'reasonable proportion' of the amount which the interim payment judge is confident will be awarded as a lump sum at trial (ie a conservative estimate).

- In **Walton**, the figure was 75%.
- In **PZC**, HHJ Leighton Williams QC found that 85% would be the maximum reasonable proportion.
- In **Brown** and **TTT**, 90% was found to be a reasonable proportion.
- In **FP**, the award made was approximately 96% of the minimum capital that would be awarded.

The Eeles 2 Test

To grant an interim payment of a sum that is greater than a reasonable proportion of the amount that the judge is confident will be awarded as a lump sum at trial, that judge has to be satisfied both that there is a real need for the interim payment requested and that the amount asked for is reasonable.

It is only then that the judge can be justified in assuming that a trial Judge would assess the amount of the final award at such a level as will permit the making of the necessary interim award.

Level Playing Field

The most common objection to an application made under Eeles 2 is the need to maintain a level playing field at trial: will the interim payment be applied in such a manner as to alter the status quo (whether as to care/case management or accommodation) and risk tying the hands or fettering the judgment of the trial judge?

As observed by HHJ Robinson in **Kirby**, interim payment applications should not normally be made to effect retrospective approval of decisions to spend money which had not, as yet, been awarded. The "level playing field" argument tends to be run in conjunction with one or other of the other points considered below.

Acquiring accommodation

In **Wilson**, the level playing field objection was not considered persuasive: the claimant sought the interim payment not to *purchase* her own property, but rather to acquire rented accommodation into which she could move from hospital and so set up her own (reasonably costed) care regime.

Conversely, courts, alive to the "level playing field" objection, will scrutinise the reasonableness of sums sought to purchase accommodation.

In **Brown**, HHJ Leighton Williams QC refused an application for the purchase of a substantial property set in 4.5 acres of land at a cost of £1,000,000, which would cost a further £432,000 to extend and adapt to make it suitable for the claimant's needs. He considered that such costs exceeded that which was reasonable to incur for suitable accommodation and concluded:

> *"…I am firmly convinced that to enable such a purchase now would unfairly and unreasonably tie the hands of the trial judge".*

HHJ Leighton Williams QC also found that the property proposed in **PZC** was not reasonable. As well as finding there was not an immediate need for the claimant to move into alternative accommodation (as to which see below), he stated:

> *"I am not satisfied that the requested interim award of £845,000 for accommodation is reasonable, nor that expenditure of such a sum to purchase a property is reasonably necessary. [address 2] is a very large property the ground floor dimensions of which, assessed at more than 300sq m far exceed the family's requirements and the cost of which is 3.5 times the value of the present family home. I am quite satisfied that a suitable property can be acquired at a significantly less cost".*

Earlier in the judgment, he had specifically agreed with the claimant's accommodation expert's statement of principle that:

> *"It is appropriate to consider the provision of essential housing which provides a similar standard of housing to that which the family would normally have provided for themselves at this point in P's life, and to allow for such enlarged or improved accommodation as is necessary to accommodate P's particular disability"*

and he went on to state there was some doubt as to whether the claimant's expert had in fact properly taken this into account in relation to his conservative estimates of the cost of purchasing an appropriate property.

Crispin is another case in which the court found it could not be confident that the trial judge would find that the proposed purchase was reasonably necessary to meet the claimant's needs and that the court would grant the requested accommodation costs on the basis of the particular house identified, especially when assessed conservatively. It therefore refused a second interim payment application.

In that second application, the claimant had sought the money to move to a suitable property in the centre of Winchester, where she had lived prior to the accident, because she was currently living in rented accommodation which was further from the centre that she had moved to on her discharge from hospital following the RTA for which the defendant was responsible.

Haddon-Cave J found that it was for the trial judge to decide the 'yardstick' and to reconcile what the claimant wanted and needed with what was objectively reasonable, and if he ordered the interim payment requested, that would fetter the trial judge's discretion.

Immediate Need

A claimant has to establish an immediate need, but an application will not succeed simply because existing accommodation is or will soon prove unsuitable.

In **Brown** and **Mabiriizi**, it was agreed, and the judge in each case accepted, that the claimant's present property was wholly unsuitable for the needs of the claimant, but an interim payment to enable the purchase of alternative accommodation was refused.

At the end of her judgment in **Mabiriizi**, having recognised that there was a genuine dispute between the parties as to whether or not the claimant's long term care needs would be better met in his own adapted accommodation or a residential setting, Sharp J reluctantly refused the application. She stated:

> *"I have been troubled by the fact that the Claimant will therefore be left in unsuitable accommodation for a uncertain period"*

but noted that the defendant had offered to fund suitable rented accommodation and she urged the parties to endeavour to bring the matter to trial as soon as possible.

In **Brown**, HHJ Leighton Williams QC recognised that it was in the claimant's interests that he should obtain suitable accommodation and that a care regime should be implemented, but found that those considerations had to be tempered by the need to ensure that the expenditure proposed to meet those ends was reasonable.

The trial date is an obvious consideration for the court. In **PZC**, HHJ Leighton Williams QC refused to make the interim payment order requested because there was a trial fixed for just under six months from the application hearing and a settlement meeting fixed two months before that. He was not persuaded that the claimant's need for alternative accommodation was so urgent that it could not wait until after trial or settlement.

The judge found it to be significant that the claimant's mother referred to the family not being able to cope for 'much longer'.

Awarding a lesser sum than is asked for

As can be seen from the list on page 3, in **Kirby**, **FP** and **Wilson**, interim payments of a lesser amount than requested were ordered. None of the interim payments requested in these cases were to fund the purchase of accommodation but rather were for care regimes, adaptation or rental accommodation costs.

The question of whether a smaller interim payment should be ordered, where the application to fund the purchase of a particular property has been found either to be unreasonable or not sufficiently urgent, is less straightforward.

Despite finding that a further interim payment of £700,000 could be awarded under Eeles 1, in **PZC** HHJ Leighton Williams QC refused to make a lesser award than the £845,000 requested, despite the claimant's Leading Counsel submitting that it would be open for the judge to award such a sum to be held by the claimant's solicitor so that the family could then have the money readily available should a suitable property become available.

He took into account that the claimant was an infant, whose affairs were not at that time administered by the Court of Protection, and also the proximity of the trial. It is important to note that a further interim payment of £85,000 to cover limited future expenditure was not disputed by the defendant and was ordered.

Only a month later, in the case of **Brown**, HHJ Leighton Williams QC actually made the suggestion of the award of a lesser sum, but this was not adopted.

In **Mabiriizi**, Sharp J noted that:

> *"…It is not suggested that the court should make an interim payment in such a (lower) sum, though no doubt the parties can restore the matter for further argument if it is felt it is appropriate to do so".*

In that case, the total conservative capitalised amount was £424,375 (Sharp J having refused to take account of a future accommodation claim for the reasons discussed above), compared to the sum of £670,000 being requested.

Undertakings as to how money will be spent

The suggestion has been made in some cases that the claimant or their solicitor should make an undertaking that the money paid by way of an interim payment should only be spent in relation to certain heads of losses.

In **FP**, the interim payment ordered was subject to an undertaking to expend money only on categories identified in the schedule of damages in the claim.

On the other hand, in **Wilson**, HHJ Seys Llewellyn QC rejected the suggestion, raised at a late stage in submissions by the claimant's Leading Counsel, that an undertaking might be given that the interim payment be devoted only to the expenditure as it occurred of professional care and case management. He stated:

> *"…It seems to me that to make an order for an interim payment which I would otherwise not make, on the basis of such an undertaking, would be to proceed on the basis that I did not have the high confidence that otherwise I would need as to the regime being viable and requiring money. Further, if I were to do that, I would be fettering the Claimant's entitlement to her own money".*

However, the judge thought that it could be a very helpful suggestion for negotiation at another time in similar circumstances.

Making two applications

In **PZC** and **Crispin**, the claimant made two interim payment applications: one for future expenditure until trial (limited at £85,000 and agreed to by the defendant in **PZC** and £250,000 in **Crispin** to avoid the need for further applications) and the other to fund the purchase of a property for the claimant (£845,000 in **PZC** and £750,000 in **Crispin**).

In both cases, the first interim payment for expenses was granted, but the interim payment for accommodation was refused.

This approach is obviously an alternative to a single application of the type successfully made in **Wilson** for *"£x or some substantial lesser sum"*.

In 2011 Members, Staff and friends of Old Square Chambers helped us to raise over £51,000 for Headway UK! Not only did we climb, run, walk, cycle and fall we helped in smaller ways to raise awareness for such a great cause.

Multiple defendants

The only Court of Appeal decision in 2011 on interim payments came with the case of **Berry**. This considered an application made against multiple defendants.

Two points emerge from the decision:-

- Where defendants blame each other for the accident, then an interim payment application will not succeed against either one of those defendants, unless the case on at least one of those defendants being liable is clear cut.
- As long as the party against whom the interim payment is ordered is insured, it matters not that another of the defendants is uninsured.

Ogden

When is it appropriate to depart from the suggested non-mortality reduction factors to a multiplier and how should it be done? Can the legal profession be persuaded away from simply using the Ogden tables as a starting point before reflecting the individual circumstances of a case with an impressionistic adjustment?

While awaiting the further wisdom of the Ogden Working Party in the forthcoming 8th edition of the Tables, five cases are worthy of mention:

- **Sharma**
- **Connery**
- **Higgs**
- **XYZ**
- **Johnson**

They neatly encapsulate a variety of factual scenarios, whether as to level of disability or else as to work record, pre- and post-accident. They also underline the willingness of the court to depart from the guidelines/ starting point provided by the Ogden tables.

What these cases fail to provide, however, is any principled approach as to how and to what extent such modifications should be effected to reflect the circumstances of a particular case.

It will be interesting to see how this battleground may develop and what attention might be paid by courts to the heralded re-write of the introductory notes to the next edition of the Ogden Tables.

Sharma

The 35 year old claimant had suffered a traumatic amputation of the tip of his right index finger, losing his nail and the surrounding area.

Having considered the Guidance Notes and accepted that the claimant was to be considered "disabled", the judge had to weigh the evidence bearing on residual earning capacity.

The claimant had a post accident record of three years' employment in more secure work than that he had held at the time of the accident. While he was precluded from certain forms of employment (which he had previously undertaken) through a loss of manual dexterity, the court noted that he was far less disabled than other persons who would meet the definition of disability (which would include those with a complete loss of function in a hand).

If considered disabled, the full reduction factor was thought to be 0.4, compared with 0.89 if non-disabled. The court plumped for 0.6.

Connery

The 43 year old claimant had suffered a whiplash injury in a road traffic accident. The court accepted that she developed a complex regional pain syndrome, causing disability through pain in her right arm and right leg.

It resolved apparent discrepancies between her level of functioning described to medical practitioners and that revealed with surveillance evidence by finding that she genuinely perceived her condition to be worse than it actually was.

The prognosis was actually for a good, if not full, recovery. At the time of trial, she was to be considered as disabled, but might not be in the future. She would, however, have been out of work for 4-5 years before being able to re-enter the job market.

In considering her residual earning capacity, a reduction factor of 0.72 would have been appropriate

if she were non-disabled, while a reduction factor of 0.28 would have applied if she were disabled.

The court awarded her 12 months' loss of earnings, then a partial loss of earnings, with a reduction factor of 0.66 applied. She also received a lump sum award in respect of a claim for loss of promotion prospects.

Higgs

The 53 year old former bricklayer/builder suffered significant injury to his right knee and shoulder in a road traffic accident. He continued to suffer from pain and limitation and movement in his shoulder, while the condition of his knee was such that he would require a knee replacement at the age of 60.

4.5 years after the accident, he had not found further work, despite being motivated to do so and having improved his qualifications.

The court assessed his residual earning capacity by applying the reduction factor applicable to a disabled, unemployed man of the claimant's age, without adjustment. It rejected an argument that the claimant's disability had already been taken into account through a choice of a lower multiplicand to reflect the restricted type of work for which he was now suited.

XYZ

The 37 year old claimant suffered nerve damage and total renal failure following negligent medical treatment.

A kidney transplant was successful, but he was left with various significant medical problems, including urinary difficulties and a restriction in function of his right lower limb preventing him from running and walking on uneven ground and causing difficulty in climbing stairs. He would require a further kidney replacement by the age of 61, preceded by symptoms of progressive renal failure.

In assessing residual earning capacity, the court opined that "it was a borderline decision whether the claimant's lack of mobility and urinary problems meet the full criteria [of disability]".

A reduction factor was selected at a mid-point between those applicable to a disabled and non-disabled man of the claimant's circumstances.

Johnson

Bucking the trend, the court, noting the claimant's remarkable work record prior to injury, decided that it would be inappropriate to apply any reduction factor to the actuarial multiplier.

Future loss of earnings

Two cases are principally concerned with an assessment of the prospects of a claimant's business, but for the accident. Following a line of authority which includes **Langford**, **Collett** and **Clarke**, the courts in **XYZ** and **Johnson** approached the task by:

- establishing a baseline level of earnings;
- incorporating further differential earnings based on the percentage chance of the relevant scenario/s occurring;
- applying an overall discount

It is on the issue of overall discount that the cases are generally instructive.

XYZ

The claimant was to have set up his own market research agency in the pharmaceutical industry. For some 13 years he had worked in the industry and had reached the top of his profession in the employed sector. For two years he had actively planned setting up his own agency and, at trial, he was able to lead evidence from former colleagues, both as to his performance and skill and also as to their success in setting up similar businesses.

On the basis of this evidence, the court felt able to produce a career model (based on percentage chances of turnover reaching a certain level by a certain point in time) over a 26 year period. It then considered whether or not a percentage discount should be made to the overall calculation to reflect the various uncertainties inherent in any such approach.

An overall discount of a little less than 30% was applied (through a combination of a discount of 14.46% to the multiplier and 15% to the multiplicands) to take into account the following factors, which would only work against the claimant:-

- The length of time (26 years) over which the earnings model was projected;
- The considerable disparity between the projected earnings of the business and the net earnings that would otherwise have been achieved if the claimant had returned to the employed sector;
- The contingency that the claimant would have been compelled to release a substantial element of the equity to a business partner at some point over the 26 year period;
- The contingency that the net profit margin assumed would actually be lower for period/s over the 26 years.

Johnson

This case produced a not dissimilar result as concerns overall discount, where physical and psychological injuries were found to have undermined the claimant's ability to develop a software sales company.

The court first determined the likely turnover the business, then applied a 20% discount to take into account the chance that it might not reach such a level of business: **Allied Maples**. From that turnover figure, a net profit figure was derived. This, in turn was reduced by 20% to reflect the likely dilution of share capital by virtue of share options to be granted to employees.

Supervening events

Readers will doubtless recall the tragic case of Corr, in which Mr **Corr** suffered a head injury, later developed depression as a consequence and, 6 years after the initial accident, committed suicide.

In **Dalling**, the Court of Appeal again had to consider the circumstances in which a defendant tortfeasor could be held responsible for a second injury causally related to an initial accident.

Mr Dalling suffered a head injury which had a disinhibiting effect and probably also the effect of potentiating the effect of alcohol upon him. Three years after the accident, without the intervention of others, he drank to excess in a pub, fell to the ground and struck his head again.

The Court of Appeal upheld a finding of primary liability, with contributory negligence of one-third, on the basis that the claimant's action in getting drunk was not an act of free volition (which would have broken the chain of causation) but one for which both parties bore significant responsibility. It was noted that:

> *"it would be possible for a judge to hold that, even though there was a causal link between the defendant's tort and the injury, the claimant should not recover anything because the injury was substantially his own fault."*

A matter of fine judgement, then.

Provisional damages and variable PPOs

Kotula is a significant decision. Following a road traffic accident, the claimant had been left with complete paraplegia at the T6 level, together with a brachial plexus injury that gave weakness in his left arm. As with other spinal cord injury patients, he was left with a risk of suffering post-traumatic syringomyelia.

An application was made on his behalf for a provisional damages award and an order permitting variation of the periodical payments, should the contingency arise.

The court acceded to the application, following detailed argument and reliance upon the judgment of Scott Baker J in **Willson**.

It was accepted that the development of syrinx was only one of a number of potential complications that could greatly alter the predicted functioning of the claimant. That said, the expert consultants in spinal surgery (Gardner/Tromans) were able to agree as to the % risk of the claimant developing a syrinx (10-15%) and the % risk of a clinically significant syrinx developing (1%). The chance of the claimant developing the condition was not to be viewed as fanciful.

Significant clinical features would include a range of consequences, from loss of sensation in the fingers through to loss of the ability to swallow and/or ventilator dependence. Mr Gardner opined that it was only one in ten of those developing clinically significant consequences would develop really serious consequences (ie this represented a 0.1% likelihood).

Once diagnosed, the consequences flowing from the condition would be readily ascertainable.

In exercising its discretion to make the order sought, the court distinguished syringomylia from general, "Protean" and common conditions such as osteoarthritis and psychiatric illness.

Approaches to medical evidence

In claims in which the claimant is a child that has suffered catastrophic head injury, there is often a tension between the desire to postpone an assessment of damages until prognosis can be reasonably clarified (in late adolescence/early adulthood) and the desire to achieve final settlement sooner.

Cook

In **Cook**, the 10 year old claimant had suffered bilateral occipital and temporal lobe damage and total blindness as a small child.

Although her physical disability was set, her long-term needs as regards care and support would vary significantly according to her psycho-social development, which could only properly be assessed following neurological and psychological examination at age 16. Liability was not in dispute.

The court exceptionally made a split trial order in relation to the assessment of damages: a first trial would deal with losses up to the age of 16, with longer-term losses to be assessed at a later trial, when there could be more certainty as to prognosis.

Smithurst

Restating matters of principle, the Court of Appeal, in **Smithurst**, provided fresh support for the "acceleration" approach to the determination of damages, where a court has to consider the risk that an injury would have occurred at some time in the future, regardless of the occurrence of an index accident.

In rejecting the claimant's argument that the court was bound to assess damages and then reduce those damages by the % chance that a similar injury would have occurred, the court concluded:

> *"It may be said that the acceleration method would involve an element of swings and roundabouts, under which Mr Smithurst would recover damages calculated at the full rate over two years but nothing thereafter, rather than damages calculated at a progressively diminishing rate over a longer period.*
>
> *I do not think that an excessively analytical approach to the assessment of damages is to be encouraged in cases of this kind… provided the judge is careful to ensure that the cut-off date fairly reflects the medical evidence, the acceleration approach can in my view be properly adopted."*

General Damages

Appeals from decisions as to the valuation of general damages for pain, suffering and loss of amenity are rare. **Sadler** is one such decision, concerned with the valuation of multiple injuries. It found that:

> *"the judge should have, firstly, considered the various injuries and fixed a particular figure as reasonable for each and then, secondly, stood back and had a look at what would be the global aggregate figure and ask whether it was reasonable compensation for the totality of the injury".*

The judgment of Pitchford LJ provides some useful, common sense guidance as to the circumstances in which a discount for overlap between injuries is appropriate, while separately pointing out that the total effect of a series of injuries may be more significant than the aggregate total of those injuries, taken individually.

Care

Unusually, there have been few high value quantum cases this year focused on care issues. However, **McDonald** was heard in 2011 by the Supreme Court and, whilst it did not concern personal injury awards, it serves as a useful reminder of how limited the care provided by local authorities to people in their own homes can be.

By a majority of 4:1, the Supreme Court in effect held that it was lawful for the local authority to provide incontinence pads and sheets to the claimant, who was not incontinent but had the need to go to the toilet up to 3 times in a night and due to having suffered a stroke could not get to a toilet or commode without assistance, rather than provide the claimant with a carer to assist her overnight.

The Supreme Court were not invited to revisit the decision in **Barry**, which means that local authorities are entitled to take resources into account in deciding whether and how they are going to meet the needs of someone cared for in the community.

Whiten

If one case merits reading, it is this. As a result of the defendant's admitted negligent management of the claimant's mother's labour and the claimant's birth, the claimant suffered profound hypoxic ischaemic damage and developed a mixed spastic-dystonic severe quadriplegic cerebral palsy.

Rather unusually, when the case came to court, nearly all heads of loss remained in dispute. In a 142-page judgment, Swift J provides useful and comprehensively reasoned comment on almost all issues that commonly arise in personal injury quantum matters.

Here are some of the more interesting points from this case which are not commented upon elsewhere in this newsletter.

PPO for future loss of earnings

Whilst a PPO for care was agreed between the parties, Swift J decided that the future loss of earnings award should also be subject to a PPO, indexed by reference to ASHE Table 1.7a, namely that for all male full-time employees (paragraph 6 of the judgment).

Aggregate care rates

Aggregate care rates were used to calculate the award for gratuitous care, given the well-documented levels of stress and exhaustion the claimant's parents had been placed under, that gratuitous care was given at all hours of the day and night and when paid care was first introduced that was only during the day, and it was not possible to be doing anything else at the same time as caring for the claimant (see paragraphs 138-141). A discount of 25% was made to reflect the fact it was gratuitous (D had argued for 30%) (see paragraphs 142-144).

Employed v agency carers

Swift J had no hesitation in preferring the directly-employed carers regime proposed by the claimant's expert Mrs Sargent over the live-in agency carer combined with directly-employed carers regime proposed by the defendant's expert Ms Douglas (paragraphs 198-206)

Care team leader

Swift J accepted that the claimant's needs would be best met by appointment of a team leader as part of the care team (disputed by the defendant), who would be paid between £1-£3 an hour more than the other carers and would have additional duties such as providing advice and support for the care team, arranging training sessions, planning care rotas, acting as co-ordinator between the care team, therapists and anyone else involved in the claimant's care, and dealing with day to day problems such as covering staff absences (paragraphs 157-165).

The decision by the claimant's case manager to employ a team-leader in advance of the court's decision on this point was unattractive because it appeared to Swift J to be an attempt to pre-empt the court's decision by establishing a fait accompli and unwise because it might have had the effect of raising expectations in the minds of the claimant's parents (paragraph 211).

Pensions Act 2008

Allowances should be made for the provisions of the Pensions Act 2008, because whilst they were not expected to come into force for some time, they were already enshrined in statute (paragraphs 171-176).

Transfers

It is important that a claimant's activities are not restricted as a result of the absence of a second person to assist in transfers, particularly where the claimant has a number of different chairs, a walker, a trike and other pieces of equipment. If he is to be adequately stimulated and is to play a full part in family life, he is likely to require a considerable number of transfers during the course of the day.

It could not be assumed that either or both of the claimant's parents would always be available to assist (paragraphs 194-196).

Case managers

The decision for the claimant's parents to engage a case manager from the same organisation as the claimant's care expert was unfortunate and ill-judged, although in the particular circumstances it did not raise an issue of conflict of interest (paragraphs 210-211).

Family gym membership

The costs of family membership to a private leisure club were not awarded because whilst the claimant derived physical benefit from exercising in the water, Swift J found it was the overwhelming probability that the claimant's parents would in any event have taken out membership of a private leisure club rather than taking their children to a public facility (which is what they contended they would have done had it not been for the claimant's injuries) (paragraphs 235-236).

Hydrotherapy

Swift J refused to award costs for hydrotherapy, referred to in that case as "aquatic physiotherapy". Swift J found:

> *"I am not satisfied that the claimant has established a clinical need which cannot adequately be met by physiotherapy exercises carried out in an ordinary swimming pool with suitably trained carers and, occasionally, his treating physiotherapist".*

She went on to find:

> *"Whilst it might be convenient for the claimant to have a pool at his new home, there is no evidence of a real need for that facility"*

as he could be taken by his trained carers in his adapted car to a local private leisure club whenever he wanted and the availability of such pool facilities would be one of the facts to be considered when the family moved (paragraphs 257-263).

Hippotherapy

Swift J allowed a claim for hippotherapy on the basis that there was evidence from the experts that such activities were therapeutically beneficial to the claimant and would remain to be until the age of 30, but only allowed one-third of the annual costs to the age of 30 on the basis of the restrictions on access to the activity centre where hippotherapy was carried out which she had heard about in evidence (paragraphs 269-272).

Environmental controls

Swift J found that the cost of environmental controls that would enable the claimant to control lights and curtains would be disproportionate to the benefit he would derive from them when he will have carers to attend to his needs and comfort and given his anticipated future cognitive ability (paragraphs 362 et seq).

Multiple adaptations

It was agreed between the parties that the claimant and his family would need to move when the claimant became about 11 ½ year's old and Swift J awarded the predicted costs of adaptation to that property.

Swift J also awarded the past costs for substantial adaption of the property that the claimant was living in at the time of trial even though the family had moved there since the claimant's injuries were sustained and the adaptations were carried out at a time when the claimants' parents were aware that, even with the adaptations, the property would not be suitable in the long-term.

It is interesting to note that the difficulty in obtaining large interim payments following **Eeles** was one of the reasons why Swift J found that it was reasonable for the claimant's parents not to have moved to a larger property which would have involved just one set of adaptations being necessary.

However, Swift J did note that, in most cases, the incurring of duplicate adaptation costs will not be reasonable (see paragraphs 367-455 and in particular 404 -419).

Roberts v Johnstone

The judgment also provides detailed considerations on what deductions, if any, should be made against the **Roberts v Johnstone** calculation in respect of the new property that will be bought by the claimant outright at age 11 to take account of the fact that the rest of his family will also live in that property.

Swift J found that:

> *"I consider it wrong in principle for the value of a property that would have been owned by the claimant's parents to be deducted from the value of the new property to be owned by him.*
>
> *To make such a deduction would also be unfair to the claimant. It would inevitably result in him being inadequately compensated for the loss of investment income on the capital value of the new property. It is not the claimant who has been relieved of the expense of purchasing a home; it is his parents. Yet the loss would fall on him."* (paragraph 465).

Swift J went on to find that it was not a failure of the claimant's part to mitigate his loss by failing to require his parents to pay rent. She found that it was unreasonable for the claimant (or those acting on his behalf) to demand rent from his parents due to the following factors:

- the considerable commitment the parents have made by indicating that, because of the severity of the claimant's cognitive disabilities, they would live with him for the rest of his life
- the claimant would always function at the level of a young child and they will remain ultimately responsible for him despite a paid care regime being in place;
- the claimant will require a considerable amount of emotional and other support from them
- his disabilities will restrict the range of choices available to them in respect of holidays and family activities
- once the family are in the new property, it will become difficult or impossible for them to move again.

By way of more general comment she went on to say:

> *"The factors I have described above will be present, to a greater or a lesser extent, in the vast majority (if not all) cases involving children with severe disabilities, where the family has to move to alternative, disability-related accommodation. The context and circumstance of those cases will not, in my view, be appropriate for a finding of a failure to mitigate loss to be made.*
>
> *The view expressed by the judge in Iqbal – to the effect that it is not just to deprive parents of the incidental benefit of living rent free having regard to the uncompensated effects of the defendant's negligence on them – can perhaps be regarded as another way of expressing the same conclusion"* (paragraphs 467-469).

Thus, Swift J found that no deduction should be made until the age when it is found that the claimant would have bought his own property (paragraphs 456-470).

Swift J also found that it was plainly appropriate for a deduction to be made from the **Roberts v Johnstone** calculation from age 28 onwards to take account of the likelihood that the claimant would have purchased his own property with a partner at that age, had he not been injured.

DIY

Swift J made an award of £1,000 per year from age 28 (having found that the claimant would have had his own house from that age) in respect of having to employ someone to do the decorating, DIY and gardening the claimant would have done had it not been for his injuries.

The defendant had argued against such a claim on the basis that it was highly speculative, saying that many men, particularly those will full-time jobs, do not undertake any home maintenance work at all and there was no reason to believe that the claimant would have done so (paragraphs 494-495).

Holiday costs

Whilst Swift J rejected the claim for an adapted holiday home to be bought in France (argued for on the basis that the claimant needed to return to the same area to ensure suitable access to facilities and medical services), she made substantial awards for increased costs of holidays to Barbados (to visit his grandparents who spent part of the year living out there and his grandfather's family who permanently lived there) as well as increased costs for holidays to Europe in the years when a visit to Barbados was not made, together with a modest carers' subsistence allowance for holidays (paragraphs 498-530).

Christopher Walker

Christopher specialises in personal injury litigation, particularly catastrophic (spinal and head) injury, fatal accident claims, industrial disease and other employer's liability claims.

He is also regularly involved in clinical and professional negligence claims, health and safety matters, coroner's inquests and product liability claims.

He is ranked as a personal injury advocate in Chambers & Partners 2012 directory, which describes him as *"perceptive and incisive... a calm and courteous advocate noted for his excellent client skills and an ability to deal with clients in a sympathetic but non patronising way"* as well as in The Legal 500, where he is noted as *"a tenacious advocate and shrewd negotiator."*

Rosalie Snocken

Rosalie is a pupil at Old Square Chambers. After reading Maths and Philosophy at Oxford, she gained a distinction in her Graduate Diploma of Law and was then graded Outstanding when completing the Bar Vocational Course.

Before and after her BVC, Rosalie joined Irwin Mitchell's serious injury team, working on workplace accidents, RTAs and occupiers' liability matters. These cases ranged from small fast track matters to £multi-million catastrophic injury claims, with a particular focus on those involving major brain injury.