Neutral Citation Number: [2023] EWHC 1584 (KB)

Case No: KB-2023-LDS-000001

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

Leeds Combined Court Centre
1 Oxford Row, Leeds, LS1 3BG

Date: 19 May 2023

Before :

MR JUSTICE SWEETING

- -

Between :

Damian Grzegorz Tylus	**Appellant**
- and -	
Froneri Limited	**Respondent**

- -
- -

David Rivers (instructed by **True Solicitors**) for the **Appellant**
Mark Diggle (instructed by **Kennedys Law**) for the **Respondent**

Hearing dates: 18 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 27 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

Mr Justice Sweeting :

Introduction

1. On the 9th of April 2018 the Appellant was at work when he attempted to clear a blockage in a machine with which he was not familiar and had not been trained to use. He suffered an 11-12mm amputation of the tip of his non-dominant left index finger when it came into contact with moving parts. He was then 29 years of age. The machinery had no guards or fail-safe mechanism, no alarms and no isolation system. Primary liability was admitted subject to an argument as to contributory fault.
2. There was a two-day trial on the 15th and 16th of November 2022. The issues were whether the Appellant had contributed to his injury and the quantification of damages. The Recorder trying the case did not accept all of the Appellant's evidence as to how the accident had occurred and made a finding of contributory negligence of one third. There is no appeal against this determination.
3. The substantive appeal relates to a single head of damages which turned on the issue of whether or not the claimant was entitled to recover the cost of future prosthetics. This was the largest element of the claim. There is a further appeal against a consequential order which permitted the Respondent to set off damages against costs. Permission to appeal was granted by Ritchie J.
4. Under CPR rule 52.21, an appeal is a review of the decision of the lower court. Insofar as an appeal is a challenge to findings of fact, an appellate court will be slow to interfere with findings by a trial judge who has seen and heard the witnesses. Factual findings will only be overturned when the judge is plainly wrong (see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577 per Clarke LJ) either because there was no evidence to support a challenged finding of fact, or the trial judge's finding was one which no reasonable judge could have reached (*Grizzly Business v Stena Drilling* [2017] EWCA civ 94 at 39-40 and *Perry v Raleys* [2019] UKSC 5).

Prosthetics - The Evidence

5. About a year after the accident the Appellant approached his General Practitioner to inquire about the possibility of a prosthetic fingertip. He was advised to research options online. He was not referred for treatment within the NHS. He does not appear to have taken his enquiry further at that stage but later raised the matter with his solicitor who arranged a private assessment.
6. Both parties relied on reports from Consultant Plastic surgeons; Mr Sohail Akhtar for the Appellant/Claimant and Mr Shehan Hettiaratchy for the Respondent/Defendant. In a report of December 2020, Mr Akhtar recommended surgery to remove abnormal nail growth. The Appellant underwent nail ablation surgery on a private basis on 3 June 2021. The various photographs which were within the trial bundle show the resulting and final condition; a stump finger without a fingernail.
7. In his first witness statement of January 2022 the Appellant set out the steps that had he taken to obtain a prosthetic and then described his feelings about the appearance of his injured finger following the ablation operation:

> "I am upset by the appearance of my stump however. This is something I do not like.
>
> I feel that people laugh at me because of the appearance of my finger. I try and hide it by making a fist and hiding my damaged stump in my palm.
>
> People at work laugh at me. I remember people laughing once when I pointed at something with my damaged finger and on another occasion I put all five fingers up to signify the number 5 but my colleagues laughed and said it wasn't five it was 4 1/2.
>
> I hide my hand by keeping it in my pocket to disguise the issue and I will wear gloves when it's cold. I need to use gloves anyway to keep my hands warm. In warm weather I would not wear gloves as this would draw attention to it but I do keep my hand in my pocket.
>
> I have asked to have a prosthetic fitted and have been evaluated by Dorset Orthopaedic. They tell me that I am suitable for a small prosthetic to disguise the appearance of my shortened finger.
>
> I'm very interested in this. I currently have an appointment to finalise the fitting and the colour match. I had a trial piece fitted earlier which was uncomfortable but that was before my nail ablation procedure surgery when the tip of my finger was sensitive and sore.
>
> I am confident a better fitting prosthetic can now be found which I'm keen on trying to assist with disguising the unsightly appearance of my damaged finger. I'm really looking forward to obtaining something which will help me disguise the appearance of this finger."

8. In their joint statement of July 2022 the Consultant Plastic Surgeons agreed;

> "2.5 …Mr Tylus will have a permanently shortened left non-dominant index finger. We do not think that his normal activities are significantly affected by his slightly shorter finger.
>
> 2.7 We do not think Mr Tylus requires any further surgical intervention and does not require any ongoing care of either medical or non-medical nature.
>
> 2.8 ...The most significant symptom he has at the moment is cold intolerance…
>
> 2.9 There is the permanent cosmetic issue of a slightly shorter finger and the loss of a nail complex, which he is addressing with a prosthetic. Mr Hettiaratchy suspects this is unlikely to give him a solution that he finds acceptable. However Mr Hettiaratchy and Mr Akhtar are of the opinion that it would be reasonable to pursue this solution if this is what he wants"

9. Given the extent of the agreement between the plastic surgeons the judge case-managing the claim did not allow their attendance at trial. In relation to paragraph 2.9

of the joint report (set out above) the Recorder concluded (at paragraph 71 of his judgment):

> "The Court considers the last sentence significant, as the experts were not identifying a future need for the prosthetic, but simply agreeing that trying one was a reasonable step for the claimant to take considering the loss of the tip."

10. This might be thought to beg the question as to what the purpose of the trial was, not least because the plastic surgeons were referring to a "solution" to the "permanent cosmetic issue".
11. The Appellant's further witness statement of July 2022 provided an update on his use of a prosthetic:

> "I have received and I am using a cosmetic prosthetic fingertip recently provided by Dorset orthopaedics... I do like this prosthetic as it seems to me to be a good fit cosmetically. It is a much better fit than the version I had earlier before the operation I had to remove the remainder of my nail.
>
> I wear it regularly, if not all the time when I go out socially through the week or at weekends. This includes when I go shopping and/or to the city centre of Leeds for any reason. I wear it anywhere where I think I will be seen by new people who do not know me.
>
> That being said, I do *not* wear it at work as I am scared I will lose or damage it, or around the house as I am not so bothered about my family and friends seeing my damaged finger. I do not wear it at the gym either.
>
> I like the fact that people don't look at my hand or notice my problem as much when I'm wearing the prophetic. I can say that I'm no longer as conscious about looking to see if people are looking at me now. This used to worry me a lot more.
>
> I used to be very self-conscious when out before I got my prosthetic and would wear gloves and sometimes put my hand in the pocket to disguise its appearance.
>
> To be clear I do not use the prosthetic all of the time but find it helpful in disguising the appearance of my finger in social situations. I am pleased with it and would like to continue to use a prosthetic into the future."

12. There was further evidence from Mr Tomasz Czyzniakowski, a neighbour and friend. He said:

> "I am aware of the claimant's prosthetic, I often see him wearing it. I am aware he has a summer and winter version to match his skin tone. The prosthetic is very realistic.
>
> The claimant wears the prosthetic always when me and the claimant go out. The time when the claimant does not wear the prosthetic is in the house, as he wishes not to damage the prosthetic.

> The prosthetic has made the claimant more confident. The claimant was always hiding his hand before, but now he does not have to."

13. The Recorder concluded (at paragraph 74 of the judgement) that the Appellant's oral evidence at trial went somewhat further than his witness statements (which stood as his evidence in chief). He considered the Appellant's evidence at trial that "I wear it everywhere if I'm not at home or at work" and "I put it on for visitors", to be inconsistent with his witness statements. It was argued that this was at the very least a surprising conclusion given that the oral evidence was, in this respect, not dissimilar to the Appellant's witness statements. Nevertheless, this was an assessment which a trial judge was best placed to make and it was tempered by the subsequent observation that any exaggeration was perhaps subconscious.
14. The Recorder does not however appear to have rejected the Appellant's central case as set out in his witness statements; concluding (at paragraph 74): "I accept however, that there are still some situations where he feels he derives a benefit from wearing it, for example in some social situations."
15. Both parties called evidence from registered prosthetists; Ms Alice Hannah for the Appellant and Mr Abdo Haidar for the Respondent. Prosthetists are health care professionals whose clinical discipline involves the supply and fitting of prosthetics to replace a missing body part. The title "prosthetist" is protected by law. Ms Hannah is employed by Dorset Orthopaedic Company Limited. She had been involved in the Appellant's prosthetic treatment. She had carried out an assessment for the purpose of her report in July 2022. By that stage the Appellant had been wearing a cosmetic silicone digit for about five months. She noted in her report:

> "3.4 Mr Tylus reported that he is self-conscious of the appearance of his left hand. He stated that he finds his cosmetic digit comfortable and he feels like it supports his residual digit and provides compression.
>
> 3.5 Mr Tylus stated that he uses his cosmetic digit every weekend and when he is out and about. He can wear it for an unlimited amount of time and in all weather conditions.
>
> 3.6 Mr Tylus is happy with the cosmetic finish of the digit and stated that it has improved his self-confidence."

16. Ms Hannah had recommended high-definition silicone prosthetic digits matched to the Appellant's summer and winter skin tones. The Appellant was wearing a high-definition prosthetic at the trial. By that stage he had used it for some 10 months. The Recorder described the skin tone matching as "impressive" when he inspected it. The annualised future cost of the prosthetics, in Ms Hannah's opinion, was £2,100. The claim was advanced on the basis that the Appellant would use a prosthetic throughout his life.
17. Mr Haidar did not see or examine the Appellant until the trial. His instructions were to provide a "desktop prosthetic expert opinion". At paragraph 3.19 of his report he said:

> "I understand from the documents provided to me that Mr Tylus is concerned about the presentation of his amputation site in public and at work. From my experience, this is normal with finger loss amputees."

18. At paragraph 3.21, he explained the role of "cosmetic handmade multicolored high-definition silicone prostheses":

> "These are usually provided for amputees who are conscious about their appearance following finger loss and at times suffer from anxiety and mental health issues. These types of prosthetics are usually worn when socializing. Amputees rarely wear these at home, for sports, water activities, sleeping or for laborious type job. These prosthetics are available in NHS prosthetic centre and are often provided if found clinically warranted."

19. He included a photograph following this passage in his report which showed a number of prosthetic fingers made by the prosthetics business he had founded which are of the same type and length to that with which the Appellant had been fitted.
20. As far as the cost of prosthetics was concerned his opinion was that:

> "In the event that the court permits long-term provision of a silicone cosmetic prosthesis for Mr Tylus, the cost quoted by Dorset Orthopaedics is reasonable."

21. However, Mr Haider then qualified this view during his oral evidence, stating that a significant discount would be expected after the initial provision. This had not been identified as an issue in his report or in the joint report, signed on 11 October 2022. Ms Hannah was recalled to deal with the point and disagreed, giving her reasons. The judge observed in the course of submissions that the issue had arisen late. In reality there was no evidence on which any discount could be calculated.
22. At paragraph 3.28 of his report Mr Haider set out what he termed his "cosmetic prosthesis prognosis". This was then simply copied into the later joint expert statement as setting out the extent of his disagreement with Ms Hannah (with the omission of the sentence I have italicised):

> "I have fitted a large number of finger loss amputees with cosmetic prosthetics. I have rarely fitted finger loss male amputees who have sustained such a minimal loss with cosmetic prosthetics. The non-dominant hand is not used for handshake and the index finger once in a relaxed hand position is often flexed and not exposed to the eye. *Mr Tylus is not likely to* [sic] *a cosmetic prosthesis at home, between close friends, for sporting activities, for work, for personal care and hygiene. This prosthesis is often used for special social occasions where the hand is likely to be exposed to the public.* I am of the opinion based on the minimal loss he has suffered, a prosthesis if worn is likely to attract more attention to his injured hand (colour difference and difficulties to disguise trimlines). While DT might endorse the use of the prosthesis in the short time, he is likely to abandon its use in the fullness of time. In summary, based on my experience with similar cases, a prosthetic silicone finger is not likely to achieve the desired result and is likely to be abandoned in the fullness of time if provided with one."

23. Plainly this was not based upon any interview with or assessment of the Appellant nor was there any explanation as to what was meant by the phrase "the fullness of time". In cross-examination he said it was difficult for him to say exactly when that time would

come. If what Mr Haider had meant was that the Appellant would not replace the prosthetics he was currently using, then he could have said so, but did not.

24. The Respondent's skeleton argument for trial had suggested that if the claim for a future prosthetic was accepted it should be limited to 5 years. In the course of closing submissions, the Respondent's counsel argued that, assuming an award was made for future prosthesis, it would be open to the court to award compensation on the basis of a lesser period than for life.
25. The Respondent's Counter Schedule asserted that Mr Haider considered that "the claimant is likely to abandon the use of the prosthetic in the long term". A further point was advanced in the Counter Schedule about the impact of use on a limited range of occasions in the following terms: "on his own account the claimant avers he uses the prosthetic purely in social settings, he does not wear this at home or at work. The frequency of any requirement for any replacement prosthetics should take account of this light use." Mr Haider gave an estimate, in his expert report, of the lifespan of a prosthetic if it was used for a few hours a week on social occasions (in the region of 3-4 years).
26. When Ms Hannah gave evidence it was suggested to her that only a small proportion of patients carried on using prosthetics. The Recorder referred to this at paragraph 77 of his judgment:

> "Ms Hannah rejected the suggestion put to her in cross examination that 'long term' only about 5% of patients using prosthetics are still using them, this being based on the written report of Mr Haider."

27. However, there is no mention of a figure of 5% in Mr Haider's written report. Neither was there any explanation of the composition of that 5% group until Mr Haider gave oral evidence. Although his written report included the observation that he had "rarely" fitted prosthetics to male amputees who had sustained such a minimal loss, it was not clear whether that was because the presenting group was small or because there had been a positive decision not to fit a prosthetic to a patient referred to Mr Haider for a prosthetic. In his oral evidence he appears to have given further evidence about this group when he said that he had not had any patients with a 10 to 12 millimetre loss who had come back for replacement prosthetics. Again, this had not featured in his written report, nor had it been discussed at the expert meeting. Nevertheless, it follows that Mr Haider must have fitted prosthetics to some patients with similar injuries, for cosmetic purposes.

The Legal Framework

28. The principle underlying compensation in personal injury cases is that of "full compensation" for pecuniary and non-pecuniary loss (see Lord Woolf MR in *Heil v Rankin* [2001] 2 QB 272 at paragraph 22).
29. Full compensation means a sum of money that will as nearly as possible put the injured party in the in the same position as they would have been in if they had not sustained the wrong for which they are receiving damages (per Lord Blackburn in *Livingstone v Reynolds Coal Company* [1890] 5 AC 25).
30. Identifying the sum of money by way of damages that will achieve that objective in relation to non-pecuniary loss involves an assessment of the injured party's reasonable

needs as Lloyd Jones J. (as he then was) explained in *A v Powys Health Board* [2007] EWHC 2996 at paragraph 94 of his judgment:

> "The Claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. Accordingly, if the treatment claimed by the Claimant is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable. *Rialis* and *Sowden* were concerned with the appropriate care regime. However, the principles stated in those cases apply equally to the assessment of damages in respect of aids and equipment. In determining what is required to meet the Claimant's reasonable needs it is necessary to make findings as to the nature and extent of the Claimant's needs and then to consider whether what is proposed by the Claimant is reasonable having regard to those needs. *(Massey v Tameside and Glossop Acute Services NHS Trust* [2007] EWHC 317 (QB), per Teare J. at para. 59; *Taylor v Chesworth and MIB* [2007] EWHC 1001 (QB), per Ramsay J. at para 84.)"

31. In *Whiten v St. George's* [2011] EWHC 2066 (QB) Swift J. described the assessment of "reasonableness" as follows:

> "The claimant is entitled to damages to meet his reasonable needs arising from his injuries. In considering what is "reasonable", I have had regard to all the relevant circumstances, including the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item."

32. In *Ellison v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB) Warby J. said of this passage in Whiten:

> "18. Ms Vaughan Jones also relied on a proposition in the same paragraph of Swift J's judgment, that the relevant circumstances include "the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item". I accept, and I did not understand it to be disputed, that proportionality is a relevant factor to this extent: in determining whether a claimant's reasonable needs require that a given item of expenditure should be incurred, the court must consider whether the same or a substantially similar result could be achieved by other, less expensive, means. That, I strongly suspect, is what Swift J had in mind in the passage relied upon.
>
> 19. The defendant's submissions went beyond this, however. They included the more general proposition that a claimant should not recover compensation for the cost of a particular item which would achieve a result that other methods could not, if the cost of that item was disproportionately large by comparison with the benefit achieved. I do not regard Whiten as support for any such general principle, and Ms Vaughan Jones did not suggest that Swift J had applied any such principle to the

> facts of that case. She did suggest that her submission found some support in paragraph [27] of *Heil v Rankin*, where Lord Woolf MR observed that the level of compensation "must also not result in injustice to the defendant, and it must not be out of accord with what society would perceive as being reasonable."
>
> 20. Those observations do not in my judgment embody a proportionality principle of the kind for which the defendant contends, and were in any event made with reference to levels of general damages for non-pecuniary loss. Ms Vaughan Jones cited no other authority in support of the proportionality principle relied on. I agree with the submission of Mr Machell QC for the claimant, that the application to the quantification of damages for future costs of a general requirement of proportionality of the kind advocated by Ms Vaughan Jones would be at odds with the basic rules as to compensation for tort identified above."

33. In *Robshaw -v-United Lincoln Hospitals NHS Trust* [2015] EWHC 923 (QB) Foskett J. expressed his tentative agreement with Warby J.'s analysis of Swift J.'s judgment on this point, adding:

> "To my mind, in assessing how to provide full compensation for a claimant's reasonable needs, the guiding principle is to consider how the identified needs can reasonably be met by damages – that flows from giving true meaning and effect to the expression "reasonable needs". That process involves, in some instances, the need to look at the overall proportionality of the cost involved, particularly where the evidence indicates a range of potential costs. But it all comes down eventually to the court's evaluation of what is reasonable in all the circumstances: it is usually possible to resolve most issues in this context by concluding that solution A is reasonable and, in the particular circumstances, solution B is not. Where this is not possible, an evaluative judgment is called for based upon an overall appreciation of all the issues in the case including (but only as one factor) the extent to which the court is of the view that the compensation sought at the top end of any bracket of reasonable cost will, in the event, be spent fully on the relevant head of claim. If, for example, the claimant seeks £5,000 for a particular head of claim, which is accepted to be a reasonable level of compensation, but it is established that £3,000 could achieve the same beneficial result, I do not see that the court is bound to choose one end of the range or the other: neither is wrong, but neither is forced upon the court as the "right" answer unless there is some binding principle that dictates the choice. It would be open to the court to choose one or other (for good reason) or to choose some intermediate point on the basis that the claimant would be unlikely to spend the whole of the £5,000 for the purpose for which it would be awarded and would adopt a cheaper option or for some other reason."

34. The starting point is to make findings in respect of the claimant's needs and then to consider how they can be met by an award of damages. The claimant's needs will arise from the nature and effects of the injury. It is these needs that require identification before particular methods of addressing them are considered. A claimant who has problems with mobility, for example, will have a need to preserve their existing physical abilities and to continue daily life, insofar as possible, unimpeded by a lack of mobility. Meeting that need may include therapies to reduce the physical impact of immobility, such as physiotherapy, and the provision of aids, such as adapted vehicles and wheelchairs. As Foskett J. observed there may often be a choice between

alternatives which achieve the "same beneficial result". However, as long as the claim is within a reasonable range the claimant is entitled to damages at the level sought and will have mitigated their loss even if they have not pursued the least costly option (see *A v Powys Health Board* [2007] EWHC 2996 and *Manna -v- Central Manchester University Hospitals NHS Foundation Trust* [2015] EWHC 2279 (QB)). A claimant's "reasonable needs" represent an amalgam of the claimant's psychical, mental and emotional needs occasioned by the injury and the reasonable method of meeting those needs expressed in damages. The overarching purpose of damages remains that of restoring a claimant to their uninjured position to the extent that can be achieved by way of a monetary award.

35. Questions of "proportionality" may arise where there is more than one potential approach to meeting the claimant's needs, about which there may be differing expert opinions, but once the claimant has established a reasonable continuing need there is no principle of leaving it unmet or depriving the claimant of damages because the overall sum is "too much". As the Appellant's counsel observed in argument such an approach would produce a highly artificial, and unprincipled, distinction between cases involving the same reasonable need but differing multipliers. The multiplier for a therapy or aid that will be needed over a lifetime, for example, depends upon both life expectancy and the discount rate. The overall amount of the award under such a head will be significantly different as between a younger and older claimant, or between those with an impaired or unimpaired life expectancy, even where the therapy or aid are identical. In all of these cases the multiplicand will necessarily have been determined to be reasonable, either by agreement or judgment, and the overall sum will be extinguished or used up over the period during which the therapy or aid is required. The claimants will be in the same position; there is no additional benefit because one may have a larger award.
36. The claim in the present case was for the annualised cost of an aid, the prosthetic, to allow the appellant, on occasions, to improve the cosmetic appearance of his injured finger. Subject to a late point about a reduction for repeat fitting and supply there was no dispute that the annualised cost was reasonable if it needed to be incurred.
37. The Recorder was referred to *Lewis v Royal Shrewsbury Hospital NHS Trust* [2007] 1WLUK 628. This case included a claim for a home "hydrotherapy pool". It was predicated upon providing the environment and facilities to allow the delivery of a particular therapy within the claimant's home. The installation of a such a pool involves a significant initial capital outlay. It often requires the construction of an extension or an annex and may increase the size and cost of the special accommodation required because of the claimant's injuries. There are usually high maintenance and running costs. The cost was not simply therefore the annual cost of the therapy. Not surprisingly, a claim of this sort often attracts considerable scrutiny in personal injury litigation.
38. There was a stark expert dispute in *Lewis* between the physiotherapists called by either party. The claim was not advanced on the basis of hydrotherapy in the strict clinical sense, involving exercise in the water supervised by a physiotherapist. The therapeutic benefits were said to be derived from swimming and generally being in the water where the claimant could move her limbs freely. The defendant's case, supported by its expert, was that there was no therapeutic need and that any benefit was temporary, being limited to those occasions when the pool was used, and took the form of relaxation and enjoyment. It was in this context that the defendant contended that the high capital and associated costs of constructing and operating a pool were either not recoverable because they were unnecessary or that such a pool was not a reasonable method of delivering a minor benefit which could be provided in other ways. The claim for a pool

was allowed as the judge concluded, "not without some misgivings", that there were tangible therapeutic benefits to the claimant which would make a difference to the claimant's enjoyment of life and that other approaches were not feasible in all the circumstances.

39. At paragraph 88 of his judgment in the present case the Recorder said:

> "It is common ground that in order to succeed in his claim for future costs of his current prosthetic the Claimant has to prove a need and that the total projected cost of £157,000, less a few pounds, is fair and reasonable in all the circumstances. In the course of counsels' helpful submissions I have been referred to the first instance judgment of Sir Alistair MacDuff, given [sic] the case of Katie Lewis Shrewsbury Hospitals NHS Trust 2007 1WL UK 628, and in particular §§179-193 of the judgment which sets out the principles to be applied in circumstances [sic] future losses is being claimed in respect of what may be argued is an unnecessary special need in a claim for personal injury and loss. From these paragraphs I judged that the claimant has to establish that:
>
> a. There is a current genuine and future need for the appliance or item claimed, and;
>
> b. there is a genuine therapeutic benefit (physical and/or psychological) to be derived from the expenditure in question, and;
>
> c. there is no reasonable alternative means to achieve that same benefit, and;
>
> d. the cost of providing that benefit is reasonable in all the circumstances.

40. Although this may be a fair summary of the way issues were identified in *Lewis*, the judgment in that case does not set out, in these terms, four principles which have to be applied in cases involving an arguably "unnecessary special need" or matters which the claimant "has to establish". Subparagraphs a) and b) might be thought to be inseparable sides of the same coin which do not need to be qualified by the word "genuine". It is by no means clear that it is for a claimant to establish the proposition at c), particularly if what is meant is "no reasonable" cheaper "alternative means". The Appellant's counsel also questioned whether it was accurate to say that it was common ground that the Appellant had to show that the "total projected cost was fair and reasonable".

The Judgment

41. The Recorder allowed no future prosthetic costs but awarded the incurred costs of the prosthetics which the Appellant was already using. He set out his findings and conclusions at paragraph 88 of the judgment where he said: "Applying these principles to this case" (the principles he had identified in *Lewis*):
    i. "There is no tangible physical benefit to this claimant in having a prosthetic, indeed it presents as an interference to his work and leisure activities.
    ii. There is only marginal psychological benefit to the claimant from his use of the prosthetic. I accept that he was initially much more self-conscious of his missing fingertip, but that has improved over time when he didn't have one, and he identified in his witness statement and evidenced those situations where he now does not use it.

iii. The reality is that his use of the prosthetic is largely limited to social situations when he is in the company of strangers, as he is not concerned by the presence of friends, workmates and or fellow gym users, including some which are likely to be strangers, and perhaps when going to the pub, going shopping or travelling on public transport.

iv. That there are other reasonable options, especially in winter, when he can wear a glove or otherwise cover it. Whilst I found the claimant to be mainly straightforward and frank in his evidence, it was evident that, perhaps subconsciously, following his recent use of the prosthetic, that he was making more of his self-consciousness in his oral evidence than is consistent with his witness statement.

v. This was a distressing accident and resulting injury with unpleasant sequelae including the need for follow up surgery, but the residual present cosmetic impact is in my judgement modest, and whilst I accept I think the claimant's evidence that he feels more comfortable in certain social situations with the prosthetic, as he described in his witness statement, I'm not satisfied, applying the principles set out above, that there is a genuine long term need for a cosmetic prosthetic fingertip going forwards, or a genuine lasting therapeutic benefit to be gained from its use, but rather I find that it provides only a marginal benefit in a few social situations.

vi. In the final analysis, considering the nature of his injury, and what I judge to the occasional 'psychological' benefit to his current and future social life, the sum claimed of £156,940 is not justifiable as a 'reasonable' expenditure in all the circumstances.

vii. In so finding, I have reminded myself of the principles drawn from Lewis v Shrewsbury Hospital NHS Trust (and set out above) that this element of the claimants claim dwarfs all other elements of his claims for general and special damages which have accrued from a relatively minor injury, whereas in Lewis, the therapy pool was one element of a very large claim for someone who sustained devastating injuries at birth and his quality of life was very modest, but which quality of life would be significantly improved by the provision of the therapy pool. This issue is a relevant factor in determining the reasonableness or otherwise of such an award in this case."

Discussion and Conclusions

42. The Appellant's case had never been advanced on the basis that there was a physical or functional benefit to having a prosthetic, it was entirely concerned with the masking of the cosmetic disfigurement in social circumstances where the Appellant felt self-conscious.
43. Although the Recorder concluded that the Appellant was embellishing his evidence to some extent ("perhaps subconsciously") he nevertheless did not reach any finding rejecting the account given in his witness statements. The Appellant's explanation, of the nature and circumstances in which he wore the prosthesis, was supported by the Appellant's friend who also commented on the improvement in his self-confidence in social situations. The Recorder made no reference at all to the evidence of Mr. Czyzniakowski in his judgment.
44. The Appellant's evidence established that he had made an early inquiry as to the use of a prosthetic and had eventually been provided with one. He wore it consistently on the occasions when the cosmetic injury was of consequence to him, where the prosthetic helped to alleviate his concerns. His stated intention was to continue to use it. The

consultant plastic surgeons had endorsed a trial of the prosthetic as a reasonable step to take in finding a solution to the permanent cosmetic issue they had identified. This was not a case in which the court had to consider whether a particular therapy, which had not yet started, would in fact be pursued or an aid used, which had not yet been purchased. The liability outcome, resulting in a reduced recovery, was to be ignored in this respect (see *Manna* above).

45. Mr Haider's report of August 2022 referred to the Appellant's concerns about the appearance of the amputation site and commented: "from my experience, this is normal with finger loss amputees."
46. Mr Haider does not appear to have disputed the fact that the Appellant was wearing the prosthetic and obtained a benefit from doing so. His position, although not based upon any assessment of the Appellant himself for the purpose of his report, was that at some point in the future he would cease to do so. Mr Haider had in fact supplied and fitted a finger prosthetic to patients with an equivalent injury because he was able to give evidence about whether they were inclined to return for a replacement. He must have done so for cosmetic reasons given the agreed evidence as to the lack of a functional reason for the use of a prosthetic with an injury of this type. His own prosthetics business appears to make prosthetics of the same type worn by the Appellant.
47. The Respondent submitted that the Recorder must "implicitly" have rejected the Appellant's evidence that he obtained a benefit, which was significant for him, on the occasions when he wore the prosthetic and would do so in future. That was a tacit acknowledgement of the fact that the Recorder's findings do not involve any express or implicit rejection of the Appellant's evidence in this respect. He found the Appellant to be mainly straightforward and frank and accepted that he felt more comfortable in certain social situations with the prosthetic. The fact that the use of the prosthetic was largely limited to social situations when the Appellant was in the company of strangers was not surprising; nor did that mean that the Appellant did not have a need to conceal his finger on those occasions. Mr Haider's evidence on the point was that "this prosthesis is often used for special social occasions where the hand is likely to be exposed to the public" and that concern about the appearance of an amputation site was normal.
48. Social occasions on which the hand was likely to be exposed were not situations in which the Appellant could generally "wear a glove or otherwise cover it". The other "reasonable options" were limited to putting his hand in his pocket. Although the Appellant had not been able to obtain the prosthetic until some years after the accident that meant that he had some experience of his reaction to social situations of the sort he described in his witness statement and that he had tried to cope with the appearance of his finger without a prosthetic. By the time of the trial, he had been wearing the prosthetic, successfully, for nearly a year. Although, as the Recorder observed, there were "pros and cons" to wearing a prosthetic the issue was whether it was of benefit to the Appellant for the reasons he gave in his witness statements. The Recorder's conclusion that the Appellant could wear a glove or, in effect, put his hand in his pocket would appear to acknowledge that the Appellant would wish to do so to hide the amputation site.
49. Since the Recorder accepted "the claimant's evidence that he feels more comfortable in certain social situations with the prosthetic, as he described in his witness statement" it is not clear why the Recorder considered the benefit to the Appellant to be "marginal". There are many types of aid which will only be employed in specific circumstances and within the limits of what can be achieved by their use. The pool in *Lewis* only conferred a direct benefit while the claimant was using it. Social settings are precisely the

circumstances in which cosmetic injuries might reasonably be anticipated to be of greatest concern to the Appellant. A reduction in anxiety and an increase in self-confidence might be thought to be the principal benefit which a high-quality cosmetic prosthetic could confer. This was what the evidence indicated in the Appellant's case. It is difficult to see what other benefit could be achieved.

50. If the prosthetic was used on a limited number of occasions during the course of a year (at the weekends mainly according to the evidence) that would be reflected in the lifespan of the prosthetic and the annualised cost. The logical consequence of the Recorder's approach was that the Appellant had no need to use a prosthetic in future and should mitigate his loss by wearing gloves or putting his hand in his pocket. That does not appear to me to be consistent with the evidence which the Recorder had accepted. The fact that the Appellant felt compelled to hide his hand was the very reason why he had enquired as to the possibility of using a prosthetic. The fact that he otherwise had to take such measures was the context in which the use of a prosthetic allowed him to behave normally and not hide his entire hand.
51. The finding that the Recorder was not satisfied that there was "a genuine long term need for a cosmetic prosthetic fingertip going forwards, or a genuine lasting therapeutic benefit to be gained from its use" begs the question of whether there was a need and a benefit in the short or medium term. The high point of Mr Haider's evidence was that concern over the appearance of an amputated finger was normal, that a cosmetic solution involved the fitting of a prosthesis, as he himself had done in similar cases, but that its use would, in many or most cases in his experience, be discontinued at some future point (in the "long term" according to the Respondent's counter schedule). If that was the evidence that the Recorder had accepted then it would have required an assessment of the period over which the Appellant would have continued to wear the prosthesis and benefit from its use. That appears to have been contemplated in the Respondent's evidence and submissions.
52. What seems to have weighed with the Recorder was the benefit to the Appellant's "current and future social life" set against the high lifetime cost of the prosthetic. The overall cost of the prosthetic was the result of applying the Appellant's agreed lifetime multiplier to the annualised cost of replacement prosthetics. There was little or no dispute about those annual costs between the experts, at least until Mr Haider qualified the opinion expressed in his report. This was not a case which involved a significant capital outlay at the outset, as in *Lewis,* and in any event by the time of trial the initial cost was a past loss and was allowed, presumably on the basis that the Appellant had a genuine cosmetic concern which it was reasonable for him to have addressed by obtaining and wearing the prosthetic. If that had been on a trial basis initially then it was successful according to the evidence of the Appellant and his witness. The issues which emerged as to the cost of a future replacement and the period before, on the Respondent's case, the use of a prosthetic might be abandoned were either not addressed in the Respondent's expert evidence prior to trial or were not quantified.
53. It follows that the conclusion reached that there should be no future award was not one, in my view, that reflected the evidence that the Recorder had accepted and was not a conclusion that he could have come to on that evidence. Mr Haider's reservations were about long-term use but not a rejection of the present use of the prosthetic. Since there was no substantial disagreement about the annual cost it was artificial in those circumstances to frame the case as involving an issue as to whether a sum of £156,940 could be "justified as reasonable expenditure". This was not the initial capital outlay but the product of applying the multiplier in the case of a claimant who was relatively young. The cost would not have been objectively more reasonable if it had been reduced

because, as the Respondent contended, the cost of replacement was lower or the period of use shorter.

54. For these reasons I allow the appeal in relation to that part of the order appealed which was consequent upon the finding that there was no future loss in relation to the cost of prosthetics.
55. I have considered whether I could reach a finding on the appeal which I could substitute for that reached by the Recorder and so vary the order. There is a Respondent's notice which, in the alternative to its case that the appeal should be dismissed, seeks to increase the sum awarded by £1,585 to "reflect the limited future use that the appellant is likely to make of the cosmetic prosthetic".
56. I do not consider that that course is open to me. I could not reach a conclusion on the material before me as to whether the Appellant will continue to use the prosthetic and if so, with what frequency and over what period. I accept the parties' submissions, made at the hearing, that in those circumstances the appropriate order is to remit the issue of future prosthetics back to the County Court for consideration by a different judge.

Set Off

57. After the handing down of the judgement there was a further hearing to deal with costs and consequential orders. A question was raised as to whether the appellant had in place an "After The Event" (ATE) insurance policy which would respond to a claim for costs against him or whether the insurers would repudiate liability on the claim. The ATE policy was disclosed voluntarily at the Recorder's request but it was not possible on the day of the hearing to obtain an express indication that the policy would meet a claim. A number of the queries raised by the Respondent would have entailed consideration of privileged correspondence. The Recorder refused an adjournment or an extension of time and made an order permitting the Respondent to set off the damages it was required to pay against costs awarded in its favour (paragraph 4 of the order made after the hearing of 23rd December 2022).
58. There had been no finding of fundamental dishonesty. Although the Recorder had not accepted all of the Appellant's evidence there was nothing to suggest any basis for repudiation. The effect off the set off was that the Appellant recovered nothing in a case in which liability had been admitted and where he had obtained ATE insurance to cover his potential costs exposure. The grounds of appeal are, essentially, that the order was unjust given its effect and that the appropriate course in these circumstances would have been to allow the application for an adjournment for the issue to be resolved between the parties.
59. Further information in relation to the insurance position was sent to the Respondent's solicitors in January 2023. Following the hearing before me the Respondent reflected on the position and has indicated, without accepting that the Recorder was wrong, that had the same information been before the Recorder in December, the Respondent would not have sought the set off that was ultimately ordered. The Respondent it is prepared to accept that paragraph 4 of the order appealed should be set aside.
60. Whether or not the Appellant was obliged to have supplied more information about his insurance position prior to the December hearing, which is far from being obviously the case, it is clear that any queries were resolved relatively swiftly after the hearing. Given the consequence to the Appellant of not granting what would have been a short adjournment it is difficult to see how the course taken by the Recorder properly balanced any potential prejudice to the Defendant against the obvious prejudice to the

Appellant. The Recorder knew, because it had been made clear in submissions, that the Appellant would receive nothing if the set off was ordered. He appears to have been prepared to allow further clarification of the position if it could be obtained on the day but not otherwise.

61. Had the Respondent not taken a pragmatic view as to how this aspect of the appeal should be dealt with, I would have concluded that paragraph 4 of the order should be set aside, as it is now agreed it should be.