DB, R (on the application of) v Criminal Injuries Compensation Appeal Panel [2002] EWHC 698 (Admin) (24th April, 2002)

Neutral Citation Number: [2002] EWHC 698 (Admin)
Case No: CO/3286/2001

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL
24 April 2002

Before:

THE HONOURABLE MR JUSTICE STANLEY BURNTON

The Queen on the application of DB **Claimant**
- and -
Criminal Injuries Compensation Appeal Panel **Defendant**

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

Adrian Whitfield QC (instructed by Barcan Woodward) for the Claimant
Robin Tam (instructed by the Treasury Solicitor) for the Defendant

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HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

Mr Justice Stanley Burnton:

Introduction

1. In these proceedings the Claimant, to whom I shall refer by his initials DB, seeks judicial review of the decision made by a Criminal Injuries Compensation Appeal Panel, consisting of Mr Charles Whitby QC and Mr John Hugill QC, given on 17 May 2001, awarding him compensation in a total sum of £1,141,582.

2. DB was born on 26 April 1980. He was thus aged 21 at the date of the decision. He had suffered massive brain damage as a result of a non-accidental injury in infancy, caused by violent shaking by his natural mother. He is totally dependent on others in all matters of daily living, and will remain so for the rest of his life. He has spastic quadriplegia, and his mobility is severely limited. He requires a wheelchair. He cannot feed himself. He has very limited capacity to communicate. He is doubly incontinent. He suffers from epileptic attacks. In 1999 he was placed at a college where he is taught basic IT skills.

3. DB is cared for by his adoptive mother, to whom I shall refer as Mrs B. She is aged 47. She fostered DB when he was 23 months old and adopted him in March 1983. She is a remarkable lady, who in addition to DB in 1984 adopted a girl with Down's Syndrome. She was then married, but soon after the adoption her husband left her, and they were subsequently divorced. She now lives with her partner. He does not carry out the personal care of DB, but helps with household chores and with lifting DB, which is necessary every 3 to 4 hours in order to change his nappies.

4. Before the Panel DB was represented by Mr Adrian Whitfield QC, who similarly represented him before me. Mrs B gave evidence to the Panel by way of her witness statement and orally. She produced a video, which the Panel viewed, of DB and the family in their previous house. A document produced by Mrs B summarising DB's history contained the following passages:

> "(DB) between eleven and sixteen
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> After the diagnosis of (DB's) illness his general health improved. He began to gain weight and to grow. Although this was great to see he became increasingly difficult to lift and carry. This resulted in me injuring my back and neck on many occasions and I underwent various treatments by osteopaths. (DB) as before still needed total care and still had disturbed nights.
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> ...
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> (DB) aged between sixteen and twenty
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> ... Recently I have again started to suffer with back and neck problems and I am having another course of treatment from the osteopath."

5. In her witness statement Mrs B stated that her then home was unsuitable for DB, and that she and her partner would like to buy a bungalow which they had found and convert it so that DB could be moved around easily and bathed in a bath, and in which there would be room for his equipment and a carer. Plans were produced of the bungalow in its then form and as it would be if the building work proposed by Mrs B was carried out.

6. The panel had a number of medical reports and heard from Dr Lewis on the issue of DB's life expectancy, as to which no issue is now taken. In addition, there was a nursing care report dated 19 December 2000 of Maggie Sargent, which valued the care DB had received in the past and was receiving from Mrs B and estimated the cost of future professional paid care. The report stated:

> "Currently (DB) is looked after by his adoptive mother, who is aged 46 years, with the help of her partner, who is aged 47 years. They are both in good general health, but are suffering with neck and back problems and will not be able to continue looking after (DB) in the long term without a team of carers to give them respite. Mrs (B) does not want him to go into a home and is very keen that he should remain in future with the family with paid support. ..."

7. Mrs Sargent stated that DB would need carers for 16 hours a day and a sleep-in carer paid 4 hours for a total of 8 hours worked at night, and a second pair of hands for transfers for a total of 6 hours a day. This was costed at approximately £96,000 per year after the first year, when the cost would be some £98,500.

8. The report of the physiotherapist stated:

> "(DB) is reliant on maximal assistance for all mobility functions.
>
> 1. Transfers: (DB) is lifted for all "transfers" onto or off the armchair, wheelchair, or bed. I observed that (Mrs B) achieves this by holding (DB) by the rigid framework of the splint. This places unacceptable strain on (Mrs B's) back and neck and places her at a high risk of injury to her back. She reported that she now experiences pain in her neck and back, for which she has regular osteopathy treatment. This is not at all surprising given the number of times she has to lift (DB) in a typical day."

9. Apart from the above references in the report of Mrs Sargent and the physiotherapist, there was no independent medical evidence as to the condition of Mrs B's back.

10. During the hearing, the Panel asked Mrs B whether or not she would actually employ the carers envisaged in Mrs Sargent's report. Mrs B said that she would, as she could not continue looking after DB anymore. She told the panel that she had a bad back and visited an osteopath regularly for help with her back. She explained that the osteopath had told her that lifting DB, something that she did five or six times a day had caused the damage to her back. She said that she was worn out and needed some help. She would continue to care for DB's emotional needs and be "mum" but wanted to hand over all of his physical care to the carers.

11. The claim before the Panel included, in addition to the claim for pain, suffering and loss of amenity, a claim for £170,000 for past care and £1,500,000 for future care, based on Mrs Sargent's report and a multiplier of 13.35.

12. Mr Whitfield made his submissions to the Panel. After retiring, the Panel announced their award. The award made by the Panel included the sum of £100,000 for past care and the sum of only £425,000 for future care. It is the award for future care alone of which complaint is made on behalf of DB, and which is the basis of the claim for judicial review. The Panel initially gave no reasons, but read out the figures that they had arrived at. The difference between the amount claimed and the amount awarded for future care was so great that DB's solicitor was shocked and disappointed, and could not understand how the Panel had reached their decision. She thought the panel must have made a mistake. Mr Whitfield QC made further submissions about the care claim and asked the Panel on what basis they had reached their decision, and to reconsider it. The Panel again conferred in private. When the hearing was reconvened, the Panel said that they thought that no professional care would be obtained for some considerable time. They said that they thought Mrs B would continue to care for DB for the next seven to ten years. They would allow her £10,000 per year to do this in line with the rates claimed for past care with a reduction of a third for the gratuitous nature of the care. They said that they had allowed a contingency figure for the rest. They also said that they had made a slight adjustment in favour of DB in that they had used a multiplier of 14. They said that the award of £425,000 would stand.

13. Subsequently the Panel sent to DB's solicitors written reasons for their decision in relation to future care. After setting out the background the Panel stated:

> "In considering the claim for future care there were three issues. They were:
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> (1) First the overall period for which care would be necessary. This would depend on the applicants life expectancy.

> (2) Secondly, for how long (Mrs B) and her partner would continue to care for the applicant. Her case was that a full time professional care regime would start and should be paid for almost immediately.
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> (3) Finally, what the fair rate should be for professional care provided. This was in our view pitched high in the applicant's care reports. Various figures of the order of £100,000 a year were submitted. Maggie Sargent's report suggested £98,578 for year 1 and £95,578 p.a. thereafter. The applicant's schedule put the first nine months at £74,984 (£100,000), thereafter at £99,308 a year."

The Panel referred to Mrs B's evidence, including her evidence that she had a bad back and required help with DB and that she and her partner were finding it more difficult to cope; and that it was her intention to employ professional carers for DB. She had told them that she hoped the family would be in a position to move into their new home in August 2001. The written reasons continued:

> "On the issue of future care we did not consider that (Mrs B) would cease caring for (DB) as soon as the new home was purchased. She had looked after (DB) and her other adopted child in a wholly remarkable maternal fashion, and we did not accept that she would, or would be able to change so far as (DB) was concerned and run a regime staffed by professionals in a virtual annex to her home. We were firmly of the opinion given her age and physical health that she would continue with the present system which she said was in (DB's) best interest. This accorded with the way she ran her life and followed from (DB's) adoption. There was no medical evidence before the Panel to support the suggestion that (Mrs B's) back prevented her caring for (DB), nor was it supported by her appearance before us or on the video. However, we considered it was likely that after some years she would require increasing assistance towards the end of (DB's) life.
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> She was aged just 47. Our initial view was that she would continue for 10 years, but we revised that to a period which provided a multiplier of 7 years. In the light of that view, for the initial period represented by the 7 year multiplier, we used the annual rate which we considered appropriate for past care. We awarded £10,000 per annum for 7 years, in total £70,000.
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> We considered that (DB) would receive some professional care after the period represented by the initial multiplier of 7 years. The claim for the cost of future care by professional carers was set out in detail in the applicant's schedule at £99,308.74 per annum. We considered figures of that order were too generous to the applicant, were unlikely to be implemented, and that (Mrs B) would continue to have input into his care. We looked with care at the schedule and we assessed the cost of (Mrs B's) continued participation together with a likely increase for the cost of professional future care as being £350,000 which equated to a multiplier of 7 x £50,000, for the balance of the overall multiplier of 14 years. The figure of £50,000 was assessed as the value we put on (Mrs B's) continuing care together with what we considered it would be necessary to pay for additionally for professional care. We added that the £70,000 from the first 7 year period and rounded the calculation up to a figure of £425,000."

14. The evidence before me included a witness statement of Mr Whitby QC, with which Mr Hugill QC was stated to have agreed. It added little to the written reasons referred to above.

15. The decision of the panel was made under the terms of the 1990 Criminal Injuries Compensation Scheme. Paragraph 12 of the Scheme required compensation to be assessed on the basis of common law damages.

16. The principal bases for judicial review contended for DB are that the decision of the Panel should be quashed for insufficiency of reasons, on the basis that in any event it was not consistent with common law as required by Paragraph 12 of the Scheme and was not supported by the evidence; that the Panel had rejected the unchallenged evidence of Mrs B and Mrs Sargent; and that the Panel's decision was unreasonable.

Insufficiency of reasons

17. It is undoubtedly in general insufficient for a tribunal simply to give the figures it has determined to award an applicant with no explanation as to how they have been arrived at: see the well-known statement of Sir John Donaldson in *Alexander Machinery v Crabtree* [1974] ICR 121, 122B. The initial announcement by the Panel of its decision was clearly insufficiently reasoned. However, the Panel subsequently gave reasons orally and in writing, and in Mr Whitby's witness statement. The question arises whether the written reasons of the Panel are adequate.

18. In *R v Immigration Appeal Tribunal, ex parte Khan* [1983] 2 All ER 420, Lord Lane CJ said, at 423c:

> "A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not."

19. In *Flannery v Halifax Estate Agencies Limited* [2000] 1 WLR 377, the Court of Appeal set aside a judgment where the trial judge had failed to give reasons for his preferring the evidence of the Defendants' experts as against those of the Plaintiffs. The Court stated the applicable principles at 381:

> "It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye-witness accounts is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible: see *de Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), pp. 465-466, para. 9-049. But with expert evidence, it should usually be possible to be more explicit in giving reasons: see Bingham L.J. in *Eckersley v. Binnie* (1988) 18 Con. L.R. 1, 77-78:
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> > "In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons. The advantages enjoyed by the trial judge are great indeed, but they do not absolve the Court of Appeal from weighing, considering and comparing the evidence in the light of his findings, a task made longer but easier by possession of a verbatim transcript usually (as here) denied to the trial judge."
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> We make the following general comments on the duty to give reasons.
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> (1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave* [1994] 1 WLR 98) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
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> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
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> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence)

> to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
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> (4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

20. Subject to the question of expert evidence, in my judgment the written reasons given by the Panel were adequate. They explained sufficiently the basis for its decision in relation to the cost of future care.

21. So far as expert evidence is concerned, the relevant evidence was that of Mrs Sargent. However, as Mr Tam submitted, the Panel did not reject Mrs Sargent's evaluation of the cost of future care by professional carers, if they were employed to the exclusion of Mrs B. The Panel rejected Mrs B's evidence of her intentions and abilities, and considered that the care described in Mrs Sargent's report was unlikely to be implemented.

22. In my judgment, therefore, the written reasons given by the Panel were adequate. It is clear from those reasons what findings of fact were made, why and what followed from them. Indeed, it is because those reasons are sufficient that Mr Whitfield is able to attack them as being based on an incorrect of the law.

23. I add that Mr Whitfield referred to the Panel's initial reference to the award of a contingency figure as being inappropriate and inconsistent with common law. What the Panel meant by this seems to have been explained in their subsequent written reasons, albeit not totally satisfactorily. I take them to have referred to the award for future totally professional care, which in a sense was contingent on DB requiring such care when the Panel assessed he would do so. I do not regard the inconsistency, if there be such, between their reference to a contingency figure and their written reasons sufficient to cast doubt on the genuineness of the written reasons for their decision.

24. In my judgment, therefore, the reasons given for the Panel's decision were not such as to justify judicial review. I therefore turn to consider the question whether the Panel made an error of law in arriving at their decision.

Error of law

25. Mr Whitfield submitted that at common law damages would have been awarded on the basis of Mrs Sargent's valuation of the cost of care irrespective of whether the care package so costed was in fact implemented. He referred me to and relied upon the judgment of Bridge LJ in *Daly v General Steam Navigation Co.* [1981] 1 WLR 120, at 127B:

> "I approach, first, the judge's assessment of the future loss in this respect. It has been energetically argued by Mr. Bennett, for the defendants, that before future loss of capacity to undertake housekeeping duties can properly be assessed at the estimated cost of employing some third person to come in and do that which the plaintiff is unable to do for herself, the plaintiff has to satisfy the court that she has a firm intention in any event that such a person shall be employed. For my part, I am quite unable to see why that should be so. Once the judge had concluded, as this judge did, that, to put the plaintiff, so far as money could do so, in the position in which she would have been if she had never been injured, she was going to need, in the future, domestic assistance for eight hours a week, it seems to me that it was entirely reasonable and entirely in accordance with principle in assessing damages, to say that the estimated cost of employing labour for that time, for an appropriate number of years having regard to the plaintiff's expectation of life, was the proper measure of her damages under this heading. It is really quite immaterial, in my judgment, whether having received those damages, the plaintiff chooses to alleviate her own housekeeping burden, which is an excessively heavy one, having regard to her considerable disability to undertake housekeeping tasks,

> by employing the labour which has been taken as the basis of the estimate on which damages have been awarded, or whether she chooses to continue to struggle with the housekeeping on her own and to spend the damages which have been awarded to her on other luxuries which she would otherwise be unable to afford."

26. Mr Tam submitted that the issue addressed by the Panel, on which it made a finding adverse to the Claimant, was that his need was not that put forward on his behalf: his need was for care which, the Panel found, would be met by Mrs B for 10 years. He submitted that in making their assessment the Panel applied the rules of common law.

27. The approach of Mr Tam has the merit that it is consistent with the award made by the Panel, and indeed that sought on behalf of DB, in respect of past care. If damages are to be assessed by reference to need, rather than actual expenditure, one would perhaps expect the same basis to be applied to past, as well as future, loss. However, logical consistency is not necessarily appropriate. In *Daly* itself, Bridge LJ continued, at 127G:

> "As a matter of strict logic it might seem to follow from that that the same reasoning ought to apply to the period elapsing before trial, but if that is the strictly logical conclusion, then I think there is a fallacy in the logic somewhere. Looking at the matter as one not so much of logic as of practical reality, the fact is that the plaintiff is unable to say that she has incurred the cost of employing the labour which no doubt she needed in the years which intervened between the accident and the trial, ignoring the times when she was in hospital. What she has done and what she has had to do for lack of means to do otherwise, has been to manage as best she could with all the disabilities from which she was suffering and with the assistance of such help as her husband and daughter were able to give her.
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> Mr. Hamilton, for the plaintiff, has argued strenuously that the judge's award under this head, the figure of £2,691 based on 299 weeks' domestic help at £9 a week, can be understood as his evaluation of the domestic help which was rendered to the wife by her husband and daughter; but, although this may have been pleaded and argued, I can find no trace of any such finding in the reasoning of the judge's judgment. With the utmost respect to the judge, I cannot think that, as a matter of principle, it is a correct method of evaluating what is essentially an element in the plaintiff's pain and suffering and loss of amenity, caused by the additional difficulties she had had in doing her housekeeping work, to take the figure which it would have cost her to employ someone, whom she has not in fact employed in the past, to take that burden off her shoulders."

28. As can be seen, Bridge LJ did not identify the logical fallacy in question. Be that as it may, it appears that the strict logic of his statement of principle for the calculation of future loss has not been applied generally in care cases. *Kemp & Kemp* states, at paragraph 5-015/1 (with my added italics):

> "Before we consider various regimes of care, etc., a word of warning may be in order. It is highly desirable that the appropriate regime be put in operation as soon as possible. Not only does this provide the claimant with what he requires to alleviate his condition, but it makes it much more difficult for a defendant to attack the cost of such regime as extravagant *or the regime unlikely to be adopted* [sic]. *Courts look with some scepticism on expense regimes which are not in operation by the time of the trial.* An instance is provided by the Court of Appeal's reaction in *Havenhand v Jeffrey*.

29. *Havenhand*, in which judgment was given on 24 February 1997, is unreported, other than in *Kemp & Kemp*. Allowing the Defendant's appeal in that case, Otton LJ said:

> "The award depends on four premises based on the balance of probabilities:
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> (1) That the level of day and night care within her home contended for was in fact required;
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> (2) That the total regime would be put into immediate effect from the date of judgment;
>
> (3) That this regime would continue for the rest of her life;

> (4) That the reasonable cost of providing this level of care was a staggering £46,791 per annum, or almost £900 per week.
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> There is reason to doubt each of these premises. The level of day and night care was not in place before, or at the time of, trial. The level of actual provision fell well below that, notwithstanding an interim payment and the undoubted availability of further interim payments if required. More significantly, the regime has not even now been put into effect. The explanation given is that the plaintiff wished to be cautious in view of the impending appeal. I regret that I cannot accept this as the sole explanation.
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> ....
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> It is never a pleasurable task to reduce a plaintiff's damages, particularly for a person of indomitable spirit who has coped so courageously with the disastrous effects of an accident. However, it was most unfortunate, in my view, that the magnitude of the plaintiff's claim for future care was only made apparent in the last few weeks before trial. The defendant showed an admirable sense of responsibility by not seeking an adjournment in view of the plaintiff's advancing years. Even so, it behoved the Judge to scrutinise closely this aspect of the claim, and not to accept without question the premise upon which the claim was advanced."

30. *Havenhand* was decided in February 1997. It is difficult to think that the Court of Appeal in that case, consisting as it did of Beldam, Otton and Thorpe LJJ, was not aware of the principle in *Daly*.

31. Similarly, in *Nash v Southmead Health Authority* [1993] PIQR Q156, in which the plaintiff had also suffered very serious injuries, including cerebral palsy, Alliott J determined first how long he was likely to remain in his parents' home before deciding the cost of future care. If damages for future care were to be assessed by reference to the need for care alone, that step would, it would seem, have been unnecessary. A similar approach was followed by HH Judge David Clark QC, now the Recorder of Liverpool, in *Fairhurst v St Helens and Knowsley Health Authority* [1995] PIQR Q1, in which he the contention of the plaintiff that a paid helper would be engaged, and found that the plaintiff would be cared for by her parents under the then care regime for about half the plaintiff's anticipated life-span.

32. The earlier Court of Appeal judgment in *Housecroft v Burnett* [1986] 1 All ER 332 is also inconsistent with Mr Whitfield's submission. O'Connor LJ said, at 342:

> "Where the needs of an injured plaintiff are and will be supplied by a relative or friend out of love and affection (and, in cases of little children where the provider is parent, duty) freely and without regard to monetary reward, how should the court assess 'the proper and reasonable cost'? There are two extreme solutions: (i) assess the full commercial rate for supplying the needs by employing someone to do what the relative does; (ii) assess the cost at nil, just as it is assessed at nil where the plaintiff is cared for under the national health scheme, but let me say at once that the defence in the present case has not contended for the second solution. The reason why a nil assessment is made where the plaintiff is to be looked after under the national health service is because no expense will be incurred in supplying the needs (see the speech of Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* at 918, [1980] AC 174 at 187–188). It follows that in assessing the 'proper and reasonable cost of supplying the needs' each case must be considered on its own facts, but it is not to be assessed regardless of whether it will be incurred.
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> The earlier cases were mostly concerned with recovering earnings lost by the caring relative as a result of looking after the plaintiff. The more recent cases show that substantial sums have been assessed when the relative has not given up any employment. In *Taylor v Glass* (23 May 1979), referred to in Kemp and Kemp *The Quantum of Damages* vol. 2, para 1—715, Smith J assessed the loss on the open market rate, it having been agreed that if what the parents did had to be bought on the open market the cost would be £50 per week. In *Moser v Enfield and Haringey Area Health Authority* (1982) 133 NLJ 105, referred to in Kemp and Kemp *The Quantum of Damages* vol. 2, para 1—721, Michael Davies J assessed the mother's care at £3,000 per annum out of a total of £12,000 per annum for future care. Very often we find rates being agreed and, as is shown by the approach of the judge in the present case, regard is had to what it would cost to buy the services in the open market, but it is scaled down.

> I have found this a very difficult problem. For the reasons given by Megaw LJ in *Donnelly*'s case, I am very anxious that there should be no resurrection of the practice of plaintiffs making contractual agreements with relatives to pay for what are in fact gratuitous services rendered out of love. Now that it is established that an award can be made in the absence of such an agreement, I would regard an agreement made for the purposes of trying to increase the award as a sham. I suspect that the proper assessment has been influenced by the status of the money. In *Cunningham v Harrison* [1973] 3 All ER 463 at 469, [1973] QB 942 at 952 Lord Denning MR said that the money would be held in trust for the wife. This statement was obiter, and although we have heard no argument on this point it seems to me to be inconsistent with the reasoning in *Donnelly v Joyce*. Once it is understood that this is an element in the award to the plaintiff to provide for the reasonable and proper care of the plaintiff and that a capital sum is to be available for that purpose, the court should look at it as a whole and consider whether, on the facts of the case, it is sufficient to enable the plaintiff, among other things, to make reasonable recompense to the relative. So, in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the plaintiff to achieve that result. The ceiling would be the commercial rate. In cases like the present I would look at the award of £108,550, remembering that there is in that sum a sum of £39,000 over and above the sum required to provide the expected outgoings, and ask: is this sufficient to provide for the plaintiff's needs, including enabling her to make some monetary acknowledgment of her appreciation of all that her mother does for her? I would also ask: is it sufficient for this plaintiff should her mother fall by the wayside and unable to give as she gives now? I have no doubt that in this case the answer is Yes to both questions.
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> The court is recognising that part of the reasonable and proper cost of providing for the plaintiff's needs is to enable her to make a present, or series of presents, to her mother. Neither of the extreme solutions is right. The assessment will be somewhere in between, depending on the facts of the case.
>
> I would not interfere with the judge's final assessment of £3,000 per annum as the provision for the mother's care. As I have said, I think that he omitted to make any provision for giving Mrs Housecroft a break, but when this is capitalised at £7,000 it is substantially less than the amount by which I think that the judge was over-generous in his assessment for pain, suffering and loss of amenity. I would not make any increase in the award under this head."

33. In the light of these authorities, I conclude that Mr Tam's submission is correct. It is perhaps odd that the quantification of DB's loss should depend on the willingness of his mother to care for him. However, it is not surprising that the award of damages to cover the cost of future care, which in cases such as this is the largest component of damages, should depend on whether, when and for how long that cost will in fact be incurred. It was necessary for the Panel to determine whether and when Mrs B would cease to care for DB. It follows that the Panel did not make an error of law in doing so, and in making their award on the basis of their findings.

Unreasonableness and failure to take into account relevant evidence

34. Mr Whitfield QC submitted that the Panel had erred in rejecting the undisputed evidence of Mrs B and of Mrs Sargent. So far as Mrs Sargent is concerned, as mentioned above, the Panel did not reject her evidence as such: they rejected the evidence of Mrs B that she would employ the carers envisaged by Mrs Sargent as soon as Mrs B stated she would. The real question therefore is whether the Panel were entitled in the circumstances of this case to reject part of Mrs B's evidence.

35. The case for the Claimant was put graphically in his solicitor's witness statement:

> "Experience suggests that a claim of this sort in the Civil Courts even if disputed would expect to attract damages of approximately £2m.. It is difficult to imagine a High Court Judge approving a settlement on behalf of a patient of £1,349,000 (the award with minimal benefit deduction) when the undisputed evidence is of a claim of £2,616,784."

36. It is correct that the Panel had before it no evidence contradicting that of Mrs B. However, the procedure of the Panel is not adversarial, but more inquisitorial. There is no defendant or respondent

before the Panel. It is for the applicant to satisfy the Panel of the facts on which the award he seeks is based. He may fail to do so although no adverse evidence is before them: see *R v Criminal Injuries Compensation Board, ex p Milton* [1997] PIQR P74 at P81. The Panel did ask Mrs B whether she would actually employ the carers. She gave evidence about her state of health and of her back. Save in the respects to which I refer below, there was no medical evidence to support an assertion that she would be compelled in the very near future to give up caring for DB as she had in the past. Her evidence did not satisfy the Panel.

37. I turn to the questions, connected with the preceding question, whether the Panel failed to take into account relevant evidence (namely the evidence as to the condition of Mrs B's back) and whether the decision of the Panel was unreasonable, in the sense of being a perverse decision in the light of the evidence before them. These are not two separate questions, but interconnected questions.

38. In considering these questions, I bear in mind that the Panel is a specialist tribunal whose members were drawn from practitioners with long experience of personal injuries litigation. This Court is a court of review, not a court of appeal or a court that may simply redetermine the merits of DB's claim. The Court must defer to the Panel in relation to its findings of fact and assessments of future conduct based on those findings unless convinced that they ignored relevant evidence or acted perversely: c.f. *R v Hillingdon LBC, ex p Puhlhofer* [1986] 1 AC 484, per Lord Brightman at 518E; *R v Parole Board, ex p Watson* [1996] 1 WLR 906, 917C-D; *R v the Director General of Telecommunications, ex p Cellcom Ltd* [1999] COD 105 at paragraphs [26] to [27].

39. The evidence relating to the condition of Mrs B's back was principally her own evidence of the increasing difficulty of lifting DB, that she had a bad back and that she had consulted and was regularly visiting an osteopath. There was no report from her osteopath or any other medical expert on the condition of her back. However, Mrs B's evidence received support from that of the physiotherapist cited in paragraph [8] above.

40. As mentioned above, Mrs Sargent stated in her report that Mrs B and her partner:

> "... are both in good general health, but are suffering with neck and back problems and *will not be able to continue looking after (DB) in the long term* without a team of carers to give them respite."

The italics are mine. This statement did not suggest that the condition of Mrs B's back was such as to make her replacement by a team of carers immediately necessary. Furthermore, Mrs Sargent advised that a suitable hoist system should be installed in DB's home. DB's claim before the Panel included, as Item M.14, the cost of about £19,000 of a hoist system. The Panel's award included £110,000 for equipment (as against £152,227 claimed), and they may have assumed that such an important item as a hoist system would be purchased out of that sum, and that with such a system Mrs B would be able to continue to care for her son for some years despite her bad back.

41. In the light of the physiotherapist's report, and notwithstanding the assumption that I am prepared to make that the Panel envisaged that a hoist system would be purchased by Mrs B from their award, I am surprised that they considered that Mrs B, aged 46, would, with her partner, be able to care for DB for the period that would produce a multiplier of 7 years. However, I am unable to conclude that that finding was perverse, or that in making it the Panel must have ignored significant relevant evidence. Their determination was one open to them on the evidence before them.

42. Mr Whitfield also criticised the written reasons given by the Panel in stating that they:

> "...did not accept that she would, or would be able to change so far as (DB) was concerned and run a regime staffed by professionals in a virtual annex to her home."

Mr Whitfield criticised the reference to the proposed conversion of the bungalow that DB wished to buy as a "virtual annex". The drawing of the proposed ground floor plan of the building shows that the rooms that would be occupied by DB and his carer would have limited access from the remainder of the building. The only entrance / exit appears to be from the covered way at the rear of the building. I do not think that the description of the rooms for DB and his carer as a "virtual annex" was incorrect or misleading.

Conclusion

43. The award made by the Panel was not generous. Based on the evidence I have seen (and I have not had the advantage of the oral evidence of Mrs B) it is not the award I should have made. However, I have been driven to conclude that there are no grounds for quashing the Panel's decision.

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MR JUSTICE STANLEY BURNTON: My judgment has been distributed to the parties in draft and sets out the reasons for my rejection of the claimant in this case.

THE DEFENDANT: My Lord, I act for the defendant today and ask for the costs, those costs to be determined pursuant to CPR registration rule ---

MR JUSTICE STANLEY BURNTON: That means you only get such an amount as it is reasonable to -- --

THE DEFENDANT: That is correct.

MR JUSTICE STANLEY BURNTON: -- is the normal -- what used to be a football pools order. I understand that that is not opposed.

THE DEFENDANT: My Lord, I think agreement on that was reached late yesterday evening.

MR JUSTICE STANLEY BURNTON: So there will be an order in those terms.

THE DEFENDANT: My Lord, I am grateful.

MR JUSTICE STANLEY BURNTON: Copies of the judgment are probably available for reporters and press. I do not think it is as interesting as yesterday's.
