

Quantum in birth injury claims



David Sharpe KC
sharpe@12kbw.co.uk



Charley Turton
turton@12kbw.co.uk

Introduction

▶ This talk is the third (and final) in the 'Birth Injuries' Clinical Negligence Mini-Series.

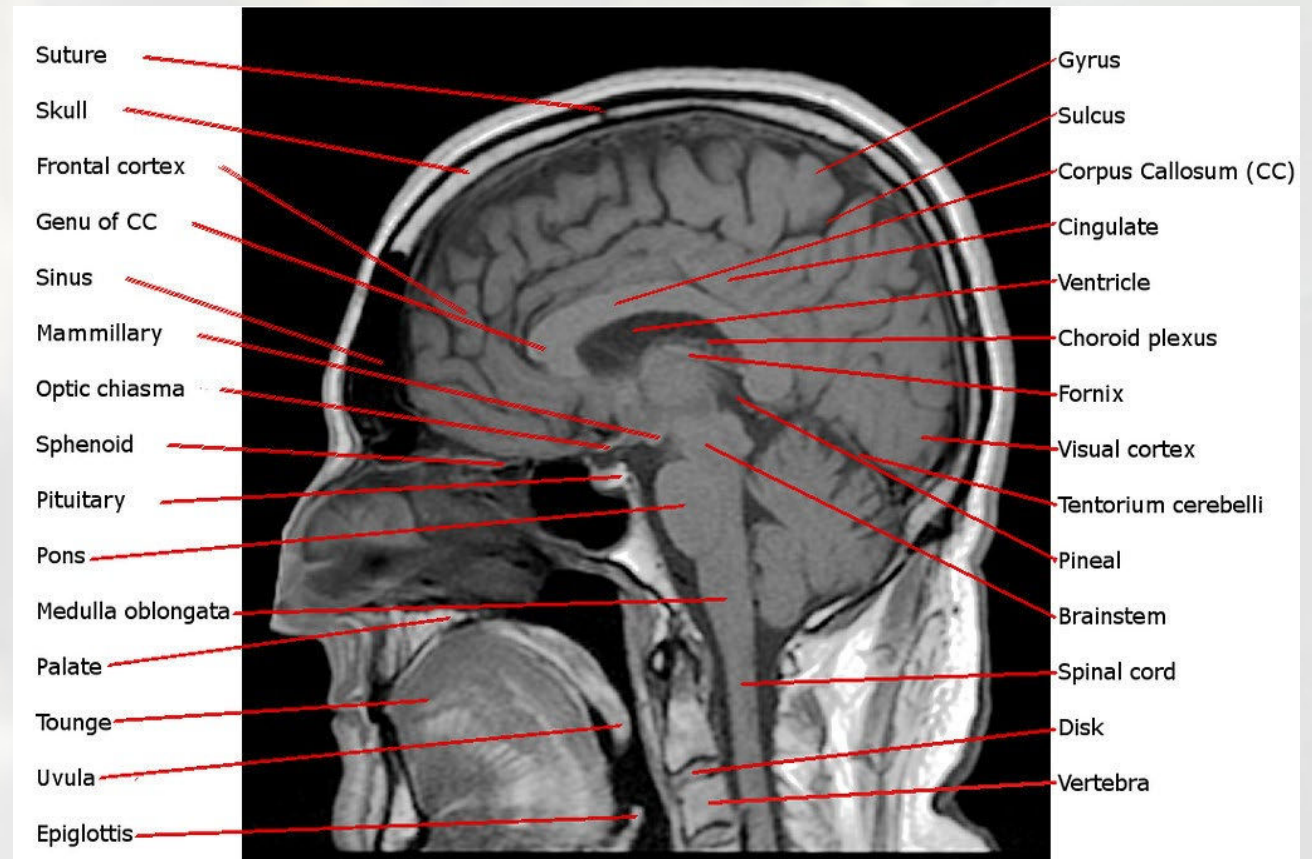
- ▶ Consider the anatomy of quantum in these complex high value claims;
- ▶ Identify and discuss in detail topical areas of law and practice;
- ▶ Review the relevant authorities;
- ▶ Summarise the principles to be applied in the quantum aspects of birth injury cases .

The Anatomy of Quantum

A. General Damages

B. Past and Future Loss:

- Care Costs
- Loss of Earnings
- Travel & Transport
- Aids & Equipment
- Accommodation
- Miscellaneous



Three Key Topics for Today

- ▶ Life Expectancy (DS)
- ▶ Accommodation (DS)
- ▶ Care (CT)

- ▶ Questions at the Conclusion



Life Expectancy I

- ▶ Remains important – even with PPOs.
- ▶ Accommodation, aids and appliances, therapies and holidays usually awarded as lump sums;
- ▶ “The issue is still with us” – McGregor on Damages, 21st Ed at 40-106
- ▶ Crucial if faced with a Part 36 Offer;

Life Expectancy II



There is a rebuttable presumption of a normal life expectancy – *Rowley v London & North Western Railway* (1873) LR 8 Ex 221;

Normal life expectancy can be calculated by reference to statistical information derived from population studies. Life Expectancy Tables are produced for given age and sex.

See Pages 16 and 17 'Facts & Figures' produced by the PNBA.

Life Expectancy III

- ▶ The Courts have accepted projected mortality figures (taking into account improvements in healthcare etc) as more accurate than historical tables. See *Barry v Ablerex* [2000] PIQR Q263;
- ▶ The Ogden Tables (currently 8th Ed) are based on projected mortality rates – see Page 18 of Facts & Figures;
- ▶ Example – Table A3 (Page 18) – a 50 year old male has a life expectancy of 34 years and female 36.8 years;

Life Expectancy IV – Factors affecting life expectancy in CP

- ▶ Sex – women live 3 years longer than men!
- ▶ Social Status at birth – average unskilled manual worker (social class V) will live 8 fewer years than the average professional (social class 1)
- ▶ Mobility and Feeding Ability – See 'Life expectancy in cerebral palsy: an update. *Developmental Medicine and Child Neurology* 2008, 50: 487-493. Strauss, Brooks, Rosenbloom and Shavelle.
- ▶ Quality of Care

Life Expectancy V - Caselaw

- ▶ In Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923 (QB) Foskett J accepted the argument that Claimants who have the benefit of substantial damages are likely to live longer than other members of their cohort who do not have the same advantage. In considering the lack of objective evidence supporting such a contention, Foskett J noted that no ethically acceptable experiment could be set up to test it. He added 2 years to the Claimant's expected life expectancy to take account of favourable economics. He said at [113]:
- ▶ "I do not see why the court cannot, in an individual case, seek to identify the risks that exist in an individual's life if he or she is a cerebral palsy patient and then consider the life that such a patient is likely to lead in the future and to determine how large those risks in truth are likely to be in that individual's life. In some cases of course, the best care may not obviate or materially reduce those risks. But there may be other cases in which if it is quite plain that the risk to life are reduced by the quality of care to be received and if that can be demonstrated as the likely scenario I cannot see any reason in logic for the court not giving effect to the conclusion in the individual case by adjusting the life expectancy thrown up in the generality of cases based on the available statistics."

Life Expectancy VI - Disputes

- ▶ The Court weighs up the factual and expert (statistical and medical) evidence and decides.
- ▶ This approach was considered in RVI v B (a child) [2002] EWCA Civ 348 the Defendants tried and failed to persuade the Court of Appeal that the judge should have been bound by statistical evidence. Tuckey LJ said at [20]:
- ▶ “This is not, I emphasise, to say that Professor Strauss’s evidence or the evidence of any other statistician or actuary is inadmissible. In an appropriate case such evidence may well provide a useful starting point for the judge, but if it is to serve this purpose Professor Strauss or any other such expert should be required to give evidence if his report is not agreed. Such evidence, together with medical evidence, should provide a satisfactory interdisciplinary approach to the resolution of issues of the kind which arose in this case.”

Life Expectancy VII – RVI Continued

- ▶ Sir Anthony Evans said at [39]:
- ▶ “... the court must still rely primarily, in my judgment, on expert medical witnesses before reaching a conclusion in a particular case. It would be wrong to allow a statistician, or an actuary, to do more than inform the opinions of the medical witnesses and the decision of the court, on what is essentially a medical, or clinical issue.”

Accommodation Claims I



The Courts have long considered the quandry of compensating Claimants who need to spend substantial capital sums to house themselves suitably and the probability that The Claimant (or the estate of the Claimant) Will enjoy a 'windfall' which is not compensation for the injury sustained.

Roberts v Johnstone [1989] QB 878 sought to address this by awarding a lump sum equivalent to the loss of income achieved if the capital used to purchase had been invested in risk-free Investments.

Accommodation Claims II

- ▶ The Roberts v Johnstone approach fell apart once the discount rate was reduced from 2.5% to -0.75% in March 2017
- ▶ The Court of Appeal delivered judgment in Swift v Carpenter [2020] EWCA Civ 1295 in October 2020.
- ▶ Where the two principles were in conflict then fair compensation took precedence – otherwise it would be “...to put the cart before the horse”, per Irwin LJ, at [146];
- ▶ Capital purchase less its reversionary value;
- ▶ The reversionary value was calculated using a discount rate of 5% applied to the Claimant’s life expectancy.

Short Life Expectancy

- ▶ Irwin LJ noted that the Court of Appeal's guidance should not be regarded as a "straitjacket to be applied universally and rigidly". One area in which the jacket may not fit is short life expectancy cases. The simple application of the Court's reversionary interest formula to such claimants appears to be one area where the direct application of the guidance may be inappropriate. As stated by Irwin LJ:
- ▶ "There may be cases where this guidance is inappropriate. However, for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring." [210]
- ▶ The Court has left open the possibility that a different approach may be required for short life expectancy cases, where the value of the reversionary interest, and therefore the deduction to the additional capital sum, will be much greater:
- ▶ "It may be that different considerations and arguments could be applied to that category of case". [171]
- ▶ Options include renting (no security of tenure) or seek financial assistance on the open market for a third party to buy a suitable property, allow it to be adapted, and grant a life tenancy to the Claimant.

Some key issues in care claims

- ▶ Expert evidence
 - ▶ Post *Muyepa v MoD*.
 - ▶ Key principles.
 - ▶ Dos and don'ts of care reports.

- ▶ Statutory funding, double recovery and reverse indemnities.



Expert evidence

Muyepa v MoD [2022] EWHC 2648 (KB)

“There is a danger that because comparatively few personal injury/clinical negligence cases reach a hearing where the issues of care/aids and equipment are contested, and as a result few reminders are given by the Courts of the correct approach to be adopted, that some reports will fail to approach the analysis of what should be claimed/funded with sufficient rigour.”

[§301]

Expert evidence

Muyepa v MoD [2022] EWHC 2648 (KB)

- ▶ (1) The question to be addressed is whether care, and/or aids or equipment are **reasonably required?** If a reasonable requirement is identified it is then necessary to consider two further questions.
- ▶ (2) (a) Firstly, whether it is likely that the **uninjured Claimant** would have paid for or had access to what is being recommended in any event. Sometimes what is claimed for is to be found in most households.
- ▶ (2) (b) The second question is whether, as a matter of fact the Claimant will **actually use/receive** what would be recommended as a **reasonable necessity**.

Expert evidence

Reasonableness: what's the test?

- ▶ *Rialis v Mitchell* (1984) Times, 17 July
- ▶ *Sowden v Lodge* [2004] EWCA Civ 1370
- ▶ ***Personal Injury Schedules*** (Latimer-Sayer et al):
 - ▶ (i) What are C's reasonable needs?
 - ▶ (ii) Is the model of care chosen by C reasonable?
 - ▶ (iii) What are the reasonable costs of meeting C's needs?

Expert evidence

Reasonableness: what's the test?

Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC923 (QB) at §166

- ▶ ...the guiding principle is to consider how the identified needs can reasonably be met by damages... That process involves, in some instances, the need to look at the overall **proportionality** of the cost involved... 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.

Expert evidence

Common areas of disagreement between care experts

- ▶ second carer
- ▶ overnight care
- ▶ holiday needs
- ▶ transport needs
- ▶ level of case management

Expert evidence

Dos and Don'ts

- ▶ Experts should:
 - ▶ Give a breakdown of C vs. D instructions.
 - ▶ Set out a range of views.
 - ▶ Provide a breakdown of the assessed hours in terms of the type of care being provided
 - ▶ Look to the future.
 - ▶ Be reminded of judicial guidance (see e.g. *McKeever*).

Expert evidence

McKeeever v Redmond [2021] NIQB 30

“32. When instructed to prepare a report for a cost of care claim, an expert will have two principal sources of information. Firstly, she must **carefully scrutinise the medical evidence** to identify the potential care needs of the Plaintiff. Secondly, a **detailed interview** will be required with the Plaintiff and the members of his family who may be prepared to provide the requisite care. The report itself must set out the **factual basis for the opinion** and analysis provided by the expert. It is essential that this analysis is **guided by the legal principles** set out at paragraph [30] above. If the expert has any doubt as to the proper approach to any of the legal issues which arise, she should **seek guidance** from those who instruct her.”

Expert evidence

Dos and Don'ts

- ▶ Experts should **not**:
 - ▶ Present themselves as part of C or D's "team".
 - ▶ Sacrifice analysis or opinion, in favour of history and narrative.
 - ▶ Cherry-pick evidence.
 - ▶ Be afraid to reconsider/recalculate.



Statutory funding, double recovery and reverse indemnities:

The starting point

- ▶ *Sowden v Lodge* [2004] EWCA Civ 1370 / *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71
- ▶ *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145

Statutory funding, double recovery and reverse indemnities:

The Court will disallow double recovery, but by what mechanism?

- ▶ *Harman (A Child) v East Kent Hospitals NHS Foundation Trust* [2015] EWHC 1662 (QB)
- ▶ *Martin v Salford Royal NHS Foundation Trust* [2021] EWHC 3058 (QB)