Case commentary: Reaney v University Hospital of North Staffordshire NHS Trust [2015] EWCA Civ 1119

How should courts determine the quantum of a care claim in cases in which the claimant already requires care?

The Court of Appeal has handed down judgment in *Reaney v University Hospital of North Staffordshire NHS Trust*. The Court allowed the Defendant's appeal against a finding of Foskett J that the Trust should be liable to pay the Claimant's full damages because they negligently worsened the Claimant's pre-existing condition. David Westcott QC was instructed for the successful Defendant for the appeal alongside Charles Feeny, who had represented the Defendant at first instance.

The Court of Appeal's judgment, given by Lord Dyson MR, draws a distinction between situations in which care needs are "qualitatively" different before and after the tortious act and those in which prior care needs have been exacerbated by negligence. In addition, the Court provided guidance on when the "but for" test can be discarded in favour of assessing whether there has been a material contribution to the risk of harm.

Facts:

The Claimant was diagnosed as suffering from transverse myelitis and became paralysed below the mid-thoracic level. This condition was not alleged to have resulted from any negligence. However, during a long period in hospital, the Claimant developed deep pressure sores, an infection of the bone marrow and hip dislocation. The Defendant admitted liability for the injuries caused during the hospital stay.

The decision at first instance

In assessing damages Foskett J found that, but for the Defendant's breach, the Claimant would have been able to initially rely on gratuitous family care and 7 hours of local authority support per week. The Claimant would then have needed additional support as she aged. This was estimated at 31.5 hours per week of local authority care, none of which the Claimant would have had to pay for.

Because of the injuries caused during the hospital stay, the learned Judge concluded that the immediate *"need for 24 hour care by two carers cannot truly be disputed".* He found that the

Claimant was entitled to recover in full the costs of this care, in addition to the costs of physiotherapy, transport, equipment and holiday needs.

The question at trial was whether the Defendant was liable to pay the total of the Claimant's care needs or was only liable to pay the difference between the needs the Claimant now has and those she would have had but for the negligence.

Foskett J favoured the former approach. He noted, at paragraph 70, that "*a tortfeasor must take his victim as he finds him and if that involves making the victim's current damaged condition worse, then he (the tortfeasor) must make full compensation for that worsened condition".* He added that, even if he was wrong on this, the Defendant had materially contributed to the Claimant's risk of harm, citing *Bailey v MOD [2009] 1 WLR 1052.*

What harm is the Defendant liable to compensate for?

The Court rejected Foskett J's conclusion and found that the Defendant must only compensate the Claimant for her condition *"to the extent that it has been worsened by the negligence" (paragraph 18).* The cases of *Steel v Joy [2004] 1 WLR 3002] and Baker v Willoughby [1970] AC 467* were cited with approval. Quoting Lord Pearson in *Baker*, Lord Dyson MR noted that the Defendant was entitled to take the Claimant as they found her, and that they had not injured an able bodied person, but a woman who already had considerable care needs. Foskett J's contention that *Steel* and *Baker* could be distinguished as they involved apportionment of the cost of care between two tortfeasors, as opposed to the instant case where the prior needs were not caused by negligence, was found to be wrong.

Is the loss qualitatively different – or merely quantitatively bigger?

The Court qualified its ruling by distinguishing between cases in which care needs after the negligent injury were qualitatively different from those cases in which the claimant only needed "more of the same". It was found that:

> "*if the judge had made a reasoned finding that the care package required as a result of the negligence was different in kind from that which Mrs. Reaney would have required but for the negligence, it might have been difficult for Mr. Westcott to challenge it"* (at paragraph 22).

Reference was made to the decision of Edwards-Stuart J in *Sklair v Haycock [2009] EWHC 3328 (QB)*, in which a Claimant suffering from Asperger's syndrome, who was cared for by his father, was injured in a collision caused by the Defendant's negligence and required 24 hour care because of his injuries. The Court approved the result in *Sklair,* but for different reasons than those given by Edwards-Stuart J. It was said that the proper approach to *Sklair* was to consider that the care the Claimant required because of the accident was *"qualitatively different"* from that which he already needed because of his Asperger's syndrome. Thus, the Defendant was liable for the whole loss.

Restricting the material contribution test

In an obiter comment, the Court criticised Foskett J's proposed application of the "material contribution" test. At first instance, it was found that the Defendant could have been liable because they materially contributed to the need for the Claimant to receive the 24-hour care package. This was rejected by Dyson MR who, quoting Waller LJ at paragraph 46 of *Bailey v MOD,* noted that the material contribution test only applies in cases where medical science cannot determine the application of the 'but for' test, but can establish that the contribution was more than negligible. As there was no doubt with regards to what the Claimant's injuries would have been but for the Defendant hospital's negligence, the material contribution test could not assist the Claimant.

The basis of assessment

Lastly, the Defendant obtained permission to appeal on the ground that the Judge had incorrectly made positive findings about the Defendant's existing care needs on the basis of a subjective assessment of how she would have dealt with her paraplegia. It was argued that the Judge should have, instead, conducted an objective assessment of her reasonable care needs but for the tort. This point was not addressed in the Court of Appeal's judgment. As Foskett J had found that the pre-existing care needs of the Claimant should not be taken into account, the Court did not need to decide whether his approach to such an assessment would have been correct.

Comment:

The distinction between cases which fall into the *Steel v Joy* category, meaning defendants only need to compensate claimants for the additional damage that they caused, and those which fall into the exceptional *Sklair* category, in which the defendant will be liable for the

whole loss, may be difficult to apply in practice. The judgment of the Court of Appeal appears to propose two tests to distinguish between them. First, at paragraph 19 the Court approved of the parties' agreement that if the care needs after the negligence were *"substantially of the same kind"* as pre existing care needs, the Defendant would only need to compensate the Claimant for her additional care needs. However, the judgment continues by noting that, "*if needs caused by negligence were qualitatively different from pre existing needs"*, then those needs would have been found to be caused in their entirety by the negligence and thus must be compensated in total.

It is not clear that these tests can be reconciled. What of scenarios in which care needs after the defendant's negligence are substantially of the same kind as the needs prior to the negligence, but the context of care delivery is qualitatively different? Situations do arise in which, but for the negligence, the claimant would have received mostly gratuitous care, but afterwards they require a high degree of professional support to do similar, but more onerous, tasks. There is still uncertainty about how a Court should approach deciding whether these scenarios fit into the *Steel* or *Sklair* categories. In submissions, the Appellant used the phrase '*essentially*' different rather than '*qualitatively*'. It remains to be seen how restrictively courts will apply the tests in *Reaney* and whether a formulation can be developed which reconciles the apparent differences between them.

Lord Dyson MR's comments on the restriction on the application of the material contribution test should prove easier to interpret. We now know (if we did not before) that claimants cannot resort to the material contribution test if the 'but for' test gives them an unfavourable result; but can only use it if, due to scientific uncertainty, 'but for' is impossible to prove.

Defendants to clinical negligence actions, for obvious reasons, often deal with patients who have already suffered injuries and loss. The judgment in *Reaney* leaves open the question of on what basis pre-existing care needs should be assessed. However, the Court's finding, at paragraph 29, that "*if a person has caused the loss, he is liable to compensate the claimant for it. If he has not, then he is not liable"*, suggests that the objective approach advanced by the Defendant is correct. If it were otherwise, claimants who sued both a negligent hospital trust and the party who caused their original injury but were only successful against the trust could ask to be put back in the position that they would have been in had neither negligence

occurred. That would lead to a situation which would be unsustainable for defendants and would not be in the wider public interest.

The future

The decision in *Reaney* will not be the end of arguments about how pre-existing care needs are to be assessed. Some claimants will no doubt argue that, but for the Defendant's negligence, they would have 'made do' with far less care than a wholly objective assessment might suggest.

In addition, the approval given to *Sklair* means it is open for claimants to argue that their care needs after the accident are so different from those before that they should be compensated in full. The facts of *Sklair* were exceptional, but the approval given to the principles in the judgment in *Reaney* means it may impact on less unusual cases. Whether these arguments will be successful is likely to be a matter of fact and degree. The uncertainty this causes may well result in continued debate and litigation.

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