



Neutral Citation Number: [2021] EWHC 2989 (QB)

Claim No: E90LV074

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY
SITTING AT MANCHESTER CIVIL JUSTICE CENTRE

8th November 2021

Before :
MR JUSTICE FORDHAM

Between :
EXN **Claimant**
(a protected party proceeding by his Litigation
Friend HGF)
- and -
ALDER HEY CHILDREN'S NHS FOUNDATION **Defendant**
TRUST

Bill Braithwaite QC and Christopher Barnes
(instructed by Stephenson Solicitors LLP) for the **Claimant**
John Gimlette (instructed by Hill Dickinson LLP) for the **Defendant**

Hearing date: 8/11/21

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

1. The purpose of today’s hearing has been for me to consider whether the proposed settlement of the damages claim in this case is in the best interests of the Claimant who is aged 13 and is a protected party. His dad stands as his litigation friend and a Deputy has been appointed. An anonymity order was sought and provisional anonymisation was used in the cause list – publicly accessible through the “courtservice” website – for today’s hearing. I dealt with anonymity at the start of the hearing. The Defendant adopted a neutral position as to anonymity, but raised a helpful point in relation to notice in the third party application mechanisms for which the anonymity order would provide. No member of the press or public raised any objection to anonymity. I made an anonymity order. I was satisfied, having regard to the principles in X v Dartford and Gravesham NHS Trust [2015] 1 WLR 3647, that anonymity is necessary. It is because of the anonymity order, which I have made for the protection of the Claimant, that I am calling him “the Claimant” and I am going to refer to other family members without using anyone’s name, in this judgment.
2. This is a clinical negligence case. On 19 September 2009, the Claimant (who was just 17 months old) suffered a focal seizure which affected the right side of his face. An ambulance was called, and he was taken to Alder Hey Children’s Hospital. While in the A&E department, he suffered a second focal seizure, while under observation by medical personnel. He was sent home and, despite re-attendance, was not diagnosed with the virus HSV until 24 September 2009. He sustained catastrophic brain injuries, leading to profound impairments, and intractable epilepsy. Proceedings were commenced in October 2018. Subsequently, the Defendant admitted breach of duty. Subject to one contested point, the Defendant also admitted causation of loss and damage. This was recorded when judgment was entered for the Claimant by DJ Jenkinson on 9 April 2020, the order stating that it was “the Defendant’s case that the Claimant would always have suffered a mild residual cognitive deficit and epilepsy in any event and, therefore, to that extent, causation is still in dispute”. The questions of quantum of damages, including that contested causation point, were listed for a ten-day trial due to take place in this Court, before me, starting on 1 November 2021. In the run up to the trial the parties arrived at the settlement, subject to the approval of the Court. As Mr Braithwaite QC emphasised, the Claimant’s parents were only relieved of the pressure on them, two working days before the trial.
3. The Claimant suffers from severe learning difficulties, mild right hemiplegia, severe drug-resistant multifocal epilepsy, autism and severe behavioural problems with violent outbursts. He has very significant care needs. The relevant experts agree that he needs what is called in the papers “double-up care”, for the rest of his life. That means two carers caring for him 24/7, including at night when one of the two carers can be sleeping but is ‘on call’ for when needed. The Claimant also needs specialist modified accommodation, specialist medical therapies and specialist equipment. What is proposed is that there be a lump sum award of £7,750,000, from which credit is to be given in the sum of £225,000 in respect of previous interim payments and in the sum of £8,584.60 in respect of the CRU (Compensation Recovery Unit) referable to payments made by the Defendant to the Department of Work and Pensions. I am invited to approve an apportionment which would involve a payment to the Claimant’s Litigation Friend of the sum of £455,000 in respect of past gratuitous care and past final expenses met by the parents (calculated having regard to the interim payments

received). The balance of the lump sum (£7,061,415.40) will be payable into the Claimant's Deputyship Account. In addition to the lump sum, there are index-linked periodical payments, to be made throughout the Claimant's life. These are in respect of future care and case management, linked to the ASHE 6115 index, starting at £330,000 per year payable next month to continue until the Claimant is aged 19, and then at £337,500 per year for the rest of his life. The Claimant's team have helpfully given me their overall capitalised value of this award as being approximately £27.3 million.

4. I have had the benefit of reading the very thorough confidential Advice dated 3 November 2021 written by the Claimant's junior Counsel Christopher Barnes. It sets out the reasons why he, and the Claimant's Leading Counsel Bill Braithwaite QC and the Claimant's solicitor Carla Duprey of Stephenson's, consider that a settlement in these figures and structured in this way is in the Claimant's best interests. Mr Braithwaite QC describes the Advice – rightly – as an “excellent guide”. I have been taken through the key features, including the unusual features, by Mr Braithwaite QC in his submissions today. I can see the very careful thought that has been given, and the positions that were adopted in the run up to trial. I also have the benefit of two confidential reports from an independent financial adviser, Richard Cropper, dated 16 July 2021 and 2 November 2021. These reports address the appropriateness of the form and structure of the award, and in particular of the periodical payments. I have had access to the trial bundles and have been able to consider relevant materials from within them in doing my job in relation to the question of approval of the settlement.
5. I am satisfied that the proposed settlement is a sensible settlement from the Claimant's point of view. I am happy to give my approval to the settlement. I will make an Order in the form that has been proposed, circulated and considered. My Order – a document available from the court files – will contain the appropriate recitals, including recording my satisfaction of features relating to the periodical payments orders being made and as to the payment regarding the apportionment. There will, as agreed, be an order for costs and for a further interim payment on account of costs of £175,000.
6. This approval hearing took place fully in-person in Manchester, with everyone present in the court room. That was what mum and dad wanted and I agreed with them and with the Claimant's legal representatives that it was appropriate. I have been able to read, in the papers before the Court, about those events of September 2009, and how the Claimant had been a healthy toddler who was developing normally, could walk unaided and was speaking his first few words. I have read about how the world of each of the members of the family was “turned upside down”. I have seen descriptions of what the position was at various stages during the twelve years and two months, since September 2009. That has included the seizures which had begun at the end of 2010, described as ten to twenty seizures every day including four or more every night, seizures which needed mum or dad to be standing behind the Claimant with arms wrapped tightly around him, to help him; and which later came to include “drop seizures”, meaning the Claimant using a wheelchair and wearing a helmet when out and about. I have read witness statements and I have seen photos. I have learned about how mum and dad came to operate, like a “tag team”, so that one of them was with the Claimant at all times. That was usually mum, especially when dad was at work as a finance director. It was one parent sleeping alongside the Claimant at night. It is a story of married partners and parents feeling like “passing ships”; feeling low; feeling that they had “hardly any time” to devote to the Claimant's older sister. But I have also read about the Claimant's

beautiful smile when he gets to be driven around in dad's car; and how it is when he is having fun in the pool.

7. The Claimants' lawyers have told me about how mum and dad had to cope with these most traumatic events, and these most difficult circumstances, and responded by meeting the Claimant's needs by themselves. As the lawyers put it, the fact that the Claimant is doing as well as he is is a reflection, mum and dad, of your devoted action. Mr Braithwaite QC – on behalf of himself, Mr Barnes and Ms Duprey – told me that even in the short time that Counsel have represented the Claimant it has “shone out to them” how extremely difficult this has been and how well they have coped. Mr Gimlette, on behalf of the Defendant, put the position in this way: nobody reading the papers in this case could fail to recognise the tireless and remarkable care provided by the Claimant's parents and family. Mr Gimlette has also informed the Court that a letter of apology was sent to the Claimant's parents in this case in September and that an apology has been given on behalf the Defendant by its Leading Counsel.
8. I found a vivid description in the papers which I have read. It is a description which tells the Court about how, as parents: you “lost your sense of self”, being “thrust into the role of full-time carers”; becoming “consumed” by “caring for and looking after” your vulnerable son, who was reliant on you, 24/7. Three words encapsulate your response as parents: you were “consumed by caring”. In addition to recording in that way this Court's tribute to you, may I also thank you for thinking to tell the Court about your daughter's essay: the one she wrote at school, from her own experiences as the Claimant's sister, about “hidden disability” and about not judging people. That is particularly poignant having in mind behavioural consequences of injuries, as in this case. And thank you for enabling me to finish this approval judgment by mentioning a trip to PC World, a couple of years ago. It was a trip which had the Claimant sitting in an enclosed area on a video game, in a driver's seat, behind a steering wheel. He loved it. So much so – you tell me – that you struggled to get him off it.

8.11.21