Section 1.—Personal Injuries

TAYLOR v. BRISTOL OMNIBUS CO.

Court of Appeal [1975] 1 W.L.R. 1054; 119 S.J. 476; [1975] 2 All E.R. 1107

Damages for badly crippled infant

Lord Denning M.R.: This case is to be considered as at the date of the trial in February 1974. I will state the facts as then proved.

The plaintiff, Paul Taylor, is nine years of age. He is a hopeless cripple. It is all due to an accident six years ago, when he was only $3^1/_2$ years. He was a bright little boy. His parents had taken him for a drive in the car. He was sitting in the back seat. It was along the road from Huntingdon to Cambridge. His father had stopped the car before turning right. But it was then run into from behind by a coach. Paul was thrown from the back seat and hit his head. There was not much injury to the rest of his body, but to his head. His skull was fractured extensively and his brain was damaged severely. The consequences have been terrible. He cannot control his legs or his arms, or his speech. He cannot walk. He can only get around on his knees or by pushing himself around in a sitting position. His left arm is useless. He cannot feed himself. He makes attempts to dress himself, but without much success. He can understand what people say to him, but he is not much good at making himself understood. He cannot formulate his words properly. He knows the letters of the alphabet and figures, but he cannot add or subtract above four. He has had three major epileptic attacks. He is taken each day to a school for disabled children. At home he sits and watches television. He needs constant supervision and nursing care day and night. His mother and father look after him with the utmost devotion. He will never be able to be employed by anyone. But his expectation of life is not reduced to any great extent. His intellectual capacity is sufficient for him to be aware of his helplessness and of his utter dependence on others. His sister, who is three years older, has been much affected. His grandparents too, because they help look after him.

The question is, what is the proper figure of damages? The judge assessed them as:

	£	£
Special damages (agreed)		500
Adaption of accommodation (agreed)		1,000
Electrically–propelled chair (agreed)		500
Home help at £15 a week for the next eight years	6,000	
Less one–third for present payment	2,000	
	4,000	4,000
Thereafter in a Cheshire Home, or similar home at £30 a week (£1,500 a year) from eight years hence to the end of his life. Take a multiple of 16.	24,000	
Less five–twelfths for present payment	10,000	
	14,000	14,000

	£	£
Loss of future earnings from age 19 for rest of his working life. Average £2,000 a year. Take a multiple of 16.	32,000	
Less one–half for present payment.	16,000	
	16,000	16,000
Pain and suffering and loss of amenities of life	27,500	27,500
	TOTAL:	63,500
Interest in accordance with *Jefford* v. *Gee*		8,300
		£71,800

Counsel for the defendants said that the total figure of £63,500 was too high. He suggested that it was about £10,000 too much.

Now, there is one matter that I would mention at the outset. These damages were assessed by Shaw J. in February 1974. We are deciding this appeal in May 1975. In the intervening 15 months there has been a big drop in the value of money; and the rate of inflation has increased greatly. Nevertheless, it is our duty to throw our minds back, if we can, to February 1974, and assess the damages as at that date. No one should be encouraged to appeal by the idea that the Court of Appeal will take into account changes in values since the trial. We are not asked to take it into account. I think this was right. The question has been much discussed, notably by the High Court of Australia in *O'Brien* v. *McKean* (1968) 42 A.J.L.R. 223, by the House of Lords in *Taylor* v. *O'Connor* [1971] A.C. 115 and by this court in *Mitchell* v. *Mulholland (No. 2)* [1972] 1 Q.B. 65. It must be remembered that, when assessing compensation for loss of future earnings, the court is not seeking to replace week by week the sums which the plaintiff would have earned. It is only giving compensation for loss of future earning capacity. And when it is assessing compensation for expense of nursing and attendance, it is not calculating ahead what that expense will be. It is only giving compensation for the fact that in the future extra expense will be incurred. This compensation could become altogether excessive if it were based on the expectation of future inflation. To keep it within bounds, it must be based on the value of money at the date of the trial.

Another matter which I would mention is the splitting up of the award into items. At one time this was thought to be undesirable: see *Watson* v. *Powles* [1968] 1 Q.B. 596; but it is now recognised as necessary, if only so as to enable the interest to be calculated: see *Jefford* v. *Gee* [1970] 2 Q.B. 130. Yet at the end the judges should look at the total figure in the round, so as to be able to cure any overlapping or other source of error.

Finally, at the outset I would mention the parents. They were in the car which was struck in the back by the coach. There was a breach of duty to them as well as to their baby. If they had themselves been injured or had suffered nervous shock, they could have recovered damages for themselves. They did not so suffer, but the tragedy is for them even greater. Before this accident they could have looked forward to a future of happiness, bringing up their baby son with the joy it brings, seeing him through his schooldays, marrying and having children of his own, and then his caring for them in their old age. Now, in consequence of this accident, they are deprived of it all. They have nursed him day and night. They have watched over him. They have carried him everywhere.

They have taught him to do little things for himself. They have devoted their lives to him and will continue to do so. Yet they are not entitled to recover any damages for all their grief and suffering. Not a penny. Nor would they ask it.

With these matters in mind, I turn to the items in his case.

1. *Pain and suffering etc.*

The judge awarded £27,500. Counsel for the defendants says that that figure is very high but he recognises that it is not so high that this court should interfere with it. It is difficult to find any comparable cases. In *S.* v. *Distillers Co. (Biochemicals) Ltd.* [1970] 1 W.L.R. 114 Hinchcliffe J., in 1969, for badly deformed infants, awarded £18,000 and £28,000. In *Daish* v. *Wauton* [1972] 2 Q.B. 262 for a boy of five, with severe brain damage, this court, in 1971, awarded £20,000. Seeing that the value of money has fallen much since those awards were made, I do not think we should interfere with the award here of £27,500. This little boy is ruined for life. He can do nothing. He can enjoy nothing. He can take part in none of the activities of others. And he is aware of it—to his great distress.

2. *Cost of future nursing and attendance*

In *Cunningham* v. *Harrison* [1973] Q.B. 942 we said that, if and in so far as a disabled person is likely to be provided for by the state free of charge, he cannot claim it as part of his damages. But in this case we have been referred to section 29(5) of the National Assistance Act 1948. It says that a local authority may recover such charges as they may determine. And we are told that in this present case they may make a charge for any services rendered by them. So it would not be right to regard their services as free.

The judge divided the figure into two parts: (i) for the next eight years Paul would be at home, but his parents would reasonably spend £15 a week for help in the house; (ii) for the rest of his life he would be in a Cheshire or similar home at £30 a week.

Counsel for the defendants directed some criticism at those figures. He said that it was a mistake to divide up Paul's life into two parts—the next eight years at home—and the rest thereafter in an institution. I think that criticism is justified. The doctor said that it would be better for Paul to be with the family as long as possible. Most of us have known of similar sad cases. I should have thought that these devoted parents would have kept Paul at home with them as long as they could. They would do so until they themselves were too old to do it. They would give their own lives to him. And then someone else in the family would do it.

If such is the future, the question arises: is his compensation to be less because he is looked after at home instead of in an institution? I do not think so. I am glad to say that as a result of recent cases, compensation can be given in money for services rendered by the parents. It has been so held when a wife gave up work to look after her husband: see *Wattson* v. *Port of London Authority* [1969] 1 Lloyd's Rep. 95; when she did not give up work but, nevertheless, devoted her life to looking after him: see *Cunningham* v. *Harrison*; and when a mother gave up work to look after her child: see *Donnelly* v. *Joyce* [1974] Q.B. 454. In *Hay* v. *Hughes* [1975] 1 All E.R. 257, Lord Edmund-Davies said that "the injured plaintiff can recover the value of nursing and other services gratuitously rendered to him by a stranger to the proceedings."

Approaching the case on those broad principles, the boy was only $3^1/_2$, his father 30 at the time of the accident, and his mother a little younger. Taking values at the date of trial, the cost of a home help and compensation for the parents' services can be put together at £20 a week. That is £1,000 a year. All this is over his whole life. I would take a multiplier of 18. Thus arriving at the

figure of £18,000 in all. That is the very figure arrived at by the judge, although by a different route. I would add that, although this sum is only recoverable by Paul, it is really for the costs incurred and services rendered by the parents. If a trust is created, as it should be, this fact should be borne in mind in administering the trust.

3. *Loss of future earnings*

The judge assumed that Paul would start earning at the age of 19. He took the yardstick of his father's position. He took an average figure of £2,000 a year and used a multiplier of 16. Thus making £32,000. Less one-half for present payment: making £16,000.

Counsel for the defendants urged us to adopt a new attitude in regard to babies who are injured. He suggested that the loss of future earnings was so speculative that, instead of trying to calculate it, we should award a conventional sum of say £7,500. He suggested that we might follow the advice given by Lord Devlin in *H. West & Son Ltd.* v. *Shephard* [1964] A.C. 326, 357, that is: (i) give him such a sum as will ensure that for the rest of his life, this boy will not, within reason, want for anything that money can buy; (ii) give him, too, compensation for pain and suffering and loss of amenities; (iii) but do not, in addition, give him a large sum for loss of future earnings. At his very young age these are speculative in the extreme. Who can say what a baby boy will do with his life? He may be in charge of a business and make much money. He may get into a mediocre groove and just pay his way. Or he may be an utter failure. It is even more speculative with a baby girl. She may marry and bring up a large family, but earn nothing herself. Or, she may be a career woman, earning high wages. The loss of future earnings for a baby is so speculative that I am much tempted to accept the suggestion of counsel for the defendants.

This suggestion is, however, contrary to present practice. In the children's cases hitherto the courts have made an estimate of loss of future earnings. In *S.* v. *Distillers Co. (Biochemicals) Ltd.* Hinchcliffe J. took a loss of wages at £1,500 a year and assessed an annuity value on that basis of £13,700. In *Daish* v. *Wauton* this court took an annual loss of £1,000 a year for 20 years and arrived at £6,000. Those cases were decided four or five years ago; and wages and salaries have gone up much since then. I cannot say that the judge was wrong in taking an average of £2,000 a year. Counsel for the defendants said that the judge did not allow for Paul's reduced expectancy of life. The doctor said it was reduced by 5 to 10 per cent. But that would have little impact on his working life. I think the judge was entitled to take a loss of £2,000 a year from age 19 to 60 or 65. This might well give a figure of £16,000.

I feel that we must follow the accepted practice in the cases. I would not dispute the judge's figure of £16,000 for loss of future earnings.

4. *Overlapping*

It was suggested that there might be some overlap in that, if he was earning wages he would have had to spend some of them in keeping himself; and also his family, if he married. This was considered by this court in *Daish* v. *Wauton*. The court then pointed out that in most cases an injured man will have living expenses after he is injured which are roughly equivalent to those he would have had to pay if he had not been injured. The expenses, therefore, cancel out. And so far as the cost of wife and children are concerned, if he had married, this should not be deducted: any more than if he had remained a bachelor: see *Fletcher* v. *Autocar & Transporters Ltd.* [1968] 2 Q.B. 322 by Diplock L.J. The only deduction which might be made is, if he was in an institution and getting his board and lodging included in his expenses. That, however, is not this case, because it is probable that Paul will stay at home and not go into an institution.

5. *Conclusion*

I must confess that at first I thought that the £63,500 was too high. Looked at in the round, I thought that counsel for the defendants was right and that it should have been about £55,000. But, on analysis, and considering it with my brethren, I have come to the conclusion that the figure was not out of the way. At any rate, not so much that this court should interfere with it. I would, therefore, dismiss this appeal. But I would like to say that these huge lump sums give food for thought. Our present system of assessing and awarding compensation for injuries such as these calls for radical re-appraisement; and I hope that the Royal Commission presided over by Lord Pearson will do this.

Stamp and Orr L.JJ. delivered concurring opinions.

Note:

This is not in any way a leading case, but it provides a good instance of the various items for which one may claim damages in a personal injury suit. Translated into 1990 prices, the economic loss (lost income and increased expenditure) totalled £165,240 and the human loss (pain and suffering, loss of amenities) £126,225. In personal injury cases as a whole, economic loss and human harm come out about 50–50.

Important cases include *Lim Poh Choo* v. *Camden H.A.* [1979] 2 All E.R. 910 (H.L.), where Lord Scarman refused to follow Lord Denning's "radical reappraisal," which would have reduced the award by 45 per cent., but deplored the actual position and implored the legislature to improve it; also *Housecroft* v. *Burnett* [1986] 1 All E.R. 332 (C.A.), where awards for human loss were upgraded to take account of inflation.

These cases involved largish sums (about £650,000 and £430,000 in 1990 prices), and doubtless awards will increase substantially as well as nominally as doctors get even cleverer at keeping human wrecks expensively afloat so that their non-enjoyment of life may be maximally prolonged. Medical negligence claims tend to be the most expensive, and local health authorities are more than occasionally facing claims of £1 million or more; as they do not insure, the effect of the incidence of such liabilities is not spread through the country and the impact in a particular area on, say, new hospital buildings or equipment may be severe, despite a system for spreading the loss over a 10-year period.

But the great majority of claims are much smaller, for a variety of reasons (free medical treatment, net income loss, deductions for collateral benefits, ungenerous judges) and now they will be heard in the county court, not the High Court. The relationship between awards to victims and rewards to their lawyers may be seen in the offer by the manufacturers of the noxious drug Opren: £2,275,000 for the victims and £4,000,000 for their lawyers.

Economic Loss

A. *Lost Income*

(1) *For how long?* Although in this case the plaintiff's normal earning life was not shortened, a victim may die early as a result of his injuries. Can such a victim claim only what he would have earned during the years now left to him, or can he also claim what he would have earned, and not spent on himself, during the years of which he has been deprived? The House of Lords opted for the latter solution in *Pickett* v. *British Rail Engineering* [1980] A.C. 136, which leads to tiresome discussions about how much the claimant would have spent on himself/actual dependants/possible dependants, etc. This claim no longer transmits to the victim's estate, as it did at the time of *Hill* v. *Chief Constable of West Yorkshire* [1987] 1 All E.R. 1173 (above, p. 90).

(2) *How much?*

(i) Income is taxed and damages are not. So the defendant makes good only the plaintiff's "take-home" pay. As to tax this was decided in *Gourley's* case [1956] A.C. 185 (not followed in Australia, (*Atlas Tiles* v. *Briers* (1978) 21 A.L.R. 129 (H.Ct.Aus.)) and as to contractual pension contributions by *Dews* v. *N.C.B.* [1987] 2 All E.R. 545 (H.L.).

(ii) People's income often rises as they grow older because of (a) inflation and (b) promotion and seniority. The courts generally ignore (a) (*Auty* v. *N.C.B.* [1985] 1 All E.R. 930 (C.A.)), and take account of (b). Overpaid but insecure Yuppies may present problems.

(iii) Future gains are birds in the bush, while present damages are birds in the hand. Folk-wisdom operates. Courts award a plaintiff less than he would probably have earned, because he might not have earned it.

(iv) The plaintiff is receiving money now in place of income and expenditure in the future. A discount is therefore applied. On the other hand, he is receiving money now that he was entitled to receive when he was injured, or, in deference to Englishry, at the moment he formally demanded it. He must therefore obtain interest, a matter which has given rise to not very interesting discussion.

(3) *Earnings, ability to earn, or ability to work?* If the victim continues to receive wages during his incapacity to work (and he has a statutory right now to a maximum of £52.50 per week for 28 weeks, paid by the employer who is reimbursed up to 80 per cent. by the state) he suffers no or less "loss of earnings" with which to charge the tortfeasor. It can, however, be said that he has nevertheless suffered a "loss of earning capacity," as may also be said of a person who has not lost his job but would have difficulty in finding another as good. Just as the courts are prepared to give damages for "need for medical treatment" though there have been no "medical expenses," so they give damages for "loss of earning capacity" though it is not proved that any earnings will be lost. These are called "*Smith* v. *Manchester*" damages, after the case at (1974) 17 K.I.R. 1, confirmed in *Moeliker* v. *Reyrolle* [1977] 1 All E.R. 9 (C.A.). Such damages may be substantial (£35,000 in *Foster* v. *Tyne & Wear C.C.* [1986] 1 All E.R. 567); and £5,000 (worth £10,000 at age 18) was awarded to an infant injured at one month, whose future was entirely speculative (*Mitchell* v. *Liverpool H.A.* (C.A., *The Times*, June 17, 1985)).

Some people, of course, work without being paid. The housewife is the classic example. Until recently the housewife had no claim for her inability to do the housework. The husband, on the other hand, was able to claim something for the loss of her assistance in the home. The husband's action is abolished by the Administration of Justice Act 1982, s.2. S.9 of the same enactment makes the tortfeasor liable for the victim's inability to perform gratuitous family services, but applies to Scotland only. In England such a claim had been endorsed by *Daly* v. *General Steam Navigation Co.* [1980] 3 All E.R. 696 (C.A.).

B. *Increased outgoings*

(1) *Medical expenses.* Although treatment under the National Health Service is free, patients who go to a private specialist can send the bill to the defendant (Law Reform (Personal Injuries) Act of 1948, s.2(4)). The rule in the Criminal Injuries Compensation Scheme is much more stringent (above, p. 180).

(2) *Nursing.* The plaintiff may need attention after leaving hospital. Having a nurse to live in costs a lot. Having a member of the family do the nursing costs the patient nothing (though it may cost the family something if someone has to give up a job to do the nursing). The Court of Appeal adheres to its view, shared by the Pearson Commission, that the victim's *need for treatment* is one of the items of his loss and that the defendant must pay its value, even if that need is met without cost to the plaintiff himself. The damages, which belong to the plaintiff and are unaffected by any private agreement between the victim and the family nurse, need not equal the commercial value of the services and must not exceed it (*Housecroft* v. *Burnett* [1986] 1 All E.R. 343).

H. WEST & SON v. SHEPHARD

House of Lords [1964] A.C. 326; [1963] 2 W.L.R. 1359; 107 S.J. 454; [1963] 2 All E.R. 625 (noted 83 L.Q.R. 2 (1969))

Damages for permanently comatose victim's loss of amenity

The plaintiff, a woman of 41 years of age, was dreadfully injured in a street accident brought about by the negligence of the defendant's servant. She