



NINESTJOHNSTREET
PERSONAL INJURY

CLYDE&CO

Riley v Salford
Royal NHS
Foundation Trust
[2022] EWHC 2417
(KB)

QUANTUM CASE NOTE



Riley V Salford Royal NHS Foundation Trust [2022] EWHC 2417 (KB)

QUANTUM CASE NOTE

References in square brackets relate to the paragraph numbers in the judgment.

Facts

1. The Claimant was a 27 year old man at the date of trial. He lost control of his motorcycle and suffered a serious fracture injury to his right leg in a road traffic accident. His injuries consisted of fractures to the right femur, tibia and fibula. He developed compartment syndrome. A delay in his treatment meant that following several operations, it became necessary to perform a below knee amputation of his right leg.

The Claim

2. The Claimant brought a clinical negligence claim arising out of the delays in his medical treatment. Breach of duty was admitted. It was accepted that absent the negligent care an amputation would have been avoided.
3. The Defendant advanced an argument that the Claimant would have suffered some inevitable orthopaedic restrictions irrespective of his negligent treatment.

Details of the Amputation Injury

4. The Claimant underwent a below knee amputation. He had been greatly troubled by cysts, abscesses and infections affecting the stump. He had been unable to use his prosthetic limbs at all at one stage, and had been restricted to using crutches, an iWalker or a wheelchair. He underwent surgery 3 years before trial for these problems and his condition had improved. At the date of trial, the Claimant's mobility was confirmed as SIGAM Grade F.

Lay Evidence

5. The Claimant had been able to return to some work and had taken several holidays abroad. He was a private individual with some difficulty accepting his disability and post-accident appearance. The case manager confirmed that the Claimant was often resistant to new ideas of methods of coping.
6. Following his amputation, the Claimant purchased a bungalow, after meeting his partner two years' previously, at a cost of £527,000 following receipt of an interim payment via a personal injury trust. The Claimant's 1st child was born during the year of trial.

Expert Evidence

7. The Court heard oral evidence from experts in the fields of orthopaedics, rehabilitation medicine, care / occupational therapy, accommodation and prosthetics. In addition, the Court received written evidence from experts nominated by the Claimant in the fields of psychiatry and physiotherapy.



The “But For” Case

8. The Defendant’s case on the Claimant’s “but for” condition and prognosis collapsed at trial with the Defendant largely conceding the Claimant’s case [13] and [16]. This had a knock-on effect for the cogency of the Defendant’s care evidence [25].
9. The Claimant’s case on causation was that “but for” the clinical negligence:
 - i. He would have largely recovered in 12 months.
 - ii. The tibial fracture would have healed.
 - iii. He would have worked to normal retirement age but would not have been able to work as a PE teacher and would have avoided employment with prolonged standing, walking, and heavy lifting.¹
 - iv. He would have been self-caring and capable of carrying out all but the heaviest of domestic tasks.²

The Major Issues

10. The central issues of interest considered in this judgment were:
 - i. Life expectancy [29]–[33].
 - ii. Future loss of earnings [61]–[72].
 - iii. Future care and case management [74]–[83].
 - iv. Prosthetics [100]–[110].
 - v. Accommodation [118]–[125].

The Court’s Determination of the Issues

a. Life Expectancy

11. The Defendant’s rehabilitation expert provided a “guestimate” of four to six years’ reduction of life expectancy relying on (i) impaired mobility (ii) excessive BMI (in the region of 30).
12. This was reduced to three to four years in the joint rehabilitation experts’ statement. At trial, the Defendant contended for a reduction in life expectancy of three years.
13. The Court rejected the invitation to reduce life expectancy in the absence of expert life expectancy evidence, the fact that BMI had not always been above 30 and there had been no detailed review of the factors (positive and negative) [32].
14. There was no satisfactory evidence to suggest the Claimant should be treated as someone with the reduced life expectancy [33].

b. Future Loss of Earnings

15. Pre-accident, the Claimant had applied to university to undertake a sports science degree to train to become a PE teacher. He had previously chosen not to pursue a degree. He had undertaken office work for the past couple of years. He was unable to pursue his ambition to become a PE teacher due to his non-negligent injuries arising from the road traffic accident. He contended that he was going to obtain IT qualifications at Open University having done a limited amount of computer software work after his amputation. The Court was prepared to adopt a multiplier-multiplicand approach to future losses despite the uncertainties. The Court held that but for his amputation the Claimant would have obtained University degree in IT and become an IT professional.
16. The salient aspect of the Court’s award on future loss of earnings were:
 - i. The Claimant’s return to work had been impeded by the physical and psychological effects of his amputation as well as his engagement in the rehabilitation process [39–40].



- ii. The Court discounted the first few years of credit to be given for likely earnings on the basis that the Claimant would work part-time whilst he acquired qualification and experience in IT work [69].
- iii. The Court accepted the Claimant's rehabilitation expert's opinion that the Claimant would need to give up work early by three to five years and therefore held a retirement age of 64 [70].
- iv. The Court accepted that at age 60–64 years, the Claimant's ability to work full time would be affected and reduced the multiplicand by approximately 38.5% during this period³ [70].

c. Future Care Claim

17. The Defendant faced a problem because its care expert had prepared her report on the basis of the Defendant's orthopaedic expert evidence, which had been abandoned at trial. The Court largely accepted the Claimant's care expert evidence [25].
18. The rehabilitation of the expert evidence on the likely SIGAM grades as the Claimant aged was as follows [17]:

SIGAM ⁴	Description	Sooriakumaran	Kulkarni
F	Normal or near normal	Up to 55–60 years	Up to 60 years
E	Walks more than 50m. No aids except in adverse terrain or weather.	60–70 years	60–70 years
D	Walks outdoors on level ground only, in good weather, more than 50m with/without aids.	70–80 years	70–80 years Straddling D/E
C	Walks on level ground less than or equal to 50m with/without aids.	80 years onwards	70–80 years Straddling D/E
B	Therapeutic use only for transfers, walking in therapy or use with nurses.	80 years onwards possibly	80 years onwards possibly
A	Limb wearing abandoned or cosmetic use only.	Last 2–3 years of life	Last 2–3 years of life



19. The Court made the following award for care:

Age	Hours	Basis	Cost
To 70 years	3 hours per week	Domestic support	£2,026 p.a.
70–75 years	3 hours per week	Domestic support	£2,026 p.a.
	7 hours per week	Agency support	£8,634 p.a.
Sub total			£10,660 p.a.
75–80 years	3 hours per week	Domestic support	£2,026 p.a.
	14 hours per week	Agency support	£17,268 p.a.
Sub total			£19,294 p.a.
80–83 years	3 hours per week	Domestic support	£2,026 p.a.
	28 hours per week (approx)	Agency support	£34,536 p.a.
Sub total			£36,562 p.a.
Last 2 to 3 years of life	—	Agency support	£362,199 ⁵
		No domestic assistance, help inevitably required	

Life (annual) care requirements (in addition to standard care provision)			
For Life	14 hours week / 5 weeks p.a.	Additional care when unable to use prosthetics.	£1,643.50 p.a.
For Life	2 weeks p.a.	Agency care ⁶ , additional care when ill	£657.40 p.a.
TBC		2 future surgeries	£7,000

Childcare			
0–3 years × children	10.5 hours per week	Childcare £5,256 p.a. × 6.05	£31,799
Children aged 1 to 12	—	Heavier domestic tasks related to childcare: cleaning/ laundry £1,351 p.a. × 17.27	£23,322



d. Future Case Management






20. The rehabilitation experts agree the Claimant would require a case manager for up to one year post-cessation of the litigation.
21. The Claimant's care expert had recommended three hours per annum for life. This was not accepted, the Court preferring the joint view of the rehabilitation experts.
22. The Court allowed:
 - 1 year × 3 hours p.a.
 - From age 70, 3 hours p.a.
 - Last 2–3 years of life, £3,240 p.a.

e. Prosthetics

23. The Claimant initially received an NHS prosthesis before subsequent private provision. He did not like the function of the micro-processor Elan foot, as it destabilised his gait. He used an Echelon VT foot on a day-to-day basis. His third prosthetic was for sports/water-based activities which was an Ossur Xplore foot.
24. The central point of dispute was whether the Claimant should be awarded a microprocessor Kinnex 2 foot. He had trialled the prosthesis and found it to be an improvement. The Defendant's prosthetics expert did not recommend this prosthesis being concerned that the heavier weight and charging requirement outweighed the advantages. The Claimant's expert believed the Kinnex 2 foot facilitated greater movement than his day-to-day Echelon VT foot and would reduce socket pressure which was especially advantageous given the problems with the Claimant's stump.



25. For contextual understanding, the prosthetics under consideration were as follows:

Prosthetic	Image	Description
Elan foot		Micro-processor everyday prosthesis
Echelon VT foot		Everyday prosthesis
Kinnex 2 foot		Micro-processor everyday prosthesis
Cheetah Explore		Sporting and water-based activities prosthesis
Ottobock Pro-Carve		Snowboarding foot



26. The Court determined the issues as follows:

i. **5 vs. 6 years replacement cycle for Kinnex.**

Held: 6 years.

Rationale: The Claimant's expert conceded six years' was reasonable and the Defendant's expert consistently maintained for six years.

ii. **Use of Kinnex as everyday prosthesis after 60 years.**

Held: Reasonable until 75.

Rationale: The Claimant's expert summary of the advantages (see paragraph 26) and the Claimant's own evidence as to the benefits after a trial.

iii. **Ottobock ProCarve Snowboarding Prosthesis.**

Denied by the Defendant.

The Claimant tried skiing and did not wish to pursue this hobby but expressed an interest in snowboarding seeing the advantages of the fixed position of feet on a single board. The Claimant claimed for eight years' cycles to age 60.

Held: The Court allowed a single cycle.

Rationale: The Claimant was not likely to take up snowboarding any time soon given the age of his children. The Claimant did not actually snowboard. Snowboarding tends to be pursued by younger skiers, and he was likely to snowboard for a limited number of years.

iv. **Whether socket revision should be included as a predictable cost within each cycle or as a lump sum contingency?**

Held: Reasonable to allow for replacement of socket in middle of each six year cycle up to 60 years.

Rationale: The rehabilitation experts anticipated muscle atrophy with aging affecting the socket fit.

v. **Whether a lump sum should be allowed for the introduction of new technology and price increases?**

The Claimant pointed to past examples of increasing costs.

Held: No award.

Rationale: Price increases were speculative. Competition might even lead to a reduction in prices.

27. The Court awarded prosthetics as follows:

Age	Prosthesis	Replacement	Costs
Up to age 60	1. Kinnex 2	6 years	£260,230
	2. Echelon VT		£103,885
	3. Cheetah Explore		£105,555
	Maintenance to 2023		£2,030
60–75 years	Kinnex 2	6 years	£164,187
	Echelon VT		£54,906
75 years +	A lightweight waterproof prosthesis		£30,952
Snow activity	Ottobock Pro-Carve Snowboarding Foot	1 cycle	£15,721
	Sub total		£737,466



f. Accommodation Claim

28. The Defendant advanced an argument that:
- But for the Claimant's injury he and his partner would have purchased a property at £240,000. The Claimant was required to give credit for half of the cost of the "but for" property in the sum of £120,000. This was agreed.
 - The Claimant ought to have obtained a contribution of £120,000 from his partner for living in the more expensive bungalow property.
29. The Court rejected this argument on the basis that:
- No authority was advanced in support of the proposition.
 - In **Swift v. Carpenter [2022] EWCA Civ 1295**, it was not suggested that it would be a failure to mitigate for the Claimant not to seek a contribution from their partner.
 - It was unlikely the Claimant would move in the future i.e. purchase another property.
 - This point was not advanced to the Claimant in cross-examination.

Final Judgment Sum

30. The final award made consisted of the following damages:

PLSA	£120,000
Interest on PSLA	£8,748
Past Losses	£323,426
Future Losses:	
Earnings	£769,100
Pension	£27,403
Care and Case Management	£980,557
Surgeries	£45,230
Therapies	£92,198
Transport	£308,990
Prosthetics	£737,466
Aids and Equipment	£160,887
Accommodation	£983,313
Holiday costs	£113,879
Shopping Costs	£5,245
Total	£4,676,442



Analysis: Headline Observations

31. Each case turns on its facts and there were specific aspects of the Claimant's case which were unique to the Court's assessment of care and the provision of prosthesis, namely the issues he had with his stump and a limited degree of inevitable future restrictions, although neither are unique features of amputation injury claims.
32. The Defendant's "but for" case on inevitable orthopaedic restrictions collapsed at trial, which fatally damaged the cogency of the Defendant's care expert evidence which was predicated on the Defendant's orthopaedic evidence. It will sometimes be advisable for a care expert to cost their recommendations on an either-or basis where there is a stark differential between the medical basis of each parties' case.
33. The Court was not interested in reducing life expectancy without a firm medical basis or commitment from the Defendant's rehabilitation expert or specific life expectancy evidence. No studies appear to have been advanced or disclosed before the trial [30]. It is unclear whether during the procedural phase of the litigation, the Defendant had sought to adduce life expectancy evidence or not. It should be remembered that the burden is on the party seeking to increase or reduce life expectancy.
34. The explanatory notes to the 8th edition of the Ogden Tables indicates at paragraph 8 that no increase or reduction is required for mortality outside the Ogden Tables unless there is, "...clear evidence in an individual case that the Claimant is "atypical" and can be expected to experience a significantly shorter or longer than average lifespan...".
35. At paragraph 13 of the explanatory notes, the editors state that any bespoke life expectancy assessment should not only take into account the consequences of the injury, but also all pre-and post-injury positive and negative factors relevant to the individual Claimant, these can include weight and whether the Claimant has an ideal BMI or is obese.
36. The trial of a prosthetic, if successful, combined with the Claimant's views will be a persuasive factor in the Court's assessment of which prosthetics to award.
37. The Court held that six-year cycles of replacement prosthetic costs were suitable for the particular prosthetics awarded. It was not prepared to speculate on the prospect of increased prosthetic costs in the future, notwithstanding the history of increasing prosthetic costs.
38. The award for care was detailed and full. It owed much to the collapse of the Defendant's orthopaedic evidence and the Court's preference for the Claimant's care expert generally. In this context, the later life care costs awarded in **Riley** provide a stark contrast to those awarded in **Swift**⁷, see the table below, suggesting an increased amount of 100%–120%.

Authority	Swift	Riley
80 years+	£15,750 p.a. [63]	£36,598 p.a. [75]
Last 2 years of life	£65,000 p.a. [66] ⁸	£144,879.60 p.a. [75] ⁹

39. Case management was limited to one year post litigation and re-starting at 70 years. The Court was influenced by the views of the rehabilitation expert over the Claimant's care expert. The total award was £21,633 [83] whereas in **Swift** a "contingency only" case management award of £8,000 was made [69(iv)].
40. It was not a failure to mitigate to seek a further contribution from the Claimant's partner to the cost of the adapted bungalow property. This argument was explored to a limited degree and it appears to have been developed more in submissions than in live evidence.



41. In this case, the Claimant had purchased his accommodation with an interim payment and was unlikely to move in the future. The normal starting point is that the Claimant will give credit for the amount of equity in the property which they would have held or contributed to “but for” the accident.
42. In other authorities, arguments that credit should be given to reflect the benefit that a Claimant’s parents might receive by living rent free in the new accommodation have previously been rejected because this is an incidental benefit to third parties (not the Claimant)¹⁰ see **Manna v. Central Manchester University Hospital NHS Foundation Trust** [2015] EWHC 2279 (QB).
43. The Court’s approach in **Riley** was to hold that any benefit to the Claimant’s partner being able to live rent-free in the Claimant’s property is a benefit to the partner (not the Claimant) and was not to be offset against the Claimant’s claim¹¹. This argument has been previously run without success in **Noble v. Owens** [2008] EWHC 359 (QB) and see also **Iqbal v. Whipps Cross University Hospital NHS Trust** [2007] LS Law Medical 97. It remains to be seen whether it will be reviewed at a higher judicial level.

Matthew Snarr (9 St John Street) and Elizabeth Wallace (Clyde & Co)

15.11.22

Notes

- 1 In its assessment of the Claimant’s “but for” earnings, the Claimant did not apply a disabled contingency discount multiplier [67].
- 2 Hence there was no inevitable care [74].
- 3 By agreement of the parties in the event the Court accepted the medical causation argument.
- 4 Specialist Interest Group for Amputee Medicine, see paragraph 3.1 and footnote 72 of the British Society of Rehabilitation Medicine – Amputee and Prosthetic Rehabilitation – Standards and Guidelines (3rd Ed.).
- 5 This sum was agreed between the parties, see further comment in the “Headline Observations” section.
- 6 This is not explicitly clear from the judgment but the cost indicates professional provision.
- 7 See **Swift v Carpenter** [2018] EWHC 2060 (QB) in which the Claimant, aged 43 at trial, had suffered a left sided below knee amputation with phantom limb pain and orthopaedic injuries to her right foot/ankle causing ongoing pain and stiffness in her right ankle/foot. She was a robust person who had pursued running and triathlons post-accident.
- 8 Calculated at £1,250 pw × 52 weeks as agency care see paragraph 66 of **Swift**. The award of £1,250 pw reflected an enhanced amount inside a reasonable bracket of £900–£1,500 due to London weighting.
- 9 No annual breakdown is given in the judgment. The figure of £362,199 is awarded as (agreed) compensation for the last 2–3 years of the Claimant’s life. Taking a very rudimentary approach of £362,199 / 2.5 years = £144,879.60 p.a.
- 10 See Chapter H-335 of *Personal Injury Schedules: Calculating Damages* (4th Edition).
- 11 Ibid.