Neutral Citation Number: [2022] EWHC 532 (QB)

Case No: D90MA092

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

The Civil Justice Centre,
Bridge Street West,
Manchester

Date: 11 March 2022

Before:

His Honour Judge Bird sitting as a Judge of this Court

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Between:

CELINE MARTIN **(formerly known as Vicky Kathleen Higgins)**	**Claimant**
- and -	
SALFORD ROYAL NHS FOUNDATION TRUST	**Defendant**

- -
- -

Mary Ruck (instructed by **Slater and Gordon UK Limited**) for the **Claimant**
Charles Feeny (instructed by **Hill Dickinson**) for the **Defendant**

Hearing dates: 12,13,14 January 2022 & 11 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

His Honour Judge Bird:

1. This hearing follows my assessment of damages in this case. I am to determine how the damages are to be paid: by a lump sum order or by a periodical payments order and if periodical payments are appropriate whether that order should be variable. I am also to determine (after allowing permission to amend the original claim at the end of the quantum trial) whether the claimant (whom I found to have capacity) should receive damages to reflect the set up and running costs of a personal injury trust.

2. The background to the claim is set out in the liability judgment of Andrews J (as she then was) reported at [2018] EWHC 1824 (QB) and the quantum judgment reported at [2021] EWHC 3058 (QB).

Lump Sum or Periodical Payments Order

3. By section 2(1) of the Damages Act 1996 a court awarding damages for future pecuniary loss in respect of personal injury is required to consider making an order that the damages are wholly or partly to take the form of periodical payments.

4. CPR 41.7 requires the court to have regard to all the circumstances of the case and in particular to consider the form of order which best meets the claimant's needs having regard to the following factors:

    a. the scale of the annual payments taking into account any deduction for contributory negligence.
    b. the form of award preferred by the claimant including

        i. the reasons for the claimant's preference; and
        ii. the nature of any financial advice received by the claimant when considering the form of award; and

    c. the form of award preferred by the defendant including the reasons for the defendant's preference.

5. The claimant has received financial advice from Richard Cropper. He has prepared 3 reports and I heard oral evidence from him. His evidence was, given the size of annual payments, that the claimant's needs would be best met by a periodical payments order. In summary, he was concerned that uncertainty in the performance of future investments meant that there was a risk that returns anticipated by the discount rate would not be achieved. His view was that the risk of underperformance should not be borne by the claimant. Mr Feeny (who appears for the defendant) did not challenge that conclusion.

6. Miss Ruck who appeared for the claimant confirmed that the claimant accepted Mr Cropper's advice and was content that she should receive a periodical payments order.

7. I have considered the claimant's detailed witness statement dated 22 October 2021. In that statement she confirms that she has discussed the matter with her father. Her position is summarised at paragraph 3:

> *".... I have really considered hard whether it would be better to have the lump sum myself and I think it should be my decision. However, my dad and my legal representatives have concerns about that, given what Mr Cropper says in his report. They all agree with Mr Cropper's advice that an annual payment is the best way forward. Having listened to them and discussed it all, I agree with the conclusion reached by Mr Cropper. It is my preference to have my damages awarded in respect of future care and case management paid by way of periodical payments."*

8. Taking into account the factors set out in CPR 41 I have come to the clear conclusion that I should order that the claimant's damages for future pecuniary loss should take the form of periodical payments.

<u>Variation of the Periodical Payments Order</u>

9. Article 2 of the Damages (Variation of Periodical Payments) Order 2005 ("the 2005 Order") gives the court power to include as part of an order for periodical payments provision that the periodical payments may be varied (such an order is referred to as a "variable order").

10. The power arises:

> *If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will–*
>
> *(a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or*
> *(b) enjoy some significant improvement, in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission.*

<u>The mechanism envisaged by the Order</u>

11. If such an order is made, Article 5 of the 2005 Order provides that it "must specify" the relevant disease or type of deterioration or improvement and "must provide" that a party "must obtain the court's permission to apply for it to be varied unless the court otherwise orders".

12. The requirement to specify the relevant disease or type of deterioration or improvement is central to the operation of the 2005 Order. See in particular:

    a. Article 7 which provides that a party may only make one application to vary a variable order in respect of each specified disease or type of deterioration or improvement
    b. Article 10 which requires an application for permission to vary the order (which is required by Article 5 unless the court dispenses with the requirement) to be accompanied by evidence that "the disease, deterioration or improvement specified in the order …. has occurred"
    c. Article 13 which allows the court to vary the order if satisfied that that "the disease, deterioration or improvement specified in the order …. has occurred"

13. The need for permission to apply to vary the order introduces a gate-keeping step into the process (similar to permission stage built into most appeals and into judicial review proceedings). Article 10 deals with the application for permission and provides (Article 10(5)) that it will be dealt with "without a hearing" after consideration of the applicant's evidence and any representations made by the respondent. If permission is refused the applicant has the right to have the refusal reconsidered at a hearing where any decision is final (Article 11). If permission is granted the Court will give directions for the final determination of the application.

14. Article 14 provides that unless the provisions of the 2005 Order are inconsistent with them, the Civil Procedure Rules ("CPR") will apply. CPR 41 (which deals with damages) makes no specific reference to the variation of periodical payments. CPR 39.2 provides that the general rule is that interim or final decisions made by the court are to be made at a public hearing. CPR 23.8 sets out certain instances in which the court may make an order on an application without a hearing. The application to vary the variable order (the substantive application) will therefore generally take place at a public hearing in the usual way. CPR 52 and its Practice Directions will govern rights of appeal.

15. There was some suggestion in the course of argument that the application to vary might be dealt with on paper without any right of appeal. For the reasons set out above I reject that contention.

The Power to Vary

16. There are clear similarities between the terms of the 2005 Order and the terms of section 32A(1) of the Senior Courts Act 1982 which authorises the court to award provisional damages:

> *This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the [claimant] will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition*

17. With the exception of the underlined words, Article 2(a) follows section 32A(1). It follows that judicial guidance on the application of section 32A(1) will assist with the application of Article 2(a). In *Kotula v EDF* [2011] EWHC 1546 (QB), Irwin J accepted the submission that the basis for variation of periodical payments is in law "identical for all essential purposes" to the test under the amended Damages Act 1996.

18. In my view the power to vary an order under Article 2(a) covers physical and mental conditions. Such an interpretation is consistent with the view taken by Irwin J in Kotula that the 2005 order does not mark a change on legal policy. The omission in the 2005 Order of the underlined words in the Statute seems to me to be simply a matter of drafting. The underlined words have been removed because they are not necessary.

19. The effect of Scott Baker J's decision in *Willson v Ministry of Defence* [1991] ICR 595 (and the subsequent decision of the Court of Appeal in *Curi v Colina* [1998] 7 WLUK 549 and also the decision of Slade J in *Chewings v Williams* [2009] EWHC 2490 (QB) at para.12) is that before the power arises there has first to be proved or admitted a chance (ie something

that is measurable rather than fanciful) that the claimant will develop some serious disease or suffer some serious deterioration to her physical (or mental) condition.

20. In *Willson*, the Learned Judge found on the evidence that no "chance of a serious deterioration" had been established and so no order could be made.

The evidence

21. The application for a variable order is made by the defendant because the serious deterioration for which it contends will lead to a decrease in the cost of the claimant's day-to-day care. The relevant deterioration identified by the defendant falls under 2 heads, the first identified by the claimant's own orthopaedic expert Mr Worlock (see paragraph 22 of the quantum judgment) and the second from the jointly instructed neurorehabilitation expert Dr Basu (see paragraph 25 of the same judgment).

22. Mr Worlock suspects that the combination of the claimant's long standing psychiatric problems (not attributable to the defendant's negligence), the profound weakness of her left arm/leg and problems with her right hip will mean that she will require to move to a nursing home at some point in the future probably during her 60s or 70s. Dr Basu felt that it was likely that the claimant would suffer from significant limb stiffness from about the age of 60 at which point it might be necessary to transfer her to institutional care.

23. The defendant's position is therefore that there is a sufficient "chance" that the claimant will in the future (when she is in her 60s) suffer a deterioration in her physical condition as a result of its negligence which (either alone or as a result of her pre-existing mental health condition) will result in a need to move her to an institutional care environment. Such a deterioration would be serious because it would mean that the claimant's home-based care regime, no matter how comprehensive, would not be sufficient to meet her care needs. In other words, she could no longer live at home and would require "institutional" care.

24. Whether that chance (which I find exists) eventuates is a matter for the court in due course on any application for a variation.

25. I am satisfied that the defendant has established on the evidence that there is a more than fanciful prospect (a chance) that at some time in the future, the claimant will, as a result of the act or omission which gave rise to the cause of action, suffer a serious deterioration in her condition.

26. I am therefore satisfied that the power to make a variable periodical payments order arises. I have a discretion. In exercising the discretion, I bear in mind the following points:

    a. The claimant has expressed a desire for certainty going forward. She does not want to worry about further applications to court or about the risk of losing some of her award. The claimant does not trust the defendant.
    b. The making of a variable order should not be a run-of-the-mill occurrence. The general principle remains that damages should be assessed once and for all at the date of the relevant court hearing.
    c. The need for caution in approaching the issue of variation is underlined by the fact that the order allows for only one application to vary.

d. If the order is made and the variation activated there would be a benefit to the public purse because the defendant would pay a reduced annual bill. At the same time, because for the variation to be made it would need to be established that the claimant's care needs could not be met at home, there would be no consequential detriment to her.

27. I have come to the conclusion that I ought to exercise the discretion in the defendant's favour and make a variable order. I accept that such orders are not everyday orders but note that the Order allows me a wide discretion. The claimant will be disappointed by this conclusion. I am satisfied however that it is the appropriate order to make. In making it I am simply permitting an application for a variation to be made in due course in accordance with the terms of the Order. Whether one is permitted will be a matter for the court in due course.

28. It was suggested that any order should prevent an application to vary being made before the claimant's 60th birthday. Although the evidence refers to the likelihood or probability of the deterioration occurring once the claimant is in her 60's, it does not exclude the chance that it will occur earlier. For that reason, the order should permit the application to vary at any time during the claimant's lifetime.

29. Since hearing argument an amended draft variable order has been prepared. The terms of the draft are not agreed. If there are further submissions on the precise form of order, I will hear them when this judgment is handed down.

<u>Damages in respect of the cost of a PIT</u>

30. At the end of the quantum trial, I gave permission to the claimant to amend her schedule of loss to include the cost of setting up and running a personal injury trust (the PIT). There has been no amendment of the Particulars of Claim and so no new cause of action has been added. I now deal with the outcome of the trial of that issue.

31. In summary the claimant submits that there is a reasonable need for an award of damages to cover the costs of the PIT so as to restore the claimant to the position she would have been in had the defendant not been negligent. The claimant relies on her vulnerability to justify such an order. In effect she calls on the court to make an order designed to protect her from the consequences of that vulnerability. The amended schedule of loss puts the claim in this way:

> "*…the Claimant will require a professional trustee and the shelter of a Personal Injury Trust to provide the necessary protection, structure and security for the Claimant's funds. She is vulnerable to financial exploitation, by reason of her mental health and the receipt of funds will make her a target for such exploitation. A trust puts a shield between her and the money, so as to impede unrestricted access*."

32. I will deal with the particular circumstances of the claimant which render her vulnerable and so establish a reasonable need for a PIT. I will then consider the evidence of how a PIT would work in practice and how effective it would be as a mechanism to protect the claimant against her vulnerabilities and then consider the law, first by reference to specific authorities and then by considering the proper approach to an award of damages of this type first as a matter of principal and then on the facts of the case as I have found them to be.

The claimant

33. The experts (Dr Adshead and Dr Ramzan) agree that by reason of her EUPD diagnosis, the claimant is at risk of "*getting into the kind of interpersonal relationship in which she is vulnerable to exploitation by an intimate or dependent*".

34. I have accepted that evidence and found that the claimant is vulnerable to suggestion and at risk of being influenced to spend her money in inappropriate ways as a result of her EUPD. On the other hand, I have found that she has capacity and that she seeks and acts on advice, in particular from her father. The claimant told me in evidence during the quantum trial that she would seek advice on how to deal with her fund and it was clear from her evidence that she had some insight into her vulnerability.

35. Specific instances of how others have taken advantage of her vulnerability or attempted to do so are set out in her latest witness statement of 22 October 2021. There the claimant talks about Tinisha Cotterell's request to borrow £10,000. I refer to this incident in the quantum judgment. Dr Qureshi (whose report I refer to below, and whose assessment of the claim is the most up to date I have) refers to requests from family for money once she has received her damages award.

36. I accept, as the experts point out, that the claimant's schizophrenia is not subject to complete recovery and both schizophrenia and EUPD are "enduring in nature". In June 2020 when Dr Ramzan prepared his report on the claimant (as her instructed expert in psychiatry) he concluded that her schizophrenia was stable, and that the claimant was taking prescribed drugs appropriately. At the same time her EUPD was in "relative remission" following a "gradual amelioration of the claimant's presentation over time".

37. I note that the expert evidence refers to a close link between the claimant's physical care regime and her mental health. Dr Adshead and Dr Ramzan have agreed that "a proper and comprehensive approach to meeting her physical health needs is likely to have a beneficial effect on her mental health." In my view this link is important. Going forward the claimant will have in place a suitable and appropriate physical care regime as a result of the damages award. She will have the benefit of a periodical payments order to cover her future care needs and she will soon receive a substantial capital payment to allow her to purchase and adapt a property in which she can live comfortably. All of these factors will, as the experts have agreed "have a beneficial effect on her mental health".

38. Because it was relied on by the claimant it is necessary to consider the claimant's risk of suicide. I briefly referred in the quantum judgment to suicide attempts before 2010.

39. Between April 2013 and May 2016, the claimant lived at Agricola House. Whilst there it appears that she experienced some suicidal ideation and may have attempted suicide by tying a cord around her neck. She told Mr Ford (her care and equipment expert) that the episode was a "blip" and that by July 2017 she had no suicidal thoughts although there were reports of such thoughts in February 2017. Dr Ramzan describes that in 2018 the claimant again had suicidal thoughts and had taken overdoses of cocaine in August and November 2018. In 2019 (at a time when the claimant was in hospital having been recalled under the terms of the hospital order) she was assessed as being a suicide risk and presented with "suicidal thoughts, plans and intent". She remained at risk of suicide in 2019 whilst still in hospital. After release from hospital in March 2020 it appears from a report compiled by Dr Qureshi on 16 April

2021 that she continued to have some suicidal thoughts. In August 2020 she was admitted to hospital following an overdose and released shortly thereafter.

40. Dr Qureshi concluded in April 2021 that the claimant's then current risk to herself was low but could escalate quickly if her mental health deteriorates. I have seen no new expert evidence since the reports prepared for the quantum trial in May 2021. Dr Qureshi's report is the most up to date I have been taken to.

The Evidence of protection afforded by a PIT

41. It is notable that despite detailed evidence from very experienced experts I have not seen a proposed or standard form trust deed. I do however have the benefit of a helpful explanation of how a PIT might be constituted from Elizabeth Hughes, the defendant's expert and, albeit to a lesser extent, Mr Knott, the claimant's expert. Miss Hughes is a solicitor and director of Hugh Jones Solicitors where she is head of Court of Protection work. She deals with PITs at paragraphs 14 to 19 of her statement dated 18 October 2021. Mr Knott is a solicitor and a Senior Practice Director at the claimant's solicitors.

42. Miss Hughes' evidence is that the usual vehicle for a PIT is a "bare trust". Snell's Equity describes a bare trust in this way (see para.21-027 in the 34th ed.) :

> *A bare (or simple) trust is one where property is vested in one person on trust for another, but where the trustee owes no active duties arising from his status as trustee. His sole duty is to convey the trust property as the beneficiary directs him. An example is where property is transferred to T "on trust for B absolutely". In such a case, T's sole duty is to allow B to enjoy the property and to obey any direction he may give as to how the property should be disposed of.*

43. As the claimant has been found to have capacity, Miss Hughes points out that trustees will have "extremely limited duties". Miss Hughes bases her assessment of future costs of a PIT on such a limited involvement. At paragraph 17 she says:

> *"in the event that an adult Claimant with capacity requests access to her money, her trustees cannot stand in her way. If she asks for the trust to be wound up and for the assets held within it to be transferred to her, the trustees will be duty-bound to comply with her instruction. The Claimant will be making her own decisions. The trustees will be powerless to prevent the Claimant from spending her money in any way that she chooses"*

44. At paragraph 4(b) of his statement of 13 May 2021, Mr Knott agrees that the most suitable form of trust in these circumstances is a bare trust.

45. In the joint statement prepared by the experts, Miss Hughes noted that the PIT gives "*some protection against vulnerability because it gives the trustee the opportunity to discuss a decision with the beneficiary but if the beneficiary retains capacity to make the decision even if they are vulnerable the trust cannot withhold funds*". Both experts agree that the "level of costs" is "reasonably necessary" to manage the claimant's award.

The case law on the general approach to awards which compensate the claimant for the cost of managing a compensation fund

46. Such awards are routinely made when a claimant lacks capacity. In those cases, the award would cover Deputyship and Court of Protection costs. Such cases represent the paradigm invocation of the court's protective jurisdiction. Where a claimant has capacity, awards to cover this type of loss have (at least in the past) not been made.

47. The general approach to an award of damages to cover the cost of taking advice on the investment of a compensatory fund (and managing that fund) is summarised in *Eagle v Chambers No.2* [2004] EWCA Civ 1033 at paragraphs 88 onwards. The Court of Appeal there discuss the first instance decision of Davis J in *Page v Plymouth* [2044] EWHC 1154 (QB) decided 2 months earlier. The following points appear:

    a. The claimant in *Eagle* was a protected party. There was no issue that the costs of a "receiver" (or Deputy) were recoverable, but there was an issue about investment advice that would be provided by experts selected from a court of protection panel.

    b. Damages in respect of such costs were not awarded because Investment costs are "within the territory" of the applicable discount rate. In other words, the cost of investment advice is taken into account when the discount rate is set (*Wells v Wells* [1999] 1 AC 345 and *Page v Plymouth* [2004] EWHC 1154) and so awarding such sums would lead to double recovery (see also *A v Powys* [2007] EWHC 2996 at paragraph 157). The principle applies to protected parties and parties of full capacity.

    c. Fund management charges fall to be treated in the same way as investment advice. *Page v Plymouth* concerned claims for investment charges and fund management costs.

48. It is common ground (the experts having so agreed) that the PIT sums sought will not cover investment advice.

49. In *A v Powys Local Health Board* [2007] EWHC 2996 Lloyd-Jones J (as he then was) dealt with the issue of future management of a large award at paragraphs 155 onwards. The claimant, who was vulnerable but of full capacity, had sought an award to cover the cost of a professional trustee to carry out administrative tasks and "to act in protection of [her] interests". The Learned Judge rejected the claim on the basis that the claimant had no reasonable need for a trustee to protect her interests. The Judge attributed particular weight to the fact that the claimant was of full capacity and was no more vulnerable than any other severely physically disabled claimant. She had the benefit of "devoted and protective family". On this basis the court left open the question of whether it would "ever be appropriate to make an award in the case of someone who is not and will not be a patient for the cost of a trustee performing a protective role similar to that of a court appointed deputy in the case of a patient".

50. I was referred to a Scottish decision of the Outer House of the Court of Session in *Good v Lanarkshire* [2015] CSOH 75. At paragraphs 15 to 17 Lord Uist deals with the recoverability of PIT costs. The court refused to award PIT costs on the basis that a PIT was not "necessary".

Where a claimant has a particular vulnerability

51. The claimant argues that the Court has a positive duty to protect the vulnerable which requires it to award the PIT costs the claimant seeks. *Rabone v Pennine Healthcare* [2012] 2 UKSC 2 is cited as authority for that proposition.

52. The claimant points to a number of claims which lead to the House of Lords decision in *JD(FC) v East Berkshire Community Health NHS Trust and others [2005] UKHL 23* as an instance of the court acting to protect the vulnerable. The report concerns three joined appeals. In each, parents sought to bring negligence claims against doctors and social workers who had negligently concluded that the parents had abused or harmed their children. In one case a child brought an action. In each case, after the trial of a preliminary issue, the claims had been struck out on the ground that no duty was owed to parents or to children applying principles set out in the House of Lords decision of *X v Bedfordshire County Council* and *M v Newham London Borough Council* [1995] 2 AC 633.

53. The Court of Appeal (whose decision is reported at [2003] EWCA Civ 1151) noted that the facts of each claim had arisen before October 2000 when the Human Rights 1998 came into force. No claim could therefore be brought under the Act. The Court of Appeal concluded that, insofar as they concerned the rights of a child, the *Bedfordshire* and *Newham* decisions of the House of Lords "*cannot survive the Human Rights Act*" and therefore that "*It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings*." The position was "*very different*" in respect of claims brought by parents. The Court of Appeal concluded that no common law duty of care was owed to parents.

54. The appeal to the House of Lords was concerned only with the question of whether a duty was owed to parents. Lord Bingham would have allowed the appeal, expressing a clear preference for the law of tort to "*evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems*". The majority however (Lords Nicholls, Rodger and Brown) dismissed the appeal.

55. The claimant also relies on *Re T* [2021] UKSC 35 a case which concerns the court's power to invoke its inherent jurisdiction to deprive a child of her liberty when to do so appears to run contrary to statute and to article 5 of the Convention for the Protections of Human Rights and Freedoms. In short, the majority of the Justices agreed with the view expressed by Lady Black that "*it is unthinkable that the High Court, with its long-established role in protecting children, should have no means to keep these unfortunate children (and others who may be at risk from them) safe from extreme harm, in some cases death. If the local authority cannot apply for an order under section 25 because there is no section 25 compliant secure accommodation available, I would accept that the inherent jurisdiction can, and will have to be, used to fill that gap, without clashing impermissibly with the statutory scheme*."

56. At paragraph 175 Lord Stephens (with whom the majority agreed) felt that the use of the inherent jurisdiction in these circumstances was "supported by the operational duty" which arises under Article 2:

> "*The positive operational duty to protect life under article 2 arises where the state, or in this case the High Court as a public authority, has actual or constructive*

knowledge that there is a real and immediate risk to the life of an identified individual or individuals. If the duty arises then it falls to be discharged by public authorities, including by the High Court but this does not necessarily mean that action, or any particular action, needs to be taken. Rather the nature of the action depends on the nature and degree of the risk and what, in the light of the many relevant considerations, the public authorities, including the High Court, might reasonably be expected to do to prevent it. In this way the positive operational measures must be chosen with a view to offering an adequate and effective response to the risk to life as identified."

57. The ***Rabone*** decision is relied upon to establish that the court has a protective jurisdiction and a duty to protect the claimant from the risk of suicide. It is submitted that the duty should be discharged by requiring the defendant to pay damages to allow the PIT to be established. Before dealing with the argument, I note that the claimant has not expressly pleaded reliance on Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the right to life) and so does not seek to argue that Article 2 can be used to provide any remedy. At paragraph 12 of the claimant's skeleton argument Miss Ruck, relying on *Rabone*, submits that "*the court, as an emanation of the State, has an operational duty to safeguard life where there is a real and immediate risk to life*".

58. In *Rabone*, The parents of an adult child who committed suicide whilst on home leave from hospital where she was a voluntary patient receiving psychiatric care after a recent serious attempt at suicide argued that the defendant trust owed them a duty ("the operational duty") to take steps to prevent their daughter's suicide. The claim was dismissed at first instance and in the Court of Appeal but upheld in the Supreme Court.

59. The following points arise from *Rabone*:

    a. Article 2 may, in certain well-defined circumstances, give rise to a positive duty to protect life. The duty will be breached if there is a known "real and immediate risk" to the life of an identified individual and the relevant authority has failed to take appropriate steps which might have avoided the risk (paragraph 12)

    b. It is not every "real and immediate risk" to life that gives rise to the duty. The risk of a patient dying whilst undergoing heart surgery is likely to be "real and immediate", but no operational duty arises. The risks in such cases are simply "casual risks" (see paragraphs 18 to 21).

    c. The following factors may be relevant ("*but not necessarily provide a sure guide*" see paragraph 25) in determining whether the operational duty exists (where there is "real and immediate risk"):

        i. Whether the state has assumed responsibility for the individual's welfare. The paradigm case being where the state has detained an individual (paragraph 22)
        ii. The vulnerability of the individual (paragraph 23)
        iii. The nature of the risk (paragraph 24) where a distinction is drawn between ordinary risks (inherent for example in a soldier's working life or treatment as a patient) and exceptional risks.

d. The steps an authority would need to take to discharge its duty depend on "the extent of the risk" (paragraph 98 Lady Hale) and the standard demanded is one of reasonableness (paragraph 43). The authority is not required to take on a disproportionate burden in discharging the duty (paragraph 12 and Lady Hale at paragraph 86)

Bars on recovery and other reasons to require recovery

60. In granting the claimant permission to amend to plead a claim for PIT losses, I expressed the view that simple, factual "but for" causation was made out. "But for" causation is generally seen to serve an exclusionary purpose. Save in special circumstances (which do not arise here) a claim will fail if the claimant cannot establish that "but for" the defendant's wrong the loss would not have been suffered. Establishing "but for" causation is often simply a first step in the enquiry into the extent of recoverable damages.

61. The general aim of an award in damages is to restore the claimant to the position they would have been in "but for" the defendant's wrong. The general aim is however subject to restrictions. As McGregor puts in at para. 6-001:

> "*to award damages so as to put claimants, as far as money can do, entirely in the position they would have been in had the tort or breach of contract never occurred, would place too great a burden upon defendants. Some limits must be imposed upon this starting figure, and the defining and refining of these limits by the courts over the years have produced the most difficult, and hence the most interesting, problems in the whole field of damages*"

62. Damages that are too "remote" are not recoverable. McGregor explains that remoteness is a portmanteau term covering a spectrum of reasons for denying what might be seen as "full" recovery.

63. It follows from these statements of principle that even if the claimant establishes that there is a reasonable need for her to receive damages to cover the costs of the PIT so as to restore her to the position, she would have been in had the defendant not been negligent, a right to recovery does not follow.

Discussion

64. I regard the absence of any reported decision where the court has decided to award the costs of managing an award to a claimant of full capacity as instructive. As Lloyd-Jones J (as he then was) noted in *A*, the absence of authority is not in itself a bar to recovery as long as the claim is in accordance with legal principle and other authority.

65. The claimant seeks to invoke the protective jurisdiction of the court. The presence (or absence) of a relevant protective jurisdiction is in my judgment of central importance to the outcome of the claim.

Does the court have a protective function here?

66. The Court's protective (or supervisory) jurisdiction arises most obviously where a party lacks capacity. In such circumstances the party is a "protected party", or a "protected beneficiary" and the protector is the Court. The costs of managing a compensation fund (deputyship costs and court of protection costs but not the cost of taking investment advice) are awarded in such cases as a matter of course.

67. The High Court has an inherent general jurisdiction in relation to children (and others who are unable to protect themselves) which is protective in nature (see the decision of Macdonald J in ***Tameside v AM*** [2021] EWHC 2472 (Fam)). In some circumstances a positive duty (an "operational duty") arises to protect the fundamental rights of a vulnerable individual. The cases of ***JD*** and ***Re T*** are cases where this protective jurisdiction is invoked to protect children.

68. Save where children and protected parties or protected beneficiaries are involved, the Court does not generally adopt a protective role. This is illustrated by the established principle that the Court is not concerned with how a claimant deals with damages after they are awarded. A person who is of full capacity is entitled to take his or her own view of things. There will be no separate award in respect of the cost of investment advice and a successful claimant will be free to invest, gamble or otherwise squander his damages.

Discussion

69. Although there is no claim based on Article 2 (the right to life) I accept that it is appropriate to consider if the court comes under an operational duty to take steps to counter the risk that the claimant might commit suicide. Such a duty is protective in its nature.

70. I am prepared to proceed on the basis that the claimant's risk of suicide is both real and immediate. Dr Qureshi's report of April 2021 (now 8 months old but the most recent I have) clearly considers that the risk of suicide is not remote or fanciful. I note that in ***Rabone*** the Judge at first instance described the risk of suicide as "low to moderate" (see paragraphs 35 and 38). Dr Qureshi's evidence in my view is that the risk of suicide was "present and continuing" in April 2021. This is enough for me to conclude that the risk is "immediate" (see paragraph 39 of Rabone).

71. I did not hear evidence from Dr Qureshi and so the conclusions I draw from his report (which was not prepared for these proceedings but for a different but important purpose) are necessarily not as robust as they would be had his view been tested in cross examination.

72. It is plain from ***Rabone*** that the presence of a real and immediate risk to life is not sufficient for the operational duty to arise. In considering if the duty does in fact arise, I take the following factors into account:

    a. The claimant is not under the direct supervision of the state (or the defendant) or the court. She is not an in-patient and she is not a protected party. In ***Rabone*** the Supreme Court extended the class of persons who might benefit from the Article 2 operational duty to those who were "voluntary" psychiatric in-patients. To extend the class of potential beneficiaries even further to someone in the position of the claimant would in my view be going too far and would not be in accordance with principle.

    b. I accept the claimant is vulnerable to exploitation. That vulnerability has been "amplified" by her injuries and by the award of damages she has received. But she

has support from her father and takes his advice. Her position is improving, and her continued stability will be assisted by the care package and accommodation that will be put in place.

c. In considering the nature of the risk it is necessary to consider likelihood of the risk eventuating as well as whether the risk is "exceptional" or "ordinary".

d. The risk of the claimant committing suicide is, on the evidence, not a high risk. Dr Qureshi has expressed the view that the claimant's self-harming is "a lot better" and reports that she is "collaborative and co-operative" when dealing with mental health support. These factors, combined with the award of damages designed to address her physical needs for the rest of her life (which will have a "beneficial effect" on her mental health (see paragraph 35 above), are all pointers to a low risk.

e. As to the nature of the risk, it arises from a number of factors including substance abuse and relationship breakdowns and feelings of desperation arising out of her injuries, all of which are exacerbated by pre-existing mental health issues. I would class the risk as exceptional rather than ordinary because it cannot be said to be something the claimant has consented to or acquiesced in. I consider it relevant that the suicide risk has not been created solely by the defendant's negligence.

73. Taking all of these factors into account I have come to the conclusion that the operational duty does not arise.

74. If I am wrong and the duty does arise, I have come to the conclusion, bearing in mind the extent of the risk, that the duty has been discharged and if I am wrong about that, that there are no reasonable and proportionate steps the court (or the defendant) should be required to take to deal with the risk. In reaching that conclusion I take the following into account:

a. A substantial award of damages has been made to deal with the claimant's physical health and care needs going forward. The care package she will receive is holistic and includes agreed provision for holidays, transport and accommodation. No provision within the damages award was made for mental health care because no issues were raised with the state-funded psychiatric care she is receiving. The provision of a state-funded suitable mental health care package (which addresses her risk of suicide and self-harm) is a very strong indicator that any operational duty owed to her is being discharged.

b. I am not persuaded on the evidence that requiring the defendant to fund a PIT would address the risk faced by the claimant in any meaningful way. The claimant is free to choose to have a PIT if that is how she chooses to manage the fund and for the reasons I set out below I am not persuaded that the PIT is in any event an effective mechanism to protect the claimant from her vulnerability.

75. A further point arises in my view from the cases. In ***Re T*** the court was invited to authorise a local authority to deprive a child of their liberty. The court sanctioned the steps taken by the local authority and in effect declared the steps they had taken to be lawful. In ***JD*** the court used the Human Rights Act to conclude that a duty of care was owed to a child. In neither of those cases was the court's direct answer to the call to act an award of damages. Here the claimant seeks an award of damages. Even if the court owes an operational duty it seems to

me that an award of damages would not be a reasonable response to the risk.

76. I therefore conclude that no protective jurisdiction arises, whether by reason of an operational duty or otherwise.

The consequences of an absence of protective jurisdiction

77. In the absence of a protective jurisdiction over her affairs in my view it is not open to me to award damages in respect of a PIT. This is consistent with the absence of any reported case where damages to fund a PIT have been awarded to a claimant with capacity. The overriding principle is that the court is not concerned with the future management of the compensatory fund. Save for the points I have dealt with and dismissed, there is no principled basis on which I can conclude that an award should be made.

Taking the claimant as the defendant finds her

78. In my view this also adds nothing to the argument. Taking the defendant as a vulnerable person is the starting point. The real issue is what steps should be taken to deal with the vulnerability. Where the court lacks a protective jurisdiction (as explained above) the answer in my judgment is that the court has no power to protect the claimant.

79. For these reasons I have come to the conclusion that no award should be made under this head on the facts of this case.

Alternatives

80. In case I am wrong in my conclusion, and it is open to me on the facts as a matter of principle, to make an award I would in any event decline to do so.

81. I am not satisfied that the claimant's vulnerability is such that an award of damages to fund a PIT is reasonably necessary or indeed appropriate. I come to that conclusion for a number of reasons:

    a. As Miss Hughes' evidence make plain a bare trust could be unravelled at any time by the claimant. If she is determined to make unwise gifts, investments or purchases that is a matter for her, and such a determination would not be foiled by a PIT. It may be that other mechanisms could be worked into the trust to introduce a cooling off period or other protections, but such mechanisms were not explained to me and could not interfere with the overriding purpose and principle of a bare trust. A trustee of a bare trust seeking to frustrate the will of the beneficiary would be acting in breach of trust. In any event a limited cooling off period in my judgment adds nothing. A bare trust offers little (if any) protection against the claimant's vulnerability.

    b. Whilst the claimant is vulnerable her future care regime is likely to lead to a better mental health outcome than would have been the case if there had been no such package. The care package is itself to be funded by way of variable periodical payments. There is therefore some comfort that her vulnerability will not become

worse as time moves on. She has an insight into her vulnerability and the support of her father and others around her including a case manager.

82. The fact that the experts have agreed that PIT damages are reasonably necessary to manage her award deals with a different point. I agree with the experts that if it was appropriate to award damages to fund the management of the award, the sums they have agreed would be appropriate. However, I have concluded that that is not the case. The principle of whether to award damages is a question for the judge, not for the experts.

83. If I am wrong in every respect of the conclusions I have expressed and damages should be awarded, I would have awarded the following sums (all heads save (d) are agreed):

    a. Setting up the trust £1,200
    b. Year 1 costs £14,700
    c. Year 2 costs £11,300
    d. Annual costs after year 2 in the annual amount of £7,500
    e. The one-off cost on respect of future contingencies £24,000 and
    f. Winding up costs of £900

84. A multiplier would need to be applied to the annual costs. I agree there would need to be a small reduction in the multiplier agreed for the quantum trial because almost a year has passed since that trial took place. I would not make any award in respect of the annual cost of the trust employing support workers. I do not consider such a cost would be reasonably necessary to meet the claimant's needs as a vulnerable person. Neither do I make any allowance for the prospect of a reduction of costs if the claimant moves to residential care. I have dealt with the prospect of residential care in the quantum judgment and above in this judgment dealing with variation of the periodical payments order. I would award £7,500 in respect of ongoing costs because I prefer Miss Hughes' view on costs over that of Mr Knott whose initial report set out substantially higher costs than those now agreed.

85. Before the claimant reaches any conclusion about a PIT it will be vital that the guidance given by Norris J in *OH v Craven* [2017] 4 WLR 25 is followed.

Conclusion

86. For the reasons I have set out I will make a variable periodical payments order and award no sums in respect of the amended claim for the costs of setting up and running a PIT.

87. I am grateful to both counsel.