



OUTER HOUSE, COURT OF SESSION

[2011] CSOH 99

A3160/02

OPINION OF LORD STEWART

in the cause

D's PARENT AND GUARDIAN (AP)

Pursuer:

against

GREATER GLASGOW HEALTH
BOARD

Defenders:

**Pursuer: Maguire QC, L. Henderson; bto
Defenders: Stephenson QC, F Lake; NHS Scotland Central Legal Office**

16 June 2011

[1] This medical negligence action called for Proof on Tuesday 9 November 2010. Liability had been admitted. An interim award had been made in 2003 [*D's Parent and Guardian v Argyll and Clyde Acute Hospitals NHS Trust* 2003 SLT 511]. (The liabilities of the previous defenders have been transferred to the present defenders.) The proof, restricted to quantum, was set down for nine weeks. The sum sued for was £23,000,000.

[2] At 12.30 on the second day, 10 November, senior counsel for the pursuer made a motion, unopposed, to adjourn for two days to discuss settlement. I granted

the motion. The case called again on Friday 12 November and was further adjourned until Tuesday 16 November. On Tuesday 16 November, on joint motion, the proof was discharged. The case was continued by Order and then again on two further occasions until 3 February 2011 when I pronounced decree in terms of a settlement agreed by Joint Minute.

[3] Counsel invited me to issue an Opinion about the settlement so as to record and publicise its elements. I am happy to do this because the settlement represents new thinking about the resolution of certain catastrophic injury cases in Scotland. Counsel and solicitors are to be complimented on the professionalism which they have shown in achieving this outcome.

[4] The outcome is a settlement that includes periodical payments for the claimant's lifetime. With only one exception that I was told of, in 2002, Scottish medical negligence cases of this kind have been settled on a lump sum basis. Judicial awards of course have to be made on a lump sum basis. This is notwithstanding the fact that the limitations of, not to say objections to, lump sum compensation in catastrophic injury cases have been appreciated for many years.

[5] I am grateful to Ms Maguire QC, senior counsel for the pursuer, and to Mr Stephenson QC, senior counsel for the defenders, for their informative oral submissions. I am grateful to Ms Maguire QC for providing me with a Note of Submissions setting out the legal background, the issues surrounding the settlement and the outline terms of agreement. I understand that the Note has been read over by Mr Stephenson QC. The following summary draws substantially on the Note of Submissions and includes references to cases and other materials subsequently provided by counsel in answer to my requests for clarification.

Catastrophic neurological injury

[6] The claimant is a boy, aged ten at the date of the proof. He suffered catastrophic neurological trauma at birth. During delivery assisted by Keilland's forceps there was a compression-torsion injury of his spinal cord at the highest level, C1/C2.

[7] The claimant's brain was spared: but he is paralysed from the head down. He cannot breathe spontaneously. He requires ventilatory support with 24-hour care and supervision. Care costs are easily the biggest head of claim. The cost of 24-hour care for someone with the claimant's needs is, at present values, hundreds of thousands of pounds a year for life. Life expectancy is therefore central to the quantification of damages.

The lump sum problem

[8] Forecasting life-expectancy is currently the main challenge in resolving perinatal and early-life catastrophic injury cases. Typically the claimant's and defenders' experts are years apart, perhaps ten years apart or even more. These differences translated into lump sums can amount to millions of pounds.

[9] The only reasonable certainty about forecasts of life expectancy is that they are bound to be wrong [*Lim Poh Choo v Camden and Islington Health Authority* [1980] AC 174 at 182—183 *per* Lord Scarman]. Consequently, lump sum awards are almost inevitably going to be too little or too much: either the patient outlives the award and is left without care; or the patient pre-deceases and the family receives a windfall, probably at taxpayers' expense in medical cases [*Thompstone v Tameside and Glossop Acute Services NHS Trust* [2006] EWHC 2904 (QB) (23 Nov 2006) at §§ 14–28].

[10] The vagaries of the lump sum system are illustrated by the after-history of the tragic Dr Lim. She sustained catastrophic brain damage in 1973 when she was 36. The trial judge found life expectancy at the date of trial in 1977 to be 37 years. The multiplier for future case costs from the date of judgement in the House of Lords, 21 June 1979, was 12. The doctor in fact died in 2007, 30 years after the trial, at the height of the stock market boom, leaving an estate valued at over £1,000,000 [N Bevan, “Future Proof” (2), (2008) 158 NLJ, 1168].

[11] There can also be a conflict of interest objection — not I hasten to add an issue in this case — that the individuals who stand to benefit from a death before the exhaustion of the fund may be the same people who are making decisions about the amount and quality of care.

[12] It is difficult for relatives, parents especially, to compromise on life expectancy, thinking, as they are bound to, about what will happen when they die or are no longer able to assist with care. There is difficulty for defenders too, given the size of the sums at issue, in rejecting expert advice on life expectancy in favour of an “economic” settlement. It is particularly difficult for health authorities with public responsibilities. The situation is an anxious one for legal advisers on both sides.

The periodical payments problem

[13] In theory, staged compensation by way of lifetime periodical payments might seem to be the answer: but there are, or have been, a number of problems. The main problem from the claimant’s viewpoint is that periodical payments, fixed now for perhaps several decades to come, are at risk of being eroded by inflation. Pegging payments to the Retail Prices Index [RPI] is not a solution: wage inflation has for

many years outstripped price inflation; and carers' wages are, as has already been said, easily the most important component of future costs in catastrophic injury cases.

[14] In *Cooke v United Bristol Health Care* [2003] EWCA Civ 1370 (16 Oct 2003) evidence was offered for the plaintiff that the difference between a lump sum award calculated on the basis of the statutory discount rate of 2.5% a year, which is premised on the RPI, and a lump sum award calculated by reference to the NHS Pay Cost Index was £2,300,000. In *A v B Hospitals NHS Trust* [2006] EWHC 2833 (Admin) (10 Nov 2006) it was calculated that the assessed differential of 1.7% a year between the RPI and the rate of inflation for care costs would result in an annual periodical payment shortfall of £29,030 by year 10, £193,091 by year 27 and £347,015 by year 36.

[15] The difficulty of inflation-proofing care costs using the standard measure has been advanced as an argument for lump sum awards [*A v B Hospitals NHS Trust*; *Taylor v Chesworth* [2007] EWHC 1001 (QB) (30 Apr 2007); *Sarwar v Ali and Motor Insurers' Bureau* [2007] EWHC 1255 (Q.B.) (25 May 2007); see also D Lush (Master of the Court of Protection), "Damages for Personal Injury: why some Claimants prefer a Conventional Lump Sum to Periodical Payments", (2005) 1(2) *London Law Rev*, 187].

A change of approach

[16] The initial approach to staged compensation was by way of structured settlements. "Structured settlements" are settlements in which compensation is agreed to comprise, at least in part, periodical payments funded by an annuity purchased by defenders from approved insurers and priced on the basis of life expectancy projections. In the period 1988 to 2006 about 1,500 cases in England & Wales were settled in this way [R Lewis, "The indexation of periodical payments of

damages in tort: the future assured?”, *Legal Studies*, Vol 30, No 3, Sept 2010, 391 at 394, note 18]. Scottish experience of structured settlements in the same period was limited [cf. *Bell’s Curator Bonis*, *Noter* 1998 SC 365].

[17] The Damages Act 1996 s. 6 made a potentially important change for both jurisdictions by empowering ministers to give guarantees for periodical payments funded directly by public sector defenders. By section 2 the 1996 Act also empowered courts to make “periodical payment orders” — but only of consent:

“2 Consent orders for periodical payments

(1) A court awarding damages in an action for personal injury may, with the consent of the parties, make an order under which the damages are wholly or partly to take the form of periodical payments.”

[18] In *Wells v Wells* [1999] i.e. [1999] 1 AC 345 AC 345 at 384 Lord Steyn described section 2 of the Damages Act 1996 as “a dead letter”. He proposed the “relatively straightforward solution” of giving the court “power of its own motion to make an award for periodical payments rather than a lump sum in appropriate cases”. The 1996 Act was not in fact entirely ineffectual — more than 200 self-funded structures were put in place by the National Health Service Litigation Authority (England & Wales) in the period to 2003 [R Lewis, “Clinical negligence and the NHS refusal to structure settlements with profit”, (2003) 19 (1) *Professional Negligence*, 297].

[19] But Lord Steyn’s remarks did provoke a period of research and consultation [Clinical Disputes Forum, *Lump Sum Damages and Periodical Payments*, Discussion Paper (2000), Report (2002); *Structured Settlements: Report of the Master of the Rolls’ Working Party* (2002); Lord Chancellor’s Department, *Damages for Future Loss: Giving the Courts the Power to award Periodic Payments for Future Loss and*

Care Costs in Personal Injuries Cases, Consultation Paper CP 01/02 (2002), Analysis of the Responses to the Consultation Paper CP (R) 01/02 (2002)]. Legislative reform followed.

[20] The Courts Act 2003 s. 100 substituted — for England & Wales only — a new section 2 in the 1996 Act. The 1996 Act s. 2 as amended now empowers courts to require damages in appropriate cases to take the form of periodical payments:

“2 Periodical payments

(1) A court awarding damages for future pecuniary loss in respect of personal injury—

(a) may order that the damages are wholly or partly to take the form of periodical payments, and

(b) shall consider whether to make that order...”

[21] The new section 2(8) deems periodical payment orders to be index-linked by reference to the RPI: but the new section 2(9) provides that RPI indexing may be disapplied or modified.

[22] The innovations introduced by the 2003 Act include, by a new section 2B, provision for enabling variation of periodical payment orders. The power to increase or reduce payments has now been conferred by the Damages (Variation of Periodical Payments) Order 2005 SI 2005/841. The power is not available in Scotland.

[23] The amending provisions came into force on 1 April 2005. Almost immediately a raft of cases in England & Wales invoked section 2(9) to raise the question of applying alternative indices for care costs. In the interlocutory appeal in *Flora v Wakom (Heathrow) Ltd (formerly Abela Airline Catering Ltd)* [2007]

1 WLR 482 the Court of Appeal decided that:

“there was nothing in the language of [subsections 8 and 9] to suggest that the power to make provision such as identified in section 2 (9) might only be triggered in an exceptional case, nor was there any indication in section 2 of the 1996 Act that Parliament intended to depart from the principle that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses”.

[24] Shortly afterwards, in a four case conjoined appeal, the Court of Appeal held that the appropriate basis of care-cost indexation was the Office of National Statistics Annual Survey of Hours and Earnings, disaggregated data, standard occupational group classification 6115 [ASHE 6115] “care assistants and home carers” [*Thompstone v Tameside and Glossop Acute Services NHS Trust; Corbett v South Yorkshire Strategic Health Authority; H (A Patient) v United Bristol Healthcare NHS Trust; De Haas v South West London Strategic Health Authority* 2008 1 WLR 2207]. The ASHE 6115-based approach was endorsed “after an exhaustive review of all possible objections to its use” [at § 100 *per* Waller LJ giving the judgment of the Court].

[25] As Waller LJ explained in *Thompstone et al* at § 71, because ASHE is not an index as such but rather an annual earnings survey, a further step is necessary before ASHE 6115 can be used for the indexation of care costs. The actual care costs have to be pegged to a position in the range of earnings for the occupational classification in question. For example in *Thompstone* the weighted average hourly cost of the care package identified as suitable for the claimant was £8.50. This cost fell at the point described as the “75th percentile” of the then-current ASHE 6115 range. The care costs were indexed to that point in the range.

The compensation method of choice?

[26] *Thompstone*, it has been predicted, “will propel the periodical payments regime from the backwaters into the mainstream” [N Bevan, “Future Proof” (1), (2008) 158 NLJ, 116]. The model has been described as the “the compensation method of choice” for catastrophic injury cases [R de Wilde and others, *Facts and Figures: Tables for the Calculation of Damages* (London, 2009), introduction, quoted in Lewis “Indexation of Periodical Payments”, 391].

[27] The claims for the model are that it removes the burden of investment and inflation risks from claimants; that it eliminates longevity/ mortality risks from the equation and should neither under- nor over-compensate; that it gives some protection against dissipation and offers assurance to defenders and to the Court that compensation will be applied to the purposes for which it is awarded; and that it permits defenders to defer the costs of compensation. (Deferring costs appears to have particular attractions for the National Health Services: see *YM (A Child) v Gloucestershire Royal Hospitals NHS Trust* [2006] EWHC 820 (QB) at § 20; see also *McEwan and Paton on Damages for Personal Injuries in Scotland* (looseleaf), § 17-02.)

[28] At least in cases where self-funding packages are available, lawyers who fail to address the merits of compensation by periodical payments could now be liable in professional negligence for resulting losses [Bevan, “Future Proof (2)”]. (By the Civil Procedure Rules [CPR], rule 41.5 made in terms of the Damages Act 1996 as amended, the Court (in England & Wales) may order parties to make a statement as to whether compensation by periodical payments or a lump sum is considered appropriate.)

[29] Clearly, however, the *Thompstone* model is not the complete answer. Use of the model will spread if liability insurers develop self-funding: but the model cannot work for non-self-funding structures unless or until earnings-indexed annuities are available. In cases settled at a discount or where there is a deduction for contributory negligence, claimants may continue to opt for lump sums even if periodical payments are on offer [*Sarwar v Ali and Motor Insurers' Bureau* [2007] EWHC 1255 (QB), where the court used its power under the 1996 Act as amended s. 2(1) (a) and CPR rule 41.7 to impose an award of periodical payments for future care costs; *Rowe v Dolman* [2008] EWCA Civ 1040 at §§ 19—27 *per* May LJ].

[30] It is not clear that the system in England & Wales is designed to meet a situation where there are multiple defenders with rights *inter se* and one or some but not all defenders can self-fund a periodical payments structure.

[31] If — in current conditions this may be a big “if” — the historic inflation differential between prices and earnings continues I would expect a feedback loop to develop with a tendency towards doubling lump sums for larger claims [cf. *Cooke v United Bristol Health Care*, at §§ 21—22]: at least I would expect the conventional discount rate to be subverted resulting in increased multipliers for claims involving sizeable wage loss or labour cost components [cf. *Sarwar v Ali and Motor Insurers' Bureau* [2007] EWHC 1255 (QB) (25 May 2007); *Helmut v Simon*, Guernsey Court of Appeal, 31/2010 (14 September 2010)] .

Expert advice

[32] In *Thompstone* at § 109 Waller LJ envisaged that claimants will usually instruct an independent financial adviser [IFA] to report on the form of order best suited to the claimants' needs. In England & Wales, Practice Direction 41BPD.1

envisages that claimants will usually have such evidence for the purposes of CPR rule 41.7. The main issue is likely to be about the proper mix of periodical payments and lump sums.

[33] The advice obtained from the IFA instructed in the present case was that there should be periodical payments for future care costs. In the result the agreed package involves a lump sum, subject to deduction of interim payments, with lifetime annual periodical payments index-linked to ASHE. There is a “ratchet” clause which means that the annual payments cannot be reduced. I express no view as to the appropriateness of such a clause or indeed whether it meets all contingencies in a situation where prices outpace earnings.

[34] Following recent English precedent reported in the Association of Personal Injuries Newsletter, parties in the present case have adopted a split indexation approach whereby the cost of care staff is index-linked to ASHE 6115, 75th percentile, and the cost of nursing staff is index-linked to ASHE 3211, 80th percentile

[L Middleton-Guerand, “Appropriate index for residential home costs: *David Pullen v J W Carpenter Ltd*”, *APIL PI Focus*, Vol 20, Issue 8].

[35] As at the date of settlement in the instant case, the care cost split was roughly 90% to care staff costs and 10% to nursing costs. The care cost schedules appended to the settlement agreement have actuarial approval. The present case shows the importance of analysing the care cost package to determine the applicable ASHE class and the appropriate percentile.

[36] In the present case, expert advice was also obtained on the taxation aspects of the agreement. I understand the advice to have been that in terms of the Income Tax (Trading and Other Income) Act 2005, ss.731—734, no liability for income tax arises in respect of periodical damages payments. The advice received was that it is no

longer necessary to have the agreement approved by the Inland Revenue [cf *McEwan and Paton*, § 17-01, note.] I also understand from counsel that the form of settlement does not compromise the right to means-tested benefits [G Aldous QC and others, *APIL Guide to Catastrophic Injury Claims* (Association of Personal Injury Lawyers/Jordan Publishing, 2010) § 15.15; see also Y Evans, “Personal injury trusts: benefits and PITfalls”, 2011 JLSS, 14 February 2011, 28; D Francis, “Personal Injury Trusts – the PITs? (Part 1)”, 2011 SLT (News) 89; “(Part 2)”, 2011 SLT (News) 95].

Continuity and security of periodical payments

[37] A claimant’s advisers have to be satisfied that periodical payments will be secure for the claimant’s lifetime. In terms of the Damages Act 1996 (as amended) s. 2 (3), courts cannot make an order for periodical payments “unless satisfied that the continuity of payment under the order is reasonably secure.” Section (4)(c) provides that continuity of payment is deemed to be reasonably secure if the source of payment is “a government or health service body”, meaning, in terms of section 2A (2) “a body designated as a government body or a health service body by order made by the Lord Chancellor”. This provision does not apply to Scotland.

[38] By the Damages (Government and Health Services Bodies) Order 2005 SI 2005/ 474 the Lord Chancellor has designated various types of health authorities, boards, trusts (but not Foundation Trusts) and agencies in England, Wales and Northern Ireland.

[39] In the present, Scottish, case the claimant’s advisers have made their own judgment as to whether the continuity of payments can be described as “reasonably secure”. The judgment has been made by reference to a number of factors including the annual budget of the defenders which, for 2009—2010 was £2.5 billion.

[40] The claimant's advisers have also had regard to the mandatory "orphan liabilities" provisions applying to Scottish health authorities in terms of the National Health Service (Residual Liabilities) Act 1996 section 2. An example of the operation of these provisions is the transfer to the present defenders in this action, Greater Glasgow Health Board, of the liabilities originally incurred to the claimant by the now defunct Argyll and Clyde Acute Hospitals NHS Trust. There is no precedent for non-transfer of liabilities since the residual liabilities legislation came into force.

[41] I am told that an amendment, not material for present purposes, is pending to section 2(2)(b) by virtue of the National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000 SSI 2000/ 54 [the CNORIS Regulations]. CNORIS is a contributory, risk-pooling scheme for Scottish health authorities administered by the Scottish Ministers.

[42] The CNORIS Regulations have been made with the consent of the Treasury pursuant to the National Health Service (Scotland) Act 1978 as amended s. 85B for the purpose of, among other things, meeting liabilities to health service patients including, as the title implies, liabilities for clinical negligence. It is mandatory for NHS boards and trusts in Scotland to be members of the scheme.

[43] A matter which, as I understand it, gave the claimant's advisers pause, is that the Scottish Ministers' power to make payments out of the scheme is permissive rather than mandatory. In reality I suspect that all that this means is that settlements have to have formal ministerial approval. There could be no question of a statutory scheme being operated in an arbitrary manner.

[44] Ministerial guarantees for public sector settlements are provided for by the Damages Act 1996 section 6, as amended. Section 6 applies to Scotland. The Scottish

Ministers have declined to give a guarantee in the present case on the basis that it is unnecessary. The position has been accepted by the claimant's advisers.

[45] In all the circumstances the claimant's advisers have taken the view that they can responsibly advise that continuity of payment is secure even without a ministerial guarantee, and I think realistically so. The only situation where a "security of payments" issue is known to have arisen in relation to health service settlements is the situation involving Foundation Trusts in England & Wales [*YM (A Child) v Gloucestershire Royal Hospitals NHS Trust* [2006] EWHC 820 (QB)].

Enforceability of the agreement

[46] Part of the interest of *YM* is that the published judgment includes the draft order and schedule. Express provision is made for enforceability of the agreement. In the present case the claimant's advisers have applied their minds to the enforceability issues that may arise when the claimant ceases to be a minor and before a financial guardian is appointed.

Sources and terms of the agreement

[47] The Joint Minute is in the usual form. There is provision for the payment of sums due to the claimant to be made to the Trust to comply with the provisions of the Children (Scotland) Act 1995, section 13.

[48] The published sources for the Agreement include the model schedule in *Thompstone v Thameside Hospital NHS Foundation Trust* [2008] EWHC 2948 (QB) (2 Dec 2008), *Kemp & Kemp: Quantum of Damages* (looseleaf), 9-212 and G Aldous QC and others, *APIL Guide to Catastrophic Injury Claims* (Association of Personal Injury Lawyers/ Jordan Publishing, 2010). Innovations on the existing styles include

the provision for split indexation and a “ratchet” clause. The styles had to be adapted for use in Scotland and for the circumstances of the present case.

[49] The Agreement sets out the lump sum and periodical payments to be paid to or for the claimant. Schedule Part A to the Agreement relates to the part of the care costs accounted for by care staff and applies ASHE 6115, 75th percentile. Schedule Part B relates to the part of the care costs accounted for by nursing staff and applies ASHE 3211, 80th percentile. There is provision for the eventuality that the Office for National Statistics [ONS] ceases to publish relevant data; and there is provision for arbitration in the event of a lack of agreement as to alternative methodology. The Agreement also provides for the expenses of the Agreement and the expenses of arbitration.

[50] There is provision for proof of life and proof of the date of death and for adjustment of payments on death. Interest on late payments is specified to be either at the judicial rate or at a commercial rate depending on the circumstances of the late payment. Provision is made for the payment of interest on repayment.

Periodical payment of damages in Scotland

[51] In relation to the non-application to Scotland of the amendments to the Damages Act 1996, my understanding is that the Courts Act 2003 s. 100 (4) limits the extent of section 100(1) to England & Wales and Northern Ireland and, as stated above, section 100(1) is the provision that substitutes the new section 2 of the 1996 Act.

[52] It is for consideration whether statutory provision ought to be made in Scotland for the payment of damages by periodical payments similar to the provision that has been made for England & Wales and Northern Ireland. Parties were agreed

that it would be helpful to have the same provision in Scotland. Counsel for the defenders told me that the Scottish Government has an amendment to the 1996 Act under consideration. He informed me that it is Scottish Government policy to encourage Scottish public authorities to settle claims of this kind on a periodical payments basis where that can reasonably be done. Counsel told me that the Motor Insurers' Bureau also self-funds this type of settlement.

[53] Counsel submitted that, even if the Court does not have power to order periodical payments of damages it would be helpful to have rules of Court to give a framework for facilitating settlement. Counsel observed that one issue to be addressed was how periodical payment orders were to fit with defenders' offers to settle or judicial tenders. My own view is that it must always be possible for defenders to offer to agree heads of damages, for example annual care costs, in a way that is effective to give protection in relation to the expenses of the relevant part of the proof.

[54] With or without statutory provision claims can be settled by agreement that includes provision for periodical payments. The Civil Procedure Rules and Practice Directions in England & Wales offer some guidance. Counsel have thoughtfully provided anonymised versions of the Joint Minute and Settlement Agreement used in the present case in the hope that these documents may be useful styles for parties who wish to explore the possibility of self-funding structures in other cases. The styles are appended.

APPENDIX

1. STYLE OF JOINT MINUTE FOR SETTling PERSONAL INJURY ACTION, CHILD CLAIMANT, WHERE DAMAGES ARE TO BE PAID PARTLY BY PERIODICAL PAYMENTS

IN THE COURT OF SESSION

JOINT MINUTE

in the cause

A, suing as parent and guardian of **C**,
residing at [],

Pursuer

against

D, having their registered/ head office at []

Defenders

[] for the pursuer, and [] for the Defenders concurred and hereby concur in stating to the Court that, for the purposes of the present action, they have agreed and hereby agree as follows:-

1. Decree shall be pronounced of consent in satisfaction of the conclusion of the summons;
 - a. For payment of the lump sum of [] (£) STERLING, under deduction of interim payments already made totalling [] (£), with interest at the rate of 8% per cent per annum from [] until payment, to be made to the pursuer as guardian of [C];

- b. For payment of interim payments for the period from 15 December [year x] to 14 December [year x + 1] in the sums of
1. [] (£) STERLING in respect of the cost of supply of care staff ; and
 2. [] (£) STERLING in respect of the cost of supply of nursing staff

each with interest at the rate of 8% per cent per annum from 15 December [year x] until payment, to be made to the pursuer as guardian of [C];

- c. For payment of annual periodical payments in terms of the Damages Act 1996 section 2(1) to be made in accordance with the Settlement Agreement attached hereto, such payments being made to the pursuer as guardian of [C] up to and until [C] reaches the age of 16 and thereafter to [C] or his financial guardian on his behalf;
- d. Directing, pursuant to section 13(1) of the Children (Scotland) Act 1995, that any such sums payable to the pursuer as guardian of [C] on or before [C's 16th birthday] be paid to the trustees acting under the trust for [C] constituted by Deed of Trust set up by [E] and dated [] and recorded in the Books of Council and Session on [];
- e. For the expenses of the action and
- f. That the following persons should be certified as skilled witnesses for the purposes of Rule of Court 42.13:

[List of skilled witnesses for the pursuer]

IN RESPECT WHEREOF

2. STYLE OF SETTLEMENT AGREEMENT FOR PAYMENT OF DAMAGES BY LUMP SUM AND INDEX-LINKED PERIODICAL PAYMENTS, CHILD CLAIMANT, WITH INDEXING SCHEDULES

SETTLEMENT AGREEMENT

between

[A and B], both residing at [] (“The Parents”) parents and guardians of C, residing at the same address (“C”);

and

[D] having their registered/head office at [] (“D”);

IN RESPECT THAT:-

1. C suffered personal injuries on [].
2. A as parent and guardian of C has raised proceedings in the Court of Session against D claiming damages for those personal injuries;
3. D have admitted liability to make reparation to C for those personal injuries;
4. The Parents and D have now reached agreement to settle those proceedings and all claims competent to them as C’s guardians in respect of those personal injuries as set out below in full and final satisfaction of D’s liability to C;
5. C is the sole beneficiary in the Trust for C constituted by Deed of Trust set up by [E] and dated [] and recorded in the Books of Council and Session on [] (“the Trust”);
6. The Parents consider that it is in C’s best interests for the Trust to administer all sums due to C, or to them as C’s guardians, hereunder;

THEREFORE THE PARTIES HAVE AGREED AND AGREE AS FOLLOWS:-

1. D shall pay the sums referred to below as “SUMS PAYABLE TO, OR FOR THE BENEFIT OF, C” on the terms and conditions hereinafter specified;
2. D shall pay interest at the judicial rate on any outstanding payments from the date they fall due until full payment is made, including without prejudice to that generality, periodical payments or part thereof not paid on 15 December in any year from 16 December in that year.
3. All sums payable hereunder on or before [C’s 16th birthday] shall be paid to the Trust. Thereafter all sums shall be payable to C, his financial guardian or any entity nominated by them.
4. Any sums payable to the Trust shall be paid to the following bank account or such other bank account as the said trustees may nominate:-
5. The financial provisions of this Settlement Agreement shall not relieve D of any of its statutory obligations towards C. [To be used only if NHS entity]
6. D will pay all reasonable expenses of and incidental to this agreement.
7. This agreement shall be governed and construed in accordance with the law of Scotland and the parties hereby prorogate the exclusive jurisdiction of the Court of Session in Scotland in respect of any dispute arising herefrom.

SUMS PAYABLE TO, OR FOR THE BENEFIT OF, C

(i) Lump Sum

- a. A lump sum of [] (£) under deduction of interim payments already made totalling [] (£);
- b. It is recorded that there is no sum payable to the Compensation Recovery Unit and accordingly that no credit is required against the lump sum for recoverable benefits;
- c. The balance, namely, [] (£) shall be paid to the solicitors for the Trust by 4pm on [] together with interest thereon at the rate of 8% per annum from 15 December [year x] until payment.

(ii) Interim Payments

On [], for the period from 15 December [year x] to 14 December [year x + 1]

- 1) A payment in respect of the cost of supply of care staff of [] (£) with interest at the rate of 8% per cent per annum from 15 December [year x] until payment ; and
- 2) A payment in respect of the cost of supply of nursing staff of [] (£) with interest at the rate of 8% per annum from 15 December [year x] until payment

(iii) Periodical Payments

On 15 December of each succeeding year commencing on 15 December [year x + 1]

- 1) A periodical payment calculated in accordance with Schedule Part A; and
- 2) A periodical payment calculated in accordance with Schedule Part B

on the following conditions:

- a. the amount of each periodical payment shall be calculated to the nearest penny in accordance with Parts A and B of the Schedule to this Agreement;
- b. the First Periodical Payment of each shall be made on 15 December [year x + 1] and shall be in respect of the period from 15 December [year x + 1] to 14 December [year x + 2];
- c. all periodical payments continue during the lifetime of C;
- d. the number of periodical payments to be made shall not be subject to a minimum or a maximum;
- e. the periodical payments shall cease to be due upon the death of C;
- f. those acting on behalf of the Trust, C or his financial guardian shall:-
 - i immediately notify D upon his death;
 - ii by 1 December each year, commencing on 1 December [year x + 1], provide to D a certificate or letter from C's GP dated not before 1 November of that year confirming that C is still alive. In the event that such a certificate or letter is not provided as aforesaid D shall be entitled to withhold payment until such certificate or letter is provided, said certificate or letter not to be dated more than one month prior to submission to D, but upon such provision the whole of the sum shall be paid;

- iii by 15 November immediately preceding the falling due of the periodical payment notify D of any change in the details of the nominated bank account;
- g. D shall by 15 December each year provide the Trust, C or his financial guardian or those acting on their behalf with details explaining how the periodical payment for that year has been calculated;
- h. when C dies, a proportionate part only (i.e. the number of days C survives beyond 15 December, divided by 365) of the payment due for the year ending the following 14 December shall be payable and accordingly C's estate will be liable to refund any overpayment, subject only to deduction by C's estate of such sums as C's estate may be liable for in respect of the termination of the employment of any persons employed to care for C. If such refund is not made within 180 days of C's death, his estate will be liable to pay interest on the outstanding sum at a rate of one per cent above Bank of England base rate from the 1[] day after C's death until payment;
- i. D shall provide the Trust, C or his financial guardian or those acting on their behalf with a claims reference number and details of the contact through whom communications with D should be channelled and shall notify the Trust, C or his financial guardian or those acting on their behalf of any changes to these details.
- j. the periodical payments are to be paid free of taxation under sections 731-734 of the Income Tax (Trading and Other Income) Act 2005.
- k. if the Office for National Statistics ("ONS") does not publish by 17 November in the relevant year all the relevant data, or if statistical data such as is required to give effect to the provisions of this Agreement ceases to exist, and as a result D is unable to perform the relevant calculations under the Schedule hereto to recalculate the periodical payments due to C before 15 December of the relevant year, D shall, as an interim measure, on 15 December of the relevant year make the periodical payments in the same sums as those paid in the previous year. In that event any balancing payment due to C shall be made within 28 days after the publication of the relevant data by the ONS or a relevant determination by an arbitrator in terms of this Agreement. Interest shall run on the balancing payment at a rate of one per cent above Bank of England base rate from 15 December in the relevant year until payment

IN WITNESS WHEREOF these presents typewritten on this and the preceding four pages are, together with Schedule Parts A and B annexed, executed as follows:-

They are subscribed by the Parents at on before the witness hereto subscribing whose designation is appended to their signature

Witness Signature

A

Witness Name

B

Witness Address

They are subscribed by the Authorised Representative of D at on
..... before the witness hereto subscribing whose designation is appended to
their signature

Witness Signature

Auth Representative's Signature

Witness Name

Auth Representative's Name

Witness Address

SCHEDULE PART A

Cost of Supply of Care Staff

1. 1.1 The present value annual sum of [] (£) for the cost of supply of care staff (“the annual sum”) as recalculated in accordance with the succeeding provisions of this Part shall be payable annually on 15 December each year (“the periodical payment”) with the first such periodical payment to be made on 15 December [year x + 1].
- 1.2 If, but for this sub-paragraph, a recalculation under paragraphs 4 to 11 below would result in the annual periodical payment payable being lower than the amount payable in the immediately preceding year the recalculation shall be disregarded and the said payment made at the same amount as during the previous year.
2. The relevant earnings data for this periodical payment is the gross hourly pay for “all” employees given by the present Standard Occupational Category (“SOC”) for care assistants and home carers (“6115”) at the relevant percentile shown below (currently in table 14.5a at the tab for “all” employees) of the Annual Survey of Hours and Earnings in the United Kingdom (“ASHE”) published by the ONS.
3. The original relevant percentile is the []th percentile.

First Periodical Payment

4. Unless paragraphs 6 to 11 below apply, the periodical payment referred to in paragraph 1.1 above shall be recalculated in November prior to payment on 15 December of the same year commencing November [year x + 1] in accordance with the following formula:

$$PP = C \times \frac{NP}{A}$$

- 4.1 Where

- 4.1.1 PP = the amount payable by way of the periodical payment in each year being calculated in November and paid on 15 December, the first PP being the payment on 15 December [year x + 1];
- 4.1.2 C = the annual sum set out in paragraph 1.1 of this Schedule;
- 4.1.3 NP = the first release hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 6115 for “all” employees for the year in which the calculation is being carried out, the first NP being the figure applicable to the year [year x + 1] published in or around November [year x + 1];

- 4.1.4 A = the revised hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 6115 for “all” employees applicable to the year [year x] published in or around November [year x + 1]. In the event of a correction by the ONS it will be the replacement final figure issued by the ONS retrospectively;

Subsequent Periodical Payments

5. Unless paragraphs 6 to 11 below apply, the periodical payment referred to in paragraph 1.1 above shall be recalculated annually in subsequent years in November in each year prior to payment on 15 December of the same year commencing November [year x + 2] in accordance with the following formula:

$$PP = C \times \frac{NP + (NF - OP)}{A}$$

- 5.1 Where in addition to the definitions previously set out
- 5.1.1 NF = the revised hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 6115 for “all” employees applicable to the year prior to the year in which the calculation is being carried out, the first NF being that applicable to the year [year x + 1] and published in or around November [year x + 2];
- 5.1.2 OP = the first release hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 6115 for “all” employees for the year prior to the year in which the calculation is being carried out, the first OP being the figure applicable to the year [year x + 1] published in or around November [year x + 1].

Recalculation of the periodical payment in the event of reclassification of the SOC or a change of methodology by the ONS

6. Reclassification for the purposes of paragraphs 7 to 10 occurs when the ONS publishes for the same year “revised” hourly gross wage rates for both:
- 6.1 the previously applied SOC (for which the “revised” wage rate is defined as “AF” in paragraph 7.1.1 below) and
- 6.2 for a new SOC (for which the “revised” wage rate is defined as “AR” in paragraph 8.1.4 below) that includes those currently defined as “home carers” in ASHE SOC 6115.

In that event the new SOC shall be applied.

7. The periodical payment at paragraph 1.1 above following reclassification shall be known as “CR” and shall be calculated in the year of reclassification only as follows:

$$CR = C \times \frac{AF}{A}$$

- 7.1 Where in addition to the definitions previously set out

- 7.1.1 AF = the final published revised hourly gross wage rate for the []th percentile of the previously applied SOC for “all” employees.

8. The first such periodical payment only following the publication of the reclassified revised data shall be recalculated on the following basis

$$PPR = \left[CR \times \frac{NPR}{AR} \right] + \left[C \times \frac{AF - OPF}{A} \right]$$

The second bracket of the above formula shall not apply where at the time of reclassification there has been no periodical payment made in the previous year and in those circumstances the first such periodical payment shall be recalculated on the following basis

$$PPR = \left[CR \times \frac{NPR}{AR} \right]$$

- 8.1 Where in addition to the definitions previously set out

- 8.1.1 PPR = the periodical payment payable in each year following reclassification;

- 8.1.2 NPR = the first release hourly gross wage rate published for the new percentile of the new SOC relating to home carers following reclassification for the year in which the calculation is being carried out;

- 8.1.3 OPF = the final first release hourly gross wage rate published for the []th percentile of the previously applied SOC for “all” employees;

- 8.1.4 AR = the revised hourly gross wage rate for the percentile of the new SOC, when first published, which is closest to AF, and the relevant new percentile shall be the percentile to which AR corresponds.

9. Until further reclassification the formula for calculating subsequent values of PPR shall be:

$$PPR = CR \times \frac{NPR + (NFR - OPR)}{AR}$$

- 9.1 Where in addition to the definitions previously set out
- 9.1.1 NFR = the revised hourly gross wage rate published for the new relevant percentile of the new SOC following reclassification for the year prior to the year in which the calculation is being carried out;
- 9.1.2 OPR = the first release hourly gross wage rate published for the new percentile in the new SOC following reclassification for the year prior to the year in which the calculation is being carried out.
10. Further reclassifications shall be dealt with in the same way by the application of paragraphs 6 to 9 above.
11. For the purposes of this part a change of methodology occurs when the ONS publishes two sets of data for the applied SOC. In that event, the same process as set out in paragraphs 7 to 10 above shall be undertaken. However, in these circumstances references to
- 11.1 ‘reclassification’ shall be treated as being a reference to ‘a change of methodology’,
- 11.2 ‘the new SOC’ shall be treated as being a reference to ‘the existing SOC using the new methodology’, and
- 11.3 ‘the previously applied SOC’ shall be treated as being a reference to ‘the existing SOC using the old methodology’.
12. In the event that statistical data such as is required to give effect to the provisions of this Agreement ceases to exist and the parties are unable to agree an alternative methodology of calculation of the periodical payments due, a single arbitrator shall be appointed to determine a suitable alternative methodology to reflect the intention of this Agreement.
13. In the event of a dispute between the parties arising from the application of paragraphs 6 to 11 above, the appropriate series and/or percentile shall be determined by a single arbitrator.
14. Any arbitration required under paragraphs 12 and/or 13 shall be conducted by a single arbitrator, being an actuary, agreed between the parties which failing by the President of the Institute and Faculty of Actuaries, which single arbitrator shall constitute the tribunal for the purposes of the Scottish Arbitration Rules, as amended from time to time, the arbitration being conducted under said Rules, subject to the following Rules not applying:-

Rules 22, 41, 46, 47, 49, 55, 62, 64, 65, and 69,

15. Until a determination pursuant to paragraphs 12 and/or 13 is produced by the arbitrator, the PP shall continue at its last fixed amount and thereafter shall be calculated with any changes effective from the last date on which it was fixed in accordance with the determination of the arbitrator.

16. The costs of the referral to the arbitrator appointed under either of paragraphs 12 or 13 shall be borne by D

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SCHEDULE PART B

Cost of Supply of Nursing Staff

17. 17.1 The present value annual sum of [] (£) STERLING for the cost of supply of nursing staff (“the annual sum”) as recalculated in accordance with the succeeding provisions of this Part shall be payable annually on 15 December each year (“the periodical payment”) with the first periodical payment to be made on 15 December [year x + 1]
- 17.2 If, but for this sub-paragraph, a recalculation under paragraphs 20 to 27 below would result in the annual periodical payment payable being lower than the amount payable in the immediately preceding year the recalculation shall be disregarded and the said payment made at the same amount as during the previous year.
18. The relevant earnings data for this periodical payment is the gross hourly pay for “all” employees given by the present SOC for nurses (“3211”) at the relevant percentile shown below (currently in table 14.5a at the tab for “all” employees) of ASHE published by ONS.
19. The original relevant percentile is the []th percentile.

First Periodical Payment

20. Unless paragraphs 22 to 27 below apply, the periodical payment referred to in paragraph 17.1 above shall be recalculated in November prior to payment on 15 December of the same year commencing November [year x + 1] in accordance with the following formula:

$$PP = C \times \frac{NP}{A}$$

- 20.1 Where
- 20.1.1 PP = the amount payable by way of the periodical payment in each year being calculated in November and paid on 15 December, the first PP being the payment on 15 December [year x + 1];
- 20.1.2 C = the annual sum set out in paragraph 17.1 of this Schedule;
- 20.1.3 NP = the first release hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 3211 for “all” employees for the year in which the calculation is being carried out, the first NP being the figure applicable to the year [year x + 1] published in or around November [year x + 1];

20.1.4 A = the revised hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 3211 for “all” employees applicable to the year [year x] published in or around November [year x + 1]. In the event of a correction by the ONS it will be the replacement final figure issued by the ONS retrospectively;

Subsequent Periodical Payments

21. Unless paragraphs 22 to 27 below apply, the periodical payment referred to in paragraph 17.1 above shall be recalculated annually in subsequent years in November in each year prior to payment on 15 December of the same year commencing November [year x + 2] in accordance with the following formula:

$$PP = C \times \frac{NF + (NF - OP)}{A}$$

21.1 Where in addition to the definitions previously set out

21.1.1 NF = the revised hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 3211 for “all” employees applicable to the year prior to the year in which the calculation is being carried out, the first NF being that applicable to the year [year x + 1] and published in or around November [year x + 2];

21.1.2 OP = the first release hourly gross wage rate published by the ONS for the []th percentile of ASHE SOC 3211 for “all” employees for the year prior to the year in which the calculation is being carried out, the first OP being the figure applicable to the year [year x + 1] published in or around November [year x + 1].

Recalculation of the periodical payment in the event of reclassification of the SOC or a change of methodology by the ONS

22. Reclassification for the purposes of paragraphs 23 to 26 occurs when the ONS publishes for the same year “revised” hourly gross wage rates for both:

- 22.1 the previously applied SOC (for which the “revised” wage rate is defined as “AF” in paragraph 23.1.1 below) and
- 22.2 for a new SOC (for which the “revised” wage rate is defined as “AR” in paragraph 24.1.4 below) that includes those currently defined as “nurses” in ASHE SOC 3211.

In that event the new SOC shall be applied.

23. The periodical payment at paragraph 17.1 above following reclassification shall be known as “CR” and shall be calculated in the year of reclassification only as follows:

$$CR = C \times \frac{AF}{A}$$

- 23.1 Where in addition to the definitions previously set out

23.1.1 AF = the final published revised hourly gross wage rate for the []th percentile of the previously applied SOC for “all” employees.

24. The first such periodical payment only following the publication of the reclassified revised data shall be recalculated on the following basis

$$PPR = \left[CR \times \frac{NPR}{AR} \right] + \left[C \times \frac{AF - OPF}{A} \right]$$

The second bracket of the above formula shall not apply where at the time of reclassification there has been no periodical payment made in the previous year and in those circumstances the first such periodical payment shall be recalculated on the following basis

$$PPR = \left[CR \times \frac{NPR}{AR} \right]$$

- 24.1 Where in addition to the definitions previously set out

24.1.1 PPR = the periodical payment payable in each year following reclassification;

24.1.2 NPR = the first release hourly gross wage rate published for the new percentile of the new SOC relating to nurses following reclassification for the year in which the calculation is being carried out;

24.1.3 OPF = the final first release hourly gross wage rate published for the []th percentile of the previously applied SOC for “all” employees;

24.1.4 AR = the revised hourly gross wage rate for the percentile of the new SOC, when first published, which is closest to AF, and the relevant new percentile shall be the percentile to which AR corresponds.

25. Until further reclassification the formula for calculating subsequent values of PPR shall be:

$$PPR = CR \times \frac{NPR + (NFR - OPR)}{AR}$$

- 25.1 Where in addition to the definitions previously set out
- 25.1.1 NFR = the revised hourly gross wage rate published for the new relevant percentile of the new SOC following reclassification for the year prior to the year in which the calculation is being carried out;
- 25.1.2 OPR = the first release hourly gross wage rate published for the new percentile in the new SOC following reclassification for the year prior to the year in which the calculation is being carried out.
26. Further reclassifications shall be dealt with in the same way by the application of paragraphs 22 to 25 above.
27. For the purposes of this part a change of methodology occurs when the ONS publishes two sets of data for the applied SOC. In that event, the same process as set out in paragraphs 23 to 26 above shall be undertaken. However, in these circumstances references to
- 27.1 ‘reclassification’ shall be treated as being a reference to ‘a change of methodology’,
- 27.2 ‘the new SOC’ shall be treated as being a reference to ‘the existing SOC using the new methodology’, and
- 27.3 ‘the previously applied SOC’ shall be treated as being a reference to ‘the existing SOC using the old methodology’.
28. In the event that statistical data such as is required to give effect to the provisions of this Agreement ceases to exist and the parties are unable to agree an alternative methodology of calculation of the periodical payment due, a single arbitrator shall be appointed to determine a suitable alternative methodology to reflect the intention of this Agreement.
29. In the event of a dispute between the parties arising from the application of paragraphs 22 to 27 above, the appropriate series and/or percentile shall be determined by a single arbitrator.
30. Any arbitration required under paragraphs 28 and/or 29 shall be conducted by a single arbitrator, being an actuary, agreed between the parties which failing by the President of the Institute and Faculty of Actuaries, which single arbitrator shall constitute the tribunal for the purposes of the Scottish Arbitration Rules, as amended from time to time, the arbitration being conducted under said Rules, subject to the following Rules not applying:-.

Rules 22, 41, 46, 47, 49, 55, 62, 64, 65, and 69,

- 31. Until a determination pursuant to paragraphs 28 and/or 29 is produced by the arbitrator, the PP shall continue at its last fixed amount and thereafter shall be calculated with any changes effective from the last date on which it was fixed in accordance with the determination of the arbitrator.

- 32. The costs of the referral to the arbitrator appointed under either of paragraphs 28 or 29 shall be borne by D

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