

IN THE HIGH COURT OF JUSTICE  
(QUEEN'S BENCH DIVISION)  
2005 EWHC 2628 (QB)

HQ04X02674

The Royal Courts of Justice  
The Strand  
London WC2A 2LL

Thursday 13<sup>th</sup> October 2005

Before:

MR. JUSTICE MACKAY

Between:

**BEN ROYCE**

**Claimant**

- v -

**DARREN BOYLE**

**Defendant**

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MR C WILSON-SMITH QC and MR M PHILIPS (Instructed by Messrs Stewarts)  
appeared on behalf of the Claimant

MR R METHUEN and MR N SELIGMAN (Instructed by Messrs Greenwoods)  
appeared on behalf of the Defendants

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JUDGMENT  
(approved)

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(Tape Transcription by John Larking Verbatim Reporters  
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BEN ROYCE –v- DARREN BOYLE

1. JUDGE MACKAY: Ben Royce is now 21 and suffered a severe injury in the form of spinal cord lesion at the level C4/C5 in a road accident on 10<sup>th</sup> August 2002 when he was 17. His current position simply stated is that he is a single man, an incomplete tetraplaegic who has very limited hand and arm functions, impaired sensation below the level of his lesion and suffers from spasms. These last symptoms have much improved since the accident but are still a problem.
2. He was in hospital until March of the following year and moved into rented accommodation. At the beginning of 2004 he bought what is now his home, a four bedroomed two storey house which has just recently had substantial adaptations to it completed and, as it now is, it is and will be his home for life. If he should have the good fortune to marry and a better fortune to have children, that's where they will live. At the present time he lives there with his brother, the defendant, a cousin and the cousin's girlfriend, and a carer. He has lost both his parents. He is expected to live to the age of about 67 and a half or 68 and it in the highest degree unlikely that he will ever be able to manage paid employment.
3. He requires substantial care of the usual kind for someone with his injury which includes intermittent catheterisation up to half a dozen times a day, bowel evacuations every other day and the coping with emergencies, accidents and the like that are an inevitable accompaniment of a serious injury of his kind. He also requires the presence of a carer for 24 hours a day, seven days a week.
4. All the items of his claim are agreed bar one and the court is indebted to counsel for their exertions in that respect. The entirety of all other heads of damage, including general damages and interest, amounts to £2,279,501. That has left for my determination one item only, the value of future care and the valuing of the claim in that respect and I have heard evidence about it.
5. The claimant himself gave evidence. He is a big man, 16 or 17 stone, of a clear mind but limited academic attainment. He has problems with spasms which particularly show themselves on rising and retiring at night. He can do virtually nothing for himself; opening his letters, turning on his computer, pulling up the blankets in bed all seem to require the help of his carer, quite in addition to the other necessary daily tasks we all do without thinking. It is right to say that he has through interim payments been given a home which is ideal for his needs and includes environmental controls to open the curtains, turn on the lights, switch on the television and so forth.
6. He has resident relatives as I have described. They pay no rent, they provide no care for him but look after themselves. They provide, I imagine, what is most important to a young man of his age, namely some companionship and something resembling a social life with people of his own age group. But the agreed psychological evidence suggests that he has not reacted well to his plight, and that is no criticism of him; rather it is a remark which should be taken to be in sympathy with him. He put on a brave front in court but it was a front, I thought. The psychologist's view is that he needs help and that

- should take the form of cognitive behavioural therapy and I must bear his condition in this respect in mind.
7. He has a case manager who, in my view, has done a good job for him to date, and a team of carers, the composition of which has changed from time to time as will always happen. Currently it includes Jackie Burnett from whom I heard evidence, an experienced and mature carer, and two other women. Records were kept with, I consider, unusual clarity for a case of this nature which enable one to see in some detail the day by day care provided.
  8. He described a typical day in this way; he gets his daily medication at eight in the morning and between nine and nine-thirty he gets up in the sense that you can use that phrase for someone in his condition. The process of starting the day for him begins. He has a bed bath and is generally groomed and dressed. He has leg stretches. He is transferred to a chair and on every other day he is assisted with bowel evacuation. This will take him to mid-morning, eleven or eleven-thirty, whereupon the carer will do the necessary housework, prepare a mid-day meal and feed him and in the day he does various things. He will go out in his special vehicle, a Chrysler Voyager, driven by his carer with him sitting in his electric chair which he can steer and drive himself with the hand controls. They go shopping or look round shops. They take his dogs out for walks.
  9. In the future he may have things like physiotherapy delivered at the home. He goes and visits relatives in the locality. The carer is involved in all these activities. He does passive cycling when he returns home. His friends come round in the evening to socialise two or three times a week. The carer will make drinks for him, snacks for him and for visitors when they come. They will watch television or play poker.
  10. He starts the process of retiring at about twelve o'clock which takes about half an hour and includes a skin inspection. During the night, the carer will be woken, he said, three or four times on average. The tasks will include turning him, inserting a catheter and coping with the occasional bowel accident.
  11. Though the records are extensive and clear, they haven't been meticulously analysed by either side. Mr Methuen explored a fortnight in recent times and I have at times in the case skimmed through other periods. It seems to me that at the present time, were one to attempt a rough average of the night time disturbance of the carer, between midnight and eight am it is something like two or three times but this is an ungenerous definition, in my judgment, of night-time disturbance. I note that the British Nursing Association applies night rates to care delivered between 1800 and 0800 hours.
  12. The actual carers for the claimant under the present regime get very little sleep. He used to use an Oswestry standing frame fairly regularly which is thought on all sides to be good for his condition but because of his size and spasm problems, he was advised, as I accept, at hospital that he should use two carers. Rightly or wrongly, he doesn't feel safe with one and feels that he might fall if he has a spasm coinciding with the transfer. For that reason he uses it infrequently, particularly of late, and, in my judgment, probably should use it more often.
  13. This regime is provided in this way; one carer works for three consecutive periods of 24 hours without a break. She will then have her break, a second carer will do one period of 24 hours and the third carer then three periods of

- 24 hours and so on. The principal carer or the senior carer of the current team, Jackie Burnett, described what she was doing as 16 hour shifts.
14. When the claimant had given his evidence and left court at the request of his counsel, she, Jackie Burnett, quite evidently felt able to be more open about the effect of this regime on her. The money was good, she said, but she said she was shattered after her three day shift. She described the claimant as quite demanding. Having seen him, I am not surprised by that. Often if she sits down to have her own meal, he will then give her a task to carry out. On a bad night, she can have six or more disturbances but however many she has or does not have, when she goes to bed at night the fact is that she will not know whether she will have an uninterrupted night of sleep. She knows in fact she probably won't and doesn't know whether she will have any real sleep at all. Though she is, as I am sure, a dedicated carer and has a positive side to her relationship with the claimant, she is not to be ignored. In my judgment, she was a woman under strain. I accept that the claimant is demanding. I accept that he can be verbally abusive.
  15. Mrs Burnett's daughter Jo was with the claimant as part of the team for two years and I saw her as well give evidence. She left principally for this reason; "I've had enough," she said, "of the abuse and the sleepless nights." She said that it left her "knackered" (her word) and played havoc with her life.
  16. Despite Mr Methuen's well-argued and attractive submissions to the contrary, I accept that these two women are honest witnesses. They were impressive witnesses. One other carer made similar complaints to the claimant's expert, Miss Sargeant, on her visit. It is right to say that others expressed no misgivings when the defendant's experts or other experts visited and looked at the position in the house. I am not surprised by this given the context of such visits. It would, I think, only be natural for someone engaged in delivering the current care package, knowing that these visits were forensic in their purpose, to present a brave face to the forensic experts to conceal any misgivings that they had, especially where those experts were perceived to be on the "other side."
  17. Both spinal consultants, Mr Gardner and Mr Trowmans, while naturally deferring to the care experts on the pattern of care delivery, were concerned when they heard the evidence of the claimant and the two carers I have described about the current regime. Mr Gardner was concerned about the effect of a three day shift; Mr Trowmans was concerned about disturbance at night and said quite simply that they were working too long hours. The fact is, however, that they are working them and that to date they are delivering good quality care to this claimant.
  18. The cost of the present regime in round figures is approximately £100,000 per annum. The claim for future care is based on the first schedule of Miss Sargeant's report which for the first phase, ignoring year 1 which I will ignore, is £106,157-odd. It is essentially built on the current system of hourly paid shift workers with the addition of sleep-in care and with the achievement of periods of overlap by day at which for three parts of the day, as she described it, two carers will physically present at the same time when transfers, standing frame activity and the like, can be achieved more safely than they could be with a single carer.
  19. Miss Sargeant is a very experienced witness in this area, herself a case manager and a commercial provider of care. She told me she has 100 plus

clients under management and has been in this business, if that is the right word to describe it, for some 20 years. She has put together similar high care packages to this and indeed has based this one on them. Not all of those packages have been in the context of insurance funded tort claims but they have included claims where funding has come from private or local authority sources.

20. As a cross-check, the claimant offers the evidence of Mrs Scandrick of CPA. She expressed the view that a live-in package such as the defendants contend for was not appropriate here, that an hourly paid regime was necessary. She carried out her costings and they came to £121,252 when updated. She had earlier been approached by and given advice to the defendants but they have not relied on her views. She said through her firm, CPA, she provided some 80 or 90 live-in packages and she was familiar with them as a means of delivering care. Her view was that it was “definitely” not appropriate for such a package to be used in the claimant’s case.
21. So the philosophical difference between the sides when one comes to the defendant’s approach becomes clear. The defendants base their analysis of this claim on the evidence of Mrs Elizabeth Carless who envisaged a living-in carer regime recruited either through a case manager or a commercial agency. The carer would work for either two weeks at a time, one week at a time or if necessary, half a week at a time and then have an equivalent time off and would be paid a weekly wage. When on duty living in, the carer would provide personal care as needed for 24 hours a day including night times.
22. In acknowledgement of the fact, says Mrs Carless, that there will be substantial periods of the day where no hands-on care is called for, this package comes cheaper. The carer will effectively accept remuneration which assumes that he or she has ten or twelve hours per day “to herself”. Of those, the two or three hours will be in the day time which in the language used by Mrs Carless is called unmeasured care (or which might better be called unpaid time) when he or she is available but not active. The rest of the ten or twelve hours is night time. I have already endeavoured to paint a picture of what the night times are like in the claimant’s house. Her calculation of the cost of purchasing such a care package was a little over £50,000 a year. Having heard the evidence she said that she would add about another £20,000 a year to superimpose on the living carer a separate sleep-in night carer.
23. The defendants also called Angela Gifford who as a paper exercise in January 2005 estimated that her agency could provide the claimant with care in the form of a live-in self-employed carer for £38,370 a year or £48,500 for one who was employed. She saw the claimant in his home in September 2005 and revised her former figures to give a seven day live-in regime costed at £40,970 or if it were divided into carers working three and four day shifts consecutively £44,670. These figures of hers are those that are now advanced by Mr Methuen for the defendants. Having heard evidence in court, she, too, would now add something to that base figure and to that scheme for a night carer who would have to be supplied, she thought, not by the main agency supplying the live-in carer but by a more local agency superimposed on top.
24. So, in his submissions, Mr Methuen re-works his estimation in this way; I should take her basic seven day package and add to that the cost of the night sleeper at, say, £20,000 a year in round figures and, say, 15 hours case

management at about £1280 leading to a total of £62,251 per annum which he says would provide a reasonable regime to meet the claimant's needs.

25. So there is a different principle or approach between the two sides in this case and having considered the evidence I have to decide between them. I find myself clearly preferring the claimant's approach to the analysis of future provision and the valuation of it. Firstly, the current regime is proven, has worked well for over two years, has been well-organised, has attracted good carers, albeit those carers have been operating close to the limits of their capacity but they have done so I suspect because they have been well-rewarded by being paid hourly rates which are at the top of the market scale.
26. Secondly, I feel a live-in scheme is not appropriate for a high level dependency claimant such as this man. Its value as an instrument is that a carer will accept it as a good bargain. Take the case of a less disabled, say, an elderly person, who can be left to his or her own devices for significant periods of the day for what Mrs Carless would be called unmeasured care. The salary per week of the live-in carer is not to be evaluated by dividing it by 24 hours per day for the number of days in this working week. In that way, a cheaper package can be obtained which is acceptable to both purchaser and provider.
27. Thirdly, while all four of the care experts I have named so far are women who are highly qualified in this field, and I accept were all trying to assist the court to the best of their abilities, I found Miss Sergeant and Mrs Scandrick to have had better experience of the actual provision of care packages such as this and care packages of both types that I have been considering and are, therefore, better placed to discriminate between the two. Mrs Carless by contrast, as she accepted, is essentially a forensic expert, albeit one with long experience in spinal injury nursing in the past, but who is not herself a case manager or the provider of case management services, nor the provider of care for a tetraplaegic person in the community. Mrs Gifford has very long experience through her company of providing care. It is right to say, as Mr Wilson-Smith Q.C. does, that she had committed herself to a figure before ever she saw the claimant and his home. She has been forced to modify her scheme as her understanding of the factual position has developed but she has essentially adhered to the bones of her scheme. More significantly perhaps, her company is not registered for the provision of nursing care and the claimant's package includes an element of frank nursing, the catheterisation, the bowel evacuation being examples. She mainly supplies purely domiciliary carers.
28. Fourthly, above all, I just do not believe that the live-in system would work. It would place demands on the carers which would distort the bargain to their disadvantage. They would vote with their feet. There would be, therefore, periodic crises, much more frequent than they are now, when carers would leave and new carers would come and continuity for anyone in this position, and for Ben Royce in particular given his problems, is all important.
29. I am, therefore, persuaded as a matter of generality that the Sergeant model, so called, is the right one. It is of course a vain exercise to attempt to predict with any accuracy what form the future care will actually take. In practice there will have to be considerable flexibility, variation upwards and downwards in time and in response to developments and improvements and deteriorations in the claimant's position but I am satisfied that Miss Sergeant's first schedule is the right starting point. I was not convinced that the quantity

of doubling up that she built into it will necessarily be incurred in the immediate years and indeed for quite some number of years from today though I do think he needs two hours at least from now on when there are two carers present especially to cope with the standing frame problem. I accept that this is something which needs to have two carers at hand.

30. To remove all the doubling up features of her package would, as I understood her evidence, reduce the cost of it by some £2340 per year plus the related National Insurance contributions. I would reduce her package by something like half this sum and I would also ignore the claim for enhanced case management in Year 1 because the regime is effectively in place now.
31. For the immediate future, therefore, the result is that I would value the damages required to meet the claimant's future care needs at £105,000 per annum.
32. Is there a second phase to this? The claim is put this way that from about 40 to the end of his expected span there will be increased need on the claimant's part due to the aging process. Mr Gardner talked about skin deterioration. The claimant has in fact had a very good skin condition to date. It is one of the markers of excellence of the care that he has received. He will also get increased stiffness, become more difficult to handle and there will of course be the effects of aging generally on him which will hit him more early than a person without his problems.
33. The main difference that is envisaged in this second phase in the way this claim is constructed is that the night carer will need to be a waking carer rather than a sleeping carer because the night disturbances will be more frequent and more difficult to cope with, even for a dedicated sleeping night carer, and that increases the costs to Miss Sergeant's second schedule of £122,129. The defendant's spinal consultant thought that this process described by Mr Gardner began a little later and started around 50 rather than around 40.
34. I think there is an element of over-statement in this part of the claim. I believe the Schedule 1 regime will be enough to provide reasonable and proper care through most of the claimant's life. It will perhaps be a little more than he in fact will take up in the earlier years and a little less than he will need in the later years. I cannot envisage him needing a waking night carer until, say, the last decade or so of his life. From that time a full Schedule 2 Sergeant regime, if I may so call it, would be appropriate from, say, the age of 60. I round it up to £122,130 per annum.
35. Given the agreed life multiplier of 27.65 there will, therefore, be two parts to the future care claim as follows; first from aged 21 to 60 £105,000 times 20.04 which equals £2,629,200; the second stage will be from 60 onwards which is £122,130 times 2.61 which is £318,759. The total is £2,947,959 to which must be added the total of other heads of claim previously mentioned of £2,279,501 giving a grand total for all damages inclusive of interest of £5,227,460. It goes without saying that all those figures are subject to verification and correction by counsel and I will hear them on that.

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