



Compass Chambers

Prosthetics Claims – *restitutio in integrum?*

Steve Love, QC

Compass Chambers

Edinburgh – 22nd November 2019

Prosthetics Claims





List of Authorities

- *Donnelly v FAS Products Limited 2004 SCLR 678*
- *Wagner v Grant & Anor [2015] CSOH 51*
- *Pinnington v Crossleigh Construction [2003] EWCA Civ 1684*
- *A v Powys Health Board [2007] EWHC 2996*
- *Miller v Imperial College Healthcare NHS Trust [2014] EWHC 3772 (QB)*
- *Swift v Carpenter [2018] EWHC 2060 (QB)*



Prosthetics Claims

Questions to be addressed

- Will the court allow the cost of prosthetics?
- If so, to what extent?



Restitutio in integrum

- *Watson, Laidlaw & Co v Pott, Cassels & Williamson* 1914 SC (HL) 18
- “...the task of restoration under the name of compensation calls into play inference, conjecture and the like. And this is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. **The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe...**” Lord Shaw at page 29

Section 2(4) of the Law Reform (Personal Injuries) Act 1948

- *“In an action for damages for personal injuries ... there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977.”*
- Reasonable to acquire prosthetics privately (but funding?)



Donnelly v FAS Products Limited

- *“...She is not obliged to use the National Health Service in order to acquire a prosthesis: Law Reform (Personal Injuries) Act 1948, section 2(4). While I cannot be certain that the pursuer will in fact choose to replace her prosthesis every year, I consider that she is entitled to be put into such a position that she is able to do so. A prosthesis is a poor substitute for lost fingers but it is the only substitute that is available. The principle of restitutio in integrum applies. If it is necessary for the pursuer to succeed in recovering the whole life cost of replacement that I find that she probably will replace the prosthesis each year by private purchase (assuming that she is placed in such a financial position as to allow her to do so), then I make that finding...”*



Wagner v Grant & Another

- *“I am not satisfied that what (is proposed) for the pursuer is reasonably necessary. In response to question from me (the pursuer’s prosthetist) accepted that what he was proposing was “a Rolls Royce” prosthetic arrangement. I accept the submission for the defenders that the implementation of (the defenders’) recommendations would enable the pursuer to pursue an active and energetic lifestyle and prevent him adopting the life of a professional amputee...” Lord Uist at para 24*



Pinnington v Crossleigh Construction

- *“This was a case in which, bearing in mind what he is entitled to do under the 1948 Act, the judge was entitled to find that it was reasonable for Mr Pinnington to acquire this range of devices and renew them once every five years. He would be acting reasonably in acquiring them from a private centre which would provide him properly for his needs in what is very much a very personal affair. Those of us who have not had the misfortune of losing an arm may have more difficulty in appreciating the view of the joint experts when they said how personal this kind of appliance is to a disabled man or woman...”* Brooke LJ at para 49



A v Powys Local Health Board

- *“The basis of assessment is the test of reasonableness as stated in Rialis v Mitchell, (Court of Appeal, 6th July 1984) and Sowden v Lodge [\[2005\] 1 WLR 2129](#). The claimant is entitled to damages to meet her reasonable requirements and reasonable needs arising from her injuries. In deciding what is reasonable it is necessary to consider first whether the provision chosen and claimed is reasonable and not whether, objectively, it is reasonable or whether other provision would be reasonable. **Accordingly, if the treatment claimed by the claimant is reasonable it is no answer for the defendant to point to cheaper treatment which is also reasonable.** Rialis and Sowden were concerned with the appropriate care regime. However, the principles stated in those cases apply equally to the assessment of damages in respect of aids and equipment. **In determining what is required to meet the claimant's reasonable needs it is necessary to make findings as to the nature and extent of the claimant's needs and then to consider whether what is proposed by the claimant is reasonable having regard to those needs.**”*

Miller v Imperial College Healthcare NHS Trust

- *“In every respect in which a test was performed (the more expensive limb) was significantly more effective in restoring the mobility and confidence which the claimant would have had before the injury. Neither limb, of course, is in any way a substitute for the lost leg.”*
- Claimant entitled to the prosthesis which put her more closely in the same position as she would have been in had she not suffered the amputation



Swift v Carpenter

- *“I accept her evidence that if funds become available she will purchase the Meridium prosthesis and that the reason she has not yet done so is cash flow...The Claimant’s choice of a Meridium is largely because it affords her flexibility in footwear. This is reasonable. For this reason alone, the claim is made out. However, as Mr Arney further submits, Mr Audland’s submission that the costs of the Echelon should be allowed would lead to the unsatisfactory and illogical endpoint of the Claimant being awarded by me the costs associated with a limb which she has never yet tested and which may be uncomfortable or not suit her. I therefore accept the Claimant’s case that her choice of the Meridium prosthetic is reasonable...The Defendant’s further submission is that, if I were to conclude that the Meridium was reasonable, then I should make a downward adjustment to the overall cost on the basis that in later life the Claimant may select the Echelon over the Meridium. I do not accept this point either. I take into account the Claimant’s prognosis, including the prospect that in later years the Claimant will likely need to use a wheelchair for mobility. However, there is no basis for my concluding that there is anything other than a fanciful chance that the Claimant may in later years favour the Echelon over the Meridium either because of the weight of the prosthesis, because wearing high heels will be less important or because of technological advances. It is, I find, overwhelmingly likely that the Claimant will in her later life elect to stay with the prosthesis with which, by then, she will have long been familiar. I do not therefore make any adjustment to reflect that the Claimant will substitute the Echelon foot for the Meridium.” Mrs Justice Lambert at paras 35 - 37*



Observations

- Courts will not consider cheaper options if the item claimed is “reasonable” – essentially a jury question
- The legal burden is always on the Pursuer to prove what is reasonable for their specific needs in all the circumstances
- Pursuer more likely to be able to satisfy the legal burden if they are using the prosthesis or have trialled it
- Does this effectively shift the burden to the defenders to prove that what is claimed is “unreasonable”?
- Conflict of interest if rehabilitation provider is also the expert witness?
- Suggest question is: Having regard to the available and emerging technology, what is “most appropriate” for this pursuer?



Compass Chambers

Rehabilitation

- Purpose of trialling?
- Depends on prosthesis
- Emphasise the main benefits:
 - Increased function and mobility
 - Return to pre-injury activities
 - Increased comfort
 - Increased tolerance
 - Reduced pain
 - Reduced blistering
 - Ease and benefits of use
 - Increased walking distance
 - Ability to negotiate stairs/uneven ground
 - Improved gait
 - Orthopaedic impact (protect against deterioration with the passage of time)
 - Better cosmetic appearance





Pursuer

- If acting for the pursuer, suggest that pursuer or immediate family keep a diary with a view to logging:
 - Pain levels
 - Walking distance
 - Length of time able to wear prosthetic
 - General observations and comments about mobility and psychological factors

Compensators

- There are clear benefits to insurers in seeking to play an active role in rehabilitation and the developing technology
- Ensuring that developing technology is used to its best advantage ensures the best possible rehabilitation outcomes (reduced claims/costs) and keep costs at a reasonable and proportionate level

Preparation for Proof

Consider:

- Merit in interim payments (voluntary or by motion)
- Experience of other party's expert (CV/consult with own expert)
- Researching/reviewing the other party's proposals with your own rehabilitation and prosthetics experts
- Comparison of proposals including consideration of Advantages/Pros v Disadvantages/Cons
- Sufficiency of Case Management? Is the Case Manager doing enough to push?
- Requirement for therapeutic input or treatment (physiotherapy, fitness, psychological, etc)
- Consider whether the proposed prosthetic provision meets "criteria for use" (home and recreational)
- Waterproof qualities
- Intrinsic safety features
- Functional testing
- Blind testing – merit?
- Biomechanical assessment e.g. gait analysis
- Video and other recorded evidence (diary)
- Disadvantages/advantages of moving from trialled prosthesis to any available alternative
- Engagement with rehabilitation process
- Developing technology and likelihood of availability in the future



Compass Chambers

THE END

QUESTIONS?



Compass Chambers

Contact

**Compass Chambers
Parliament House
Edinburgh
EH1 1RF**

www.compasschambers.com

Steve Love QC

E: steve.love@compasschambers.com

M: 07920 810967

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com