

Insight 211

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

In this week's edition of Insight, we report on the recent High Court ruling in the case of [Celine Martin v Salford Royal NHS Foundation Trust](#).

This case dealt with a claim where there was statutory funding in place for care and whether it was appropriate to separate the physical care and make private provision for it. The case also considered mental capacity and the weight to be attached to neuropsychological testing to determine that issue.

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Celine Martin v Salford Royal NHS Foundation Trust

Background

The claimant was 47 years old. She had an extensive psychiatric history which began before the defendant's negligence. The claimant was diagnosed with Emotionally Unstable Personality Disorder (EUPD), paranoid schizophrenia and had a history of substance abuse. In the past the claimant had attempted suicide and had been detained at mental health facilities for long periods.

Injuries as a result of the defendant's negligence

As a consequence of the defendant's negligence in 2010 the claimant had become dependent on others for all aspects of her daily life. The claimant uses a wheelchair to get around and relies upon carers. A hoist was required to move her from her chair. She has restricted movement in all limbs, poor sitting balance, her left leg was shortened, and she has foot drop. The claimant also suffered a brain injury resulting in severe neurological impairment.

The claimant's current care package

The claimant received mental health support and physical care provided under the statutory duty set out in section 117 of the Mental Health Act 1983 ('s117'). The care packages for mental and physical care were provided by separate agencies. The claimant was happy with the mental health support provided but alleged the physical care package was inadequate.

The claimant's current plan allowed for care to be provided for four hours per day seven days per week. There was no care provision at night.

Expert evidence suggested the claimant's physical care needs would increase with age. The experts agreed the claimant's mental health needs were likely to fluctuate.

The issues to be decided

Various heads of damage had been agreed between the parties. The outstanding issues were:

- The extent of the claimant's future physical care needs.
- The extent to which such needs are recoverable.
- The need for a case manager
- The size of the accommodation required by the claimant.
- The claimant's future travel requirements
- The claim for future loss of earnings
- The issue of a periodical payments order
- The claimant's capacity
- Whether the claimant should be allowed to amend the claim to include the cost of a PI Trust?





The claimant's physical care needs

The judge accepted the claimant required care and support for the rest of her life. Her needs fell into two categories: Those that arose out of her mental health needs which did not arise out of the defendant's negligence and those that arise out of the claimant's physical needs caused by the defendant's negligence.

The extent to which the needs are recoverable

The defendant contended that the claimant would continue to receive s117 funded care and it was not appropriate to separate out physical care and make private provision for it. This would amount to double recovery. The defendant relied upon *Crofton v NHS Litigation Authority (2007)*.

The judge referred to the judgment of Lord Justice Longmore in *Tinsley v Manchester City Council (2017)* who stated:

"It is of course the case that courts will seek to avoid double recovery by a claimant at the time they assess damages against a negligent tortfeasor. If therefore it is clear at trial that a claimant will seek to rely on a local authority's provision of aftercare services, he will not be able to recover the cost of providing such aftercare services from the tortfeasor"

The question to be asked, the judge concluded, was whether it was clear the claimant would continue to receive physical care funded through s117? The judge stated this was a question of fact taking into consideration whether a split care package was detrimental to the claimant and whether the existing s117 care package was adequate.

The judge concluded the separation of physical care and mental care was not detrimental to the claimant.

Turning to the adequacy of the current s117 package the judge noted

- There was no flexibility regarding the timings of the care package. He noted the claimant had to leave court early each day to fit in with her care regime.
- There was no overnight care

Overall, the judge concluded the current care package was insufficient to put the claimant in the position she would have been but for the defendant's negligence and the possibility the claimant might continue to take advantage of s117 provision for her physical care was insufficient to apply the discount advocated in *Crofton*.

The judge assessed the appropriate level of physical care required was two day time carers, a personal assistant and one night-time sleeping carer. The daytime support was assessed at 14 hours each day at £12 per hour with an enhanced rate of £17 per hour for one of the support workers to act as team leader. Ancillary costs of 36% were factored in.

The judge applied a full life multiplier despite the possibility of the claimant being hospitalised in the future for long periods.

The need for a case manager

The judge concluded that clear communication between those providing physical and mental care was key. In the absence of a case manager communication would be difficult. There was a clear need for a case manager. The cost was approved at £8,886 per year with a one-off set up cost of £15,188.

The accommodation required by the claimant

The need for accommodation was not disputed. The issue was the size of the accommodation, whether a dedicated room was required for home physiotherapy and whether a garage or car port was needed.

Size

The judge had to decide between a smaller property with a notional value of £283,333 or a larger property with a notional value of £474,950. The judge concluded the smaller property was appropriate.

Dedicated room

The judge noted that therapy would be intensive for the first year (88 sessions of therapy) and reduce to 18 sessions per year after two years. It was not reasonable to provide a dedicated therapy room in those circumstances.

Car port / garage?

The claimant contended a garage should be provided to prevent undue exposure to the elements and to provide additional storage space.

The judge concluded the provision of a car port was reasonable. He allowed the sum of £11,800 being the top of the range of costings for the provision of a car port.

The claimant's future travel requirements

The claimant claimed the sum of £322,298 for the lifetime provision of a vehicle with suitable wheelchair access. The claimant had in the past had a Motability vehicle, but this had been returned as she had no-one to drive it. The claimant told the judge she "had no reason not to use Motability in the future"



The judge stated that whilst the defendant could not argue that the claimant should be required to mitigate her loss by using a Motability vehicle (see *Eagle v Chambers No.2 2004*) the claimant had expressed a willingness to use the scheme in the future. The judge declined to make an award in respect of the funding of a vehicle. Instead, the judge awarded the sum of £16,000 in respect of additional travel expenses.

The claim for future loss of earnings

The claimant claimed an award for loss of congenial employment and an award for future loss of earnings.

As no congenial employment was lost there was no award made.

As to future loss of earnings the claimant contended she would have been able to seek supported remunerative work for example in a charity shop. The defendant contended any employment would have been therapeutic only.

The judge accepted the claimant would have been able to find some low paid remunerative employment. He assessed the value of this at £5,000 per year.

The issue of a periodical payments order

It was agreed this issue would be held in abeyance.

The claimant's capacity

The starting point under The Mental Capacity Act 2005 is that an adult is to be presumed to have full legal capacity to make decisions for themselves unless it can be shown that they lack capacity to make a decision at the time the decision needs to be taken.

The judge referred to the Code of Practice supplementary to the Mental Capacity Act and noted

A person is unable to make decision if they cannot:

- a) understand the relevant information about the decision to be made (such information must be appropriately presented and includes the nature of the decision, the reason the decision is needed and the likely effects of deciding one way or another)
- b) retain that information in their mind to the extent necessary to make a decision
- c) use or weigh that information as part of the decision-making process
- d) communicate their decision

The judge accepted that based on the expert medical evidence before the court the claimant had an impairment of the mind or brain. The issue was whether that impairment meant she was unable to manage her award.

The judge considered the evidence of the neuropsychologists. The claimant's neuropsychologist concluded the claimant lacked capacity.

The defendant's expert contended the psychometric testing of the claimant by her expert was unreliable as they did not reflect the claimant "in the real world". They only reflected the position during clinical tests. The defendant's expert accepted that there would be times during acute phases of poor mental health that the

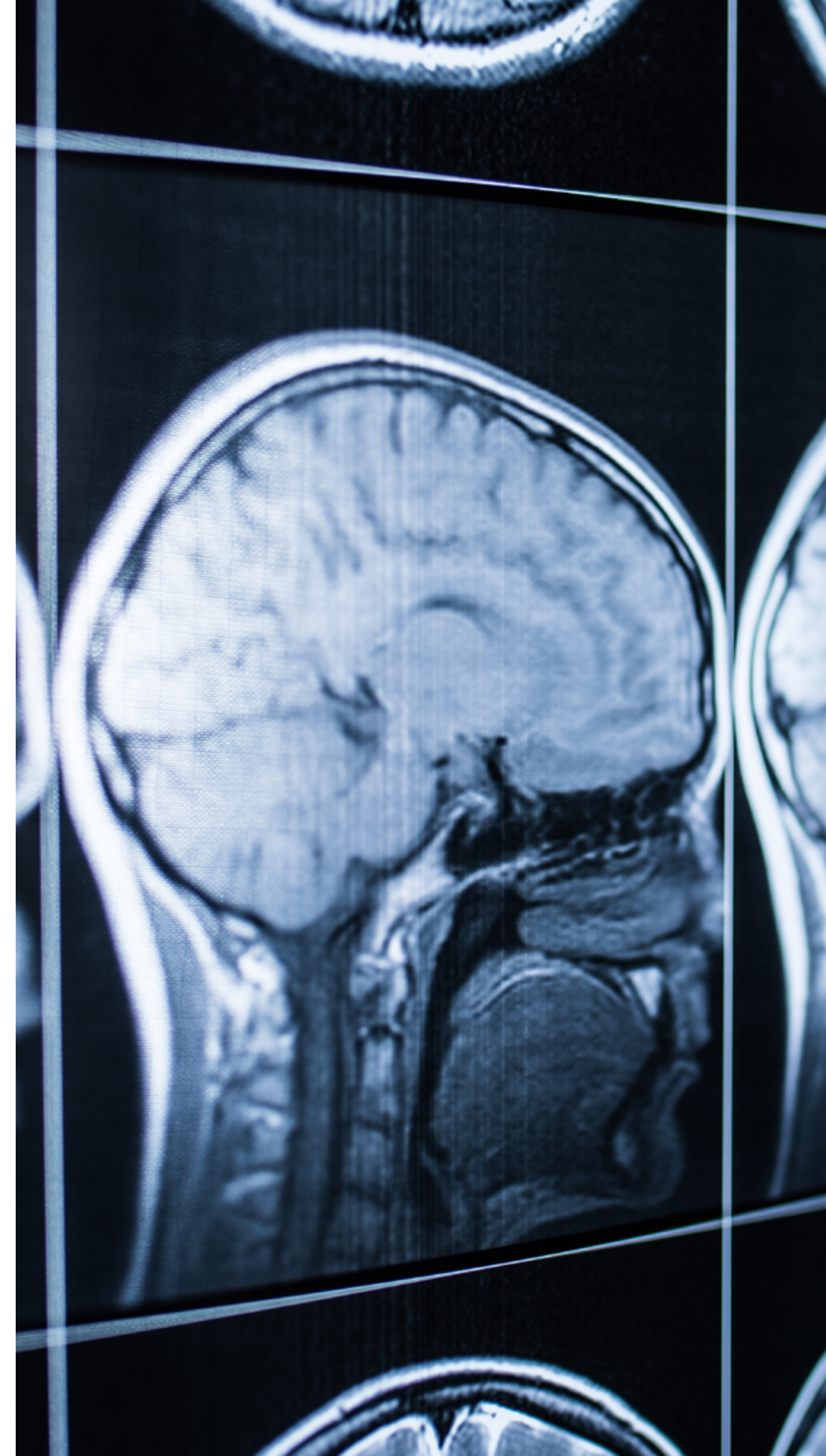
claimant may lack capacity, but this did not equate to lack of capacity as set out in the Mental Capacity Act.

The judge considered other evidence from the claimant's father relating to practical examples of the claimant's vulnerability and her inability to manage her financial affairs. The claimant herself told the judge she was vulnerable to exploitation and preferred to have the court manage her affairs.

The judge preferred the defendant's neuropsychologist's evidence. This expert had seen the claimant in a "real world setting" and not in a clinical controlled setting. The judge stated

"I am satisfied that Dr Clarke's "real life" observations of Miss Martin are of greater evidential value than the results of psychometric testing. I accept that Miss Martin is vulnerable to suggestion by others. On balance of probabilities, I am satisfied however that the vulnerability does not arise from her brain injury but rather from her personality disorder. In my judgment the evidence falls short of that needed to displace the presumption of capacity"

As a consequence of this finding the judge declined to make any award in respect of the costs of a Deputy or Court of Protection costs. Had the judge decided the claimant lacked capacity there would have been an application to amend the schedule of loss to increase the claim by between £195,747 and £464,470.



Commentary

Whether the claimant should be allowed to amend to include the cost of a PI Trust?

At the conclusion of the trial on the basis of the judge's finding that the claimant had capacity an application was made by the claimant to amend the claim to include the cost of a personal injury trust. The potential claim in respect of the personal injury trust amounted to £385,680.

The defendant argued the need for the personal injury trust did not arise out of the defendant's negligence and that it was made late. The latter argument was conceded by the claimant.

The judge did not accept the defendant's main submission:

"In my judgment it is clear that "but for" the defendant's negligence there would be no need for a personal injury trust. The requirement that Miss Martin take control of a large fund of money, and so be exposed to the risk of pressure from others to fritter away the fund, would not arise if the defendant had not been negligent."

Despite the amendment being sought at a late stage the judge concluded it was in the interests of justice to allow the application.

The judge then directed the parties to agree directions to deal with the outstanding issues not dealt with.

The claim is listed to be heard again in January 2022 when the outstanding issues will be determined.



Care

Whilst it was accepted that if the claimant were to continue receiving s117 funding to meet her physical care needs she would not be able to recover these from the defendant the judge was able to separate the mental health care from the physical care and go on to conclude the physical care funded by s117 was inadequate.

The decision was generous to the claimant particularly with regard to the full lifetime multiplier applied notwithstanding the likelihood of the claimant being hospitalised for long periods due to her mental disorder and by the judge not applying the Crofton discount.

Capacity

The judgment shows the need to look at capacity in a "real world" situation. How does the cognitive impairment affect the claimant on a day-to-day basis and how does it impact on the ability to manage financial affairs? Reliance should not be placed solely on expert neuropsychological tests but also on factual evidence concerning this issue. It is important that experts instructed to consider capacity adopt this approach.

Overall, the judge has given with one hand (accommodation and transport) but has taken with the other (care and permission to amend to include the personal injury trust)

Although the claim is to continue our expectation is that settlement before the next hearing is likely.

