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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

JM (a young person) by
her mother and next friend LM

Plaintiff:

-and-

NORTHERN IRELAND HEALTH AND SOCIAL CARE TRUST

Defendant:

STEPHENS J

Introduction

[1] The plaintiff, JM, now 10 (date of birth 26 September 2006) sustained an Erb's Palsy injury to her dominant right arm as a consequence of shoulder dystocia at the time of her birth. The defendant, the Northern Health and Social Care Trust, which was responsible for obstetric care, has admitted liability. The plaintiff's claim for damages has a number of elements namely (a) general damages, (b) damages for past care provided to the plaintiff by her parents (c) the plaintiff's future loss of earnings and (d) damages for the loss to the plaintiff by reason of her inability to undertake services which will require others to provide those for her or for the plaintiff to pay others to do so. The parties have agreed, subject to approval, figures for all those elements except for general damages. It has been agreed that I should assess general damages and that another judge should then consider whether to approve the settlement in relation to the other elements, so that if the settlement is not approved, I will then hear and determine the appropriate level of compensation in relation to those further elements.

[2] Mr Good QC and Mr Colin Henry appeared on behalf of the plaintiff. Mr Cush appeared on behalf of the defendant.

The initial injuries and the treatment received

[3] The injury, a Grade 2 Erb's palsy was sustained at birth on 26 September 2006. An Erb's palsy is an injury that occurs when the brachial plexus nerves in a baby's upper arm are damaged. It is called an Erb's palsy as the injury usually occurs as a result of a lesion at Erb's point, the area near the baby's neck where the fifth and sixth cranial nerves merge to create the upper point of the brachial plexus.

[4] The nerves in the brachial plexus give movement and feeling to the arm, hand and fingers.

[5] After the plaintiff was born the plaintiff's mother was told that the plaintiff had a lazy arm and it is recorded that there was bruising to the plaintiff's face and under her right shoulder. The bruising resolved, but the plaintiff had sustained permanent restrictions in the movement of her right shoulder and to a lesser extent in her right arm. Initially the Erb's palsy resulted in a progressive contracture of her right arm with internal rotation of the arm at the shoulder. On discharge from hospital Moro reflexes were absent on the right, her right arm was internally rotated, there was flexion of her right index finger and she was not moving the right arm as frequently as the left. The Moro reflex is an infantile reflex normally present in all new-borns up to 3 or 4 months of age as a response to a sudden loss of support, when the infant feels as if it is falling. It includes the components of spreading out the arms (abduction) and un-spreading the arms (adduction).

[6] On examination on 10 October 2006 there was weak flexion and extension of the plaintiff's right fingers and some protraction of the right shoulder. There was a flicker of thumb abduction. On 18 December 2006 she had weak elbow flexion and wrist extension. She had a flicker of shoulder abduction and external rotation. She had weak shoulder internal rotation.

[7] The plaintiff required, and still requires, physiotherapy. Although it was felt that the plaintiff was making progress with physiotherapy she was referred to Musgrave Park Hospital for further assessment. Mr Cowie FRCS then referred her to Professor Carlstadt at the Royal National Orthopaedic Clinic. She was seen by him on 22 January 2008 when she was 1 year and 4 months old. She was reviewed by him on 22 April 2008. He noted deterioration in external rotation at the right shoulder. Concern was expressed that the right shoulder might dislocate and it was suggested that the plaintiff might require surgery to release her medial rotation contracture at the right shoulder. In the event the muscle imbalance resulting from the contracture necessitated a surgical release of the right shoulder to correct the imbalance. She came to surgery at the Royal National Orthopaedic Clinic on 7 July 2008 when she was 2 years old. She was in hospital between 6 July 2008 and 9 July 2008. After the surgery she was treated in a plaster body case with an arm cast attached by a bar for about 6 weeks so that her arm was extended up. The plaintiff was agitated and annoyed by the surgery. Understandably, after the surgery, the plaintiff's mother noticed that the plaintiff's lack of desire to use her right arm

increased. The plaintiff had difficulty lying at night time with the plaster body case and arm cast. She also had itches underneath the plaster. Two weeks after the operation the plaintiff had to travel back to London wearing the plaster to have her stitches removed which could be done without removing the plaster. She then travelled back to Northern Ireland in the plaster. Four weeks later they returned to London to have the plaster cast taken off. The plaintiff's mother took two weeks unpaid leave from work so as to accompany the plaintiff to London for this operation, followed by two weeks annual leave, so as to be at home to care for her. The plaintiff's father used his annual leave from work to attend appointments and to be there for her surgery. The surgical release was helpful in reducing the contracture.

[8] At review on 18 November 2008 at the Peripheral Nerve Injury Unit it was noted by Mr Horwitz FRCS that she was doing very well and had good hand function. She had maintained good external rotation and it was noted that "her parents have obviously been doing the exercises."

[9] At review on 5 May 2009 Professor Carlstedt noted "the situation is quite good with hand function which she uses." He said that he would see her the following year. She has attended for annual reviews since then in July of each year and this will continue until the plaintiff is 18 years old. At her last review in July 2016 it was felt that due to a growth spurt that movement had deteriorated slightly and this emphasised the need for physiotherapy which has recently been adapted to add in weights to improve its effectiveness.

[10] The plaintiff also has reviews at the Musgrave Park Hospital in December of each year.

Physiotherapy

[11] Physiotherapy has been a constant daily feature of the plaintiff's life commencing when she was just two weeks old and it will be a constant feature in the future.

[12] Two weeks after the plaintiff's birth and for a period of some two to three weeks, a physiotherapist came to the plaintiff's house, twice a week, staying about 30 to 45 minutes, on each occasion. The purpose of these initial visits was not only to perform physiotherapy on the plaintiff, but also to demonstrate to the plaintiff's parents the various exercises which they should undertake with the plaintiff.

[13] Both of the plaintiff's parents, having received instruction, then commenced performing physiotherapy on the plaintiff, 5 to 6 times per day, which involved six different procedures. Each session lasted approximately 15 minutes. They also stimulated the plaintiff's arm by tickling it with a make-up brush at various times during the day. The plaintiff's mother states that initially the plaintiff did not react adversely emotionally to this as she was just a baby. However her elder sister, who

is just 16 months older than the plaintiff, was missing her parents, due to the attention that the plaintiff required.

[14] In addition to the on-going physiotherapy provided at home provided by both of her parents, the plaintiff was provided with physiotherapy at the Child Development Centre of the Robinson Hospital Ballymoney ("the Robinson Centre") which is a short car journey from their home. This commenced when she was 2½ to 3 months old and was weekly for a period of approximately 6 to 7 years. The plaintiff had both what are termed dry sessions and physiotherapy sessions in a hydro pool. Each session lasted half an hour and the plaintiff had alternating blocks of dry sessions, for say six weeks, followed by blocks of sessions in the hydro pool, for say six weeks. Fortunately the plaintiff really enjoyed the hydro pool. However in relation to the dry sessions she occasionally became a bit frustrated and emotionally upset, not wishing to go into the building. The plaintiff's parents had to explain the potential for improvement in her arm to her and had to encourage her to have the sessions. This reluctance on the part of the plaintiff continued until approximately two years ago.

[15] The plaintiff's weekly visits to the Robinson Centre for physiotherapy continued until she was 6 or 7 years old. Thereafter she still went to physiotherapy at the Robinson Centre but not as frequently because as she was older more of it could be done at home.

[16] In relation to physiotherapy the plaintiff has "sort of got used to it." It has become a part of her life. She can see the improvements in the movements of her arm and this motivates her to continue.

[17] The physiotherapy at home has continued every day since the plaintiff was two weeks old. Her parents have been told that if the physiotherapy is not carried out her arm can deteriorate again. Presently it takes about 15 to 20 minutes every day at home to do physiotherapy, though if plaintiff goes swimming, she has a reward in that she does not have to do it that day.

[18] All the physiotherapy which has been undertaken by the plaintiff and by her parents has provided gradual incremental improvements in the plaintiff's arm.

Balance whilst learning to walk

[19] The plaintiff learnt to walk when she was approximately one year old but her balance was affected by her injuries in that her right shoulder was held back. The plaintiff's mother stated, and I accept, that this affected the plaintiff's balance causing the plaintiff to fall over far more frequently than would normally have occurred. That the plaintiff's parents had to constantly keep an eye on her. That she fell "a lot of times" hurting herself on occasion and on one occasion requiring to be taken to hospital in relation to a cut to her forehead. This was another aspect of the

constant attention which the plaintiff required from her parents in contrast to her sister.

[20] I accept that the plaintiff was frustrated by this need for constant attention particularly given the contrast between her and her elder sister who was so close to her in age and was able to move around without any difficulties with balance.

Family relationships

[21] The plaintiff is the third child in the family and her closest sibling by age is a sister just 16 months older than her. My assessment is that both of the plaintiff's parents have strong family values and have lavished their deep affections on all their children. They have coped sensibly with the problems that inevitably have arisen as a result of the plaintiff's injuries, constantly and greatly encouraging the plaintiff. They have also developed and then adhered to clear routines, but avoiding over-protection. This need to prioritise the plaintiff has inevitably resulted in her parents devoting a disproportionate amount of time on her, given her injuries, in comparison to the plaintiff's sister. That disproportionate attention to, and prioritisation of, the plaintiff would have been apparent to the plaintiff's sister, but the reasons for it would not have been understood by her when she was younger. This affected the relationship between them. The relationship was also affected by the plaintiff's understandable frustration at her inability to undertake tasks which her sister could perform. The sibling relationship is different from what it would have been if these injuries had not been sustained. However this is to be seen in the context that there is, and remains, a very strong bond between the plaintiff and her sister.

The present position

[22] The plaintiff has no pain. There is no loss of sensation. She uses both hands together quite naturally. There is no difference in arm lengths or hand size. Her handwriting is of a high standard.

[23] The Erb's Palsy has affected the trapezius muscles on the right which are less prominent than on the left. The pectoralis muscles at the front of her chest are more under developed on the right than on the left.

[24] The plaintiff has some limitation of movement to the right shoulder.

(a) External rotation is 25 degrees on the right as opposed to 50 degrees on the left.

(b) The ability for the plaintiff to put her right hand up behind her back has been affected in that she can reach up to the sixth thoracic vertebrae with her right hand as opposed to the twelfth thoracic vertebrae with her left.

(c) The ability to lift her right arm from her side has also been affected. On the right she can do this to 110 degrees as opposed to being able to bring her left hand up fully to be positioned above her head.

[25] The plaintiff cannot fully extend her right elbow to allow the arm to come out straight. There remains a residual 15 degrees of flexion when she attempts to straighten her elbow. Otherwise the plaintiff has good movement at her elbow and good strength in both flexion and extension. She has full rotation of the forearm and has good grip in the hand with no apparent discrepancy of strength.

[26] The Mallet grading system is a commonly used functional scoring system to assess the function of the arm following brachial plexus injury. The Mallet score gives a score of 1-5 for the various parameters which are abduction at the shoulder, external rotation of the shoulder, positioning of the hand on the neck and hand to the spine and also bringing the hand to the mouth. The score ranges from a possible low function of five to a maximum functional score of 25. According to the Mallet grading system the plaintiff achieves a score 22 out of 25. It can be seen that her function is reasonably good according to the Mallet score. The main area of difficulty is in doing bi-manual tasks above shoulder height. The restriction in using her right arm above her head is a permanent restriction.

[27] The plaintiff has settled well in school. She has no specific problems in the school environment due to the injury that she sustained.

[28] The plaintiff has one size bigger jumpers and T shirts so as to facilitate taking them on and off by herself. If she has a normal fitting top then she will always come to her mother for assistance to both dress and undress. However the plaintiff can manage buttons at the front.

[29] The plaintiff would like to do some sports such as judo which she cannot do in case she damages her arm. Her sister is keen on gymnastics, being able to do cartwheel and hand stands, whilst the plaintiff is frustrated that she cannot achieve anything like the same degree of proficiency as her sister. The plaintiff's sister learnt to ride a bicycle without stabilisers at 6 years of age and the plaintiff only achieved this when she was 9 because she was so nervous with her balance which she could not get right.

[30] The plaintiff has difficulties drying her own hair with a hair dryer in one hand and a brush in the other. She has difficulties carrying heavy bags and her mother is concerned about her ability to carry heavy school bags when she progresses to secondary school.

[31] The plaintiff does get upset and anxious when she considers that she is different from other children in achieving tasks like learning to ride a bicycle.

[32] The plaintiff and her sister are members of a swimming club. The plaintiff started to learn to swim at the same time as her sister with the same lessons but was unable to achieve to anything like the same standard as her sister. However the plaintiff is able to swim 800 metres and states that she is good at the front crawl. However the restriction of movements in her shoulder affects the way in which she performs the various swimming strokes including the front crawl. She develops her own technique to accommodate the restriction in movements. When her arm is tired she resorts to kicking.

Cosmetic appearance of the right shoulder

[33] One of the consequences of the Erb's Palsy has been prominence of the plaintiff's right scapula together with asymmetry in that the pole of the right scapula is more prominent. There is also a pattern of "winging". The scapula on the right is not as adherent to the chest wall, as on the left, so that then she pushes with her arms, the medial border of the right scapula "wings."

[34] The plaintiff has a 9 cm linear operation scar which extends from just below the outer aspect of the clavicle towards the apex of the axilla in the groove between the deltoid muscle and the pectoralis muscle on the front of the shoulder. The scar is reasonable fine and not markedly visible to inspection.

[35] The plaintiff has expressed to her mother some anxieties when friends have noticed her scar and her protruding shoulder. She has become self-conscious about being different. It is likely that in the future she will choose tops and dresses that are not backless or shoulder-less so that prominence in not given to her right shoulder.

[36] She is more likely than the general population to experience self-esteem issues around her physical appearance in adolescence.

[37] As a result of an inspection I considered that the cosmetic aspect, particularly the winging of the plaintiff's right shoulder, was significant and was understated in the medical reports.

Psychological effects

[38] The long term effects of Erb's palsy may cause a child to suffer psychologically with a lack of self-esteem and with frustration or anger caused by difficulties in performing various tasks.

[39] Dr Catherine Mangan, consultant child and adolescent psychiatrist was asked to report on the likely effect on the plaintiff's self-esteem and social development. Dr Mangan noted that both the plaintiff's parents had been emotionally and practically supportive towards the plaintiff. As one would expect, given the quality of the parental support for the plaintiff, there is no reference to anxiety in the plaintiff's medical notes and records. However there have been strains on the

plaintiff of the regular hospital appointments, of the need to have physiotherapy and the plaintiff has been frustrated at taking longer to master skills such as swimming. Dr Mangan is of the opinion that the plaintiff "is more likely than the general population to experience depression, anxiety and self-esteem issues regarding her appearance through her adolescence and adult life." However given the excellent emotional and practical support given to the plaintiff by her parents and whilst I accept a degree of risk I consider that the risks of depression or anxiety are modest.

Risks for the future

[40] The plaintiff still has a fair amount of growth left but as she has not developed significant deformities or complications it is likely that she will avoid these deformities and complications.

[41] The risk of shoulder dislocation is stated to be low.

[42] The fact that the plaintiff has had surgery to her shoulder and has restriction of external rotation means that she has a higher risk of degenerative arthritis and pain in her shoulder in the future. In addition a minority of people with Erb's Palsy do develop pain in adulthood although it is hoped that she will avoid that additional risk. Overall in the long to the very long term the plaintiff may have increasing restriction of shoulder movement, increasing shoulder pain and diminishing shoulder movement as a result of late contractions. Again overall she may have a very long term risk of arthritis though this would be unlikely to require any surgical interventions above the risk of the general population.

Careers

[43] There is an impact on the choices of careers available to the plaintiff in that she cannot pursue a career where she is expected to do bi-manual tasks above her head. Examples would include hairdressing or the aviation industry though this list is not exhaustive. She may also struggle with occupations which involve a considerable amount of lifting as her right arm may fatigue earlier than would be the case had she not had an Erb's Palsy. However a wide range of occupations would be available to her.

The approach to the assessment of General Damages

[44] In some cases there is a multiplicity of injuries each of which call for individual valuation, then aggregation, followed by consideration of, and if appropriate, an adjustment of the global figure, *Wilson v Gilroy and MIB* [2008] NICA 23. In this case I consider that there are aspects of the plaintiff's claim for general damages which do require separate analysis but which are not sufficiently distinct from the major brachial plexus injury to require separate valuation. Rather they should be considered as factors to be taken into account when forming an intuitive assessment as to the suitability of the sum produced to compensate for that aspect of

the plaintiff's injury. However there is one aspect of the plaintiff's claim, the cosmetic aspect, which I consider is sufficiently distinct and I will adopt the *Wilson v Gilroy* approach in relation to that aspect.

Consideration of the Guidelines for the Assessment of General Damages in Personal Injury cases

[45] I was referred by counsel to the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (4th Edition) published on 4 March 2013 ("the Guidelines") which at page 27 lists categories under the heading "Shoulder Injuries" namely:

(a) "Serious Injury. Dislocation of the shoulder and damage to the lower part of the brachial plexus causing pain in shoulder and neck, aching in elbow, sensory symptoms with forearm and hand and weakness of grip. The higher level would be appropriate where there is damage to the brachial plexus resulting in significant disability. …" - £20,000 - £75,000.

(b) "Moderate Injury. Frozen shoulder with limitation of movement and discomfort with symptoms persisting for some years." - £10,000 - £25,000.

[46] This case does not fall easily into these categories. In relation to category (a) the plaintiff's shoulder did not dislocate, there is no pain in her shoulder or in her neck though she does get tired when lifting heavy weights and there are no sensory symptoms or weakness of grip. The plaintiff's overall functional disability is less than one would assume would result from an injury in that category. However in category (a) there is no mention of age and the plaintiff will literally have this injury for life. There is no reference to the prospect that in her seventies and eighties she may well have to cope with increasing pain and restrictions in her shoulder, in addition to whatever other physical ailments that older age may inflict. There is no reference to the cosmetic impact of the injury, to the psychological impact, to the impact on her feeling of worth, to the restriction in her employment prospects, to the impact on her family life, particularly in her relationship with her sister, to the operation under general anaesthetic, to the intrusion and worry of two annual reviews, to being in a plaster cast for a period of 6 weeks or to the other risks set out in this judgment. There is also no concept of the daily intrusion into her life and the daily disruption of having to undertake physiotherapy.

[47] Mr Cush acknowledged that this case did not fall within the descriptors in category (a) but submitted that the case fell somewhere within the broad range of value given of £20,000 to £75,000. In support of that proposition Mr Cush drew the court's attention to other categories with an upper limit in the region of £75,000; see page 23 letter A. (d) and page 27 letter E. (b). He submitted that the overall figure for general damages taking all the different aspects into account should lead to an award not exceeding £50,000 and might be somewhat less.

[48] Mr Good QC agreed that this case does not fit easily into the categories in the Guidelines. He submitted that the Guidelines were not going to produce an answer. He approached the matter by considering different aspects of the plaintiff's case. In relation to the cosmetic element he suggested a figure of £25,000. For the operation under general anaesthetic he suggested a figure of £12,500. For the intrusion and upset of having to perform physiotherapy on a daily basis combined with the functional restrictions and the long term effects of the shoulder injury he suggested a figure of £75,000. He acknowledged that these figures could not just be added together but rather that the court had to stand back and award an appropriate overall figure.

[49] In the introduction to the Guidelines Girvan LJ made reference to adjusting the figures for inflation stating that

> "the figures which we have given are at current values. As each year goes by, courts in assessing damages should take into account the effect of RPI inflation over time when assessing the appropriate damages in individual future cases. The figures for damages are given in broad terms and with relatively broad ranges to take account of the infinite variety of factual situations. The assessing court can thus determine the appropriate damages at the correct figure taking account of relevant inflation in the period subsequent to the date of publication of these updated Guidelines."

Nearly four years have elapsed since the Guidelines were published. Inflation over that period has been low and I only take this factor into account to a very modest extent in the most general way.

Conclusion

[50] I consider that all aspects of the shoulder injury, excluding the cosmetic upset, have a value of £65,000. I value the cosmetic element at £25,000. The total is £90,000, but standing back and looking at the case in the round, I consider that the appropriate overall figure is £80,000. I enter judgment for that amount in relation to general damages.