Neutral Citation Number: [2022] EWHC 1440 (QB)

Case No: G90MA376

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 13 June 2022

Before :

His Honour Judge Pearce

- -

Between :

MR PIOTR SALWIN **Claimant**

(a Protected Party, by his litigation friend, MATEUSZ SOBIEPANEK)

- and –

MR HIATHEM SHAHED **Defendant**

- -

MR WINSTON HUNTER QC (instructed by **POTTER REES DOLAN**) for the **Claimant**
MR PATRICK VINCENT QC (instructed by **DF LAW LLP**) for the **Defendant**

Hearing date: 7 June 2022

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. This is my judgment on the Claimant's application for an interim payment, heard on 7 June 2022.

2. The application notice, dated 9 May 2022, seeks "*a general interim payment in the sum of £175,000 or such other sum as the Court sees fit, to fund the Claimant's ongoing*

rehabilitation." In the event, Mr Hunter QC for the Claimant contended that the Court could comfortably award a higher sum, having regard to the relevant principles and the anticipated need to fund care, therapy, rehabilitation and the suchlike over the next two years. The application was opposed by the Defendant, who contends that interim payments that have already been made to the Claimant exceed what the Claimant can show to be "*no more than a reasonable proportion of likely amount of the final judgment*" under CPR 25.7, when proper consideration is had to the relevant heads of loss and the appropriately conservative approach to assessing what is a reasonable proportion.

3. The application is supported by a witness statement from Ms Jeanne Evans of the Claimant's solicitors dated 9 May 2022. In response, the Defendant has filed a statement from Mr James Allen of the Defendant's solicitors dated 27 May 2022. Both statements exhibit a variety of documents that provide helpful background.

4. The bundle filed in support of the application comprises the application notice, the statement and exhibits and a recent case management plan from the Claimant's case manager. In addition, during the hearing Mr Hunter QC referred me to a letter from Dr Andrew Harrison, neuropsychologist instructed on behalf of the Claimant, dated 6 June 2022. That letter goes to the issue of the likely time when it will be possible for him to give a final opinion regarding the Claimant's long-term needs and therefore to resolve this claim. Mr Vincent QC did not object to me seeing the letter though raised a query as to what weight could in reality be placed on it.

5. Both counsel filed skeleton arguments. I am obliged to each of them for their thorough approach to the issues in the case, both in written and in oral submissions.

Background

6. The Claimant is a Polish national who is resident in the United Kingdom. He was born on 5 April 1971 so is now aged 51. He speaks no English (and in light of the injuries suffered in the accident which caused the injuries for which he brings this claim, he is highly unlikely to learn to do so now).

7. On 1 June 2019, he suffered catastrophic injuries when, as a pedestrian, he was struck by a car driven by the Defendant. He suffered multiple injuries, including a traumatic brain injury. He also suffered fractures of the left clavicle, humerus and scapula, the right L1 transverse process and the left ankle. He had left lung lacerations and contusions.

8. At the accident scene, his GCS was 3. He required ventilation, sedation and ICP monitoring. He underwent emergency surgical intervention including a decompressive craniectomy and evacuation of a subdural haematoma.

9. Following acute inpatient care the Claimant was subsequently transferred to the Brain Injury Rehabilitation Unit at the Walton Centre where he received early post-acute rehabilitation input. In May 2020, he was transferred to a supported residential placement with Wings, a specialist provider of transitional care and intensive support in the Liverpool area. He had access to support and supervision around the clock. His core support needs were met by way of Local Authority funding. He also received case management and input from support workers.

10. In 2021, the Claimant was apparently expressing dissatisfaction with his placement with Wings. The problem was described thus by the case manager:

> **"***He enjoyed* (the placement with Wings) *to begin with. As time went on the surrounding flats became inhabited and there were issues with challenging behaviour within the actual property and surrounding ones. Piotr steadily became more anxious and stressed while living there and it became a part of our priority to move him away from this. For example, several times the police were called to violent incidences. There were loud bangs, Piotr was so anxious that he would be awake shaking in his bed and unable to call for support. He would also try and intervene if he saw others anxious or upset and staff would try to redirect him back to his flat but then not support him further to do this so he would be on his own.*

11. The Claimant's capacity was assessed and Dr Harrison considered that he lacked capacity to make decisions relating to his care and placement. A best interests decision was taken that he would be best in a placement within a community setting. The initial proposal was that he move in with family members but later the Claimant indicated that he wished to live in his own accommodation. Eventually he moved to a house in Formby in February 2022 with a package of 24 hour support.

The Claim to date

12. The Claimant's claim was initially disputed by the Defendant. Ultimately, liability was settled on the basis of 80% recovery.

13. In the mean time, the Defendant has made voluntary interim payments totalling £422,000 as follows:

2 October 2020:	£30,000
23 December 2020:	£27,000
11 January 2021:	£70,000
24 August 2021:	£120,000
24 December 2021:	£100,000
11 May 2022:	£75,000

The Claimant's losses to date

23 The difference between the positions taken by the parties on losses to date is relatively narrow. Their respective figures are as follows:

	Claimant	Defendant
Pain, suffering and loss of amenity	£225,000	£150,000
Loss of earnings	£51,000	£36,000
Gratuitous Care	£30,000	£10,000
Case Management	£91,577.96	£50,000
Support worker	£43,130.48	£43,130
Physiotherapy	£19,246.27	£19,246.27[1]

[1] The statement of Mr Allen at paragraph 35 accepts the total of £120,890.34, which is the sum of the figures for physiotherapy, psychology, speech and language therapy, occupational therapy and translation services.

Psychology	£58,292.87	£58,292.87
Speech and Language Therapy	£16,058.75	£16,058.75
Occupational Therapy	£19,843.00	£19,843.00
Dietician	-	-
Translation	£7,449.45	£7,449.45
Accommodation	£5,600	-
Deputyship costs	£20,000	-
TOTAL[2]	£567,199	£410,020

24 The difference between the two totals is very largely explained by a difference in the valuation of damages for pain, suffering and loss of amenity and the Claimant's claim for past case management, though there are lesser issues as to the claims for loss of earnings and gratuitous care. My conclusions on these differences are dealt with below.

The Claimant's Current Condition

25 The Claimant's condition is described at various points in the documents before me. In particular, the Claimant draws my attention to:

a. The reports from Dr Harrison, neuropsychologist, relied on by the Claimant. In his report of 8 February 2021, he stated that the Claimant presents with widespread cognitive impairments both in formal testing and in day to day settings, with problems in attention, concentration, memory, receptive and expressive language and executive functioning including planning, organising and decision-making. He records the result of psychometric testing, in which the Claimant showed good evidence of effort but impaired performance on tests of verbal intellectual reasoning, immediate and delayed verbal memory, attention and various aspects of executive functioning, In his report of 25 March 2021 (which refers to an interview on 24 February 2010, though from the context this is almost certainly a mistaken reference to 2021), Dr Harrison describes the Claimant having suffered a severe traumatic brain injury resulting in significant cognitive and psychological impairments. These impairments caused Dr Harrison to conclude that he lacked the capacity to make decision regarding where he lived and his appropriate care needs.

b. In her report of 25 March 2022, Dr McNulty, a treating neuropsychologist, speaks of impaired cognition, with difficulties in particular, in executive functioning, including disinhibition, impulsivity, reduced insight and emotional dysregulation.

c. Ms Heather Lodge, the Claimant's case manager speaks, in her most recent case management plan of 27 May 2022, of increasing concerns about the Claimant being aggressive and consuming alcohol.

26 This leads the Claimant's case manager to the conclusion that he requires a continuing high level of case management, input from a neuropsychologist, speech and language therapist, occupational therapist, physiotherapist and dietician and round the clock support in the form of one to one support in waking hours and sleeping night support.

27 In contrast, the Defendant points to evidence in the various records which support the contention that the Claimant is able to undertake personal care, travel and access the community independently and carry out a variety of domestic tasks. In this respect, Mr

[2] Total to the nearest pound, here and elsewhere.

Des O'Neill, a care expert instructed by the Defendant has identified various entries in the records that support the conclusion that the Claimant is close to being able to live independently with only limited support.

28 Mr Vincent QC backs this case up within his written submissions, referring to various of the support worker records to support the conclusion that the Claimant's needs are overstated. Examples include:

a. Whilst the case manager identifies fatigue as an issue (see for example internal page 6 of the Case Management Plan dated 27 May 2022), there is very little reference to fatigue within the support worker records.

b. Whilst there is evidence of the Claimant being frustrated about his situation and this sometimes leading to aggressive behaviour, the support worker records indicate that this is as much a consequence of the restrictions on his ability to do what he wants that flow from the care regime as it is any consequence of the accident – see for example the support worker's note for 1 March 2022:

> *"At 18:00 I went to kitchen to prepare dinner for PS. PS come to kitchen from the garden and told me that he is out off Coca-Cola, he thought that he have it more but that's not a problem because he will go to shop now and buy more while I will do dinner. I told PS that we had this conversation yesterday evening and today morning. I told him that the rules for now and something can change on Thursday, but for now I have to go with him. PS puts his voice up and start to point finger on me. He told me that is stupid rule, that he uses to go out whenever he wants to. He told me also that "you can write that I run away, and you will be cover". I told PS that he is shouting at me and asked him to not to point his finger at me. PS apologized, put is voice down and thank me for telling him what he is doing. I asked PS to give me a chance to tell him my point of view. He agreed and sat down. I told him that now he have 24h care and we are here to support him. I told him that I understand why he is upset, and I apologized for this. PS told me that he is not upset at me but at this situation."*

c. Whilst the case manager reports in her plan dated 27 May 2022 that, *"He has also left his phone on the bus despite being prompted and then the staff have had to manage the whole situation of trying to find it and get it back"*, it is apparent from the support worker records that this was a very low level incident of which it is recorded, "*Just before we went out from the bus, PS notice that he left his mobile phone on the seat. I picked his phone and give him back.*"

29 This difference as to the Claimant's current condition gives rise to a substantial difference as to his therapeutic needs which underpins the differing position of the parties.

The Claimant's Case as his current needs

30 The Claimant relies on the reports of Dr Harrison together with the detailed records from the clinical and therapeutic MDT as the foundation for his case as to his current needs. The Claimant is entitled to damages that would put him, so far as possible, back into the position that he would have been but for the injuries, not simply damages to provide him with a safe living environment.

31 Dr McNalty, the treating neuropsychologist, formulated a statement of the implications of the Claimant's difficulties for his rehabilitation thus in her report of 25 March 2022:

"Piotr continues to experience significant cognitive, emotional and behavioural difficulties as a result of his brain injury. The most prominent symptoms relate to cognition, in particular, executive functioning difficulties including disinhibition, impulsivity, reduced insight and emotional dysregulation. One of the main barriers to progressing with Piotr's rehabilitation was his previous placement and the lack of consistent staff who could communicate effectively with Piotr to meet his needs and provide support. Now this has been established the delivery of neurorehabilitation and assessment of risk is more accessible.

With a consistent approach to his rehabilitation and access to Polish speaking support workers 24 hours a day Piotr has benefitted significantly. His understanding of his brain injury and insight into his difficulties have improved, he is less anxious and he is managing cognitive difficulties more effectively. His acceptance of support including understanding his need for support has also improved. The external support and structure implemented is allowing learning through habituation and Piotr is developing skills in activities of everyday living. This has facilitated the introduction of new systems to support and assess Piotr's difficulties.

Piotr's focus is settling into his new home and completing all the practical tasks which that involves. Due to his reduced cognitive abilities and him easily feeling cognitively overloaded it can be challenging to shift Piotr's focus to neurorehabilitation and increasing his independence. Piotr continues to have a limited understanding of his difficulties and the associated risks.

32 The Claimant contrasts the evidence relied on by the Claimant, particularly the reports of Dr Harrison, on the one hand and the letters relied on by the Defendant on the other. The reports of Dr Harrison show that he has considered the medical records and has borne in mind the severity of the original injury and the available evidence as to the course of rehabilitation. The psychological and cognitive sequalae of this accident as described by Dr Harrison continue to be reflected in the notes of MDT meetings and are consistent with the basis of the costings of the Claimant's care and therapeutic needs obtained by Ms Lodge.

33 In contrast, the letters relied on by the Defendant show only limited selective reference to the records and do not for example show any justification for the limited care that the Defendant would allow.

34 The conclusion is drawn from the Claimant's evidence that he needs a period of continued rehabilitation in his new accommodation with the support, at least of for the time being of 24 hour care. This leads to the case management plan set out by Ms Lodge, the case manager, and costed over the next 12 months in her letter of 9 May 2022 as follows:

Brain Injury Case Management	£42,008.08
Neuropsychology	£53,265.60
Speech and Language Therapy	£19,280
Occupational Therapy	£21,425.70
Garden furnishings	£2,000

Physiotherapy	£7,547.40
Dietician	£7,227.28
Support Staff	£213,094.40
Expenses for support staff	£2,600
Mileage for support staff	£468
Translation costs	£23,182
Housing costs	£16,800
TOTAL	£408,898

35 In the course of his skeleton argument, Mr Hunter QC advanced the claim for losses between now and a presumed trial two years hence as follows:

Loss of Earnings - £17,500 x 2	£35,000
Accomodation costs (rent of £1,400 p.c.m.) - £16,800 x 2	£33,600
Deputyship costs - £15,000 x 2	£30,000
Therapy and case management - £170,000[3] in year 1 and £150,000[4] in year 2	£320,000
Care/support worker - £213,000[5] in year 1 and £160,000[6] in year 2	£373,000
TOTAL	£791,600[7]

36 As a backstop position, the Claimant contends that this is a case where, if the interim payment sought cannot be justified under the first stage of the Eeles approach, a Judge would probably capitalise losses under Stage 2 to ensure that there was continuity in the Claimant's care and therapy.

The Defendant's Case as to the Claimant's current needs

37 The Defendant contends that the figures being claimed by the Claimant are simply way beyond what the evidence could justify. The Defendant criticises the evidence relied on by the Claimant in support of these figures, pointing out that, just because a Case Manager states that it is intended to spend a particular sum on behalf of an injured person does not mean that that sum will be recovered. The Claimant has proceeded with this application without producing evidence of the kind that might be expected from Part 35 experts[8]. Yet it is incumbent on the Claimant to prove his case. On the material before the court, applying the cautious approach required by cases such as Eeles v Cobham Hire Services Ltd [2009]

[3] Essentially as Ms Lodge's figures.
[4] As Ms Lodge's figures with a small reduction.
[5] As Ms Lodge's figures.
[6] As Ms Lodge's figures with a reduction, stated in oral submission to involve the removal of night care.
[7] In oral submissions, Mr Hunter QC substituted this figure for the figure of £693,000 referred to in paragraph 35 of his skeleton argument – that figure itself had not brought forward the figures for loss of earnings, accommodation and deputyship costs referred to in paragraph 32 of his skeleton argument.
[8] As Mr Hunter QC points out, since there has been no direction for expert evidence in this case, no expert, can accurately be described as "*a Part 35 expert*". But the true meaning of Mr Vincent QC's submission was clearly that a distinction is to be drawn between treating clinicians and case managers on the one had, and those whom it is intended to instruct for the purpose of giving expert evidence at trial on the other.

EWCA Civ 204, the Claimant fails to show an entitlement to any further sum by way of interim payments.

38 The Defendant bases his position on the weakness of the case advanced by the Claimant and, in contrast, the three letters that have been obtained from intended Part 35 experts dealing with the Claimant's future needs. Given the absence of analysis from the Claimant's own experts, the Defendant says that the court is limited, in applying the proper approach under Eeles, to taking the figures advanced by the Defendant's experts as to the proper level of damages of which the Court can take a reasonable proportion for the purpose of ordering an interim payment.

39 In terms of losses over the next 12 months, Mr Allen, taking most of the figures from paragraph 31 of Ms Evans' statement, values the claim as follows:

Brain Injury Case Management	£42,008.08
Neuropsychology	£53,265.60
Speech & Language Therapy	£19,280.00
Occupational Therapy	£21,425.70
Physiotherapy	£7,547.40
Dietician	£7,227.28
Support Staff	£53,756
Translation	£23,182.00
Total:	£227,692[9]

40 Taking this sum together with the figure for losses to date of £410,020, the full liability value of the claim is therefore no more than about £638,000. Applying the liability settlement of figure to this, the highest probable recovery for losses to date and over the next 12 months is no more than about £510,000. Applying a reasonable proportion of that of 80%, the interim payments already made exceed the sum that can be justified under CPR 25.7 and therefore no further interim payment order should be made.

41 In so far as this would leave the Claimant in a position where his current needs cannot be met (even on the Defendant's case), the Defendant says:

a. This is a consequence of how the money that has been obtained thus far by way of interim payment has been utilised on behalf of the Claimant;
b. The Claimant still has around £20,000 left from previous interim payments that could be used to fund continuing costs in the short term;
c. There is nothing to stop the Claimant making a further application for an interim payment if he can obtain proper supportive evidence.

The Law

42 The law relating to interim payments is governed by CPR 25.7(4). This provides the threshold circumstances before an order can be made, including, at CPR

[9] Mr Allen's slightly different total of £227,786 may be due to rounding some figures - in any event it makes no appreciable difference to the argument.

25.7(1)(B), that "*the claimant has obtained judgment against that defendant for damages to be assessed* …" It is agreed that this threshold is met here.

43 The court is then empowered to award an interim payment of no more than a reasonable proportion of the likely amount of the final judgment (CPR 25.7(4)). It is common ground that the proper approach to applications for interim payments in heavy personal injury cases is the two stage test set out by Smith LJ in Eeles v Cobham [2009] EWCA Civ 204 at paragraphs 43 to 45:

> *"43. The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided the assessment has been conservative. The objective is not to keep the Claimant out of his money but to avoid any risk of over-payment.*
>
> *44. For this part of the process the Judge need have no regard as to what the Claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection.*
>
> *45. We turn to the circumstances in which the Judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. This can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest, and accommodation costs alone. We endorse the approach of Stanley Burnton J in the Braithwaite case [2008] LS Law Medical 261. Before taking such a course, the judge must be satisfied by the evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of confidence, then he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim payment."*

44 The proper way in which to deal with losses which are not in the past at the time of the making of an interim payments order but will be past losses by the time of trial was considered by Yip J in PAL v Davison [2021] EWHC 1108 (QB). She noted the comment of Popplewell J as he then in Smith v Bailey [2014] EWHC 2569 (QB) that past losses were "*to be taken at the predicted date of trial rather than the interim payment hearing"* and contrasted with that the reference by Smith LJ in Eeles to "*special damages to date."* She went on:

> "26. *It seems to me that the starting point remains as stated by Smith LJ that strictly speaking the court looks at special damages "to date". However, there will be many instances where it is entirely appropriate in making the conservative assessment at the first stage to bring in special damages which have not yet accrued but will do so before trial. I consider this a question of fact which inevitably depends on the context of the application. What is essential, is to keep in mind the clear principles which underpin the approach at stage 1 of Eeles. The court's task is to estimate the likely amount of the lump sum element of the final judgment. The objective is not to keep the claimant out of his or her money but to avoid the risk of overpayment. The court must avoid fettering the trial judge's freedom to make an appropriate PPO.*
>
> *27. It is easy to think of examples where the court can be confident that special damages yet to accrue will form part of the likely amount of the lump sum. In the case of an adult claimant, an ongoing claim for loss of earnings might fall into that category. The provision of gratuitous care on a basis which is expected to continue to trial might be another example. Even then, any advance payments in respect of special damages yet to accrue can give rise to some risk of over-payment. The longer the estimated period to trial, the greater the uncertainty and so the greater the risk.*
>
> *28. It is acknowledged by the defendants that the claimant has requirements for care, case management, therapies, aids and equipment. Those requirements will need to be met from interim payments until her claim is finalised. The costs will then be claimed as past loss and will form part of the lump sum element from which the interim payments will be deducted…*
>
> *29. When considering an application for an interim payment to cover the claimant's pre-trial needs, it may well be reasonable to include costs which have yet to be incurred but which will accrue before trial in the stage 1 assessment. Whether it is reasonable to predict the costs to trial or for a lesser period must depend on all the circumstances. There is a balance to be struck. The risk of possible over-payment must be managed, particularly where any uncertainty exists. On the other hand, the claimant should not be kept out of her money nor be required to make frequent applications for further payments. If the parties adopt the sensible approach evident at the hearing before me, I see no reason why they should not manage to strike that balance and reach agreement. Such an approach will allow the claimant's rehabilitation to continue while still leaving it open to the defendants to argue at trial that costs were not reasonably incurred*."

45 Mr Vincent QC reminded me of the "level playing field" argument considered by the Court of Appeal in Campbell v Mylchreest [1999] PIQR Q17. The full ambit of this principle and the interplay between it and the principle that it is a matter for the Claimant how damages are applied are by no means straightforward questions. Further, as Sir John Balcombe said in that case:

> *"It is accepted before us that the level playing field argument can never be an absolute bar to an interim payment. It might otherwise be possible for a defendant, by introducing one dissident voice, to hold up indefinitely an interim payment which the overwhelming preponderance of medical evidence showed desirable for the benefit of the plaintiff."*

46 However, it is clear from the judgments in the Court of Appeal in Campbell v Mylchreest that, where an interim payment is intended to be applied in a way that might tilt the playing field against the Defendant (or in the words of Sir John Balcombe, "*somehow prejudice the interest of the defendant"*), this is a factor which should be taken into account in determining whether an interim payment is made and if so in what amount.

Discussion

47 The first issue to consider is whether an interim payment should be refused because of the "*level playing field argument*." The concern expressed by the Defendant is that this interim payment is intended to be used to continue to fund a care regime which is simply beyond what the Claimant needs but more significantly is likely to hinder rather than help attempts at rehabilitation. The former point simply goes to the quantum of any order – the court should, on the Defendant's argument, exercise particular caution in valuing the claim where there is such a discrepancy of opinion between experts. But the latter point goes further. As I have noted, Dr Crawford's comments "*I am concerned that the support is being used to provide company and will result in learned dependency*." If she is correct in this regard then an interim payment at the level sought by the Claimant will not simply be an overvaluation of the claim as it currently stands, it will lead to a position where the claim may increase in value because of the consequence of the learned dependency.

48 Against this though must be weighed the argument that, if Dr Crawford is incorrect and if in fact the Claimant's case correctly identifies his reasonable needs as including care at the level now being claimed, he would suffer prejudice as a result of not receiving appropriate care and therapeutic input pending a trial that may be two years hence. This prejudice is at least as great as that which may be caused to the Defendant. In my judgment, this argument should not lead to a situation in which the court declines to make award of an interim payment at this stage. However, it remains relevant to the exercise of the appropriate caution under the Eeles test as to the amount of any award.

49 I turn to the next matter which is the extent to which the court should take into account losses that may accrue between now and the trial of this case as part of the measure of what is a reasonable proportion of those damages. The judgment of Yip J in PAL v Davison provides a principled approach to determining this.

Since the very purpose of the claim for damages is a case such as this is to provide sums for rehabilitation and care both before and after trial, the inclusion of a reasonable figure to reflect the value of such claims in making the calculation under Stage 1 of Eeles is perfectly proper. However the court must be alert to the risk of over-compensating the Claimant or at the very least tying the hands of the trial judge as to the making of an appropriate periodical payments order. This is particularly likely to be so where (as here):

a. The Claimant will only recover a proportion of his reasonable needs;
b. There is a dispute as to what those needs are.

50 In considering on the length of time over which the calculation is made, one must bear in mind:

a. The longer the period and therefore the higher the damages that are properly to be taken into account in calculating the interim payment, the greater the risk of over-compensation and/or tying the hands of the trial judge as to the terms of a periodical payments order;
b. On the other hand, the shorter the period, the greater the risk that the Claimant will be driven to making a further application by the need for a further order to cover losses to trial.

51 In my judgment, the relevant factors here point towards one year's anticipated future losses (calculated in accordance with Eeles on a cautious basis) to be brought into the equation:

a. There is a genuine dispute as to Claimant's appropriate care needs. In so far as any award of periodical payments is based on the Claimant's assumptions as to those needs, there is a real risk of an excessively high award.
b. The risk of overcompensation is particularly high because the Claimant will not recover the full value of his losses given the 80% settlement.
c. The evidence before the court in support of the Claimant's proposed care regime is not overly robust. Whilst I acknowledge the expertise of the Case Manager and the other therapists upon whom he has relied for the calculation of figures, such sources of evidence are not of the same quality as an expert whom it is proposed be instructed under CPR Part 35, since the various obligations of such experts and their greater independence from the Claimant than treating clinicians and therapists gives their opinion greater weight.
d. Whilst the Claimant is not necessarily to be criticised for failing to have disclosed the opinions of proposed Part 35 experts on the care regime yet, given that the current regime has only recently been established, a period of around one year should give the Claimant the opportunity to obtain such evidence and to present it to the court should a further application for an interim payment be made.
e. There is a risk that Dr Crawford has rightly identified the possibility of the Claimant learning dependency as a result of being provided with a care package that exceeds his needs. If the court is persuaded that the evidence before the court justifies a substantial care package at this stage, the shorter the period until that package is reviewed with better evidence, the less the likely prejudice to the Defendant and/or harm to the Claimant's rehabilitation if she is correct.

f. Whilst it would be unfortunate if there were two contested interim payment applications, one now and one in a year's time, the possibility of that has to be weighted against the likelihood that, if better evidence is available in a year's time, it is more likely that the parties will be able to reach agreement on any further application.

52 However, in approaching the issue of the interim payments on this basis, I bear in mind the increased uncertainty of the losses that may accrue over the next year. On the facts of this case, that uncertainty is met not only by the application of the usual caution in valuing damages for the purposes of Stage 1 of the Eeles test, but also by factoring in a larger discount in determining what is a "*reasonable proportion*" of the figure for losses over the next year than for losses already incurred.

53 I turn to the third issue in this case, the appropriate level of damages from which a reasonable proportion can be determined for the purpose of the ceiling of any interim payment contained in CPR25.7(4). In order to determine this, I consider the Claimant's losses in two parts: losses to date and those that are likely to accrue over the next year.

54 In terms of losses to date, the parties' positions are noted in the table above. As to the disputed items:

a. The level of damages for pain, suffering and loss of amenity is the subject of considerable dispute. Having regard to the Sixteenth Edition of the Judicial College Guidelines for the Assessment of General Damages in personal Injury Cases, I agree with the submission for the Claimant that this injury probably lies at the upper end of moderate brain injury category or the lower end of the moderately serve category, which brackets meet at £219,070. Having regard to the Claimant's other physical injures, the figure of £225,000 proposed by the Claimant is at the conservative end of the reasonable range.

b. The claim for past loss of earnings at £17,000 per annum is a higher figure than the Claimant was earning before the accident, which was around £315 per week based on the PAYE P11 form, up to and including 2 June 2019. The Claimant seeks to justify the higher figure by wage inflation, but as against this must be balanced the risk that there could have been some disruption to his employment for reasons unrelated to the accident. The appropriate figure to take is the annualised equivalent of £315 per week, that is £16,380 per annum for the 3 years from the accident to date. From this figure needs be deducted post-accident sick pay of £5,775.30, according to Mr Allen, giving a net figure of £43,365.

c. The claim for gratuitous care costs put by the Claimant of £10,000 per annum appears well within the range of what one would expect in a case with injuries of this severity. Whilst of course the Claimant has had most of his care needs met either by the institutions in which he has lived at no expense to him or more recently through the employment of commercial carers, I consider the figure of £10,000 in total for the last three years, as proposed by the Defendant to be very much on the low side. In contrast, the figure of £10,000 per annum proposed by the Claimant to be in the reasonably cautious range. I use the latter for the basis of this calculation.

d. Like the Defendant, I share some surprise at the level of past case management fees. The Claimant points out that this head of loss relates to past expenses that have actually been incurred. He contends that there is not even the beginnings of an argument that he has failed reasonably to mitigate his loss and/or that these losses are not properly to be treated as being caused by the accident, on account of some new intervening cause. Whilst such a case has not yet been formulated, when exercising the cautious approach required pursuant to Eeles, it is appropriate for the court to reduce heads of loss, even relating to past losses, where these on their face look arguably excessive. Taking this approach, I accept the Defendant's figure of £50,000 as being in the reasonably cautious range.

e. Whilst the Defendant was not presented with estimated accommodation and deputyship costs in advance of the hearing and can have some legitimate complaint that he had no opportunity to consider these heads of loss, the figures proposed by the Claimant are eminently reasonable for a case of this nature, subject to the argument that the Claimant would have incurred some accommodation costs (which I estimate at £800 per month or £9,600 per annum) in any event.

55 Accordingly, I would consider a cautious valuation of these heads of loss to be as follows:

	Cautious Valuation
Pain, suffering and loss of amenity	£225,000
Loss of earnings	£43,365
Gratuitous Care	£30,000
Case Management	£50,000
Support worker	£43,130
Physiotherapy	£19,246
Psychology	£58,293
Speech and Language Therapy	£16,059
Occupational Therapy	£19,843
Translation	£7,449
Accommodation	£2,400
Deputyship costs	£20,000
TOTAL	£534,785

56 Allowing for the discount for the liability settlement, the value of these heads totals £427,828. Given the cautious way on which these heads of loss have ben approached (in some cases there being no formulated criticism to the figures claimed and in some others, taking the Defendant's figures), the Court can have a high degree of confidence that the sum allowed for these heads of loss will be close to that set out above. Correspondingly, the reasonable proportion of these losses for the purpose of CPR 25.7 is a high one, in my judgment around 90%. I would therefore value these heads of loss for interim payment purposes at £385,045.

57 Turning to losses over the next year, I have noted the considerable dispute over the Claimant's proposed care and support regime. My provisional view on the material before me is that the Defendant's case significantly understates the likely

care needs over the next year. Whilst its figures are supported by experts who are likely to be instructed pursuant to CPR Part 35, there is little analysis therein of the Claimant's injuries and his consequent needs. Whilst it is correct that the case management records produced do not support the conclusion that the Claimant has in fact been involved in incidents where there has been a serious risk of harm sufficient to justify a 24 hour care regime, there is clear reference to events that could have escalated to a more serious situation[10]. It is reasonably arguable, as contended for by the Claimant, that it is the very fact of the supportive regime that is in place that has prevented more serious consequences from developing.

58 On the other hand, the claim for a 24 hour care package, even over the next 12 months, seems to be in excess of what is likely to be required. Indeed, the reduction of support for the Claimant appears to be advocated generally as a means to develop his independence. To give virtually the full cost of 24 hour care for 12 months appears excessive.

59 Doing the best I can, I take the current care regime and assume that it gradually reduces over the next year so that, by one year hence, the Claimant is having no night care and one half of the day support that he now has. The value of that claim can be estimated using Ms Lodge's figures as follows:

a. The annual cost of day care as claimed is (£2,056 + £918.40) x 52 + £1,028 + £1233.60 = £156,930.40. The gradual reduction of that so that only 50% of such care is required in a year's time is 75% of that figure, £117,698.
b. The annual cost of night care is (£760 + £304) x 52 + £380 + £456 = £56,134. The gradual reduction of this so that none of this care is required in a year's time is 50% of that figure, £28,067.

60 Thus, in my judgment, the care claim over the next year can be valued at about £145,746. To this should be added other expenses over the next year, reflecting either my assessment of these losses as past losses above or the Defendant's concession that these are reasonable figure to take for the purpose of this exercise.

Loss of Earnings	£15,000
Accomodation costs (rent)	£7,200
Deputyship costs	£15,000
Brain Injury Case Management	£42,008
Neuropsychology	£53,266
Speech and Language Therapy	£19,280
Occupational Therapy	£21,426
Physiotherapy	£7,547
Dietician	£7,227
Translation costs	£53,756.00
Support/care costs	£145,746
TOTAL	£387,456

[10] See for example the passage headed "Behaviour and Emotions" in the case management plan of 27 May 2022.

61 The value of these losses after the liability discount is £309,965. However, these losses are necessarily less certain than past losses. I cannot have the same confidence as to their likely recovery as I do in respect of the losses already incurred. Apart from the dispute as to the proper care regime, there has been no examination at this stage of the detail of the proposed therapeutic costs and caution is therefore necessary.

62 In my judgment, the appropriate discount to apply to them to come to what is a reasonable proportion is one third. I accordingly I allow two thirds of this figure, that is £206,643.

63 It follows from my analysis that the sum of £591,688 (£385,045 under paragraph 56 above and £206,643 under paragraph 62) represents the maximum that is now available by way of total interim payment under CPR 25.7. Since payments of £422,000 have already been made, the Claimant can reasonably argue for a further figure of £169,688, say for the sake of simplicity £170,000.

64 The manner in which an interim payment is used is not a primary consideration for the court in determining whether such a payment is made. Therefore I am minded to make an order in this amount. I am fortified in the view that such an order is appropriate by the following:

a. It is highly likely that the Claimant will recover for loss of earnings or at the very least lost of earning capacity beyond the period of one year into the future, the ultimate level of damages will probably be higher than the gross equivalent of the total of interim payments including the award of a further £170,000, that is to say £746,000[11]. Thus it is unlikely that the Claimant will be over compensated.

b. Whilst an excessive award by way of interim payment can restrict the trial judge's power to make a periodical payments order, the reality is that, unless the Claimant has a significant claim for future therapies, care, case management and/or deputy costs, a periodical payments order would be unlikely in a case involving only 80% recovery.

c. Since the interim payment that I am able to make is not based on the assumption of around the clock support for the next year and, on the available figures, would clearly not finance that as well as the appropriate therapies and other costs, there is only a small risk of the Defendant's fear coming to pass that he may be subject to an inappropriate regime that actually increases his dependency and therefore his compensation claim such as to tilt the playing field unduly against the Defendant.

d. The Claimant would be put in a very difficult if no further interim payment were awarded at this stage since the case manager's plan for future care and therapies would have to be abandoned. It is not clear what would be put in its place. If a trial judge were faced with a choice between capitalising future losses to provide current rehabilitation (which on the Defendant's case should, if properly targeted, reduce the value of the claim), it is probable that the Judge would capitalise the losses so as to provide for the

[11] £592,000 is 80% of £740,000. My valuation of the claim at paragraphs 54 and 60 above, with the liability discount is £922,241, of which 80% is £737,793. Thus, the total interim payments in fact only just exceed my current valuation of the claim on the limited information before me if the element of caution required to determine what is an appropriate interim payment is not brought into play.

Claimant's current needs. Thus, if I am wrong in my calculation of the stage 1 Eeles valuation in this case, this award is arguably justified under Stage 2 of the Eeles approach.

Conclusion

65 In conclusion, I am satisfied that the maximum further interim payment that can properly be made on the material before the court is £170,000. In the circumstances, I consider it appropriate to make an order in that sum. The relevant sum due to the Compensation Recovery Unit will need to be deducted from that sun before payment of the net amount.

66 It goes without saying that the valuation that I have attempted for the purpose of this application is based on the material currently available and is necessarily based on less than complete evidence and a number of assumptions. It is not intended to bind the court on any future occasion, even in so far as it relates to losses that the Claimant contends he has already suffered.

67 I acknowledge that the Claimant may have a good argument for a further interim payment. Whilst the application has supposed that it covers his reasonable needs over the next 12 months valued on a cautious basis, he may in fact be able to produce evidence that the assumptions that I have made are unduly cautious and that a further interim payment is needed sooner than this. However, given the dispute as to the appropriate level of support for his future needs, I would expect such an application to be supported by the opinion of independent experts.