



Neutral Citation Number: 2006 EWHC820(QB)

Case No: HQ03X00575

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 12th April 2006

Before :

THE HONOURABLE MR JUSTICE FORBES

BETWEEN :

YM

**(A child and patient by her Mother and Litigation
Friend EH)**

Claimant

- and -

**(1) Gloucestershire Hospitals NHS Foundation
Trust**

(2) Secretary of State for Health

Defendants

AND BETWEEN :

Case No: HQ02X03809

Joseph Samuel Kanu

(A Patient suing by his Father and Litigation Friend, Samuel Kanu)

Claimant

-and-

(1) King's College Hospital Trust

(2) Secretary of State for Health

Defendants

In Case No. HQ03X00575:

Adrian Whitfield QC and Robin Oppenheim (instructed by Davies and Partners) for the
Claimant

Michael de Navarro QC (instructed by Bevan Brittan) for the First Defendant

Elisabeth Laing (instructed by the Departmental Solicitor) for the Second Defendant

In Case No. HQ02X03809:

Susan Rodway QC and Timothy Petts (instructed by Anthony Gold) for the Claimant

Paul Rees QC (instructed by Kennedys) for the First Defendant

Elisabeth Laing (instructed by the Departmental Solicitor) for the Second Defendant

Hearing date: 30th January 2006

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

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Mr Justice Forbes :

1. **Introduction.** On 30th January 2006 I made appropriate Orders in accordance with the terms agreed by the parties in settlement of these two separate clinical negligence claims. At this stage of my judgment, it is not necessary to go into the precise terms of the orders in question except to observe that each order included provision for appropriate periodical payments to be made to the claimant in respect of future pecuniary loss and that each such order required my approval pursuant to the provisions of CPR Part 21.10.
2. Under section 2(1)(a) of the Damages Act 1996 (as amended) the court has power to award damages for future pecuniary loss in respect of personal injury wholly or partly in the form of periodical payments. However, before making any such order, the court must be satisfied that the continuity of the periodical payments is reasonably secure: see section 2(3) of the Damages Act 1996, which provides as follows:

“A court may not make an order for periodical payments unless satisfied that continuity of payment under the order is reasonably secure.”
3. Both cases had been previously listed for hearing on 21st October 2005. Again the purpose of those hearings had been to approve the settlements agreed by the parties and to make the necessary orders. However, it had not been possible to conclude either case on that occasion, because an issue had arisen as to whether I could be satisfied that continuity of payment under each of the proposed orders was “*reasonably secure*”, as required by section 2(3) of the 1996 Act, given that one of the concerned NHS bodies was a NHS Foundation trust and that the other, although currently a NHS trust, had applied for NHS Foundation trust status (although the application is currently deferred and the issue therefore somewhat theoretical).
4. **The problem and how the issue was resolved.** Both the concerned NHS bodies in these proceedings are members of the Clinical Negligence Scheme for Trusts (“the CNST”), a scheme covering liability for alleged clinical negligence occurring on or after 1st April 1995 and administered by the National Health Service Litigation Authority (“the NHSLA”: as to which, see below). However, membership of the CNST is voluntary and (as I understand it) can be terminated by giving 12 months’ notice.
5. The problem that gave rise to the issue in question results from the difference in the relevant statutory provisions relating to NHS Foundation trusts as opposed to those applicable to NHS trusts in the event of the NHS body in question ceasing to exist or (for example) becoming insolvent. It is important to note that the NHSLA was not joined as Defendant to either claim. In the ordinary way, therefore, were it not for the agreements and arrangements that have been made in these proceedings and the resulting form of order, to both of which matters I shall refer in greater detail later in this judgment, neither claimant would have had any right of recourse directly against the NHSLA for enforcement of the terms of the order. But for the arrangements that have been reached and implemented in these proceedings, each claimant would only have been entitled to enforce the terms of the order against the particular NHS body named as the first defendant in the case in question.

6. No problem arises where the NHS body in question is and remains an NHS trust. Where a NHS trust ceases to exist, the position with regard to its liabilities is dealt with by section 1(1) of the National Health Service Residual Liabilities Act 1996 (“the NHSRL Act 1996”), which provides as follows:

“1. (1) If a National Health trust, a Health Authority or a Special Health Authority ceases to exist, the Secretary of State must exercise his statutory powers to transfer property, rights and liabilities of the body so as to secure that all of its liabilities are dealt with.”

7. However, the provisions of the NHSRL Act 1996 do not apply to an NHS Foundation trust. In the case of an NHS Foundation trust, the applicable statute is the Health and Social Care (Community Health and Standards) Act 2003 (“the HSC(CHS) Act 2003”). By virtue of Part 1 that Act, the NHS Foundation trust was created as a public benefit corporation authorised to provide goods and services for the purposes of the health service in England. When an NHS trust becomes an NHS Foundation trust, it is no longer (by definition) subject to the terms of the NHSRL Act 1996, but it retains the property and liabilities of the former NHS trust: see section 7 of the HSC(CHS) Act 2003.
8. The NHS Foundation trust enjoys a significant amount of financial, managerial and operational freedom. Whilst it remains part of the NHS, a Foundation trust is not subject to the direction of the Secretary of State and will be regulated under a separate regime policed by a new regulatory authority (the Independent Regulator of NHS Foundation Trusts, known as “Monitor”).
9. Sections 23 to 26 of the 2003 Act make provision for a failing NHS Foundation trust. Thus, if an NHS Foundation trust gets into financial trouble, Monitor can require its directors to obtain a moratorium or propose a voluntary arrangement: see section 24(1) of the HSC(CHS) Act 2003. In such circumstances, neither the NHSRL Act nor the Secretary of State can intervene. In the circumstances provided for in section 25 of the HSC(CHS) Act 2003, the Secretary of State can make various orders, including one providing for the dissolution of the Foundation trust and, in theory, the Secretary of State can do so without transferring its liabilities to claimants so as to secure that they are properly dealt with.
10. However, the critical difference between the two statutory regimes (“the critical difference”) is that, whereas section 1(1) of the NHSRL Act 1996 is mandatory and imposes a duty on the Secretary of State to transfer the liabilities of a failed NHS trust so as to secure that all its liabilities are dealt with, sections 25(3) and 26(1) of the HSC(CHS) Act 2003 do not impose such a duty. Instead, these statutory provisions under the 2003 Act give the Secretary of State a discretion to order the transfer of the liabilities of a failing NHS Foundation trust (e.g. because it has become insolvent), as follows:

“25. (3) An order may transfer, or provide for the transfer of, any property or liabilities of the trust to –

(a) another NHS foundation trust,

(b) a Primary Care Trust,

(c) an NHS trust,

(d) the Secretary of State.

...

26. (1) *In sections 24 and 25, an order means an order made by the Secretary of State.*"

11. In the ordinary way and absent the agreements and arrangements that have now been made in these proceedings, when considering whether the court is satisfied that continuity of payment under an order for periodical payments in a case involving an NHS Foundation trust is reasonably secure, an important question would be whether it could be assumed that the Secretary of State would exercise her discretion under section 25(3) of the HSC(CHS) Act 2003 so as to order an appropriate transfer of the Foundation trust's liabilities in the event that the Foundation trust in question became insolvent or was dissolved. If yes, the critical difference between the statutory regimes would be of no significance; if no, the critical difference would be a significant factor in the court's consideration of the matter.
12. At the hearing on 21st October 2005, it therefore quickly became apparent that the issue was not without difficulty and I came to the conclusion that it was necessary for its proper determination to join the Secretary of State as a party to the proceedings pursuant to CPR 19.2. As I pointed out in the short judgment that I gave on 21st October,

"12. ... The issue that has arisen between the parties is whether, in relation to a Foundation trust I can be satisfied that continuity of periodical payments is reasonably secure, as I am obliged to be satisfied pursuant to section 2(3) of the Damages Act. The parties do not agree as to whether I can be so satisfied. The representatives of both claimants point out that the final long-stop protection for the claimant (if I can describe it as that) will be the exercise of the Secretary of State's discretion under section 25(3), whereas in the case of an ordinary (NHS) trust the Secretary of State is under a positive obligation. On the other hand, both defendants argue that it is important to bear in mind that my obligation is to be satisfied that such payments are reasonably secure. It is not absolute security that has to be demonstrated.

13. There is, in my view, no doubt that there is a serious issue between the parties with regard to whether I can be so satisfied in this case. ...

...

15. ... Also, as it seems to me, it is clear that since the exercise of the Minister's discretion under section 25(3) of the (2003) Act is a very important consideration in resolving the issue, the issue does involve the Minister and it is an issue which is connected to the matters in dispute. I am quite satisfied that, in those circumstances, it is appropriate to add the Minister to these proceedings for the purpose of resolving this particular issue ...

16. As it seemed to me, ... paragraph 31 of Ms Rodway QC's skeleton argument for the purpose of today's hearing highlights the problem:

"The court has no evidence from or assurance given on behalf of the Secretary of State as to how discretion under this power (section 25(3)) would be exercised in relation to someone in ... (her client's position)."

13. In the event, on the 30th January 2006, having regard to the fresh material and evidence that was provided by the parties for the purposes of the hearing, giving details of the agreements and arrangements that had been made in these proceedings in order to deal with the issue, I decided that I was satisfied that continuity of the periodical payments was reasonably secure in each case and, having approved the terms of the settlement, I made the orders in question. This judgment sets out my reasons for having reached the conclusion on 30th January that I was satisfied that continuity of the periodical payments was reasonably secure.
14. As I have already indicated (see paragraph 2 above), section 2(3) of the Damages Act 1996 prohibits the court from making an order for periodical payments by way of an award of damages for future pecuniary loss in respect of personal injury "*unless satisfied that continuity of payment under the order is reasonably secure*".
15. Section 2(4)(c) of the Damages Act 1996 provides that there is deemed to be reasonable security if the **source** of the payment is a government or health service body and subsections (2) and (3) of Section 2A define what is meant by that expression, as follows:

"2(4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if—

...

(c) the source of payment is a government or health service body.

...

2A (2) For the purposes of section 2(4)(c) ... "government or health service body" means a body designated as a government body or health service body by order made by the Lord Chancellor.

(3) An order under subsection (2) -

(a) shall be made by statutory instrument, and

(b) ..."

16. The current regulations made by the Lord Chancellor pursuant to his powers under section 2A(2) of the Damages Act 1996 are the Damages (Government and Health Service Bodies) Order 2005 S.I. No. 474 ("the 2005 Regulations). Part 1 of the Schedule to the 2005 Regulations lists the various government departments and other bodies that constitute designated government bodies for the purposes of section 2(4)(c) of the Damages Act 1996. The Department of Health is included in that list. Part 2 of the Schedule to the 2005 Regulations lists the NHSLA as the designated

health service body for the same purposes for England (Part 2 of the Schedule also lists, inter alia, NHS trusts and Local Health Boards as designated health service bodies for Wales).

17. Accordingly, if the NHSLA is the effective source of the payments, as opposed to being an administrative conduit by which payments are made, the continuity of payments is deemed to be reasonably secure by virtue of section 2(4)(c) of the Damages Act 1996. Furthermore, in such circumstances, a claimant would have the further security provided by the terms of section 1(1) of the NHSRL Act 1996 (see above) if the NHSLA ceased to exist, because the NHSLA is a Special Health Authority within the meaning of section 1(1). This would be so, whether the NHS body in question was an NHS trust or an NHS Foundation trust.
18. However, as stated in paragraph 6.10 of the written explanatory note agreed and provided by the parties for the purposes of the hearing on 30th January 2006, the essential difficulty that had arisen in these proceedings (“the essential difficulty”) was that the NHSLA was unwilling to be named as the effective source of periodical payments in the body of the order in either claim, with resulting direct rights of enforcement against the NHSLA, for the reasons set out in paragraph 18 of the witness statement of its Chief Executive and Accounting Officer, Mr Stephen Walker (“Mr Walker”: as to paragraph 18 of his witness statement, see below). This essential difficulty had, in turn, focussed attention on the problem resulting from the critical difference between the relevant statutory regimes (see above). However, by the time of the hearing on 30th January 2006, arrangements had been made, agreed and implemented (as to which, see below) that resolved the essential difficulty and enabled the matter to proceed to a satisfactory conclusion.
19. In his witness statement dated 20th January 2006, Mr Walker explained the role of the NHSLA and its relationship to the CNST, as well as referring to the Existing Liabilities Scheme (“the ELS”) and other schemes for dealing with certain National Health Service liabilities. As I have already indicated, the relevant scheme for the purpose of the two present cases is the CNST, although it is possible that the issue raised in these proceedings could also arise in relation to a claim brought against a defendant NHS body who is a member of the ELS. So far as concerns the NHSLA, the CNST and the ELS, Mr Walker stated as follows:

“The NHSLA

3. The Authority is a Special Health Authority set up under section 11 of the NHS Act of 1977. It came into being on the 21st November 1995, by virtue of the NHS Litigation Authority (Establishment and Constitution) Order 1995. The principal task of the Authority is to administer schemes set up under Section 21 of the National Health and Community Care Act 1990.

4. Currently there are five schemes. First a scheme covering the liabilities for alleged clinical negligence where the original incident occurred on or after 1st April 1995 (the “Clinical Negligence Scheme for Trusts” or CNST). Second, a scheme covering liabilities for clinical negligence incidents which occurred before the 1st April 1995 (The “Existing Liabilities Scheme” or ELS). Third, a scheme covering the outstanding liabilities for clinical negligence in respect of the former Regional Health Authorities. Fourth, a scheme relating to any

liability to a third party where the original incident occurred on or after 1st April 1999 (the Liability to Third Parties Scheme or LTPS). Fifth, a scheme relating to any expenses incurred from any loss or damage to property where the original loss occurred on or after the 1st April 1999 (the Property Expenses Scheme or PES).

5. As far as the two instant cases are concerned, it is the CNST which is involved. ... Membership of the CNST is voluntary (although all NHS bodies in England who could apply for membership have done so) and all NHS bodies in England, including NHS Foundation Trusts, whether members of CNST or not, may apply for financial support under the ELS.

6. The need for the Authority to manage and handle clinical negligence claims on behalf of NHS bodies in England arose as a result of the financial independence given to Trusts by the 1990 Act. Without access to a risk sharing scheme individual Trusts would be obliged to meet liabilities out of annual running costs, with the inevitable result that one or more large settlements could jeopardise local patient services. Additionally, the presence of such an Authority would allow for a central collection of data providing an overview of liabilities to the NHS together with the opportunity to plan for ways of improving the management of risk so as to allow lessons from adverse events to result in a better service to patients.

7. Organising matters in the above fashion has given the Department of Health an element of global control. All claims falling under the remit of the schemes are managed by a team of claim handlers and a panel of appointed solicitors. ...

The ELS

8. This scheme is funded centrally by the Department of Health. The effect of the ability for any NHS body to request support is that every body does so and all payments are made by the Department, although the scheme and the payments under the scheme are managed by the Authority.

9. Establishment of the ELS by the Secretary of State was by the National Health Service (Existing Liabilities Scheme) Regulations 1996. Whilst, theoretically, the concerns identified for NHS Foundation trusts under the CNST apply (since the NHS Defendant is the party liable under any order), the practical mechanics mean that any annual payment order is met by the use of an annual budgeted sum made available to the Authority by the Department of Health to cover the anticipated liabilities for that year of the ELS. This arrangement has been in operation for the 10 years during which the Authority had managed the scheme and has functioned without difficulty and there is no reason to suppose that this will alter. ...

The CNST

10. This scheme was set up by means of the National Health Service (Clinical Negligence Scheme) Regulations 1996. The scheme is a voluntary one and is operated as a “pay as you go” scheme. Currently all NHS Trusts and PCTs (and all those which have become NHS Foundation Trusts) in England are members.

The Authority with the assistance of its actuaries calculates the required funds necessary to meet the calls under the scheme in the forthcoming year and levels contributions from each of the scheme members, raising sufficient to discharge the anticipated liabilities. This means that reserves are not carried forward from year to year as would be the case with an insurer.

11. The annual level of contribution is determined and weighted by a number of factors, including the number of clinical staff, the size of each medical team and the risk rating of the member within the CNST risk management system. If a member were to leave the scheme it would take with it any continuing annual payment obligations.”

20. In paragraphs 12 to 14 of his witness statement, Mr Walker gave a short history of periodical payments in claims involving the NHS and pointed out that the NHSLA has always encouraged and supported the resolution of cases through *‘self funded annual/periodic payments.’* As Mr Walker observed, the benefit to the Department of Health and the NHS of such arrangements is *‘the cash flow value of retaining the lump sum and replacing it with an annual stream of payments into the future.’* It is also the NHSLA’s view that this method can offer the most sensible and positive way of resolving claims from the perspective of the injured individual for the term of his or her life.
21. Before turning to deal with the position relating to NHS Foundation trusts, Mr Walker suggested that, certainly so far as concerns NHS trusts, assurance as to the continuity of the annual/periodical payments is provided by the NHSRL Act 1996, because it imposes an absolute obligation on the Secretary of State to exercise his powers to transfer any residual liabilities of a relevant NHS body in England and Wales if it ceases to exist (the relevant NHS bodies being a NHS trust, a Health Authority or a Special Health Authority: see section 1(1) of the Act, quoted above).
22. In paragraph 15 of his witness statement, Mr Walker dealt with the position of the NHS Foundation trust. He effectively acknowledged the existence of the problem that had been identified at the earlier hearing by accepting that the operation of sections 7 and 25 of the HSC(CHS) Act 2003 could mean that, if an NHS Foundation trust were to fail or be dissolved *‘then as regards that body because there was no absolute duty, there was the theoretical possibility that the then Secretary of State might not arrange for residual liabilities to be transferred or otherwise met.’*
23. However, in paragraph 16 of his witness statement, Mr Walker very properly acknowledged that, from the perspective of the court and of claimants, the problem was not merely theoretical, as follows:

“16. As stated by both Defendants on 21st October 2005 it was then and remains now the view of the Authority that it would be inconceivable that any Secretary of State would do anything other than make arrangements to meet annual payments agreed and/or approved to made to patients injured by the NHS. However, in conjunction with the Department of Health, the Authority has recognised that from the perspective of the Court and importantly Claimants the lacuna could be perceived as a disincentive to conclude annual payments on a self funded basis in NHS claims. If that state of affairs were to remain unresolved that would result

in an outcome which was directly contrary to the aims of the Authority and to the best interests of Claimants.”

24. In paragraphs 17 to 22, under the heading “*The Way Forward*” Mr Walker described the steps have been taken and the arrangements that have been made and agreed to overcome the essential difficulty and to deal satisfactorily with the perceived lacuna in the relevant legislation (“the perceived lacuna”). In paragraphs 17 and 18, he said this;

“17. Since the adjournment of both of the above named claims, the Authority has been liaising with the Department of Health as to the most efficient way in which to provide both to the Court and to Claimants an arrangement which meets all concerns as to the reasonable security of the continuity of periodical payments. The agreements made and to be made as between the Authority, the Department of Health and the NHS bodies are such that the Authority has been able to agree within the body of an order as being responsible for making the payment, such that the Claimant has within the order itself a right of recourse as against a Special Health Authority (the NHSLA) which benefits from the security of the 1996 Residual Liabilities Act. Further, as the source of the payment as named and defined in the order will be a health service body designated within the terms of the Designation Order (see paragraph 18 below), the payment is defined by statute as reasonably secure.

18. Prior to these arrangements being put in place, the Authority had taken the position (and did so by both Defendants of 21st October 2005) that the source of payment identified by reference to the Damages (Government and Health Service Bodies) Order 2005 as being the Authority did not render the Authority responsible or liable to make the payments and the obligation to do so and the entity against which the Claimant had a right of recourse under the order was the Defendant. Because of the “pay as you go” funding of the CNST arrangements, that stance was the only stance open as the Authority had no guaranteed way of obtaining funds to secure the payment if a Foundation Trust failed. Additionally, the Authority was acting in pursuance of its obligations to all of the members of the CNST. However, providing that the conditions described below are met the Authority is in a position to revise its approach and enable it to become responsible for continuing payments and to have that reflected within the order.”

25. In paragraphs 19 to 21 of his witness statement, Mr Walker gave details of the conditions that the NHSLA require to be met (and which have now been met in both the present cases) that will enable and in the present cases have enabled the NHSLA: (i) to agree to be named as the source of the periodical payments; (ii) to be made legally responsible for such payments to the claimants and (iii) to provide practical security to those claimants, thus resolving the essential difficulty and dealing satisfactorily with the perceived lacuna.
26. The arrangements that have been agreed and implemented to achieve that objective can be summarised as follows:
- An agreement entered into by the defendant trust in each case with the NHSLA, whereby the NHSLA agrees to take on the liability to make periodical payments to the claimant, with the defendant trust confirming that

in the event of its departure from the CNST it will pay a lump sum to the NHSLA for all continuing future liabilities subject to periodical payment orders made under CNST cases. This will ensure that the NHSLA is in funds to meet the continuing periodical payments on departure of a defendant trust from the CNST. It is intended that all members of the CNST will enter into an agreement with the NHSLA. If a CNST member refuses to sign the agreement the NHSLA will not agree to be named in the order and will not be responsible for a defendant trust's periodical payments (see paragraphs 19 to 20 of Mr Walker's witness statement);

- An agreement by the Secretary of State to put the NHSLA in funds to meet the periodical payments in the event of insolvency of an NHS Foundation trust (see page 80 of the Court bundle for the agreement in question, quoted in paragraph 34 below); this enables the NHSLA to take on the liabilities of an NHS Foundation trust to make periodical payments and to agree to be both the source of payment and responsible for payment within the body of the order; and
- A collateral contract between the defendant trust, the NHSLA and the claimant embodied in a recital to the order that enables the claimant to enforce the NHSLA's responsibility to make such periodical payments to or for the benefit of the claimant under the order: see the Model Form of Order appended to this judgment.

27. Appropriate recitals are provided in each order to give practical effect to these arrangements (see the appended Model Form of Order) . They are as follows:

- The NHSLA shall be responsible for and make the payments set out in the relevant schedule to the order ("the periodical payments") to or for the benefit of the Claimant;
- The NHSLA has entered into an agreement with the Defendant which permits the NHSLA to be responsible for and make the periodical payments under the order;
- The NHSLA is a special health authority within the meaning of the National Health Service (Residual Liabilities) Act 1996;
- The Defendant and the NHSLA agree with the Claimant that in the event of any failure to make the periodical payments or any alteration in the method or change in the identity of the source of the payment the same shall give rise to a direct right of the Claimant to enforce the order and all rights arising under it against the NHSLA in consideration of the Claimant agreeing to the terms of the order.

28. As Mr Walker observed in paragraph 22 of his witness statement:

"22. As a result of these constructive arrangements, it is possible for the Authority to agree to a form of order in periodical payment cases (and so as to avoid any disparity to do so for both ELS and CNST cases), whereby it is named in the order as responsible for discharging the ongoing annual payments. In this

way the Claimant has directly within the terms of the order a right of recourse as against an entity which benefits from the Residual Liabilities Act and as a health service body for the purposes of section 2(4)(c) of the Damages Act. ...”

29. Of course, the arrangements that have provided a satisfactory resolution of the issue in these proceedings could not have been agreed and implemented without the active involvement and agreement of the Secretary of State. Details of the Secretary of State’s helpful and constructive approach to the issue are contained in the evidence of Ms Flora Goldhill (“Ms Goldhill”), who is the Deputy Director of the Chief Nursing Officer’s Directorate in the Department of Health. In paragraph 3 of her witness statement dated 6th January 2006, Ms Goldhill confirmed that she had been authorised to make her statement by the Secretary of State. She also confirmed that the Secretary of State had been told of the issues in these proceedings and that she had agreed that all steps possible within the current legislative framework should be taken to ensure protection of a periodical payments order to protect the claimants in the current and any similar future cases.

30. In paragraphs 4 to 6 of her witness statement, Ms Goldhill confirmed her understanding of the issue that had arisen in these proceedings and the reason for the Secretary of State being joined as a Second Defendant, as follows:

“4. ... The Judge added the Secretary of State as a second Defendant in the proceedings after an issue arose between the claimant and the first defendant as to whether the continuity of the periodical payments proposed to be made by the defendant, which has applied to become a Foundation Trust (“FT”), would be reasonably secure.

5. The purpose of this statement is to explain to both the court and the parties the steps that are being taken by the Secretary of State to ensure that the continuity of any such payments will be reasonably secure.

6. I understand that the court is concerned that the NHS Residual Liabilities Act 1996 (“the NHSRLA”) does not apply to an FT in the event of that body’s insolvency. It is nonetheless the Secretary of State’s policy to do all that she lawfully can to ensure that claimants who are awarded damages in clinical negligence cases against FTs are in no worse a position than successful claimants against any other health service bodies. It is also important to the Secretary of State that FTs remain covered by, and members of, the Clinical Negligence Scheme for Trusts (described below) which is the most cost-effective way of providing clinical negligence insurance cover in the National Health Service.”

31. In paragraphs 7 to 10 of her witness statement, Ms Goldhill summarised the Secretary of State’s position in the following terms:

“7. In summary, the Secretary of State’s view is that provided in any given case the National Health Litigation Authority (“NHSLA”) remains the source of payments under a periodical payments order, the continuity of the payments is presumed to be reasonably secure in accordance with section 2(4)(c) of the Damages Act 1996 (“the 1996 Act”).

8. *The NHSLA is a health service body designated by an order made by the Lord Chancellor under section 2A of the 1996 Act. ... The regulations underpinning the Clinical Negligence Scheme for Trusts (CNST) (see further paragraph 11 below) expressly contemplate the possibility of the NHSLA remaining liable for payments in the event that a member departs from the scheme.*

9. *It is therefore possible for the defendant Trust and the NHSLA to make a binding agreement under the regulations that the NHSLA will remain the source of payment in the event that either defendant Trust leaves the scheme or becomes insolvent. It is anticipated that such an agreement will be reached in this case.”*

32. In paragraphs 11 to 18 of her witness statement, Ms Goldhill gave an account of the CNST from which it is appropriate to quote the following passages:

“14. The CNST is analogous to a mutual insurance fund and handles all clinical negligence claims against member NHS bodies where the incident in question took place on or after 1 April 1995 (or when the body joined the scheme, if that is later). Although membership of the scheme is voluntary, all NHS Bodies which provide services to patients in England currently belong to the scheme.

...

16. When a claim is made against a member of CNST, the NHS body remains the legal defendant. However, the NHSLA takes over full responsibility for handling the claim and meeting the associated costs in like manner to an insurer.

33. In paragraph 19 of her witness statement, Ms Goldhill explained the purpose of the agreement that had been reached between the Secretary of State and the NHSLA in December 2005, which is recorded in her letter dated 20th December (as to which, see paragraph 34 below), as follows:

“19. The aim of this agreement is to ensure, and it does ensure, that the defendant’s liability to make periodical payments under any order for periodical payments made by the court in this case will, irrespective of any future change in the defendant’s status, and of any future insolvency of the defendant, continue, as a matter of law, to fall to be met by the NHSLA. This means that reasonable security of those payments is presumed by statute. The NHSLA is a body designated as a “health service body”, for the purposes of section 2(4)(c) of the 1996 Act ... as I have already mentioned.”

34. On 20th December 2005, on behalf of the Secretary of State Ms Goldhill had written to Mr Walker on behalf of the NHSLA, with regard to the agreement to which she referred in paragraph 19 of her witness statement, in the following terms:

“Foundation Trusts and Periodical Payments

I am writing to advise you of the decision reached by Department of Health Ministers to enable the NHSLA to become the source of periodical payments on behalf of CNST members, where an appropriate agreement has been reached between the NHSLA and a member trust.

The Secretary of State for Health was asked to agree that (a) the NHSLA should be the source of payments for periodical payments orders, where an appropriate agreement has been reached with a member trust, and that (b) in the event of insolvency of a Foundation Trust, such that it would not be able to put the NHSLA in the necessary funds to meet those payments, the Secretary of State would do so. On 16 December 2005, the Secretary of State for Health confirmed her agreement. The Minister for State for NHS Delivery, Minister of State for Quality and Patient Safety and Monitor (the Independent Regulator of Foundation Trusts) are all content. In addition, Central Finance at the Department of Health has given their approval.

I trust this letter is sufficient to provide you with the necessary assurances to proceed with entering into agreements with scheme members.”

35. In addition, in paragraph 20 of her witness statement, Ms Goldhill referred to the fact that the NHSLA is a Special Health Authority and that it is financed each year to carry out its functions in accordance with the statutory regime governing the financing of the National Health Service. Ms Goldhill pointed out that, by virtue of section 97 of the National Health Service Act 1977, the Secretary of State is under a statutory duty to finance a Special Health Authority to enable it to carry out its functions. As Ms Goldhill then observed: *“The Secretary of State must therefore enable the NHSLA to fulfil its duties under the CNST which will include its responsibility to meet this periodical payment order to the defendant trust.”*
36. **Conclusion** In my judgment, the various arrangements and agreements that have been made and implemented between the NHSLA and the parties and between the NHSLA and the Secretary of State, as described above (“the arrangements”), do overcome the essential difficulty and deal satisfactorily with the perceived lacuna, because they ensure that the NHSLA is the effective source of the periodical payments made under each of the orders in these proceedings and that, if necessary, each order can be directly enforced against the NHSLA. I am therefore satisfied that the continuity of the payments is reasonably secure by virtue of the terms of section 2(4)(c) of the Damages Act 1996 (see above). Furthermore, the claimants will have the additional security that results from the NHSLA being a Special Health Authority within the meaning of section 1(1) of the NHSRL Act 1996 (see paragraph 17 above).
37. Obviously, the arrangements that have resulted in the satisfactory conclusion to the issue in these two cases are capable of appropriate application in other similar cases, as Mr Walker plainly anticipates in paragraph 22 of his witness statement (see above) and as indicated in paragraph 23, where he said this:

“I firmly believe that this arrangement can allow the Court and the Claimants and families to have every confidence in the continuity of the annual payments. The Authority remains committed to being able in appropriate cases to offer this form of resolution and for all concerned in the process to be reassured as to the integrity and security of self funded annual payments made by the NHS.”

I therefore attach as an Appendix to this judgment, a model form of order that incorporates the necessary recitals and terms required by the arrangements implemented in these proceedings for adaptation and use in similar cases and for possible consideration by the Civil Justice Council.

38. It remains only for me to congratulate the parties, their legal advisers, the NHSLA and the Secretary of State for having achieved such a satisfactory resolution to the issue in these proceedings. I would also like to stress that it is very apparent from all the evidence that I have considered (in particular, that of Ms Goldhill and Mr Walker), that the approach adopted by the NHSLA and the Secretary of State in this matter has been sympathetic, helpful and constructive throughout and deserving of a great deal of the credit for the successful outcome.

Appendix – Model Form of Order

IN THE HIGH COURT OF JUSTICE
QUEEN’S BENCH DIVISION

CLAIM NO

BEFORE THE HONOURABLE

BETWEEN

A

(A Patient/Minor suing by his/her [] and Litigation Friend, [])

Claimant

And

B NHS TRUST

Defendant

DRAFT ORDER

BEFORE The Honourable [] sitting in the High Court of Justice, [] on [] 2006.

UPON HEARING [] one of Her Majesty’s Counsel and [] one of Her Majesty’s Counsel, on behalf of the Defendant.

WHEREAS the Claimant has made a claim (the “Claim”) against the Defendant for personal injuries suffered by him/her arising out of the Defendant’s negligence on or about [] and in respect of which proceedings were commenced by the Claimant against the Defendant in the High Court of Justice on [].

AND WHEREAS the Claimant is a Patient/Minor and brings the Claim by his/her [] and Litigation Friend, []

AND WHEREAS the National Health Service Litigation Authority (“NHSLA”) shall be responsible for and make the payments set out in paragraph () of this Order to and for the benefit of the Claimant (referred to below as “periodical payments”).

AND WHEREAS the NHSLA has entered into an agreement with the Defendant which permits the NHSLA to be responsible for and make the periodical payments under this Order.

AND WHEREAS the NHSLA is a Special Health Authority within the meaning of the National Health Service (Residual Liabilities) Act 1996.

AND WHEREAS the Defendant and the NHSLA agree with the Claimant that in the event of any failure to make the periodical payments or any alteration in the method or change in the identity of the source of payment the same shall give rise to a direct right of the Claimant to enforce this Order and all rights arising under it against the NHSLA in consideration of the Claimant agreeing to the terms of this Order.

AND UPON READING the Advice from Counsel for the Claimant dated [] and the financial report of [] dated [].

AND the Court of Protection having approved the terms of the compromise of the claim in this order;

AND UPON the Claimant and the Defendant having agreed in full and final settlement of the Claim the terms set forth herein.

AND UPON the Court being satisfied that:

- (a) The continuity of payment under the Order is reasonably secure pursuant to section 2(3) of the Damages Act 1996 (as amended) and/or pursuant to section 2(4)(c) of the Damages Act 1996 (as amended) and under the terms of the Order as herein set out;
- (b) The periodical payments are to be paid free of taxation under section 731 -734 of the Income Tax (Trading and Other Income) Act 2005;
- (c) That the Order set out below is agreed by the Claimant and the Defendant as being the preferred Order that should apply.

AND UPON the Claimant having agreed to accept the sum of £ [] (pounds) inclusive of recoverable benefits [of which the sum of () has already been received by way of interim payments] plus the periodical payments referred to in the attached Schedule.

AND UPON the Claimant having given the following undertakings to the Court

1. A Receiver has been appointed for the Claimant.
2. The Claimant whether acting by his/her Litigation Friend or his Receiver will take all necessary steps to seek to stay the claim and any proceedings which

have begun or have been threatened against the Defendant in connection with the Claim.

3. The Claimant, his/her Litigation Friend and/or his/her Receiver will not institute any proceedings against the Defendant or any other party or person whomsoever in connection with the Claim save by way of enforcement of this Order.

AND UPON the Court having approved the terms of this Order and the Schedule annexed to this Order:

BY CONSENT

- (1) **IT IS ORDERED** that the Defendant shall make payments to or for the benefit of the Claimant as follows in full and final settlement of the claim:
 - (i) By [] the sum of £[] (pounds) shall be paid into court and subject to a first charge under Section 16(6) of the Legal Aid Act 1988 shall thereafter be transferred forthwith to the Court of Protection to the credit of the Claimant there to be dealt with as the Court of Protection in its discretion shall think fit; and
 - (ii) By [] the sum of £[] (pounds) shall be paid to the Claimant's solicitors in respect of damages held on trust for the Claimant's parents [for past gratuitous care, losses, expense and interest thereon]
- (2) **AND IT IS FURTHER ORDERED** that further sums as specified in the attached Schedule to be paid as stipulated in the Schedule and be funded in accordance with section 2(4)(c) of the Damages Act 1996 as amended, such that the NHSLA shall be responsible to the Claimant for and make such payments to the Claimant, with the sums payable to comprise damages for [future care and associated costs].
- (3) **AND IT IS FURTHER ORDERED** that the Defendant do pay the Claimant's costs of this action on the standard basis such costs to be the subject of a detailed assessment, if not agreed.
- (4) **AND IT IS FURTHER ORDERED** that there be permission to have a detailed assessment of the Claimant's costs in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989 as amended, Article 5 of the Access to Justice Act 1999 (Commencement No. 3) Order 2000, Article 4 of the Community Legal Services (Funding) Order 2000 and the Civil Legal Aid (General) (Amendment) Regulations 2000 as amended, save that in the event that the Claimant's solicitors waive any claim to any further costs beyond those referred to above, they have permission to dispense with any Legal Aid Assessment.
- (5) **AND IT IS FURTHER ORDERED** that all further proceedings in this action be stayed except for the purpose of implementing the terms of this Order and the terms set out in the attached Schedule, for which purpose there be permission to apply to the

Claimant, the Defendant and to the NHSLA, and if necessary to add the NHSLA as a party to enforce the terms of this Order.

(6) **DATED** this [] 2006

SCHEDULE TO THE ORDER

The following sums shall be paid:

1. The sums of:
 - 1.1 £ [] (pounds) recalculated in accordance with the formula in clause 8, payable on [] in each year, with the first such payment to be made on []
 - 1.2 A further sum of £[] (pounds) recalculated in accordance with the formula in clause 8, payable on [] in each year, the first such payment to be made on []
 - 1.3 A further sum of £ [] (pounds) recalculated in accordance with the formula in clause 8, payable on [] in each year, the first such payment to be made on []
 - 1.4 A further sum of £ [] (pounds) recalculated in accordance with the formula in clause 8, payable on [] in each year, the first such payment to be made on []
 - 1.5 The sums in paragraphs 1.1 to 1.4 inclusive above shall be index-linked from [] in accordance with the provisions set out below.

Each sum payable under paragraphs 1.1 to 1.4 is a “Periodical Payment” subject to the conditions set out at paragraphs 2-7 herein:

2. All the Periodical Payments will continue during the lifetime of the Claimant.
3. No minimum number of Periodical Payments shall be made.
4. Payment of any Periodical Payment will cease on the death of the Claimant.
5. The final payment will be pro-rata for so much of the final year that the Claimant had survived and any balance owing to the NHSLA or its successor will be repayable to it out of the Claimant’s estate.
6. The NHSLA shall be entitled to require the Claimant to produce evidence in a form reasonably satisfactory to the NHSLA that the Claimant remains alive before making any Periodical Payment.
7. The Periodical Payments all to be made by BACS to the Court of Protection (or its successor) for the benefit of the Claimant under reference [].

8. Each Periodical Payment shall be recalculated annually on [] in each year from [] in accordance with the following formula:

$$NF = OF \times \frac{NIF}{OIF}$$

Where:

NF = the new Periodical Payment figure being calculated.

OF = the relevant Periodical Payment figure calculated on [] in the year preceding the year in which the calculation is being carried out;

NIF = the Index applicable to [] in the year in which the calculation is being carried out, the first NIF being in respect of [];

OIF = the Index applicable to [] in the year prior to the year in which the calculation is being carried out, the first OIF being in respect of [].

Index = the United Kingdom General Index of Retail Prices for all items published by the Central Statistical Office (January 1987 = 100) or any equivalent or comparable index which in the NHSLA's reasonable opinion replaces such index from time to time.