In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: 269

EMMERSON GLENVILLE DONALD

Plaintiff

-v-

THE MINISTER OF WORKS AND ENGINEERING

1st Defendant

-and-

THE ATTORNEY-GENERAL

2nd Defendant

JUDGMENT

(ASSESSMENT OF DAMAGES)

(In Court)

Dates of hearing: January 25-29, February 3, 2016
Date of Judgment: February 19, 2016

Mr. Richard Horseman, Wakefield Quin Limited, for the Applicant

Mr John Cooper, Williams, and Ms Shakira Dill-Francois, Attorney-General's Chambers, for the Defendants

Background

1. The Appellant is a Jamaican national, now 44 years of age, who was employed as Police Constable with the Bermuda Police Service ("BPS") in 2000 as a healthy 28 year old. He worked at the Somerset Police Station, Hamilton Police Station and the Forensic Support Unit at Southside, St David's. In or about 2004 he was diagnosed with chronic renal failure. Through his lawyers' letter dated February 18, 2008, the Plaintiff requested the Commissioner of Police to investigate the environmental status of those three work sites. By a Generally Indorsed Writ issued on March 2, 2010, the Plaintiff sought damages for personal injuries caused by the Defendants' failure to maintain a safe working environment.

2. On June 16, 2011, I gave directions for a trial on liability. By a Consent Order dated December 2, 2011, the action was stayed upon the Defendants' admission of liability with liberty to the Plaintiff to apply to proceed with a trial on quantum if damages were not agreed. The Plaintiff's Summons for Directions on quantum was issued on December 6, 2013; directions were ordered on January 16, 2014. Further pre-trial directions were ordered by Hellman J on October 2, 2014. Thereafter, there were various hearings related to discovery before, by Notice of Hearing dated November 2, 2015, the matter was fixed for trial in January 2016.

3. Despite a flurry of late exchanges of expert reports, amendments to the Plaintiff's Schedule of Loss and applications by the Defendants to adjourn the trial, the parties commendably managed to resolve various issues (notably general damages and the fact that the Plaintiff was entitled to retire early on health grounds) before trial. The trial not only proceeded on the fixed date; it was completed using only six of the original 10 days assigned.

4. One issue was reserved for possible future determination in the absence of agreement, the issue of the Plaintiff's loss of pension claim. On the final day of the trial, the Plaintiff's counsel handed in a signed undertaking by the Plaintiff to apply forthwith for retirement on health grounds. It is hoped by both the Plaintiff and the Defendants that this application will be processed swiftly by the relevant authorities so that the Plaintiff's employment can be brought to an end at the end of this month. He can then relocate to the United States where his wife is currently employed and access cheaper medical care.

5. That left for determination by this Court the Plaintiff's future loss of earnings and future medical expenses claims. The loss of earnings claim dispute mainly centred on which of three promotion scenarios would have likely occurred but for the injury; an incidental question was what sums the Plaintiff would likely have earned in post-retirement employment. Disagreement on the admissible extent of the future medical

expenses claim mainly centred on assessments of the number of likely kidney transplants and related expenses, together with assessments of the risks of related and unrelated medical complications and consideration of the impact of reduced life expectancy.

Findings: past and future loss of earnings

The Plaintiff's case

6. Mr Horseman submitted that the Court should be guided by the overarching principles found in the following words of Potter LJ in *Herring-v-Ministry of Defence* [2003] EWCA 528:

> "*In any claim for injury to earning capacity based on long-term disability, the task of the court in assessing a fair figure for future earnings loss can only be effected by forming a view as to the most likely future working career ('the career model') of the claimant had he not been injured. Where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident, the working assumption is that he would have done so and the conventional multiplier/multiplicand method of calculation is adopted, the court taking into account any reasonable prospects of promotion and/or movement to a higher salary scale or into a better remunerated field of work, by adjusting the multiplicand at an appropriate point along the scale of the multiplier. However, if a move of job or change of career at some stage is probable, it need only be allowed for so far as it is likely to increase or decrease the level of the claimant's earnings at the stage of his career at which it is regarded as likely to happen. If such a move or change is unlikely significantly to affect the future level of earnings, it may be ignored in the multiplicand/multiplier exercise, save that it will generally be appropriate to make a (moderate) discount in the multiplier in respect of contingencies or 'the vicissitudes of life'.*"

7. In *Herring*, at the time of the injury, the claimant was a sports coach who was pursuing an HND[1] in law with a view to becoming a police officer. Employment evidence showed that he was a strong candidate for selection. The trial judge found that he was likely to have reached sergeant but that promotion beyond that was too speculative. Future loss of earnings based on the assumption that he would have worked until retirement age as a policeman and retired as a sergeant were assessed by the trial judge but reduced by 25% to take into the risk that he might not have become a policeman at all. The Court of Appeal not only upheld this award but increased it, in part holding that the discount to account for the risk that the claimant would not have joined the Police at all was unjustified in light of clear evidence of comparable earning capacity in his existing career.

[1] Higher National Diploma.

8. Mr Horseman also relied on the facts of this case to illustrate the point that the Court's jurisdiction to assess promotion prospects for an existing police officer, such as the Plaintiff, was far broader than the Defendants contended. The Plaintiff's claim had two elements to it:

    (1) a claim for loss of earnings as a police officer until retirement at age 55, based on his own assessments of his future prospects and undisputed documentary evidence as to his academic and professional record; and

    (2) a claim for post-retirement loss of earnings based on a combination of his own evidence and supporting undisputed evidence from two former police officers who are now lawyers.

9. The financial computations in relation to this claim were supported by an Accountant's Report prepared by Mathew Clingerman of KRyS Global. This Report posited three possible scenarios for the Plaintiff's career as a police officer which the Plaintiff supported through his own evidence:

    (1) **Scenario 1**: the Plaintiff would have been promoted to the rank of Sergeant on January 1, 2010 and retired at that rank at age 55 on January 17, 2027;

    (2) **Scenario 2**: the Plaintiff would in addition be promoted to the rank of Inspector on January 1, 2015;

    (3) **Scenario 3**: the Plaintiff would in addition have been further promoted to the ranks of Chief Inspector on January 1, 2017 and Superintendent on January 1, 2022.

10. The Plaintiff relied, *inter alia*, on the following facts (confirmed by documents attached to his first Witness Statement) to support his own subjective assessment that Scenario 3 best reflected his promotion prospects:

    (a) between 1990 and 1993, the Plaintiff worked as Primary School teacher after leaving school where he attended Sixth Form, was a prefect and obtained two 'A' Levels ;

    (b) in 1993 he joined the Jamaican Police Force, qualifying to use six different types of firearm and subsequently placing first in the entire country in the 1996 Grade 1 Promotional Examination. Although he was working in Bermuda from 2000, the Plaintiff was promoted to the rank of Corporal in

the Jamaican Constabulary Force in 2002 before he formally resigned from that Force in 2003;

(c) in or about 1996 he commenced studies while working in Jamaica and obtained a BA Degree from the University of the West Indies ("UWI") on July 1, 2000;

(d) after joining the BPS and before being diagnosed with chronic renal failure in 2004, he obtained a Perfect Attendance Certificate in 2002, and received the following assessment from then Chief Inspector DeSilva:

> "*This is an outstanding officer who carries himself in a most professional manner. He is extremely productive and has a deep spirit of dedication. He has stuck through some very problematic times …and is a calming and professional influence on his colleagues*…";

(e) the Plaintiff registered for an LLB Degree with the University of London in 2001 and attempted the Intermediate Examinations in 2005, after he had become ill. The Plaintiff passed two of the four courses he attempted, Public Law and Common Law Reasoning and Institutions;

(f) even after becoming ill in 2004, the Plaintiff demonstrated leadership qualities. For instance, in 2009 he made a written recommendation to his superior officers that Bermuda adopt a witness protection programme, years before such a programme was implemented. He was also 'Team Player of Year' for 2013.

11. As far as what his post-retirement career prospects would have been, had he not sustained the work-place illnesses which he succumbed to, the Plaintiff relied upon his own evidence that he would likely have pursued a law-related second career and the unchallenged evidence of two former police officers who became lawyers: Edward P Bailey and Kenville St Clair Savoury.

12. Mr Bailey joined the BPS as a cadet in 1967, became a Constable the following year and was promoted to the rank of Sergeant in 1974. Having obtained a BSc Degree from University of Maryland, he was promoted to Inspector in 1980. He then took study leave and was called to the Bermuda Bar in 1982. He is now aged 66 and continues to practise running his own law firm. He states that it is not uncommon for police officers to pursue second careers[2]. Mr Savoury served the BPS for 25 years retiring early at age 47, having already commenced law studies. He was called to the

[2] He cites the examples of the former Solicitor-Generals Wilhelm Bourne and Barrie Meade, and former Senior Magistrate Archibald Warner. I take judicial notice of the fact that these individuals are all in the same age bracket as Mr Bailey and who must have also begun their legal careers in their early to mid- 30's.

Bermuda Bar in 2009 and continues to practise aged 57 years. He also confirms that many police officers pursue second careers after retiring from the BPS.

The Defendants' case

13. The Defendants primarily relied on the evidence of the Commissioner of Police. The Commissioner readily agreed that the Plaintiff's record demonstrated that he would likely have been promoted to Sergeant. However, he said it was impossible to properly assess the likelihood of his promotion beyond that. Apart from the obvious fact that in statistical terms as one rose up the ranks there were fewer posts to be promoted to, the qualities relevant to higher level promotion could not be expected to be displayed in the Plaintiff's records reflecting his assessment at the level of a Constable. The Commissioner accepted that the Plaintiff had shown initiative by proposing a witness protection programme, but insisted that this demonstrated more problem-solving skills than the sort of strategic and team leading qualities which would be crucial when being considered for promotion above the level of sergeant.

14. The Commissioner admitted under cross-examination that some persons who joined the BPS in the same year as the Plaintiff were promoted to the rank of Sergeant as early as 2007 and to the rank of Inspector as early as 2009. In answer to the Court, he stated that the Plaintiff's degree was a factor which might have resulted in his being promoted to the rank of Sergeant earlier than might otherwise have occurred.

15. Scenario 1 was all but formally conceded to be the most likely outcome in terms of the Plaintiff's BPS career prospects had his illness not occurred.

16. As far as past loss of earnings are concerned, it was suggested to Mr Clingerman (the Plaintiff's accounting expert) that his approach of basing the computation of loss of earnings as a Sergeant for the period 2010 to 2014 on average earnings was inappropriate. As overtime earned declined significantly during that period and thereafter, a declining weighting approach should have adopted. The witness stood by the use of an average figure as fair. Mr Cooper submitted in closing that it was clearly unfair for the witness to have been asked to compute future post-retirement loss of earnings as a teacher or a lawyer without allowing for a re-training break (of 8 months or five years).

Findings: BPS career loss of earnings

17. I find that the Plaintiff would most likely have been promoted to the rank of Sergeant with effect from January 1, 2010 as he himself claims. This would be two-three years

after the earliest of his contemporaries were promoted (in 2007) and is accordingly a very conservative finding indeed. This finding is based on a combination of the following undisputed key factors:

(a) he joined the BPS with seven years previous experience in Jamaica;

(b) he possessed a Degree;

(c) his record before he became ill in 2004 clearly demonstrated his aptitude for promotion to that rank; and

(d) the Commissioner's evidence was that the Plaintiff would likely have been promoted to the rank of Sergeant between 2010 and 2014 and he agreed (in answer to the Court) that the Plaintiff's academic background was an indicator that he would likely have been promoted earlier than might otherwise have been the case.

18. Less straightforward is the question of whether he would have been further promoted beyond that. As a matter of law, the Court is required to assess what would likely have occurred using the best available evidence. I place no reliance on the Plaintiff's own partisan assessments of what his progress might have been. His views which I accept as honestly believed by him lack the independence that is required. The Commissioner's evidence on this issue is somewhat more independent than the Plaintiff's in that in strict legal terms, the Commissioner does not employ Police officers and accordingly is not a Defendant. However, the Commissioner was not called to give independent expert evidence as to the employment prospects of the Plaintiff with a view to assisting the Court. He was the Defendants' witness who was clearly called to support their defence of the Plaintiff's assessment of damages claim. More importantly still, he did not assert that the Plaintiff would not be promoted to the rank of Inspector in that he clearly lacked the potential to rise to that rank. Rather, the essence of his evidence (which I fully accept) was that the performance appraisals carried out in the course of the Plaintiff's career to date did not assess the Plaintiff for the competencies which would have been important for promotion at the Sergeant-to-Inspector stage. In effect, the Commissioner said it was impossible for him to make an informed judgment about what might have transpired. Does the evidence of the Commissioner combined with the most reliable performance appraisals enable the Court to make any findings on the further promotion issue?

19. Of the 147 officers recruited between 1980 and 1999 who are still members of the BPS, there are 37 Sergeants, 20 Inspectors, 8 Chief Inspectors and only four superintendents. On any sensible view of these figures, even accepting the Commissioner's astute observation (which Mr Cooper subsequently endorsed) that promotion prospects cannot be assessed in purely statistical terms, the competition

becomes stiffer the higher up the ranks one goes. The number of Inspectors as a percentage of the number of sergeants is accordingly 54%, Chief Inspectors 21% and Superintendents 11%. The top 54% of Sergeants have a realistic prospect of moving up to the rank of Inspector, the top 21 to the rank of Chief Inspector, the top 11% to the rank of Superintendent. Obviously the numbers of Police Officers still on staff excludes those who may well have been promoted yet since left so these figures do not provide the basis for a truly scientific or statistical analysis. More significantly still, the Plaintiff was not assessed at all as regards performance indicators which would have been very pertinent to his suitability for further promotion beyond the rank of Sergeant: 'Managing and Developing Staff', 'Operational Planning', 'Strategic Planning'. His performance in those competencies might not have matched those which were assessed at the entry level.

20. I find it helpful nevertheless to consider what performance percentile the evidence suggests that the Plaintiff would have fallen into. A rough and ready objective assessment is to my mind helpful to supplement the rather broader 'big picture' approach upon which the Plaintiff (based on *Herring-v-Ministry of Defence* [2003] EWCA 528) was entitled to rely. The best available evidence, as Mr Horseman rightly submitted, is that of the Plaintiff's pre-2004 renal failure diagnosis performance appraisals. I consider equally pertinent the one 2005 appraisal placed before the Court before his illness worsened and he was effectively on reduced hours. The appraisal scheme scored marks between 1 and 7 in respect of 8 performance indicators. According to the appraisal forms themselves, a mark of 4 was typically achieved by 30%, 5 by 24%, 6 by 9% and 7 by 2%. The available assessments reveal the following:

    (a) his second six months' Probation Report (31 marks or 3.87-just below the 30th percentile rank. He was scored at 4 overall, achieving the same overall score in a mid-year appraisal);

    (b) his third six months' Probation Report (40 marks or 5.0- just within the 24th percentile rank);

    (c) his 2003 Annual Appraisal, after being confirmed in his post (41 marks or 5.1-a percentile rank of roughly 22.5);

    (d) his 2005 Annual Appraisal, the year after his initial diagnosis (41 marks or 5.1-22.5 percentile).

21. The Plaintiff as a Constable was on average a top 25% performer in his first five years as a BPS officer. Superintendents represent only 11% of Sergeants in raw number terms; Chief Inspectors 21%; Inspectors 54%. The Plaintiff's early performance as a top 25% officer does not clearly or directly support the proposition

that, as a Sergeant, he would have performed in the top 21% or even higher. But it does support the hypothesis, in an admittedly broad-brush manner, that he would quite likely at least have been a top 54 percentile performer who might well have risen to the rank of Inspector. I consider it inherently improbable that the Plaintiff, in light of his academic and early career background, would have become an underperformer at the Sergeant level. Three more qualitative considerations fortify this view:

(1) the Plaintiff's early BPS record suggests that although he may have been from the outset somewhat introverted in personality, he had natural general leadership skills. He was a prefect in school, a teacher immediately after leaving school, and despite scoring 4 in his first appraisal for general leadership scored 5 in each of his next three appraisals;

(2) the Plaintiff's early BPS record suggests that he was capable of self-development and addressing weaknesses. This supports the view that even if he initially failed to impress as a Sergeant in higher level leadership indicators, he would have been unlikely to continue to underperform. For instance:

(a) in his second Probation Report, it was noted that he was developing his capacity to communicate orally with Bermudian members of the public scoring 4 for Communication. In his next three full appraisals, he scored 5,5 and 6 for Communication,

(b) in his second Probation Report, he scored 3 for 'Self-Motivation', with concerns noted about workload management skills. In his next three full appraisals, he scored 5, 6 and 5 for the same performance indicator;

(3) the Plaintiff's strong academic background further supports the view that he would have probably continued to impress as a Sergeant and qualify for further promotion to the rank of Inspector. Various comments in his appraisals further support this finding. For instance:

(a) "*PC Donald is a fast learner*" and "*this is an outstanding officer*" (final Probation Report);

(b) "*The officer has shown a high degree of self-motivation in that he takes on a heavy workload…He has requested work which extends experience and new challenges*…" (October 2003);

(c) "*DC Donald displays excellent communication skills orally and in writing*" (November 2005).

22. I accordingly find that the Plaintiff's career, but for the Defendants' negligence, would have likely followed Scenario 2 and that he would have been further promoted to the rank of Inspector with effect from January 1, 2015 and retired in that rank at age 55. This promotion date appears to me to be reasonable bearing in mind that the Plaintiff's most high-flying peers were promoted to the rank of Inspector six years earlier, in 2009.

23. So the Plaintiff is awarded past loss of earnings on the basis that he would have been promoted to Sergeant with effect from January 1, 2010 and further promoted to Inspector on January 1, 2015. He is awarded compensation for future loss of earnings on the basis that he would have continued at that rank until retirement at age 55. As far as the precise figures are concerned, I do not believe there is any dispute concerning the way in which Mr Clingerman approaches the calculation of the net pay of Sergeants. Nor was there any apparent dispute about the net Inspector pay for the year 2015. The controversy centred on the approach to determining overtime at the Sergeant and Inspector levels.

24. I accept the uncontradicted (but not unchallenged) expert opinion of Mr Clingerman that his use of average overtime figures for Sergeants for the period 2010 to 2014 was a reasonable basis for computing the relevant earnings in question ($248.74). The fairness of the Inspector's overtime pay being based on an average which is not weighted for the 2010-2014 period appears more questionable on its face because:

    (a) the Plaintiff's award is based on a promotion with effect from January 1, 2015, just after the end of the period used for computing the overtime average; and

    (b) the first year of the period used to calculate the average (2010) has a disproportionately high figure (658 hours) with the overtime figures for subsequent years ranging between a high of $283.48 (2011) and low of $160.22 (2013), with the resultant average figure being $326.80.

25. However, in my judgment it would be wrong for the Court to adopt its own methodology for computing an appropriate Inspector's overtime pay figure, based on a layman's analysis, as Mr Cooper invites the Court to do. The principle underlying the use of averages calculated over a period of time is that what has occurred over a period of time in the past is likely to reflect the ups and downs which will occur in the future, as the Plaintiff's expert witness explained. The Defendants benefit from the fact that the Inspector overtime average is based on four out of five years when overtime was far lower than the high of 2010. It is a matter of speculation whether the current lows will continue unabated until the Plaintiff reaches 55 in just over 10 years' time. It is reasonable to assume that budgetary constraints will continue for the next 3 to 5 years, but it does not follow that the BPS workload will be controlled in a

proportionate manner having regard to the unique constitutional role performed by the Police. Moreover, as Mr Clingerman pointed out under cross-examination, although there was a steady downward trend in overtime pay for Sergeants and Inspectors for the years 2011, 2012 and 2013, overtime for both ranks went up in 2014.

26. I am satisfied that the approach adopted by the Plaintiff's expert is a reasonable one. It is only fair that the Plaintiff should benefit from account being taken of possibly higher amounts which would have been earned in the years ahead. I accordingly accept the average overtime figures for both Sergeant's and Inspector's pay used by Mr Clingerman to calculate the BPS loss of earnings figures. It was agreed that the loss of pension element of the claim should be dealt with at a separate hearing- if it was not subsequently agreed between the parties.

27. The Plaintiff is accordingly awarded $1, 133,594, as calculated by Mr Clingerman under Scenario 2B in Table 8.1 on page 48 of his Report (as updated by his email of January 26, 2016 'backing out' the pension element) in respect of BPS future earnings. This may require some adjustment to take into account any divergence between the assumed and the actual final working date[3]. He is also awarded the increased salary and average overtime he would have earned as a Sergeant and an Inspector less what he actually earned in the relevant period as a Constable ($97,713[4]) by way of compensation for past loss of earnings.

Loss of future second career earnings

28. Loss of future earnings in respect of a career after retiring from a disciplined force can be assessed by this Court: *Downing-v-Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216[5]. The Plaintiff's claim as supported by the evidence of Mr Clingerman was based on two alternative scenarios. The first was that he became a Primary School teacher earning around $68,000 gross per annum and retiring at age 65 and the second that he entered some private sector job earning $100,000 gross per annum and working till 70. The Plaintiff himself acknowledges that he might not have fully qualified as a lawyer but indicates that he would have wished to pursue some form of law-related work.

29. I find that it is more likely that the Plaintiff would have sought some post-retirement work in the private sector earning a salary which Mr Horseman pointed out was little more than what a senior Constable would have earned, rather than re-qualifying as a teacher and earning far less than he was earning earlier in his BPS career. The

[3] The Report proceeds on the assumption that the retirement will be made effective as of December 31, 2015: paragraph 4.3. In the course of Mr Cooper's closing submissions, Mr Horseman indicated that if the calculations in the Report were used, credit could simply be given for the pay received in 2016.
[4] Report, paragraph 7.10
[5] The judge decided that the claimant, then 43 and a warrant officer in the Army when forced to stop working, would have retired at age 50 as a Captain and worked in the private sector until age 68.

Plaintiff has a demonstrated interest in the law and while I think it is improbable that he would have post-55 fully qualified as a lawyer, it seems quite likely that he would have sought to use his Police experience in some private sector capacity upon retirement. To take into account various contingencies including the possibility that he might either take a break or retrain after retiring from the BPS or indeed retire earlier than 70, I find that the post-BPS loss of earnings award should be based on the assumption that he would work from 55 to 68. I accordingly accept the point made in paragraph 16 of the Defendant's Counter Schedule and fortified by Mr Cooper in oral argument that the assumption that the Plaintiff would be continuously working from age 55 to 70 adopts too broad an approach.

30. In the course of his closing oral submissions on the latter point Mr Cooper referred the Court to paragraph 6.5.1 of Mr Clingerman's Report. He queried whether the discounted multiplier approach adopted by the Plaintiff's expert was appropriate in the context of assessing future loss two careers. Mr Clingerman was not cross-examined on this issue. To the extent that this submission invited the Court to do more than indicate that the appropriate multiplier for the second career loss of earnings head should be less than 15 years, I accept the unchallenged and uncontradicted evidence of Mr Clingerman as to the appropriate discount rate for all aspects future loss of earnings claim.

31. Accordingly the second career award is based on the Scenario 2B loss of earnings figure of $1,495,886 adjusted to reflect a period commencing on January 1, 2027 but ending on December 31, 2040, rather than December 31, 2042.

Total loss of earning award

32. The total award for loss of earnings, subject any adjustments as may be advised by or agreed between counsel is: $97,713 (past earnings) + $1, 133,594 (BPS future) + $1,495,886 (less 2 years-second career). These amounts are based on figures calculated by the Plaintiff's expert Mr Clingerman applying a discount rate which was essentially agreed. Subject to the parties hopefully agreeing the adjustment required to give effect to a 13 year rather than a 15 year second career, the total award for loss of earnings is in the region of **$2.5 million**.

33. The parties have liberty to apply if necessary for determination of the Plaintiff's loss of pension claim.

Findings: Future Medical Expenses

Overview

34. It is common ground that the Plaintiff will require at least one kidney transplant preceded and followed by ongoing dialysis treatment, is subject to increased health risks (notably cancer and cardiovascular disease) and has a reduced life expectancy. The medical experts had differing views on the future prognosis which were significant in terms of the implications for the award to which the Plaintiff is entitled in respect of the related medical expenses.

35. The Plaintiff called two expert medical witnesses. Firstly, Dr Michael Gray who was first licensed to practise medicine in Arizona in 1979, after obtaining his MD from the University of Cincinnati and his Masters in Public Health degree from the University of Illinois. He has carried out clinical research on the human health effects of toxic materials including fungal agents for over 30 years. He has been evaluating and treating patients exposed to toxic molds for 13 years. He has numerous publications. His current Board Specialty certifications include the American Board of Preventative Medicine and the American Board of Internal Medicine. He is an independent consultant in Occupational and Environmental Toxicology and is Medical Director of the Progressive Healthcare Group. Dr Steven Bifulco from Tampa, Florida, has worked in the field of Physical Medicine and Rehabilitation for 26 years. For the last six years he has been a Life Care Planner. He was accepted as an expert in this area and his main function was to assess the Plaintiff's likely future care costs.

36. The Defendants called Dr M.A. Mansell, a Consultant Nephrologist at various hospitals in and near London since 1983, including the Middlesex Hospital and the Royal Free Hospital. In private practice since 2010, he is widely published in the area of chronic renal failure. He is also an accredited expert witness and President of the Medicolegal Society.

37. Dr Gray was initially a pivotal witness on liability. His area of practice was somewhat broader than Dr Mansell and so he could opine with greater authority on general medical matters. Dr Mansell could clearly speak with unrivalled authority on the Plaintiff's primary kidney function prognosis. Dr Bifulco was best equipped to speak on US-related medical expenses, but was hampered by the reluctance of medical institutions to release detailed costs estimates. His initial estimate for the costs of a kidney transplant had to be slashed when a far lower 2013 estimate obtained by the Plaintiff himself was belatedly disclosed to the Defendants. I did not consider the fact that this single item was shown to have been initially inflated to be sufficient to justify accepting the Defendants' submission that none of his evidence was to any extent reliable.

Kidney transplant(s), life expectancy and related costs

38. In dispute was not simply how much one kidney transplant would cost but how many transplants were likely and how much related medical expense would likely be incurred. The related costs had two elements. Firstly, hemodialysis, medication and related care costs while waiting for a transplant and secondly actual transplant costs taking into account the risk of extended care to deal with complications.

39. In the Plaintiff's Submissions on Assessment of Damages, Mr Horseman was willing to rely on the US Renal Data System ("USRDS") 2013 estimate of annual dialysis-related costs estimate of $87,945 in a document attached to Dr Mansell's December 30, 2015 Report. This seemingly included medications and was higher than Dr Bifulco's estimate of $62,000, which did not include medication costs. It was lower than the Boston Hospital discounted charges of $93,000 Bermudians on GEHI were currently paying, as Ms Tuckett of GEHI confirmed on behalf of the Defendants. Bermudian charges were admittedly far higher still. However, it was clearly possible that the Plaintiff might in the future obtain treatment from facilities far cheaper than Boston hospitals. Dr Mansell exhibited the USRDS Report to his own Report because it contained useful data. He was unable to comment on the accuracy of the $87, 945 hemodialysis costs estimate and he admitted he could not fairly opine in detail on US medical costs.

40. Bearing in mind that this figure is seemingly based on national US data, it provides a credible basis for assessing annual costs in relation to a claimant who may live (and receive treatment) in various parts of the United States. However it is found in a 2013 publication and costs have probably increased since then. I accordingly assess the annual hemodialysis costs at $90,000.

41. It is agreed that the Plaintiff will have to wait approximately five years for a kidney transplant. It is agreed that he will receive at least one transplant. The Plaintiff claimed $243, 800 based on Dr Bifulco's estimate, without complications. The Plaintiff's Brigham and Women's Hospital 2013 estimate was $218,000 for a cadaver kidney transplant. The Defendants, relying primarily on the evidence of Ms Tuckett in relation to actual charges paid by GEHI for kidney transplants recently carried out for Bermudian patients in Boston, suggested that the costs were lower. In 2012, a transplant was done at the Lahey Clinic for $132,729.97. She suggested Florida costs without complications would be in the region of $110,000 (excluding pre-operative and post-operative care. However she also stated that GEHI was typically given discounts by US hospitals, so that a transplant patient with complications in late 2013 was charged $440,283 for a cadaver kidney transplant yet GEHI only paid $241,809.

42. Ms Tuckett accepted that the same discounts offered to GEHI as an insurer referring numerous patients on an ongoing basis would not be offered to the Plaintiff as an

individual private patient. She also stated that GEHI actually paid more than $392,000 and more than $412,000 for two other patients with complications in 2013. Mr Horseman pointed out that all three Bermudian transplant patients insured by GEHI in 2013 had complications and that the USRDS statistics indicated that in the same year 78% of transplant patients had complications. I accept that Court ought to assume that there will be complications, applying the principle of full compensation. I accordingly award $400,000 as the costs of one transplant assuming there will more likely than not be complications. This is based on the apparently discounted actual costs paid by GEHI in two such cases, appreciating that the Plaintiff might be charged more in Boston but also taking into account the fact that Plaintiff may elect to have the transplant done in a less expensive part of the United States.

43. How many transplants will the Plaintiff likely have? I accept the evidence of Dr Mansell that it is unlikely that the Plaintiff will have three transplants. The question of whether two transplants would be likely was more ambiguous. Dr Mansell accepted that he had opined in his August 24, 2014 Report as follows:

> "*57…He could probably be listed to receive a second renal transplant at* [59]*…he might have to wait about five years for a suitable second kidney, suggesting re-transplantation at about the age of 64 years. A typical survival for a second cadaver graft would be about 10 years, potentially taking him into his mid-seventies.*"

44. However, he contended that this was over-optimistic and ignored other problems faced by the Plaintiff. In his December 30, 2015 Report, he opined that the first transplant would probably last 15 years (up from "*10-15 (mean 13) years*" in his August 2014 Report). He then states:

> "*2… A second transplant may be possible subsequently, depending on the physical state of the patient, although is probably unlikely in this case…*"

45. Some elaboration of his earlier opinion is entirely understandable, particularly in light of the Plaintiff's subsequent reliance on the June 24, 2015 Report of Dr Gray which made a case for early retirement on health grounds which the Defendants later that year accepted. By this date it was far clearer how much further waiting time was required for the first transplant. Dr Gray suggested under cross-examination that when Dr Mansell opined that a second transplant "*may be possible*", that suggests a 51% chance of the Plaintiff receiving a second kidney. What is crucial is what Dr Mansell himself meant by this. Under cross-examination he opined that he felt the likelihood of a second transplant was no more 20-30%, although he also noted that the absence of a power to award provisional damages and review awards based on future developments was problematic. If the Plaintiff was eligible for a second transplant, he would be "on the cusp" of eligibility. The primary reason why he made a positive case for a second transplant for the claimant in *XYZ-v-Portsmouth Hospitals NHS Trust*

[2011] EWHC 243 was that the claimant in that was far younger, having received a first transplant at roughly 37, two years before the trial.

46. Under re-examination Dr Mansell estimated that of around 800 patients who came to his transplant clinic, around 550 were on their first transplant and 346 on their second transplant. While the Plaintiff could conceivably have a first transplant at around 50, return to dialysis at 60 for 5 years and obtain a second kidney at 65, Dr Mansell explained that he was "cool" about this outcome in the Plaintiff's case because of the other complications flowing from the toxic mould infection. However, other health risks (notably cancer and emphysema) were identified by Dr Gray in his May 7, 2009 Report. He had suggested way back then that steps should be taken to address these risks materializing (screening and anti-inflammatory drugs), not to mention a comprehensive regimen aimed at removing the toxins from his system.

47. It seemed at first blush difficult to reconcile the distinctly different approaches adopted by Dr Mansell to the likelihood of a second transplant between his August 24, 2014 Report and his December 30, 2015 Report together with his evidence at trial. At trial, he emphasised the drastic reduction in life expectancy the longer a patient is on dialysis as being pivotal to his analysis. In August 2014, he opined that the Plaintiff would "probably" be able to receive a second transplant based on the following timelines:

    - first transplant at age 46
    - return to dialysis at age 59
    - second transplant at age 64.

48. At trial, in early 2016 just after the Plaintiff's 44th birthday, Dr Mansell's projected timelines were effectively as follows:

    - first transplant at age 48
    - return to dialysis at 61
    - second transplant at 66.

49. The change in timelines does provide objective support for a marginally more conservative assessment of the prospects for a second transplant. Mr Horseman encouraged the Court to adopt the view that a shift in approach has taken place from a 2014 assessment which was (by Dr Mansell's own account) "overly optimistic" to a 2015/2016 approach which is overly pessimistic. It is true that in his January 11, 2016 Report, Dr Mansell agreed that it was "quite common" for patients who developed renal failure at 50 and above to have two transplants, but the Plaintiff did not fall into this category of patient.

50. In fact, the 'change of position' between the two Reports, carefully read, is not as great as selective reading would lead one to believe. This is because of the crucial issue of life expectancy. After describing the possibilities of a second transplant in paragraph 57 of his August 24, 2014 Report, Dr Mansell went on to opine as follows:

> "*58. The above predictions for his likely future clinical management takes no account of his likely life expectancy. Assuming that he will be treated with a mixture of dialysis and renal transplantation I would suggest that his life expectancy lies midway between that for dialysis (10 years) and transplantation (26 years). The mid-point is about 16 years, suggesting that he will survive to about the age of 60; clearly the suggestions of survival to 77.6 years…are unrealistic.*"

51. Dr Mansell accordingly opined that it was possible that the Plaintiff would die before a second transplant was required although he accepted that he could conceivably live longer. He did not initially opine that a second transplant was likely at all. Dr Gray opined, using the same USRDS figures, that he would place the Plaintiff's life expectancy at the top of the 'transplant scale' at 69. Dr Gray's position on life expectancy apparently ignores the impact of time spent on dialysis. In his December 30, 2015 Report, Dr Mansell relied on generic US data suggesting that the difference in life expectancy was 3.4 times greater with a transplant (33.7 years life expectancy for a 43 year old as against 9.9 for a man of the same age starting dialysis). Although he was not asked to explain his mid-range assessment, his evidence apparently assumed five years on dialysis pre-transplant followed by 13 years (48-61) on a transplant. Although I appreciate that any further dialysis would reduce life expectancy, guarding against dangers of under-compensation without ignoring Mr Cooper's entreaty to shun over-compensation, I find that greater weighting in favour of a longer life expectancy is justified.

52. On balance, the evidence before this Court suggests a reasonable life expectancy of 65 years, keeping in mind the governing aim of full compensation. This finding is indirectly supported by Dr Mansell's opinion that the Plaintiff is only 20-30% likely to receive a second transplant, assuming that the first transplant is only functional for 13 years and that he returns to dialysis at age 61 for a further four years. He would be near the end of his life expectancy of 65 when his fitness to actually receive a transplant would fall to be assessed.

53. I find that, having regard to the umbrella principle of full compensation:

    (1) the Plaintiff's life expectancy should be fixed at 65;

    (2) the Court should assume that the Plaintiff will receive a transplant within 5 years of commencing his dialysis in April 2015 (i.e. by age 48-four more years);

(3) the Court should assume that the Plaintiff returns to dialysis at the lower end of the transplant range of 13 years (i.e. age 61); and

(4) the Court should assume that the Plaintiff does not receive a second transplant but receives dialysis for a further four years.

54. The Plaintiff is accordingly entitled to recover the costs of 8 more years' dialysis (8 years @$90,000 per year): $720,000. The total award for one transplant taking into account complications ($400,000) + further dialysis ($720,000) = **$1,120,000**.

55. If I had made any award for the chance of a second transplant, I would have felt obliged to make an award of only 25% of the full transplant with complications award of $400,000: $100,000. I would also have deducted 25% of the further dialysis period of four years; a reduction of $90,000. In these circumstances the assumption of only one transplant is only marginally more generous to the Defendants than assuming a 25% chance of a second transplant, which is the only alternative finding that the evidence would properly support.

56. For the avoidance of doubt I find the 10% risk of a transplant failure invoked by Mr Horseman in support of an award for both a second and third transplant to be too small to justify making any award in respect of a second transplant, bearing in mind the somewhat generous approach I have taken to the Plaintiff's life expectancy and dialysis costs awards.

Other Ongoing Medical Expenses

57. Two categories of other medical expenses fall to be assessed. Firstly, post-transplant costs, which Dr Mansell accepted would be elevated for the first year, and ongoing medical expenses during the life of the transplant. Secondly, general medical expenses including Dr Gray's toxic mould infection treatments and general health maintenance e.g. cancer screening/psychological support. This second category of expense applies to the remainder of the Plaintiff's life expectancy.

58. Mr Horseman submitted that the USRDS figure of $32,000 for post-transplant care was the best available evidence. Dr Mansell agreed that this sounded logical as regards the first year after the transplant, but that thereafter costs would drop off, principally because the most expensive item was immune-suppressant drugs during that initial year. I award this sum for the first year after the assumed transplant and assess additional nephrological care costs for the remaining 12 years of the assumed transplant life-span at $8000, including medications. This is 25% of the first year's costs and is based on Dr Mansell's evidence that doctor's visits would only be quarterly rather than, monthly. I consider this a more sound approach than relying on

the estimates used by Dr Bifulco in light of Dr Mansell's expertise in relation to renal treatment-but not US costs. In this regard, I accept Dr Mansell's evidence that during the life of the transplant the Plaintiff's quality of life is likely to be quite fair but that thereafter the position will be less favourable.

59. In terms of other ongoing costs, and based on the evidence of Dr Bifulco, Dr Gray and Dr Mansell, I award:

    (a) $1000 per year for nutritional evaluations and counselling (21 years-$21,000);

    (b) $5000 per year for psychological counselling and assessments up to and for the first year after the assumed transplant and for the last five years of his assumed life-span (10 years-$50,000);

    (c) $5000 for case management services for each of the two years preceding and after the assumed transplant and the last five years of the assumed lifespan (7 years-$35,000);

    (d) $1200 per year for CT scans and blood tests + $800 per year for neurologist visits= $2000 per year (21 years-$42,000);

    (e) $25,000 per year for home care for the assumed second period of dialysis (4 years-$100,000);

    (f) $4,713.36 per year for Mycotoxicosis treatment (21 years-$98,978.46).

    TOTAL: **$ 346,978.46**.

Increased Risk of cancer/heart disease etc

60. Dr Gray opined that the Plaintiff is at increased risk of suffering from various illnesses because of mould infection. It is common ground between him and Dr Mansell that there is an elevated risk of cancer and cardiovascular disease. Dr Gray opines that his mould exposure elevates the risk which kidney transplant patients would generally have from 20-30% to 40% (cancer) and 50% (cardiovascular disease). I decline to make any award in respect of the additional health risks which were not agreed. Dr Gray accepted that the two main agreed risks potentially shorten the Plaintiff's life expectancy, but also opined that they could be mitigated by:

(a) treating the underlying mould infection and hopefully reducing and/or eliminating the toxins from the Plaintiff's body;

(b) monitoring the Plaintiff rigorously so as to diagnose cancer early so as to increase the prospects of effective treatment; and

(c) removing the Plaintiff's infected kidneys before inserting new ones.

61. The Plaintiff reduced an initial claim for $500,000 for additional complications to $200,000. As Mr Cooper rightly pointed out, any award for this head of loss must avoid recording inconsistent findings between the assumed life expectancy of 65 and the onset of life-threatening illnesses which could result in a far shorter life-span. On the other hand there is no more than 50% chance that significant additional medical expense may be required to successfully treat these two potential ailments which it is now agreed (or not positively disputed) may be sustained as a result of the Defendants' breach of duty. In my judgment $105,000 is a reasonable lump sum to award to cover the Plaintiff's assumed life expectancy of 21 years to meet this real contingency of potentially expensive additional private care. Total award: **$105,000**.

Total future medical expense award

62. The total future medical expense award, assuming a life expectancy of 21 more years, is accordingly $1,120,000 (transplant and dialysis) +$346,978.46 (ongoing medical expenses) + $105,000 (risk of additional serious illnesses) = **$1,571,978.46**. The parties have liberty to apply for the determination of the appropriate discount rate to be applied to this limb of the award if it is not agreed.

Conclusion

63. The Plaintiff is awarded the amounts summarised in paragraphs 32 and 62 above for loss of earnings and (subject to the application of the appropriate multiplier to be determined by this Court in the absence of agreement) future medical expenses. The parties shall have liberty to apply with respect to the loss of pension benefit claim and as to the terms of the final Order generally.

64. Unless either party applies to by letter to the Registrar within 21 days to be heard as to costs, the costs of the assessment of damages trial shall be awarded to the Plaintiff.

Dated this 19th day of February, 2016 _____

IAN RC KAWALEY