In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 6

KATE THOMSON **Plaintiff**

-v-

JAMES THOMSON

1st Defendant

-and-

COLONIAL INSURANCE COMPANY LIMITED

2nd Defendant

JUDGMENT (ASSESSMENT OF DAMAGES)

(In Court)

Dates of hearing: June 1-5, 8-9, 2015

Date of Judgment: July 17, 2015

Mr. Paul Harshaw and Ms. Alsha Wilson, Canterbury Law Limited, for the Plaintiff

Mr. Craig Rothwell, Cox Hallett & Wilkinson Limited, for the Second Defendant

Background

1. On June 14, 2013, following the liability phase of a split trial, the 2nd Defendant was found liable for the 1st Defendant's negligence in causing the Plaintiff (his wife) serious injuries in a road traffic accident which occurred on January 15, 2006. The Plaintiff was found to have been contributorily negligent in that she was not wearing a seat-belt at the time of the accident[1].

2. The trial on quantum raised the following principal issues:

    (a) how much was recoverable in respect of past loss (in particular loss of earnings);

    (b) how much was recoverable in respect of future loss (in particular loss of earnings, other employment–related loss and medical expenses); and

    (c) what 'discount rate' should be applied when calculating the lump-sum awarded in respect of future loss?

3. The discount rate issue was argued on a joint basis in relation to the present action and two other unrelated proceedings on the basis of expert actuarial and economic evidence. My conclusory findings in relation to that issue were recorded in the following paragraphs of my Ruling dated June 22, 2015 in *Warren-v-Harvey et al* [2014] SC (Bda) Civ (22 June 2015):

> "*105. I accept the evidence of Mr. Daykin (based on the uncontradicted inflation/earnings projections of Dr. Llewellyn) that the appropriate discount rate for Bermuda as regards Mrs. Thomson (44.5 years old at the date of the Report) should be:*
>
> *(a)-0.25% for heads of damage likely to be affected by price inflation; and*
>
> *(b)-1.85% for heads of damage likely to be affected by real earnings increases.*
>
> *106.The extent to which, if any, a separate UK rate falls to be computed because the claimant Thomson now resides in the UK will be determined in a separate judgment however, I accept the further evidence of Mr. Daykin again*

[1] [2013] SC (Bda) 49 Civ (14 June 2013); [2013] Bda LR 48.

(based on the uncontradicted inflation/earnings projections of Dr. Llewellyn) that the appropriate discount rate for the UK should be:

(a)-0.5% for heads of damage likely to be affected by price inflation; and

(b)-2.5% for heads of damage likely to be affected by real earnings increases (i.e. future loss of earnings)."

4. The most financially significant single dispute centred on the Plaintiff's contention that her loss of earnings awards should be based entirely on a Bermuda measure and the 2nd Defendant's contention that UK wages provided the appropriate measure as she would likely, in any event, have returned to her original home of Wales. However, there was also controversy as to whether the multiplier/multiplicand approach should be followed at all.

Findings: can the Court adopt the multiplier/multiplicand approach at all or are the imponderables too great to justify more than a broad-brush assessment?

5. Mr. Rothwell invited the Court to conclude that the uncertainties surrounding the Plaintiff's future earnings were so uncertain that the conventional multiplier/multiplicand approach ought not to be adopted. A similar argument was advanced with greater justification in *Warren-v-Harvey* [2015] Bda LR 1 (see paragraphs 18-20, 23), but rejected. A broad-brush assessment was, exceptionally, made in relation to a loss of earnings claim in *Blamire-v-South Cumbria Health Authority* [1992] EWCA Civ 22 in very different circumstances where it was unclear to what extent the claimant would have chosen to work at all as opposed to deciding to be a home-maker. This argument must be decisively rejected here.

6. The present case is very different from *Blamire*, most notably because at the date of the accident (a) the Plaintiff was a qualified public sector professional in a largely recession-proof occupation with a clear earnings path, (b) she was her household's primary breadwinner, and (c) there is no basis for doubting that, but for the accident, she would have worked until she retired. The position in *Sreco and Sreco-v- Dejewski* [1997] Bda LR 23 was also quite different, with no reliable evidence about what the Slovenian claimant's current or future earnings in Slovenia were or were likely to be.

7. I am again guided by the following *dictum* of Keene LJ in *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194:

"19…*All assessments of future loss of earnings in personal injury cases be necessarily involve some degree of uncertainty. As far as possible, the task of the court is to seek to arrive at the best forecast it can make of the scale of such loss, normally on the well-established basis of multiplying an anticipated annual loss by an appropriate multiplier.*

20. Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges therefore should be slow to resort to the broad-brush Blamire approach, unless they really have no alternative..." [emphasis added]

Findings: but for the accident, how long would the Plaintiff have continued to work in Bermuda?

8. The Court is bound to grasp the nettle and do its best to determine how long the Plaintiff would likely have continued to work in Bermuda had her accident not taken place. Mr Rothwell offered up the tempting escape route of assessing her loss of earnings based on her actual residence in Bermuda immediately after the accident and then in the UK after July 23, 2007. He sought to light the way by reference to the approach adopted by Ground J (as he then was) in *Sreco and Sreco-v- Dejewski* [1997] Bda LR 23. But that case was wholly distinguishable because the plaintiffs there admitted that they intended to return to their place of origin within a specific time-frame, as Mr. Harshaw pointed out.

9. The 2nd Defendant's counsel also argued, without reference to authority, that awarding damages for loss of earnings on the Bermuda scale for a period when the Plaintiff was actually in the UK would give her a "windfall". This argument must be rejected. The Court's proper function is to assess how to fully compensate the Plaintiff by a loss of earnings award for what she would have earned had the accident not occurred. What the Plaintiff's living expenses were or would have been is a wholly irrelevant consideration for the purposes of this task.

10. Mr. Rothwell rightly reminded the Court of the need to treat the controversial aspects of the Plaintiff's evidence with care because of her obvious financial interest on the outcome of the present proceedings. I found her to be a credible witness in general terms; she did her best while in the witness box to testify in a straightforward way. The crucial assessment of how long she would likely have stayed is in any event primarily a matter of objective judgment; it could never be enough to simply 'believe' what the Plaintiff now says would have occurred, in isolation from the broader picture and surrounding facts which can more clearly be discerned. The background facts, established by largely uncontroversial evidence, which I find to be particularly relevant are the following:

(a) the Plaintiff was a nurse specially qualified to work in two areas, wound care and paediatrics. She could also have done general nursing. At the time of the accident she was employed subject to a three year work permit which would have expired on March 5 2008. Her first contract was from 2001 to 2003, her second from 2003 to 2005. However, the profession of nursing as late as 2012 was still an area recognised by the Immigration Department as exempt from work permit term limits because of a shortage of sufficient local human resources;

(b) although her former supervisor Mrs. Virgil would have liked to retain her services, it was unclear whether there would have been a job for the Plaintiff in her two preferred areas when her contract expired in March 2008 because Bermudians might have been eligible for appointment;

(c) nurse numbers declined somewhat from 2010 due to a cash crisis at the Hospital, as did the opportunity to earn overtime;

(d) the Plaintiff would have reached her basic salary cap in October 2011;

(e) Hospital pay was frozen in 2012;

(f) the Plaintiff, rather than her husband, was the primary breadwinner. Although the Plaintiff was reluctant to concede that this was the case, I find that the family would have been stretched to live on her income alone;

(g) the Plaintiff's husband was employed on yearly work permits in the marine construction industry and his long-term employment status was even more uncertain than the Plaintiff's, especially taking into account the notorious now longstanding downturn in the Bermuda construction industry and the absence of any or any convincing evidence that he possessed relevant special qualifications or skills;

(h) the Plaintiff's husband is currently working in a family scaffolding business which he might have wanted to return home to, even if the accident had not occurred;

(i) before they left Bermuda in 2007, the Plaintiff and her husband gave their friends (such as Mrs. Cheryl Alves and Ms. Kimberley Morbey) no reason to doubt that they intended to remain in Bermuda as long as possible;

(j) the Plaintiff's eldest daughter was attending Bermuda High School for Girls at a cost of $14,000 p.a. and, had the family remained in Bermuda,

would likely have finished there by 2012-2013 when the younger daughter would likely have started.

11. I am unable to accept that the Plaintiff would more likely than not have worked in Bermuda until her retirement in circumstances where she had no right to work in Bermuda beyond the term of her current work permit at the time of the accident. This permit would have expired in March 2008. She cannot benefit from the mere presumption that she would have stayed on, the sort of starting assumption which would operate in favour of a claimant with the right to reside and work in Bermuda on an unrestricted basis. On the other hand I accept entirely that she would have wanted to stay, especially while she was able to fortify her earnings with liberal 'doses' of overtime shifts and while her husband was actively employed.

12. Bearing in mind that nurses were at all material times in short supply, I will assume in her favour that the Plaintiff would have been able to obtain work permit renewals after her initial permit expired. In assessing how long the Plaintiff was likely to have continued working in Bermuda, and accepting that she would have chosen to stay as long as possible based on her expectations and hopes when the accident occurred, the uncertainty of her Immigration status is not the sole consideration to be taken into account. The following further considerations (upon which Mr. Rothwell heavily relied in cross-examination and in his closing arguments) further reduce the likelihood that the Plaintiff would have stayed in Bermuda:

    (1) the economic headwinds which Bermuda sailed into from at least 2010 would in any event have both probably:

        (a) reduced the Plaintiff's opportunity to supplement her earnings with overtime, and

        (b) reduced the earning capacity of the Plaintiff's husband significantly, if not altogether;

    (2) when the Plaintiff's elder daughter finished High School in or about 2012, she would likely have needed to pursue further education abroad (having no automatic right to work in Bermuda); and

    (3) in or about September 2012 the Plaintiff's younger daughter was due to start, ideally (if she was still in Bermuda), the private Bermuda High School for Girls.

13. In my judgment the evidence clearly points to a likely scenario of the Plaintiff being confronted in or about 2012 by a choice between:

(a) returning home to Wales where her husband would have had access to more stable employment in his family's business and her daughters would have less expensive access to secondary and tertiary education (and/or her elder daughter would have unrestricted access to employment), on the one hand; or

(b) staying in more expensive and uncertain Bermuda with household earnings no better than and most likely reduced below their robust and healthy pre-accident levels, on the other hand.

14. The Plaintiff's attempt to project her optimistic working and social pre-accident relationship with Bermuda, as experienced by her in the pre-Recession 2005-2007 era, indefinitely into the future is emotionally understandable but evidentially unconvincing. Looked at in the round, in my judgment it is impossible to fairly exclude the strong possibility that the Plaintiff would have decided that her family ought to return to the United Kingdom in or about the summer of 2012 even if the accident had not occurred. However, I equally cannot exclude the possibility that if the Plaintiff had obtained a further three year work permit in 2011, she might well have personally remained in Bermuda, staying in single accommodation, to work out her contract and ensure a maximisation of income while her husband and children (one finished secondary education and the other about to start secondary education) relocated to the UK on their own in the summer of 2012. It is common ground that her earnings in the UK would have been significantly less and the Plaintiff would only have reached her basic salary cap in October 2011.

15. The Plaintiff impressed me overall as a financially careful, practical and prudent person. When she initially arrived, after all, she very practically left her then young first child behind with her parents and stayed temporarily in nurse's accommodation in Bermuda before establishing a proper family home. I find that it is more likely than not that she would have responded to the declining financial fortunes which would probably have impacted her family had they stayed in Bermuda after in or about 2010 in a predominantly practical rather than a sentimental manner.

16. Having regard to the fact that the Plaintiff must prove the various heads of loss for which she seeks to be compensated, I have simply not been satisfied on a balance of probabilities that she would have continued to work in Bermuda beyond the expiry of what would have been her fifth work permit term in March 2014, taking into account:

    (a) the uncertainties surrounding her ability to obtain work permit renewals which were acknowledged in evidence adduced as part of her own case;

(b) the even greater uncertainties[2] surrounding her husband's ability to generate an important second household income; and

(c) the negative economic conditions which we now know have stifled private sector employment and frozen public sector wages in Bermuda from in or about 2010-2012 until today.

17. Accordingly, I find that the Plaintiff is entitled to be compensated for a loss of past earnings on the basis that, but for the accident, she would have returned to work in the United Kingdom (and probably South Wales) and/or ceased working in Bermuda on March 5, 2014.

Findings: loss of earnings

Past loss of earnings: Bermuda average

18. There was a dispute as to what the Plaintiff's average earnings would have been had she continued to work in Bermuda, primarily centred on how much overtime would have been available. I accept the evidence of Mrs. Virgil, under cross-examination, that the maximum overtime the Plaintiff would likely have earned would have been 200 hours a year, had she renewed her contract on March 2008. Mr. Rothwell submitted the addition to basic salary would be between 11% and 16%.

19. I find that the Plaintiff's average Bermuda earnings are the gross contractual base salary she would have earned in Bermuda from the date of the accident until March 5, 2014 less statutory deductions assessed on the following basis. For the period from the date of the accident to March 5, 2008, I accept the Plaintiff's claim for an uplift of 49% based on the overtime earned in the 12 month period preceding the accident. For the period March 5, 2008 to March 5, 2014, I assess the uplift for overtime at the rate of 15%[3]. Having regard to Mrs. Virgil's evidence that salaries were frozen in 2012, I find that the Plaintiff's salary between 2012 and 2014 would not have exceeded the gross basic of $84,957 she would have earned by 2011. There was no clear evidence as to whether the 2012 freeze was at the 2011 level or included an annual increase. I reject the assumption made by the Plaintiff's Employment Expert, Paul Jackson (Supplementary Report, paragraph 3.3), that a 3.5% increase would have occurred each year from and including 2012 to 2014.

[2] These uncertainties were not diminished by the fact that the husband was not called to give evidence in support of this or any other aspect of the Plaintiff's quantum claim.

[3] I omitted to record discrete findings as to the overtime rates for the pre-March 5, 2008 and post-March 5, 2008 periods in the draft of this Judgment circulated for editorial comments. Mr. Harshaw drew this discrepancy to my attention in what might strictly amount to more than an editorial comment. This issue was fully addressed at trial and I did intend to include separate findings for these two periods in my original draft Judgment but failed to do so. Be that as it may, it is my practice in personal injury damage assessments to adopt a more generous approach to editorial corrections with a view to saving time and costs.

Past and future loss of earnings: UK earning (but for the accident)

20. The Plaintiff would most likely have commenced working in the UK with effect from April 1, 2014, but for the accident. I have found that her return would have been planned well in advance so it is reasonable to assume that she would have been able to secure employment as a nurse with effect from a date soon after her Bermuda contract came to an end on the hypothetical date of March 5, 2014. She is entitled to be awarded what she would have earned from that date until the date of trial (June 3, 2015) under the head of past loss of earnings.

21. There were two employment experts, Mr. Paul Jackson (for the Plaintiff) and Mr. Keith Carter (for the 2nd Defendant), neither of whom gave oral evidence. Mr. Jackson described himself in his Curriculum Vitae as an 'Employment and Vocational Rehabilitation Consultant', and has, *inter alia*, a MSc in Disability Management in Work and Rehabilitation from the City University in London. He has been accepted as an employment expert in the County Courts and High courts in England and Wales, and has been carrying out occupational assessments for at least 15 years. Keith Carter has nearly 40 years of working and researching in the employment field and has been a consultant since 1985. He has a BA and MA in Sociology, experience as an expert witness in both England and Scotland. He has also been a writer and teacher/trainer on employment related matters for many years.

22. Most significant of the disputes between them was the question of which NHS pay band the Plaintiff would have fallen into upon her resuming UK employment (Band 6 versus Band 5); less significant was the question of how much overtime she would have earned (base pay +14.5 % versus base pay + 9%.). It was common ground that she would have been able to obtain employment as an NHS nurse at pay scales applicable to Wales. I prefer this assumption to the alternative more lucrative (but, it seems to me, less secure) agency nurse option considered in the alternative by Mr. Jackson.

23. Mr. Carter suggests that the most likely band for the Plaintiff to have been employed in had she returned to the UK to work from in or about 2006 would be Band 5. This was her grade when she left the UK in 2000 with seven years' post-qualification experience. However it is a salary band which embraces even experienced staff nurses and staff nurses with further qualifications. Band 6 includes specialist nurses. Mr. Harshaw invited the Court to prefer the higher salary band contended for by Mr. Jackson because Mr. Carter had ignored the substantial additional experience the Plaintiff had acquired since then.

24. The examples of Grade 6 jobs relied upon by Mr. Jackson on balance suggest that the Plaintiff would only have been able to obtain a non-community-based specialist nursing position if she had or was pursuing a degree or could produce other evidence of similar studies. I am not satisfied that her post-registration certificates combined

with admittedly substantial experience by 2014 (had the accident not occurred) would have been enough to carry her into Band 6. I find she would have been employed from April 1, 2014 in the UK with the NHS in Grade 5 but at the top of that range for 2014-15 (as described by Mr. Carter in Table 7): £27,901 gross or £21,927 net (basic pay). I would assess her overtime pay midway between the figures contended for by the two experts at 11.75%[4].

Past loss of earnings award

25. I assess the Plaintiff's net past loss of earnings (for the period April 1, 2014 until trial) at the annual basic rate of £21,927 (or $35,083) plus 11.75% for overtime less her actual UK earnings for that period at the rate of £8424 or $13,478. Prior to that, her loss of earnings award is her net lost Bermudian nurses' earnings (i.e. her basic +15% for the reasons explained above) minus the net amount she actually earned when she resumed working in the UK until the date of the trial on quantum. For the reasons set out below, I reject the 2nd Defendant's case that the Plaintiff failed to mitigate her loss by taking too long to seek re-employment.

Future loss of earnings: the Plaintiff's actual likely future earnings

26. The best evidence of the Plaintiff's actual future earning capacity is based on the part-time administrative work she is now doing. Before the trial, I considered it quite plausible that she might through further study re-qualify and improve her present earnings. Under cross-examination the Plaintiff explained that she abandoned her idea of pursuing an LLM in Medical Law because she looked at the course materials which an acquaintance that was pursuing this course showed her. It was immediately obvious that it was "beyond" her. This oral account had the ring of truth to it, especially against the background of the Plaintiff having pursued but failed her 'A' Levels when young. Moreover, she has since returning to the UK obtained two vocational accounting qualifications. Whatever objective view may be taken of her academic potential, there is no solid basis for concluding that she will at some ascertainable point in the future, more likely than not, acquire the confidence to pursue higher-level study which will materially increase her earning capacity above what it is today.

27. I accept Mr. Carter's opinion that the Plaintiff could perhaps on the open market potentially earn more than she is currently earning if she continues to do administrative/bookkeeping work on a less than full-time basis. However, I do consider that she was fortunate to obtain a job when she did through a personal contact, bearing in mind her partial disability and economic conditions at the time. Moreover, as Mr. Harshaw correctly pointed out, she is presently at the bottom but

[4] As a result of comments made by Mr. Harshaw on a draft of this Judgment, I added this finding which was omitted from the draft circulated but which I had consciously made (save that I had originally contemplated 11.87%) before circulating the draft.

within Mr. Carter's suggested net salary range (£8,424-£12,522 or $13,479-$21,568) for administrative/bookkeeping work.

28. In terms of future loss of earnings only, I would assess the actual (net) earnings amount to be deducted from what she would have earned as an NHS nurse (£21,927 or $35,083 basic pay + 11.75%) at £10,000 or $16,000.

29. The awards that are made in respect of future earnings below are all subject to the application of the applicable discount rate and the selection of the appropriate multiplier in light of the findings recorded in this Judgment (and my earlier related Ruling on the Discount Rate) which counsel have not yet had an opportunity to consider in relation to the various amounts claimed.

Employment-related benefits

30. The Plaintiff claims compensation for employment-related benefits lost in the form of her employer's contributions to Argus Medical Insurance and social insurance pension contributions. Reliance is placed on *Dews-v-National Coal Board* [1988] A.C. 1 at 14E-H, *HS-v-Lancashire Teaching Hospitals NHS Trust* [2015] EWHC 1376 at paragraph 30 and (indirectly) *Woodrup-v-Nicol* [1993] PIQR Q104.

31. The *Dews* case dealt directly with pension rights alone. *Lancashire Teaching Hospitals NHS Trust case* concerned primarily the future care award in relation to a child and not the recoverability of the employer's portion of contractual health insurance premiums at all. Clear support for the proposition that the private medical costs incurred by the Plaintiff in the UK are in principle recoverable is provided by *Woodrup*, where Russell LJ said:

> "*For my part, I have no doubt whatever that if, on the balance of probabilities, a plaintiff is going to use private medicine in the future as a matter of choice, the defendant cannot contend that the claim should be disallowed because National Health Service facilities are available.*"[5]

32. The pension contribution claim is clearly supported by the *Dews* case, the recoverability of the private medical expenses claimed is clearly supported by the *Woodrup* case but there is no support for the proposition that the loss of health insurance premium contributions is recoverable independently of a corresponding medical expense. The 2nd Defendant accepts in principle that the employer's contributions towards the Plaintiff's pension for whatever period she would have worked in Bermuda constitute recoverable loss (Counter Schedule, page 18). The

[5] [1991] EWCA Civ J0424-3 at page 19.

Plaintiff based on my findings is entitled to recover $50.68 per week for the seven month period conceded by the 2nd Defendant until March 5, 2014. I did not understand the quantum of the corresponding UK pension employer contributions to be in dispute and so the amounts claimed by the Plaintiff are, for the avoidance of doubt, also awarded, subject to hearing counsel as this issue was not directly addressed in either the 2nd Defendant's Counter Schedule nor, as far as I can recall, in oral argument[6].

33. As far as the medical insurance employer contributions claim is concerned, it is contended by the 2nd Defendant that this is inadmissible because as a matter of fact the Plaintiff suffered no loss because she returned to the UK where she had access to free medical care via the National Health Service (NHS). It is also contended that this is duplicative of her medical expenses claim. The medical insurance contributions constituted an element of the Plaintiff's employment package which she lost the benefit of because of the accident. But this is not the sort of benefit (like a pension contribution) which would have represented money in the hand of the Plaintiff. It was designed to protect her from having to pay for private medical care in Bermuda where, only incidentally, no comprehensive public health care was available.

34. I find that the appropriate measure of loss in relation to this lost contractual benefit is the actual medical expenses incurred during the period when the Plaintiff, but for the accident, would have been employed in Bermuda, not the value of her employer's contributions to the Group Health Policy. There would be an element of duplication in compensating the Plaintiff for actual loss sustained because she was not insured and at the same time awarding her the value of insurance premium payments for the same period when the medical expenses were incurred. But the main objection to this head of claim, based on the arguments advanced in the present case at least, is that the character of the contractual benefits of a group health policy is fundamentally different to salary, overtime and pension benefits, which are well-recognised recoverable forms of earnings-related loss.

35. Accordingly I accept the submissions of Mr. Rothwell on this issue and refuse the health insurance premium contributions limb of the Plaintiff's employment-related benefits head of claim.

36. A claim is also made for the replacement cost of the Plaintiff's life insurance which is agreed to be £60 per annum after January 15, 2008 when it expired until the end of her employment in Bermuda. The Plaintiff is only entitled to recover this cost for 2008 to 2014 (7 years) based on my finding that she would in any event have returned to the UK in March 2014. In these circumstances no allowance is required for inflation.

[6] This 'omission' was drawn to my attention by Mr. Harshaw when commenting on a draft of this Judgment. When Judgment was handed down it emerged that no evidence on the UK pension position was actually adduced at trial.

Mitigation of loss: when should the Plaintiff have started working upon her return to UK after the accident?

37. The Plaintiff returned to the UK on or about July 23, 2007 and the 2nd Defendant contends that she ought immediately to have sought work whilst the economy was buoyant before the downturn in 2008 adversely affected economic conditions. Waiting until December 2010 to start looking for work was, it was submitted unreasonable. She could have started part-time administrative work far earlier, bearing in mind that her last operation was in 2008.

38. The Plaintiff produced various reports from a Consultant Orthopaedic Surgeon at John Radcliffe Hospital, Oxford, Mr. James Wilson-MacDonald. The 2nd Defendant elected not to cross-examine the medical expert although he attended the hearing, supposedly on the grounds that it had not been made clear before the hearing that his evidence would not be positively challenged. I initially granted permission for the Plaintiff to adduce a further late report from her medical expert which would have significantly increased the quantum of her claim but also granted the 2nd Defendant an adjournment to take instructions from its own expert. The 11th hour unscheduled further report was ultimately withdrawn. After this Report was withdrawn, I also refused an ambitious attempt to call the surgeon in any event to supplement his reports, in the face of vigorous objections from Mr. Rothwell that any additional oral expert evidence would amount to a back-door means of orally expanding the Plaintiff's claim[7].

39. Mr. Wilson-MacDonald examined the Plaintiff on October 15, 2010. The history set out in his Report reveals that in August 2007 she was still not fit for work. In September 2007 a fusion procedure was recommended for her back. This was carried out in February 2008. In June 2008 she was still having "*intensive physiotherapy and hydrotherapy*", and on various medications. Her General Practitioner's notes record that that she reported panic attacks in late October 2008, and was to take anti-depressants and she undertook counselling. She attempted to stop this medication in June 2009 and in December 2009 was due to gradually discontinue it. In October 2010 she was still experiencing back and ankle pain which she scored at 4/10. Mr. Harshaw rightly submitted that this instance of self-reporting demonstrated that she was not prone to exaggeration. She also reported in October 2010 that she was no longer on anti-depressants because she felt more positive now than previously. On

[7] Before the trial proper started, I also excluded covert edited video evidence which the 2nd Defendant sought to rely on to demonstrate that the Plaintiff had exaggerated the severity of her injuries. No witness statements were available to explain how the editing of the recording had been carried out. The fact that the company responsible had apparently gone out of business and its employees were not traceable made this evidence highly suspect and inherently unreliable, not to mention technically inadmissible.

examination, the surgeon nevertheless noted that "*she seemed rather sad*" and that her "*lumbar spine was stiff*".

40. Since the 2nd Defendant expressly elected not to cross-examine Mr. Wilson-MacDonald and put to him the possibility that the Plaintiff was exaggerating her symptoms, this Court should be slow to reject a distinguished expert's assessment of the Plaintiff's condition. On the face of the expert's Reports, it does not appear that she exaggerated her symptoms to her doctors in any event. If anything, she perhaps understandably under-reported the extent to which an accident caused by her husband's negligence which had deprived her of her chosen career and a life 'in the sun' was a psychological blow which it was difficult to recover from. That she may have exaggerated her qualifications when seeking employment or the extent of her physical disability when seeking financial support is entirely beside the point, and I make no findings in these respects.

41. I find that the combination of the Plaintiff's physical and psychological injuries sustained in the accident made it reasonable for her to postpone looking for work until she did in or about December 2010. By her own account it was only then that she realised that her condition would be unlikely to further improve. I infer from this evidence and the medical expert evidence that she started looking for work as soon as she reasonably could.

Findings: the Plaintiff's retirement date (but for the accident as a UK NHS Nurse)

42. The 2nd Defendant accepts that the Plaintiff's original NHS pension plan provided for retirement at 60. Mr. Carter points out that the State pension retirement age is now 67. The Plaintiff's case was primarily based on the proposition that she would have retired at 65 in Bermuda. It is wholly speculative to contemplate the possibility that the NHS Nurses' pension age may be raised, as much as it is to assume that the Plaintiff might have retired before 60, had the accident not occurred.

43. I find that the multiplier for computing future loss should be based on an assumption that the Plaintiff, but for the accident, would have resumed her original career as an NHS Nurse on April 1, 2014 (aged 43) and continued to work as such until she reached what I understand to be the current retirement age of 60[8].

[8] It was pointed out in comments on a draft of this Judgment that 60 is in fact the earliest retirement date for NHS Nurses. Paragraphs 42 and 43 are based on my perhaps imperfect apprehension of the evidence.

Findings: past and future care

Past care

44. The 2nd Defendant offers $10,000 in response to the Plaintiff's $73,840 claim for past care despite submitting that care provided by close family members is not recoverable and contending that her husband, the 1st Defendant, had not provided sufficient care. The Plaintiff counters that her husband was preoccupied with work and that the law in any case does not require a plaintiff to mitigate her loss by requiring the tortfeasor to provide care. Moreover care was not provided simply by her immediate family, but by neighbours before she left Bermuda as well.

45. It is right that the Plaintiff is not entitled to recover damages for care provided by her husband because he is the tortfeasor: *Hunt-v-Severs* [1994] 2 All ER 385 (HL). On the evidence I find that for present purposes there is no basis for finding that the Plaintiff failed to mitigate her loss by seeking assistance from strangers which her husband reasonably ought to have given himself. I also accept Mr. Rothwell's submission that it is necessary to distinguish care and support which family members would ordinarily provide from care which would legitimately be paid for. He aptly relied on the central kernel of a passage from the judgment of Staughton LJ in *Mills-v-British Rail Engineering Ltd*. (1992) PIQR Q130; [1992]EWCA Civ J0506-8 (at page 12 of the transcript), a broader sample from which is reproduced below:

> "*To my mind there can be no justification in principle for differentiating between full-time care needing really a trained nurse and full-time care needing a carer giving love and affection to the patient, the dying person, to a degree far more than would be expected in any ordinary way of life. In principle it must be, in my judgment, a matter for an award only in recompense for care by the relative well beyond the ordinary call of duty for the special needs of the sufferer. The basis, as explained by Lord Justice O'Connor in his judgment in Housecroft v. Burnett, is that the court will make an award to enable the sufferer or his estate to make reasonable recompense to the relative who has cared so devotedly. So it must indeed only be in a very serious case that an award is justified -where, as here, there is no question of the carer having lost wages of her or his own to look after the patient.*" [emphasis added]

46. I find that the Plaintiff's injuries were sufficiently serious to justify incurring the cost of paid care after her release from hospital in Bermuda until her body brace was removed (36 weeks after her release from hospital) and during the six week period of bed rest after her February 26, 2008 operation in Wales.

47. I am not satisfied that any other more routine care provided by family members or friends justifies recompense. As regards family assistance, I am not satisfied the care went "*beyond the ordinary call of duty*". There is no evidence that other carers lost wages to provide whatever support they provided at comparatively non-critical times.

48. I would make an award on the basis of 5 hours per day 5 days per week (25 hours per week) at the claimed rate of £8.43 or $13.49 (£210.75 or $337.20 per week) for 36 weeks after her release from Hospital in Bermuda in 2006: £7,587 or $12,139. I would make a similar award (5 hours per day for five days in each week) in respect of the six week bed rest period after the Plaintiff's release from Hospital in Wales in March 2008 using the claimed rate of £8.85 per hour or $14.16 (£ 221.25 or $354 x 6): £ 1,327.50 or $2,124. The total award for past (home) care is accordingly £8,914.50 or $14,263.

49. According to page 21 of the 2nd Defendant's Counter Schedule, the past medical and treatment claim net of interim payments made which is outstanding ($11,447.48) is not disputed on the basis that a further 15% discount for contributory negligence will be applied.

Past Household/Aids & Equipment

50. The grocery delivery aspect of this claim alone is in dispute. I find the amount offered by the 1st Defendant of $6.789.84 (subject of course to a 15% contributory negligence discount) is a reasonable sum to award for this head of loss.

Past Travel and Transport

51. All items claimed for travel and transport are agreed, according to the Plaintiff's re-amended Schedule of Loss at page 42, save for the costs of returning to the UK from Bermuda. These costs are claimed on a hypothesis which I have rejected, namely that but for the accident the family would not have returned until retirement. This head of loss is refused.

Future care (medical treatments etc)

52. The future medical and treatments claim is complicated by uncertainty as to what further treatments in terms of further operations will likely be required as well as disagreement as to whether it is appropriate to assume that the Plaintiff will opt for the expense of private care when NHS care is likely to be available. It is persuasively argued by the 2nd Defendant that any future operations will not be needed on an urgent basis and can therefore be planned in advance avoiding the delays which are often the rationale for electing to incur the expense of private care. On the other hand, the Plaintiff submits that she ought not to be precluded from the option of private care particularly where certain treatments (e.g. orthotic treatment for her ankle) may be preferable on a private basis and some equipment will have to be purchased.

53. If any award is made in this respect, the 2nd Defendant contends that the most that should be awarded is £23,530 or $37,648 (Counter Schedule, pages 22-24). The Plaintiff is said to have originally claimed $1,067,413 but her total future care claim was reduced before trial to $270,915. The future medical treatments claim alone was in fact increased at trial from $114,400 or £75,450 to $156,516 or £103,227. In my judgment the amounts claimed ought generally to be reduced to take into account the fact that it is unlikely that all the identified potential treatments will reasonably have to be obtained via private care. The approach adopted by the 2nd Defendant in its Counter Schedule is more reasonable generally and I accept it in terms of assessing the lump sum to be awarded for each item of loss, subject to hearing counsel in the (absence of agreement) on the appropriate multiplier being applied to each item. My provisional view is that equipment costs are obviously price-inflation linked (-0.5% discount rate) and the professional service costs are earnings-linked (-2.5%).

Future care

54. The Plaintiff's claim for $2158 for care post ankle surgery on two occasions is agreed, if the Court accepts, as I do, that further ankle surgery is likely. The claim for 3 hours per week at £9.24 per hour for home care presently being provided by the Plaintiff's daughters using a multiplier of 88.23 to produce a total claim of £127,178 or $192,831 provoked howls of outrage in the 2nd Defendant's Counter Schedule. But this was explained as simply the result of the application of the discount rate accepted in *Simon-v-Helmot*. In my judgment, having regard to the fact that an award is being made on the assumption that it is possible that further surgeries may take place and physiotherapy will be pursued, it is unreasonable to assume that the same level of care as the Plaintiff presently is receiving will always be required and/or will not be capable of being provided on a family basis e.g. by her husband. On the other hand it seems unrealistic to adopt a wholly optimistic approach and ignore the risk that her condition might in fact worsen increasing the need for care.

55. I award in respect of future care 1 hour per week or 52 hours pa at £9.24 per hour, to which the appropriate multiplier must of course be applied.

Future Travel and Transport

56. The Plaintiff makes a modest claim for £100 per annum for the cost of going to and from future medical appointments. A multiplier of 50.03 is relied upon based on the expert evidence of Dr. Llewellyn and Mr. Daykin which this Court has now accepted. The UK-based discount rate here would be -0.5%. Subject to whatever modification to the multiplier which may be required, the Plaintiff is entitled to recover these future costs.

57. A further claim is made to the additional costs of an automatic car which the Plaintiff must now drive as a result of her injuries. The Plaintiff complains that the 2nd Defendant has produced no evidence to support the contention that an automatic car is now the norm, so that her claim for the additional cost of an automatic car ought to be allowed. It is contended that she was not cross-examined on this aspect of her claim at all.

58. Unless I am wrong in believing that the Plaintiff was not challenged when she was cross-examined as to the need for her to use an automatic car (i.e. that it was not put to her that she would in any event have purchased an automatic car), I would accept this further head of claim. This award would of course be subject whatever adjustments to the multiplier, which counsel have not had an opportunity to apply to the various figures, may be required.

Future Household Aids & Equipment

59. The Plaintiff claims the replacement costs every five years of a neck pillow, a "Reacher", a foam mattress and a "TENS" machine. The 2nd Defendant accepted these purchases were necessitated by the accident for the purposes of the past loss claim. In my judgment they should be allowed for the purposes of the future loss claim as well on the basis claimed at page 52 of the Plaintiff's re-amended Schedule of Loss, subject to whatever adjustments to the multiplier may be required.

General Damages/Interest

60. General damages were agreed at the beginning of the trial. I am not entirely clear as to whether any controversies exist in relation to interest although the parties' respective

positions (as regards special damages at least) may well be impacted by the contents of the present Judgment. It is to be hoped that interest can now be agreed.

Conclusion

61. The Plaintiff's damages on all disputed items are assessed on the basis set out above. I will hear counsel, if necessary, on the terms of the final Order and any matters arising from this Judgment including interest and costs.

Dated this 17th day of July 2015 _____

IAN R.C. KAWALEY CJ