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Judgment: approved by the Court for handing down | *Delivered:* **7/5/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DOROTHY HELEN WILSON

Respondent/Plaintiff

and

JAMES ANTHONY GILROY and MOTOR INSURERS' BUREAU

Appellants/Defendants

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Before Kerr LCJ, Campbell LJ and Girvan LJ

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KERR LCJ

[1] This is an appeal from the decision of Treacy J awarding the plaintiff, Dorothy Helen Wilson, £150,000 damages and costs for personal injuries, loss and damage sustained by her in a road traffic accident on 18 December 1999. A subsidiary issue in the appeal related to the amount of interest which the judge ordered should be applied to the principal sum. He ordered that interest at the annual rate of $2^1/_2$ % should be paid over the period from the date of the accident until the date of judgment, 9 November 2007. It is accepted on behalf of the respondent that the rate should have been 2% and that the starting date for the payment of interest should be the date of the issue of proceedings, 29 October 2002.

[2] Before reviewing the particular circumstances of the case, it is useful to say something about the proper approach to appeals against awards of damages. In *Santos v Eaton Square Garage Ltd* [2007] EWCA Civ 225 Maurice Kay LJ dealt with this issue in the following passage: -

> "It has long been established that we do not interfere with an award unless satisfied that the judge acted on some wrong principle of law, misapprehended the facts or that the amount awarded was wholly erroneous. It is not sufficient that the members of this court would have awarded a different sum if they had been sitting as the court of first instance – see *Flint v Lovell* [1935] 1 KB 354, 104 LJKB 199, [1934] All ER Rep 200; *Owen v Sykes* [1936] 1 KB 192, 105 LJKB 32, [1935] All ER Rep 90. If anything, the current approach is less rather than more interventionist. Thus, in *Ashdown v Michael* (unreported) [98/0516/2] Buxton LJ stated that
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> > "It should only be in exceptional cases . . . where this court should be asked to consider interfering".
>
> For my part, I would add that in this context it is pertinent to have regard both to the sums of money involved and the cost of Appellant litigation and to ensure that the one is not disproportionate to the other."

[3] In an earlier decision of this court, Nicholson LJ in the case of *McMullan v Coleraine Football and Sports Club Ltd and another* [2006] NICA 26, having referred to *Flint v Lovell (supra)*, said this about the review of a judge's award of damages by the Court of Appeal: -

> "To use the phrase 'entirely erroneous estimate' is now regarded by many judges as likely to mislead. In *Wells v Wells* [1999] 1 AC 345, [1998] 3 All ER 481, Lord Lloyd preferred 'outside the appropriate bracket'. See also *Simpson v Harland & Wolff Ltd* [1988] NI 432, [1988] 13 NIJB 10."

[4] The source of the comment would appear to be *McGregor on Damages* 17th edition at 45-032 where the author quotes Salmon LJ as describing 'wholly erroneous estimate' as now having an archaic ring. But a careful reading of Lord Lloyd's speech in the *Wells* case discloses that he was *not* expressing a preference for the formulation 'outside the appropriate bracket' over the rubric, 'entirely erroneous estimate' for he regarded the two as interchangeable. The relevant part of his speech is in the following terms: -

> "The underlying question is whether the defendants in each case succeeded in showing that damages awarded by the judges at first instance in respect of any particular head of damage (see *George v Pinnock* [1973] 1 All ER 926 at 934, [1973] 1 WLR 118 at 126 per Sachs LJ) are outside the appropriate bracket (see *Every v Miles* [1964] CA Transcript 261 per Diplock LJ; *Kemp and Kemp* vol 1, para 19–006), or else represented a 'wholly erroneous estimate', whether due to mistake of law or a misapprehension of the facts (see *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774 at 782, 799, [1980] AC 136, at 151, 172 per Lord Wilberforce and Lord Scarman respectively)."

[5] We have been unable to find anything in the judgment of Lord Lowry CJ in *Simpson v Harland & Wolff Ltd* which supports the notion that the use of the phrase 'entirely erroneous estimate' is misleading or inapt. On the contrary, Lord Lowry said that each of the members of the Court of Appeal had reached the conclusion that the amount awarded by the trial judge for general damages in that case was "very high indeed compared with what we would have expected under this heading". This seems to us to be as consistent with a conclusion that the award was a wholly erroneous estimate as it is with any other basis of review. Moreover, we cannot, with respect to the authors of *McGregor*, agree that use of the phrase, 'entirely erroneous estimate' is likely to mislead or that there is any widespread judicial view that it does. The phrase describes a familiar concept that is regularly used by appellate courts in a wide variety of different contexts. It indicates a proper reticence to interfere with a decision of the lower court. The reasons for this reticence are well known. A judge at first instance enjoys a considerable advantage in having listened to and formed an impression of the various witnesses whose evidence must crucially inform his assessment of the proper level of compensation. It appears to us, therefore, that the law in this jurisdiction remains as expressed by Lord Lloyd in *Wells* and that, unless an assessment of damages can be impeached as being based on a wrong principle in law or a misapprehension of the facts, it must be shown to have been a wholly erroneous estimate. For reasons that will appear, however, in this case it matters not whether the test is as described by Maurice Kay LJ or that a more interventionist approach is justified.

[6] A second preliminary issue can be dealt with briefly. Judgment in this case was given in November 2007. At that time publication of the third edition of *Guidelines for the assessment of general damages in personal injury cases in Northern Ireland* was imminent. The second edition of this work had been published in 2002. The third edition has just been published. It is, in our view, clear that the guidance contained in the latest edition should apply to

the assessment of the appropriate amount of damages. We say this for two reasons. In the first place, the respondent's claim falls to be assessed by the standards that currently apply since she has not yet received compensation for her injuries and their consequences. Secondly, as the text of the successive editions of the guidelines makes clear, it is not intended that they should remain unalterable over the life of each edition. Changes in the value of money over the period that elapses between each edition should not be ignored in the application of the guidelines.

[7] In fact, publication of the third edition of the guidelines had been delayed pending the decision of the House of Lords as to whether the development of pleural plaques constituted compensatable personal injury. Had this not been necessary, the latest edition of the work would have been available to the trial judge and it would be illogical not to apply it now. In any event, the guidance contained in the latest edition, published so soon after Treacy J's decision, must be regarded as representing the correct level of compensation to be applied at the time of his judgment.

[8] The circumstances in which Mrs Wilson suffered her injuries were exceptionally harrowing. She and her four children had arrived at a house which her husband was building in Drumree, Enniskillen at approximately 8pm on 18 December 1999. Her son Joshua was in the front seat and her three daughters were in the back. All had removed their seat belts and were about to alight from the car when a vehicle driven by Mr Gilroy collided violently with it. Her daughters were all injured, one of them particularly seriously. Tragically, Joshua, the youngest child and only boy in the family, was killed. Mrs Wilson also suffered serious injuries that required her to be taken to hospital. There she was informed that Joshua was dead. Some of her injuries were treated as she sat at the bedside of her dead son. It is unsurprising that, in light of these horrific events, much of her continuing disability is connected with her mental state. At the time of this dreadful accident, Mrs Wilson was thirty three years old. She is now almost forty-two.

[9] As the learned trial judge observed, Mrs Wilson's injuries fell into three broad categories: psychiatric, facial and dental and other orthopaedic and lacerating injuries which included fractures of two ribs, lacerations of the knees and of the tongue, fracture of the lateral malleolus and a muscular injury to the back.

[10] It is convenient to deal first with the facial and dental injuries. Mrs Wilson's jaw was fractured. She lost five permanent lower teeth. This required the insertion of dental implants and for these she needed bone grafting. Mrs Wilson had to undergo two operations under general anaesthetic for harvesting bone for the grafts and removal of necrotic bone and two further operations to replace the missing teeth with a fixed bridge. She will have to have the bridge replaced every ten years.

[11] The guidelines deal with damage to teeth in the following passage: -

> "*Damage to Teeth*
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> In these cases there will generally have been a course of dental treatment. The amounts awarded will vary as to the extent and discomfort of such treatment. Costs incurred to the date of trial will, of course, be special damage but it will often be necessary to award a capital sum in respect of the cost of future dental treatment."

[12] For the loss of or serious damage to several front teeth the recommended range is £10,000 to £25,000. Mr Ringland QC for the appellants accepted that the dental injuries suffered by Mrs Wilson warranted compensation at the upper end of this range. Mr Elliott QC for the respondent suggested that damages beyond this range should be awarded because of the protracted treatment that she had to undergo and the further treatment that will be required. It is clear that the guidance makes provision for adjustment of the figure depending on the duration and level of pain associated with the treatment and we do not consider, therefore, that it is appropriate to go beyond the range suggested. But we consider that these dental injuries are as serious as one could contemplate within this category and we have concluded that £25,000 is the appropriate sum for this aspect of her injuries.

[13] For a simple fracture of the jaw for which immobilisation has been required and from which there has been a complete recovery the guidelines suggest compensation up to £12,000. In this case the plaintiff required splinting of the jaw but this had to be removed in order to deal with other injuries to the mouth and we have concluded that £12,000 is the correct sum for this injury.

[14] The orthopaedic injuries have not proved to have lasting consequences. The rib fractures have healed although they are notoriously painful injuries in the months after they have been sustained. The guidelines state that "fracture of a rib or several ribs with, at the upper end, disturbance of the intracostal margin with a number of weeks of acute discomfort followed by good recovery" should attract an award up to £12,500 and we consider that the appropriate sum to allow for the rib fractures is £10,000.

[15] The ankle injury consisted of a small flake fracture of the left malleolus. No long term sequelae to this fracture are anticipated. We consider that £7500 is the appropriate measure of compensation for this injury. The guidelines

suggest compensation of up to £18,000 for less serious ankle injuries in the following passage: -

> "Less serious, minor or undisplaced fractures, sprains and ligamentous injuries. The position within the scale would be determined by whether or not a complete recovery has been made and if not whether there is any tendency for the ankle to give way, any scarring, aching or discomfort, or the possibility of later osteoarthritis."

[16] In relation to the back injury, no physical or psychological cause for the plaintiff's continuing complaints could be found and the learned judge concluded that this aspect of her injuries should be evaluated on the basis of Mr Yeates' opinion. He was the consultant orthopaedic surgeon who gave evidence on behalf of the defendants. He felt that the plaintiff would have suffered some pain and discomfort in her back for a period of eighteen months and that these symptoms would diminish during that period. The guidelines describe minor back injuries as "strains, sprains and disc prolapses and soft tissue injuries which have made a full recovery or resulted only in minor continuing disability or which have accelerated or exacerbated pre-existing unrelated conditions for a fairly brief period of time." They suggest a compensation range of up to £15,000. We consider that the correct figure for the back condition that the plaintiff suffered is £7,500.

[17] Mr Ringland had invited the judge to conclude that Mrs Wilson was exaggerating. He also submitted to this court that we should so conclude. This submission was made on the basis that there was no physical or psychological source for Mrs Wilson's assertion that she continued to suffer back pain and the fact that she is recorded in April 2000 as having told a senior house officer that she suffered occasional pain in the back and left ankle. Treacy J recorded this submission but made no explicit finding in relation to it. We are certainly not persuaded that the only conclusion available from the medical evidence is that the plaintiff was deliberately inflating the effects of the back injury. This woman has been the victim of incalculable emotional trauma as a result of this accident. We find it entirely unsurprising that when, in the context of a medico-legal examination, she is asked to give an account of her condition, an element of emphasis or overstatement has been present. This does not betoken deliberate falsehood on her part. From the experience of the members of this court of similar cases we consider that it is far more likely to be due to her involvement in such a distressing and harrowing event. Furthermore, Mr Yeates, when expressing difficulty in understanding why Mrs Wilson should continue to experience the level of pain in her back that she complained of, commented in his report, "[I] would suggest that there may be a psychological problem which does tend to accentuate the perception of pain."

[18] There is little assistance to be obtained from the guidelines in relation to the injuries to Mrs Wilson's tongue and knees. These were significant injuries. The laceration of the tongue had caused a full thickness wound approximately 2.5cm long extending to the tip. It required sutures. The tongue is slightly distorted and the plaintiff has reduced sensation in the area of the injury. She finds it difficult to distinguish between sharp and blunt objects. We consider that the appropriate sum for this injury is £6,000.

[19] Derek Gordon FRCS, consultant plastic surgeon, described the injuries to the knees as follows: -

> "She has been left with permanent scarring on the front of her knees. This is a cosmetically significant area in a woman and the scars are permanent. They represent both a cosmetic deformity and a functional disability as they interfere with kneeling. Neither the appearance of the scars or the tenderness associated with them would be helped by surgical treatment either now or in the future."

[20] We have not seen the scars, although the trial judge did. We must rely on the description provided by Mr Gordon, therefore. Although scarring on the legs is obviously less serious than on the face, it is clear that the scars in this case are in a relatively prominent position and would be readily visible if the plaintiff was wearing an above knee dress or when she sat so that her knees were exposed. The functional disability of tenderness when kneeling is a significant aspect of these injuries also. We consider that the correct measure of damages for the lacerations to the knees is £9,000.

[21] As we have already observed, the most significant injury suffered by the plaintiff is to her mental state. When she was examined by Dr Michael Curran, a consultant psychiatrist, in June 2001, she was found to be suffering from a post traumatic stress disorder. He considered that she was in need of psychiatric help. In February 2003 Dr Curran predicted that Mrs Wilson would have to continue taking anti depressant medication for at least another twelve months. In March 2004, Dr Fleming, the consultant psychiatrist who examined her on behalf of the appellants, diagnosed "a moderate depressive disorder [with] typical features of persisting grief". In December 2006 Dr Fleming reported that the plaintiff was "much as I had found her two and a half years ago". She continued to be prescribed anti depressants. His conclusion was expressed in the following paragraph: -

> "There can be little doubt that this woman was significantly affected by this accident, but

> particularly by the death of her two-year-old son. Dr Curran has diagnosed post traumatic stress disorder and there are certainly features of post traumatic stress disorder with the distressing memories of the accident and dreams of it. Some travel anxiety was also mentioned to Dr Curran, which would not be surprising in a case such as this. However, the prominent symptoms of mood disturbance are those of depression arising out of the losses that this woman sustained, particularly the loss of her son, but also the marked changes in the home situation … This woman appears to have stoically risen to this challenge whilst dealing with her own dealing with her own persisting grief symptoms which continue up to the present. However, the more severe depressive symptoms subsequently gave way to chronic fluctuating lower grade mood disturbance, which is a dysthymic condition … There has been some modest improvement but it is unlikely that this woman will ever fully come to terms with the loss of her child and the other changes in family life …"

[22] Dr Fleming had earlier in his report defined dysthymia as "a chronic depression of mood which does not fulfil the criteria for a depressive illness". Although not as severe as a depressive illness such a condition causes those who suffer from it to feel tired and depressed for much of the time with impairment of sleep. In the plaintiff's case, this will continue throughout her life with, at most, some slight amelioration. Her case therefore falls to be evaluated on the basis that for the rest of her existence she will never again experience the normal level of happiness and contentment that her pre morbid condition would have indicated. This is truly a forbidding prospect.

[23] The guidelines deal separately with psychiatric damage generally and post traumatic stress disorder but, as this case illustrates, often there will be an overlapping between the latter condition and a general psychiatric condition into which category we consider that dysthymia falls. A number of general factors by which the seriousness of either condition is to be judged are adumbrated in the following passage from the latest edition: -

> "The factors to be taken into account in valuing claims for psychiatric damage include the following:

(i) Ability to cope with life and particularly work;
(ii) Effect on relationships with family etc;
(iii) Extent to which treatment would be successful;
(iv) Future vulnerability;
(v) Prognosis;
(vi) The extent and/or nature of any associated physical injuries;
(vii) Whether medical help has been sought."

[24] In relation to her condition of dysthymia, Mrs Wilson scores adversely in most of these factors. Treatment is unlikely to be successful, she is vulnerable to the effects of the condition in the future, the prognosis for significant recovery is negligible, she has suffered extensive physical injuries and she has sought and received medical help. Mrs Wilson has also experienced significant family problems but these appear to stem largely from her husband's reaction to the loss of their son and the injuries to members of his family. Her own condition cannot have helped this situation, however.

[25] The guidelines suggest that the number of these factors that are present should guide the categorisation of the level of severity of psychiatric damage as follows: -

"*(a) Severe Psychiatric Damage*

In these cases the injured person will have marked problems with respect to the factors (i) to (iv) above and the prognosis will be very poor.

(b) Moderately Severe Psychiatric Damage

In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be more optimistic than in (a) above.

(c) Moderate Psychiatric Damage

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

(d) Minor Psychiatric Damage

> The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep are affected.
>
> Considerations as to the level of the award will include the length of the period of disability and the extent to which daily activities were affected."

[26] The plaintiff's condition cannot be easily located in any of the categories that have been identified but it appears to us that it should be regarded as warranting inclusion in the second category at least. The range of awards for this category suggested by the guidelines is £36,000 to £80,000.

[27] In the section dealing with post traumatic stress disorder, the guidelines suggest the following approach: -

> "An increasingly large number of cases deal with a specific reactive psychiatric disorder in which characteristic symptoms are displayed following a psychologically distressing event outside the range of human experience which would be markedly distressing to almost everyone. Such symptoms would affect the basic functions such as breathing, pulse rate and bowel and/or bladder control. They would also involve persistent re-living of the relevant event, difficulty in controlling temper, in concentrating and in sleeping, and exaggerated startled response.
>
> *(a) Severe*
>
> Such cases will involve permanent effects which prevent the injured party from working at all or at least from functioning at anything approaching the pre-trauma level. All aspects of the life of the injured person will be badly affected.
>
> *(b) Moderately Severe*
>
> This category is distinct from (a) above because of the better prognosis where some recovery with professional help is anticipated. However, the effects are still likely to cause significant disability for the foreseeable future.

(c) Moderate

In these cases the injured person will have largely recovered and any continuing effects will not be grossly disabling.

(d) Minor

In these cases a virtually full recovery will have been made within one to two years and only minor systems will persist over any longer period."

[28] It appears to us that the grouping which most closely fits the plaintiff's situation is the moderate category. The range of damages suggested for this category is £9,000 to £36,000. We consider that this case comes within this category because Mrs Wilson's post traumatic stress disorder has largely recovered according to Dr Fleming and any symptoms attributable to that condition (as opposed to her dysthymia) could not be described as 'grossly disabling'.

[29] It would not be appropriate to award compensation for each of the conditions of post traumatic stress disorder and dysthymia and aggregate these sums to arrive at a global figure for the plaintiff's psychiatric damage because some at least of the symptoms that she suffered from were common to both. Nevertheless, we have concluded that substantial compensation must be awarded for the all pervasive and permanent effect that these conditions have had on Mrs Wilson's life. Mr Ringland suggested that a sum of £50,000 was appropriate for this aspect of her injuries but we consider that compensation of an altogether different order is required. Our view is that general damages of between £75,000 and £90,000 are in the proper range for the psychiatric condition.

[30] In cases involving a multiplicity of injuries each of which calls for individual evaluation it is well established that one should check the correctness of the aggregate sum (which is produced when one adds together the amounts for all of them) by considering the figure on a global or general basis. Essentially, this involves an intuitive assessment of the suitability of the sum produced to compensate the overall condition of the plaintiff. Having carried out this exercise, we have concluded that the award made by Treacy J was entirely proper. The appeal is dismissed. Interest on the sum of £150,000 at the rate of 2% per annum will be payable from the date of the issue of proceedings until the date of payment of the principal sum.