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23390/2014

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ROSEMARY (ROSIE) SANDS

Plaintiff

and

STEPHEN HAMILTON

Defendant

_____

COLTON J

Introduction

[1] On 9 July 2012 the plaintiff in this action, Rosie Sands, who was born on 9 August 1986, had much to be thankful for and much to anticipate. She was on the cusp of entering her final year at Bath Spa University where she was reading Education studies and Religion with the expectation that she would obtain a first class honours degree. At University she had met another student from Northern Ireland with whom she had formed a strong relationship. She had come to visit and stay with his family in Northern Ireland. She was an accomplished, enthusiastic sailor who had just recently competed in the World Championships and was preparing for the British Championships which had the added attraction of being held in her home town of Exmouth where she initially developed her love of sailing.

[2] Her life was about to change irrevocably. On that fateful day she had travelled with her boyfriend, his mother and her boyfriend's niece to the airport to pick up another university friend from England who was coming over to stay for a visit. Tragically, on the return journey the car in which she was a passenger was involved in a high speed, head-on collision with an oncoming jeep and a trailer, as a result of which she sustained serious personal injuries, as did the other travellers in the vehicle. Most tragically of all her close friend who was sitting beside her, and who came to rest on top of her after the accident, was fatally injured and died at the scene. The plaintiff herself remained in the car awaiting the arrival of the emergency

services before she could be released knowing that her friend was dead and that the other travellers in the car were also seriously injured. She was brought by ambulance to the Accident and Emergency Department at the Antrim Area Hospital where she received treatment for her injuries.

[3] The driver of the oncoming vehicle has admitted liability for the accident and the issue for this court is to determine the compensation to which the plaintiff is entitled. She seeks general damages for personal injuries, pain, suffering and loss of amenity. She further claims damages for loss of earnings past and present and for the cost of care and treatment, again past and present.

General Damages for Personal Injuries

[4] A summary of the injuries sustained by the plaintiff is well set out in the Report from Mr M C R Whiteside MD FRCS, Consultant Surgeon, at Antrim Area Hospital. In his report of 8 January 2013 he reports that:

> "She was brought to Accident and Emergency at Antrim Area Hospital where she complained of neck, back and abdominal pain. A CT scan of her chest, abdomen and pelvis was performed as an emergency. This indicated a small area of pulmonary contusion on the left side, compression fracture of the eleventh thoracic vertebrae with a 25% loss of height and a significant amount of free fluid in the abdomen consistent with bleeding.
>
> She was taken to theatre for an emergency laparotomy and was found to have a tear in the small bowel mesentery which was the source of bleeding and resulted in a small section of bowel infarction. 29 cms of small bowel was resected, this was bruised and haemorrhagic in the mesentery and bowel. The mid part of the bowel showed acute ischaemic necrosis of the mucosa and the small bowel was re-joined. Approximately two litres of free blood was present in the peritoneal cavity and a small minor tear to the right colon was also repaired.
>
> She was admitted following her operation for a period of 11 days until discharge on 20 July 2012. In that time she was initially kept on strict bed rest in view of the thoracic spine fracture. Following an MRI scan and review by the fracture service she was allowed to mobilise and arrangement was made to fit her with a plaster jacket which she needed to wear for four months."

[5] At that time some 6 months post-accident she reported to Mr Whiteside that:

> "She still has regular weekly physiotherapy in view of ongoing pain in her neck and back and ongoing left shoulder pain. Prior to the injury she had a cervical rib diagnosed and the injuries seemed to exacerbate symptoms from that and she was referred for a vascular opinion at the time of the injury regarding that. She had abdominal pain ongoing for about 3 months which is now settling but she still feels her abdominal wall is significantly weakened. She can mobilise but gets painful and tired after a short while but can work normally. She has returned to University. She finds it painful to sit for any period. These symptoms are gradually improving although initial progress is now slowing."

[6] Mr Whiteside also took the opportunity to examine the plaintiff's abdomen and reports on the scar arising from the emergency laparotomy. It was 21 cms in length and 1 cm wide at its maximum point. Although it was well healed it was proud and red with evidence of keloid formation.

[7] The plaintiff was subsequently examined by a series of physicians who specialise in the treatment and assessment of the individual injuries sustained by her. In the course of the hearing I received a series of medical reports which were admitted in evidence without the necessity of formal proof. The relevant reports are as follows:

MCR Whiteside FRCS (General Surgeon)	08/01/2013
Roy Millar FRCS (Plastic Surgeon)	08/01/2013
E A Cooke FRCS (Orthopaedic Surgeon)	08/01/2016
Neill Thompson FRCS (Orthopaedic Surgeon)	10/01/2013
W I Garstin FRCS (General Surgeon)	11/01/2013
Neill Thompson FRCS (Orthopaedic Surgeon)	04/03/2014

E A Cooke FRCRS (Orthopaedic Surgeon)	05/03/2014
R Stephen Cooke FRCS (Neurosurgeon)	05/03/2014
Dr Anne McDonnell FRCP (Psychiatrist)	05/03/2014
W I Garstin FRCS (General Surgeon)	06/03/2014
Jeremy Tate FRCS (General Surgeon)	27/03/2014
Dr Matthew Laugharn FRCR (Radiologist)	30/04/2014
Jeremy Tate FRCS (General Surgeon)	15/05/2014
Hedley Saunders BDS (Dental Surgeon)	24/10/2014
Dr Gregor Stenhouse FRCR (Radiologist)	22/12/2014
Jeremy Tate FRCS (General Surgeon)	29/01/2015
W I Garstin FRCS (General Surgeon)	24/03/2015
E A Cooke FRCS (Orthopaedic Surgeon)	19/05/2015
Dr Elias Ragi FRCR (Neurophysiologist)	13/06/2015
E A Cooke FRCS (Orthopaedic Surgeon)	13/07/2015
John Thompson FRCS (Vascular Surgeon)	28/07/2015

[8] Before I refer to any of the contents of these reports, which I have read carefully, I make the observation that this case is a perfect example of the importance of oral evidence and argument in the assessment of damages. It was only after hearing the evidence of the plaintiff, both during examination in chief and on her cross-examination, that a true and full picture emerges of the impact this accident and the personal injuries she sustained have had on her life. The medical reports, often prepared after short consultations, set out the nature of the plaintiff's injuries, the treatment she received and their potential future impact. The medical evidence is not in dispute. Her evidence in this trial provided colour and context to the canvass of the text of the reports. This was augmented by the skilful and measured presentation of Mr Frank O'Donohue QC who appeared with Mr Joseph McEvoy for the plaintiff.

[9] I listened to the plaintiff whilst she gave evidence over two days. Unsurprisingly, she found the experience at times upsetting and distressful. I hope it is of consolation to her that I formed a very favourable opinion of her. As I indicated to Mr Cartmill, who appeared for the defendant, as he approached the end of his cross-examination, the more I heard the plaintiff the more I came to the view that she was an honest, understated, stoical and admirable individual. As a result of her evidence and the answers she gave, in conjunction with the expert medical reports in the case I came to the view that this accident has had a life changing impact on her.

[10] I shall now discuss the individual injuries she sustained.

Fracture of T11

[11] Mr Cooke, Consultant Orthopaedic Surgeon, who has examined the plaintiff for medico-legal purposes on two occasions and who has provided some supplementary comments confirms that the plaintiff sustained a superior end plate fracture of T11 with a loss of 25-30% of vertebral body height anteriorly. He confirms her 11 day stay in hospital and the fact that she was given a neofract jacket to wear on her spine following her discharge. When he saw her on 8 January 2013 she complained of pain in the lower thoracic area of her back particularly when sitting, bending or walking and this interfered with her university studies. He described limitation of movement of her back in the mornings and on examination he found her tender around the lumbar region of her back. When asked to flex forward she could reach her fingertips at just below knee level with this movement causing low back pain. At that time he felt there should be gradual improvement in her back pain but that she may have some low level back pain with activities in the future although this should not prevent the majority of activities. On 5 March 2014 some 1 year 8 months post-accident he noted that the plaintiff indicated that her back pain worsened around August 2013 with difficulty in driving, sitting or standing. He reported that the plaintiff had attended physiotherapy weekly at BMI Clinic, Bath, including hydrotherapy. On examination he found slight prominence of the spinous process around T11 and when asked to flex forward the plaintiff

could reach her fingertips to approximately a third of the way between knees and ankles with all back movements causing pain. In view of the level of persisting back pain he recommended obtaining a current MRI scan of her thoraco lumbar spine. On 13 July 2015 he provides a commentary on an MRI scan of the plaintiff's whole spine performed on 22 December 2014 by Dr Stenhouse, Consultant Radiologist, the scan of the thoracic spine revealed a mild superior end plate compression of T11 vertebrae body with end plate irregularity and with approximately 20-30% loss of vertebral body height. He found no evidence of any significant disc or marrow signal changes at this level. He accepted that in a small number of cases symptoms following this type of injury may follow a significantly protracted course. He advised it is more usual that symptoms would ease over a period of approximately 18 months from time of accident with some low level back pain persisting in the longer term as a result of such an injury.

[12] In her evidence she told me that the pain in her back was really bad when she was in the hospital. She was completely immobile for maybe 4 to 5 days. Thereafter, she worked on her mobility so that she could be released from hospital. She attended at the Royal Victoria Hospital for the fitting of a neofract jacket. At that stage she could stand for about 20 minutes before she needed a rest. On her release from hospital she continued to wear the jacket. She remembers specifically wearing it at a carol service shortly before Christmas that year. Between her release from hospital to that time she had slowly "weened" herself off the use of the jacket. After her release from hospital she was looked after by her boyfriend's family before returning to university in September. It was very painful throughout her time in Northern Ireland. Her back symptoms improved for a while but as she returned to more activities she found that she suffered from pain regularly. This comes on if she sits for long periods of time or stands for long periods of time. Lifting heavy weights can cause symptoms. She indicated that it was quite painful during the course of the court hearing, probably because she had been sitting down for long periods of time. She takes paracetamol regularly for the pain. She has been receiving physiotherapy on a regular basis. She also received hydrotherapy, acupuncture and the use of a tens machine. Since December 2012 the insurance company for the defendant have been paying for weekly physiotherapy sessions. These sessions were stopped shortly before the commencement of this trial. She would very much like to continue with physiotherapy once per week. She indicated that she finds physiotherapy very beneficial in terms of strengthening exercises for her neck, shoulder and back and that she notices pain in her back if she misses her physiotherapy. In order to keep fit she swims 3 times per week which she finds helps her symptoms.

[13] In terms of her injuries when she was being looked after by her boyfriend's family in Belfast she required help for most physical activities such as dressing or showering. When she returned to university she needed help from her housemates. She spent much of the time confined to her student house. She needed help to be able to sit up in the morning. After the neofract jacket was recovered she did not require any aid in this respect. Nonetheless, she was clear in her evidence that she

continued to have difficulties with tasks such as vacuuming, ironing and the changing of bed clothes. She indicated that she would still have difficulties with these tasks and indeed has benefited from a cleaner for 2 hours per week, which again was paid for by the defendant's insurers until shortly before this trial. Her back pain also contributed to her inability to drive for almost a year. Even now she finds driving for any distance difficult although also she recognises that there is a psychiatric element to her reluctance in relation to driving. Of particular relevance to her back symptoms is the fact that this interferes with her ability to assist her now boyfriend in relation to a business they have since started to which I will refer later. In essence the business concerns the provision of food at county fairs throughout England. She finds it difficult to participate in any of the physical activity involved in this business.

[14] Furthermore, her back injury has contributed to her inability to resume her previous sailing activities which were at a very high competitive level, more of which later.

[15] She also expressed concern that her back injury may have interfered with or set back her plans for childbirth. She worries about how the injury might come against her in the future.

[16] All in all in relation to the back injury it is clear that she has suffered a significant trauma to her back. I accept that her symptoms are ongoing and significant. I agree with her assessment that she would benefit from ongoing physiotherapy and assistance with cleaning.

Abdominal Injury

[17] As is clear from Mr Whiteside's report the plaintiff suffered significant trauma to the abdomen as a result of the restraining effect of her seatbelt at the time of the accident. In hospital she was brought to the operating theatre and had an emergency laparotomy performed. This revealed intra-abdominal bleeding secondary to a tear in the mesentery of the bowel. This necessitated small bowel resection with primary anastomosis of the bowel. There was also a tear in her ascending colon which was repaired.

[18] When seen by Mr Garstin, Consultant Surgeon, on 11 January 2013, 6 months post-accident, he records that following her discharge from hospital the plaintiff remained very constipated and had abdominal bloating and pain. She found it very difficult to move for several weeks or sit up because of the pain in her abdomen. The wounds in her abdomen healed but she has been left with a significant scar. Initially, she found it difficult to eat and only took soup for a period of 6 weeks. Her abdominal complaints had improved at that stage but she was still aware of abdominal discomfort and weakness in her abdominal wall but felt this was generally improving. When he examined her he noted the scar which was still red. He also noted that she was reluctant to sit up because of discomfort and that she had

generalised discomfort over her abdomen. His opinion was that the injuries were consistent with a significant degree of trauma. It was his opinion that she should make a full recovery from her abdominal complaints but indicated that she was at increased risk of obstructive complications throughout her life due to adhesions. He anticipated that the ongoing pain in her abdominal wall should resolve over a further period of 6-12 months, ie a period of 12-18 months post-accident. Mr Garstin saw the plaintiff again on 6 March 2014 some 20 months post-accident.

[19] In the meantime she had been seen by a Mr J Tate, Consultant Surgeon, in Bath. Mr Tate had noted that in the last few months the plaintiff had several episodes of upper abdominal colic pain which came on suddenly and could last for several days. In general he felt that her abdomen felt more uncomfortable than it did 6 months ago, particularly if she was standing for long periods of time. Like Mr Garstin he states that following this type of surgery the majority of patients would make a full long-term recovery with no long-term consequences. Again, as indicated in Mr Garstin's initial report, he advised that such surgery can produce adhesions and that it was possible the plaintiff had some transient symptoms of intestinal obstruction secondary to adhesions. He thought it was difficult to put a clear timescale on when she would be fully recovered and felt that a further investigation such as MRI enterogram would be a potential method of investigation. When Mr Garstin examined the plaintiff she continued to describe a weakness in her abdomen with difficulty sitting up. She did agree that this was gradually improving but that she continued to suffer from an ache in her periumbilical and epigastric region with the symptoms occurring on average once per month, although on occasions they could be more frequent occurring up to 3-4 times per week. He too felt that further investigations were indicated and particularly felt that an upper GI endoscopy would be beneficial. He did put forward a number of potential causes related to the accident.

[20] The plaintiff continued to see Mr Tate in Bath and an MRI of the small bowel performed on 30 April 2014 did not reveal evidence of any bowel obstruction. Mr Tate provided a final report on 29 January 2015 which confirmed that the plaintiff suffered from ongoing attacks of abdominal colic which are unpredictable. He describes her situation as static. His view was that the diagnosis would be difficult to prove but felt that an intrusive process such as a laparotomy might not show a definite diagnosis. The plaintiff indicated that the interference with the quality of her life was manageable and that a conservative approach to treatment would be adopted. Mr Garstin comments on Mr Tate's opinions with whom he agrees entirely. His view was that the investigations carried out to date ruled out any significant anastomotic stenosis or underlying adhesive obstruction disease. He did agree that her symptoms may continue in the longer term. His view was that recovery from such serious injuries can be prolonged, however the usual trend is one of improvement which may take many years.

[21] This history was confirmed in her evidence in chief and she also indicated that some abdominal weakness was a contributing factor to her inability to

contribute fully in the physical aspects of the business with her partner. It has also contributed to her inability to sail competitively and at her previous level. When she was asked about the medical findings in cross-examination the way she explained it was that Mr Tate advised that keyhole surgery would be necessary to further refine any diagnosis. She felt that this would not be advisable as it may result in further adhesions and pains in the future. She felt that she could cope with her symptoms.

[22] Most of the medical experts have commented on the scar on her abdomen. Specifically Mr R Millar FRCS, Consultant Plastic Surgeon, examined the plaintiff on 8 January 2013 and provided a report on his findings. He also prepared a diagram and photograph of the scarring. The scar is vertical, skirting the right side of the umbilicus and measures 21.5cm in length and is up to 1cm in width. When examined by him the scar was purple in colour and slightly thickened particularly in the upper part. He describes the scar as prominent and conspicuous. His view was that even after maximum resolution the scar will remain obvious and he confirmed that revisional surgery would not be of benefit. In her evidence the plaintiff confirmed that she did not like the scar and was conscious of it when swimming for example. She also indicated that it did interfere with her choice of clothing.

[23] The most recent photograph of the scar is attached to the report of Dr Keegan who examined the plaintiff on behalf of the defendant on 11 June 2015. The photograph reveals an extensive scar in accordance with the one described by Mr Millar. Dr Keegan describes "a very major abdominal scar which was somewhat thickened". I would agree with his assessment of the scar as being one of "significant cosmetic defect".

[24] Whilst not directly related to the abdominal injury Mr Millar also noted that the plaintiff has been left with some scarring on the top of her right shoulder and at the side of her right hip. These presumably were caused by the seat belt. The marks on the side of her right hip are described as "two faint, pale pink superficial marks" and the scar at the top of her right shoulder is described as a "pale flat scar measuring 1.9cm".

Shoulder Injury

[25] The plaintiff complains that she has suffered from ongoing symptoms in her left shoulder since the accident. This has proven to be a difficult issue to assess and was the subject matter of significant controversy in the course of the trial. It will be recalled that in the initial summary of the injuries provided by Mr Whiteside, Consultant Surgeon, it is recorded that the plaintiff was complaining of ongoing left shoulder pain. The plaintiff told Mr Whiteside that prior to the injury she had a cervical rib diagnosed and the injury seemed to exacerbate symptoms from that and she "was referred for a vascular opinion at the time of the injury regarding that". The Orthopaedic Surgeon, Mr Cooke, engaged by the plaintiff also records shoulder complaints with the restriction of movement and a description of the left shoulder as "being quite painful" when examined on 8 January 2013. Associated with this injury

the plaintiff complained about her left arm and hand being shaky and clumsy. On examination he did find a loss of 10% of abduction of the left shoulder. Because of ongoing symptoms her GP in England referred her for treatment with a potential diagnosis of rotator cuff syndrome. Mr Cooke indicated that any diagnosis of the shoulder injury would depend on the results available from such treatment. In relation to this injury the plaintiff then engaged Mr Neill Thompson, Consultant Orthopaedic and Shoulder Surgeon. He examined the plaintiff on 10 January 2013 and he records similar complaints of intermittent pain in the left shoulder which was improving. He also recorded the feeling of clumsiness and shakiness in her left hand. He was sceptical about the diagnosis of rotator cuff tear and he suggested a report from a vascular surgeon would be appropriate particularly having regard to the previous diagnosis of thoracic outlet syndrome (which the plaintiff describes as a cervical rib). He refrained from making any definitive comment pending further investigations in a subsequent report dated 4 March 2014 he confirmed his view that the plaintiff had not suffered a rotator cuff injury. He felt the symptoms related to a straining injury to the left trapezial area and felt there was a possibility that her pain would persist into the future. He did not anticipate any deteriorating symptoms.

[26] The plaintiff's advisers subsequently obtained (in accordance with Mr Thompson's initial advises) a report from a vascular surgeon based in England namely Mr John F Thompson MS FRCSEd FRCS. He has had the benefit of treating the plaintiff in the past and is familiar with her medical history. He provided a report on 28 July 2015 which seems to me to be the definitive medical report in respect of the shoulder complaints. He records her complaints which are consistent with those given to Mr Thompson and Mr Cooke. He felt that as a result of those symptoms the plaintiff had adapted her activities of daily living but described her as "moderately disabled" by the pain and weakness. He confirms that in the past the plaintiff was diagnosed with cervical ribs and arterial and neurological thoracic outlet syndrome. Indeed, Mr Thompson saw the plaintiff in November 2004 because of a problem in her left arm. At that time he recorded the fact that the plaintiff was a very active young lady who was keen on pursuing a career sailing, kayaking and teaching outdoor sports. In view of that career intention he regarded the plaintiff's complaint as "a highly significant disability". He said at that time there was clear evidence of thoracic outlet syndrome. He asked her to consider at that stage whether she felt surgery would be justified. Instead the plaintiff was referred for physiotherapy and Mr Thompson indicates that physiotherapy as being "successful". She was referred again in July 2010 with identical symptoms and once again was referred for physiotherapy which obviated the need for surgery. Mr Thompson reviewed the medical notes and records post-accident and also a neurophysiology assessment performed on 13 June 2015. His opinion is essential in assessing the injuries sustained to the left shoulder as a result of this road traffic accident. He has confirmed that prior to the accident the plaintiff was a fit and active high performing sports woman who has cervical ribs. The condition from which she suffers has been diagnosed as neurological thoracic outlet syndrome and arterial thoracic outlet syndrome. He indicates that in the past she had used physiotherapy, postural control and exercise to keep her symptoms at bay. It was

his opinion that the severe impact of the road traffic accident resulted in a flaying forward type injury of the left shoulder with wrenching of the brachial plexus as a whole. Whilst her neck complaints have recovered it is his opinion that unfortunately and despite assiduous physiotherapy she is still suffering from persistent neurological thoracic outlet syndrome as a result of the trauma of the accident. He expressly states that the plaintiff is genuine and indicates that there is no basis for disputing her symptoms.

[27] Under the circumstances he recommended a decompression procedure known as supraclavicular scalenectomy and excision of the cervical rib and band with release of the brachial plexus. He states that in his personal 25 year experience of this procedure he would predict a 80-85% chance of complete resolution of her symptoms and a return to full functional activity in the shoulder. He indicated that recurrent thoracic outlet syndrome due to scar tissue formation is always present within 6 months of surgery and so a final and confident long term prognosis could be made at that time.

[28] All of this is consistent with the evidence the plaintiff gave in the course of this trial. In her evidence in chief she indicated that prior to the accident she had a shoulder problem but that "it did not affect me that much". She indicated that she first became aware of this problem at secondary school when she was engaged in cross-country running during which time she noticed severe pain on the inside of her left shoulder towards the back of the shoulder. She confirmed that at that time she saw a specialist/surgeon (who turns out to be Mr Thompson) she was told that she had an extra rib but she gave evidence that she had physiotherapy and it did not stop her from doing anything. She indicated that the problem recurred and she got it checked out again at which stage she was referred for further physiotherapy. She confirmed that the physiotherapy involved manipulation and movement exercises and whilst she had symptoms for a while it had stopped causing her a problem and it was "not something that was holding me back". She said "it did not curtail my activities".

[29] In accordance with what she has told the doctors she indicated that since the accident she has suffered from ongoing problems in her left shoulder which were significantly worse than experienced prior to the accident. She has worked hard at rehabilitating the shoulder through physiotherapy and she has retained good movement but still has ongoing symptoms. She is particularly concerned about shaking in her left arm and hand and paresthesia in her left hand. This is particularly so because the left hand is her dominant hand and can affect such simple activities as writing, using knives whilst eating and she can be clumsy when carrying items such as cups of hot coffee or tea. The shoulder injury is another factor in her inability to return to her level of sailing and other water sports. The injury was particularly debilitating in the post-accident period and contributed to her requirement for assistance and care whilst in Belfast and also when she returned to university. She is aware of Mr Thompson's view that an operation could be of benefit but she gave evidence that she was wary about undergoing such an

operation and at this stage would prefer to concentrate on improving it through getting stronger as she had done in the past.

[30] It was a general theme of defence cross-examination in this case that the plaintiff had exaggerated the extent of her injuries and specifically lied about and deliberately misrepresented the extent of her pre-existing injuries. This was particularly so with relation to the shoulder injury. In particular the plaintiff was taken through her medical notes and records in minute detail to attempt to make good this assertion against her. In particular Mr Cartmill focused on attendances with Mr Thompson commencing in November 2004 to March 2005. These attendances are of course referred to in the expert medical evidence from Mr Thompson. The November 2004 attendance refers to her history of pain in her left arm. Notwithstanding that history Mr Thompson records that the plaintiff was a "quiet though very active young lady who is keen on pursuing a career sailing, kayaking and teaching outdoor sports". It was his opinion that this was a highly significant disability considering her career intention. He describes her as being otherwise fit and well. He recommended a scan and indicated that she might have a careful think as to whether surgery in the future would be justified. A scan in March 2005 confirmed the thoracic outlet syndrome and in particular Mr Thompson recorded that "the rather serious problem is that she finds it difficult to right a dingy and get back into the boat when she capsizes". He also confirmed that he had referred her for physiotherapy but his view was that "quite honestly I think she is heading for surgery in the long run".

[31] When asked about this the plaintiff indicated that in or around this time she had moved up a grade and was using a high performance racing boat and she did have an initial problem righting the dingy. When she was pressed further she indicated that her mother was naturally concerned about this and thought it prudent that she be referred for expert opinion. I was impressed by her answers to the questions put to her when cross examined about these entries. Her evidence was very straightforward. She said she did not want to have surgery. She worked hard at her physiotherapy and overcame the problem. She got better at sailing the boat. She said "I got stronger and overcame it". "I never needed it" (the surgery). She was pressed further about her subsequent attendance in July 2010 where Mr Thompson noted that he remembered the plaintiff well. He records that she had had a good result following physiotherapy and he hoped that again physiotherapy would deal with any symptoms she would have and that the senior physiotherapist "will be able to keep her out of my surgical clutches". Happily, this proved to be the case as the plaintiff again responded well to physiotherapy. She was quite emotional when pressed on this matter and pointed out that her shoulder difficulty did not hold her back. She said:

> "I worked with marines – it was hard physical work – it did not hold me back – I wanted an outdoor career – I excelled at it – I decided I would work at the physio and get better – I did the same when I was 12 years of age

after the cross-country running problems – the physio had a positive effect – my shoulder complaint did not hold me back."

[32] These are not mere words from the plaintiff. The facts of the matter are that notwithstanding this complaint she did indeed avoid the clutches of the surgeon and physiotherapy was successful. This is evidenced by the fact that in the weeks before she actually was involved in this road traffic accident she had competed in the world championships for her particular fleet. She was in the course of preparing for the national championships and indeed was unable to do so because of the accident. This was a particular disappointment to her because they were being hosted in her home town. She had been planning this for a couple of years and indeed her own crew used her boat without her. In my view the way the plaintiff dealt with this enhanced her credibility. Her previous condition had been disclosed to the medical experts who had examined her for medico-legal purposes. She dealt with this in her own quiet and understated way when she gave her evidence in chief. When cross-examined she passionately set out her interpretation of her history to the effect that she had a congenital condition, that she dealt with this by way of physiotherapy to the extent that she was able to continue to participate in strenuous outdoor activities and compete at a very high level in a physically demanding sport. None of this, in my view, was inconsistent with the medical notes and records. Specifically, I consider that the defendant has not made good the assertion that the plaintiff lied to me and deliberately sought to misrepresent the extent of her previous condition.

[33] In accordance with the opinion of Mr Thompson I am of the view that this significant road traffic accident has caused the shoulder symptoms about which she complains. I accept that those symptoms have had a significant effect on her since the accident but that she is doing her best to improve them by way of physiotherapy. Nonetheless, I cannot and do not ignore the fact that she did have a pre-existing condition. Notwithstanding the success of previous physiotherapy it was the view of Mr Thompson that in the long term surgery could well be needed for this condition. Clearly therefore there is an element of exacerbation of a pre-existing condition and I take this into account when assessing the appropriate level of damages for this injury.

Psychiatric Injury

[34] It is unsurprising that the plaintiff suffered a psychiatric injury as a result of this horrific road traffic accident. The medical notes and records from the Antrim Area Hospital confirm that in the course of her in-patient stay she was seen by a Psychiatrist post-operatively for assessment. His note indicated that she suffered from flashbacks and nightmares related to the accident and had understandable depression and anxiety when thinking about the events. The Psychiatrist noted her positive attitude and the fact that she had good support from her family. I had the benefit of a report from Dr Anne McDonnell MRC Psych, Consultant Psychiatrist who examined the plaintiff on 5 March 2014 some one year and 8 months

post-accident. The true horror of the accident is evident from the account given by the plaintiff to Dr McDonnell which is recorded as follows:

> "She realised very quickly that she was injured. She was covered in blood and she was aware that her friend beside her was bleeding profusely and immediately suspected that she was fatally injured. Her concern was for Bethany, her partner's niece who was in the car seat as she wanted to prevent her from seeing what had happened. She recalls her boyfriend Paul in the front turning to see what had happened and panicking at the sight of Michelle. She herself was also concerned that lights had been broken with loose wires visible. This combined with what she now knows to be the smell of activated airbags, led her to worry that the vehicle may go on fire and they would all be killed. She was unable to move in the car and she recalls then also the driver of the other vehicle coming to the passenger and the horror of his face when he saw the injuries to the passengers.
>
> When emergency services came, initially they attended to Michelle whom as she was aware was fatally injured and died at the scene. She recalls the Fire Brigade attended and she was taken out of the car and put into an ambulance on a stretcher. …
>
> During the journey to the hospital she felt that she was going to die and she strongly suspected her injuries to be life-threatening. It was quite a number of weeks before she felt confident that she would recover and her life not to be threatened.
>
> She recalls going to the hospital and receiving blood and being brought to theatre. She recalls thinking it was most likely that she would not return from theatre alive such was the evident stress of those around her."

[35] She told Dr McDonnell that she suffered from flashbacks and difficulty sleeping due to seeing and reliving the accident nearly every day for the first 6 months. In particular she described the flashback experience of seeing the face of the other driver coming to the car. She also recalled the smells, sound and the vision of Michelle's injuries at the scene of the accident. These had gradually reduced. She also described extreme anxiety symptoms and panic attacks. She developed travel anxiety which also transferred to travelling in trains and aeroplanes. She described her mood in the initial aftermath of the accident as being low. Contrary to medical advice she did return to university to try to re-engage with her previous activities.

During this time she relied heavily on her housemates and her boyfriend to look after her. A combination of her physical disability and her inability to concentrate saw a deterioration in her performance and she obtained a 2-1 degree rather than the first class honours which had been expected of her. She described how her mood became low and she became more withdrawn and irritable. This impacted on her relationship with her boyfriend and they broke up about 9 months after the accident. Her analysis was that they dealt quite differently with the emotional impact of the accident. In particular he wanted to talk about it whereas she did not. As a result of concern from her family she did attend for counselling but did not feel it was particularly beneficial.

[36] She indicated that she was prone to tearfulness particularly in the early stages of her recovery. She remains more vulnerable to tears than previously. She described loss of confidence with friends and guilt at times around the death of Michelle. Michelle was not wearing her seatbelt and she felt that in some ways others blamed her that she had not advised her to do so. She was self-conscious about her scar. Her inability to return to sailing and in particular competitive sailing had a major impact on her as her own sense of identity was very much associated with her sailing.

[37] In terms of past medical history she told Dr McDonnell she had attended a psychologist as a small child due to issues at school and that she also saw a counsellor for anxiety when she was about 17 for one session. Dr McDonnell was of the view that she was always somewhat vulnerable to anxiety. Dr McDonnell describes the plaintiff as a neat, tidy, well-presented lady who spoke at length about the impact of the accident and her reaction to it. She described the plaintiff as very fluent and insightful describing the impact on her emotionally and on her life. She indicated that she continued to have residual symptoms. In particular she still gets anxious at times, lacks confidence and has low self-esteem. She does suffer from occasional panic attacks.

[38] Dr McDonnell's diagnosis was one of Post Traumatic Stress Disorder with anxiety and depressive symptoms which was gradually resolving at the time of her examination. She indicated that much of her current residual symptoms arise from adjustment, physical health problems and the impact on her sporting life which was a significant part of her identity. She has developed coping strategies and felt that her psychological symptoms should continue to improve within a minimum timeframe of 2 years but most likely up to 3 years from the date of her examination. It was her anticipation that there should not be any long-lasting psychological symptoms arising directly from the index incident itself.

[39] As with her physical injuries the oral evidence of the plaintiff was important in assessing the nature of her psychological symptoms and the extent to which they continue. In her evidence in chief she confirmed the history given to Dr McDonnell but indicated that she still had residual symptoms. She confirmed that she wanted to deal with her psychological issues herself. She told me that she was not

enthusiastic about attending for counselling but did so essentially because her parents felt that it would be a good idea. She does not enjoy talking about the accident and preferred to deal with things herself. She wanted to get physically better first and this was her focus. She gave evidence that recently she saw an accident involving a van and a car and she was so upset that she collapsed on the pavement before being helped by a passer-by.

[40] In many respects the true extent of the plaintiff's continuing psychological symptoms only emerged in the course of cross-examination. As was the case in relation to her previous shoulder condition the defendant made the case that the plaintiff had been dishonest in her presentation to Dr Ann McDonnell, Consultant Psychiatrist and to a Cognitive Behavioural Therapist, Michelle Thatcher, relating to her pre-existing psychological history, in particular a history of panic attacks. In relation to Michelle Thatcher it will be recalled that the plaintiff indicated she went to her reluctantly and did not feel the need to engage with a therapist. She only went because of pressure from family and friends. In terms of the medico-legal report from Dr McDonnell it will be recalled that the plaintiff did disclose to her that she had attended a psychologist as a small child due to issues at school and that she also saw a counsellor for anxiety when she was about 17. The medical notes and records indicate that in fact this occurred between 17 November 2008 and 15 January 2009. Before the specific entries were put to her she did recall an incident when she was breathing too fast when younger. She had read on the internet that it might be a panic attack. She saw a counsellor who described it as simply "breathing too fast" and she was given breathing exercises to deal with the problem should it arise again. Thereafter she said that she was absolutely fine. She also recalled that the incident followed a food poisoning on holiday. In my view all of this was consistent with the medical notes and records which were put to the plaintiff. The record of 17 November 2008 from her GP is as follows:

> "Still intermittent abdo discomfort and food intol since d&v. Getting into anxiety spiral at night had couple of panic attacks. Refer asami."

The entry of 21 November 2008 is as follows:

> "Panic Disorder (Episodic Paroxysmal Anxiety …
>
> Referral to a Mental Health Team …
>
> Panic Disorder (Episodic Paroxysmal Anxiety)"

Then the final entry to which I was referred was on 15 January 2009 which states as follows:

> "Counselling – assessment … previously having panic symptoms however read up on internet and this has

> helped – no further panic. Occasional symptoms of hyperventilating? Showed breathing retraining exercise. No further apts wanted. No thoughts of harming self, discharging counselling".

[41] I do not consider that these notes and records demonstrate any misleading of the court or the expert medical witnesses in the case. Indeed as a result of the disclosure the plaintiff made to Dr McDonnell she was able to form the view that the plaintiff "has always been somewhat vulnerable to anxiety."

[42] As the plaintiff was pressed further about her psychiatric symptoms I formed the view that they remain a significant factor in her life. She told the court that as she has matured she is aware that her psychological problems have become more evident. She indicated that recent events have impacted upon her and she referred again to the crash that she had witnessed. This had caused a panic attack and she was unable to do anything for 2 days in the aftermath. She confirmed that when she saw the therapist in May 2014 she did not want to go there and couldn't commit or talk to her. She dealt with her problems by focussing on physical issues but as these have improved her psychological issues have become more prevalent. She indicated to Mr Cartmill that she would like to agree with his suggestion that she was over her psychiatric symptoms but this simply was not the case. She indicated that:

> "It has become harder – but that she would rather not talk about it."

She indicated that it is affecting her life on an ongoing basis. She became increasingly emotional as she was pressed on her psychiatric recovery. She indicated that she could refer to other recent examples which had brought the accident back to her but at this stage she became extremely upset and was unable to continue. I formed the view that this was a genuine emotional reaction to having to speak about the psychiatric effects of the accident.

[43] Overall I formed the view that the plaintiff suffered a significant psychiatric injury which is clear from the unchallenged evidence of Dr McDonnell who diagnosed a Post Traumatic Stress Disorder with anxiety and depressive symptoms which she anticipated would not resolve until 2-3 years post her examination which was in March 2014. It was clear from the plaintiff's evidence that she still suffers psychologically as a result of the accident.

[44] In assessing the extent of the psychiatric injury Mr Cartmill makes a number of valid points which should be taken into account in balancing and assessing the extent of that psychiatric injury. In particular he points to the fact that the plaintiff did successfully obtain her degree, albeit a disappointing 2-1 instead of the anticipated first. He points out that although her relationship with her boyfriend at the time has broken down she has gone on to form a new and apparently stable and supportive relationship. Whilst in her final year at university she met her current

boyfriend and in order to provide her with some focus she assisted him in entering a competition at university which involved the submission of a business plan to create a catering company which would provide high quality mobile hot food offering rare meat products at various festivals and events. The plan won the prize and indeed she had gone on with her now boyfriend to operate this business and although this has proven very challenging it now makes a modest profit to which I will refer later. She is someone who has a positive outlook on life and these issues demonstrate her ability to function at a reasonably high level.

Soft Tissue Injuries

[45] The plaintiff also suffered soft tissue injuries to her neck, right hip and shin. In relative terms they were nowhere near as serious as the injuries to which I have referred above but nonetheless it should be noted that when she was examined by Mr Cooke, Consultant Orthopaedic Surgeon, in January 2013 he found discoloration and tenderness over the right lateral iliac crest and also found generalised soft tissue swelling over the medial aspect of the right tibial border with decreased sensation to touch over this area. All of these injuries contributed to her disability in the aftermath of the accident although they do not feature prominently in her current symptoms. I do not propose to discuss them in any detail as there was no real disagreement between counsel on the appropriate value for these injuries.

Head Injury

[46] The plaintiff also suffered a mild concussion which is dealt with in the medical report from Mr Stephen Cooke, Consultant Neurosurgeon. It was his opinion that the plaintiff has suffered a mild concussive impact to the brain. Again, I do not propose to discuss these injuries in any detail as there was consensus between counsel as to the appropriate value of this aspect of her injury.

Damage to Teeth

[47] This injury was dealt with in a medical report from Hedley Saunders, who is a dentist practising in Exmouth. The report confirms a fracture of a lower left second molar, treated by the application of composite occlusal coverage to the left lower second molar to splint the fracture. This tooth has poor prognosis and may need root filling and a crown. It may need to be removed. She also suffered fractures of her right upper central incisor and lower left lateral incisor through enamel only. There is a risk of these teeth becoming non-vital in the future and requiring root filling and possibly crowns. Again, I do not propose to discuss these injuries in any detail as there was consensus between counsel as to the appropriate value of this injury.

Interference with Lifestyle/Loss of Amenity

[48] The plaintiff was born and brought up in the town of Exmouth in Devon. She is the eldest of two girls. Her mother works as a journalist and her father has an engineering business. It is clear from all the evidence I have considered that she enjoys strong supportive family relationships. She left school after completing her AS year because of the passionate interest she had developed in outdoor activities, particularly sailing. Much of this was due to her environment as Exmouth is an area with great association with sailing and also with the Royal Marines who have their training base at the perimeter of the town. Throughout her youth she had sailed competitively and had been a sea cadet for 4 years. In the course of the trial I was presented with a file setting out the many achievements of the plaintiff as a sailor. I was referred to a series of entries in local newspapers with photographs of the plaintiff reporting on her many successes in various sailing races between 2000 and 2009. Notwithstanding the obvious success she enjoyed Mr O'Donoghue QC had great difficulty in extracting from her the details of her achievements which is consistent with her quiet and understated manner. It was only when she was pressed on this matter in cross-examination that the full extent of her recent success and participation became clearer. She had stopped keeping a scrapbook after her teenage years but continued to excel in sailing. As I have indicated already she participated in the world championships immediately preceding the accident and was training for the nationals which were to be held in her home town. She had been winning with Silver Fleets and was progressing to gold standard. Although she did not expect to win at that level she hoped to do well. Unfortunately, the accident intervened and she was unable to participate in the nationals in Exmouth although her boat and crew did compete.

[49] Such was her passion for sailing and the outdoor life that she left school after AS level and obtained qualifications in outdoor education and sport. I was provided with a schedule of awards/qualifications and accreditations achieved by her. In July 2005 she obtained a national diploma in sport in outdoor education Level 3 BTEC. She obtained a RYA power boat instructor's certificate on 9 November 2007, a Level 2 NVQ in Sport, recreational and allied occupations activity leadership in September 2008, she obtained a RYA short range certificate on 12 April 2006 and a RYA senior dingy instruction short range certificate on 28 March 2010. During this time she had been a sea cadet for 4 years. She worked at the Commando Training Centre Royal Marines Water Activity Centre (WAC) Exmouth initially in a voluntary position for 6 months. She then engaged on a 3 year course through Bicton College which involved her attending the college for one week of term, the remaining time spent in full-time employment with a team at the WAC.

[50] She initially attempted to set up a sailing school in Exmouth but this ended in disappointment due to a personality clash with her business partner. At this stage she decided that she wanted to develop a career in the military in either the RAF or Navy. In order to enhance her prospects she decided to return to university and take a degree in Education and Religion which she felt would augment her

qualifications in outdoor education and sport. She was doing extremely well at her studies to the extent that it was expected she would obtain a first class honours degree. Unfortunately, because of her injuries and the effects they had on her return to university she did not achieve a first but a very high 2-1. Whilst the plaintiff does not point to any specific disadvantage as a result of not obtaining a first in my view this does represent a legitimate disappointment to her which is attributable to the accident. However, in terms of loss of amenity and lifestyle of much more significance is the fact that she can no longer sail competitively. She has returned to some recreational sailing with her boyfriend on a very limited basis but she cannot and will not be able to return to the level of sailing in which she participated pre-accident. She does not have the strength and manoeuvrability for high performance sailing. It is quite clear that sailing was a huge part of the plaintiff's life and as Dr McDonnell said a huge part of her identity. It clearly gave her huge satisfaction, self-confidence and enjoyment. I accept fully that her inability to continue sailing at her pre-accident level has been a devastating blow to her.

[51] In awarding compensation I bear in mind that to some extent general damages for the physical injuries she sustained do reflect interference with the plaintiff's lifestyle. However, clearly this is a case where the plaintiff is entitled to an award for a very specific and important loss of amenity.

[52] I would make a further comment about the attack on the plaintiff's credibility. I have already dealt with this in detail in relation to the shoulder injury and psychiatric injury. The plaintiff's credibility is of course important in terms of the overall assessment of damages in this case. I note that not a single doctor who examined the plaintiff for this action (and there were many) has made any adverse comment about the reliability of the plaintiff or about the way in which she co-operated with their examinations. The futile attack on her credibility was further demonstrated by two instances in the course of the trial. When she was being challenged about the extent of her care it was put to the plaintiff that she was able to shower whilst she was in hospital, with the inference being that she was more mobile than was being suggested. However, as she pointed out, she had to be wheeled in a chair into the shower with the assistance of two nurses. At the very end of the cross-examination two photographs which had been provided by Dr Keegan (although not included in his report) were shown to the plaintiff to suggest that she was significantly more mobile than she suggested. The first was not even a photograph of the plaintiff and the second showed her carrying a box of eggs to the van which she and her boyfriend used in the course of their business. The only effect of this line of cross-examination was to reinforce the plaintiff's credibility, in my view.

Assessment of Damages

[53] I now propose to turn to the level of damages that should be awarded in respect of each injury suffered by the plaintiff. In doing so I of course have regard to the Guidelines for the Assessment of General Damages in Personal Injury Cases in

Northern Ireland published by the Judicial Studies Board for Northern Ireland on 4 March 2013. In coming to a figure in respect of each individual injury I have cross-checked it with the relevant categories set out in the guidelines. Of course I also bear in mind the apt words of Girvan LJ in his introduction to the guidelines when he says:

> "Guidelines, whether they relate to the appropriate level of damages or the appropriate level of sentencing in relation to criminal offences, remain just that, no more and no less. The function of the courts in assessing damages requires a careful scrutiny of the evidence, the drawing of conclusions about the nature and extent of relevant injuries and the impact of those injuries on the life of the plaintiff. The function of the court must never be seen as a box ticking exercise. Rather it calls for an exercise of judgment in the light of all the relevant circumstances. The infinite variety of life throws up a huge array of factors and matters relevant to the assessment of fair damages in respect of individual cases. It is thus not surprising that even within individual categories of injuries there may be a wide range of appropriate awards dependent on the circumstances of the individual case. The assessment of damages remains an art and not an exact science. These Guidelines provide assistance to those called on to exercise their art. They do not provide the precise answer to any given case."

[54] In the preceding paragraphs I have set out the evidence and the conclusions I have drawn with regard to the nature and extent of the relevant injuries sustained by the plaintiff and the impact of those injuries on her life. The injuries must also be seen in the context of her being aged almost 26 at the time of the accident.

[55] **For the back injury I propose a figure of £50,000 to reflect her age, the severity of the injury, the extent with which it interfered with her everyday life and the extent of her ongoing symptoms.**

[56] When I look at the guidelines Chapter 7 paragraph B it is clear to me that the injury is outside and more serious than the description in (e) of a moderate back injury which has a range of £14,000-£42,000. Mr O'Donoghue QC sought to make a case that the relevant category was that set out in (c) because firstly this was a serious back injury, secondly it involved a fracture, thirdly the plaintiff suffers from ongoing pain and discomfort which impaired her agility and also resulted in some depression and had an effect on her employability. The range for such an injury was between £50,000 and £92,000. The interim category at (d) refers to an injury causing permanent residual disability albeit of less severity than in the higher bracket and suggests a range of £28,000 to £50,000. I take the view that the injury probably lies at

the lower end of (c) and the upper end of (d) and therefore the figure of £50,000 is entirely in accordance with the guidelines.

[57] In relation to the abdominal injury there are three separate injuries. The first relates to the damage to the bowel, the repair of the bowl and the repair to the upper colon. This was clearly a significant and traumatic injury to a young female which has caused ongoing abdominal problems albeit of a relatively minor nature. On its own this injury in my view would attract an award of £30,000. In addition the plaintiff had to undergo an emergency laparotomy. There is no guidance on an appropriate level for this intrusive surgery but in the context of say an unnecessary laparotomy in a medical negligence claim one would frequently see an award of £15,000. In addition the plaintiff has been left with permanent and unsightly scarring. I would have thought that on its own this injury would attract an award of £30,000. Adding these figures together I get £75,000. However, I am conscious that there is a considerable degree of overlap in these injuries and that I should take this into account in an overall figure for the abdominal injury.

[58] **Having done so I have come to the conclusion that an appropriate figure for the abdominal injury and all related symptoms is £65,000.**

[59] Again, this fits well with the guidelines which suggest a range of between £50,000 and £75,000 for severe abdominal injury. In this case there has not been any impairment of function but there has been a laparotomy and disfiguring scars and some ongoing residual symptoms which justify an award in this category.

[60] I find it difficult to assess the appropriate level of award for the plaintiff's shoulder injury. The medical evidence from Mr Thompson who has treated the plaintiff over many years is fairly unequivocal in that he attributes her current symptoms to the accident. He feels that the issue could be resolved by surgery which has an 80-85% chance of success. I consider that the plaintiff is reasonable in deciding not to have surgery and to try to deal with the injury by way of physiotherapy, something which she has done in the past notwithstanding the fact that surgery was raised as an option. Nonetheless, I feel that Mr Thompson does tend to understate the significance of her pre-existing condition. After all he himself had suggested that the plaintiff was someone who would be a candidate for surgery in the long term when he saw her in her younger years. So I think there is an element of exacerbation here but there is no doubt that the plaintiff's symptoms are significantly worse than anything she experienced before. Indeed, I accept that she was symptom free in the years prior to the accident as is clearly demonstrated in evidence by her participation in high level competitive sailing.

[61] **Taking all these matters into account I assess damages for the shoulder injury at £30,000.**

[62] Looking at the guidelines I see that a serious injury to the shoulder carries an award of £20,000 to £75,000. I consider that it is appropriate to award a figure at the

lower end of this range having regard to the pre-existing problem from which the plaintiff suffered.

[63] In terms of the psychiatric injury Dr McDonnell has diagnosed that the plaintiff suffered from post-traumatic stress disorder with symptoms likely to continue for 2-3 years after her then examination at which stage the plaintiff was suffering from ongoing psychiatric symptoms. For the reasons I have set out above I take the view that the plaintiff has suffered very significant psychological symptoms which are ongoing. Looking at the guidelines for post-trauma stress disorder I consider that her symptoms are greater than moderate and can be properly categorised as moderately severe. I bear in mind the awful context of this accident and what the plaintiff experienced at the time together with the life changing effect the injuries have had on her.

[64] **I therefore assess the appropriate award for damages for the psychiatric injury at £45,000.**

[65] I note that this figure is above the top level for moderate post-traumatic stress disorder at £40,000 and at the lower end of moderately severe with a range of £35,000 to £70,000.

[66] **I assess damages at £10,000 for the soft tissue injuries to her neck/hip and shin.**

[67] **I assess damages at £5,000 for her concussive injury.**

[68] **I assess damages at £3,000 for the damage to her teeth.**

[69] In my view this is a case which clearly merits a specific award for the loss of amenity in respect of the plaintiff's inability to continue sailing at a competitive level. I recognise that this has been factored in to some extent in respect of the general damages I have already assessed. This element of loss was considered by the House of Lords in the case of Girvan v Inverness Farmers Diary [1998] SCHL 1. That was a Scottish case in which the pursuer sustained injury in a road traffic accident. Prior to the accident he had been actively engaged in the pastime of shooting. He sustained a number of injuries the most serious of which was a fracture of the right elbow which resulted in the fact that he was no longer able to participate at international level in the sport of shooting. He was an outstanding clay target shot, having represented Scotland and Great Britain in international competitions and won numerous medals at competitions including a bronze medal in the 1982 Commonwealth games and the European Championship in 1988. He was training for the 1990 Commonwealth games at the time of the accident and his ambition was to represent the United Kingdom in the Olympic games. He had found it very hard to accept that he was unable to continue with competitive shooting. The initial trial in the action was held before a jury who assessed solatium at £120,000. The defender successfully enrolled a motion for a new trial and the

verdict of the jury was set aside. At the second trial the jury awarded a solatium of £95,000. The defenders thereafter enrolled a motion to have the verdict set aside on the ground that the damages awarded were excessive. The motion was refused at the Court of Session and the defenders appealed to the House of Lords.

[70] Much of the judgment dealt with the test to be applied when setting aside damages which were allegedly excessive. Nonetheless, the discussion of the approach to such an award is interesting. In his judgment Lord Hope comments:

> "But if the award is for solatium only, or it is the solatium element in the award only which is under attack, the position is different. This is not a figure which is capable of precise calculation. Reasonably and fair-minded jurors might quite properly arrive at widely differing figures in making their assessment of the amount to be awarded for pain and suffering and general inconvenience.

[71] In the course of his judgment Lord Hope goes on to analyse the relevant figures for damages then applicable in personal injury cases in Scotland. His judgment contains the following passage:

> "The award which has been made in present case is undoubtedly a high one in comparison with awards made by judges for similar injuries. I would be inclined to set the figure for the appropriate judicial award, taking the most pessimistic view of all the physical and emotional effects of the injury – but leaving out of account the effect on the pursuer's sporting activities – at about £25,000 to £30,000. But the factor which I have left out of account in this assessment is a factor of great importance, because a jury would be entitled to attach great weight to it in reaching their view as to how much money should be paid to the pursuer to compensate him for what, in this respect, he has lost. I do not think that it is helpful in this case to go further with the question what a jury could properly have awarded after taking this element into account. The element is so obviously one for a jury to assess. In this case we now have the benefit of two jury awards and the award by the second jury is £25,000 less than the first. When account is taken of that fact, I find it quite impossible to say that no other jury would award such a large sum."

[72] Thus although the court held that the award was undoubtedly a high one and because it was impossible to say that no other jury would award such a large sum the defender's appeal was dismissed.

[73] The significance for the purposes of assessing a particular loss of amenity in this case is that the House of Lords did not feel free to interfere with such a high award which was made almost 20 years ago. The court clearly accepted that a plaintiff in this situation is entitled to an award to compensate her for loss of sporting activity. Ms Sands of course is not a Commonwealth athlete with ambitions to participate in the Olympic games but clearly her inability to continue competitive sailing is a very significant element of what she has lost as a result of this accident and I consider that she is entitled to a sum to compensate her for this loss. Such a sum of course should be proportionate to the overall level of general damages which I have set out above.

[74] **I have come to the view that an appropriate figure in this particular case for this particular loss of amenity to the plaintiff is £30,000.**

[75] **This brings me to a total figure for general damages of £243,000.**

[76] 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 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.

[77] **Having carried out this exercise I conclude that a global figure of £240,000 represents fair and reasonable compensation for the personal injuries and loss of amenity the plaintiff has sustained.**

Claim for Loss of Earnings

[78] The case pleaded on behalf of the plaintiff was that but for the accident she would have joined the Armed Services, probably the RAF but possibly the Navy. The plaintiff's solicitor engaged a Forensic Accountant, Ms Nichola Niblock of ASM to prepare a calculation of loss of earnings based on the assumption that the plaintiff would have had a career in the RAF. With her customary professionalism Ms Niblock carried out the appropriate research in terms of potential earnings and career progression for a university graduate such as the plaintiff in the RAF. She considered two scenarios one which involved the plaintiff remaining in the RAF to retirement at age 60 and another on the presumption that she would have remained in the RAF for approximately 12 years. She prepared a schedule of figures setting out the potential earnings under these two scenarios together with RAF employment related benefits. She then dealt with the question of residual earnings pre and post accident, in this instance providing three potential options depending on the plaintiff's level of disability. She also prepared calculations in relation to loss of pensions and employers state pension contributions in these scenarios.

[79] At the opening of the action it was indicated that this claim for loss of earnings was being abandoned as it was accepted that the plaintiff would not be able to pursue a career in the RAF because of her pre-existing asthma. On the instructions of the plaintiff's lawyers Ms Niblock then prepared a loss of earnings claim based on what the plaintiff might have earned had she not been injured but on the basis that she was not eligible for a career in the RAF. I will return to those figures shortly.

[80] The issue of the initial claim for loss of earnings based on a lost opportunity to have a career in the RAF was the subject matter of considerable controversy at the trial. Mr Cartmill commenced his cross-examination of Ms Niblock by what I consider to be an unwarranted attack on both her competence and integrity. On seeking clarification from Mr Cartmill on the purpose of this line of cross-examination he made it clear that it was the defendant's view that there was no requirement for a Forensic Accountant's report at all in this case and that Ms Niblock's fees should be disallowed.

[81] The essence of this attack appeared to be that Ms Niblock should never have presented or supported a case based on a loss of career in the RAF and that any "half-wit" would have known that such a career was not open to the plaintiff because of her pre-existing medical condition. In response Ms Niblock indicated that on the basis of her instructions the proposed career in the RAF was entirely reasonable and credible. She had consulted with the plaintiff and was aware of her career background and qualifications. As the plaintiff indicated in her own evidence which I have set out above she was determined to have a career in the RAF. This made sense in view of her background which has been set out in detail in this judgment. The plaintiff herself indicated that she only became aware of the potential difficulty arising from her pre-existing asthma on the day of the commencement of the trial. She told the court and I accept that she considered her asthma to be a child asthma and something she associated with chest infections. When she was cross-examined about this from the medical notes and records I was satisfied that this was indeed her perspective. She could not remember the specific attendances to which she was referred in cross-examination but these related to her teenage years and were indeed associated with chest infections. Thus she attended with her General Practitioner on 12 September 2000 with exercise induced asthma, age 14, on 7 June 2002 with asthma associated with pain in left chest and on 7 October 2003 when asthma was disturbing her sleep with coughing. She also attended on 1 September 2004 when it was confirmed that she was taking Salbutamol for her asthma. She had no idea that this would disqualify her from a career in the RAF. Insofar as the thoracic outlet syndrome may have prohibited her from taking up a career in the RAF the plaintiff indicated that she would have had the operation in that event.

[82] Most importantly however from the point of view of the cross-examination of Ms Niblock she was totally unaware of the fact that the plaintiff had a pre-existing history of asthma. She did not know this nor were there any reasonable grounds or

suggestion that she should have known this. She had read the medical reports and referred to them extensively in her report. In none of these reports is there any reference to the plaintiff's asthma. This only became apparent from a detailed examination of her medical notes and records which were not available nor provided to Ms Niblock. Indeed it is significant that Mr Hill who was from Toppings Forensic Accountants based in Manchester and instructed by the defendant did not suggest that the plaintiff would not be an appropriate person to have a career in the RAF based on her medical condition. He like Ms Niblock of course was unaware of the pre-existing asthma. Indeed, when dealing with Ms Niblock's report he raised issues such as the age at which the plaintiff might be entering the RAF, the history of females in the Armed Forces and the point at which officers leave the RAF as the basis for challenging some of the figures put forward by her. I also note that on receipt of the report from Mr Hill Ms Niblock responded in her usual professional fashion by countering some of the points made in his report and by accepting some of his comments, in particular when she agreed to increase her figures for residual earnings based on what Mr Hill said the plaintiff had the potential to earn on his analysis of the relevant ASHE figures.

[83] More importantly from the point of view of assessment of quantum Ms Niblock prepared an amended schedule of loss based on an assumption that the plaintiff would not be eligible to join the RAF. There is no doubt that but for the accident the plaintiff would have had a formidable CV. She would have had a first class honours degree with a background of excellence and high achievement in competitive sport. On the face of it she would have been a very attractive proposition for many employers. In any event there is no real dispute between the forensic accountants as to an appropriate figure for potential civilian earnings for someone such as the plaintiff but for the accident. Indeed, Ms Niblock accepted the figures for civilian earnings put forward by Mr Hill, in effect at 80% percentile of the average earnings of UK employees based on the ASHE figure earnings statistics. Ms Niblock was criticised for this by Mr Cartmill on the basis that in her initial report she suggested that the plaintiff's civilian earnings for the purposes of residual earnings would start at £18,634 gross as being the starting point for a new graduate. In response Ms Niblock accepted that Mr Hill's approach was better and whilst this did have the effect of increasing past loss of earnings it had a very marked effect on future loss of earnings as it markedly increased residual earnings. I consider this to be a further example of a professional and reasonable approach by Ms Niblock. The real dispute about past loss of earnings is whether or not it was reasonable for the plaintiff to engage in the catering business with Mr Robertson. Essentially while Mr Hill accepted it was a matter for the plaintiff to pursue whatever career she chooses he says that from the point of view of reasonable mitigation the court should take the view that the plaintiff should have pursued a graduate career. Since this was the basis of the proposed figure for past loss of earnings being put forward by Ms Niblock this would in effect mean that there was no past loss of earnings. So the real question for me to determine is whether or not it was reasonable for the plaintiff to engage in the catering business. I consider that it was, having regard to her personal circumstances when she graduated. The genesis of the catering business of

course had been the business plan which she had helped Mr Robertson prepare whilst at university. When she graduated she was only one year post-accident and was still suffering very significant symptoms as a result. On a personal level she felt it was "nice to be needed" and that Angus "needed assistance". She bought into the idea of trying to make a success of the business rather than seek some other form of employment. I consider that this was an entirely reasonable course of action and that she cannot be criticised for doing so. I consider that in the context of this litigation it was a reasonable means by which she could mitigate her loss. As in most businesses it takes time to work up a profit. It is only in the last year that a modest profit has been returned. **Thus for past loss of earnings I award <u>£60,966</u>.** This is on the basis of a figure of **£65,935 for earnings she would have received but for the accident less residual earnings of £4,969. The £65,935 is based on the appropriate civilian earnings for a graduate such as the plaintiff based on the 80% percentile of the average earnings of UK employees based on the ASHE figure to which I have referred above. The figure of £4,969 is what the plaintiff has earned in the catering business to date.**

[84] The calculation of a potential future loss is more difficult. Firstly I accept that the plaintiff does suffer from a handicap in the labour market. I accept that because of her injuries and her ongoing symptoms her employment status remains compromised. The issue is how to calculate this loss. Ms Niblock as one would expect from a Forensic Accountant has sought to apply a mathematical basis for the calculation of this loss. She provides a figure for future loss of earnings based on what her civilian earnings would be as per the past loss of earnings and has presented four options in relation to residual earnings based on no disability, 10% disability, 20% and 30% disability. Mr Hill takes no issue with the calculations which would in effect result in future loss of earnings of nil (no disablement), £19,512 (10% disablement), £38,719 (20% disablement) and £58,231 (30% disablement). Mr Cartmill on behalf of the defendant says that this is not an appropriate case for a forensic approach to future loss of earnings (although he disputes that the plaintiff is entitled to any in any event – which would be consistent with the nil disablement figure). In particular he refers me to the decision in <u>Blamire v South Cumbria Health Authority</u> [1992] EWCA Civ 20. The issue in that case related to whether or not a first instance judge adopted the correct approach in awarding a general figure of £25,000 in respect of future loss of wages, loss of pension benefits and damage for handicap in the labour market. The thrust of the decision is set out in the very short judgment from Lord Justice Balcombe when he agreed with the main judgment of Lord Justice Steyn where he says:

> "For the reasons given by Lord Justice Steyn, of which I agree, there were far too many imponderables here for the judge to have been bound to take the conventional approach. Amongst its imponderables were the prospects of the plaintiff obtaining other employment, and it is to be recalled that her injuries, while rendering her unable to continue with a career in nursing, were not

> such as would have disabled her from taking up other work should that become available; the possible number of children which she might have, the possibility that she might not wish eventually (whatever she may have said at the hearing, and she is still a very young woman) to go on working; these are all reasons only it seems to me that the judge was fully entitled not to take the conventional multiplier multiplicand approach and decide the matter on the basis that he did."

[85] Mr Cartmill says that this is exactly such a case and that there is simply far too many imponderables about the plaintiff's future to adopt a multiplier/multiplicand approach. On balance I am inclined to agree with Mr Cartmill. **Adopting a "broad brush" approach, doing the best I can I propose to award a figure of £30,000 for future handicap in the labour market.** I note that this figure is pretty much in the middle of the range of figures put forward on the forensic basis which provides me with further comfort that this is an appropriate figure. In doing so I have regard to her ongoing symptoms, her age and her current employment.

Care Claim

[86] The plaintiff has brought a claim for past and future care. In support of this claim I have been provided with a written report from Sandra Sheddick Associates Nursing Care Consultants, although I did not hear evidence from the author Janice Reid. I also have received a report from Dr Keegan, Consultant Physician, on behalf of the defendants and again he did not give oral evidence. Ms Janice Reid who is an expert in Advanced Nursing Care considered the medical reports in this case and interviewed the plaintiff on 28 October 2014 which has formed the basis of her report. She has made an estimate of the care that has been provided to the plaintiff up to the date of her examination although she has provided a subsequent amended report to provide up-to-date figures and to comment on the report from Dr Keegan. Essentially she breaks the care provided down to various periods. For pre-discharge care while plaintiff was in hospital she suggests that the plaintiff received the equivalent of 2 hours care per day. For the period whilst she was in Belfast before returning to university between 20 July 2012 to 30 September 2012 she suggested an appropriate amount of care as being 8 hours per day. For the period 1 October 2012 to 31 December 2012 she suggests an appropriate rate of 4 hours per day. This was reduced to 2 hours per day for the period 1 January 2013 to 30 January 2013 in view of the improvement post-removal of neofract jacket. Post degree she suggests a figure of 1 hour per day. As to future care from date of trial until age 50 she suggests 5.5 care hours per week and from age 50-70 one hour per day with post age 70 two hours per day. The relevant annual figures claimed were £5,276.96, £6,481.68 and £12,953.60 per annum respectively.

[87] On the other hand Dr Keegan suggests that the following care input would be reasonable namely –

- In the first month after return to home from hospital 3 hours per day.
- In the second to fourth month after return to home from hospital 2 hours per day.
- For a further short period one hour per day with no care input thereafter.

[88] Thus there clearly was a very great divergence of opinion between the experts in this field. This is a type of dispute to which the courts are well accustomed and ultimately the determining factor to me was an assessment of the plaintiff herself when she gave evidence as to what care was provided to her in the past and what care she might need in the future. In assessing this aspect of the case I think there are a number of matters to bear in mind. Firstly the court should "keep its feet on the ground". There is no doubt that the plaintiff has made an excellent rehabilitation and notwithstanding the severity of her injuries and the significance of her ongoing symptoms she is not someone who suffers from catastrophic injuries resulting in for example paraplegia. Secondly I bear in mind that there can be very little mathematical precision to hours of care and what is involved are estimates. Finally it must also be remembered that the plaintiff does not have to establish that care is necessary. Rather the issue is whether or not the care claimed either past or in the future is reasonable. In this case for example I have no doubt that if the plaintiff is provided with no care or assistance whatsoever in the future she will do her best to get by. This does not mean that she is not entitled to some allowance for reasonable assistance.

[89] In assessing this particular issue I am also grateful to the assistance of Ms Niblock who has provided financial calculations based on the Sherlock Report, making the appropriate discounts etc, providing the appropriate multipliers, depending on the decision reached by the court.

[90] Having considered the evidence of the plaintiff in particular I am satisfied that she did require significant care both in hospital and after her discharge from hospital whilst in Belfast. I also accept that she required very significant care on a diminishing basis after her return to university. One thing that became clear to me for example in the course of the evidence was that someone had to sit with the plaintiff whilst she was recuperating in Belfast which if allowed as an appropriate claim for care would have had the effect of increasing Ms Reid's figures for that period. Therefore, I have come to the conclusion that the appropriate level of care up to 31 December 2012 is as per the Sherlock report. On the basis of Ms Niblock's calculations this would result in a figure for care for that period at £7,498. From this I deduct 25% on the basis of abatement for gratuitous care which leaves a figure of £5,623.50.

[91] Rather than the 2 hours suggested by the Sherlock Report I propose to allow one hour per day between January 2013 to 30 June 2013 which will result in a figure

of £2,866 less 25% abatement equals £2,149.50. From then to date of trial I propose to reduce the Sherlock Report figure of £8,170 to £5,000 with a subsequent abatement of 25% equalling £3,750. I do so because I take the view that there was a reduction in her care needs after her graduation but it is impossible to put a precise figure on that amount. The figure I have chosen approximates to something in the region of 5 hours per week. **Thus the total amount for past care is £12,773.**

[92] In terms of future care the plaintiff's expert report is based on the suggestion that "all future care should be purchased from an outside source from date of hearing and for the foreseeable future." In this context it is suggested that care would be needed to "assist with household tasks and shopping for example."

[93] As I have indicated earlier in my judgment I have no doubt that the plaintiff is someone who will get by even in the absence of any support. I also think there is no doubt that she will continue to receive support from her friends and family both physically and emotionally in the years ahead. I note that up until a few weeks prior to the trial the plaintiff had the benefit of the assistance of a cleaner at the equivalent rate of 2 hours per week provided by the defendant's insurers. She said she found this very helpful. I think the best way to approach future care is to make provision for the continuation of this service. **This has been calculated at £35,867 by Ms Niblock and I award this amount to assist with future care. In addition in respect of future care I propose to allow a figure to provide the plaintiff with assistance with DIY, household and decorating costs at a cost of £260 per annum which results in a figure as per Ms Niblock's report of £7,173.**

[94] In terms of future medical assistance I take the view that the plaintiff is entitled to a figure for ongoing physiotherapy. I accept her evidence that this has been beneficial to her and I consider that it is a reasonable claim. I consider that ongoing physiotherapy once a week will significantly improve her quality of life and will help her deal with the ongoing symptoms she suffers as a result of her injuries. On the basis of Ms Niblock's calculation, which I accept, this would entitle the plaintiff to a figure of £80,054 for ongoing physiotherapy. However, I take into account the fact that the plaintiff had periods of physiotherapy in the past for her shoulder condition. Therefore, there is a reasonable probability that she would have required some physiotherapy in the future, even without the accident. Nevertheless, I accept that the vast majority of her need for physio has been and will be attributable to the accident. **I propose therefore to reduce this figure to £70,000, in effect a discount just over 10%.**

[95] I consider that these three figures will adequately compensate the plaintiff for future care. In awarding these three figures I have adopted a practical approach measuring future compensation against actual assistance as opposed to the approach in the Sherlock Report of awarding an annual basis for care in addition to other items. I consider this to be a reasonable approach in assessing the plaintiff's future requirements to assist with her physical disabilities.

[96] There remain a number of claims for items of special damage which I shall deal with shortly.

Aids and Equipment

[97] I do not make any award under this heading. Some of the claims are in monetary terms of a relatively trivial nature such as £5.95 for a button hook/zipper, £5.10 for a spread board and £16.98 for an auto-chop. The more substantial items under this heading such as tumble dryer, dishwasher and microwave oven seem to me to be fairly standard items. In my opinion any need for these items could not be attributed to any injury sustained by the plaintiff in this accident.

Loss of Care Givers Facility

[98] In my view there is insufficient evidence to support such a claim and the basis of the claim is highly speculative so I make no award under this heading.

Addition Travel Costs

[99] **In relation to additional travel costs I do allow the £734 for past travel but make no allowance for future travel.** As I understand it the plaintiff's requirements to attend for physiotherapy should not incur any significant financial detriment and I have allowed the claim for the actual cost of physiotherapy which in my view is adequate in this case.

[100] In relation to additional vehicle cost claim it appears that this is justified on the basis of the injury to the plaintiff's left shoulder/arm. In my view the injury would not justify an award under this heading which I disallow.

Additional Prescription Costs

[101] **In relation to additional prescription costs I do award a figure of £382 for past prescription costs.** I am not persuaded that the plaintiff is entitled to a figure for prescription charges on an ongoing basis for life in respect of which there is a claim of £2,200. However, I do accept that the plaintiff will in all probability require some additional prescriptions as a result of the accident into the future and **I therefore award a figure of £500 under this heading**.

Additional Expenses

[102] There is also a claim for additional expenses for £13,972 which is set out in Appendix I of the report from ASM Forensic Accountants. Having gone through the claim in detail I disallow £7,520 in respect of alleged loss of earnings from Mr Sands on the basis that I heard no evidence in relation to this matter. I reduce the claim further by £330 in respect of the claim for subsistence. I do not consider that this is an additional expense arising from the family's requirements to visit the plaintiff

whilst she was in hospital and in Belfast. In any event I have provided for care under this heading.

[103] Finally, I also reduce the amount by £696 claimed in respect of an upgrade for the plaintiff's computer as I have no direct evidence on this point**. This leaves a total claim for £5,436 in respect of additional expenses** which I do allow and am satisfied arise from the requirements of the plaintiff's family to visit her whilst she convalesced in Belfast. **I allow the claim for £838 in respect of additional past medical expenses.** In this regard I note this figure includes treatment for dental work in the past. I note that in the dental report from Hedley Saunders there is a claim for potential future dental treatment. However, the dental report was somewhat out of date, with the plaintiff not being seen since 2012 and I have no evidential basis for making an award for future dental treatment.

Final Award

[104] I therefore make the following award for damages:

(a) £240,000 for general damages.

(b) £60,966 for past loss of earnings.

(c) £30,000 for future loss of earnings.

(d) £12,773 for past care.

(e) £35,867 for services of a cleaner.

(f) £7,173 for assistance with DIY, household and decorating costs.

(g) £70,000 for future physiotherapy treatment.

(h) £730 for past travel.

(i) £382 for past prescriptions.

(j) £500 for future prescriptions.

(k) £5,436 for additional past expenses.

(l) £838 for past medical expenses.

[105] This amounts to a total award of £464,665.

[106] I will hear submissions from the parties in relation to interest but I would propose 2½% on general damages from date of issue of proceedings to date and 3% on past losses from date of issue of proceedings to date.

[107] I award the plaintiff costs against the defendant with those costs to be taxed in default of agreement. For the avoidance of doubt such costs shall include the costs incurred in instructing the plaintiff's forensic accountant subject to taxation.

[108] I will grant a 3 week stay.