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Judgment: approved by the Court for handing down | *Delivered:* **12/02/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ANTHONY HAZLETT

Plaintiff;

-and-

GLYNN ROBINSON
ARCHIE LOUGHREY
ANDREW USSHER

Defendants.

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GILLEN J

Introduction

[1] The plaintiff, who was born on 8 December 1979, sustained injuries to his left humerus, thoracic spine, left fibula and subsequently an adjustment disorder in the course of a road traffic accident on 23 May 2009 when he was a rear seat passenger in a vehicle driven by the third defendant. Save for the issue of contributory negligence for alleged failure to wear a seat belt, liability was admitted by the defendants. Mr Ringland QC appeared on behalf of the defendants and Mr Rooney QC appeared on behalf of the plaintiff with Mr Henry.

The left humerus

[2] The plaintiff suffered a fracture of the left humerus in the mid-shaft area which was treated with conservative measures.

[3] In evidence before me the plaintiff made the following points concerning this injury:

- At the time of the accident he had felt pain in his left arm and thought indeed he had lost his arm. After discharge from hospital on 9 June 2009 he continued to have pain and a restricted range of movement in the left shoulder and left elbow.

- He described the pain at the time as being the worst pain in his life.

- He suffered nerve damage to his thumb and two adjacent fingers with numbness, pins and needles.

[4] Mr McCormack FRCS, consultant orthopaedic surgeon, who reported on behalf of the plaintiff, recorded on 16 April 2013 that whilst the fracture of the humerus had healed, the plaintiff still had on-going symptoms in relation to his left shoulder and arm which had not resolved following extensive physiotherapy. He concluded that this would give some restriction of motion of his left arm. As the symptoms had persisted for a period of approximately four years by that time, he felt they were unlikely to resolve over the short term. He concluded that whilst Mr Hazlett might be able to carry on as a car salesman in certain ways, he did not think he would be suited to doing heavy manual labour around the car and in certain movements, for example when cleaning a car with his left arm, he would also be restricted. That restriction would be of a functional nature to a degree only given that he was right-handed.

[5] In evidence before me, Mr McCormack added the following to the contents of his reports:

- The left humerus had a large butterfly fragment ie. it was comminuted. Conservative treatment was not unusual with such an injury.

- By October 2009 the fracture had solidly healed.

- However, the plaintiff still complained of a limited range of movement at the shoulder which Mr McCormack thought was genuine.

- An MRI scan of the shoulder showed no rotator cuff tear and he was hopeful that it should return to a functional level.

- The radial nerve had been irritated by an injury of this kind and whilst there was no motor loss, there was some sensory loss as described by the plaintiff. The radial nerve had not fully recovered and hence he did have a pins and needles sensation. It was not unexpected. The nerve recovery can be unpredictable and can go on for many years.

- The fact that the fractures healed well did not mean that it would be functionally perfect.

- The plaintiff had exhibited in court before me restriction of movement of the arm from his shoulder. Mr McCormack, putting his hand on his scapula, felt that he had reached the limit of movement as described. Mr McCormack indicated that when he saw him he felt he was making the best effort he could.

- He had seen the plaintiff on four occasions and he did not feel that the plaintiff had exaggerated to him.

- He had limitation of external rotation at the shoulder but internal rotation was "not bad".

[6] On behalf of the defendant Mr Mawhinney FRCS, consultant orthopaedic surgeon, had also provided four reports. He recorded that a fracture of the humerus is a major injury and is regularly associated with radial nerve injuries. However, he felt there should be no functional deficit from this. Some pain on heavier activity could be expected although an MRI scan had excluded any significant shoulder pathology.

[7] However, he referred to the plaintiff's muscular build and therefore recorded "It is difficult to know just how painful and stiff his shoulder is".

[8] In evidence before me Mr Mawhinney made the following additional points:

- The plaintiff had not given him an honest history (to which I will later refer).

- Such an injury would lead to a patient regaining full shoulder motion in between 75% and 100% of cases. Some pain in heavier activity, however, would not be unexpected.

- He should have been in a position to return to good activity within nine months and unrestricted activity save for heavy activity within 12 months.

- His resistance of movement of the shoulder at 90 degrees was much greater than he expected. His impression was that he was resisting movement rather than the restriction being genuine. He felt there would be muscle wasting if usage was other than full and functional. Mr Hazlett was of muscular build and usually in order to get a muscular build you need a full range of shoulder movement, though Mr Mawhinney had on one occasion seen someone with a defective shoulder have such a muscular build.

- He noted that he had no difficulty using his crutches and that if he had a lack of upper shoulder strength he would not have expected him to be able to manage his crutches in the way that he observed.

- He observed that the medical notes of 21 August 2009 made at Altnagelvin Hospital recorded that there was no radial nerve palsy and therefore it did not seem to him that at that stage there had been any complaint of a tingling sensation in his hand. Such a condition should not come and go because once it is settled it should not return. The findings of by Mr McCormack had been subjective because there was no definitive test to ascertain if the plaintiff was telling the truth or not.

- He accepted that the plaintiff had been referred to physiotherapy on 15 July 2009, commencing on 29 July 2009. Between October 2009 and February 2010 he had attended on 16 occasions, mainly for his shoulder, and during these visits there was no suggestion of a lack of co-operation.

- Mr McCormack found a slight loss of full extension of about 20 degrees at the left elbow but full flexion comparable to the right was found.

[9] I found Mr Mawhinney's reservations about the nature of the plaintiff's on-going complaints with reference to the humerus to be well made given his observations as outlined above. Despite Mr McCormack's confidence in the reliability of the plaintiff, I cannot explain Mr Mawhinney's concerns based on his observations on any basis other than exaggeration by the plaintiff. Nonetheless it is a significant injury and I value it as worth £25,000.

His back injury

[10] There was a compression fracture of the superior end plates of T7 and T8. Mr McCormack recorded that he would expect some mid-portion back pain to be anticipated intermittently depending on his work practice and on his sports activities, with some minor on-going discomfort in his back without any major functional deficit. He felt the back pain was not surprising given the injury he sustained in that the adjacent end plates and discs *will* give rise to degenerative change, which can give rise to intermittent back pain as noted by the plaintiff. Whilst this would not preclude his taking part in a great many occupations, it would limit his lifting and carrying of heavy objects, stooping and bending repetitively, and he would have discomfort in a heavy manual job of any type.

[11] The plaintiff's evidence concerning his back included the following assertions by him in evidence before me. Following the injury, the combination of his injuries meant that he needed his family to assist him to toilet, wash, lie on the sofa in his living room, together with the need for strong medication which he is still taking. Today he still takes anti-inflammatories and stomach tablets.

[12] He attended a physiotherapist on various occasions as outlined above. He was then referred to hydrotherapy treatment in hospital. He also attended a pain clinic for a number of months requiring acupuncture.

[13] He admitted that he had had previous problems with his lower back when younger but now the pain was in the middle of his back.

[14] Prior to his accident he had bought cars that needed work and fixing up which were then sold on. He would have carried out body repairs or mechanical repairs. Now he finds he cannot do this. He had tried and had difficulty even washing a car and it hurt him to attempt to get down or stoop. This was due to a combination of his shoulder and back.

[15] In the course of his evidence before me Mr McCormack made the following points on behalf of the plaintiff:

- His back is not normal. He suffered an injury to the disc. It will not be unusual to get intermittent back pain in the future particularly when involved in manual work like lifting, bending, stooping etc.

- It was not unreasonable to be complaining of back pain four years on.

- Over time it would be likely that the disc would degenerate although this does happen less often at T7/T8. Some degree of backache at that level will probably occur. Precautions will have to be taken to protect his back.

- He had suffered a compression fracture to the thoracic spine. This is not a minimal injury. It might be less serious than larger wedge fractures or displaced fractures but it is still serious.

- He had told him that he had a history of occasional back pain.

- Whilst he told Dr Curran on 18 May 2011 that his back "had not improved at all" that was not how he presented himself to Mr McCormick. Mr McCormack's view was that the initial phase of pain would be improved within 6-9 months and beyond that there would be intermittent pain as a pattern. It would gradually improve.

- The consultant recognised that there was a significant history of low back pain ending in 2002 and that the plaintiff had not told him about this. Moreover he had not been told about previous elbow problems.

- Mr McCormack had come across radial nerve injuries of this type going on for several years. It was not a low level injury.

- Mr McCormack, having been informed that the GP of the plaintiff had referred him to a pain clinic, indicated that this would not have been his preferred choice of treatment, though the fractures at T7 and T8 could give rise to intermittent pain.

- He was unaware that there was a significant history of low back pain with a three year history of low back pain into the left hip in 2002.

[16] On behalf of the defendant Mr Mawhinney in evidence before me made the following points:

- The plaintiff had not been an honest historian. He had specifically asked the plaintiff if he had any previous problems or injury to his spine and no mention had been made to him of the low back pain he had clearly suffered for three years leading up to 2002.

- There are predominantly good outcomes from spinal wedge fractures. It is a good indicator that 18 months after the accident there was no damage to the disc on MRI scans.

- Some ache, more than pain, on increasing activity is to be expected although there should be diminishing discomfort/ache. By six months the majority of pain should be gone.

- Since the MRI scan was normal after 18 months, the risk of arthritis is very low. It is only a possibility.

- By 9/12 months after the accident, he should have been back to work.

- He drew attention to the reference "learned helplessness" contained in referred to in the physiotherapy reports dealing with this man. He found such a comment "close to unique" in his experience and unusually damning of the plaintiff.

- He agreed that the plaintiff could not do heavy lifting and that prolonged standing could precipitate aching

[17] Once again I preferred the general thrust of the evidence of Mr Mawhinney on this injury. I was satisfied that this plaintiff was being less than candid in his complaints and had been untruthful about his previous back history. Nonetheless, his back is not normal and he has suffered an injury to the disc. It is not unusual to get intermittent back pain in the future particularly if involved in manual work like lifting, bending, stooping etc with a risk of arthritis in the future. I value this injury at £25,000.

Left fibula

[18] Despite the lateness of its advent, I permitted during the course of the trial an amendment to the statement of claim to include reference to a hairline fracture of the proximal neck and head of the left fibula, which was undisplaced. It is clear that there had been some confusion about this injury although the plaintiff had referred

to it in a course of his examinations. This injury caused some associated pain and discomfort for a period of 4-6 weeks following the accident but there was no long term problem arising therefrom. I value this at £8000.

Psychiatric injury

[19] Both parties agreed that the psychiatric evidence to which I will refer below could be submitted without the need for the witnesses to give evidence. It was agreed that any adjustment disorder from which he was suffering was due to pain arising from the accident i.e. during such a period as the court determined he was genuinely in pain and for such a period that it was at a level requiring adjustment to it.

[20] Dr Burn, his GP, had recorded in a note of 22 December 2009 that he was suffering from depression and on regular treatment with painkilling tablets and antidepressants. He also recorded his having problems looking after himself in terms of cooking, shaving and dressing.

[21] Dr Curran, on behalf of the plaintiff, and Dr Chada, on behalf of the defendant, were the two consultant psychiatrists in the case. Both were in agreement that the plaintiff had described symptoms in keeping with a depressive adjustment order (Dr Curran described it as a prolonged adjustment order). Dr Curran also considered he had travel anxiety and sleep difficulties. The first mention of depressive symptoms emerged in the GP notes and records seven months after the accident in December 2009 when antidepressants were started at that time. It was clear from both of these reports that his low mood was related directly to his complaints of pain.

[22] The plaintiff had described in evidence that this incident was "the worst thing that ever happened to him" and "to this day his mood is not great" with his still being on antidepressants.

[23] I consider that the plaintiff exaggerated the continuing nature of this condition in evidence before me. I consider Dr Chada probably captured the nature of this part of the case when she opined that he had low mood for a period of around 15 months, with no referral for counselling and no frequent attendances with his GP. £10000 is the value of this aspect.

General Damages

[24] At the conclusion of the case I invited counsel to draw to my attention any relevant guidelines or figures in the "Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland". Whilst Mr Ringland did so, Mr Rooney had no such instructions from the plaintiff.

Financial claim for future loss

[25] It was the plaintiff's evidence that, after leaving school at 16, he had worked as a general labourer/farm labourer until about 2002 when he had started a car repair business. This involved him purchasing damaged vehicles which he subsequently repaired and sold. Occasionally he sold vehicles which were not damaged.

[26] An accountant produced figures showing that his income for the four income tax years between April 2005 and April 2008 before capital allowances was as follows:

- Year ending 5 April 2005 - £18,395.00.
- Year ending 5 April 2006 - £17,647.00.
- Year ending 5 April 2007 - £9,270.00.
- Year ending 5 April 2008 - £6,873.00.

[27] The average figure, therefore, would amount to £13,043.00 before capital allowances on plant and equipment.

[28] In 2008 the plaintiff indicated that he got into financial difficulties in relation to an outstanding income tax debt to HMRC. A creditor's bankruptcy petition was filed against him in April 2008 for £5,499.54. During the time of his bankruptcy, until the debt was paid, he did not carry out any self-employed work. Accordingly, he was not working when the road traffic accident occurred on 23 May 2009 although he said that he was preparing to return to work.

[29] No claim has been made for loss of earnings to date. His claim for future loss was based, not upon the conventional multiplier and multiplicand approach, but, firstly, was to be assessed upon the broad brush principles established in Blamire v South Cumbria Health Authority (1993) PIQR Q1 CA. Secondly, there was a claim for an award for handicap on the labour market universally known as a Smith v Manchester award, after the decision of that name reported at (1974) 17 KIR 1. In short a combination of both (see Ronan v Sainsbury's Supermarket Limited [2006] EWCA Civ. 1074) was the basis of the future loss claimed.

[30] A Blamire award and a Smith v Manchester award may be combined but they are quite distinct. As Ronan's case made clear, a trial judge should be careful not to fall into error by eliding a Blamire award for a future loss of earnings with an award for handicap on the open market as set out in the Smith v Manchester approach. The former is appropriate where the evidence shows that there is continuing loss of earnings, but there are too many uncertainties to adopt the conventional multiplier and multiplicand approach to its quantification. A Blamire award is not a substitute for showing that there is continuing loss of earnings attributable to the accident. The latter is nothing to do with a continuing loss. It is an award for a contingent future

loss, in the event of the plaintiff losing his current job, when, as a result of the accident, he would then be handicapped on the labour market at which he would not have been but for the accident (see Ronan's case).

[31] In evidence the plaintiff accepted that he could buy and sell cars now but he could not fix them up because of the difficulties lifting. He had not tried to perform any other job because he did not know any other trade. He was bad at reading and writing and had no qualifications.

[32] In cross-examination on this aspect of his case, the plaintiff indicated that due to the recession his business had dropped off but things were not going well for him. He claimed he was not working for 13 months prior to the accident. The £5,500 to his creditors had been paid off by £3,000 from the bank and "£2,000 in a cupboard" which he had kept at home. Although he had not been in receipt of benefits between May 2009 and May 2011, he had been living off his family according to him and some other money which had been paid to him by his brother.

[33] He conceded that on 25 August 2011 he had pleaded guilty to charges brought by Trading Standards investigators. He also acknowledged that he might have showed three cars for his brother for the purposes of sale.

[34] I pause at this stage to deal with the evidence on this aspect of the case given by Richard Lambe, private investigator on behalf of the defendant. Suffice to say that I found his evidence so thoroughly unsatisfactory that I have paid no attention whatsoever to it. Not only had he patently misunderstood the address of the plaintiff and carried out investigations at the wrong address, but the account put to the plaintiff by Mr Ringland acting on his instructions about where certain vehicles were parked was in complete contrast to the evidence he gave before me. I had no doubt that he was thoroughly confused and had given contradictory instructions to counsel. Moreover, it also emerged that he had taken photographs and a video which he had not produced to the solicitor instructing him his instructing solicitor in circumstances which I found incomprehensible. I therefore found his evidence of no value whatsoever.

Conclusions on future loss

[35] As with a considerable part of his evidence, I considered the plaintiff's evidence on this matter evasive and unconvincing. I was unable to discern any likely pattern of future employment given that the business he had been in had become bankrupt and had ceased for some time prior to the injury in the instant case. His earnings had dropped appreciably during 2007 and 2008 before he completely ceased trading.

[36] I see no reason whatsoever why he should not be buying and selling cars, particularly since even on his own admission, he has "shown" three cars on behalf of his brother. Watching him carefully when he gave this evidence, I considered that

he was being less than candid with me about the degree of cars sales that he has been involved in since the accident.

[37] Equally, however, I recognise that, whatever the uncertainty that exists about his employment prospects even without the injury, the fact of the matter is that he will not be able to do heavy lifting and this must have some modest influence on his future employment. The problem is that at the time of the accident he was not in an established field of work in which he is likely to have remained but for the accident and I cannot make a working assumption that he would have continued to do the work that he had ceased to do some time prior to the accident. Accordingly, the conventional multiplier/multiplicand method of calculation cannot be adopted here. In short, the invocation of the OGDEN tables which would be the conventional approach to future loss must be ruled out in this case because the future is simply too uncertain. In respect of both the established and the likely pattern of future earnings given the fact that he has been injured, the burden is on the plaintiff (see Ward v Allies and Morrison Architects [2013] P.I.Q.R. Q1 at 20).

[38] I consider that in light of the fact that he was not working at the time of the accident his future employment would have been very uncertain and, therefore, the appropriate manner in which to assess any future loss in this case will be to consider it on the basis of a handicap in the labour market. This involves assessing two risks. The first is that he will be out of work in the future (notwithstanding that I consider it is likely he is selling some cars even now) and the second is, if he should be out of work, that because of the accident he will be less able to obtain fresh employment or employment at equivalent pay. I consider that if he were to obtain work in the future, it would probably be in the realm of selling cars (which I think he is probably doing in any event) but his injury will make him less able to fully engage in this occupation because of his inability to carry out heavy repairs from time to time in order to make the cars ready for sale. This may impede his ability to increase the profit margins on his sales. It may also impede to some extent his ability to return to labouring if he finds the car sales business unprofitable. Recognising that he is only 35 years old, I assess the proper award on a Smith v Manchester basis at £17,500.

The seatbelt issue and contributory negligence

[39] It was the plaintiff's case that he had been wearing a seatbelt at the time of the accident. He asserted that he had been leaning forward speaking to the driver and front seat passenger when the head on collision occurred.

[40] Mr McCormack, on behalf of the plaintiff, has asserted that he was aware of two instances where a patient had been wearing a seatbelt and had suffered a similar injury to that of the plaintiff. I did not hear, however, what injuries these patients had suffered or the circumstances of the impacts in either of these cases.

[41] On behalf of the defendant Mr Mawhinney gave the following evidence with reference to the seatbelt issue in this case:

- If a seatbelt was being worn, he could not comprehend how a bone like the humerus would be fractured. He had never in his entire 19 years experience come across a fractured humerus where someone was restrained by a seatbelt. The humerus is a strong bone and very difficult to break. This was a butterfly fragment fracture which it takes a great deal of force to cause. He could not conceive of this if the Plaintiff had been wearing a seatbelt.

- If the seatbelt were round his arm, it would be splinted against his chest and the seatbelt would not be sufficient to break the arm. If the injury had occurred in this way there ought to have been massive external damage to the muscles surrounding the arm. The arm would need to impact on something or be hit by something causing a blow. Thoracic fractures are also very uncommon in road traffic accidents. It was impossible to rule this out if he were not wearing a seatbelt but it was certainly not probable.

- In his opinion, on the balance of probabilities there would have been no fracture to the humerus or the back if he had been wearing a seatbelt because the body would have been restrained.

- In his opinion it was at best very difficult to accept and highly improbable that he was wearing a seatbelt.

[42] The defendant also called on this matter Stephen Parkin, an accident reconstruction and seatbelt specialist of 25 years' experience. He was a chartered engineer and a member of the Association for the Advancement of Automotive Medicine. As the manager of the Accident Research Centre at the University of Birmingham he had been involved in the investigation of several thousand road traffic accidents.

[43] He had been supplied with an engineer's report for the vehicle in which the plaintiff had been travelling and which was damaged. It revealed modest/moderate frontal impact.

[44] It was his conclusion that in frontal impacts the use of a seatbelt will significantly reduce the severity of injuries that would be suffered by an unrestrained rear seat occupant. He was satisfied that a seatbelt would have saved the plaintiff from his serious arm and spinal injuries. Given the moderate/modest nature of the damage to the Peugeot, had the plaintiff been wearing a seatbelt he would have sustained bruising and abrasions from the seatbelt and the possibility of, for example, a whiplash injury.

[45] The nature of the accident in this case was incompatible, in his view, with a humerus fracture. The level of force required to restrain an occupant is modest/moderate and the usual level of injury is bruising/abrasions and whiplash.

The force to create a humeral injury is a great deal more than the forces exerted by a seatbelt.

- He concluded that the forces necessary to cause fractures at T7/T8 are also a great deal more than would be exerted by someone being restrained by a seatbelt. In his view there was no chance that the fractures of T7/T8 could have been created by the accident if the plaintiff was restrained by a seatbelt.

- In this accident the deceleration would have been low and not severe. Fractures of this kind occur when a plaintiff hits something stiff and unforgiving. That did not happen in this instance if he were wearing a seatbelt.

- He did not require a police report or inspection of the vehicle itself or the seatbelts therein in this case because this was one of the instances where a consideration of the damage to the vehicle, as evidenced in the documentation available to him, and the injuries made it "so obvious" that he had not been wearing a seatbelt. He had studied this type of claim on hundreds of occasions and in his opinion the plaintiff's injuries were "way beyond what he would have sustained" had he been wearing a seatbelt.

[46] I pause to observe that whilst his photographs had not been served pursuant to Order 38 rule 3A, the plaintiff did not seek an adjournment to consider them and in any event he had not retained a seat belt expert in this case. As the Rules currently stand there is no obligation on either party to serve engineering experts' reports in advance of trial unless directed to so do.

Conclusion on the seatbelt issue

[47] I saw the plaintiff and in particular I watched him giving evidence when he was dealing with the seatbelt issue. As with much of the rest of his evidence, he appeared evasive and uncertain and I was satisfied that I was watching someone who was being less than candid with me on this matter.

[48] I found the evidence of Mr Mawhinney to be preferable to that of Mr McCormack on this aspect of the case. The fact that Mr McCormack had only come across two such incidents of a similar injury when a seatbelt was worn in 25 years' practice and Mr Mawhinney had never come across such an injury with a seatbelt worn in 19 years indicates the remoteness of the likelihood of this having occurred in this instance. Moreover, when one considers that it was a fracture not only of the arm but also the back, the unlikelihood is increased even further. There was a compelling logic to Mr Mawhinney's description of how these fractures generally occur and the unlikelihood of them being caused by a seatbelt. Accordingly, Mr Mawhinney's evidence alone would have been sufficient to persuade me that this plaintiff was not wearing a seatbelt.

[49] When I added to Mr Mawhinney's evidence that of Mr Parkin who, although not a medical expert, had carried out research into hundreds of accidents causing injuries with and without seatbelts, and had never come across fractures of this kind when seatbelts were worn, I was completely satisfied that the defendant had proved on the balance of probabilities that the plaintiff had not been wearing a seatbelt and that a deduction for contributory negligence should be made.

[50] Where a motorist has failed to wear an available seatbelt and, thus, the damages for his personal injuries fall to be reduced by an amount, the appropriate deduction must be assessed by the courts having regard to the extent to which the injuries were caused or contributed to by such failure. The court ought not to be invited to consider what the injuries otherwise might have been, if only the motorist had worn the belt, because those circumstances had never arisen (see Patience v Andrews (1993) R.T.R. 447 applying Froom v Butcher [1976] Q.B. 286).

[51] In Froom's case, before it became compulsory to wear a seatbelt, the Court of Appeal expressed the view that in such cases the damages should be reduced by about 25% where the injuries would have been prevented by wearing a seatbelt and by about 15% where the injuries would have been less severe. *Charlesworth and Percy on Negligence*, 10th Edition at 9-160 declares:

> "It may be that the modern view of the courts will be that since there is a criminal penalty for failing to wear a seatbelt, a greater reduction for contributory negligence will be appropriate in cases where the wearing of a seatbelt would have prevented serious injuries."

[52] However in J (A child) v Wilkins (2001) P.I.Q.R.. p. 179 the Court of Appeal indicated that the guidelines provided in Froom's case still applied and that although there might be exceptional cases which would fall outside the guidelines, such cases would be rare.

[53] Having heard the evidence of Mr Mawhinney and Mr Parkin, I am satisfied that these injuries would have been much less severe had he been wearing a seatbelt and, accordingly, I make a reduction of 20% to reflect that.

Costs and the principles to be applied

[54] The plaintiff having succeeded in this case, subject to a deduction for contributory negligence, the conventional approach is that costs follow the event.

[55] In this instance Mr Ringland contended that the plaintiff had been guilty of dishonesty and gross exaggeration of his symptoms and that this should have an impact on costs. He argued that the plaintiff's claim should be struck out for abuse of process or alternatively he should be penalised to a material extent in the costs

which he could recover and which he would have to contribute to the defendants' costs.

[56] Mr Rooney contended that this was not an instance where the draconian step of striking out the claim should be invoked and, insofar as contributory negligence was a finding against the plaintiff, the plaintiff would be penalised in that any award and damages would be reduced proportionately as will the costs commensurate with the reduced award.

[57] A number of authorities, some of which were invoked by counsel, deal with the concept of gross exaggeration and false claims. They include Molloy v Cell UK Limited [2001] EWCA Civ. 1272, Booth v Britannia Hotels Limited [2002] EWCA Civ. 579, Yvonne Painting v University of Oxford [2005] EWCA Civ. 161, Cheltenham Borough Council v Laird [2010] All ER (D) 50 (Feb), Hulloch v East Riding of Yorkshire County Council [2009] EWCA Civ. 1039), Feeney v Tyco Health Care (UK) Manufacturing Limited [2008] NIQB 133, Fairclough Homes v Summers [2012] UKSC 26,South Wales Fire and Rescue Service [2011]EWHC 1749 (Admin), Selfridge v NHSST (unreported GIL9085) and R (On the Application of Cherkley Campaign Limited v Mole Valley District Council [2013] EWHC 3558 (Admin).

[58] Many of these cases are fact specific. Moreover courts in this jurisdiction need to be acutely aware that the English authorities are often governed by the Civil Proceedings Rules (CPR) which do not apply in Northern Ireland. There is no doubt that the emphasis in England and Wales on this issue of costs is somewhat different to that in Northern Ireland. The provisions of CPR 44.3(2)(a) have preserved the longstanding presumption that a successful party would get his costs, but the whole tenor of CPR 44.3 is that this is only the starting point in any decision about costs and that success alone will rarely be the sole determining factor of liability, unless there are no countervailing circumstances of the kind specified in CPR 44.3(4). The appropriate exercise of the discretion under CPR 44.3(2) requires the court to identify what the real issue between the parties has been and reflect that in the costs order which it makes (see Hulloch's case). Thus, for example, part 44.3(4) makes express provision for an award of costs in light of the conduct of the parties, whether a party has succeeded on part of the case or under Part 36 orders. Northern Ireland has not introduced the CPR Rules and, accordingly, that is not necessarily the approach that has to be adopted in this jurisdiction.

[59] Nonetheless certain principles can be distilled on this subject which are applicable to this jurisdiction.

- The trial judge has a wide discretion on costs. Order 62 rule 3(3) of the Rules of the Court of Judicature (Northern Ireland) 1980 makes provision that if a court exercises its discretion to make an order as to the costs of the proceedings:

> "the court shall order the costs to follow the event except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

- Whilst Order 62 rule 9 sets out two specific matters to be taken into account when exercising discretion, namely an offer of contribution brought to the court's attention in accordance with Order 16 rule 10 and any payment into court, those are clearly not the only limits.

- The inclusion of a false claim with a genuine claim does not of itself turn a genuine claim into a false one or justify the striking out of the genuine claim or claims. To do so would be to deprive the plaintiff of a substantive right as a mark of disapproval, which the court should not do unless, as a last resort, the conduct of the litigant has put the fairness of the whole trial in jeopardy (per Lord Clarke in Fairclough's case at [30]). The court should recognise that there is a considerable difference between a concocted claim and an exaggerated claim and the court must be astute to measure how reprehensible the conduct is (Fairclough's case, per Lord Clarke at [14]).

- It is not unusual for plaintiffs to fail to win every point in a case and that should not deflect a court from awarding costs in the overall situation. If it was not unreasonable for the plaintiff to put forward the unsuccessful ground or the plaintiff has not pursued the point unselectively or his unsuccessful ground is closely related to other successful grounds on which he has succeeded, he should be entitled to his full costs (see Cherkley's case).

- On the other hand, when deciding what order to make, the court has to have regard to all the circumstances. The fact that a party succeeded overall is not necessarily sufficient to entitle him to recover all his costs and a court is entitled to take an issue- based approach in appropriate instances.

- When a judge has concluded that a plaintiff has been demonstrated, e.g. by video evidence, to be a malingerer, dishonestly exaggerating symptoms, the defendant should not bear any of the costs which the plaintiff has expended in that unreasonable pursuit (see Booth's case at [28]).

- A plaintiff who pursues a grossly exaggerated and inflated claim for damages must expect to bear the consequences when his costs come to be assessed (see Booth's case at [33]).

- The court should inquire into the causative effect of the plaintiff's lies and gross exaggeration and ascertain if it caused costs to be incurred and wasted. It is appropriate that a plaintiff should pay the costs of any part of the process which have been caused by his fraud or dishonesty. The prospect of such

orders is likely to be a real deterrent (see Lord Clarke in Fairclough's case at [53]).

Conclusion on costs

[60] This is not a case where the draconian step of striking out the claim would be justified, notwithstanding my belief that the plaintiff has on occasions exaggerated his symptoms and has fabricated a claim that he was wearing a seatbelt. He clearly has sustained significant personal injuries and must be appropriately compensated for these.

[61] His Blamire/ Smith v Manchester claim has probably been diluted by his lack of candour as to the degree of work that he has undertaken since the accident but he is still entitled to compensation for such a head of loss.

[62] I regard his assertion that he was wearing a seatbelt to be in a different category. I am satisfied that he was being deliberately dishonest in this aspect of his case and that he lied to me in the witness box when dealing with it. As a result of his determination to maintain this stance, the defendant understandably employed the services of Mr Parkin. This was not an unreasonable decision given the apparent conflict between Mr McCormack and Mr Mawhinney.

[63] True it is that the damages awarded to the plaintiff will be reduced by virtue of the finding of contributory negligence, with presumably a reduction in costs to be recovered but this does not compensate the defendant for incurring unnecessarily the expense of retaining an expert witness to rebut the untruthful assertion by the plaintiff. His dishonesty in this aspect of the process has been responsible for these costs being incurred. Hopefully this decision will serve as a deterrent to other likeminded litigants.

Award

[64] Accordingly, I award the plaintiff £85,500 reduced by 20% i.e. £68,400. I award no interest on the Smith v Manchester aspect but I award the conventional 2% on the general damages award of £54,400 which shall be calculated by counsel and added to the figures.

[65] On this sum he is entitled to the general costs of the action save that the defendant should be entitled to offset against the plaintiff's recoverable costs or damages the cost to the defendant in retaining and calling to give evidence Mr Parkin.