CROYDON COUNTY COURT

No. 9BS05605
The Law Courts
Altyre Road, Croydon

18th January 2011

B e f o r e:-

HIS HONOUR JUDGE D ELLIS

M P HIGGS

Claimant

v

U PICKLES

Defendant

JUDGMENT
(As Approved by the Judge)

MR HAMILL appeared on behalf of the Claimant.

MR WALKER appeared on behalf of the Defendant.

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Nº of words: 4624
Nº of folios: 65

His Honour Judge Ellis:

1. This is a claim for damages arising from the injuries sustained by the Claimant in a road traffic accident which occurred on 18th July 2006. The Claimant was knocked off his motorcycle when the Defendant, driving a car, turned across his path. Liability is not in issue.

2. General damages for pain, suffering and loss of amenity, and loss of congenial employment, have been agreed at £63,000, including interest. Special damages were agreed before the trial started, at £81,382.32p.

3. The principal issue between the parties concerns future loss of earnings and, in particular, how the 6th Edition of the Ogden Tables should be applied in this case.

4. In addition, at the start of the trial there were issues between the Orthopaedic experts as to whether the Claimant's shoulder injury could be resolved or improved by a further operation; the length of time before he will need a new replacement, and whether or not that will need to be revised in later years.

5. The Claimant was born on 2nd December 1957, and was aged 48 at the date of the accident, and 53 at the date of trial. He suffered a fracture to his right tibia intercondyle spinous process and a comminuted fracture of the right tibial plateau within his right knee, which extended into the medial and lateral tibial plateau, with a large central fragment posteriorly. In addition to a 2cm laceration of his medial right thigh and grazing to his right leg, he also suffered a soft tissue injury to his right shoulder.

6. The right shoulder injury was not immediately apparent. However, his symptoms became troublesome when he started to mobilise on crutches. He was initially treated with physiotherapy. However, it failed to improve. Following an MRI scan in June 2007, he had an arthroscopy to his shoulder in January 2008. He was found to have a Type 2 impingement underneath the acromion, for which he underwent a decompression of the acromion joint.

7. His right knee was examined under arthroscopy in September 2007 and was found to be degenerate, with a detached posterior cruciate ligament and a small tear to his lateral meniscus.

8. The Claimant continues to experience significant pain in his shoulder, with limitation of movement caused by his pain. Flexion within his right knee is limited to 120^0. There is laxity within the knee joint. The Orthopaedic experts agree that he will in due course develop a post-traumatic arthrosis within his knee, which will require a total knee replacement.

9. In addition to his physical injuries, the Claimant developed a depressive episode of mild-to-moderate severity and was treated with anti-depressants and cognitive behaviour therapy. Fortunately, the Claimant has made a good recovery from the depression.

10. Prior to the accident, the Claimant was a self-employed bricklayer and builder and has, as a result of his injuries, had to give up his job. At one stage the Defendant's Orthopaedic expert, Mr. Ransford, believed that the Claimant would be able to return to building work, but it is now accepted that he will not be able to resume his pre-accident employment.

11. When the Claimant realised he would not be able to return to work as a builder, he set about finding an alternative career. He consulted a friend, who had been in a similar situation, and decided he would retrain. He attended Queen Elizabeth's Residential Training College in Leatherhead, which specialises in the rehabilitation of people with disabilities. The course ran from September 2008 to 2009. It was intended that the course would incorporate a two-to-three month work placement. Unfortunately, despite the best efforts of both the College and the Claimant, no work placement could be found.

12. Since leaving Queen Elizabeth's College, the Claimant has applied for many jobs without success. He attended the local Adult Learning and Training Centre in Croydon, where the adviser attempted to find him a work placement but, again, without any success.

13. He retrained as a computer aided design ("CAD") technician, and obtained a City & Guilds Level 3 qualification in 2D Drawing.

14. The Claimant left school without any qualifications. He has no GCSEs. He started at the bottom in the building trade and worked his way up to being a skilled bricklayer. In 1998, he was short of building work and went to work for a company that built laser engraving machines used in the ceramic tile industry. His intention was to work there for a few weeks, but he enjoyed the work and did well at it, with the result that he stayed there a year. He then returned to building work, working for various firms, until he joined Owen Construction four years before the accident.

15. It is clear that the Claimant was highly regarded by his employers. Mr. Owen, the Managing Director of Owen Contractors Limited, has given evidence. He said that the Claimant was a reliable and expert bricklayer. He was a good employee; a salt of the earth-type character, having all the attributes that they look for in an employee. He was one of a pair of bricklayers who Mr. Owen looked to for the more specialist jobs. Mr. Owen's firm works for most of the principal developers. Before the current economic downturn, they were employing 300 bricklayers. That went down to 190, but Mr. Owen's evidence was clear that the Claimant would not have lost his job. His pair, Mr. Locket, has continued to work for Mr. Owen throughout, and now works in a supervisory capacity in addition to his bricklaying duties. There is every reason to believe that, had the Claimant not been injured in the accident, he would have continued to work successfully for Owen Construction. Mr. Owen said that their order book is now full again and they are back up to 400 bricklayers.

16. It is clear that the Claimant is a hard-working man, with an excellent employment record. His efforts to retrain and to obtain work show that he is a highly motivated individual.

17. In 2005, the Claimant and his wife agreed to separate. The Claimant now lives on his own.

18. The Claimant gave a clear account of his continuing symptoms and the impact on his daily life. Walking on rough ground causes him significant discomfort. He gave a vivid example of having to walk on cobbles when he visited his barrister's chambers. His pain level shot up by about 50% and lasted for five or six hours before it started to abate. His symptoms get worse in cold weather. He cannot lift any significant weight. He used to enjoy an open fire in his flat. However, he is no longer capable of chopping wood. Carrying a coal scuttle up the stairs to his flat is painful, so he rarely has a fire nowadays. He has considered a job filling shelves in a store, but repetitive lifting of even relatively lightweights would cause him significant pain. Both experts agree that he has not exaggerated his systems.

19. Mr. Halliday was instructed as a single joint expert to give an opinion as to the Claimant's employment prospects. He gave evidence at the trial. At paragraph 5.11 of his report, he expresses the view that the prospects of the Claimant obtaining employment with an architect or contractor using his newly acquired CAD skills are poor, and will remain so until at least 2014, by which time the Claimant will be 56. He assesses the Claimant's prospects of obtaining any relevant employment as being less than 50%, and the prospects of obtaining CAD work in an engineering field are even lower than this. He concludes his report (at paragraph 8.6) by stating:

> "In my view, there is a significant risk that he will have difficulty in finding full-time permanent paid work, particularly using CAD skills, in the foreseeable future. Although the CAD skills are potentially marketable, he is limited by his lack of technical or educational qualifications and the number of opportunities has fallen since he started the course. Therefore, he probably needs to consider alternative jobs".

20. The Claimant remains keen to obtain employment. However, he has only had a handful of replies to his many job applications. The only work he has obtained to date was a locum position to assist a friend working in an office doing drawing work for two weeks holiday cover.

21. It is agreed that the Claimant's net pre-accident earnings were £17,007 per annum. The net loss for the period of 4½ years from the date of the accident to the date of trial amounts to £75,721. It has been possible to agree that figure because the Claimant has been in regular work and has been able to produce records of his earnings for previous years. It is important to note, therefore, that figure takes account of the periods when the Claimant has not had work – for example, periods when it has not been possible to work in the building industry because of bad weather.

22. As to the medical issues, I heard oral evidence from the medical experts, Mr. McKay (Consultant Orthopaedic Surgeon for the Claimant), and Mr. Ransford (Consultant Orthopaedic Surgeon for the Defendant). In the end, there is very little between the experts. Mr. Walker, for the Defendant, does not seek to rely on Mr. Ransford's stated opinion that a further operation may resolve the Claimant's shoulder symptoms. Mr. Ransford expressed the view that the original

decompression procedure was not done competently and, if another MRI scan was obtained and the Claimant referred to a shoulder specialist, a further operation may be advised, which would get the Claimant's shoulder back to normal.

23. This opinion was highly speculative. There is no evidence at all to show that the original treating surgeon who was a shoulder specialist did anything other than a competent job. Mr. McKay was of the clear view that a second shoulder operation was not advisable as, in his experience, the results of secondary shoulder surgery are not good. I have no hesitation in preferring Mr. McKay's opinion on this. In any event, the Defendant now accepts that the Claimant will continue to be troubled by his shoulder symptoms.

24. Although Mr. Ransford did not state in his first report on the Claimant that he would need a new replacement operation, and recognised in giving evidence that was a failure on his part, he did agree such an operation would be required.

25. Both experts agree that it is very difficult to be precise about when the operation will be needed. Both agree that the determining factor will be the amount of pain being experienced by the Claimant. The operation may be indicated within a few years from now – or not for as long as fifteen years from the date of the accident. Mr. McKay's best "guesstimate" (as he described it) was that the Claimant would require a knee replacement at the age of 60 years. Mr. Ransford declined to give a specific age. Mr. McKay has very considerable experience in this area of surgery, having carried out more than 1,000 such operations. For that reason I accept his opinion, and future loss under this head should be calculated on the basis that the Claimant will be 60 years old when he has his knee replacement.

26. As to the need for revision of the knee replacement, Mr. McKay was of the opinion that the Claimant will need a replacement arthroplasty of the knee joint within about fifteen years of the first operation. In his experience, the replacement joint tends to get loose and needs to be revised, and that is currently the accepted view. Mr. Ransford does not believe a revision will be necessary. Again, he speculated by stating that, by the time the Claimant has his replacement, artificial joints will be better than they are now.

27. I must decide the case on the basis of current medical knowledge. Again, because of Mr. McKay's considerable experience in this area of surgery, I prefer his opinion and conclude that a revision operation will be required when the Claimant is about 75 years old.

28. The background facts of the case are, therefore, relatively clear and non-contentious. The Court is faced with the familiar scenario in which a hardworking man is no longer able to work in his pre-accident employment because of his injuries. He has made, and will continue to make, efforts to find work that he is fit to do, but it is impossible to predict what the future holds for him so far as employment is concerned. The Court has to do its best to calculate what the Claimant would have earned had it not been for the accident, and what the Claimant is likely to earn having regard to his injuries and his job prospects. Both calculations are fraught with difficulty.

29. For a number of years now, the courts have been assisted by the Ogden Tables in calculating future pecuniary loss. The Tables are prepared by the Government Actuaries Department and introduce some actuarial science into the calculation without requiring evidence from an actuary. They still involve a good deal of simplification and broad justice, but enable a court to move away from the impressionistic finger in the air assessment of compensation.

30. It is clear from the decided cases, and from the explanatory notes to the Tables, that they are to be regarded as a starting point and that adjustments may need to be made to take account of specific facts in a particular case.

31. In this case, the Claimant argues that there are no particular features which require the Court to make any adjustment and that, once the correct place in the Tables for this Claimant has been identified, the calculation can be made and damages awarded accordingly. The Defendant argues that an adjustment needs to be made to take account in particular of the new skills the Claimant has acquired and his motivation for work.

32. The 6th Edition of the Ogden Tables was published in 2007. It is clear from the introductory notes that the most significant contribution to this edition is the research carried out at City University in London and Cardiff University, which considers the impact of contingencies other than mortality on working life. The research demonstrates that people without disabilities spend more time out of employment than earlier research had suggested. It is, therefore, appropriate to apply a higher discount for contingencies, other than mortality, than was indicated in previous editions. The effect is that some claims for loss of earnings are likely to come down.

33. The research also demonstrates that the factors other than gender, which have the most effect on a person's future employment status are:

    1. Whether the person was employed or unemployed at the outset.

    2. Whether the person is disabled or not.

    3. The educational attainment of the person.

34. The research has shown that the effect of factors previously thought important – such as occupation, industrial sector, geographical location and levels of economic activity – are relatively insignificant once educational attainment has been taken into account.

35. Accordingly, the discount to be applied to a working life multiplier, or at least the starting point, can be determined from the Tables by looking up the discount factor to be applied to a person of the Claimant's gender, age, educational attainment and employment status at the time of injury.

36. Unsurprisingly, the research has demonstrated that disabled people are more likely to be out of employment than people without disabilities; therefore, justifying a higher discount for contingencies other than mortality.

37. The relevant paragraphs to the explanatory notes to the 6th Edition of the Ogden Tables are as follows:

> "31. The methodology proposed in paragraphs 33 to 42 describes one method for dealing with contingencies other than mortality, which replaces that set out in earlier editions of the Ogden Tables. If this methodology is followed, in many cases it will be appropriate to increase or reduce the discount in the tables to take account of the nature of a particular claimant's disabilities. It should be noted that the methodology does not take into account the pre-accident employment history. The methodology also provides for the possibility of valuing more appropriately the possible mitigation of loss of earnings in cases where the claimant is employed after the accident or is considered capable of being employed. This will in many cases enable a more accurate assessment to be made of the mitigation of loss. However, there may be some cases when the *Smith v. Manchester Corporation* or *Blamire* approach remains applicable or otherwise where a precise mathematical approach is inapplicable.
>
> 32. The suggestions which follow are intended as a 'ready reckoner' which provides an initial adjustment to the multipliers according to the employment status, disability status and educational attainment of the claimant when calculating awards for loss of earnings and for any mitigation of this loss in respect of potential future post-injury earnings. Such a ready reckoner cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases . . . However, the methodology does offer a framework for consideration of a range of possible figures with the maximum being effectively provided by the post-injury multiplier assuming the claimant was not disabled and the minimum being the case where there is no realistic prospect of post-injury employment".

38. There does not appear to be a reported case where the Judges applied the starting point figure without adjustment, but I have been referred to two cases where the Judge has either not applied the Tables, or has adjusted the starting point figure.

39. The first case is *Clark v Maltby* [2010] EWHC 1201, a decision of Owen J. In that case the Judge had to evaluate the impact of a residual brain injury on a solicitor's capacity to function as a solicitor specialising in banking work. She could work as a solicitor, but lacked the capacity to deal with work of that complexity. The Judge did not apply the Ogden Table discount, because he was satisfied a degree of disability had been fully reflected in the difference between her lost and residual earning capacity. It was a completely different situation to the present case.

40. Secondly, I was referred to *Connor v Bradman* [2007] EWHC 2789 in which His Honour Judge Peter Coulson QC applied the Tables, together with the appropriate discount from the 6th Edition, but then adjusted the reduction figure to take account of the fact that the Claimant was already working as, and would continue to work as, a taxi driver notwithstanding his injury. Again, very different facts to the present case.

41. I come now to the application of the 6th Edition of the Ogden Tables to the present case.

42. With regard to the Claimant's earnings, but for the accident, there is an issue as to when he would have retired. The Claimant's case is that he would have carried on working in the building trade long after the age of 65, but at about that time would have probably stopped working on building sites and moved to domestic work, such as the construction of brick walls and extensions.

43. He would have reduced his hours to two or three days a week. His father-in-law is a bricklayer, who is still doing work in his late 70s. Mr. Owen's evidence confirmed that there is nothing to stop a bricklayer to work on building sites after the age of 65 but, in his experience, most bricklayers do give up the rigours of building site work at about that time and move to domestic work, which is less demanding.

44. The Defendant has argued it is unrealistic for the Claimant to have worked beyond 65. Indeed, having regard to the rigours and risks of work on a building site, he would not have worked for as long as that.

45. However, having regard to the Claimant's enthusiasm for his work, and Mr. Owen's evidence confirming that the Claimant's plans would have been realistic, I conclude that, were it not for the accident, he would probably have continued working, using his skill as a bricklayer, until about the age of 75 years. I accept the argument of Mr. Hamill, for the Claimant, that having regard to the fact that his earnings would be significantly less after the age of 65, the multiplier should be reduced and taken to the age of 70. That gives a multiplier for the earnings, but for the accident, of 13.11. Table A indicates a reduction factor of 0.80, which reduces the multiplier to 10.48. The multiplicand for earnings but for the accident is agreed at £17,007, which gives a total figure, as claimed in the Claimant's schedule, of £178,233.

46. Before the publication of the 6th Edition of the Tables, it seems to me unlikely that a court would have discounted the multiplier by as much as that, having regard to the Claimant's excellent work record. However, the research behind the Tables shows that a higher discount is now necessary to reflect contingencies other than mortality, and there is no reason for the higher discount not to be applied in this case. Mr. Hamill does not argue otherwise.

47. Mr. Walker, for the Defendant, argues that a further adjustment is required to the reduction factor to reflect the physically demanding nature of the Claimant's work in the building industry, with its attendant risk of injury or accident.

48. However, it seems to me that that is exactly the type of contingency that the Tables now take into account. There is no evidence before me to show that bricklayers are significantly more likely to be injured at work than other workers and, in my judgement, it would be wrong for me to make a further adjustment on that basis.

49. Turning to the Claimant's residual earning capacity, his original schedule claims a multiplier up to the age of 65, adjusted by the appropriate reduction factor from Table B, which is 0.15.

50. However, in his final speech Mr. Hamill recognised that there is an argument for quantifying this head of loss on the basis that the Claimant will, if he gets work, continue to work beyond the age of 70.

51. I have decided that is the correct approach. Given the Claimant's work record; his enthusiasm for work; the fact that he is a single man, and work provides him with an interest, the Claimant will, if he gets work, stay in that work until beyond, albeit probably part-time, after the age of 65. In other words, his approach to retirement from sedentary work will be much the same as his approach for retirement had he been able to continue working as a bricklayer. That means that again the appropriate multiplier is 13.11, to which the reduction factor in Table B of 0.15 has to be applied, giving 1.966.

52. Mr. Hamill has then taken the average of Mr. Halliday's figures for the Claimant's residual earning capacity, set out at paragraph 8.5 of his report. That gives a net figure of £25,384, to be deducted from £178,233 – the amount the Claimant would have earned but for the accident, making the Claimant's future loss of earnings £152,849.

53. Should the starting point indicated by Table B be adjusted?

54. It is accepted that the Claimant is disabled within the meaning of the Equality Act 2010. He has a physical impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. For the purposes of the Tables, he is categorised as GE-A. That recognises that, although he has no school examinations to his name, he has obtained a City & Guilds qualification through his course at Queen Elizabeth College. It should be borne in mind that, had he not done that course and obtained his City & Guilds certificate, he would be categorised in Table B under Column O, someone with no qualification. In that event the reduction factor would be 0.07, indicating he would only have a slight chance of working again.

55. There is no dispute that he is not employed. The evidence is that, despite his best efforts, he has not been able to obtain work and has no immediate prospect of work.

56. Mr. Walker asked me to consider whether it is really likely that this Claimant is going to be working for such a short time, between the age of 53 and retirement, given the man he is. After all, he argues, the Claimant is honest, resourceful, highly motivated and has reasonably good communication skills.

57. It seems to me that the answer to the question is that the research on which the 6th Edition of the Ogden Tables is based strongly suggests that, given his disability, his future earnings are indeed going to be modest. Mr. Walker uses Mr. Halliday's evidence to argue that the Claimant does have good prospects of getting CAD work in 2014. In the meantime, it is argued that he will get a lower grade job at a modest salary. Thereafter, he will get CAD work and remain in CAD work, making a good living, until he wishes to retire.

58. However, in my judgement, that is to take far too optimistic a view of the Claimant's job prospects and is not borne out by careful reading of Mr. Halliday's

report. It does not take into account sufficiently the fact of disability and the absence of any qualification beyond his City & Guilds certificate. The fact is that the Claimant has no GCSE or equivalent in either English or Maths, and that will make it difficult for him when applying for all types of work. In addition, when applying for CAD work his age and lack of experience will almost certainly place him at a disadvantage when competing with other candidates.

59. Mr. Walker argues that I should adjust the reduction factor to 0.6. There is no statistical or actuarial basis for such an adjustment. I would be resorting to the old-fashioned approach of "feel".

60. There will no doubt be many cases where it is necessary to adjust the starting point to take account of special factors. However, in my judgement, there are no such special factors in this case to justify a departure from the starting point indicated by the Tables.

61. In addition to the sums claimed in the schedule, it is accepted that the Claimant is entitled to recover £1,000 to cover the cost of the additional courses recommended by Mr. Halliday, when he gave his oral evidence. It should now be possible to calculate the final Judgment sum on the basis of the figures I have given.

This is to certify that paragraphs 1 to 61 have been produced according to the procedure set out in the AVTS Quality System.

Signed: Linda Burton

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