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Case No: HQ09X03803

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 April 2012

Before :

SIR ROBERT NELSON

Between :

Amy Verlander	**Claimant**
- and -	
Mohammed Khalilur Rahman	**Defendant**

Nicolas Hillier (instructed by **Thompsons Solicitors)** for the **Claimant**
Nicholas Baldock (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 26th to 30th March 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ROBERT NELSON

SIR ROBERT NELSON :

1. On 2 September 2006 the Claimant sustained multiple and serious injuries when she was struck by a motor car driven by the Defendant in Burdett Road, Limehouse, London E14 as she was attempting to cross that road on foot. Liability was admitted on 19 April 2007 so the issue before the court is solely that of the quantum of the Claimant's claim.

2. There is a dispute between the parties on almost every quantum issue. The main area of contention is the extent and consequence of the head injury which the Claimant sustained. Both parties accept that a head injury occurred and that the Claimant suffers from depression as a result of the accident, but the effect which each of these has upon the Claimant's current condition is strongly contested. The Claimant contends that most of her current disabilities are due to frontal lobe brain damage and are now incapable of significant improvement, whereas the Defendant contends that most if not all of the Claimant's current disabilities are due to depression or psychological factors, which may well improve over time. The dispute has a profound effect on the most substantial parts of the claim, those relating to future loss of earnings and future care. There is also a dispute as to whether the Claimant has capacity to manage her properties and affairs, which I am to determine.

3. The nature of the disputes between the parties inevitably resulted in many alternative claims being put forward, exemplified by the thirteen page joint report between the care experts setting out the numerous disagreements between them, and pages of alternative and revised figures of calculation. I indicated to the parties at the beginning of the hearing on the second day that the case would be best managed by hearing and determining the principal issues first, and thereafter reformulating the claim in accordance with those findings. The care experts would then meet again and prepare final figures upon the basis of those final findings. This would involve the calling of all the evidence apart from the care experts. The parties considered this over night and agreed that this was a proper way forward. They agreed upon the issues due to be determined by the court before the care experts could prepare a final joint report and damages be resolved. The agreed issues are as follows:-

<u>The issues</u>

(i) Severity of the traumatic brain injury

(ii) Causation of the neuropsychiatric/neuropsychological symptoms,

(iii) Prognosis for those symptoms

(iv) Prospects (but not value) of future employment

(v) Probable duration of future care requirements (including Case Management and Support Worker input, but excluding the value of future care)

(vi) Financial capacity

The Background Facts

4. The Claimant who is now 27, sustained a fracture of the odontoid peg of the second cervical vertebra, a compound fracture of the left humerus, a dislocation of the left wrist, a fracture of the sacroiliac joint, and abdominal and chest injuries. The abdominal injury required a laparotomy and the chest injuries included multiple rib fractures and a haemo-pneumothorax.

5. The Claimant was admitted to the Royal London Hospital at 1.05am. The pre-hospital information records her as having a Glasgow Coma Score (GCS) of 3/15 "on scene" and 'moaning'. (Page 2/63) After admission, she was recorded as having a Glasgow Coma Score of 3 at 1.07(2/64) and on the observations chart (2/67) she was recorded as having four separately recorded Glasgow Coma Scores of 3/15 at 1.16am 1.29 am, 1.34am and 1.43am. There is a discrepancy in the notes in that in the general surgery note (2/72) she is described as having a GCS of 3/15 and "uttering few words on arrival" whereas in the orthopaedic note it is said that her GCS was 3/15 on the scene but 4/15, and "groaning", on arrival.

6. At 8pm on 2 September 2006 a GCS score of 3/15 was recorded, but thereafter the score improved to 9 or 10/15, save at 4pm the following day, 3 September 2006, when it went down to 3/15 again because the Claimant was no longer obeying commands, or otherwise exhibiting motor responses. The record (2/141) on the neurological assessment chart shows that the Claimant was intubated from 20:00 hours on 2/9/06 to 18:00 hours on 5/9/06, and it is agreed medical evidence that that would have depressed her ability to make a verbal response and hence have a better GSC score. Professor Ron said that the GCS at the scene is usually the more accurate, unaffected as it is by any drugs or therapy.

7. On 5 September 2006 the nursing notes record the Claimant as "Very agitated. Attempting to extubate self. Kicking and punching me." On 6 September 2006 the nursing notes recall that she was "very confused and combative."

8. These passages are examples of what Dr. Walton described as "other worldly" behaviour expected in brain damage cases, though he had himself not noticed them in the notes. He raised the question as to whether they could have been caused by drugs being taken at the time.

9. The assessment of post-traumatic amnesia (PTA) is often rendered difficult by the giving of medication, such as morphine, which was given here. The general view of the medical experts was that the PTA could be treated as about six days though Dr Walton said that it could be less in view of the giving of morphine, and Professor Ron said that six days could be conservative in view of the fact that, at that time, the Claimant only had isolated memories, when post-traumatic amnesia is said to come to an end only when memory is continuous.

10. The Claimant was discharged from hospital on 25 September 2006 to her parents' home. She subsequently underwent a number of operations on her shoulder and wrist and is left with pain and disability in those joints and also her left hip and back area. She is on anti-depressants.

11. Prior to the accident the Claimant was described as a lively enthusiastic girl with a sense of humour who was social and popular. She worked for the Independent Police Complaints Commission (IPCC) as an administrator and was described by her line manager, Peter Crouch, as always enthusiastic, organised, proactive and committed to the work of her team. He had great confidence in her ability to work effectively and believed that she had the necessary skills and experience to become a full-time Casework manager, in which post she had acted up for some months in 2005 with success. He expressed this opinion in spite of the fact that the Claimant had been given a verbal written final warning in 2006 for forwarding sexually explicit emails, which she had received on her work system. Some 28 people in the IPCC were investigated including senior employees, five of whom left, and twelve of whom were subjected to disciplinary proceedings. Mr Colin Woodward, the head of human resources at IPCC expressed the view that once the year's warning had expired the fact of the disciplinary warning would not have stood against the Claimant in any application for promotion. Whether or not that is so, Mr Crouch said that she had put in a greater effort after her warning and had already regained her employers' trust by the time that the accident had happened.

12. A work colleague, James Abraham from the IPCC said that he joined after the Claimant and she was appointed to train him up and show him the role. She was very thorough with great attention to detail and was liked by everybody. He has since been promoted to casework manager.

13. The picture painted of the Claimant after her accident is in marked contrast to the description of her before it occurred. She can no longer initiate and requires prompting in order to carry out tasks. If she has a structure or a rota she can work to it, but does not always keep to it unless prompted. She moved into her own council flat in July 2007 but needs help from her mother or her fiancé on a daily basis otherwise she would, in her mother's words just lay there. She suffers from mood swings and panic attacks. She can be rude to the point of aggression in public and make inappropriate remarks such as about other people's clothing. She is argumentative and suffers greatly from fatigue. She has lost her previous numerous friends, declining to go out with them. They now no longer ask. She is, according to her fiancé Daniel Gilbert, to whom she became engaged in January 2006, now very shy and quiet and sits in a corner. People don't like having conversations with her as she repeats herself over and over again.

14. Mr Gilbert said that she struggled with everyday life and could not process things as quickly as she could before. It took her a long time to fill in a form compared with before. Her memory is not as good, and even last week she forgot to do something which she was supposed to be doing. She has let him down on numerous occasions Mr Gilbert said. She now likes visiting places and will research that on the internet and get brochures, but does not drink and does not like to do anything exciting like they used to. She plays Nintendo but does not really progress in the games and then simply buys another one. He keeps his finances separate from her because he gave her his card once and she took £50 or £60 out and spent it all, when had only intended her to spend about £20. He would not trust her with hundreds of pounds.

15. The Claimant went back to work on 24 January 2008 on a phased basis, carrying out restricted duties. She started working four hours a day for three days a week, and then in April 2008 this increased to four days a week. Initially they sent cars for her and

thereafter her mother accompanied her until she had learned the route and went by herself on public transport.

16. She was given the task of logging incoming post to begin with but found this difficult and when she was asked to prioritise post she found this very difficult. She could no longer multitask and became tireder and tireder. Her mother described her as going to bed exhausted in the evening when she had finished work, staying in bed the next day until she got up to return to work the day after. Eventually she became so tired and stressed that she was unable to continue. She has since lost her job. She has not sought any other work as she is not fit to do so.

17. The Claimant is however able to perform volunteer work at the head injury Association, Headway, East London, initially for three days a week then reduced to two days a week. Her work involves helping to tidy the kitchen, making cups of tea for members, playing games and going to the local shops. Mr Rupert Spiers, who has seen her both as a patient at Headway as well as a volunteer, described her capabilities in evidence. He has seen her since 2009 on an irregular basis but from 2011 every week. He described her as trying very hard to participate in group sessions but said that she can get stuck on her own story rather than following the track of discussion of the group. As a consequence she may dominate the group. She can be intelligent but there are times when she struggles to understand what is being said to her. Thus when she has been given instructions about behavioural intervention she would struggle to understand that. She is computer literate but sometimes has difficulty with helping others on a computer. Mr Spiers recalled an occasion when she was asked to give somebody some help with a particular problem and could not do so and had to get someone else to do it. He accepted that could have been a lack of familiarity with the particular site, but said that she seemed quite concerned and anxious about it and asked him for help when he was leaving the room. He had expected a better understanding from her on a simple piece of software. When she went to the shops she did so only to make small purchases such as milk or bread. Her memory and concentration were impaired. Mr Spiers said that if he asked her to take a particular role she could well have forgotten later in the day what that was. Her concentration wandered when she was in groups. She could become quite emotional about her panic attacks and was concerned about the impending litigation. She needed extra time to be able to understand complex written or spoken instructions. Mr Spiers said that he would ask her to do one thing rather than more. As for motivation, she was often to be seen not looking for activity for members but sitting there. She needed someone to come up and ask her to do something.

18. The Claimant's mother has provided much of her care but the Claimant has had support workers from an organisation called Sweetree who proved to be inconsistent, bad timekeepers and generally let her down. She dispensed with their services and for several months in 2011 relied on her family and fiancé for help. During this period she described herself as feeling "on top of the world" in April 2011 and said she continued to feel that way in June 2011. Later that month she described a three-month deterioration in mood, having stopped the antidepressants and become aware of how the accident had affected her life.

19. In November 2011 she started again with a support worker, Debbie Lantsbury, an employee of Headway. Jenny Atkinson, the case manager for the Claimant since August 2011 arranged for Miss Lantsbury to be her support worker, as she realised

that the Claimant wanted support and her family needed respite. She described Miss Lantsbury's tasks as housework, memory support, organisational and strategic support, going out, doing exercise and meal preparation. She was satisfied that this was having a very good effect. She agreed that Debbie Lantsbury provided companionship, help in meal preparation for healthy cooking, form filling in, difficult phone calls such as dealing with a mouse problem with the council, and leisure activities. The Claimant now has an iPad which Mrs Atkinson describes as a very useful tool for her to use; she is able to use it with additional training from her support worker.

20. Miss Lantsbury, who is 23 and a responsible young woman, said that the Claimant does not want to go out on her own as she does not have confidence. She has improved in the sense that she will normally, if not always, follow the cleaning rota which Miss Lantsbury has prepared for her. She requires help with most letters and sometimes does not open her post. Using the iPad she sticks to the few apps she knows and does not like to download. She does however email and use the contacts book if Miss Lantsbury prompts her. She does not use the notes app as it is better for her to write things down to help make it stick in her mind. When she has not done the washing up Miss Lantsbury tells her that it is important and they do it together. They go out to lunch together and the cinema together. The only improvements the Claimant has made is when strategies have been put in place. She does not initiate things herself. She won't always use the rota unless reminded and would do considerably less if there was no rota or strategy. When she is stressed she gets very flustered and cannot make a decision.

21. Neither her parents nor her fiancé were prepared to accept that the Claimant had made any significant improvement since the accident though her father, when he gave evidence, did say that he had noticed things to have been more steady since Debbie had come along. Maybe that was because of a bond between them or because she was listening to someone. Nevertheless he said, as his wife had, that Amy was still not the daughter he knew. Both parents gave me an example of how difficult her behaviour had been at Christmas 2011. Amy, like everyone else had had a drink and had started an argument with everyone. Most of them, Mrs Verlander said, had ended up crying. Mr Verlander said that Christmas could not start until Amy and her fiancé had left.

22. The Claimant has demonstrated problems with the management of money. She has spent sums in excess of £2,000 on online gambling on her mobile phone. When later in receipt of an interim payment of £15,000 she lent £5,000 to her parents because her father was out of work and needed a car and spent the rest on items which her parents are unaware of and she does not recall. Some of it may have been a game called 'Travian'. After this, which caused her mother to feel that her trust had been betrayed, her mother organised the collection and spending of her daughter's income which consists of her pension and benefits. Initially her mother went with her to collect the money but after Mrs Verlander had herself suffered an injury, she was unable to do so and sent her daughter herself. The system established requires the Claimant to go to the bank at Canary Wharf to collect an envelope containing her pension of approximately £1,000 per month. The system is recognised by the cashiers and the money placed in an envelope by them. The Claimant is trusted to take the money back home to her mother, which she has always done, and the money is then divvied out in accordance with the amount outstanding on the claimant's bills. The

right money in respect of each payment card is given to the Claimant and she pays all the bills and takes the receipts. Her mother keeps the payment cards but does not receive her daughter's bank statements nor is she a signatory to the account.

23. Mrs Verlander has said that she had drummed into the Claimant that her bills must be paid first and she thought that she knew that. She said however that if she had nothing to do with it she did not know whether her daughter would pay the bills. She gave Amy only £5 a day for spending so that she could not overspend. She described an incident when she had given Amy some money for payment of her council tax and rent in 2010 but by mistake the Claimant had paid everything into the rent account. She was an impulsive buyer and had recently gone to buy a hamburger and come back with five.

24. Her application for a Litigation Friend was dismissed by the High Court on 8 February 2011.

Chronologies

25. There is a very considerable number of documents dealing with the Claimant's visits to the treating doctors, occupational therapists and others in which her account of her condition, whether worse, better or the same, is recorded. These matters and other relevant material are set out in the very detailed chronologies which Mr Baldock for the Defendant, and Mr Hillier for the Claimant have prepared, and in Mr Baldock's case amended after the evidence. I have considered each of these in conjunction with the documents they specify and will refer to the key points under each head of decision. In general terms the Defendant submits that the document show improvements in the Claimant's condition which could not have occurred had they been caused by brain damage, which would not permit any recovery after about two years, and the Claimant submits that the documents demonstrate that in spite of the occasional improvement, the underlying condition persists and any recovery is demonstrated to be fragile as Professor Ron described it. The Defendant submits that the documents demonstrate that the Claimant is much better than she or her family consider her to be.

26. The medical evidence in this case is voluminous and detailed. There are reports from Dr. Barrie, the consultant neurologist who did not give evidence before me, from Professor Ron and Dr. Sumners, the consultant neuropsychiatrists, and from Dr. Leng and Dr. Walton, the neuropsychologists. There was a sharp disagreement amongst the doctors on a number of issues, and questions were raised in relation to Dr. Walton by Mr Hillier, as to whether Dr. Walton was reporting, or giving his evidence, in an impartial manner and in accordance with his part 35 obligations as an expert. I was satisfied however that each of the doctors who gave evidence before me was seeking to do no more than put his or her sincerely held views before the court. The fact that Dr. Walton may have been vigorous in expressing those views and in his belief in them, does not detract from this conclusion.

27. No issue of credibility arises in relation to the Claimant's case or her evidence. The Defendant has submitted that there is a gulf between the Claimant's capabilities revealed by the evidence, and her reported abilities. Mr Baldock on the Defendant's behalf has however made it clear that it is no part of the Defendant's case to suggest that the Claimant is either lying or deliberately exaggerating any element of her case.

The gulf is explained, the Defendant submits, by the fact that the Claimant and her family have been wrongly persuaded by some of those treating her, that she has permanent brain damage, and that she has been influenced by that, and subconsciously adopted the role. Having heard the Claimant and her family and fiancé give evidence I am absolutely clear that the Defendant rightly concedes their honesty. I am satisfied that their evidence was truthful and at no time seeking to exaggerate or mislead the court. As Dr. Sumners has pointed out, the Claimant's honesty, in performing as well as she did in the witness box, was apparent to all observing her.

The Issues

1. Severity of head injury

28. There is no doubt, nor dispute that the claimant suffered a head injury. The views as to its severity ranged from mild/moderate to severe though those views have changed as further evidence has emerged; in particular the two normal MRI scans.

29. Dr. Barrie's view moved from mild to moderate (though no definite evidence of brain injury) to severe, and back to mild to moderate. Professor Ron moved from severe to moderate, though at the upper end of moderate. Dr. Sumner moved from moderate to severe to moderate and Dr. Leng moved from severe (using a different classification system) to being unable to say because of an uncertain PTA. Dr. Walton moved from at least moderate, possibly severe (at the mild end) to moderate. The views as expressed in evidence before me ranged from moderate to moderate at the upper end i.e., closer to severe than to mild.

30. All the experts were agreed that the two main methods of assessing the level of brain injury were the GCS and PTA. Both of these are subject to difficulty in assessment and cannot therefore always provide the clarity that might be wished.

31. The GCS score at the scene was recorded as 3/15 with the claimant "moaning", and 3/15 at 1.07, 1.16, 1.29, 1.34, 1.43, and 20.00 hrs. There after, as Dr. Walton points out, the GCS score improved to 9 or 10/15, apart from one instance on 3 September 2006, when it went down to 3/15 again.

32. Dr. Walton concluded in his first report of 27 May 2010 that it was probable there was at least a moderate brain injury, albeit that the likely sequelae of such injury were difficult to determine on the current evidence. Earlier in that report he had expressed the view that it was probable that there was at least a moderate brain injury given the initial GCS score and that it was possible that it was severe. He expressly took into account the rapid rise of the GCS score prior to sedation, the absence of CT scanning, and the equivocal evidence for sustained PTA. Hence if it was a severe traumatic brain injury it was at the mild end of that spectrum. (2/110,111) He had of course at that time also carried out neuropsychological tests on the claimant, which he had found to be normal. He considered that her reduced sense of smell and taste, lack of appetite and fatigue were all factors that supported hypotheses of brain injury and said that indeed the nature of her complaints and those of her mother were quite compelling of some deep frontal brain injury.

33. He was also aware of the "very mixed picture" of her complaints of her condition (2/114) although it appears that improvements in her condition and the two normal MRI scans caused him ultimately to conclude that the brain damage was moderate, recovery was essentially good, and the continuing problems were mainly attributable to depression and other psychological factors.

34. In his evidence Dr. Walton agreed that "moderate" could properly describe the brain damage here and each of the other three doctors who gave evidence before me categorised it as "moderate", subject to Professor Ron's view that it was moderate, but at the upper end of moderate. No one described it as mild, save for Dr. Barrie who last reported in July 2011, did not consider PTA and did not give evidence before me.

35. I am satisfied on the evidence that the brain injury can properly be classified as moderate. Medical evidence and its consideration of the GCS and PTA do not enable me to say with precision, where exactly it lies within the category of moderate, but, the evidence as a whole, and in particular Professor Ron's measured view, lead me to conclude that it is not at the mild end of moderate, but probably somewhere above the centre point between the mild end and severe end of moderate, closer to severe than to mild.

36. There are three other matters arising out of the classification of the severity of the head injury. Firstly, recovery from a moderate head injury is generally said to be good, and usually better than the recovery in severe head injury cases. This general proposition is not however particularly helpful in individual cases, especially where the classification within the moderate range is not certain. Secondly such recovery as is going to occur from a head injury will generally, though not always, have occurred by the end of two years from the injury. This is a useful yardstick but does not apply in a number of cases where recovery may take place later. Thirdly, a normal MRI does not exclude the existence of a significant brain injury. Dr. Walton describes this as "an oft quoted clinical lore" though he is not a neurologist, and Dr. Barrie, a Consultant Neurologist did express this view in her report of 28 July 2011. (2/47) I accept Dr. Barrie's opinion there expressed.

37. I also accept Dr. Leng's evidence that he has experienced numerous cases of patients with a head injury, and a normal MRI, who have exhibited signs of frontal lobe damage, some with depression some not. What Dr. Walton is certainly right about is that the fact that this is so, cannot in itself help to prove the existence of frontal lobe damage in any particular case.

2. Causation of the neuropsychiatric/neuropsychological symptoms

38. The doctors are agreed that there are psychological components to the Claimant's complaints; the question is the extent to which the symptoms are caused by brain damage on the one hand, or by depression or psychological factors on the other. The defendant contends that there are no, or minimal consequences left from the brain injury and the Claimant contends that the majority of the symptoms are caused by brain damage. The importance of the dispute to the outcome of the case is that there will be no significant improvement of the condition, save for the effect of improved coping strategies, if the condition is caused by brain injury, whereas if it is caused solely or mainly by depression the possibility of further recovery remains.

39. Professor Ron, Dr. Leng and Dr. Sumners are each of the view that the Claimant's condition was caused and continues to be caused by brain damage and that the complaints are consistent with organic brain damage.

40. Professor Ron said that the behavioural abnormalities were directly linked to the brain injury, as indeed was the depression, though that was also linked to other factors. The cause of the Claimant's conditions was multifactorial Professor Ron said: it was not a choice between frontal lobe damage or depression or psychological factors, and to try and separate them completely was not a fruitful exercise.

41. Dr. Leng said in evidence that he considered that there was an organic basis for what was happening now, and that explained the changes in behaviour following the accident and why those had not been ameliorated.

42. Dr. Sumners considered that there had been a traumatic brain injury and behavioural problems consistent with frontal lobe damage. In evidence he said that he had not found that the Claimant was clinically depressed on the last two occasions he had seen her, and had therefore to conclude, as her symptoms continued, there was evidence of frontal lobe brain damage. The fact that the improvement she had shown with therapy had not been sustained without continuing support fitted in with his view that there was evidence of frontal lobe damage requiring support and structure. He said that emotional lability, impulsivity, anger and irritability, rudeness to people, indifference to feelings of others, disinhibition and the need for a rigid structure, were all symptoms which were consistent with and associated with frontal lobe brain damage. It was essential to make a clinical diagnosis not merely to rely upon neuropsychological testing, as there were limitations to such testing.

43. Dr. Walton was the lone voice against the continuing impact of the frontal lobe brain damage. He said in his report of 4 October 2011 that he did not consider there was now any significant organic component to the Claimant's complaints. (2/165). There was no objective evidence to support the proposition that there was such an organic component. The MRI scans were normal, the neuropsychological tests were normal, and there had been a rapidly rising GCS and a short period of PTA. The Claimant's performance in the neuropsychological tests was inconsistent with her report of abilities.

44. I turn to consider each of these matters.

The Tests

45. Dr. Walton said that in all cases the Claimant performed normally in the tests and in some, in particular in speed of processing, she performed extremely competently. This was a most important test as it measured cognitive efficiency. Her performance was in the 95th centile, which provided strong evidence against brain dysfunction. She even reached a level of the 99th centile and on a complex geometric figure test scored very highly which, Mr. Baldock submits, made no sense of the level of complaints in court.

46. In countering the criticisms of neuropsychological testing Dr. Walton described how some of the tests are computer generated, so that for example on the Wisconsin test, after the Claimant had got ten consecutive responses correct, the computer then

changed the parameters without her knowing, and yet she was able to respond and adapt to that, completing the test normally. The tests are designed to "tap" the functions of the brain rather imitate real life.

47. Dr. Walton said that the measuring of brain function by objective testing provided a better basis of diagnosis than clinical examination or experience. He said there was a wealth of evidence suggesting that clinical experience was likely to be of less value than objective test data, though he produced no articles or reports in support of this.

48. Dr. Leng however did produce an article from the journal Brain Injury volume 18 number 11 November 2004 page 1067 – 1081 which argued that neuropsychological testing within the medico legal context was questionable, given the variable sensitivity and specificity of such tests. It pointed out the weakness of various tests, including the Wisconsin test carried out by Dr. Walton, and the Stroop test carried out by Dr. Leng. It concluded that the reports of "significant others" ie. family or work colleagues were likely to play an increasingly important role in the assessment of impaired executive functioning, but warned of the dangers of inaccurate reporting caused by family distress and dynamics and relative familiarity with the clients everyday functioning. Family and staff perceptions, the article states, can be somewhat rigid and may not alter even when behavioural difficulties originally underestimated by clients later improve. In spite of these reservations the authors concluded that the initial identification of executive deficits in everyday life was best achieved by more naturalistic assessment measures in conjunction with the structured reports of significant others.

49. I also had evidence from Dr. Sumners and Dr. Leng about the frontal lobe paradox, in which it is a known feature of neuropsychological testing that it does not necessarily reveal deficits that are present in every day life.

50. Dr. Leng's test results in July 2009 were essentially normal apart from slight weakness on one or two attentional tasks. The tests he later carried out were more "patchy" and Mr. Baldock argues that as those tests were outside the two year recovery period the deficits could not be due to organic damage to the brain becoming any worse. Tests may produce somewhat inconsistent results however, and an injured party may be coping better with their disabilities on some occasions than on others.

51. I fully understand Dr. Walton's desire to have an objective standard for assessing the existence or extent of frontal lobe brain damage. I do not however consider that on the evidence before me it has been shown that neuropsychological testing has, or should have, the primacy that Dr. Walton claims for it. Confronted with a patient who has sustained an undoubted head injury, who appears to be truthful, who describes symptoms consistent with frontal lobe brain damage which neuropsychological testing does not reveal, what course is the doctor to take? Does he conclude, because of the tests, that there is no organic brain damage in spite of the head injury, and in spite of all the evidence produced by the patient, his family friends and fellow employees, or must he look at the clinical picture as well and examine all the material before him, including the results of the tests, and form a clinical judgment?

52. I am satisfied that the course which the doctor and indeed this court must take is to look at all the evidence, both the clinical and the neuropsychological testing, and form

a judgment as to the existence and extent of brain damage and continuing symptoms from it.

53. This approach accords with the evidence of Dr. Sumners, Dr. Leng, Professor Ron and the Brain Injury article.

The disabilities complained of

54. The warning in the article in Brain Injury as to the caution to be taken in relation to family evidence is well made. The inability of the family to see any improvement in the Claimant's condition, when on occasions she has undoubtedly shown much improvement, may well be due to the fact that they see her everyday and are less able to perceive such improvement even though it has occurred. It may also be the case that the improvements could be seen by them to be slight and insignificant when set against the fact that they no longer have the daughter they knew and are made aware daily of the existence of her underlying and different conditions.

55. Whether that be so or not, the fact remains that the Claimant has from time to time shown signs of improvement. What has to be analysed however, is the true extent of such improvement. She loved her job and said that she tried her hardest to get back to work. Unfortunately when she did, in spite of the fact that others had described her as being much improved with her memory and concentration almost back to normal, she was unable to maintain either the level or amount of work required of her. It is also right that she decided not to pursue an appeal to the benefits tribunal, because she feared improvements in her functioning would lead to a reduction in her benefits. She discussed this with Dr. Gaby Parker, the Occupational Physician and it was clearly a rational decision.

56. It appears that her functioning had improved by September 2009 and the Claimant also said that she had improved with cooking and shopping. By what standards however had her functioning improved? Mrs Verlander was scornful, stating that she wouldn't call peeling carrots improving even if she had accepted that an improvement had occurred.

57. The evidence before me demonstrated that the Claimant could only carry out activities when given rotas, strategies, prompting and support. I accept the evidence of Mrs. Verlander, Mr. Gilbert, Mr Spiers and Miss Lantsbury on this issue. Mr. Baldock also submits that the Claimant is able to travel on public transport to GP's or banks or other places. I accept this is so when she has learned the route but if any alteration to it is proposed she will be incapable of coping with that.

58. It is correct as Mr. Baldock submits that the Claimant said she felt "on top of the world" both in April 2011 and in June 2011. Such a sustained improvement was not thought by either her or her mother to be correct, as she had good and bad days. At that time she appears to have been successfully undergoing therapy. As Mr. Hillier submits, any gains that were actually then made, appear to have been lost by the time she was seen by Ms Johnson, the defendants care expert in September 2011 some two and a half months later. This, Mr. Hillier's submits, fits in with the view of Professor Ron that the improvements were "fragile" and unlikely to be sustained.

59. Dr. Walton and Dr. Sumners both commented on the Claimant's performance in the witness box. It was, they said, very encouraging. I agree with that. I consider that the Claimant demonstrated that her IQ was intact, and that she had clear mental abilities. She demonstrated how she could concentrate for a short sustained period of time, a little over two hours, and give clear and sensible answers. She was able to find pages in the file and move quickly to answering questions based on the material she was asked to read in them. She sustained this level of performance throughout, though her memory was somewhat deficient on a number of occasions. I did not regard her performance in the witness box as inconsistent with her, or her mother's description of her symptoms. The environment in court is structured. The witness has to deal with specific points laid before her in a clear and certain manner. It is not a similar experience to the changing challenges of work or everyday life.

60. Whilst her performance in the witness box was undoubtedly good it does not in my judgment diminish the evidence of her family, her fiancé, Mr. Spiers or Ms Lantsbury as to her ability to cope with daily life as and when it happens to her.

61. The Claimant is, as Mr. Baldock submits able to use an iPad, the computer, play Nintendo games, assist in volunteering, and go to the cinema. There are limitations to all these activities however. She needs prompting in relation to the use of her iPad, she is limited in her use of the games and I accept the evidence of Mr. Spiers that her concentration levels are not always as they should be nor is her understanding of what she is told or what she reads.

62. It may be that her fiancé has been somewhat over protective towards her and she may feel unhappy about that though her description of her complaints and her condition is not always accurate, as Mr. Hillier submits; events show that she is often over optimistic. In any event I am satisfied on the evidence that she needs considerable extra help and support to get through life. I do not consider that Mr. Gilbert has in any material way underestimated the Claimant's abilities nor, if the Claimant did complain to her GP that he was treating her as being sick, does that demonstrate that her abilities were greater than the evidence shows.

63. As to the Claimant's ability to deal with money the evidence amply demonstrates that her impulsivity creates problems as Dr. Sumners and Professor Ron said in their evidence. I will deal with the ability to handle money in greater detail under the financial capacity issue but I am satisfied for the purposes of this issue that there has been no exaggeration of the Claimant's abilities. The fact that she is entrusted to make small purchases at local shops by Headway is entirely consistent with the use of small sums of pocket money given to her by her mother.

GCS, PTA, and MRI

64. I have dealt with these above in the first issue. The GCS score was 3 at the scene and found to be 3 or 4 on arrival. It must be presumed that those assessing the GCS took account of her condition, presentation and any noises or sounds that she was making or uttering. The PTA could have been less than six days but may have been more on the basis of Professor Ron's evidence. The acceptance of 6 days is in the circumstance reasonable. Any moderate head injury, more towards the severe end than the mild end, is consistent with frontal lobe damage.

65. There is, as Mr. Baldock submits clear evidence of depression or psychological factors and the Claimant is indeed stressed and anxious about the litigation. I am not however satisfied on the basis of the evidence of Dr. Sumners and Professor Ron, that impulsivity, disinhibition and rigidity of routine or emotional lability are as consistent with depression as they are with frontal lobe damage. I found Professor Ron's evidence to be helpful and measured and I accept her opinion that the behavioural abnormalities were directly linked to the brain damage. The evidence of Dr. Sumners is powerfully in support of that proposition, as is the evidence of Dr. Leng. There is no basis, in my judgment, on the evidence before me to find that on the balance of probabilities the Claimant's condition is caused solely or mainly by psychological factors. On the contrary the evidence overall is in support of the fact that the Claimant's condition, both earlier and at present, is caused by both frontal lobe brain damage and depression and other psychological factors. It is not possible to separate them so as to determine to what extent each is responsible for each set of symptoms. I accept Professor Ron's evidence that it would be a fruitless exercise to attempt to do so. Nevertheless, the continuation of the underlying symptoms, which I accept occurred, either when there was no depression as Dr. Sumners found, or when there were short periods of remission under two months as Professor Ron considered, suggests that the frontal lobe brain damage is responsible for many of the symptoms. The evidence also indicates that when the Claimant was being successfully treated for her depression her mood improved and she was better able to face the difficulties presented by her underlying condition. It is probable therefore that when she has periods of remission from her depression the extent to which she can cope with the problems created by the symptoms from her frontal lobe damage will improve.

66. On the issue of causation, whilst understanding Dr. Walton's emphasis upon the need for objective criteria, I prefer the more broadly based evidence of Professor Ron, Dr. Leng, and Dr. Sumners. It takes into account the whole evidential base in reaching an opinion, not only the tests and the objective fact of a head injury of moderate severity, but also the clinical picture. I found their evidence more impressive. I find that the Claimant's condition was and is caused by frontal lobe brain damage and also by depression or psychological factors. It was not, and is not, wholly caused by, nor substantially caused by depression or psychological factors. I find that the frontal lobe brain damage the Claimant has suffered caused her behavioural symptoms, which are directly linked to that damage, and that she suffers from depression and other psychological factors that also have their effect on her condition.

Prognosis for those symptoms

67. It is accepted by all the medical experts that no further recovery can be expected from the brain injury given that the accident occurred over 5 years ago. I consider it probable on the evidence that the Claimant's impulsivity, disinhibition, aggressive behaviour, need for rigidity of routines, prompting and some emotional lability, will not improve. She will however be able to cope better with these problems and render their effect less important on her life when her depressive condition, from time to time, is in remission.

68. It is improbable however that she will make a substantial or complete recovery from her depression and other psychological problems. Dr Walton conceded that although he was of the view that she had a normal memory and normal executive function, it would be very difficult for a significant improvement in her condition to be achieved.

Firstly, he said, those treating her would have to change their approach to accepting that there was no brain damage and secondly it is now some five and a half years since the accident. Professor Ron said in evidence that the way that a depressive illness has behaved in the past is a very good indicator of the way it will behave in the future. The pattern here has been the partial improvement in symptoms during therapy and then a return to the underlying background disabilities. The documents and the chronologies demonstrate this clear pattern. It led to Professor Ron expressing the view that any improvements in the Claimant's condition were likely to prove to be "fragile" and were unlikely to be sustained.

69. I am satisfied that the litigation has undoubtedly caused considerable stress to the Claimant, and that it's conclusion will produce an improvement in her condition. Such an improvement will undoubtedly make her feel considerably better but, as has happened in the past, it will probably not be long before events remind her of the extent of her disabilities and she will suffer further problems. I do not consider that the end of the litigation will bring about any significant improvement in her underlying condition.

70. The Claimant informed Dr. Sumners in September 2011 that she was coping better. It turned out however that her own view was not realistic. She had been attending at Headway on an irregular basis, and when she did attend her performance was subject to the problems of her underlying condition as indicated by Mr Spiers in his evidence. As Mr Hillier submits, any gains, which the Claimant may have made between April and June 2011, appear to have been lost by September 2011 in spite of what of the Claimant told Dr. Sumners at that time. Only three weeks after Dr. Sumners examination the Claimant painted a completely different picture to Ms Johnson, the Defendant's Care Expert. She was not eating her meals; she had no motivation if she was not prompted; she couldn't be bothered to deal with her personal care; she was non compliant with medication and could not be bothered to the do the household cleaning so that there were piles of clothes in her bedroom and the house was generally untidy.

71. The evidence suggests that the Claimant on occasions feels better and then tells the doctors that she does so, but the reality is that her underlying condition has not changed and she is perforce shortly reminded of this fact.

72. Both Professor Ron and Dr. Sumners considered that a vocational assessment should be carried out. This may prove to be of some benefit and, together with the end of the litigation will help to improve the way in which the Claimant copes with her underlying condition. That underlying condition will however persist even though the Claimant will learn to cope better with her life overall.

73. I conclude that the Claimant will not recover from her underlying condition caused by the brain injury, that she will improve after the conclusion of the litigation and a vocational assessment has been carried out, but whilst that improvement may help her deal with her daily life, the problems created by her underlying condition will remain and continue to restrict greatly her capacity to lead the life she might have expected to lead had the accident not occurred. Episodes of depression followed by remission are likely to persist; the Claimant will not make a substantial or complete recovery from her depression.

Prospects (but not value) of future employment

74. The Claimant demonstrated in the witness box her intellectual capacity for undertaking employment, but unfortunately her intelligence has not been, and will not on the evidence be, sufficient in itself to enable her to return to full time paid employment. It is not disputed that she is at present unemployable and that it will be very difficult for her to obtain and retain work.

75. Her attempt to return to her old job in 2006 demonstrates the difficulties she faces. In spite of being given very limited tasks she found the work stressful and exhausting. She had to recoup between workdays by long periods of sleep, and eventually could no longer maintain her work. If one adds to that fundamental problem her behavioural difficulties with impulsivity, disinhibition, rude or aggressive behaviour, the need for a rigid routine, and the need for rotas, strategies and prompting, it is unlikely that she will be able to obtain or retain any full time work.

76. Nevertheless, I was, like Dr. Sumners and Dr. Walton impressed by her overall performance in the witness box and I think it unlikely that someone who is now only 27 will remain unemployed for life. It is possible that she will be able to sustain no more than the sort of volunteering work she does for Headway at least for the present. Once the litigation is over however and she has undergone a vocational assessment her prospects of obtaining some work will be improved. Certainly employment would, as both Dr. Sumners and Professor Ron said, be highly beneficial to the Claimant's rehabilitation.

77. I conclude that the Claimant will never be able to work full time because of the problems created by her underlying condition and recurring depression but that she will probably be able to obtain and retain part time paid work for a sympathetic employer at no more than the national minimum wage. Subject to further argument I am of the view that such employment would be unlikely to exceed two or three days a week, four hours work per day. Such employment would not commence for a period of two years after the conclusion of the litigation. Nor would such employment be throughout her normal working life because of the risk of the recurrence of depression, temporary increased inability to deal with the problems created by the underlying condition and difficulties on the labour market. Any multiplier to calculate her residual earning capacity should, subject to further argument, be discounted by one third to allow for this contingency.

Probable duration of future care requirements

78. The Claimant has received considerable assistance from her family and her fiancé since the accident. A substantial burden has fallen upon the Claimant's mother who has without doubt been a very substantial help to her. The initial attempts to obtain the assistance of support workers proved to be unsuccessful and the Claimant as a consequence chose to discontinue their use. She remained receptive to the idea of receiving such help but not upon the infrequent and unsatisfactory basis that it had been given to her in the past. Miss Lantsbury of Headway has now provided such help for the last four and a half months. There is no doubt that she has helped the Claimant considerably in organising and dealing with her life. Inevitably a support worker provides companionship and help with leisure activities as well as simple organisation and practical help. Certainly Miss Lantsbury has been a valuable companion to the

Claimant. I am satisfied from her evidence that she is a mature sensible young woman already experienced in dealing with head injuries and providing support work. I am equally satisfied that the need for her services at present continues.

79. I have no doubt that the Claimant will continue to require the assistance of a support worker, probably for the rest of her life. It would be wrong for the burden of supporting her to fall upon her family or her fiancé. Mr Gilbert told me that he still loved the Claimant and wanted to marry her though he wished to be her husband rather than her carer.

80. The Claimant has managed without the help of support workers in the past, though this inevitably cast a greater burden upon her family and fiancé.

81. It is not known what effect marriage, children and work will have upon the Claimant if those events all occur. Even if they do, it is my judgment that the Claimant will continue to require some care assistance from outside her direct family. It is however likely, as Professor Ron said in her report of 29 February 2012 that her need for a support worker will vary over time and I am of the view that Ms Verlander will be able to reduce the input to one day per week, with the provision for greater input at times when she becomes more depressed or under adverse circumstances.

82. Having considered the evidence as a whole I consider it probable, subject to further argument, that the Claimant's need for a support worker will in general terms be reduced to one day per week, but that extra provision does need to be made for occasions when there is a recurrence of depression or inability to cope with her underlying condition.

83. The reduction to one day's assistance by a support worker should commence in two years from the end of this litigation and the extra provision should be calculated upon the basis that three days a week will be required for two months each year.

84. A Case Manager will still be required to oversee the Claimant's needs though her input can be reduced to once every two months from a date commencing two years from the end of this litigation.

Financial capacity

85. This issue is to be determined in accordance with the provisions of the Mental Capacity Act 2005 (MCA). There is a presumption that the Claimant has capacity unless it is established otherwise on a balance of probabilities (MCA section 1(1) and 2(4).

86. The test for capacity requires that the Claimant is at the material time unable to make a decision for herself in relation to the material matter, and that the inability is because of an impairment of, or a disturbance of the functioning of the mind or brain (MCA section 2). It is accepted that the Claimant continues to suffer a "disturbance of the functioning of the brain". The issue before me therefore is whether the Claimant is unable to make a decision for herself in relation to a material matter at the material time, bearing in mind that the burden of proving incapacity is upon the Claimant.

87. Section 3 MCA sets out the test for determining whether a person is unable to make a decision for herself. It is clear from that section that it is the capacity to make a relevant decision at the relevant time that matters, not the ability to make decisions in general. (See the Code of Practice). It is also made clear in section 3 MCA and the Code that it is the Claimant who has to be capable of making the decision not somebody else on her behalf.

88. Professor Ron and Dr. Sumners both expressed the view in evidence that the Claimant was unable to properly "weigh" information as to the decision, as part of the process of making the decision.(MCA section 3(1c)). Professor Ron had earlier said that she was also unable to retain the necessary information but no longer thought that was so by the time of the hearing. Professor Ron also accepted in cross-examination that whilst she considered that the Claimant did not have financial capacity, she accepted that there would be a reasonable body of opinion that would find that she did have such capacity on what was a difficult question. Dr. Leng and Dr. Walton agreed that there were no neuropsychological grounds upon which it could be said that the Claimant lacked capacity. I have also considered the fact that the court has already determined that the Claimant has litigation capacity.

89. The Claimant manages her own money but only with the assistance of her mother and her fiancé. She is trusted to receive £1,000 in an envelope every month and return it to her mother. Her mother however deals with the organisation of the payment of the bills, with the amounts being ascertained from the payment cards and the cash allotted to each relevant card. The Claimant herself then pays the money at the appropriate establishment and receives the receipt. My understanding of her evidence was that she did understand the need to pay the bills first, but whether she would be able to do that herself if she managed her own money is doubtful in view of her acknowledged impulsivity.

90. She is only given £5 pocket money a day together with some £30 or £40 to spend in Iceland or another local shop. Either her fiancé or her mother goes with her to Iceland when this money is spent. The Claimant is trusted by Mr Spiers at Headway to purchase small items such as bread or milk. The amounts are likely to be of the same order as she is given for daily pocket money.

91. The Claimant's mother took control of her daughter's finances in the manner described above after the Claimant had spent very substantial sums on gambling and gaming. She spent in excess of £2,000 on online gambling on her mobile phone and, later, after she had received the interim payment, a substantial sum on playing an online game called "Travian". It is not known however exactly how the Claimant in fact spent the bulk of the interim payment. The Claimant's evidence that she would never gamble again has to be taken in the context of the recidivist nature of gamblers, and the Claimant's own evidence that were she to be given substantial sums of money she would probably "blow it".

92. There is certainly other evidence apart from the gambling and gaming and the Claimant's own belief of the risks if she is left in charge of money, that she overspends, though these are minor incidences. For example she spent some £50/£60 on her fiancé's card when she was expected to spend a much smaller amount. She bought five hamburgers for herself when she had told her mother she was just going into the shop to get herself a hamburger and she bought a considerable number of

vegetables for making of soup without the capacity to be able to organise the making of larger quantities, and freezing that which was not to be used.

93. It is the evidence of both Professor Ron and Dr. Sumners that her impulsivity is the cause of her inability to weigh properly the necessary information in order to make a decision. This, Mr Hillier submits, is permanent. Dr. Sumners accepted in evidence that if the Claimant were to be given access to her bank account into which her pension money was paid, and then provided with her cash card there was a substantial risk that she would spend the money inappropriately. He nevertheless expressed the view that the Claimant did have financial capacity and that a Trust should be put in place in order to protect her from herself.

94. On the basis of the above information it cannot properly be said that the Claimant is managing her own money. She is only doing that, and making decisions in relation to it, with the substantial assistance of her mother. Even if it were to be the case that she participates in the decision to pay individual bills and then carries that out and obtains the receipts, the guiding person in making the decision is her mother. It is correct, as Mr Baldock submits, that Mrs Verlander could exercise yet further control over the situation by advising the Claimant to make payments by direct debit, by obtaining copies of the bank statements herself, and by becoming a co-signatory. The difficulty remains however that the Claimant has demonstrated an inability to take appropriate care of her money. Unknown sums were spent on gaming and a sum in the order of £2,000 spent on online gambling. The Claimant's own evidence that she would probably "blow" the cash were she to have access to it by herself without the constraints of the system set in place by her mother for collecting and delivering her pension, are telling, as is the evidence of Professor Ron and Dr. Sumners that her impulsivity prevents her from properly weighing the necessary information to make a decision about her money and Dr. Sumners' evidence that were she to be given access to money in her bank with her cash card there was a substantial risk that that money would be inappropriately spent.

95. Upon this information I conclude that at present the Claimant does not have financial capacity. She is unable to weigh the necessary information as part of the process of making a decision and, were she to have access to substantial funds through an award of the court there is a serious risk that she would spend large amounts of it inappropriately without others necessarily knowing what she had in fact done. I do not consider that a trust would provide adequate protection for the Claimant in such circumstances and, as Mr Hillier submits, if its only purpose is to stop inappropriate spending then it suggests financial incapacity.

96. I emphasise however that whilst I have firmly in mind that impulsivity may remain, it is not inconceivable that the Claimant's condition in the years to come may demonstrate that she has in fact gained financial capacity. I am not prepared to make any ruling, even if I were able to do so at this stage, which finds that the Claimant is permanently incapable of managing her own property or affairs. It would be perfectly reasonable for the Court of Protection itself to reconsider her situation some time after two years following the conclusion of the litigation. If the decision then was that at that time she had financial capacity, consideration could be given as to whether a Trust ought to be set up to provide guidance and assistance in the management of her money.

97. Conclusions

1. The severity of the head injury

The head injury should be classified as moderate, above the centre point between mild and severe and hence closer to severe then to mild.

2. Causation

The Claimant's condition was and is caused by frontal lobe brain damage, and also by depression and psychological factors. It was not and is not caused wholly or substantially by depression or psychological factors. The behavioural abnormalities were and are caused by her frontal lobe damage and are directly linked to that brain damage. Depression and psychological factors also have an affect upon her condition.

3. Prognosis

There will be no further recovery from the brain injury and recovery from the depression and other psychological factors to any significant extent is unlikely. There will however be an improvement in the Claimant's condition once the litigation is concluded and she undergoes vocational assessment, though such improvement will not remove her underlying symptoms or prevent them from recurring. The Claimant will probably learn to cope better with life overall though her underlying problems will remain.

4. Prospects of future employment

The Claimant will never be able to return to full time paid work. It is probable however that she will be able to obtain and retain simple part time work for a sympathetic employer at, subject to further argument, no more than the national minimum wage for 2 or 3 days a week, 4 hours a day. Such part time work will not commence until 2 years after the conclusion of the litigation. The Claimant does therefore have a limited earning capacity, which needs to be discounted by one third, subject to further argument, to allow for periods of recurrence of depression and temporary increased inability to deal with the problems of her underlying condition, together with periods of unemployment due to difficulties on the labour market.

5. Probable duration of future care requirements

A support worker is required to assist the Claimant for life, though after 2 years that support can be reduced to 1 day a week with extra provision for greater input when there is a recurrence of her depression. A Case Manager will still be needed with input reduced to once every 2 months.

6. The Claimant is at present financially incapable of managing her property and affairs, though this situation is not necessarily permanent and should be reviewed from time to time, the first such review being after 2 years.