Neutral Citation Number: [2023] EWHC 1437 (KB)

APPEAL REF: BM 00008A

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM REGISTRY

ON APPEAL FROM
THE JUDGMENT OF HHJ RICHARD WILLIAMS
DELIVERED ON 6.11.2019 at
THE COUNTY COURT AT BIRMINGHAM
IN CLAIM NUMBER B42YX038

Date: 14th June 2023

Before :

MR JUSTICE RITCHIE

- -

BETWEEN

NIRAJA PADMALATA LAL

Appellant/Claimant

- and -

CRAIG REEDER

Respondent/Defendant

Andrew McKie, direct access counsel for the **Appellant/Claimant**
Daniel Frieze of counsel (instructed by **Plexus Law**) for the **Respondent/Defendant**

Hearing date: 23rd May 2023

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APPROVED JUDGMENT

Mr. Justice Ritchie:

The appeal

1. This is an appeal from a decision of HHJ Richard Williams [the Judge] delivered at Birmingham Civil Justice Centre on 6.11.2019. The Claimant sought damages for personal injuries arising from a road traffic accident in which the car in which she was stationary and waiting to turn was smashed into from the rear by the Defendant, who drove off after the accident without giving his details. The Claimant's car was shunted about 1 metre forwards (the Claimant's witness statement of 28.8.2016 para. 18). The Defendant was convicted of careless driving, failing to stop, and of drunk driving. The Claimant's schedule for trial claimed general damages for pain suffering and loss of amenity, and past loss and expense of £105,154.39. The counter schedule for trial contained no total but by my addition came to around £10,400.

2. The Judge entered judgment for the Claimant for £18,342.66 in damages plus costs up to 29.4.2016, however the Claimant was ordered to pay the Defendant's costs thereafter on the standard basis together with interest thereon at 8.75% and £30,000 on account of the Defendants costs by 13.1.2020. There was no mention made in the order of any part 36 offer but clearly one was made by the Defendant and the Claimant had failed to beat it and that led to the split costs order. In the skeleton argument for the Appellant the existence of the offer was expressly stated. I shall deal with the consequences of that under CPR r.52.22 below.

3. By notice of appeal issued on 21.1.2020 the Appellant sought, in 138 grounds, to overturn many aspects of the judgment.

4. Permission to appeal was granted on the papers by Martin Spencer J on 14.7.2020 on the ground(s) relating to the Judge's decision to refuse to award to the Claimant damages for her asserted loss of part time earnings as an agency nursing assistant. The application for permission on all other grounds of appeal was adjourned over to be considered verbally at the appeal hearing.

5. On 7.7.2021 the Appellant applied for permission to rely on fresh evidence in the appeal. The application was dismissed by HHJ Kelly on 7.7.2021. The Appellant appealed to the Court of Appeal and permission was refused by Stuart-Smith LJ on 16.1.2023.

Bundles and evidence

6. The Court was provided with an appeal bundle in two parts; the trial bundles in 6 parts; a bundle called "Copy" Claimant's Trial Bundle" and skeleton arguments in writing delivered the day before the hearing by the Appellant and in 2020 by the Respondent with an update in response the day before the hearing.

The issues

7. When opening the appeal the Appellant abandoned all grounds of appeal save for two. Thus the allegations of bias against the trial Judge and of dishonesty against the Defendant's trial counsel (both of which had no merit in my judgment) were abandoned as were many other substantive grounds. The two remaining grounds were:
   (1) that the Judge was wrong or irrational to fail to award the Claimant damages for past part time loss of earnings as an agency nursing assistant for 6-8 months after the accident; and
   (2) that the Judge was wrong or irrational to fail to award to the Claimant damages for pain, suffering and loss of amenity for travel anxiety after the accident.

Appeal - CPR 52

8. I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower court, unless the Court rules otherwise or a practice direction makes different provision, and it will allow the appeal if the decision was wrong or unjust due to procedural or other irregularity.

9. This appeal is restricted to the evidence before the lower court under CPR rule 52.21(2) unless the three grounds in *Ladd v Marshall* [1954] 1 W.L.R. 1489 (CA) are made out, namely that it was: (1) not obtainable with reasonable diligence before the lower court, (2) would have an important influence on the result and (3) was apparently credible though not incontrovertible.

10. Under CPR rule 52.20 this court has the power to affirm, set aside or vary the order, refer the claim or an issue for determination by the lower court or to order a new trial or hearing etc.

Findings of fact and decisions on preferring witnesses and on credibility

11. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per Lord Reed at [67]; *Grizzly Business v Stena Drilling* [2017] EWCA civ 94, per Longmore LJ at [39-40] and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, per Males LJ at [48-55], that any challenges to findings of fact in the court below, and decisions on which expert and lay witnesses to prefer, have to pass a high threshold test. The trial Judge had the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show that the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

12. The threshold was summarised in *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ 191, per Lord Justice Males at [48] - [55]:

> "48. The appeal here is against the Judge's findings of fact. Many cases of the highest authority have emphasised the limited

circumstances in which such an appeal can succeed. It is enough to refer to only a few of them.

49. For example, in Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:

> "67. ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial Judge only if it is satisfied that his decision cannot reasonably be explained or justified."

50. We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a Judge's findings of fact. Thus in *Walter Lily & Co Ltd v Clin* [2021] EWCA Civ 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):

> "83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial Judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:
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> (i) The expertise of a trial Judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;
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> (ii) The trial is not a dress rehearsal. It is the first and last night of the show;
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> (iii) Duplication of the trial Judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;
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> (iv) In making his decisions the trial Judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;
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> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);
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> (vi) Thus, even if it were possible to duplicate the

> role of the trial Judge, it cannot in practice be done...
> 85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:
> (i) Where the trial Judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;
> (ii) Where the finding is infected by some identifiable error, such as a material error of law;
> 86. Where the finding lies outside the bounds within which reasonable disagreement is possible. An evaluation of the facts is often a matter of degree upon which different Judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by reason of some identifiable flaw in the trial Judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.
> 87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial Judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

13. The threshold was also more recently considered by Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2-4 and 52, 54:

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(1) An appeal court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(2) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial Judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable Judge could have reached.

(3) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial Judge has taken the whole of the evidence into his consideration. The mere fact that a Judge does not mention a specific piece of evidence does not mean that he overlooked it.

(4) The validity of the findings of fact made by a trial Judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial Judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the Judge failed to give the evidence a balanced consideration only if the Judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

3. If authority for all these propositions is needed, it may be found in *Piglowska v Piglowski* [1999] 1 WLR 1360; *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR

> 2477; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ. 5, [2014] FSR 29; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600; *Elliston v Glencore Services* (UK) Ltd [2016] EWCA Civ. 407; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ. 1176, [2019] BCC 96; *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ. 817, [2019] 3 All ER 429 and *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 .
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> 4. Similar caution applies to appeals against a trial Judge's evaluation of expert evidence: *Byers v Saudi National Bank* [2022] EWCA Civ. 43, [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the Judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial Judge is not bound to accept it: see, most recently, *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ. 1442, [2022] 1 WLR 973 (although the court was divided over whether it was necessary to cross-examine an expert before challenging their evidence). In a handwriting case, for example, where the issue is whether a party signed a document a Judge may prefer the evidence of a witness to the opinion of a handwriting expert based on stylistic comparisons: *Kingley Developments Ltd v Brudenell* [2016] EWCA Civ. 980."
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> […]
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> "52 … It need hardly be emphasised that "plainly wrong", "a decision ... that no reasonable Judge could have reached" and "rationally insupportable", different ways of expressing the same idea, set a very high hurdle for an appellant.
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> [...]
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> 54. These considerations apply with particular force when an appeal involves a challenge to the Judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial Judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the Judge has made so serious an error that her assessment must be set aside."

Chronology of the Judge's findings and the action

14. The Judge gave judgment after a hearing over three days between the 21st and the 23rd of August 2019. The Judge set out the Claimant's case which, in summary, was that

before the road traffic accident she was fit and healthy and was studying for a PhD at the University of Birmingham and intending to get into medical school but was working part time as an agency worker through Thornbury Nursing Services [TNS] and working 23 hours per week in the cardiac critical care unit at the University Hospital in Birmingham. The Claimant asserted that she suffered 9 categories of injuries in the road traffic accident as follows: a soft tissue neck injury; a soft tissue left shoulder injury; soft tissue injuries to her upper and lower back; a soft tissue injury to her left elbow; a soft tissue injury to her left knee; a soft tissue injury to her left ankle and headaches and eye pain. She also asserted that she had suffered psychological symptoms including travel anxiety which prevented her driving. The Claimant sought damages for loss of earnings of £90,186, firstly for being off work for eight and a half months until May 2013 and then for being forced to give up work in September 2014. The total loss of earnings after September 2014 was put forwards at around just over £1,000 per calendar month. The Claimant also claimed: just over £4,000 for care for 20 weeks after the accident along with gardening and assistance with tasks at home; educational costs of £9,751, medical costs of £3,573 and travel costs of £1,289.

15. The Judge identified that the issues he had to decide were fourfold: 1, which injuries the Claimant had suffered; 2, the duration of the injuries; 3, the damages for pain suffering and loss of amenity and 4, whether the Claimant had been fundamentally dishonest.

16. I do not need to deal with the Judge's determination that the Claimant had not been fundamentally dishonest because no appeal is made by the Defendant against that determination. However, it is apparent from the judgment, that having heard the evidence, the Judge was not impressed by the Claimant's evidence and was not prepared to make findings of fact in her favour unless objective documentary or other evidence backed up her assertions.

17. Looking at the Claimant's first witness statement dated 28.8.2016, she asserted that she suffered pain at 8-9 out of 10 within an hour of the accident at all 9 sites listed above. In her second witness statement dated August 2018 she wrote: "*45. I wasn't able to sit in the driver's seat of my car post-accident due to my injuries and anxiety for about 10 months."* That would have been from 2.9.2012 – 2.7.2013. At paras. 46-47 of that witness statement she referred to the report from Doctor McCollum which her lawyers had served and on which she relied. At para. 52. The Claimant wrote: "*I also found that when I started to drive, approximately 2 years down the line I was only able to drive for 10-12 minutes…"*

18. The Judge read the evidence from Doctor McCollum, the Claimant's GP expert, who reported nine and a half weeks after the accident. He also read the reports of Mr. Siddiqi, a consultant orthopaedic surgeon and Mr. Lockyer, a clinical psychologist. The Judge heard live evidence from the Claimant and two witnesses with whom she worked together with Doctor Adedokun, a consultant anaesthetist and pain expert. The Judge

also read the Defendant's evidence from Mr. Summers, a consultant orthopaedic surgeon and heard evidence from Doctor Bernstein, a consultant rheumatologist and pain expert.

19. The Judge noted that in the written report of Doctor McCollum, dated 14th November 2012, the Claimant had told him that she suffered no lower back pain and no anxiety and no psychological symptoms.

20. The Judge then summarised the rest of the evidence from the medical experts including three reports from Mr. Saddiqi, one report from Mr. Summers and their joint statement dated the 3rd of July 2019. The orthopaedic surgeons were mostly in agreement. The Judge found that they had agreed that the Claimant could not do housework for two months and had reduced activities of daily living. Their diagnosis was that she had suffered soft tissue injuries to four sites, not the nine claimed. The accepted injuries to her neck, left elbow, left thumb and left knee. They considered that these ought to have resolved, from an orthopaedic point of view, within 18 months to two years in relation to the neck, six months in relation to the left knee and up to four weeks in relation to the thumb. They agreed that a reasonable period for the Claimant to have taken off work would have been between six and eight months and that a reasonable delay in her medical school studies would have been similar.

21. It is noteworthy that the orthopaedic experts did not agree a diagnosis regarding any lower or middle back injury or a left ankle injury nor did they diagnose any head injury leading to headaches. Only Mr. Siddiqi supported the Claimant's other complaints of injuries, not Mr. Summers.

22. The pain experts both gave live evidence and the Judge summarised their evidence in the judgment. Doctor Adedokun diagnosed mainly left sided neck pain aggravated by looking sideways, by washing and gardening, which he considered was a whiplash associated disorder and he advised pain management treatment with facet joint injections. He considered that the pain was unlikely to resolve and would become chronic. The Claimant did not have facet joint injections.

23. Doctor Bernstein, who reported in December 2016, two months after the Claimant's pain expert, carefully reviewed the Claimant's medical notes pointing out that by April 2013, some 8 months after the accident, the Claimant reported that her left knee and left shoulder pain had resolved as a result of physio and that she was preparing to run the London Marathon. In my judgment such a factual assertion by the Claimant to a doctor is not lightly to be passed over, and Doctor Bernstein was the one who properly highlighted it. Doctor Adedokun also noted this entry but completely ignored it in his opinion section. By May 2013 the Claimant had returned to her main part time work at the hospital on a phased basis. He pointed out that in April 2014, at an occupational health review, the Claimant stated her whiplash had completely resolved. Therefore Doctor Bernstein advised that the Claimant's symptoms had largely resolved by April

2013 and that she had unrelated brief flare ups of symptoms in August and December 2013. He advised that she did not have a chronic pain syndrome.

24. In their joint report in July 2019, the pain experts wrote that in the Claimant's occupational questionnaire for entry to medical school, which she signed on the 30th of June 2014, she set out that she had no medical conditions. I have seen that form. She answered "no" to questions about whether she had any: impairment; had seen a Doctor in the last 12 months; had backache; had manual handling difficulties; had an injury to her neck; had severe arm or leg injuries; had anxiety or had suffered any medical suspension. Doctor Adedokun changed his opinion in the joint report to suggest that the accident caused the Claimant to suffer an acceleration of her neck symptoms by a period of seven years. He had not noted, and so I assume not seen, the June 2014 questionnaire when he provided his main report so this may have explained his change in opinion.

25. The Judge summarised the written report of Mr. Lockyer, dated September 2014, which recorded that the Claimant had not driven for nine months after the accident and then started driving again in June 2023 but was complaining of situational anxiety and he recommended cognitive behavioural therapy and prognosticated a full recovery 18 months after that.

26. In the Judge's summary of the expert evidence he concluded that the neck and left elbow symptoms ought to have resolved in 18 months to two years and the left knee ought to have resolved in three to six months and the left thumb in two to four weeks. The Judge then went on to consider the evidence relating to a hiatus in the Claimant's symptoms and whether he accepted that her symptoms had pretty much resolved by April 2013.

27. The Judge summarised the Claimant's evidence. He noted the Claimant complained of constant and severe pain for six months, then moderate pain for 9 to 10 months and then complained of continuing knee pain and left ankle plain and lumbar back pain. The Claimant was noted as stating in evidence that she had not driven for two years.

28. The Judge considered the lay witness evidence that supported the Claimant from adults who worked with her at the Queen Elizabeth Hospital critical care unit. He put that evidence into perspective.

29. He assessed the Claimant's evidence as forceful but unreliable and suffused with material inconsistencies. The Judge noted that the Claimant made no complaint of lower back pain to the GP or to Mr. Saddiqi early on after her accident. The Judge noted that the Claimant had told Mr. Saddiqi in December 2014 that her left elbow pain had resolved and had told Mr. Summers in 2016 that her left knee pain had resolved and that this contradicted what the Claimant had told the Judge, namely that these areas of her anatomy were still giving her pain at the date of the trial. The Judge pointed out further contradictory evidence from the Claimant. In her first witness statement she had

asserted she did not drive for ten months and in her second that she did not drive for two years. The Judge noted that the Claimant had hired a replacement car for approximately one month after the accident. The Claimant had also claimed mileage of 238 miles when carrying out agency work in May 2013. These matters clearly troubled the Judge in relation to the Claimant's reliability and credibility. The Judge noted that the Claimant specifically corrected parts of the early GP report in relation to care but made no correction in relation to the record that she suffered no travel anxiety or psychological symptoms. In particular the Judge noted that the Claimant's answers in cross examination on the occupational health questionnaire dated June 2014 contradicted what she had told Mr. Siddiqi in March 2014 and that either one or the other was false. The Judge then focused on the medical records, none of which the Claimant challenged. The Judge noted that on the 18th of April 2013 the treating physiotherapy discharged the Claimant, she not having attended the last appointment, noting that the left knee and left shoulder symptoms had resolved and that the Claimant had a full range of movement of her neck. The Judge noted the Claimant 's explanation for this clinical record was initially that she had failed to attend because she was moving house but when it was pointed out to her that she had moved the month before then the Claimant asserted she had simply forgotten the last appointment. Then the Judge pointed out what, in my judgement, was another crucial inconsistency in the Claimant's evidence. The Claimant obtained from her GP a certificate that she was not fit to work between the 2nd and 12th of May 2013. The inference was that this certificate was given to the hospital at which she worked part time. However, documentary evidence clearly showed that the Claimant worked on the 4th or 5th of May 2013 for eight hours in agency work and claimed 238 miles of travelling allowances. The inference from those pieces of written evidence was clear. Namely, that the Claimant was asserting to her employers she was unfit to work at a time when she was taking agency work.

30. I also note that, despite the answers the Claimant gave in the June 2014 questionnaire to the effect that she was completely healthy, the Claimant asserted to the Court that her symptoms from the accident made her give up work altogether in September 2014. This contradiction was neither logical not believable in my judgment.

31. At paragraph 65 of the judgment the Judge found that the accident related symptoms settled by early April 2014.

32. The Judge then analysed the evidence of the pain management experts and preferred the evidence of Doctor Bernstein because it was internally consistent and externally consistent with the evidence of the orthopaedic surgeons. Whereas Dr Adedokun had moved in his live evidence, stating that the acceleration period could have been as low as 12 months.

Quantum

33. The Judge awarded £8,500 for pain suffering and loss of amenity. He made no award [para. 78] for travel anxiety, finding that the report of Mr. Lockyer was founded wholly on the Claimant's self-report which the Judge did not accept.

34. As for loss of earnings, the Judge awarded 8 months of loss of earnings for the Claimant's time away from her part time work at the Hospital after the accident but nothing for the Claimant's asserted loss of agency work during that period. The Judge held that the Claimant had failed to establish either that she would have done agency work or what she would have earned, but for the accident. He noted the Claimant had worked 8 shifts between May and December 2013, (so one per month on average although not evenly spread) and had worked 4 shifts in August 2012, (so one per week but not evenly spread). However, based on his finding that the Claimant's evidence was unreliable, he did not make any award because the Claimant had failed to discharge the burden of proving what she would have earned in Agency work. In particular the Judge noted that the schedule stated the Claimant had worked only 1-2 shifts after the accident which was factually inaccurate.

Ground 1 of appeal

35. The Claimant relied on appeal on her 2016 and 2018 filed witness statements in which she made it clear that she had worked 8 shifts between May and December 2013.The Appellant submitted that the schedule was wrong to say 1-2 shifts. In his elegant and clear submissions Mr. McKie also relied on the agency fees evidence in the documents which showed that the Claimant had earned between £100 and £280 net per shift in 4 shifts worked in August 2012, before the accident, so submitted that the sums claimed as lost agency fees after the accident, at £278.77 per week, were modest and properly evidenced. He restricted the claim to the 8 months allowed by the Judge for the loss of earnings from the part time work in the hospital. He submitted that it was not fair to criticise the Claimant for the inadequate pleading.

36. Whilst the Appellant's counsel's attractive submissions might have been persuasive before the trial Judge they do not justify this Court, on appeal, finding that the Judge's findings were plainly wrong or irrational. The schedule of loss was signed by the Claimant. Statements of truth are important matters not to be taken lightly in my judgment. In addition, there was no evidence put before the Judge (or me) which showed that the Claimant had set out in her witness statements what she would have done by way of agency work but for the accident. The evidence of what the Claimant earned at her previous second part time job at another hospital was longer in the past and so less relevant and was not mentioned in the judgment. The Appellant did not rely upon it. The burden of proof lay on the Claimant to set out what she would have done by way of agency work from September 2012 to May 2013. She did not do so. The Judge found that she failed to discharge the burden. I note that, in the light of her work for her PhD, her main part time job at the hospital, her preparation for her entry to medical school and her choice not to take any work from the agency between 2.7.2012 when she was actuated to be able to take work and 2.9.2012 when the accident occurred,

save for 4 shifts and her desire to run the London Marathon, the Claimant's space for agency work was probably restricted. There was a gap in the Claimant's evidence on the but for projection in relation to agency work and her evidence was found to have been unreliable by the Judge in any event.

37. In my judgement the refusal to award agency earning loss was a finding which the Judge was entitled to have made on the evidence before the Court. It was not wrong or irrational.

Ground 2 – Travel Anxiety

38. The Appellant submitted that the report of Mr. Lockyer, dated August 2014, which was not challenged by cross examination, and the proof of the CBT which the Claimant undertook, as a result of Mr. Lockyer's advice, and the notes of the treating psychologist, Miss Williams, which clearly set out the Claimant's travel anxiety and recovery by July 2015, were hard evidence of the diagnosed anxiety, which were improperly rejected by the Judge. Indeed, the Claimant recovered in line with the prognosis of Mr. Lockyer. Once again, these were cogent and logical submissions from Mr McKie.

39. However, the Judge was concerned about the Claimant's veracity. The key evidence which the Judge took into account when refusing to find that the Claimant suffered travel anxiety was the report of Dr McCollum. In that report, provided 9-10 weeks post accident, and carrying a CPR part 35 statement of veracity, the Claimant had said and the GP had recorded, that she had suffered no anxiety or psychological symptoms since the accident. The Claimant served and relied on Dr McCollum's report. If she had disagreed with it, she should not have done so. If, as the Claimant asserted both at trial and to Mr. Lockyer, the anxiety emerged straight after the accident, such that the Claimant was unable even to use the hire care provided to her for a month, then that report should not have been served or relied upon.

40. In addition the Judge took into account that the Claimant had a hire care for a month after the accident. He clearly, by inference, rejected her assertion that she had not used it. Furthermore, the Judge was troubled by the fact that the Claimant had claimed for driving 238 miles in May 2013 when, on her evidence to the Court, she had been unable to drive for either 10 months after the accident or two years.

41. In my judgment, on this evidence, and for the reasons clearly explained in the judgment, the Judge was entitled to prefer and accept the evidence in the Claimant's own contemporaneous GP expert report and reject the Claimant's later self-reports to Mr. Lockyer. The reasons given were not irrational or wrong.

Assessment of damages

42. I would have assessed the damages had the grounds of appeal succeeded, despite being informed by the Appellant's counsel in the skeleton that the Defendant had served a

part 36 offer in 2016, which the Claimant failed to beat at trial, because I raised the subject in the light of CPR Part 36 and CPR r.52.22. In response, both parties wished me to do assess damages if the appeal was to be allowed and noted that none of the documents in the appeal bundles or trial bundles contained the figure offered by the Defendant. In the light of my decision above no assessment is needed.

Conclusions

43. For the reasons set out above I dismiss the permitted ground of appeal. I refuse permission for the appeal on the basis of the Claimant's asserted travel anxiety claim. I consider that the Judge was entitled to make the findings of fact which he did and to reject the heads of loss which he did

44. I invite written submissions on the Respondent's costs and require a summary costs sheet with sufficient detail for the Appellant to be able to take objections to: the solicitors and the counsel's fees and the disbursements by 7 days after the handing down of this judgment.

END