Neutral Citation No: [2017] NIQB 60	*Ref:* COL10314
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 16/06/2017

2014/57004

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

A B

Plaintiff;

-and-

HANNAH McKIMM

Defendant.

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COLTON J

Introduction

[1] The plaintiff in this action was born on 24 June 1988. On 1 July 2013 she was involved in a road traffic accident at approximately 7:30am whilst she was cycling to work in the East Bridge Street/Albert Bridge Road area of Belfast. She was struck by a motor vehicle driven by the defendant. An apportionment of liability has been agreed between the parties whereby the defendant is to be held 80% responsible and the plaintiff 20% responsible for the accident. She seeks general damages for personal injuries, pain, suffering and loss of amenity. She further claims damages for future loss of earnings.

The Plaintiff

[2] Before discussing the plaintiff's claim I want to say something about her background.

[3] A B is one of three children. She has two brothers and she is the middle child. Her parents separated and divorced some 14 years ago. She enjoys good relationships with all of her immediate family.

[4] She was born and raised in Belfast. She was educated at Strathearn Grammar School obtaining 10 GCSE's and 3 A Levels. She enjoyed school and got on well with teachers and peers.

[5] She subsequently attended at Northumbria University where she read criminology and sociology attaining a 2:1 honours degree. At that stage her intention was to join the Police Service in due course, but like many young people of her generation she decided to embark on travel before settling down to her chosen career. In addition to her passion for travelling she also had a particular interest in the coffee industry. She was working as a barista at the time of the accident. From the age of 14 she had worked part-time for a coffee outlet named 'Javaman' in the St George's Market in Belfast. This is where she had been travelling to on the morning of her accident.

[6] The plaintiff combined her interests in travel and coffee after her graduation from university in 2009. She travelled extensively over the next two years visiting Australia and South East Asia. She returned home in 2011 before travelling to New Zealand in September of that year. She paid for her travels by working in cafes and coffee shops, doing reception work, cleaning jobs, working on farms and on camp sites. In the course of her travel she visited and researched various production areas in relation to coffee.

[7] Whilst in New Zealand she learned that her brother was ill and he was ultimately diagnosed with schizophrenia which required hospital admissions. This caused great stress for the family and she decided to come home from New Zealand in January 2013 to help support him and the rest of the family. Her visa was due to expire a month or so later and her evidence was that she would have come home at that point in any event.

[8] In addition to taking the opportunity to study the production of coffee while she travelled she also enjoyed an extremely active outdoor life. She enjoyed kayaking, outdoor swimming, mountain biking, hiking, snow climbing, surfing, sailing and off-road driving. She had been good at sports at school and swam competitively in her younger days.

[9] On her return to Belfast she helped with her brother and also resumed her employment with Javaman for 18 hours per week. Her passion for travelling had not been sated and during that summer she intended to go for a one month trip backpacking around northern Spain, the Basque country and the South of France. She planned to go mountain biking, hiking, scuba diving and to walk the El Camino. She had thought about embarking on a working holiday in France with a view to driving a van selling Javaman coffee products at local markets and festivals. She hoped to make sufficient money from this to fund a trip to South America before finally returning home and settling on a career.

[10] None of these travel plans came to pass as a result of the injuries she sustained on 1 July 2013.

[11] At the trial of this action I was greatly assisted by counsel and solicitors for both parties.

[12] Mr Dermot Fee QC appeared with Mr Rory Fee on behalf of the plaintiff. Mr David Ringland QC appeared with Mr William O'Neill on behalf of the defendant.

The Medical Evidence

[13] In the course of the trial I received the following written medical reports submitted on behalf of the plaintiff:

- Reports from Mr C T Andrews FRCS, Consultant Orthopaedic Surgeon, dated 26.11.13, 29.04.15 and 18.11.15.

- Reports from Dr Brian Mangan MD FRCPsych, Consultant Psychiatrist, dated 10.04.14 and 22.04.15.

- Report of Dr Paul McConaghy, Consultant in Pain Management, dated 20.01.17.

- Report from Dr Nicola Sherlock, Consultant Clinical Psychologist, dated 28.04.17.

- Report from Mr Mark O'Hara, Occupational Psychologist, dated 11.08.15.

[14] I received the following medical reports submitted on behalf of the defendant:

- Reports from Mr Alan Yeates FRCS, Consultant Orthopaedic Surgeon, dated 15.10.14, 26.07.16 and 24.11.16.

- Report from Dr Neta Chada FRCPsych, Consultant Psychiatrist dated 12 May 2016.

[15] In the course of the hearing I heard oral evidence from Mr Andrews, Mr Yeates, Dr Chada and Dr Sherlock.

[16] There was a large measure of agreement between the medical experts as to the injuries sustained by the plaintiff.

[17] As a result of the collision the plaintiff was thrown from her bicycle before striking the windscreen of the defendant's motor car and falling onto the ground. She had immediate back pain and was taken on a spinal board to the Royal Victoria

Hospital Accident and Emergency Department where she was examined. X-rays of the cervical, thoracic and lumbar spine were taken and she was investigated with a CT scan of the chest, abdomen and pelvis. These investigations revealed that she had an ulterior wedge compression fracture of the T12 vertebral body mainly affecting the superior end plate with some loss of anterior vertebral body height. She was admitted to the ward under the care of Mr A Hamilton and spent a 48 hour in-patient period after which she was ultimately discharged with a neofract jacket on 3 July 2013. X-rays taken on 7 October 2013 demonstrated that the fracture has healed with a 50% loss of anterior vertebral body height.

[18] Subsequent x-rays of the thoracic and lumbar spine taken on 8 May 2015, which have been viewed by Mr Andrews, demonstrate degeneration and narrowing of the T11/T12 inter vertebral disc with signs of degenerative changes occurring in this disc.

[19] In addition to her physical injuries the plaintiff also suffered a psychiatric injury. On 10 April 2014 Dr Mangan diagnosed the plaintiff as suffering from an adjustment disorder with a prolonged depressive reaction. When he examined her on 22 April 2015 he noted a gradual improvement in her condition and suggested that her mood disturbance and anxiety arising from her accident would resolve over the next 18 months to 2 years. Dr Chada, who examined the plaintiff on 20 April 2016, diagnosed a prolonged depressive adjustment disorder.

[20] All of the above is not in dispute. What is in dispute is the extent, nature, duration and consequences of the symptoms the plaintiff complains of as a result of the injuries she has sustained.

[21] Before turning to the oral evidence in the trial I propose to provide some further detail of what is contained in the written medical reports.

Orthopaedic reports

[22] When Mr Andrews examined the plaintiff on 25 November 2013, almost 4 months post-accident he noted that the plaintiff was aware of immediate back pain at the time of the accident. He had access to her hospital notes and records. He records that she had to wear her neofract jacket for the first two months approximately before starting to wean herself out of it. She was taking regular analgesia at that stage. He noted that she was complaining of ongoing pain in her back at the thoracolumbar junction on a daily basis. On examination he described her as co-operative. There was no significant tenderness throughout the length of her thoracolumbar spine and her range of movement was relatively full and unrestricted in all directions.

[23] Dealing with the fracture, his opinion was that generally these injuries cause a lot of pain for a prolonged period of time. He advised that there was a chance of improvement for up to 12 and possibly 18 months. In view of the damage to the

superior endplate of L1 there was a significant risk of degenerative changes affecting the T11/T12 intervertebral disc which can lead to chronic pain. His view was that it was "*not unusual in a situation such as this young lady finds herself in for her to suffer some ongoing thoracolumbar back pain and it is noted to be common whenever the interior vertebral body height is reduced by 50%. I would expect this young lady to continue to suffer some long term lower back pain.*" Although he hoped her symptoms would improve he expected her to suffer some chronic thoracolumbar back ache.

[24] He also noted that the plaintiff suffered from bruising of her right wrist and bruising of both lower legs just above the ankle where the pedal cycles had impacted with her legs. This bruising settled within 3-4 weeks.

[25] When he saw her on 27 April 2015 some 22 months post-accident he noted that she continued to have ongoing problems with pain around the thoracic lumbar junction in the area where the fracture occurred. She was taking regular paracetamol, analgesia and ibuprofen. On examination he noted that the range of movement of the thoracolumbar spine was reduced with forward flexion allowing the finger tips to reach the knee level only. Other movements were about 60% of normal in all directions. He expected "*all of her symptoms to continue in the long term*". He discussed spinal fusion surgery but felt that would carry unacceptably high risks. He felt that she had developed degenerative changes in the intervertebral discs of T11/T12 and this was subsequently confirmed when he examined x-rays taken of the thoracic and lumbar spine on 8 May 2015.

[26] He saw the plaintiff again on 16 November 2015 approximately 2 years 3 months post-accident where he noted that the plaintiff continued to have daily chronic back pain. His opinion was that long term back pain had resulted as a consequence of the accident. He felt it was likely that this would continue. He stated that:

> "*It is well known that whenever anterior vertebral body height loss of 50% occurs chronic pain results.*"

He expected all of her symptoms to remain "*chronically and permanently*".

[27] When Mr Yeates saw the plaintiff on 15 October 2014 he noted the plaintiff's ongoing complaints. He reviewed the report of Mr Andrews dated 25 November 2013, the report of Dr Mangan dated 10 April 2014 and her medical notes and records. His opinion was that she had sustained a significant compression fracture to the 12th thoracic vertebrae with 50% loss of anterior height. He noted that she was recovering well when she was last seen by Mr Hamilton 3 months beyond the accident and advised that it is normal for such pain to improve over an 18 month period. He accepted the risk of degenerative change in the medium to longer term and that the plaintiff would probably continue to have at least a low grade level of activity related pain in the medium term. He felt that there was "*a small risk*" that such pain will gradually worsen in the longer term future over a 25 year period

approximately but he did not consider it would be at such a level as to require surgery or to prevent her from working. He felt she could continue with lots of her physical pursuits with some accommodation. He described the plaintiff as "*a co-operative, pleasant 26 year old lady*". On examination she flexed with her fingers to knee level only, with some back pain. Extension was slightly restricted and uncomfortable. He describes reasonable preservation of lateral flexion and rotation but some discomfort on rotation. At that stage she was taking two ibuprofen and four paracetamol tablets "*most days*".

[28] When he saw her again on 26 July 2016 he noted the ongoing back complaints with daily pain. She described her progress as being "*not as good as hoped*". He records that she was taking two paracetamol tablets and two ibuprofen on a daily basis. She felt that her pain had been worsening gradually over the last 18 months. On examination he noted that she walked freely and quickly into the consulting room with no evidence of back stiffness. She flexed with her fingers to just below knee level with some discomfort. Extension appeared to be very sore and was reduced by one third of the normal. Other movements were unremarkable. He reviewed a report from Mr O'Hara in relation to her ability to work. In his opinion he states:

> "*It is reasonable to point out that this lady will continue to have a degree of mostly activity related pain around and below the area of the injury on the lower thoracic spine on a permanent basis. That pain may gradually get worse but at this point in time it cannot be said that this deterioration would be to such a level as to require operative surgery.*"

[29] His view was that there was no reason why she could not carry out a lot of physical activities but with considerable moderation. He points to Mr Hamilton's discharge note to the effect that she complained of intermittent pain on the right side of her thoracolumbar area and that she was able to flex forward to touch her ankles. He felt that there was some inconsistency with regard to the subsequent observation of loss of spinal movement, even taking into account a degree of degenerative change around the area of injury. He felt that she could do many types of work. At that stage she was working 15 hours per week as a barista in two different coffee shops but he felt that she could probably increase her current hours. He also felt that she could take her career further by pursuing a social work course or a university degree leading to more lucrative work.

[30] He provided a further report on 24 November 2016 having examined DVD evidence arising from surveillance of the plaintiff at her place of work on 8 July 2016, 15 July 2016 and 24 October 2016.

[31] He indicated the DVD shows the plaintiff walking freely with no obvious signs of discomfort or restriction. She was noted to bend and sit in a comfortable manner. She is seen bending down to pull out a wooden table and also was

observed to stand on a form and push up a roller shutter. He felt that this would have produced a reasonably significant force on her back yet there was no sign of disability or outwards signs of her being in pain. He felt that this was in contrast to what he had been told by the plaintiff when he examined her previously.

[32] His opinion was that there no was reason why the plaintiff could not go kayaking or rowing at least in a limited fashion and why she could not go camping and wear a light backpack. He felt she should be able to go mountain biking and do some surfing or sailing. He again referred to the discharge letter from Mr Hamilton.

[33] With respect to her work he said that "*the probability is that she should be able to increase her hours to 35 each week provided she is allowed to moderate her activities during the day by sitting down regularly*".

Psychiatric reports

[34] Dr Mangan examined the plaintiff on 10 April 2014.

[35] He records that the plaintiff was very distressed at the time of the accident. She had a concern that she might be paralysed. She felt that her injuries had a devastating impact on her lifestyle. She was no longer able to participate in outdoor sports to the extent she previously enjoyed. She reported a sense of loss and that her injuries had taken away "*her plans and dreams*". She described the impact as affecting her self-confidence and that she was anxious socially. She felt vulnerable. She had problems with sleep disturbance. She had flashbacks relating to the incident. She had resumed cycling but on a limited basis. She was nervous and anxious whilst travelling in a motor vehicle. She had attended her general practitioner in relation to her problem of depression who had suggested taking Valium medication about which she was not keen. She had been referred for cognitive behavioural therapy (CBT). She had been in a relationship for approximately six months until the time of her accident but that ended soon after. She had previously sustained a back injury about five years previously and she was depressed for approximately a year following that incident.

[36] On examination he found her co-operative. He noted that she was distressed when talking about the impact of the accident.

[37] His diagnosis was that the plaintiff had suffered an adjustment disorder with a prolonged depressive reaction. He describes her psychiatric injuries as "*very significant*". He recommended a re-examination in six to twelve months.

[38] He did re-examine the plaintiff on 22 April 2015, one year and ten months post-accident.

[39] He noted that she described some improvement in her mood and she was feeling less depressed than she did a year previously. She had resumed driving but

initially experienced panic attacks during journeys. She continued to be very sensitive when driving and when a passenger. Whilst she had resumed cycling she had stopped doing so in urban areas due to on-going anxiety problems.

[40] Since he had last seen her she had attended for cognitive behavioural therapy and whilst this had been helpful she still struggled with pain. At that time she had lost her employment with Javaman which was distressing for her. She explained that she was still adjusting to the loss of her work position. She felt vulnerable and lacking in her normal self-confidence. His view was that on examination her mood was not pervasively depressed. Whilst he acknowledged her improvement his opinion was that the plaintiff continued to find it difficult to adjust to her level of pain and her loss of employment. He expected that her mood disturbance and anxiety arising from her accident would resolve over the next 18 months to 2 years. His opinion was that if there was an exacerbation of her physical condition there would also be an associated deterioration in her mood.

[41] Dr Mangan did not give oral evidence at the hearing.

[42] Dr Chada examined the plaintiff on 20 April 2016 some two years ten months post-accident. She had sight of the reports from Mr Andrews, Dr Mangan, Mr Yeates and the plaintiff's medical notes and records. The background to the accident and the plaintiff's personal history accords with that of the other medical practitioners. She noted that in the previous week the plaintiff's brother had been accepted into the PSNI. In relation to her employment situation she noted that since losing her job in Javaman she now was back at work in two coffee shops one in the Lisburn Road and one on the Ormeau Road. She works about 15 hours per week but hopes that this might increase to 20 hours. She felt she could not get it beyond that because of pain in her back which is exacerbated by activity particularly when she has to stand throughout the day.

[43] Dr Chada reported that the plaintiff reported good mental and physical health prior to the accident. She did make an adverse comment in relation to this given the previous medical history she had disclosed to Dr Mangan to which I have referred earlier. She noted the attendance at CBT and the fact that she had been offered anti-depressants but that she preferred to manage without them. She also noted that the plaintiff tried to manage her pain by yoga.

[44] Dr Chada's view of the plaintiff was that she was "*pleasant, reactive, spontaneous and made good eye contact*". She indicated that her mood was "*up and down*". She reports that "*objectively she was upset when discussing the accident but was otherwise euthymic*".

[45] The plaintiff set out her frustrations arising from on-going pain and limitations. She records the plaintiff as saying "*It's the fact that I'm stuck with it. That has affected my mental health. I feel depressed due to the pain.*"

[46] She goes on to describe the impact her injury has had on her everyday life including her work, her ability to socialise and her participation in physical activities. Like Dr Mangan she also recorded the plaintiff's travel anxiety and in particular panic attacks when she returned to driving.

[47] In addition to her use of yoga to manage her pain she also indicated that she had been practising "*mindfulness*" for six months and that this was something she very much believes in. She also attended for trauma therapy with a voluntary group called The Wider Circle and she had now become a co-therapist in that group.

[48] Dr Chada reviewed the medical reports.

[49] Her opinion was that the plaintiff's psychiatric symptoms were in keeping with an ICD 10, a diagnosis of a prolonged depressive adjustment disorder. The biggest factor in terms of her adjustment has been her frustration and on-going pain and more significantly her on-going limitations. The worst of the symptoms were in the first year after the accident but there had been improvements thereafter up to some 18 months post-accident. Whilst she appears to have made an adjustment since that time she continued to find herself frustrated with her limitations and continued to worry about the future in terms of her career plans and her ability to return to previous hobbies.

[50] She accepted that the plaintiff had a specific travel anxiety for some six to nine months after returning to driving.

[51] She agreed with Dr Mangan that the plaintiff will continue to have further episodes of low mood if her back pain worsens. She also noted that the plaintiff was someone who because of her background and family history was vulnerable to developing psychological symptoms following this type of incident.

Other medical evidence

[52] Dr Paul McConaghy, a consultant in pain management, examined the plaintiff on 20 January 2017 approximately 3½ years post-accident.

[53] He records the plaintiff's on-going back symptoms which are particularly sore if she is active. He records a similar history to that of the other medical practitioners and on his findings on examination he records that the plaintiff co-operated fully. In terms of movement he notes that in the thoracolumbar spine she was able to bend forwards to touch her lower shins with the knees extended. He recorded that she would be able to go further but that that would cause pain afterwards. Other movements were noted to be full but she had some discomfort at the end point of all movements.

[54] In his summary he noted that the plaintiff's pain troubles her on a daily basis particularly if she sits for more than 20 minutes or drives for more than half an hour.

She described burning pain to him. His opinion was that these symptoms would continue. He felt that she would have on-going mild low back pain that would be aggravated after doing any heavy work or with prolonged periods of activity. He felt it unlikely that she would be able to work full-time without significant exacerbation of her symptoms. He felt she would not be able to get back to the main physical activities that she previously enjoyed. He recommended that an opinion from a consultant in pain psychology such as Dr Nichola Sherlock should be obtained.

[55] Dr Sherlock, who is a consultant clinical psychologist with a specialism in chronic pain, examined the plaintiff on 28 April 2017. Her report records a familiar history and she notes the plaintiff's complaint of on-going pain in her back since the index accident. In terms of her mental health she records that the plaintiff reported that since the accident she had struggled with anxiety and low mood. She notes the attendance with the plaintiff's general practitioner and at CBT. She felt that the CBT had been helpful to a point but that it did not specifically deal with the psychological management of pain. She described her current mood as having "*good and bad days*". She also noted the trauma anxiety recorded by other doctors and the interference with her hobbies and interests. She described herself as being "*a different person from what I used to be*". She felt that her old self had been diminished and she was tearful when discussing this.

[56] Dr Sherlock applied three psychometric tests namely:

- The Pain Anxiety Symptom Scale 20 (PASS)
- The Pain Self-Efficacy Questionnaire (PSEQ)
- The Depression Anxiety Stress Scale 21 (DASS21)

[57] In relation to the PASS 20 test Dr Sherlock concluded that the plaintiff was likely to have significant difficulty coping with her pain and that her pain is likely to be having significant negative impact on her quality of life.

[58] In relation to the PSEQ she felt that the results demonstrated a loss of confidence by the plaintiff.

[59] In the DASS21 she felt that the plaintiff's score fell within the extremely severe category which indicated that the plaintiff was suffering a number of symptoms that are consistent with a diagnosis of depression. Her opinion was that the plaintiff was experiencing high levels of fear avoidance or anxiety of movement, that her pain self-sufficiency was low and she was experiencing clinically significant levels of anxiety. She felt that she was experiencing symptoms that are "*consistent with a diagnosis of depression*". Her prognosis was that the plaintiff would have to work hard at managing her pain and the psychological difficulties that she has experienced in association with that pain in order improve her quality of life. She advised that the plaintiff would benefit from psychological support at the Pain Clinic. Whilst she was hopeful that A B's quality of life would improve with a

psychological intervention focusing on her pain she felt that it was likely her pain would continue to impact on her quality of life for an indefinite period of time. Dr Sherlock, who has been working for 16½ years in the Southern Trust's Pain Team, referred to research carried out on the psychological factors that influence the experience of pain. Pain and disability, according to her, are now described as a multi-dimensional dynamic interaction among physiological, psychological and social factors. It was her opinion that the psychological symptoms described by the plaintiff were contributing to her pain experience. She confirmed that the plaintiff was on the waiting list for treatment.

[60] Finally, I received a report from a Mr Mark O'Hara dated 11 August 2015. Mr O'Hara is a chartered occupational psychologist with extensive experience working with employment services both in the public and private sector. He focused on the plaintiff's employment history, her aspirations regarding employment and looked at her potential future employment prospects.

[61] Based on the medical opinions and the self-reports from the plaintiff, which he considered to be reasonable and without exaggeration, his opinion was that her withdrawal from work since the accident was justified.

[62] His opinion was that the plaintiff would be unsuited to joining the Police Service because of her physical condition.

[63] In relation to prospects of progressing into other areas relating to her degree study he had a concern regarding her ability to undergo a period of professional training as would be involved for example in social work or Probation Service training. This was based on her inability to maintain six hours of desk work on a given day and return to activity the following day. He felt it would be more promising if the plaintiff were able to undertake part-time study but pointed out there were much fewer places available for such study and that it would be challenging for the plaintiff to secure a place in such a course.

[64] He felt she would not be physically equipped for the lengthy period of training required for social work. In terms of desk based activity he felt that the plaintiff would be limited to part-time hours. He considered that light sedentary type work in an office which provided opportunity for her to get up and move about as required on a part-time basis may be suitable. He felt a job involving consistently working at a desk would likely aggravate her condition.

Oral Evidence in the trial

[65] In terms of the orthopaedic evidence Mr Andrews and Mr Yeates confirmed the opinions expressed in their written reports.

[66] Mr Yeates accepted that as a result of this traumatic injury the plaintiff's back was "not normal". He felt it was not unreasonable that she would suffer from

activity related back pain and this would continue in the long term. She would not be pain free.

[67] However, he would have expected a much better recovery than that described by the plaintiff. In this regard he placed particular emphasis on two pieces of evidence, namely the discharge note from Mr Hamilton and a DVD prepared from surveillance of the plaintiff at her workplace.

[68] The note from Mr Hamilton is dated 9 October 2013 and states:

> "A B's check x-ray does not show any further deformity. She is not tender over her back. She can forward flex to touch her ankles. She has weaned herself out of her neofract jacket. I am happy for her to resume her normal activities. She only has some intermittent pain on the right side of the thoracolumbar junction but it is not bad enough to hold her back."

[69] He felt that this note augured well for future recovery. Typically, with this type of injury he would have expected improvement up to a period of 18 months. He felt that there was therefore some inconsistency with his findings on examination on 15 October 2014, some 15 months after the accident when she appeared to be able to flex with her fingers to knee level only and with restriction of extension. This was so even taking into account a degree of degenerative change around the area of injury. He felt that the plaintiff's subsequent complaints represented a significant deterioration from that recorded by Mr Hamilton. He could not identify a medical reason for this. He did accept that the plaintiff's symptoms would vary and there would be periods when they would be more pronounced.

[70] The DVD evidence which was played in the course of the trial shows short periods of the plaintiff's activity in the course of her employment. On 8 July 2016 she is shown to be walking normally in the café and is seen bending over on a number of occasions, attending to customers and getting items from a cupboard. She is also seen sitting outside having a smoke and drinking from a mug.

[71] On 15 July 2016 she is seen walking to work and engaged in setting up the shop for the day. She is seen placing two plants at the door of the shop which involves her bending her back. She is also seen moving out a bench and seat to the front of the shop and opening the roller-shutter of the premises. Commenting on this particular activity Mr Yeates felt that this would produce a reasonably significant force on her back but that there was no sign of disability or outwards signs of her being in pain.

[72] The DVD of 25 October 2016 shows the plaintiff sitting outside the premises having a smoke. It also shows her opening a car boot and carrying two water bottles one in each hand into the premises.

[73] Arising from this evidence Mr Yeates felt that the plaintiff could in fact increase her working hours to 35 each week provided she was allowed to moderate her activities during the day by sitting down regularly. In relation to her activities he felt there was no reason why she could not go kayaking or rowing in a limited fashion. He suggested perhaps an hour on a Saturday afternoon would be possible. He felt she would also be able to go mountain biking and do some surfing or sailing.

[74] Significantly, he did indicate that her back was likely to be more painful on the balance of probabilities after 25 years. Thus he was predicting a deterioration of the plaintiff's symptoms from roughly the age 50 onwards.

[75] Mr Andrews, who saw the DVD evidence on the morning of the trial, had no reason to change his opinion. He re-iterated that the plaintiff had sustained "quite a severe injury" which had caused a degree of damage to her back to the extent that degenerative change had already developed. He felt her symptoms would continue in the long term and would not change.

[76] He found no sign of embellishment or exaggeration when he examined the plaintiff on numerous occasions. He accepted that restriction of movement could be variable but that in the long term chronic symptoms could reasonably be anticipated. His view of the DVD evidence was that the activities shown were "*relatively light*". He felt that the plaintiff had been careful when moving the roller-shutters by keeping her back straight. He remained of the view that the plaintiff's activities would be interfered with particularly the more strenuous activities such as kayaking. He felt that it might be possible for her to increase her working hours but he felt that long shifts would cause difficulty in the long term and that she would need a very sympathetic employer.

[77] He accepted that one would anticipate improvement up to 18 months with this type of injury but that thereafter improvement would not be expected. In relation to Mr Hamilton's discharge note he commented that treating doctors can be optimistic to encourage patients.

[78] Overall, what I took from Mr Andrews' evidence was that he accepted the plaintiff did have genuine ongoing complaints which were consistent with this type of injury. There can be undoubted variation in degrees of symptoms which can be difficult to predict. He felt that the best way for the plaintiff to deal with her injuries was to keep active within the limits of what she could cope with. Thus, he recommended the yoga which the plaintiff was using and recommended that she walk as much as possible.

[79] Her ability to participate in activities and increase her working hours will depend on her level of pain. He had no reason to disbelieve the plaintiff.

[80] In relation to the DVD evidence I also heard from Declan P Cosgrove MSc, Consulting Engineer, who has a particular expertise in manual handling activities.

He attended at the plaintiff's place of work. He inspected the table and bench which the plaintiff had moved. His opinion was that the table was easily manoeuvred without any lifting, there being modest frictional resistance between its feet and the ground surface. He had no difficulty moving it around.

[81] As to the roller-shutter his evidence was that it was of a lightweight aluminium type. It was free running. The shutter is counterbalanced with a spiral spring mechanism on its axle. It was working properly on the day of his inspection. His opinion was that operating the shutter either opening or closing it required only a very modest force. He found that it moved "effortlessly".

[82] He commented that the technique used by the plaintiff as demonstrated in the DVD evidence was entirely appropriate with no use of the back which she kept straight throughout. He would have recommended this as the appropriate technique.

[83] He did not weigh the plant pots that were manoeuvred by the plaintiff. Whilst he accepted that her back was bent in the course of this operation she did use her legs and knees as appropriate. He did not weigh the water bottles carried by the plaintiff. He comments that these were not large water containers. To his eye they looked like 5 litre containers and would have therefore weighed 5 kilograms each.

[84] In her oral evidence Dr Chada explained the significance of her diagnosis, which did not differ from that of Dr Mangan, was that the plaintiff only suffered from a diagnosable psychiatric condition for up to two years. A normal adjustment reactions lasts for about six months but because of the depressive component in this case a correct diagnosis was one of a prolonged depressive adjustment disorder which is a condition lasting up to two years. She felt the plaintiff probably suffered from this condition for about 18 months and benefited from CBT.

[85] She accepted that the plaintiff would suffer from on-going low mood and potential frustration related to worsening of her physical condition. She felt however that the intensity and pattern of such symptoms would not be sufficient to justify a diagnosis of a psychiatric illness.

[86] Dr Chada was dismissive of the evidence given by Dr Sherlock. She said that the tests described by Dr Sherlock were not ones recognised in clinical practice by psychiatrists and would not justify a diagnosis of depression. She further pointed out that the diagnosis proffered by Dr Sherlock was not consistent with what she would have expected nor with what Dr Chada herself saw when she examined the plaintiff.

[87] In cross-examination by Mr Ringland, Dr Sherlock confirmed that the tests applied were self-administered with no input from her as the examining physician. She accepted that the tests were not used by consultant psychiatrists but nonetheless

felt that they were valid and that the plaintiff was suffering from on-going psychological symptoms.

The plaintiff's evidence

[88] The plaintiff gave evidence very much in accordance with the history she had given to the reporting doctors.

[89] After her discharge from hospital she was severely restricted and in great pain. She spent a number of months in her mother's house who helped look after her and assist with her recovery.

[90] She was aware that she had sustained a severe injury but her intention was that she "*would be the exception and recover*". In the months after her accident small things meant a lot. As she put it "*little things became big things*". She remembers the first time she was able to tie laces. As she began to improve she was extremely hopeful. However, the further she went on she felt she was not progressing. After her discharge from hospital treatment she recalls going to her GP when she "*cried and cried*". She reports pain on a daily basis in her low thoracic area. This is activity related. She does her best to cope with the pain. It can be particularly sore in the evenings depending on her level of activity during the day and on previous days.

[91] She has been very active in trying to improve her situation. Initially, her general practitioner prescribed Tramadol, which she took for a period. She had also been offered anti-depressants, but she had preferred to manage without them.

[92] She has been taking paracetamol and ibuprofen for the pain since the accident. Typically she takes two each of these per day although this can vary depending on the level of her pain.

[93] She had tried a wide range of treatment options for her pain. She has attended with a chiropractor, a reflexologist, a kinesiologist and has had acupuncture. She has found particular benefit from yoga and she practises this regularly. She arranged to attend at classes costing £40 per session but due to her limited income she cannot attend as frequently as she would like.

[94] She has also attended for cognitive behaviour therapy (CBT). She told me that she has become a devotee of "*mindfulness*" and uses this to help deal with her symptoms. She is awaiting an appointment at the pain clinic.

[95] Overall, the effects she described suggest that the injuries she sustained have had a life changing impact on her. Prior to the accident she was "*living the dream*". She has had to "*let go of the life I had created*". She is "*stuck with this new one*".

[96] In similar vein she continued "*this is not what I wanted to be … I wanted a career … to be active*".

[97] She admits that she struggles psychologically with her condition. It has affected her self-image and her self-confidence.

[98] She said that she wants to manage her pain as best she can and to manage her lifestyle by coping with her pain. She tries to stay calm and rather than focus on what she has lost focus on what she can do now.

[99] In practical terms she described how she was unable to get back to work until about 6 months after the accident. In "*an attempt to reclaim her life*" she returned to Javaman. She initially did 2 hour shifts but ultimately this did not work out and her employment was terminated. She simply was unable to cope with the back pain arising from her work activity.

[100] Notwithstanding that set back she did obtain employment in a café/bakery where she now works approximately 2-3 shifts per week between 8-8:30 and 1-1:30. She also does a shift in another coffee shop which involves a shift of about 4 hours per week which means that overall she is working roughly 15 hours per week.

[101] She says this is the maximum she can manage. Whilst she does her best to protect herself she finds that depending on the degree of activity she suffers from back pain. After working 3 or 4 days she will go straight to bed and set herself for the next day. She did try to increase her shifts to four in a row but simply could not manage.

[102] On occasions she has to ask to be relieved from work and she gave an example of this happening about two weeks prior to the trial. She also described occasions when she had to ring her father to come and collect her such was the extent of her back pain.

[103] She does not see how she could manage any increase in this work.

[104] In terms of her future employment her evidence was that it was always her intention to join the police service. She declared this to be her preferred career option in her UCAS form and in her final year at college, as part of work experience, she was interviewed by the police.

[105] She was candid that she was not yet ready to settle down and as is set out in the medical reports she had been travelling extensively. Nonetheless, she was adamant that she intended to pursue a professional career. As a result of her experiences she had contemplated an alternative career in the prison service or possibly social work. Nonetheless, she was clear that her choice of degree was focussed on a career in the police service.

[106] As a result of her injuries she will not be able to pursue a career in the police nor can she envisage being able to work in the prison service or as a social worker. As to further study she did attend a number of lectures but she found these

physically demanding and she could not envisage returning to full-time study. Put simply, she cannot anticipate the circumstances in which she can return to full-time employment.

[107] She accepted that her symptoms were variable depending on her degree of activity and the extent to which they might be controlled by medication.

[108] Prior to the accident she was very active and enjoyed physically demanding outdoor sports. This was a particular feature of her travel experiences. These were comprehensively referred to in the medical reports which I have already described. In the 6 months prior to the accident, after her return to Belfast, she accepted that she did not engage in these activities to anywhere near the same extent. This was due to the combination of her work and her family commitments concerning her brother. Essentially, her physical activities were concentrated on cycling and walking, particularly in the Mournes. Her immediate plans were to travel to France in the summer to help promote the Javaman coffee. She had made the arrangements for this travel in terms of booking her flights but was unable to recover these costs. She finds that her injuries have affected her social life considerably. She lives in a flat with a number of friends but cannot really engage in socialising with them to the extent she previously enjoyed.

[109] In the course of her evidence she was challenged strongly by Mr Ringland on behalf of the defendant. In summary his challenge focussed on alleged discrepancies between accounts of her symptoms in the medico-legal context and accounts of her symptoms recorded by her treating doctors.

[110] It was suggested that she was exaggerating her symptoms and that this was amply demonstrated in the surveillance material shown to the court.

[111] The effect of this, it was suggested, was that the plaintiff was not suffering to the extent described and that she was capable of a much higher level of activity in terms of her hobbies, amenities and employment.

[112] Dealing specifically with the discharge note from Mr Hamilton the plaintiff said that this note arose from a very short consultation. She was "in and out". She wanted to present as positive a picture as possible. As she had already explained the first few months had been very difficult. When she was being looked after by her mother she could not mobilise properly. She had difficulty walking to the kitchen and going upstairs to the bedroom. She needed assistance with toileting and washing.

[113] As she progressed she was extremely hopeful and this was her state of mind when she saw Mr Hamilton. She points out that her pain and restriction of movement is associated with activity, which has increased since her discharge.

[114] Mr Ringland also placed significant emphasis on an entry in the plaintiff's CBT notes and in particular the notes relating to her final session on 16 June 2014 which record:

> "A B reports a huge improvement in her mood – enjoyed mindfulness and capacity to challenge NATS. Enjoying new job because there are other staff (previous job she worked alone) and it is 'good fun'. Has had days where she has no thought about her back – soreness reducing.
>
> Overall she feels she has got more balance and reports 'feeling like myself again'. Summarised and reflected on skills learnt.
>
> Offered her a booster session in a few weeks but she feels she is much improved. Therefore, agreed closure."

[115] Again, the plaintiff felt that this reflected her positive attitude. She felt that she could not obtain any further assistance from the CBT sessions. She was focusing on 'mindfulness' techniques and yoga to cope with her symptoms which she says continued notwithstanding the notes. She said that her symptoms varied as did her mood.

[116] He also referred to an entry on 4 November 2013 when the plaintiff attended with her general practitioner where the following is recorded:

> "… low mood, anxious, night sweats, not sleeping, flashbacks when dropping off to sleep, tearful, worried re health and future, keen to get back to cycling though M finds inactivity difficult. Still pain at end of day. Agreed to try medication co fluoxetine, rv in 2 weeks. Also discussed counselling."

[117] It was pointed out that the only reference to pain was 'at the end of day'. It was suggested that this was not consistent with her level of complaint as presented to the court and the doctors retained for the purposes of the action. The plaintiff pointed out that her pain patterns changed depending on her level of activity. She felt that her GP was aware of her ongoing complaints.

[118] As to the surveillance the plaintiff pointed out that when raising the shutter she could see that she was protecting her back in accordance with what she had learned at yoga. She kept her back straight and used her thighs and arms to do the work.

[119] In terms of her bending to place out the pots she pointed out that she did flex her knees but that on looking at the DVD she can understand why she might well

have pain at the end of the day. She felt she could improve her bending technique for the better.

[120] She was adamant that her work did cause her back symptoms. She felt that there was nothing in the DVD that was particularly remarkable. The placing of the plants was something she did once per day, as was the opening of the shutters. She said she was proud of herself in clinging to that job.

[121] In her evidence she was asked about her social life and in particular her social isolation. She pointed out that she was in a relationship at the time of the accident but that this had ended in the aftermath. She indicated that it was only in the last six months or so that she was able to form a relationship. It was suggested that this was contrary to an entry in her GP notes and records on 30 July 2015 where it is recorded:

> "*Also asking about diaphragm – referred to Family Planning Clinic.*"

[122] The plaintiff was understandably upset about this line of enquiry but responded that this was an example of her trying to get her life back together again. It reflected her hope for the future. She pointed out that she never took the matter any further.

[123] Overall, the plaintiff strongly denied any suggestion that she was being dishonest or exaggerating her symptoms. She said she could not lie and she wishes she was in a better position. She said that she had been '*completely honest*'. She said "*I do my best – I really do – I strive to do my best*".

[124] I also heard evidence from the plaintiff's father, who gave evidence about the impact the accident has had on the plaintiff's life.

Assessment of the plaintiff

[125] This case turns on my assessment of the plaintiff. This is a case which demonstrates the importance of oral evidence and argument in the assessment of damages. The medical reports in this case clearly set out the nature of the plaintiff's injuries. The real issue in the case is whether or not the symptoms about which she complained were reasonable and credible. I read both orthopaedic surgeons to say that the symptoms which she described can be associated with the type of traumatic injury she sustained. Mr Andrews felt that her symptoms were credible and genuine whilst Mr Yeates felt she had made a better improvement than she reported and that as a consequence could engage in significantly more activity.

[126] I had the opportunity to assess the plaintiff while she gave her evidence over two days. She was robustly (and properly) challenged. I could see that she was nervous. She was shaking through the course of much of her evidence and was emotional on occasions. Understandably, giving evidence was not easy for her.

[127] I formed the view that she was a reliable, honest and credible witness. She gave her evidence with dignity. In my view she did her best to give a history of how she had been affected by this incident covering a period of almost 4 years. She did not seek to over dramatize her symptoms in my opinion, nor did she seek to embellish her evidence. I formed a very favourable impression of her. I have come to the conclusion that the symptoms she has suffered arising from her accident have had a significant life changing impact on her. Focussing on the main issues raised with her I consider it important to look at her medical notes and records in context and in their entirety. As I already indicated there is no dispute about the fact that the plaintiff suffered a significant injury and that the predicted arthritic changes have already been established. I accept what she says in relation to the discharge note from Mr Hamilton. More importantly, her evidence that after this discharge she became extremely frustrated by her lack of progress and that she attended with her general practitioner where she "cried and cried" is in fact borne out by the medical notes and records.

[128] I have already referred to the entry on 4 November 2013 which refers to her low mood, her anxiety, problems with flashbacks and sleep disturbance, a reference to her being tearful and worried re her health and the future.

[129] Two weeks later on 18 November there is a reference to her concern about taking Tramadol and anti-depressants and about her motivation to try CBT. The note indicates "*having to adjust lifestyle to back pain which does affect mood*". On 27 August 2014 the following is recorded by a general practitioner "*several issues ongoing back pain post RTA thoracic fractures. Taking Tradamol, advised trial of paracetamol/NSAID instead*". The full note of 30 July 2015 (when she enquired about a diaphragm) is also significant, it records:

> "*C/O – low back pain ongoing pain ever since fracture, seeing chiropractor who took x-rays and told her that there was a lot of degenerative discs and arthritis in the back. Had also been told similar when back was injured initially, on benefits currently, does yoga, using paracetamol and ibuprofen to control pain, chat re pilates, also if need evidence for income support consider referral back to orthopaedics to confirm whether pain more from degeneration than original injury.*"

[130] Perhaps her medical notes and records are best summed up in a note dated 10 October 2016 when the plaintiff registered with her new practice. It records as follows:

> "*Back pain without radiation MOS. Pt has recently registered with the practice – states that felt that she was not getting much support from her previous GP. Informed me that she was knocked down whilst cycling across a road in July 2013, by a car which drove through a red light. Sustained over 50%*

fracture of T12. She had to wear a cast for 3 months and was followed up by orthopaedics clinics for approximately 9-12 in total. Has felt very anxious since the accident. Does not drive when it is dark due to fear of having an accident, although the accident happened in daylight. Says that her GP referred her for CBT shortly after the accident and she had 6-8 sessions – found it helpful at the time. Says that her GP diagnosed her with depression after the accident, and offered to prescribe anti-depressant medication, but Pt declined at the time. Ongoing court case – has been recently assessed by an orthopaedic consultant and psychiatrist as part of the court case – states that the orthopaedic consultant advised that she will always have chronic pain due to fracture of vertebrae. Has been taking paracetamol and ibuprofen, but does not feel that they work. Took Tramadol just after the accident but they made her feel "spaced out". Never took Co-codamol. Tearful when discussing the accident. Pt denies any HX of self-harm or suicidal thoughts. Denies any Hx of anxiety or being depressed prior to the accident. Lives with flatmates. Reports good support network from friends and her father. Drinking two pints of beer once per month. Works 16 hours per week as a barista. States that psychiatrist did not give any advice re managing her anxiety and low mood. Pt attended a chiropractor last year and took x-rays and advised that she had degenerative changes of her back. Discussion re options. Pt happy to try amitriptyline-UWG. She would also be happy to be referred to the mental health hub. RV again 3/52. Worsening statement. I have asked SE for Pt's medical chart. We will discuss the option of referral to the pain clinic at the next appnt."

At a later date the following was recorded:

"29/11/16 – Follow up appointment with Dr Cathy McKeown – gradually increased AMT to 30mg nocte – feels that it is taking the edge of her pain – she did not want to increase it any further without discussing with me – no SEs encountered. She is happy to increase to 40mg nocte, then up to 50mg in 3 days' time if tolerated – UWG – she will leave me a message on Monday to let me know how she is finding the 50mg dose. She is on waiting list for counselling with HUB, and has also been recommended to attend a stress management class which she intends to do. Offered referral to pain clinic, which she is happy with."

[131] Overall, in my view her medical notes and records were consistent with her evidence.

[132] I did not find the DVD/surveillance evidence of any great import. It is no surprise that the plaintiff was seen walking without restriction. This is exactly what was found when she was examined by the orthopaedic surgeons. There is nothing in the psychical movements that I saw that was significantly different from what the surgeons found on examination. On examination the plaintiff was able to bend but experienced pain when extending her hands beyond knee level. Mr Cosgrove was clear in his evidence that the effort involved in the activities demonstrated in the video evidence was minimal and I did not find that the evidence demonstrated exaggeration on her behalf. There was never any issue that her work involved a degree of physical activity including bending. The only issue was whether or not this caused pain depending on the extent of that activity, particularly after she had completed her work.

[133] I also accept the plaintiff's evidence about her capacity for work.

[134] I consider that she is a positive, well-motivated individual who was determined to make the maximum recovery from her injuries. This is evidenced by her attempts to return to work. The fact that she was unable to maintain her employment with Javaman, whom she had worked for since she was 14 years of age, is in my view very significant. Notwithstanding this set back she did manage to find alternative employment which was less demanding. In similar vein, I note that when she attended for trauma therapy with a voluntary group she agreed to become a co-therapist in that group.

[135] In my assessment she is well motivated towards work and understands it is important for her own well-being. She only remained on benefits for a short period of time.

[136] She has sought, at her own expense and through her own initiative, many forms of treatment which she hoped might ease her symptoms. Arising from all those efforts she has settled on yoga and mindfulness as the best options for her.

[137] She has not sought to claim for the costs of these treatments or for a loss of earnings while she was off work. She has not sought the cost of care which was provided to her in the months after the accident. She has not sought the cost of the expenses incurred by her in relation to the proposed summer trip to France which had to be cancelled because of the accident.

[138] I assess her as a person who has suffered a serious injury which has resulted in ongoing physical and psychological symptoms with which she has done her best to cope.

Assessment of Damages

Back Injury

[139] The plaintiff has sustained significant trauma to her back. As is agreed by the doctors this involved an anterior wedge compression fracture of the T12 vertebral body which has resulted in 50% loss of vertebral body height. Degenerative change has already occurred. I accept that this was an extremely painful injury originally and resulted in very significant disability post-accident. I accept that she has ongoing back symptoms. I accept that these will continue for the rest of her life. I accept that it is likely (as per Dr Yeates) that her symptoms will deteriorate when she reaches 50. I accept that the plaintiff will do her best to manage her pain so that she can maintain a level of employment and activity. It would appear that the plaintiff will require medication for the rest of her life.

[140] I consider this to be a very significant state of affairs for a young lady, particularly one who was so active prior to her injuries.

[141] I also note that she sustained significant bruising to her wrist and both her lower legs but that this settled within 3-4 weeks.

[142] In the course of closing submissions counsel for each party referred me to the Guidelines for Assessment of General Damages in Personal Injury cases in Northern Ireland published by the Judicial Studies Board for Northern Ireland on 4 March 2013.

[143] Whilst I obviously have regard to the Guidelines I bear in mind Girvan LJ's comments in his introduction to the Guidelines when he says:

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

[144] Mr Fee says that the appropriate category in the guidelines is to be found at page 24 Section B(c). This category refers to

> *"Serious back injury, involving disc lesions or fractures of vertebral bodies where, despite treatment, there remains continuing pain or discomfort, considerations affecting the level of award may include: impaired agility and sexual function, depression, personality change, alcoholism, unemployability and the risk of arthritis."*

The suggested range of damages is "£50,000-£92,000".

[145] Mr Ringland says that the appropriate category is in fact that set out in (e) which refers to:

> "***Moderate Back Injuries***
>
> *A wide variety of injuries qualify for inclusion within this bracket. The precise figure depends upon the severity of the original injury and/or the existence of some permanent or chronic disability."*

The range suggested is "£14,000-£42,000".

[146] He says that it falls short of the category set out in (d) which was described as:

> "Permanent residual disability albeit of less severity than in the higher bracket. This bracket contains a large number of different types of injury; for instance:
>
> 1. A crush fracture of the lumbar vertebrae with risk of osteoarthritis and constant pain and discomfort and impaired sexual function.
>
> 2. Traumatic spondylolisthesis with continuous pain and risk of spinal fusion.
>
> 3. Prolapsed intervertebral disc with substantial acceleration of back degeneration."

The range suggested for this type of injury is "£28,500-£50,000".

[147] When considering the evidence in this matter and having come to the conclusions I have set out above I had felt that the appropriate valuation for the plaintiff's back injury was £65,000.

[148] When I looked at the categories to which I had been referred and the Guidance contained therein I have come to the conclusion that this figure is entirely appropriate.

[149] The plaintiff has sustained a serious back injury involving a fracture of the vertebral body. She continues to suffer from pain and discomfort. Her activities are limited. She has suffered from depression. The injuries have had an effect on her employment and she has already developed arthritis. She is only in her twenties. Her symptoms will be permanent and they are likely to deteriorate.

[150] **I therefore assess damages for the plaintiff's back injury and minor bruising to her wrist and legs at £65,000**.

Psychiatric Injury

[151] Having considered the psychiatric evidence I have concluded that the plaintiff suffered from a clinically diagnosable psychiatric injury for two years post-accident. She suffered significant psychiatric symptoms because of her difficulty in adjusting to her new situation. I accept that she had great difficulty coping with her injuries. I also accept that she suffered from significant travel anxiety but that this has to a large extent resolved. I accept that after the two year period she remained someone who is vulnerable to mood swings which will be influenced by her physical pain and how she is coping with that. I believe that she will attend at the pain clinic when an appointment is available. Her psychiatric injury has had an effect on her ability to cope with life and particularly work, she has sought appropriate medical assistance and I find that there is a degree of future vulnerability. I would not categorise her psychiatric injury as minor but there clearly is a considerable overlap between that injury and her physical injury.

[152] **I therefore assess damages for the plaintiff's psychiatric injury at £15,000.**

Loss of Amenity

Is the plaintiff entitled to an award for loss of amenity?

[153] In considering this issue I bear in mind that to a large extent general damages for the injuries she has sustained do reflect interference with the plaintiff's lifestyle and her hobbies.

[154] The plaintiff argues that the extent of her injuries have had a particular impact on her ability to participate in vigorous outdoor sports. I accept her evidence that prior to the accident she did engage in sports such as kayaking, outdoor swimming, scuba diving, surfing, cycling, hiking and trekking. This was very much associated with her enjoyment of travelling.

[155] I accept her evidence that her injuries have had a devastating effect on this aspect of her lifestyle and that she genuinely suffers a sense of loss in this regard.

[156] It has been suggested by Mr Yeates that she could increase her level of activity and he suggested for example that she might be able to do some kayaking or rowing for a short time on a Saturday afternoon. Even if this is right it falls well short of the level of activity enjoyed by her pre-accident. She has returned to some cycling but on a limited basis.

[157] Mr Ringland correctly pointed out that in the six months prior to the accident she did not engage in these activities to any great extent. Her physical activities related primarily to cycling and hill walking.

[158] I have come to the conclusion that the plaintiff's previous participation in rigorous outdoor activities was an important part of her life. I accept that as she settled down and commenced her chosen career her ability to participate in these activities would be significantly reduced. Nonetheless, I have no doubt that had she been uninjured she would have continued to enjoy such activities.

[159] The loss of such opportunity should not be underestimated. I have no doubt the plaintiff's ability to engage in these activities would have been an important part of her enjoyment of life in the future.

[160] In the case of Sands v Hamilton I looked at the decision of the House of Lords in the case of Girvan v Inverness Farmers Dairy [1998] SC (HL) 1.

[161] That was a Scottish case in which the pursuer sustained injury in a road traffic accident. Prior to the accident he had been actively engaged in the pastime of shooting. He sustained a number of injuries, the most serious of which was a fracture of the right elbow, which resulted in the fact that he was no longer able to participate at international level in his chosen sport. He was an outstanding clay target shot, having represented Scotland and Great Britain in international competitions and won numerous medals including a bronze medal in the 1982 Commonwealth Games and the European Championships in 1988. He was training for the 1990 Commonwealth Games at the time of the accident and his ambition was to represent the United Kingdom in the Olympic Games. He had found it very hard to accept that he was unable to continue with competitive shooting. The initial trial in the action was held before a jury who assessed solatium at £120,000. The defender successfully enrolled a motion for a new trial and the verdict of the jury was set aside. At the second trial the jury awarded a solatium of £95,000. The defenders thereafter enrolled a motion to have the verdict set aside on the ground that the damages awarded were excessive. The motion was refused at the Court of Session and the defenders appealed to the House of Lords.

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

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

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

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

[164] Thus, although the court held that the award was undoubtedly a high one the defender's appeal was dismissed because it was impossible to say that no other jury would award such a sum. The significance for the purposes of assessing a particular loss of amenity in this case is that the House of Lords did not feel free to interfere with such a high award which was made almost 20 years ago. The court clearly accepted that a plaintiff is entitled to an award for what he/she has lost in respect of hobbies or amenities – in that case sporting activities.

[165] Obviously, the circumstances of this case fall well short of those in Girvan and also those in Sands. Nonetheless, I have come to the conclusion that the plaintiff is entitled to a modest award to reflect this undoubted loss in addition to the figure awarded for pain and suffering. Such a figure should of course be proportionate to the overall level of my assessment of damages for personal injuries which I have set out above.

[166] **I have come to the view that the appropriate figure in this particular case for the particular loss of amenities suffered by the plaintiff is one of £10,000**.

[167] **This brings me to a total figure for general damages of £90,000.**

[168] I am conscious that this figure represents a total of three separate figures and in those circumstances I have considered the figure on a global basis to ensure that the sum produced is a fair figure to represent the compensation to which the plaintiff is entitled for general damages. Having carried out this exercise I conclude that a global figure of £90,000 represents fair and reasonable compensation for the personal injuries, pain, suffering and loss of amenity the plaintiff has sustained.

Claim for loss of earnings

[169] The plaintiff's claim is that but for her injuries she would probably have embarked on a career in the PSNI. She accepted that she was less sure about this than she was when she studied for her degree in that she had contemplated alternative careers in the probation service or social services. She claims a figure which would represent what she would reasonably have expected to earn in such a career/careers less the residual earnings she is likely to earn in her injured condition.

[170] Both parties instructed forensic accountants to assist the court in the calculation of any loss to which I determine she is entitled.

[171] Mr Sonner on behalf of the plaintiff put forward figures based on an assumption that the plaintiff would have joined the PSNI no earlier than April 2016 aged 28 and 3 years post-accident. For the purposes of the report it is assumed that she would retire from the police at age 60 and that she would have reached point 7 on the pay scale (but with no provision for promotion). He goes on to present various figures for residual earnings up to age 68 on the basis of various scenarios. He also includes calculations for loss of pension depending on the court's findings.

[172] In response Harbinson Mulholland on behalf of the defendants have prepared calculations based on various scenarios and assumptions. In terms of earnings but for the injury they put forward two options. Option 1 was that she would continue to work in a coffee shop setting as a barista, eventually securing a position as a store manager with earnings gradually increasing to £25,000 gross per annum. Option 2 was based on a presumption that she would have sought employment relevant to her criminology and sociology degree with earnings gradually increasing to a

maximum level of £36,847 gross per annum (£25,185 net) in line with median skill level 4 categories. Rather than a commencement date of April 2016 they suggest a commencement date for this employment April 2018.

[173] As with the Sonner report they then go on to consider various options in terms of residual earnings.

[174] Before considering the appropriate figures it is necessary to set out the basis upon which I should approach this aspect of the case.

[175] Mr Ringland suggested that this was a case in which, at most, the plaintiff was entitled to a modest lump sum to compensate her for what was in effect a handicap in the labour market. He submitted that the plaintiff was carrying out similar hours of work to that previous to the accident in a similar capacity. He relied on the evidence of Mr Yeates to the effect that the plaintiff should be able to increase her hours of work to a full working week in the region of 35 hours per week.

[176] Mr Fee argued for an actuarial approach in accordance with the Ogden Tables which was more suited to the circumstances of this case as opposed to a **Smith v Manchester** award or **Blamire** award. A **Smith v Manchester** approach applies when a plaintiff remains in the same work as pre-accident but argues that in the future there is a risk that that employment might be discontinued or reduced because of the injury. The **Blamire** approach is only appropriate when the uncertainties of what a plaintiff might have earned over time are so great that the conventional approach employing multiplicand and multiplier is inappropriate.

[177] I take the view that, depending on the evidence, the starting point should be an actuarial basis when calculating loss of earnings. To quote McGregor on Damages 19th Edition at paragraph 38-072:

> "Thus the Ogden Tables have triumphed. They are now established in the damages lexicon, the order of the damages day and the pre-requisite for the damages calculation."

[178] If the Ogden Tables can be relied upon they result in a more precise and exact award, far removed from the arbitrary round numbers of earlier days courts.

[179] The principles of this conventional method of assessment for future loss of earnings are fairly straightforward. The court should try to identify a multiplicand representing the plaintiff's potential level of earnings at the date of trial and a multiplier to represent the number of years to which the loss of earning power will last. The respective multiplicands or multiplier require adjustment depending on a variety of factors such as the probability of future increase or decrease in annual earnings and the so called "contingencies of life".

[180] Any assessment of future loss of earnings in this case inevitably involves a degree of speculation. Is there sufficient reliable evidence in this case for me to identify the likely future earnings of the plaintiff had she not been injured?

[181] Whilst she makes a strong case that she would in due course have entered the police force I do not consider that there is sufficient evidence to establish this on the balance of probabilities. I consider that there is too much uncertainty about that to justify assessing an award for future loss of earnings on this basis. The plaintiff has made a strong case for this proposition and it may well be that this would have been her chosen career. However, it seems clear that as a result of her experiences she was considering other options and of course she may not have been accepted into the police force had she applied.

[182] However, I am satisfied that she would have settled down and achieved a career consistent with her level of educational achievement. I do not consider that it is probable that she would have continued working in a coffee shop for the rest of her working career. I have come to the conclusion that on the balance of probabilities she would have sought employment relevant to her criminology and sociology degree in accordance with the defendant's accountant's second option. The figures put forward by Harbinson Mulholland in this regard are in line with median skill level 4 categories. Whilst this may represent a degree of unfairness to the plaintiff in my view it represents a reasonable and fair approach to both parties. It is, as I have described, a median figure for skill 4 which relates to persons with a degree or equivalent period of relevant work experience and is based on the NI ASHE earnings.

[183] There is a difference of opinion as to whether the plaintiff's eventual settled employment would have commenced in April 2016 or April 2018. I have decided to accept the defendant's assumption that this employment would have commenced in April 2018.

[184] By then the plaintiff would be approaching her 30th birthday by which stage I am satisfied that she would have settled on her career. In terms of the appropriate multiplier for injuries but for the accident I accept that the appropriate figure is that suggested by Harbinson Mulholland, that is 20.8 to represent a career to normal retirement age 68.

[185] **Based on those figures I determine that the projected future earnings for the plaintiff but for the accident is £523,833 (£25,185 x 20.8).**

What is the appropriate figure for residual earnings?

[186] Because I have agreed with a commencement date of April 2018 I do not propose to award a figure for loss of earnings prior to that date. I accept that the

plaintiff will continue in her current employment in the meantime. Whilst I recognise that this may involve some unfairness to the plaintiff I consider it as a reasonable approach. What then is the appropriate figure for residual earnings from April 2018 onwards? This depends on my view of the evidence in relation to the plaintiff's likely future employment prospects.

[187] She feels that she is doing the best that she can and that she would be unable to increase her work beyond her current level. Mr Andrews felt that this could be increased to say 20 hours per week but that at the end of the day it depends on how the plaintiff can cope with her pain. Mr Yeates suggested that the plaintiff could work 35 hours per week provided she was accommodated at work by being allowed to moderate her activities during the day by sitting down regularly.

[188] Mr O'Hara, who is an expert in the field, was much more pessimistic. In short he felt that she would only be suitable for part-time sedentary work.

What then is the appropriate multiplicand for the purposes of a calculation for residual earnings?

[189] Harbinson Mulholland had calculated the residual earnings on the basis that despite her injuries she could secure similar employment to her projected uninjured employment from April 2018. I reject that submission. It is based on the proposition that the plaintiff should be able to increase her working hours to at least 35 per week. Further, it is suggested that she can find alternative work at skill level 4. In short it is suggested that the injury will have little or no effect on her future employment. I completely reject this approach. I accept the plaintiff's evidence, supported in my view by Mr Andrews and Mr O'Hara that she will continue to be significantly restricted both in the type of work she can do and in the number of hours she can work because of her injuries.

[190] Mr Sonner has put forward a more realistic assessment in my view. That is that the plaintiff, in accordance with Mr O'Hara's opinion, could use her degree to avail of person centred activity which may be more suited to her physical condition. Such a job, at least at entry level, would result in a lesser salary than the professional roles which would have been available to the plaintiff were it not for her injury. However, irrespective of any job option that the plaintiff may pursue, I agree with Mr O'Hara that she will be limited to part-time hours which will lead in his words "to a significant loss of earnings over the duration of her working life".

[191] As is the case with future loss of earnings there obviously is a degree of speculation in relation to her future earnings. Mr Sonner assessed that the plaintiff could achieve an average annual salary of £21,500 gross over the remainder of her working life, that is an annual net income of approximately £17,900. This figure is based on guidance on salaries in the youth and community field as provided by NICVA (Northern Ireland Council for Voluntary Action) pay scales using NJC pay points – pay points 6-49. This is based on the assumption that the plaintiff would

reach a reasonably high level in this sector having regard to her academic qualifications but that the work would be on a part-time basis. This would represent a significant improvement on her current level of earnings.

[192] Based on Option 2 of the Harbinson Mulholland calculation for future earnings but for the accident (£25,185 net per annum) this would represent an annual loss of £7,285 which in my view represents a reasonable figure for the difference in earning capacity attributable to the accident. I therefore determine that the multiplicand for the residual earning calculation for the plaintiff should be £17,900.

What then is the appropriate multiplier for the purposes of a calculation for residual earnings?

[193] If the plaintiff is categorised as not disabled the appropriate multiplier for the residual earnings calculation would be 20.8.

[194] The plaintiff argues that there should be a reduction in this multiplier because of her disablement. Contingencies other than mortality are dealt with in Section B of the 7th Edition of the Ogden Tables. The tables recognise that it is appropriate to take account of the nature of a particular claimant's disability.

[195] As recognised in the text of Section B the methodology offers a framework for consideration of a range of possible figures with the maximum being effectively provided by the post-injury multiplier assuming the claimant was not disabled and the minimum being the case where there is no realistic prospect of post-injury employment.

[196] The definition of disabled is set out in paragraph 35 of Section B as follows:

> "A person is classified as being disabled if all three of the following conditions in relation to the ill health or disability are met:
>
> (i) has an illness or a disability which has or is expected to last for over a year or is a progressive illness.
>
> (ii) satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day to day activities.
>
> (iii) their condition affects either the kind or the amount of paid work they can do."

[197] In relation to (i) and (iii) it is clear from my findings that the plaintiff meets these tests.

[198] The definition of disability under the equivalent Equality Act Provisions in England and Wales arose in Aderemi v London and South Eastern Railway Limited [2013] ICR 591. Langstaff J, delivering the judgment of the Appeal Tribunal, stated at paragraph [14]:

> "Before the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in Section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for bifurcation; unless the matter can be classified as within the heading 'Trivial' or 'Insubstantial', it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

[199] Applying this statement of how the test should be applied, having regard to my findings in relation to the medical evidence, I am satisfied that the plaintiff is limited in her ability to carry out normal day to day activities and that those limitations are not "trivial" or "insubstantial".

[200] Having considered all the medical evidence in this case I take the view that the plaintiff is disabled in accordance with this definition.

What then is the appropriate reduction?

[201] There is no particular science to this and I have to do my best to make an assessment of the appropriate percentage of disability which should apply. The defendants suggest that this should 0%. Harbinson Mulholland have put forward various figures based on a range of between 0% and 10%. Mr Sonner has put forward a range of figures based on percentages from 10%-30%. Mr Fee argues that the percentage figure should be more than 20%.

[202] Doing the best I can I have decided that the appropriate disability percentage is 20% and that the multiplier should therefore be reduced accordingly.

[203] At the hearing of the action it was agreed that if further information was required from the accountants that this would be provided. I do not have the appropriate figure for a reduction from a multiplier of 20.8 based on a 20% disability. I determine that that figure should be the multiplier to be applied to a multiplicand of £17,900. **The resultant figure will be the figure for residual earnings which shall be deducted from the figure of £523,833 to provide the figure for future loss of earnings.**

Loss of Pension

[204] In relation to loss of pension I adopt the Harbinson Mulholland Option 2 and determine that the plaintiff's future pension without the accident is to be calculated at £40,213.

[205] In relation to residual pension I am not in a position to provide a calculation based on the two accountants' reports that have been provided.

[206] I consider that the figure of £40,213 should be reduced to reflect pension benefits from the proposed residual employment, based on employer pension obligations. I direct that the accountants provide a figure for this deduction on the following assumptions: the plaintiff will work at the level suggested by Mr Sonner referred to above; that employment will commence in April 2018 and any relevant multiplier should be reduced to reflect a disability of 20%.

[207] **That figure will then be subtracted from a figure of £40,213 to arrive at the calculation for the loss of pension sustained by the plaintiff.**

[208] The award for damages to the plaintiff shall be as follows:

(a) General damages - £90,000.

(b) Future loss of earnings - £523,823 minus the figure for residual earnings calculated in accordance with my findings.

(c) Loss of pension - £40,213 minus the figure for residual pension calculated in accordance with my findings.

[209] The total amount shall be reduced by 20% to reflect the liability agreement between the parties.

ADDENDUM

[210] Subsequent to my judgment delivered on 16 June 2017 the parties provided agreed figures based on my findings.

[211] These are set out below:

Future Loss

Earnings without incident	Multiplicand	B	25,185
	Multiplier		20.80
			523,833
Pension without incident	Multiplicand	C	1,933
	Multiplier		20.80
			40,213
Residual earnings	Multiplicand	D	(17,900)
	Multiplier		19.58
			(350,555)
Actual pension	Multiplicand	E	(1,075)
	Multiplier		19.58
			(21,053)
Total Financial Loss			**192,439**

[212] The final judgment is as follows:

(a) General damages - £90,000 reduced by 20% equals £72,000 plus interest totalling 6% (£4,220) equals a total of £76,320.

(b) Financial loss reduced by 20% equals £153,951.

(c) Total judgment £230,271.

[213] I directed that a lodgement of £32,000 be paid out with a three week stay on the remainder.

[214] The plaintiff is to have costs against the defendant with the costs to be taxed in default of agreement.