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Judgment: approved by the Court for handing down | *Delivered:* **28/06/2016**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2006/31653

BETWEEN:

JULIE ANN COOPER

Plaintiff;

-and-

JACQUELINE BYFORD
AND
ABBEY NATIONAL PLC

(No. 2)

Defendants.

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DEENY J

[1] This judgment deals with claims for financial loss suffered by the plaintiff arising out of a road accident on 25 July 2003. It follows from my judgment in Cooper v Byford and Abbey National Plc [2016] NIQB 33. This was delivered on 12 April 2016 following a hearing on 15, 16 and 19 March 2016. In that I consider the very complex and difficult medical and personal history of the plaintiff after a road accident for which the first defendant was liable. As a result of the injuries sustained therein the plaintiff was compulsorily retired as a police officer with effect from May 2005. As appears from the judgment the extent of the plaintiff's genuine injuries were a matter of keen contest between the medical advisors on both sides. In addition there was evidence of exaggeration by her when seeking to obtain Disability Living Allowance and other benefits from the state.

[2] I found that her absence from employment by reason of unfitness due to the accident of 25 July 2003 ended by 25 September 2006 i.e. 3 years and 2 months later.

I pointed out that as she had lost her long term career as a police officer she would be likely to have an entitlement to diminution in earnings even after that date.

[3] The court also awarded general damages in that judgment. It was agreed by the parties at the first hearing that I would not hear the accountancy evidence. The parties would seek to resolve the outstanding issues of financial loss following my judgment.

[4] Unfortunately that did not prove possible and the matter came back before me for hearing last Thursday, 23 June 2016. The plaintiff had retained Ms Nicola Niblock of ASM Horwath (ASM) as her expert witness. The defendants had retained Mrs Alison Holywood of Price Waterhouse Cooper (PWC) as their accountant witness. These ladies met as directed by the court and prepared a note in May 2016 of the matters between them. Some matters were agreed. Some further matters were agreed on the day of the hearing before me. At the conclusion of this judgment I shall have to go through the different heads seriatim to arrive at a figure. I shall also give directions as to the calculation of interest.

[5] As at the earlier hearing Mr James McNulty QC appeared with Mr Stephen Ham for the plaintiff and Mr David Ringland QC led Mr Michael Maxwell for the defendants.

[6] Counsel were able to agree three of the smaller items in dispute in the May 2016 note in the course of the day.

Outstanding Issues

[7] In calculating the plaintiff's loss of earning to the date when she was found to be no longer unfit for work as a result of the defendant's negligence, 25 September 2006, was it correct of ASM to adopt the average overtime of the Police Service of Northern Ireland or was it preferable to adopt the assumption of PWC based on the plaintiff's actual overtime as reported in her payslips from January 2003 to June 2003?

[8] Ms Niblock put forward the argument that because the earnings of police officers were frequently inflated by their need to do overtime over the summer marching season it was fairer to the plaintiff to take the force average rather than merely the previous six months earnings which did not reflect the period of increased police activity. She felt that six months earnings did not give a fair representation of overtime.

[9] It was the case that, by the time the accountants became involved, those were the only payslips which were available. The onus is on the plaintiff to prove the elements in her case.

[10] However, during Ms Niblock's cross-examination by Mr Ringland the court pointed out that she had exhibited at Appendix D8 to her main report, to be found at File 1/179 of the trial bundles, the statement of pay and allowances of the plaintiff for July 2003 and August 2003. It was common case that the overtime in any particular month related to the previous month. On the August 2003 line there was no overtime i.e. the plaintiff had not worked overtime for the period 1 to 25 July (the date of the accident). The July 2003 figure was £278 overtime on the basic pay of £2,134. The witness told me that was in fact only 13% of the basic pay and not the 19% which PWC were prepared to concede as reasonable overtime for the relevant period.

[11] It may be that female police officers were not deployed in the way that their male colleagues were in 2003, to deal with public order disturbances on our streets. Certainly this plaintiff, contrary to Ms Niblock's more general surmise, did not appear to have enhanced overtime in June 2003 and none at all in July 2003. Therefore I conclude that the PWC figure of £67,400 loss for her PSNI earnings to September 2006 is the correct one, based on the actual overtime worked in the previous six months.

[12] The second issue is the largest one to be determined by the court. It falls into two parts. The plaintiff maintains that were it not for the accident she would have worked on for some years as a police officer. As envisaged in my first judgment, even though I consider that her non-employment after 25 September 2006 could not be blamed on the defendants, nevertheless the court would have to make an allowance for the diminution in earnings if, on the balance of probabilities, she would not be earning as much as a police officer would have over the relevant period after being notionally fit for work. There is a notional element, partly because the plaintiff had other difficulties unrelated to the July 2003 accident.

[13] It is necessary therefore to determine what is the relevant period in which she would have remained a police officer were it not for the accident. Mr McNulty QC in his opening of the action adopted a constructive approach to this issue. It had obviously been carefully considered by the plaintiff's advisors as it had been also adopted by Ms Niblock in her May 2016 discussion with Mrs Holywood. That approach was to the effect that the plaintiff would, in any event, regardless of the accident, have retired from the Police Service by 1 December 2009.

[14] As this was a concession made by the plaintiff on one view I need not look behind it. But Mr Ringland in his closing remarks and, I have to say, contrary to the note of his accountant's view in May 2016, sought to argue that no diminution in earnings should be allowed for any period after 25 September 2006. He did not submit any alternative date for retirement but suggested there should be no residual loss. He seemed to base that submission on the judgment of the Supreme Court in Fairclough Homes Limited v Summers [2012] UKSC 26. This was on the basis that the plaintiff was, in his submission, dishonest and that that, and various other factors which I will outline in a moment, meant that she should not be allowed any

compensation for the period after the court found she was no longer unfit for employment due to the defendant's negligence.

[15] It is important to consider the proper approach of the court to this heading of loss.

[16] Although the court found that she was unfit due to the accident only until 25 September 2006, in that period she had lost her employment as a police officer. She was therefore entitled to make the case that the earnings which she would have recovered would not have been as much as those of a police officer.

[17] The plaintiff's advisors took a course which seems to the court both mature and constructive. They had to acknowledge that the plaintiff, after many years of trying, had been delivered of a child on 12 March 2009. Their submission was that she would not have taken her maternity leave from the police i.e. if there had been no accident on 25 July 2003, until 1 March 2009 and that that would have run out on 1 December 2009 and she would not have returned to work. She would not have returned not only because of the birth of the child but also for other reasons. The medical evidence, including the radiological evidence, showed that the plaintiff is unlucky in having other degenerative changes in her back which would be a deterrent to discharging her duties as a police officer. Furthermore, there are other factors to be found in her general practitioner's notes and records, of a personal kind, which would also be relevant to her ability and willingness to continue serving and might point to an early retirement. It was implicit in Mr McNulty's view of the matter, and explicit in Mr Ringland's criticisms in trying to prove to the court how long she would have remained a police officer were it not for the accident, that the court would have been slow to accept her uncorroborated evidence, given the matters set out in the first judgment which damaged her credibility. The plaintiff's advisors therefore settled on this date.

[18] Insofar as arriving at a finding on the balance of probabilities as to the length of time she would have stayed in the police this seems to be an understandable concession on their part. One minor correction would be to conclude that it was more likely that she would have taken her maternity leave some months before the birth of her child rather than 11 days before as suggested by the plaintiff. However the evidence of Ms Niblock was that it would in fact make no difference to the figures because as a police officer on the third trimester of her maternity leave she would only be on statutory maternity pay in any event. Insofar as I am concerned I consider 26 September 2009 a more appropriate date but it was not suggested that that altered the figures later put forward by the two witnesses.

[19] I then turn to Mr Ringland's contention based on the Fairclough case which is also relevant to later submissions of his. The judgment of the court was delivered by Lord Clarke. It related to a case in England heard by HHJ Tetlow. He found on liability in favour of the claimant, Sommers. The defendants, subsequent to that hearing, from their own surveillance and that carried out by the Department of

Work and Pensions were able to establish that there was a gross and deliberate exaggeration by the claimant of his injuries. For example, he would leave his house and return to his house to travel to a medical appointment in a normal fashion. However outside the doctor's surgery he would adopt the use of crutches and wear those in and out of the medical appointment. The defendant's insurers had brought the matter before the Supreme Court with a view to establishing that such conduct could lead to the striking out of the claim in its entirety pursuant to CPR 3.4(2) of the relevant English Rules. It is important to note that this decision does relate to the English Rules as is clear from paragraphs 23, 36 and 42 of the judgment of the court. That in itself gives a ground for distinction, in the submission of Mr McNulty. In the event the conduct of the plaintiff there, which I consider worse than the conduct of Mrs Cooper in the instant case, did not lead to the striking out of his case. The Supreme Court held that that was a possible remedy but in effect in an exceptional case only. They did not think that Fairclough was such a case.

[20] It seems from paragraph [63] of the judgment of Lord Clarke that the trial judge, despite his very critical findings about the claimant, nevertheless awarded not only damages but costs and interest. Lord Clarke at paragraph [53] expected a judge to "penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which had been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the court that the prospect of such orders is likely to be a real deterrent."

[21] The defendant did not in fact challenge the trial judge's award of costs and interests before the Supreme Court in that case. I have to return to this issue regarding costs in due course. I also take into account the statement of the court at paragraph [55] as follows:

"The court can also reduce interest that might otherwise have been awarded to a claimant if time has been wasted on fraudulent claims."

[22] It seems to me that the Fairclough decision is not, for a variety of reasons, on all fours with the factual situation before me. In any event it does not seem to me to be authority for the proposition that the normal rules for the calculation of damages for financial loss should be disregarded. It seems to me that the plaintiff's advisors have taken a wise course in not trying to argue that the plaintiff would have remained a police officer until 2019 or 2029 but accepted that the court would be unlikely to be persuaded of that. I might add, although not expressly referred to, two further factors would be that she had a husband who was in employment. Furthermore she had a second child, happily, not long afterwards.

[23] I therefore accept the concession but also the case made on behalf of the plaintiff that she should be entitled for any diminution in earnings from September 2006 for the period of three years to September 2009.

[24] One then turns to the second sub-issue under this heading of diminution of earnings.

[25] In my previous judgment I set out the course in fact adopted by the plaintiff at this time. She started a modest part-time course in September 2005 and in September 2006 commenced a course requiring more commitment with a view to qualifying as a counsellor. As set out in that judgment the plaintiff had been an above average student who had obtained three A levels and a place at Queen's University Belfast to read psychology. She had however left after only one year of that course.

[26] The two accountants approached this matter at the hearing before me in a similar way but arriving at different destinations. They both addressed the earnings of a typical person in the population at a certain skill level. Public statistics regarding earnings of this nature set out skill levels from 1 to 4. Ms Niblock contended that the appropriate skill level to notionally attribute to the plaintiff in the period in question was skill level 2. This, like all the levels, was based on educational attainments. It refers to somebody who completed compulsory education but has not taken A levels. Mrs Holywood of PWC argues for skill level 3.

[27] Ms Niblock makes the valid point that she has taken the full-time earnings of a skill level 2 employee (SL2) for the whole period. That allowed for the plaintiff, notionally fit for work after September 2006 to secure employment and build up her earnings. This was also relevant as the plaintiff, in fact, only obtained a diploma in June 2008. Ms Niblock suggested that the earnings of a counsellor would tend to vary a lot and would tend to be part-time. Would the experience the plaintiff had gained be transferrable to that field, she asked? Therefore she suggested it was fair to take an average of a female at skill level 2.

[28] In cross-examination Mr Ringland queried why it was appropriate to take skill level 2 when in fact skill level 3 referred to somebody with A levels as this plaintiff had. Ms Niblock said that she attempted to discount that not only for the reasons just mentioned but also because the A levels were "not current" but had been obtained some years before. The plaintiff would be re-skilling in effect. Ms Niblock, in answer to questions, gave evidence that in her opinion the plaintiff would not have been likely to obtain a managerial post as she had only been a constable in the PSNI and that for only seven years.

[29] When Ms Holywood came to give evidence she said that some of these points had not been made in earlier discussion. She could see no basis for arguing that the length of time since the A levels were obtained should militate against the plaintiff or other notional person at this time. On the contrary, she argued that experience, and particularly experience as a police officer, was a valuable attribute which would add to the attractiveness and the earnings of a person in the position of the plaintiff. She said that the earnings of a skill level 3 person would be £24,000 or £25,000 gross

per year. In addition she made the further valuable point that skilled level 2, as was apparent upon digging into Ms Niblock's figures was at £15,000 a year gross but as Ms Niblock had set out in her original report at page 9 looking at financial loss and residual earnings, one of the options she envisaged for this plaintiff was work as an administrative or secretarial employee where she would earn £18,877 per year gross. In cross-examination by Mr McNulty she accepted that it would be reasonable to acknowledge that it would take the plaintiff some time to build up earnings. She pointed out that of course the earnings might not be tied to the skill level average of £24,000 per annum but could rise above that.

[30] This is a difficult area with a strong notional element derived from the finding of the court with regard to a plaintiff whose evidence could not be trusted without corroboration.

[31] I think both of these able expert witnesses made valid points which have to be taken into account. I conclude that there would have been a period, as there was in fact, of acquiring new skills which even with her duty to mitigate her loss the plaintiff might reasonably do, if, as the court found, she could not blame the defendant for being off work at that time. If she had known that, notionally in September 2006 being physically fit, she would have sought gainful employment, at least, as her advisors concede until after the happy event of the birth of her first child. She would have been looking for work in 2006 when the economy here was thriving, although I take into account Mr McNulty's point that she was at risk of losing employment in the recession that followed approximately two years later. I have reached the conclusion that the fair finding here is to set against the earnings which she would have had as a police officer the earnings of a skill level 2 person for two years and the earnings of a skill level 3 person for one year. Mrs Holywood provided the figures to reflect such an outcome. The plaintiff's earnings as a police officer, with overtime at the rate calculated by PWC would be for the three years £86,498. Her earnings as an SL2 for two years and SL3 for one year would be £31,631. Her net loss therefore would be £54,867.

[32] The parties agreed that under the heading of "PSNI Ill-Health Pension – Annual" the plaintiff would lose an annual sum, capitalised at £11,300.

[33] The parties agreed that under the heading of "PSNI Ill-Health Pension" she would lose a lump sum of £11,600.

[34] Senior counsel agreed in the course of hearing and told the court after the luncheon interval that loss of services was agreed at £1,250.

[35] Counsel further agreed that the heading of "Prescription Costs" would not be pursued. The heading under "Physiotherapy" would be reduced to £612.

[36] I was also addressed by counsel on the issue of interest. The accountants had agreed the appropriate rates so that the dispute regarding interest was as to the

appropriate periods. In my earlier judgment I had awarded her interest on her general damages from the date of the writ not the accident. That was deliberate. Mr Ringland did not ultimately contest the helpful submission of Mr McNulty that he could not argue for interest past 26 September 2010. There were two principal reasons for reducing the interest. The first is the conduct of the plaintiff in the Fairclough sense as outlined above and to a greater extent in the prior judgment. The second was the point conceded on behalf of the plaintiff, understandably, that this case had been very slow to come to trial. A period of 13 years to bring on a personal injury case in the Queen's Bench outside the field of medical negligence is wholly exceptional. I therefore accept this concession on the part of the plaintiff regarding delay.

[37] Out of caution I am going to deal with interest seriatim. With regard to the past loss of earnings the accountants should calculate interest from the date of the writ 26 June 2006 to 26 September 2010 at 6%. As set out in the calculation of interest schedule the two headings of loss of pension should run at 3% per annum from 26 September 2009 until 26 September 2010. The diminution in earnings should run at 3% from 26 September 2006 until 26 September 2009 and at 6% from that date until 26 September 2010.

[38] The interest on the loss of services will be minimal but I fix it at 4.5% from 26 September 2006 until 26 September 2010. The interest on the cost of physiotherapy should run at 6% from 24 July 2004 until 26 September 2010.

[39] The total award of damages for financial loss therefore is £147,029. To that must be added the interest as directed above.

[40] Mr Ringland in his closing submissions raised the issues of costs. I pointed out to him that if there was a lodgement in court or Calderbank letter submissions would be premature at that time but he said there were neither. He relied on the Fairclough judgment and invited the court, ultimately, to reduce the plaintiff's damages by a percentage. Indeed at one point he invited the court to award the costs of that part of the hearing relating to the plaintiff's applications for Disability Living Allowance to the defendant. His argument was that, pursuant to Fairclough at least one and perhaps two days of the case were really used up in dealing with the "wildly exaggerated" claims of the plaintiff to the Social Security Agency. The court had concluded that those dealings were "disingenuous to the extent of being untruthful"; cf [50] of Cooper (No. 1). He had also wanted the court to award to the defendant the costs of their surveillance of the plaintiff and that element of their accountancy fees dealing with exaggerated claims. I pointed out that the court had not been provided with evidence or figures for either of those. Senior counsel then accepted that it would be inappropriate for the court go through such items line by line but to reduce the costs by a percentage.

[41] Mr McNulty in reply said that a measure of exaggeration was very common in these cases and was not a basis for disallowing costs. He submitted that Fairclough could be distinguished from the facts of this case.

[42] I do not wish to express a concluded view on whether the different traditions regarding personal injuries in this jurisdiction would lead our courts to distinguish Fairclough. Certainly it is true that it is a decision on the English CPR rather than on our own rules, although there were powers at common, of course, and are, to strike out for an abuse of process of the court. As a general observation I would caution against creating multiple satellite litigation for often expensive lawyers to engage the resources and time of the court in debating who should pay for relatively modest individual items of costs in a case where the plaintiff pitched their case higher than ought to have done. This seems an unattractive approach to me.

[43] As to Fairclough I note that the judge at first instance awarded the claimant his costs up to February 2008, some five years after the accident save that he was to pay the defendant's costs of obtaining the surveillance evidence. He made no order for costs after March 2008. As stated above the defendants did not appeal that order.

[44] Nevertheless I do have to respect the strong statement of the Court at paragraph [53] of the judgment of Lord Clarke.

[45] Costs follow the event in the normal way. Liability was only admitted on the first day of the hearing, although implicitly it had not been argued before, it would seem, save in the pleadings. There was a real and genuine argument involving the oral evidence of competing orthopaedic surgeons and competing psychiatrists about the plaintiff. Her statements were exaggerated or disingenuous in relation to obtaining benefits, which she partly blamed on the encouragement of an employee of a local politician to whom she had gone to help her fill in the forms. I take into account that the interest she is receiving here is reduced already, to an extent, as a result of Fairclough factors. I note Mr Ringland's submission that in the statement of claim her claim for financial loss was £868,990 in contrast to the figure I am awarding of £147,029.

[46] I conclude that the trial was extended by the need to explore the exaggerated complaints of the plaintiff and that those costs should not be borne by the defendant. I note the sensible acceptance by defendant's counsel that a line by line examination of a bill of costs would be inappropriate. I conclude that the case would probably have been shorter by a day were it not for these aspects of the matter. The actual hearing, of course, only makes up part of the costs of a plaintiff. I order that the defendant pay 80% of her costs on the standard basis rather than the full amount. I make it clear that, so far as I am concerned, those costs not recovered on a party and party basis are recoverable from the plaintiff (subject to any issue of delay impacting on interest). Ms Niblock and counsel should prepare a final Order including a figure for interest based on this judgment for agreement by the defendants.