

JERSEY / JUDGMENT

Chartier -v- States of Jersey Post

[2010] JRC 119 (01 July 2010)

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judgment

the bailiff:

Introduction

1. In November 2002 the plaintiff instituted an action for personal injury against, inter alia , the defendant ("Jersey Post"). His claim related to two incidents. The first occurred in March 2001 ("the March incident"). The plaintiff was standing at the back of his van. The van doors were open. A gust of wind blew the door shut. The door handle was missing, leaving the ratchet exposed. The ratchet struck the plaintiff's back and he sustained injury. The second incident occurred on 10th May, 2001, ("the May incident"). The plaintiff was collecting mail from the premises of HSBC Bank. He lifted a heavy metal box (weighing about 35 kg) and suffered an injury to his back. 2. On 8th June, 2006, the Royal Court (Commissioner Hamon presiding) dismissed the plaintiff's claim in respect to the March incident but found Jersey Post liable in respect of the May incident. A finding of 30% contributory negligence was made. In an addendum to the judgment the Court made findings on the medical evidence and causation. 3. Jersey Post appealed. On 19th March, 2007, the Court of Appeal dismissed the appeal on liability in respect of the May incident but allowed the appeal insofar as it concerned the Royal Court's findings on medical causation. That aspect was remitted for a retrial. Accordingly this Court has been concerned with issues of medical causation and quantum of damages. The shape of the case 4. In order to set the scene for what will inevitably be a somewhat technical and complex judgment, we think it helpful to set out the essential issues which arise for decision. The plaintiff was 34 at the time of the May incident and is now 43. He has a long history of depression. He asserts that, since the incident, he has suffered from considerable back pain such that he has been unable to work since then. He asserts that the incident caused an annular tear to a disc in his back which explains his symptoms. His case is that, apart from a notional allowance of four hours a week, he has been unable to work since the incident and will remain unable to work until the retirement age of sixty five. He therefore claims damages based upon these injuries and for loss of wages, pension rights etc until the age of sixty five. His claim approaches £500,000. The defendant, on the other hand, says that the plaintiff suffered only a minor muscular or soft

tissue injury as a result of the incident which should have cleared up in a matter of months. It accepts that the plaintiff perceives that he is in pain but says that this is due to a substantial psychological overlay caused by the plaintiff's depression. In other words, the plaintiff thinks that his pain is much worse than it is in reality. The defendant asserts that there is no reason why the plaintiff should not have gone back to work within a few months of the incident. The claim is therefore, says the defendant, very small (amounting to a few thousand pounds) and involves only a minor back injury which should not have led to any continuing loss. The defendant further asserts that the plaintiff was suffering from pre-existing degenerative changes to his disc which would have meant that there would have come a time in any event when he was unable to work. Any loss or damage would therefore come to an end at that time. In reply, the plaintiff asserts that, even if the court finds that the physical injuries are minor and that there is a substantial psychological overlay as the defendant asserts, this was caused by the accident which "tipped the balance" in relation to the plaintiff's depression. Even on this case, argues the plaintiff, his inability to work and the pain he perceives he is suffering were caused by the May incident and the plaintiff is therefore entitled to damages on the basis of his perceived level of pain and an inability ever to work again (apart from the notional four hours a week). The evidence 5. With that introduction we turn to consider the evidence. The case was heard over six days. On behalf of the plaintiff the court heard evidence from the plaintiff himself, Mr Coombs, an orthopaedic surgeon, Mr Berry, a psychologist, and the plaintiff's mother. The defendant relied on evidence from Professor Shearer, an orthopaedic surgeon, Mr Maurice-Williams, a neurological surgeon, Dr Veasey, a psychologist, Dr Williams, a radiologist, Miss Sandra Hayes and Mr Gerald White. In relation to the medical evidence, the court received numerous detailed reports as well as oral evidence from those witnesses mentioned above. In what follows, we propose only to give a brief summary of the evidence but we have of course considered the detailed reports and all the oral evidence which was presented to us. 6. We would wish also to add this. As will be seen, the key difference of opinion is between Mr Coombs on the one hand and Professor Shearer and Mr Maurice-Williams on the other. We wish to place on record that all three witnesses were clearly medical practitioners of the highest distinction and repute. They were experts in their field, were highly intelligent and articulate and were also attempting to assist the court to the best of their ability. They all gave their evidence in suitably measured terms and the court was fortunate to have the assistance of such able and distinguished surgeons. It is the court's misfortune that it has to resolve the difference of opinion which has arisen between them in relation to this case.

- (i) The Plaintiff 7. The plaintiff swore three affidavits. The first, dated 10th April, 2006, dealt mainly with issues of liability. He swore further affidavits on 28th February, 2008, and 15th December, 2009, which were more concerned with issues of quantum. 8. We would summarise the relevant aspects of his affidavits as follows. After leaving school, he worked for 13 years in the administration department at Ashley and Co, meat wholesalers. He worked his way up to number two in the company. He then worked in a butcher's shop in the Market where he had a half share in the business, but unfortunately things did not work out

there. Following that, he ran his own company called Belsize Media, an online advertising company. Unfortunately this was not a success and he ran up debts of approximately £30,000. He also worked during this time in an architect's office doing general administration. He joined Jersey Post on 1st November, 1999. He said in his first affidavit that before he joined Jersey Post, he had had no problems at all with his back. He was originally a postman but suffered 4 separate incidents involving dogs and did not feel able to continue. He then moved to collections, which involved visiting various sub-offices and businesses to collect their bulk mail in a van. He did large amounts of overtime at Jersey Post and by the time of the accident he had cleared his debts. 9. In September 2000 he lifted a mail bag at the premises of Invesco which turned out to be heavier than he thought and he strained his lower back. He did not take any time off work but the base and the middle of his back was sore and he carried on having a twinge in his back up to the date of the May incident. His probation period was extended because management said that he had not completed enough time in the collections department, although the plaintiff believed it was because of his attitude concerning weight problems in packages and his union activities. 10. On 7th March, 2001, he was on a collection round. It was a windy day and he opened the rear door. The wind caught the door and blew it shut. The handle struck the middle of his back at about rib height. He went to see Jersey Post's doctor and took some three weeks off work following this incident. 11. There then came the May incident at the premises of HSBC. He attempted to pick up a trunk. He lifted it up to about a foot off the ground but it was very heavy. He felt a pain in his lower back and dropped the box. He was in severe pain. However he squatted down and picked the box up again and managed to put it in the van and drive the van back to the Post Office although he was in extreme pain. The box was weighed on his return at some 35 kg. He went to see the doctor at Jersey Post who signed him off and said that if he still had problems in two weeks, he should return. At the end of that period the plaintiff went to see his own general practitioner and he has not returned to work since then. 12. He was dismissed by Jersey Post on 2nd August, 2002. The reasons given were his failure to attend a meeting on that day in order to discuss his continued absence, a failure to submit medical certificates and his forthcoming court appearance on a charge of possession of cannabis with intent to supply. He subsequently appeared before the Royal Court on that charge and was sentenced to 150 hours community service. He undertook this between October 2002 and July 2003. 13. In his second affidavit he described that the pain he was currently suffering from was very much the same as the pain in the weeks after the accident. It was continuous pain although it varied in intensity; at times it could be excruciating, at other times it was much less. The pain also affected his legs although it varied as to which leg was affected. On balance he experienced most pain when sitting. As a result of the pain he was unable to walk long distances or to walk without a walking stick, he could not undertake any form of gardening, he did not do any cooking, he could not sit for long periods of time, he could not walk his dog regularly and could not perform any personal laundry or DIY. He could drive. He felt unable to carry out any work because he could not sit or maintain a position for long periods of time. He accepted that he felt bored and depressed. 14. At the time of his third affidavit, he said that his levels of pain remained the

same as previously. The pain varied in intensity but when the sciatica and lower back pain was bad, he estimated the level at 8 on a scale of 1-10. He said that he did manage to take his dog for a slow short walk of approximately one mile each day but he used a walking stick. He said that he leaned on his walking stick nearly all the time as his left leg had a tendency to give way and he needed the stick to take his weight. He was barely able to clean his house due to his back injury and he relied on his mother for his laundry. The most he was able to do was to sweep for short periods of time and mop the floors about once a month. He managed to do a small amount of gardening although he had employed a gardener to set up raised beds, for which he had paid him £400. His routine remained that he would get up each morning and drive to his mother's house. He preferred to bath there because his own bath was a sunken one which he found it difficult to get in and out of. His mother made him breakfast and cooked him meals 2 or 3 times a week. He would buy ready meals for the remaining days. After seeing his mother he would go home for lunch. After lunch he would retire to bed and would spend the rest of the day in bed resting, reading or using his laptop computer. He had tried various treatments including physiotherapy, acupuncture, epidurals and facet joint injections. Nothing had helped. He did not feel able to return to work as it was unlikely that he would be able to hold down a job. There would be numerous occasions when he was in too much pain to work and an employer would be unlikely to be as flexible as the community service organisers had been. He had become more depressed and in March 2009 he was arrested for being in possession of cannabis. He subsequently took an overdose and still had suicidal thoughts on occasions. As to future losses, he would continue to need assistance from his mother for cooking, laundry and chores about town; he anticipated needing 20 hours assistance from a gardener every year and he would also need assistance with DIY for about 10 hours a year. 15. In evidence in chief, the plaintiff essentially confirmed and elaborated on certain aspects of his affidavit evidence. He confirmed that Mr Coombs had spoken of different surgical treatments which he might undergo but he did not feel willing to risk them at present. He confirmed that his routine remained the same. He would get up at about 8 o'clock, get dressed and drive to his mother's in order to have a long soak in the bath. He would have some breakfast and take his dog for a walk and perhaps go to a shop or visit a friend. He would then return home and have some lunch before going to bed at about 2pm. He would remain in bed for the rest of the day because he was exhausted and the pain was less when he was lying down. He felt unable to work because of the level of pain and the fact that he was exhausted and depressed. In relation to his employment history he confirmed that things had not worked out when he was a partner in the butcher's business in the Market as he was a non-drinker and his partner was a drinker. His partner had bought him out in March 1998. He repeated that he had been bitten by dogs 4 times since joining Jersey Post and had lost confidence as a result. He had taken a total of 26 days sick leave between March and December 2000. He confirmed that he had had a pension plan briefly whilst he had been at Ashley and Co. In cross examination he accepted that in April 1995, he had suffered an injury whilst carrying a pig at Ashley and Co. He had attended his GP and the notes recorded him as saying that his back was in agony. This was 3 days after the accident. He was pressed on why he had said in his

affidavit that he had had no previous back problems before working for Jersey Post and said that he had forgotten about that incident. He said that he must also have forgotten it when he told Mr Maurice-Williams that he had no previous accidents of any significance and no past history of any spinal problems. Advocate Benest took him in some detail through his various GP notes which emphasised his long history of depression, problems with alcohol and other psychological issues. He accepted that he had been on a transatlantic flight to Canada in 2005 despite saying that it was sitting down which caused him the greatest pain. He said that he was taking pain killers and sedatives at the time and he also walked around during the flight. He accepted that he had not taken up the offer to attend the Pain Clinic in Jersey but said that this was because they had suggested a course which would require an attendance for 8 hours in a day. 16. Turning to his employment history, he was questioned about the circumstances in which he left Ashley and Co. He was referred to a GP note which said "After last week felt a little depressed by weekend and boss was being difficult again so has jacked in his job. Been there 13 years." He accepted he had a number of previous convictions including a grave and criminal assault, although this was when he was 17, possessing an offensive weapon and resisting arrest. There was in addition the conviction for possession with intent to supply cannabis in 2002 and the conviction for possession of cannabis in April 2009. He accepted that he would have been dismissed by Jersey Post in any event following the 2002 drug conviction. 17. Turning to his schedule of loss, he was questioned about the fact that he was claiming for full loss of wages from Jersey Post when in fact he had been paid his salary in full until 10th February, 2002. The plaintiff replied that he was in dispute with Jersey Post as to whether they had paid him sufficient because of allowances he should have received, although he accepted that there was no claim for such allowances in the present proceedings. He said that he was claiming for a pension on the basis of a final salary scheme on the assumption that his salary would have increased to £49,000 per annum by the date of his retirement and that he would by then have accrued 29/80th of his final salary. He agreed he could probably do a few hours work a week although it would be difficult to find an employer who would be flexible because it would be uncertain as to when he could work. He was pressed upon the fact that he had apparently worked for some 12 hours a week when doing community service. The plaintiff replied that he could do that then but did not feel he was able to do that much now. He admitted that he had not tried to obtain any employment since the May incident nor had he thought of working from home or retraining. He denied that he was not seeking to help himself. 18. He was questioned about the DVD evidence and whether this did not show that he was not as injured as he claimed. He said that he had just got out of a bath and he always felt better after this. He agreed that in the DVD, he was not relying on his stick and that he had bent into his mother's car and a van and was carrying some shopping bags. However, he did not agree that he was walking perfectly normally and emphasised that his pain levels varied. He agreed that he could feed himself and clean his own home. He did not however feel capable of ironing although he could put something in a washing machine if he had one. His mother did some shopping for him and paid the electricity bill which was in her name as well as washing and ironing and giving him breakfast. It was put to him that he had wrongly withheld sick pay

monies in the sum of £4,316 that he had received from the Social Security Department whilst still being paid by Jersey Post. He agreed that this was so but said that he was in dispute with Jersey Post concerning his allowances. In relation to gardening he said at one stage that he was not a gardener and that was why he needed to employ someone. When it was pointed out to him that he could only claim for the cost of a gardener to the extent that his injuries prevented him from doing work which he would otherwise have been able to do, he said that gardening would be heavy work which he was not able to do. On further questioning he accepted that he could probably dig the raised areas by hand but he could not do any proper digging. (ii) The plaintiff's mother 19. The court also received an affidavit from the plaintiff's mother Margaret Chartier. She confirmed that he relied on her to perform various household chores such as his laundry and ironing which took approximately 8 hours per month. She also confirmed that he came to her every morning to bath and that she made him breakfast which took approximately 10 minutes a day. She also cooked 2 -3 meals for him each week which took her about 1 hour a week. She assisted him in cleaning his home for 1 hour per month and also ran various errands for him around town such as paying bills and shopping for him, which took about 4 hours per month. (iii) Sandra Hayes 20. The court also heard from Sandra Hayes who was the Human Resources Manager at Jersey Post from March 2002 until 2009. She confirmed that the plaintiff was in receipt of full pay until 11th February, 2002, although he had raised a query in relation to allowances. Between 11th February and 14th March, 2002, he was on half pay and thereafter he was reduced to pensionable pay of £10.98 per week in accordance with his contractual entitlement. She also confirmed that he had been in receipt of sick benefit from the States Social Security Department which he was required to sign over to Jersey Post under his contract of employment, but which he had failed to do. She said that an appointment had been made for 31st July, 2002, for a further assessment by BMI Health Services of his ability to return to work. The plaintiff had not attended that appointment. Given his failure to respond to earlier correspondence, his failure to submit medical certificates and his court appearance for drug offences, she wrote to him on 26th July inviting him to a meeting on 2nd August, 2002. She warned that failure to attend might result in termination of his employment with Jersey Post. He did not attend and his employment was terminated with effect from that date. She referred also to his conviction for possession of cannabis with intent to supply and confirmed that such a conviction would have resulted in his immediate dismissal from Jersey Post in any event as Jersey Post could not employ a person with such a criminal conviction. (iv) Mr Richard Coombs 21. Mr Richard Coombs has been a consultant orthopaedic surgeon to Charing Cross Hospital, London and Senior Lecturer in orthopaedics to the Imperial College School of Medicine since 1982. He also practises from Wellington and Cromwell private hospitals in London. He has many books and publications to his name. He specialises in the knee and the back. He has prepared reports on the plaintiff on a number of occasions. We have been provided with reports or letters dated 26th January, 2005, 4th February, 2005, 17th February, 2005, 5th January, 2009, 2nd February, 2009, 10th November, 2009 and 27th January, 2010. There is also a record of a joint discussion with Professor Shearer dated 2nd March, 2006. Mr Coombs has examined the

plaintiff on three occasions namely 26th January, 2005, 5th January, 2009 and 27th January, 2010. 22. In essence, Mr Coombs has been consistent in his diagnosis since his report of 4th February, 2005, at which time he had seen the MRI scan carried out on the plaintiff on 16th April, 2002. In his opinion the plaintiff has suffered an annular tear of disc L5/S1 which has allowed the leakage of disc material, which in turn has caused irritation to the nerves. The abnormality of disc L5/S1 shown in the MRI scan is, in his opinion, consistent with an annular tear. He says that this would explain the plaintiff's ongoing symptoms. Mr Coombs gave oral evidence in which he elaborated upon the reasons for his findings. We should add that we propose, when referring to all the medical evidence, to use non-technical terms where possible for ease of understanding and we hope we may be forgiven for doing so. 23. Mr Coombs explained that the disc consists of a nucleus and an outer area known as the annulus fibrosis, to which we shall refer for convenience as the annulus. The nucleus consists of material which is of a texture somewhat like crab meat and can conveniently be regarded as being slightly acidic in nature

- although that is not technically correct; it is more that it can cause irritation. All the witnesses however used the expression "acidic" for convenience and we shall do the same. He explained that it used to be thought that a disc could only cause a problem if it protruded out so that it exerted mechanical pressure on the nerves in the spinal canal. However, that was no longer thought to be the case. If there was annular tear i.e. a tear in the annulus leading from the nucleus and involving a break in the outer skin of the annulus, the acidic material from the nucleus could start to leak out. This acidic material caused bio-chemical irritation of the nerve root and that in turn could cause pain in the back and down the leg. In Mr Coombs' opinion, that was the explanation for a high proportion of patients with sciatic pain. He considered that epidural injections often worked because they washed away the irritant material. 24. He explained that discography involved injecting a small amount of radiopaque dye into the disc. If the disc was normal, the dye could not be injected as it could not escape. If the disc was torn the dye would spill out through the disc and, if there was an annular tear, into the spinal canal. In many cases, an annular tear would show up on an MRI scan by means of a high intensity zone. This was a white dot in the area of the tear. However it was his experience from discography that you could have an annular tear even where no high intensity zone showed up on the MRI scan. If you saw a high intensity zone, you could be 99% sure that there was an annular tear; but you could have an annular tear without there being a high intensity zone. Discography was the way of confirming whether in fact there was an annular tear. The oozing of acidic material over a period of years leads to chronic fibrosis and typically, when you operated on a patient who had chronic back problems, you would find that the nerves were thickened and fibrosed. It was not possible to say if an annular tear would heal. Furthermore, Mr Coombs emphasised that an MRI scan could not tell you whether a patient was in fact suffering pain. That was the problem in this case. The court had to decide whether the plaintiff was in fact suffering the level of pain which he said or whether there was, as the defence experts suggested, a psychosomatic element. But if the plaintiff was indeed suffering pain as he suggested, an annular tear would explain why he

was feeling that pain. The leakage of acidic material could also explain why the plaintiff reported feeling leg pain on the right side and on other occasions on the left side. That could not be explained by a protrusion which could clearly affect only one side or the other but it could be explained by the leakage of acidic material more to one side or the other, with some variation occurring. He confirmed that his thesis was that an epidural injection helped by washing away acidic material. He indicated that there were two possible surgical interventions which might alleviate the symptoms, namely an intradiscal procedure or an anterior spinal fusion. However they were not wholly without risk. Mr Coombs was asked by Advocate Jordan about the DVD. He said the plaintiff had pointed out that he had just had a bath when the DVD was filmed. Mr Coombs personally felt the DVD was compatible with the plaintiff's history, although he accepted that there was nothing in the DVD which would say that the plaintiff could not do clerical work and the plaintiff was also walking pretty normally, although there was the view that some days he was better than others. The fact that the plaintiff said that he had good days and bad days was consistent with an annular tear. He accepted that there would be no reason why the plaintiff could not do work such as bookkeeping on an intermittent basis where he could select his hours so that, if he were having a bad day, he would not need to attend work. It would be difficult for him to work full time on a regular basis as he would not always be able to attend. Mr Coombs accepted however that this was all entirely dependent on whether the court did or did not accept that the plaintiff was suffering pain as he described. 25. In cross examination, Mr Coombs was asked whether, if there was continued leakage of the acidic material from the nucleus, there did not come a time when there was nothing left to leak out. He said he had thought about this many times and wondered whether there was a finite amount of acidic material in the disc so that if it all leaked out the patient's pain would stop. Undoubtedly many patients get better after a while. In other cases disc space would collapse and disc problems of a totally different variety would begin because of the instability of the structure. He emphasised that it was not so much the crab meat material itself which was leaking out, it was the fluid in the nucleus which would leak out. But undoubtedly a proportion of patients who have bad backs would gradually improve. There was uncertainty as to whether annular tears healed or not. The only way of establishing that would be to do serial MRI scans or serial discography but that was not done. 26. He repeated that the real problem in this case was that everyone was dependent upon the truthfulness or otherwise of the plaintiff. Was he being an accurate and truthful historian? Was he consciously or unconsciously exaggerating his symptoms? He accepted that, from the DVD, the plaintiff appeared to be comparatively pain free and there appeared to be no reason why he could not prepare his own food or do his own laundry. He further agreed that it would be desirable for the plaintiff to be more active and not to go to bed in the afternoon, at least from a general morale point of view. The plaintiff felt unable to do this. He agreed that the level of pain described by the plaintiff was not such that he was unable to dress himself; it was simply that it was such that he could not work on a regular basis. 27. It was put to him by Advocate Benest that the abnormality in the MRI showed pre-existing degenerative change which would have led to the plaintiff having the same problems in any event within about five years. Mr Coombs accepted that this was a

possibility but he remained of the view that, on a balance of probabilities, it was the lifting of the heavy trunk which caused an annular tear to the disc which was, as a result, showing as abnormal on the MRI scan. He accepted that there was a spectrum of opinions ranging from the plaintiff being a malingerer and making up symptoms through to his suffering an acceleration of symptoms by five to ten years, through to the accident having caused an annular tear which led to his symptoms. It was the latter which was his view point but he accepted completely that there could be other opinions. 28. The court asked Mr Coombs whether his evidence that annular tears could lead to this long term leakage of material which could in turn cause the symptoms which the plaintiff reported was a conventional opinion which was recognised by others or whether it was a particular theory of Mr Coombs which would not find widespread support. Mr Coombs reported that it was a conventional opinion which would undoubtedly be recognised by those people who have a particular interest in the problem, but it may not be accepted by other experts who have less experience of the type of techniques which he had described. He would certainly perceive himself as mainstream in his views. He repeated that the real problem of this case was whether the plaintiff genuinely had the symptoms which he described and, if he did, whether he might or might not have got them at some stage in the future in any event. Mr Coombs' view was that the plaintiff would not have done so if he had not had the accident but he had to accept that that was a viewpoint within a range of viewpoints.

- (v) Professor John Shearer 29. Professor Shearer was Professor of Orthopaedic Surgery at the University of Southampton from 1976 to 1997 and since then has been Emeritus Professor of Orthopaedic Surgery at the university and consultant orthopaedic surgeon at West Nuffield Hospital in Southampton. He has extensive experience in the preparation of medical reports on personal injuries, appearing equally for plaintiffs and defendants, as well as in jointly instructed cases. He has not however operated since 2002 and did not specialise in spinal injuries although he had considerable experience of them. 30. The court received reports from Professor Shearer dated 4th May, 2004, 27th July, 2004 and 28th October, 2008. There was also a record of a joint meeting between Professor Shearer and Mr Coombs dated 2nd March, 2006, and of discussions between Professor Shearer and Mr Maurice-Williams dated 12th April, 2006, and 27th February, 2009. 31. Professor Shearer had first seen the plaintiff for his report dated 4th May, 2004. At that stage he had not seen the MRI scan and the clinical findings and history did not lead him to any particular diagnosis. He thought that the most likely injury to sustain in the circumstance in question was a musculo-ligamentous injury and the tenderness which the plaintiff exhibited on examination was consistent with that diagnosis. On the other hand, he would have expected such a condition to heal at most over a twelve to eighteen month period and most patients achieved satisfactory relief of symptoms in a much shorter time scale than that. That made it more likely that the plaintiff's problem was due to some form of facet joint disease and it was possible that the plaintiff had hypertrophic facet joint degenerative disease. Given that he had not arrived at any particular diagnosis and given Mr Berry's assessment of the situation, he concluded that there was probably a significant non-physical component to the matter. 32. Subsequently,

Professor Shearer was sent the MRI scan and other medical records of the plaintiff and prepared a further report dated 27th July, 2004. Having done so, he concluded that the incident had most likely caused a musculo-ligamentous low back problem which he would have expected to clear up fairly quickly. He suspected that the plaintiff's current symptoms were largely psychological in origin. He could see no evidence at interview and on examination or on the scans that the plaintiff's symptoms and disability should be as severe as the plaintiff described. 33. Professor Shearer saw the plaintiff again for a report dated 28th October, 2008. He recorded the plaintiff as telling him that the low back pain was more to the left side now rather than to the right as previously and that whereas he had originally suffered pain to the left leg, this had moved to the right side after the epidural injections but he now experienced symptoms very rarely on the right and it now only extended to the left leg. Professor Shearer noted that straight leg raising was 15% and 5% respectively when lying down but that, with the patient sitting at the edge of the bed, it was 75%. He noted that the plaintiff had positive Waddell tests in two respects. In summary, Professor Shearer remained of the view that this was a musculo-ligamentous injury which, in the absence of the non-physical component, should have resolved within a short period. He thought the sooner the plaintiff got back to some form of gainful employment the better and light semi-sedentary work not involving lifting, bending, prolonged standing or heavy carrying would be suitable for him. The Professor believed that the plaintiff's depression was contributing very substantially to his perception of his symptoms and disability. 34. In oral evidence Professor Shearer elaborated on his reports. He referred to the pig incident in 1995, the September 2000 incident, and the March incident and remained of the view that the most likely explanation of the damage resulting from the May incident was a musculo-ligamentous injury with substantial psychological overlay, in that the plaintiff perceived his pain to be at a much higher level than it actually was. 35. He began his evidence with a helpful description of natural disc degeneration. A disc is what maintains the gap between one vertebra and another. The degenerative change is that there is some loss of water from the nucleus of the disc and it is the nucleus which maintains the gap between the vertebra. If one loses water from the nucleus, it shrinks to some extent so the vertebrae become closer together. Accordingly there is a loss of disc height as it is usually described radiologically. An MRI scan will also show loss of signal return from the nucleus in that instead of being of greyish white appearance, it becomes blacker in appearance because there is less water in it. Furthermore, as two vertebral bodies approach one another the gap between them becomes smaller and the annulus may bulge out because there is less space for it to occupy. This is however different from a protrusion. A bulge is where the annulus is bulging because there is not enough room to accommodate it between the vertebrae anymore. A protrusion, on the other hand, occurs when the annulus ruptures i.e. there is a tear in the outer part of the annulus and the nucleus comes out through it and, protrudes from it. He also explained that, with degeneration, small fissures may appear in the annulus but these are incomplete and do not extend to a break in the outer part of the annulus so that the nucleus can protrude and escape. As he did, we shall use the expression "fissure" to mean this internal fissure, in contrast to an annular tear, which involves a tear leading from the nucleus to the

edge of the annulus and involves a break in the outer skin of the annulus. 36. He said that the plaintiff's MRI showed signs of natural degeneration of the disc in that there was some loss of disc height, loss of signal return and disc bulging. This was not unusual for a manual worker although it was occurring at quite an early age. 37. The professor stated that it was not a conventional view that an annular tear without disc protrusion could cause sciatica. As this had not been put to Mr Coombs, he was recalled briefly and he maintained that, over the last ten years, those who specialised in the field had considered that sciatic pain could be caused by an annular tear even without protrusion. However, it eventually became clear that this was not a significant point for this case because Professor Shearer did not consider that the pain which the plaintiff described in his legs was true sciatica. It was more a form of general referred pain which could occur. He accepted that an annular tear without protrusion could cause back pain. He would have expected to see an annular tear on the MRI scan by means of a high intensity zone. He would also expect an annular tear to heal over a period because the body tended to heal itself. He would also expect an annular tear to cause quite severe back pain within a short period of the incident. If it was an annular tear, he would have expected the plaintiff, within a day or two, to be quite significantly incapacitated and most patients with an annular tear go to see their doctor at that stage because they need pain control. He noted in this case that the plaintiff did not visit his GP for some 15 days, which suggested that his symptoms were not that severe, which was an added feature which led him to lean towards a diagnosis of a musculo-ligamentous problem. 38. He was asked about the theory of acceleration put forward in the joint report. He said that the pre-existing degenerative changes shown in the MRI suggested that the plaintiff would have started to suffer some problems between the ages of 35 - 40 and, assuming the symptoms were as severe as the plaintiff described, he would probably have got to that level of severity some time between the age of 40 - 50. 39. The professor considered that the inconsistencies in the results from the straight leg raising test carried out by the different doctors suggested a psychological element to the perception of the pain, although he accepted that, if Mr Coombs theory that liquid from the nucleus could drip out periodically was correct, that could explain an inconsistency in straight leg raising tests depending on when and to what extent liquid had leaked at any particular time. He also commented on the fact that on one occasion when he had examined the plaintiff, there had been a straight leg raising of 10 or 15 degrees, but that when the plaintiff was sitting up, his legs were raised 75%. The professor said that this was a distraction test, being one of the Waddell tests. He said that the Waddell tests were introduced to help surgeons decide whether to offer surgery for low back pain because, if there were psychological elements at work, the outcome of surgery was likely to be substantially less good. Although for a patient to be Waddell positive, there had to be positive findings in three out of five tests, the fact that the distraction test was positive on this occasion supported the possibility of a psychological overlay. 40. The professor was then asked to comment on the DVD. He pointed out that the plaintiff is seen leaning down to the window of a car, walking his dog on a lead, turning to his left and his right in a virtually normal movement and making no significant use of his stick. When he was reminded that the plaintiff had said that he had just had a bath and was

having a good day on the day of the DVD, the professor said that the plaintiff had told him on both examinations that the pain was constant. The professor saw no reason why the plaintiff should not cook for himself and indeed generally look after himself, including washing and ironing and general cleaning about the house except perhaps vigorous vacuuming. In effect, with the exception of heavy low work, such as scrubbing floors on hands and knees and assuming a lightweight vacuum cleaner, he thought it should be possible for the plaintiff to look after himself and the only limitation on gardening might be heavy manual work such as digging or bending forwards to weed. He would be suitable for light semi-sedentary work. The professor accepted that the plaintiff had a problem with his back but maintained that the plaintiff perceived it to be more severe than it really was and it would therefore be good for his morale if he could get back to some work. 41. In cross examination Professor Shearer summarised that there were three possible causes. The first was his preferred option, namely a muscular injury with some element of continuing pain but a substantial psychological overlay. The second was that raised in the joint report with Mr Maurice-Williams, namely that the pre-existing asymptomatic degenerative changes to the disc had been made symptomatic as a result of the May incident and accordingly that there had been an acceleration of the symptoms which he would have developed in any event by some 3 - 5 years. That assumed a psychological overlay as well because the symptoms would not have been as bad as he perceived them to be within that timescale. The third possibility was that put forward by Mr Coombs, namely an annular tear with a leakage of liquid from the nucleus. Although the first and second possibilities were put forward by the defence, Professor Shearer remained firmly of the view that this was a muscular problem rather than an acceleration of a disc problem. He did not think that this was a case of accelerated degeneration, but he could not wholly exclude the possibility. He repeated that he had not come across a case of an annular tear where there had not been a high intensity zone shown on the MRI but he would defer to Dr Wilson if he were to say otherwise. He would in those circumstances have to accept that it could occur but he had never come across it. 42. He repeated that he had never heard or read in the medical literature or at a conference of any theory that, without protrusion of the solid material, liquid from the nucleus could leak out and cause irritation to the nerve root leading to sciatica. The nucleus was solid material and there was not some fluid which could leak out periodically from it. If there was a leak, the material as a whole came out dramatically and there was a protrusion. 43. In answer to questions from the court Professor Shearer reiterated that he did not think that the plaintiff was suffering true sciatica but only a form of referred pain, which it was convenient to refer to as pseudo-sciatica. He accepted that in those circumstances, one of his arguments for not accepting Mr Coombs' theory was weakened. His case was that you could not have sciatica without a protrusion of the nucleus and there was no evidence of protrusion in this case because you would see protrusion in the MRI scan. He did not accept and had never heard the theory that, without protrusion, you could have a leakage of some fluid from the nucleus on a periodic basis leading to nerve root damage and therefore sciatica. If the pain in this case was not true sciatica and could be caused without protrusion, that element of his objection to Mr Coombs' theory was removed. Nevertheless he remained firmly of the view

that the most probable cause was muscular ligamentous injury with a substantial psychological overlay. (vi) Mr Robert Maurice-Williams 44. Mr Maurice-Williams was the senior consultant neurosurgeon at the Royal Free Hospital until he retired from the National Health Service in July 2007 when he was appointed Emeritus Consultant Neurosurgeon. He has a wide experience in general neurosurgery with a special interest in the surgery of spinal degenerative disease. He has written a number of papers and a text book on spinal degenerative disease. He has recently been President of the neurosciences section of the Royal Society of Medicine. He too has regularly prepared reports for courts and has appeared as an expert witness on many occasions. 45. He first saw the plaintiff for the purposes of preparing a report dated 15th November, 2005. At that stage he did not have sight of the MRI scan or any x-rays. He referred to the three incidents and confirmed that the plaintiff was complaining of low back pain together with intermittent pain spreading down his left leg. The pain was made worse by walking or any form of physical exertion and nothing appeared to reduce the symptoms. Mr Maurice-Williams recorded that during the physical examination, the plaintiff's manner became somewhat histrionic with a certain amount of inappropriate over-reaction, sighing and groaning etc. He sat for over half an hour during the consultation without being in any apparent discomfort and dressed and undressed at a reasonable but not particularly fast speed. He did have some difficulty in removing and replacing his shoes and socks and did not put his socks back on at the end of the consultation. Straight leg raising was 60% on both sides with a negative sciatic stretch test. Mr Maurice-Williams' opinion was that it was unlikely that the plaintiff had sustained any more than a soft tissue injury (which he accepted during the hearing was similar to Professor Shearer's musculo-ligamentous injury and which expression we propose to use for the sake of simplicity), possible superimposed on pre-existing degenerative change whether or not this had been symptomatic. He would have expected the injury to clear up within a few months at most. Physical examination revealed no neurological abnormalities and no convincing nerve root tension signs. He considered that it did reveal two features indicative of an element of functional overlay, namely a degree of histrionic over response and disparity between little forward flexion in the lumbar spine in the upright position and an ability to sit forward quite well when tested on the couch. It was not possible to say whether that functional overlay had a conscious or unconscious basis. In short he said that it was simply not possible to say whether the plaintiff's symptoms were as severe and disabling as he stated. 46. On 2nd March, 2006, Mr Maurice-Williams prepared a further short report having seen the MRI scan which had been carried out on 16th April, 2002. He confirmed that this showed modest degenerative change of the relevant disc with the minimal central disc bulge not causing nerve root compression. He said that the appearances of the disc did not provide any satisfactory explanation for the severe ongoing disabling symptoms and did not cause him to vary the opinion expressed in his report of 15th November, 2005. 47. As already mentioned Professor Shearer and Mr Maurice-Williams provided a joint report dated 12th April, 2006, in which they agreed on the diagnosis. They agreed that there was probably a degree of pre-existing degenerative change but this had not been symptomatic at the time of the first incident. They agreed on the nature of the injury as a soft tissue one and they would

have expected a recovery within a matter of weeks although it might have taken 3 - 6 months for him to recover to the point where he could resume his previous range of activities. They agreed it was likely that he would suffer from a degree of residual back pain thereafter. They both felt that there was a substantial non-physical component to the plaintiff's problems. 48. Mr Maurice-Williams saw the plaintiff again for the purposes of a report dated 25th September, 2008. The plaintiff reported that there had been no great change in his condition with the exception that the pain in his left leg had become somewhat worse leading to a decrease in mobility. On this occasion he no longer showed the histrionic over-reaction that was apparent at the time of the first examination. The plaintiff sat for approximately 20 minutes without any apparent discomfort. He dressed and undressed at normal speed and did not appear to have any difficulty removing and replacing his socks. In the upright position forward flexion was apparently severely limited but on the couch he was able to sit forward briskly without any apparent restriction of forward flexion. Straight leg raising was 80% on either side with a negative sciatic stretch test. The plaintiff walked rather stiffly with the help of a stick he carried in his right hand. 49. In essence Mr Maurice-Williams' diagnosis remained unaltered. He accepted that the plaintiff may well have some residual symptoms but he was inclined to be sceptical as to whether these were quite as severe and disabling as the plaintiff stated. He pointed out that there was a striking disparity between very limited forward flexion in the upright position and full forward flexion when tested on the couch and that the plaintiff appeared to have little difficulty in removing and replacing his socks. 50. Finally, Professor Shearer and Mr Maurice-Williams provided joint answers to questions from the defendant's solicitors on 27th February, 2009. They confirmed they both agreed that there were pre-existing degenerative changes in the disc in question which made the plaintiff's back more vulnerable to injury. They both pointed out that the MRI scan had excluded disc protrusion or a visible annular tear. They both agreed that in a man of this relatively young age who already had degenerative change in one of his discs and who was engaged in work which involved a certain amount of lifting, it was likely that he would in any case have developed symptoms between the ages of thirty five and forty. 51. Mr Maurice Williams gave oral evidence in support of his opinion. In effect, he agreed with Professor Shearer. He agreed that there were modest pre-existing degenerative changes in the disc. He felt unable to accept Mr Coombs' theory about the leakage of acidic liquid from the nucleus over a prolonged period. He said that in the first place one would expect an annular tear to heal up with time, so the leakage would stop. Secondly, he said that there was only a limited amount of material in the nucleus and it would soon come out. Thirdly, if acidic material was getting into the spinal canal and producing irritation and inflammation, the consequence would be that there would be fibrosis scar tissue and chronic inflammation in the spinal canal and this would be apparent in any subsequent surgical operation. It was his experience that one never saw this unless there had been previous surgery to the spinal canal or repeated epidural treatment or unless there had been a ruptured disc with the material extending into the spinal canal i.e. a protrusion as Professor Shearer had called it. Mr Maurice-Williams preferred to refer to it as sequestration. He accepted that there had been no surgery in this case but it was his experience over a long record of surgery that you

would see such damage if there had been prolonged leakage of acidic material. He had never heard the theory put forward by Mr Coombs save in relation to this case. It was certainly not generally accepted or discussed. His views about the need for protrusion of the nucleus in order to cause true sciatica were the same as Professor Shearer and in opposition to those of Mr Coombs, though he also agreed with Professor Shearer that he did not think that the plaintiff had true sciatica in this case. He accepted that the plaintiff might get some back problems from time to time but he was sceptical as to whether they were as disabling as the plaintiff stated. Having now seen the DVD, it reinforced his opinion as there did not seem to be anything very wrong with him in the DVD. In particular it was surprising that the plaintiff had acquired a powerful looking dog if his back was as bad as he said. Mr Maurice-Williams thought that, other than vigorous gardening, the plaintiff should be able to lead a normal everyday life and be fit for light office work. 52. On a separate aspect, he did not agree with Mr Coombs that epidurals had the effect of washing out acidic material. An epidural injected fluid which contained both an anaesthetic and steroids. It was believed that the anaesthetic dampened down the sensitivity and numbed the nerves whereas the steroids dampened down the inflammatory response at the back of the disc. 53. In cross-examination Mr Maurice-Williams confirmed that he did not undertake discography because this was done by orthopaedic surgeons. He accepted that the joint report of Professor Shearer had referred to an accelerating effect upon the pre-existing degenerative change but he said this was more Professor Shearer's opinion than his own. It was not his primary opinion. He confirmed that he did not think there was an annular tear because there was no high intensity zone in the MRI scan, but that he would defer to Dr Wilson on that point. He believed the scan had excluded a major annular tear. He reiterated that he would expect an annular tear to heal and not lead to a continuing leakage of fluid because you did not see fibrosis and previous inflammation in the spinal canal in other cases with such symptoms. He did not accept the theory that fluid could keep leaking out over a prolonged period. He had never seen a hole in the back of the disc unless there had been protrusion. Indeed, even where there had been sequestration and a huge fragment of nucleus had been pushed out and there had undoubtedly been a large tear for this to have occurred some time before, you could still find the free fragment in the canal, but the back of the disc would have healed up. You just did not find continuing holes in the back of the disc. It might be a weak point for the future but there was no continuing hole. He accepted that you could get leakage of acid within the annulus which could contribute to inflammation and back pain as part of degeneration but not that you could get this prolonged leakage into the spinal canal from a tear. He repeated that he had never heard the theory that you could get acidic fluid leaking out for a prolonged period without protrusion. He had only heard that theory in the context of this case. 54. When questioned about the pre-existing degenerative changes, he said that in his opinion, on balance of probabilities, the plaintiff would have developed intermittent back pain at regular intervals between the ages of 35 and 40 but he would not have had continuous pain. In contrast to Professor Shearer and Mr Coombs, Mr Maurice-Williams, when the court asked him, thought that if a major annular tear occurred on the first lifting by the plaintiff, it was likely that he would be

incapacitated and unable to lift the box a second time. He qualified this by saying that, if the major structural injury came without severe immediate symptoms, he could perhaps have done it. One could have major structural injury without severe immediate symptoms as they might only appear an hour or two later. But if there was immediate pain and a major structural injury such as an annular tear, he would expect the person not to be able to go on with his lifting a minute or two later. (vii) Dr David Wilson 55. Dr Wilson is a consultant radiologist at Nuffield Orthopaedic Centre in Oxford Radcliffe Hospital. He specialises in the locomotor system and spine. He is also an interventional radiologist specialising in treatment of spinal disorders. About two thirds of his radiological work is spine based as is the majority of his interventional work. It appears that he may have been called as a form of referee because, at the previous trial, there had apparently been a difference of opinion between Mr Coombs, who thought he had seen a high intensity zone on the plaintiff's MRI scan and Professor Shearer and Mr Maurice-Williams, who had not. 56. Dr Wilson confirmed that the MRI scan showed degeneration of the relevant disc. The scan did not show any protrusion nor did it show a high intensity zone. To that extent he disagreed with what Mr Coombs had said at the previous trial. However that did not exclude the existence of annular tear as discography had shown that annular tears could exist even where there was no high intensity zone. Dr Wilson began by saying that, on balance, it was most likely that the abnormality of the disc shown in the MRI was due to degenerative changes rather than an annular tear. However, it subsequently became clear that this was based more on statistics and that the abnormality could either have been due to pre-existing degenerative changes, which would have taken several years to develop, or it could have been caused by trauma, in which event, on balance, it could have developed over one year. As to which it was, Dr Wilson said that you could not tell this simply from an MRI scan and you then had to have regard to the clinical evidence. Dr Wilson did however say that he had difficulty with the concept (put forward by Mr Coombs) of the leakage of liquid from the nucleus over a prolonged period. He pointed out that the material inside the nucleus was solid material. If it protruded it could cause irritation by chemical reaction but there would come a point when that chemical reaction stopped. The concept of liquid flowing out was one that he found difficult to grasp. However, he accepted that there was considerable uncertainty as to the causes of back pain. 57. In the light of Dr Wilson's evidence, the court asked for Mr Maurice-Williams to be recalled on the issue of whether the abnormality of the disc in the MRI scan was in fact evidence of pre-existing degenerative change. Mr Maurice-Williams said that he and Professor Shearer were firmly of the opinion that it was. He accepted that it was possible for such changes to occur as a result of trauma within a period of a year but said that it would have to be the result of a very major trauma like a fracture or dislocation or a very major disruption of the disc. It was generally believed that to get these sort of degenerative changes, after only a relatively modest accident, several years would be required. 58. Dr Wilson, when recalled, repeated that it was not possible to say from the MRI scan itself whether the changes to the disc shown on the MRI scan were attributable to pre-existing degeneration or to trauma. (viii) Mr Berry and Dr Veasey 59. We propose to take the psychological evidence together as the differences between the two experts are modest. Mr

Berry was instructed by the plaintiff and has been a consultant psychologist in Jersey for many years. He saw the plaintiff in September 2003 and carried out various tests. He diagnosed chronic stress and depression. The tests indicated fairly severe somatic complaints; depression, hopelessness, and pessimism; feelings of persecution and suspicion; insecurity and indecision; disorganised thinking; and a tendency to be rebellious towards authority. In one of the tests, the plaintiff manifested on four out of eight scales a tendency towards exaggeration, although Mr Berry was of the view that such exaggeration was more likely to be a function of pre-occupation with his predicament than calculated intent. 60. Dr Veasey saw the plaintiff on 10th June, 2004, and produced a report dated 12th July, 2004. Unlike Mr Berry, he had copies of the plaintiff's GP notes. According to Dr Veasey, the plaintiff merely said that he had been depressed in 1995 and had seen his GP at that time. He denied illicit drug use. However an examination of the GP records showed that the plaintiff had suffered depression for many years as well as from problems of drug taking and consumption of alcohol. In his report, Dr Veasey pointed out that the plaintiff had a much longer history of depression and mood disturbance than he had admitted. In Dr Veasey's opinion the plaintiff is suffering from a pre-existing chronic depressive disorder with significant symptoms of anxiety and chronic alcohol excess. He noted that there had been further major stresses in the plaintiff's life since the May incident, namely being convicted of possession of cannabis with intent to supply, the loss of his job, the loss of his house, the declaration of bankruptcy and the separation from his girlfriend. The tests showed a tendency to exaggeration on the part of the plaintiff. Dr Veasey was of the opinion that there had been an exacerbation of a chronic pre-existing condition and that there had been further exacerbations relating to wholly unrelated stresses. He made a 10% attribution in terms of the plaintiff's current depression to the symptoms from the May incident. 61. The two experts subsequently prepared a joint report in 2005. In effect they were agreed on almost everything. There was an extensive past history of depression and a long history regarding alcohol consumption and relationship difficulties. In relation to the effect of the pain caused by the incident on his depression, both experts agreed that this was a very difficult exercise but Dr Veasey attributed 10% whereas Mr Berry suggested a 30% attribution. Both noted a tendency to exaggeration and Dr Veasey was concerned with the issue of credibility and reliability as a historian given that the plaintiff had not revealed his host of past difficulties or given accurate information about some of his subsequent difficulties. Both agreed that the prognosis was poor and that returning to some kind of employment would help the rehabilitation process. They were surprised that he had been graded as suffering from 100% disability. 62. Mr Berry saw the plaintiff again for the purposes of preparing a supplementary report dated 5th January, 2009. He said that, from a psychological point of view, the pain and its consequences, such as preventing him from working, were major contributors to the plaintiff's chronic depression. In his summary Mr Berry said that his opinion did not vary from that expressed in the joint statement dated March 2003. He repeated his views that a 30% attribution in respect of all three accidents was appropriate on the basis that before the accidents he was able to work whereas afterwards he was not. The plaintiff's medical records, including hospital and GP records,

were produced to Mr Berry for the first time. He had not previously had access to them although Dr Veasey had. He confirmed that they did not alter his opinion. Finally Mr Berry prepared an additional report dated 17th November, 2009. He confirmed that in his opinion, on balance, the 30% increase in severity of his depression rendered it probable that he would have had difficulty in continuing to work. He confirmed that in his opinion the May incident had exacerbated the plaintiff's depression to the point where his social and domestic function was impaired to the extent that he has stopped working. 63. In evidence, he confirmed that at the time of his first report, he had not seen any medical records and the plaintiff had made no mention of his history of depression. Although there was some inconsistency of expression, Mr Berry seemed to accept that he was talking of a 30% attribution to the accident rather than an increase of 30% in the pre-existing level of depression. However he remained of the view that the operative cause of the plaintiff not working was the May incident. He was pressed strongly by Advocate Benest on why this should be, particularly in the light of subsequent stress factors for the plaintiff such as his bankruptcy, his criminal conviction, the loss of his home and relationship difficulties with his girlfriend. Mr Berry pointed out that he stopped work after the May incident whereas these stress factors had occurred later. The plaintiff's pre-occupation with the consequences of the incident was the major contributing factor to his failure to return to work whatever effect the other stressors had had. Mr Berry was also pressed on the exaggeration by the plaintiff, to which he had referred in his report, and confirmed that the nature of the test which he had applied was such that the exaggeration was unintentional rather than intentional. He also confirmed that the plaintiff would feel a greater intensity of pain because he focused on it so much by reason of his depression and thus made it greater than it probably actually was. 64. In his evidence, Dr Veasey remained of the view that there was only a 10% attribution. He admitted that it was a complex case but pointed to the fact that there was a lengthy history of depression which had existed prior to the May incident and there were also a number of stressor events subsequent to the incident such as being declared en désastre in April 2003, losing his employment in August 2002, being convicted of a criminal offence in 2002, losing his house as a result of the désastre and encountering a separation from his girlfriend. He did not think therefore that one could conclude that the consequences of the May incident were the tipping point which led to the plaintiff not being able to work. He was cross examined by Advocate Jordan who took him in some detail through all the many stress factors which had existed prior to the incident and also pointed to the fact that all the stress factors after the incident had occurred some time thereafter, by which time he had already been off work for a considerable period. She put to him that the only logical explanation was that it was the consequences of the May incident in terms of back pain which had been the tipping point and had caused him to be unable to work. Dr Veasey did not agree and confirmed that, in his opinion, the plaintiff did not have severe depression. Dr Veasey did not consider that the plaintiff's failure to work after May 2001 was because of psychiatric ill health; it was more because of chronic pain syndrome i.e. a combination of physical and psychological factors which in an individual produced chronic pain and restriction which could not simply be explained by a physical lesion. 65. The only

other medical evidence referred to by the parties which we think it necessary to mention is a report dated 25th February, 2009, from Dr Purcell-Jones, a consultant in pain medicine and anaesthesia. He said that, on examination, the plaintiff displayed a number of inappropriate signs such as pain on simulated hip rotation and straight leg raising on distraction; there was much grimacing and groaning during the interview. He walked with a stick to the clinic. Lumbar flexion was very limited whilst standing, but more mobile while sitting on the couch. He had stiff lumbar spinal movements. Rotation was normal. Dr Purcell-Jones was unable to detect any tension signs. Straight leg raising was limited by his hamstrings. Hip movements were normal and Dr Purcell-Jones was unable to detect any abnormal neurology in his lower limbs. He diagnosed a simple mechanical low back pain and noted that the plaintiff had been involved in a legal claim and had developed a chronic pain syndrome. He advised an initial assessment by Dr Agostinis, clinical psychologist, followed by multi-disciplinary pain assessment. He suggested putting the plaintiff through a pain education programme for one day followed by a seven day pain management programme with the long term goal of seeing if the plaintiff could return to work. The plaintiff was subsequently seen by Dr Agostinis who recommended that he would be a suitable candidate for the seven day pain management programme but the plaintiff did not in fact pursue this. The Court's findings

- (i) The extent of the physical injuries 66. Having considered the matter carefully, the court finds on the balance of probabilities that the evidence of Professor Shearer and Mr Maurice-Williams is to be preferred to that of Mr Coombs and that the plaintiff has suffered a soft tissue injury which should have cleared up reasonably quickly but which has been complicated by a substantial psychological overlay on the part of the plaintiff. 67. We take first the plaintiff's evidence. We have had the opportunity of seeing and hearing him give evidence. The court finds that he is prone to exaggerate his symptoms and that the symptoms which he does suffer from are attributable to a very substantial degree to psychological overlay; in other words he perceives the symptoms to be much worse than they really are. 68. We would summarise our reasons for reaching this conclusion in relation to the plaintiff's evidence as follows:- (i) The court has had the opportunity of seeing and hearing the plaintiff give evidence. From that process, it did not find him to be a reliable witness. (ii) In his report of 18th September, 2003, Mr Berry found that the plaintiff had a tendency to exaggerate. Dr Veasey was of a similar view in his report of 12th July, 2004, and was also of the opinion that the plaintiff was not an entirely reliable or credible witness as he had failed to reveal his host of past difficulties or give accurate information about some of his subsequent difficulties when recounting his history to Dr Veasey. (iii) In his examination of the plaintiff for his report of 25th February, 2009, Dr Purcell-Jones found that the plaintiff displayed a number of inappropriate signs and that there was much grimacing and groaning during the interview. (iv) This was consistent with the evidence of Mr Maurice-Williams, an extremely experienced neurosurgeon who has specialised in spinal degenerative disease. We accept his evidence that, during his examination of the plaintiff on 8th November, 2005, he found the plaintiff's manner became somewhat histrionic with a

certain amount of inappropriate overreaction, sighing and groaning etc. That, together with a disparity between little forward flexion in the lumbar spine in the upright position and an ability to sit forward quite well when tested on the couch, led Mr Maurice-Williams to conclude that there was a functional overlay, although he could not say whether this was conscious or unconscious. (v) In his examination of the plaintiff on the 23rd September, 2008, Mr Maurice-Williams found that straight leg raising was 80 degrees on either side with a negative sciatic stretch test, there was striking disparity between very limited forward flexion of the lumbar spine in the upright position and full forward flexion when tested on the couch and the plaintiff appeared to have no difficulty in removing and replacing socks which were actions which a person with even the slightest degree of low back pain normal found extremely difficult. This led Mr Maurice-Williams to maintain his view that he was sceptical as to whether the residual symptoms of the plaintiff were as severe and disabling as the plaintiff stated. (vi) Professor Shearer was also of the opinion that the plaintiff's symptoms were largely psychological in origin i.e. there was a substantial non-physical component of the matter. (vii) In his report of 2nd July, 2003, Dr Ilangovan of the Jersey Pain Clinic queried whether there was a considerable exaggeration of his tension signs by the plaintiff. (viii) In summary, both psychologists were agreed that the plaintiff was prone to exaggeration and all the medical experts to whom we have referred concluded that there was a substantial functional overlay for the symptoms which the plaintiff described. The sole exception to this was Mr Coombs, but he accepted that the matter ultimately turned on whether the plaintiff was in fact suffering from the symptoms which he described. Mr Coombs' evidence was to the effect that, assuming he was, the annular tear was an explanation for those symptoms. (ix) We note that the plaintiff took a trip to Canada in 2005. An ability to sit for several hours in an aeroplane seat is not consistent with his description of being unable to sit for any significant period without discomfort. (x) The DVD is significant evidence. We agree with Professor Shearer and Mr Maurice-Williams that it is not consistent with the picture of a man who is unable to undertake the simplest of tasks, is unable to work and has to retire to bed every afternoon for the rest of the day because of the level of pain. The DVD showed the plaintiff walking apparently quite normally. He did not display the form of hunched over shuffle which is so often seen in a person suffering severe back pain. Furthermore he walked with a large dog on a lead. Although the dog appears to have been well behaved, it is inevitable that at times such a dog will pull strongly on the lead and this would be very painful for a person with severe back pain, as Mr Maurice-Williams explained. He was apparently able to bend down to look into a car without any difficulty or discomfort. All in all and even making allowance for his assertion that he had just had a bath, we find the evidence in the DVD to be inconsistent with the severity of symptoms which the plaintiff describes. (xi) As already mentioned, the plaintiff was sentenced in 2002 to 150 hours community service for possession of cannabis resin with intent to supply which sentence he carried out between October 2002 and July 2003. A letter from the Chief Probation Officer dated 22nd January, 2010, points out that this work was carried out principally in the Probation Office performing administrative tasks for local charities but it had also involved two sessions at St Peter's Youth Club. The schedule attached to the letter

shows the hours actually worked and the days upon which that work was carried out. The schedule shows that he regularly worked for 4 hours and often more up to a maximum on one occasion of 6.5 hours. When asked about the figures, the plaintiff said that he thought that he had usually had a break after each session but the figures show that he often worked two days running and occasionally three days running. Thus he worked for 6.5 hours on 14th November and 4.5 hours on 15th November, 2002; 4.5 hours on each of 18th and 19th November; 2, 4 and 4 hours on the 16th, 17th and 18th December; 4 and 4 hours on 27th and 28th March, 2003, and again on 3rd and 4th April, 2003, and finally he worked for 3 consecutive days on 28th, 29th and 30th May, 2003, for respectively 4, 5 and 5 hours. In our judgment his ability to carry out community service in this manner is quite inconsistent with the evidence which he gave to the effect that his symptoms are so serious that he is unable to work or carry out the simplest tasks at home. (xii) The plaintiff's evidence in this respect was also inconsistent with that of all the medical experts. Even Mr Coombs agreed that he could see no reason why the plaintiff should not carry out clerical work provided that he could work flexible hours. 69. As already indicated the plaintiff's evidence has to be considered in conjunction with the medical evidence. We have already acknowledged our gratitude for the manner in which all the medical experts gave their evidence but, having taken into account the plaintiff's evidence as well as the other evidence, the court has come to the clear conclusion that it prefers the evidence of Professor Shearer and Mr Maurice-Williams to that of Mr Coombs. It finds that their clinical conclusions are correct. In other words, the plaintiff suffered a soft tissue injury as a result of the incident which would normally be expected to clear up within a relatively short period. The defendant does not suggest that the plaintiff is a malingerer who is lying or making up his symptoms. However, accepting the evidence of Professor Shearer and Mr Maurice-Williams, we find that there is a substantial psychological overlay and that the actual continuing physical symptoms of the plaintiff are minor, but that he perceives them to be much more serious than they are because of his depression or other psychological

reasons.

Importantly, we also find on a balance of probabilities that there were pre-existing degenerative changes in the disc in question and that the plaintiff would probably have suffered symptoms as serious as those which he perceives at present between the ages of 40

- 50 even if the accident had not occurred. 70. We would summarise our reasons for preferring the evidence of Professor Shearer and Mr Maurice-Williams as follows:- (i) Mr Coombs accepted that his diagnosis of an annular tear pre-supposed that the plaintiff was indeed suffering the severity of symptoms which he described. Professor Shearer and Mr Maurice-Williams, on the other hand, concluded that there was a substantial functional overlay. Their evidence in this respect is more consistent with the other evidence e.g. our assessment of the plaintiff, the DVD, the plaintiff's ability to carry out community service and the agreed evidence of the psychologists as to his tendency to exaggerate. (ii) Both Professor Shearer and Mr Maurice-Williams found points of concern in relation to their

examinations of the plaintiff. For example, for his report of 28th October, 2008, Professor Shearer noted that straight leg raising was 15% and 5 % respectively when the plaintiff was lying down but that, when he was sitting at the edge of the bed, it was 75%. This was inconsistent and he noted that the plaintiff had positive Waddell tests in two respects. Likewise, Mr Maurice-Williams noted the histrionic over response at his examination in November 2005, the disparity between little forward flexion in the lumbar spine in the upright position and an ability to sit forward quite well when tested on the couch and the plaintiff's ability to remove and replace his socks as well as the successful straight leg raising. We found the reasons of both Professor Shearer and Mr Maurice-Williams for thinking that there was a substantial psychological component to be convincing. (iii) Mr Coombs' theory is that there was a continuing annular tear which had not healed nearly nine years after the accident through which fluid from the nucleus (rather than the crab-like material itself) has continued to leak thereby causing irritation in the spinal canal. All three of Professor Shearer, Mr Maurice-Williams and Dr Wilson said that they had never heard of such a theory other than in the context of this case. (iv) Mr Maurice-Williams gave three reasons as to why such a theory was unlikely, which we found to be convincing. Firstly, he would expect an annular tear to heal over time so that the leakage would stop. The body has a great ability to heal. In his experience, even where there has been protrusion and a fragment of nuclear material may remain in the canal, one did not in any subsequent operation see a hole in the annulus. The back of the disc would have healed up. It might be weaker as a result of the previous tear but it had healed. Secondly, he said that there was a limited amount of material in the nucleus and it would eventually all come out. It could not continue to leak indefinitely. Thirdly, if acidic material was getting into the spinal canal and producing irritation and inflammation, the consequence would be that there would be fibrosis scar tissue and chronic inflammation in the spinal canal and this would be apparent in any subsequent surgical operation. It was his experience that one never saw this unless there had been previous surgery to the spinal canal or repeated epidural treatment or unless there had been a ruptured disc with protrusion. (v) Professor Shearer gave an additional reason. He said that the nucleus was solid material and there was not some fluid which could leak out periodically from it. If there was a leak, the material as a whole came out dramatically and there was a protrusion. (vi) Dr Wilson gave evidence to like effect. He said that he had difficulty with the concept put forward by Mr Coombs of the leakage of liquid from the nucleus over a prolonged period. The material inside the nucleus was solid. If it protruded it could cause irritation by chemical reaction but there would come a point when that chemical reaction stopped. The concept of liquid flowing out was one that he found difficult to grasp. (vii) Given the evidence of Professor Shearer, Mr Maurice-Williams and Dr Wilson, we are unable to accept that fluid from the nucleus has continued to leak through an annular tear for some 9 years causing the plaintiff to suffer the level of back pain which he describes. (viii) Both Professor Shearer and Mr Maurice-Williams were of the opinion that, if the plaintiff suffered a major trauma such as an annular tear in the May incident, he would have experienced severe pain within a short while. Professor Shearer pointed out that the fact that the plaintiff did not think in necessary to attend upon his own general practitioner

for some 15 days after the accident suggested to him that the plaintiff could not have suffered something as serious as an annular tear. (ix) In their joint report, Professor Shearer and Mr Maurice-Williams, in response to a specific suggestion by the defence advocates, accepted the possibility of this being an acceleration case in the strict sense of the word. In other words, the accident caused a pre-existing but asymptomatic degenerative change in the disc to become symptomatic. The accident therefore brought forward the onset of symptoms by a number of years. In his oral evidence, Mr Coombs accepted that this was a possibility although he did not think that it was the case. In their evidence both Professor Shearer and Mr Maurice-Williams made it clear that this was not their preferred opinion. In the circumstances where none of the three experts is putting this forward as the most likely occurrence, we find that this is not what occurred. (x) We should add that, in coming to our conclusion that we prefer the evidence of Professor Shearer and Mr Maurice-Williams to that of Mr Coombs, we have taken into account that, on one aspect, Mr Coombs has been shown to be correct and Professor Shearer and Mr Maurice-Williams wrong. Mr Coombs expressed the opinion that one could have an annular tear even though no high intensity zone showed up on an MRI scan. Conversely, both Professor Shearer and Mr Maurice-Williams said that they had not come across a case of an annular tear where there had not been a high intensity zone on the MRI scan, but both said that they would defer to Dr Wilson if he were to say otherwise. When he came to give evidence, Dr Wilson was very clear that discography had shown that an annular tear could exist even where there was no high intensity zone. However, for the reasons already given, we nevertheless find it to be more probable than not that what was caused in this case was a soft tissue injury (where of course no high intensity zone would show on an MRI) rather than an annular tear which on this occasion has not shown up as a high intensity zone. (xi) We have also taken into account that the plaintiff's pain in his leg was initially more on the left side, then moved to the right side after an epidural before returning in due course to the left. Both Mr Coombs on the one hand and Professor Shearer and Mr Maurice-Williams on the other felt that this was not inconsistent with their respective theories and in each case they gave explanations for reaching that conclusion. Accordingly we do not think that this aspect assists us in determining which theory is more likely. 71. We turn now to consider whether the plaintiff had pre-existing degenerative changes in the disc prior to the incident. Mr Coombs, Professor Shearer, Mr Maurice-Williams and Dr Wilson are all agreed that the MRI scan shows abnormality to the disc in question. Mr Coombs considers that this abnormality is due to the annular tear which was caused by the incident. Professor Shearer and Mr Maurice-Williams believe that the abnormality shows pre-existing degenerative changes to the disc. Dr Wilson said that it was impossible to tell from the MRI scan itself whether the abnormality was due to pre-existing degenerative changes or to trauma. If it was the former, this would have taken several years to develop which would show that the degenerative changes existed at the time of the incident but if it was caused by trauma, it could on balance have developed over one year. In this case the MRI scan was taken some 11 months after the incident. 72. We find that the MRI shows pre-existing degenerative changes to the disc. We have already given reasons for concluding that the May incident did not cause an

annular tear. Having so concluded, that leaves only pre-existing degenerative change as the explanation for the disc abnormality shown in the MRI and that accords with the opinion of Professor Shearer and Mr Maurice-Williams, which we accept. 73. The question now arises as to when the pre-existing asymptomatic degenerative changes would have become symptomatic even in the absence of the May incident. Mr Coombs was not asked to say when - on the assumption that he was wrong and that the MRI showed pre-existing degenerative change rather than abnormality caused by an annular tear - the plaintiff would probably have become symptomatic in any event. Accordingly he gave no relevant evidence on this point. 74. Professor Shearer said that, in his opinion, the plaintiff would probably have started to suffer problems with back pain between the ages of 35 and 40 even in the absence of the incident. He emphasised that it was very difficult to be sure but he said that the problems would probably have got to the level of severity which he (the plaintiff) described sometime between the ages of 40 and 50. 75. Mr Maurice-Williams agreed with Professor Shearer that, in the absence of the May incident, the plaintiff would probably have suffered back pain at the age of 35 - 40. He said that this would probably have prevented the plaintiff from carrying out manual work but probably not sedentary work. He was not asked when the symptoms would have become as serious as the plaintiff perceived his symptoms currently to be. 76. We accept the evidence of Professor Shearer and Mr Maurice-Williams that the plaintiff would have begun to suffer back pain on a fairly regular basis between the ages of 35-40 even in the absence of the May incident. In the absence of any other evidence, we also accept Professor Shearer's opinion that, although it is very difficult to be sure, on a balance of probabilities, the level of back pain suffered by the plaintiff would have risen to the level which he now perceives he is suffering from between the ages of 40 - 50. In the absence of any greater particularity, we shall take the age of 45 as being the age at which, even in the absence of the May incident, the level of pain would have reached the level which he now perceives he is suffering from. (ii) The extent of psychological injury 77. We turn now to consider the extent of psychological injury suffered as a result of the May incident. The experts for each side, Mr Berry and Dr Veasey are in large measure of agreement. They both find that the plaintiff is a chronic depressive. There is an extensive prior history of depression and of the excessive consumption of alcohol together with drug use. Both agree that the pain caused as a result of the May incident, which on any view led him to be unable to work for some months, was a contributing factor to his current level of depression. They agree that it is very difficult to estimate the level of contribution but doing the best they can, Dr Veasey attributes 10% whereas Mr Berry attributes 30%. 78. The plaintiff's case is that, even if

- as it now has - the court finds in favour of the defence medical experts Professor Shearer and Mr Maurice-Williams as to the level of physical injury, the psychological injury caused by the incident is the tipping point which has resulted in the plaintiff being unable to work. In other words, on a balance of probabilities, but for the May incident, the plaintiff would have continued working until he was 65 notwithstanding his pre-existing depression and other psychological problems. We would add that, for convenience, we shall refer in this

section to the plaintiff being unable to work, not least because that was the expression used by the parties in their submissions. However, we shall explain exactly what we mean by that expression in the next section. The plaintiff relied on comments of the English Court of Appeal in *KR-v-Bryn Alyn Community (Holdings) Limited* (in liquidation)

[2003] EWCA Civ 85 . That was to the effect that, when assessing general damages for psychiatric injury caused by a breach of duty, (in that case abuse whilst in a care home) the court must look at the contribution that the breach of duty had made to each of the claimant's long term psychiatric problems, which necessarily involved an exercise in apportionment. However, the position was not necessarily the same in relation to a loss of earnings claim. Auld LJ said this at paragraph 134:- "We have no quarrel with the judge's declared approach but it is necessary to consider whether he applied it in each case. We note, however, that it does not follow that apportionment of loss of earnings must necessarily mirror that in relation to general damages. In this context the 'push over the edge' or cumulative effect of the Bryn Alyn abuse may have made the difference between a claimant being able to work and not being able to work." 79. The defendant relies upon the evidence of Dr Veasey and argues that the plaintiff suffered a number of other stressor events after the May incident which could equally have contributed to his depression and left him unable to work. Thus in October 2002 he was sentenced for possession of cannabis with intent to supply; he lost his employment with the defendant in August 2002; he was declared en désastre in April 2003; he lost his house as a result of being declared en désastre ; and he separated from his girlfriend. These were all significant matters which were likely to have exacerbated his depression and the plaintiff could not show on the balance of probabilities that it was the consequences of the May incident which was the tipping point in terms of his ability to work rather than any of these other factors. 80. Miss Jordan, on behalf of the plaintiff, pointed out that these additional stressor factors occurred sometime after the incident, by which time he had already been off work for a considerable period. She also referred to his good work record before the May incident. Thus he had not taken time off after the September 2000 incident and had returned to work promptly after the March 2001 incident even though he suffered at the time from the same psychological state (or at least 70 - 90% of it) and had suffered physical injury during the March 2001 incident. She also pointed out that he had undertaken relatively high levels of overtime before the May incident despite his depression and the two previous incidents. In short, it was only after the May incident that he was unable to work and the inference was therefore irresistible that it was the tipping point which meant that he was no longer able to work. As Mr Berry put it, the May incident had exacerbated his depression to the point that his social and domestic function was impaired to the extent that he stopped working. 81. Given the number of pre-existing stressor factors (which were put by Miss Jordan to Dr Veasey in cross examination) and given the number of significant stressor factors which occurred after the May incident as referred to above, we think that Mr Berry's attribution of 30% in respect of the May incident is too high. Given all these other factors, we think that Dr Veasey's 10% attribution to his current

psychological state is more probable. 82. However, although we have found this a very difficult exercise, we have just been persuaded that, on the balance of probabilities, it was the exacerbation of the plaintiff's pre-existing psychological condition caused by the consequences of the May incident in terms of initial pain from the physical injuries and the consequent inability for a time not to work which was the tipping point and pushed the plaintiff to a point where he was unable to work. To begin with there was a physical explanation for his back pain and for his inability to work, namely the soft tissue injury. However we have already found that that should have cleared up within a reasonable period and thereafter it was the exacerbation of his psychological condition which prevented him from returning to work. We note the existence of the other stressor factors listed above but note that a number of them were after he could have been expected to return to work. Ultimately we find compelling the argument put forward by Miss Jordan that, before the May incident, he was able to work despite the existence of his depression and many of the stressor factors but that after the May incident he did not feel able to work. (iii) What is his ability to work? 83. We have found that the plaintiff suffered a soft tissue injury which would be expected to clear up within a matter of months leaving him with only minor intermittent back pain. However, we have also found that the May incident was the tipping point which caused an aggravation of his depression such that he perceives the level of pain to be much worse than it is in reality. The plaintiff contends that the combination of these factors means that he is unable to work, although he has conceded for the purposes of this case the possibility of working for 4 hours a week in a sedentary or semi-sedentary job e.g. office work of some sort. The question for us is whether, even allowing for his psychological condition, he is in fact capable of more than 4 hours work a week. 84. In this respect we have the advantage of having seen the DVD. Furthermore, all three of Mr Coombs, Professor Shearer and Mr Maurice-Williams felt that he was capable of some sedentary or semi-sedentary work. We find particularly compelling the fact that, despite the physical injury with the psychological overlay to which we have referred, the plaintiff was able to carry out 150 hours community service involving light office work. Although the hours varied, the figures supplied by the Probation Service show the following in terms of aggregate hours worked on consecutive days; 11 hours on 2 days; 9 hours on 2 days; 10 hours on 3 days; 8 hours on 2 days; 8 hours on 2 days; 14 hours on 3 days. Given this evidence of what the plaintiff was actually capable of carrying out back in 2002/ 2003, we find that, even allowing for his psychological state, he is perfectly capable of working for 12 hours a week rather than the 4 hours which he has conceded. 85. The question then arises as to when he should have returned to this level of work. The defence experts used varying language to describe when a soft tissue injury could normally be expected to clear up. Thus, as summarised at para 31 above, Professor Shearer spoke of a 12 - 18 month period although many patients achieved satisfactory relief of symptoms in a much shorter timescale. Mr Maurice-Williams (see para 45) referred to such an injury clearing up within a few months at most. In their joint report (see para 47) they referred to the possibility of it taking 3 - 6 months to recover to the point where he could resume his previous range of activities. On balance

and erring if anything on the side of generosity towards the plaintiff, we consider that it was reasonable for the plaintiff to remain off work as a result of the physical consequences of the soft tissue injury until the date of his dismissal on 2nd August, 2002, i.e. a period of some 15 months. The plaintiff is therefore entitled to claim for any loss of wages in full until that date. (iv) How long does the claim for loss of wages last? 86. At paras 58-63, we have given our reasons for concluding that, on a balance of probabilities, in the absence of the May incident, pre-existing degenerative changes to the disc would have led to the plaintiff suffering the level of back pain of the severity which he now perceives he is suffering at the age of 45. Thus, at that age, he would have been in exactly the position that he now is and would only have been capable of working the 12 hours a week which we have allowed. Thus any loss of wages attributable to the May incident will come to an end on the day he attains his 45th birthday, namely 7th March, 2012. The claim for loss of wages can therefore only cover the period until that date. 87. The evidence of Professor Shearer and Mr Maurice-Williams was to the effect that, because of the pre-existing degenerative change to his disc, he would have suffered some back pain some 3- 5 years after 2001 even in the absence of the May incident. At other times this was expressed as being between the age of 35 - 40. If it were relevant, we would take 4 years as the appropriate figure. In his closing submission, Advocate Benest argued that any claim for loss of wages should come to an end at that time. However, no witness suggested that the natural onset of some back pain after 4 years would have rendered the plaintiff immediately unfit for work; indeed that was not even put to any witness. Accordingly, we cannot accept the defendant's submission that the loss of wages claim should cease at that time. 88. We have however considered whether, assuming the plaintiff developed back pain naturally after 4 years, he would also have suffered the exacerbation to his depression as a result of that pain with the consequence that, through a combination of comparatively moderate physical symptoms coupled with psychological overlay, he would have been in the same position as he is today and therefore any loss of wages would cease after 4 years. We have concluded that such a finding is not appropriate. None of the parties explored the point and in particular none of the psychologists was asked whether the gradual occurrence of back pain from natural causes would or might have had the same exacerbating effect on the plaintiff's psychological state as the sudden onset of back pain following the trauma of the May incident. One's instinctive reaction is that it is questionable whether it would do so. This was also the view of the only witness who was asked about the matter, namely Professor Shearer. In answer to a question from the court, he emphasised that he was not a psychologist but from an orthopaedic point of view, if there was no precipitating cause like an accident to start the symptoms off, so that they began insidiously, he suspected that it was likely that the non-physical component would have been less. In the circumstances we find that, although there would have been an onset of back pain in the timescale envisaged by Professor Shearer and Mr Maurice-Williams namely 3 - 5 years, that back pain would not have exacerbated the plaintiff's depression in the way that the May incident did and accordingly he would have continued to work full time until the back pain became more severe at the age of 45 as previously

described.

- (v) Various quantum

issues

89. Both counsel agreed that, in view of the complex medical evidence, the most helpful way forward would be for the court to confine itself to making certain findings of fact at this stage leaving the parties then to try and agree the details of the quantum award in the light of the court's findings. Should the parties be unable to come to terms in the light of the court's decision, any specific outstanding matters can be referred back to the court for a final decision on the exact amount of any award or part thereof. Accordingly we turn now to consider various specific matters upon which we have been asked to rule.
- (a) Period of the claim for loss of wages 90. We have already explained that any loss of wages attributable to the May incident will, on the balance of probabilities, come to an end on the occasion of the plaintiff's 45th birthday on 7th March, 2012, because the pre-existing degenerative changes would have caused the plaintiff to be in the same position as he now perceives he is so that he would by that time not be able to work for more than 12 hours a week in any event. We must however deal with the commencement of the claim. We have already found that the plaintiff is entitled to claim for his loss of wages in full up to 2nd August, 2002, by reference to his wages at Jersey Post up to that date. Naturally, to the extent that he has already been paid during that period, allowance must be made for that. Similarly, it emerged that he had received sickness benefit for part of that period but had not accounted for this to Jersey Post as required by his contract. Allowance will need to be made for that. The plaintiff accepts that he would have lost his job with Jersey Post in any event on 2nd August, 2002, because of his conviction for drug offences. He accepts therefore that his claim for loss of wages at the rate he would have been paid by Jersey Post ended at that time. 91. He also concedes that, as a result of his conviction, he would not have gained alternative employment in the period between August 2002 - January 2003. Accordingly his claim for loss of earnings is made on the basis that he would have gained alternative employment from 1st January, 2003, onwards and we agree that that is a correct basis upon which to proceed. Accordingly his loss of earnings thereafter is based upon the difference between what he would have been able to earn when he returned to full time employment in January 2003 but for the injuries from the May incident and what he would have earned if he had fulfilled his residual earning capacity of 12 hours per week.
- (b) Level of loss of wages 92. The plaintiff called Mr Gerald White, an HR/remuneration consultant with Hassell Blampied Associates Limited and a fellow of the Chartered Institute of Personnel and Development. He gave evidence on salaries which the plaintiff might be expected to earn in Jersey. Mr White reviewed the plaintiff's employment history and concluded that the plaintiff would find employment in a rôle defined by his firm as clerical / operations processing job level 8. As at 1st July, 2009, based on information from 17 employer organisations drawn primarily from the financial services sector, the median

annual base salary for level 8 was £21,438 and the inter-quartile range was between £20,606 and £23,843. 93. In his oral evidence Mr White stated that he would expect the plaintiff to be paid just under the bottom of the inter-quartile range. He said that the plaintiff would probably earn a basic salary of £20,000 per annum or a little less. Employment outside the financial services sector paid less than in the financial services sector and the plaintiff's experience was entirely outside that sector. Mr White also explained that the base salary could be increased by overtime pay and/or discretionary bonuses and/or non-cash benefits such as employer pension contributions. He indicated that on a base salary of £21,438, depending on the employer, it would not be unrealistic for a person to benefit from an overall remuneration level of some £26,000 after some years employment at job level 8 in a financial services environment. This sum would include overtime pay and/or discretionary bonuses and/or non-cash benefits such as employer pension contributions. We do not consider pension contributions to be relevant for our purposes. Advocate Jordan emphasised that the plaintiff had worked overtime with Jersey Post. Allowing therefore for overtime and discretionary bonuses, we think it reasonable to allow a figure of £22,000 at today's values. From this has to be deducted provision for tax and social security. The figure of £22,000 should therefore be used as a basis to calculate the loss of earnings going forward until 7th March, 2012. The figure can also be used to calculate past loss of earnings back to 1st January, 2003, subject to the appropriate discount. From the resulting figures there will also have to be deducted an appropriate allowance for the 12 hours per week that we have found the plaintiff could have worked.

- (c) Care and assistance 94. The plaintiff claims for the gratuitous care and assistance provided by his mother. We accept her affidavit evidence that she works for 8 hours a month on his laundry and ironing, one hour per week on preparing breakfast and other meals, one hour per month on cleaning his home and 4 hours per month running errands such as shopping or paying bills. However the issue is not whether she in fact carries out these services for him but whether they are necessary because he is incapable of doing so as a result of the May incident. 95. None of the medical evidence suggested that he was incapable of undertaking these tasks. Mr Coombs accepted that he would expect the plaintiff to be able to undertake such light domestic tasks as cooking, laundry and ironing (in small stints). The plaintiff himself accepted that he could cook and adequately feed himself although he did not really cook very much as he never had. He had breakfast at his mother's house simply because it was convenient to do so as he went there because he preferred the bath in her house. He accepted that he could undertake his own shopping and was able to deal with many matters on-line. His mother paid some of the bills because they were in her name. The only area where he felt he might not be able to proceed was ironing. 96. We find that there is no reason why the plaintiff should not carry out the services provided by his mother and therefore we disallow any claim for care and assistance, except for the period from the date of the May incident to 2nd August, 2002, which is the period we have found it reasonable for the plaintiff to be entirely off work because of the physical symptoms caused by the soft tissue injury. We think it reasonable for him to have required his mother's

assistance for that limited period.

- (d) Gardener 97. Originally the plaintiff made a claim in respect of gardening, both in relation to the past and continuing into the future. However that claim was dropped during the course of Miss Jordan's closing submissions and we therefore say no more about it.
- (e) DIY 98. The plaintiff makes a claim for DIY at 10 hours per year at £10 per hour and window cleaning at £10 per month. On the basis of the evidence from the medical experts as well as the plaintiff himself, we find that there is no reason why the plaintiff should not carry out these functions himself and we therefore disallow any claim except for the period up to 2nd August, 2002, for the same reasons as we have given in relation to the issue of care and assistance.
- (f) Pension 99. The plaintiff claims for a pension on the basis that he would have continued to be employed in a job which included a final salary pension scheme. Based upon his salary with Jersey Post in 2001, he calculates that he would have been earning a gross salary of some £49,066 by the time he retired at 65. Had he been continuously contributing to a final salary scheme until the age of 65, he would have been entitled to 29/80th of his closing salary i.e. £17,786, from which he deducted tax at 8% to reach a figure of £16,363. He then applies a multiplier of 7.14 as a mid point between a loss of pension commencing at 65 and one commencing at 70, reduces this to 6 for contingencies and arrives at a total claim of £98,178. 100. The plaintiff accepted that, even in the absence of the May incident, his employment with Jersey Post would have come to an end upon his conviction in 2002 for possession with intent to supply cannabis. It is further accepted that that conviction would not have become spent until 2007 and that he now has another conviction for possession of cannabis in 2009 which is unspent. Despite this, the plaintiff contends that he would have been able to obtain alternative employment which attracted a final salary scheme. He asserts that he would have been able to find alternative employment in the public sector. It is further accepted that, save for the public sector and comparatively few private sector firms, predominantly in the financial services sector in which the plaintiff has never worked, it is now rare to find employers who offer final salary pension schemes as opposed to money purchase schemes. 101. We think it unlikely that, even in the absence of the May incident, the plaintiff would have found employment after his dismissal from Jersey Post in 2002 which carried with it the benefit of a final salary pension scheme. His convictions would have precluded him from a number of employments and the circumstances in which he was dismissed by Jersey Post would not have made it easy to find alternative employment in the public sector. Even if he had found such employment, we have already determined that any loss would come to an end in March 2012. 102. We would have been willing to consider evidence about a money purchase scheme but none has been tendered and we accept that it would be a complex matter. Nevertheless, we think some allowance should be made for loss of pension benefits. We have found that, but for the May incident, the plaintiff would probably have found full time clerical employment of some sort between January 2003 and March 2012. It is impossible to know whether such employment would have attracted a pension but we find

that there is a reasonable prospect of such employment having offered a money purchase pension scheme. As already mentioned, we have received no evidence on this but, if we assume a wage of £20,000 pa at current value, a 5% contribution by the plaintiff and a 5% contribution by the employer would result in an aggregate contribution of £2,000 pa to the fund which would eventually provide a pension. Any accumulated sum in a money purchase scheme would of course increase in value between now and the plaintiff's 65th birthday but that is offset by the fact that the plaintiff will be receiving now any sum which we award in respect of this head of loss. 103. We were referred by Mr Benest to the case of *Blamire-v-South Cumbria Health Authority*

[1993] PIQR Q1 where the English Court of Appeal made it clear that, where there were uncertainties and imponderables, the court could forgo a strict mathematical approach and simply look at the matter globally in order to assess the present value of the risk of future financial loss. In that case the judge awarded a sum of £25,000 to reflect future loss of wages, loss of pension benefits and handicap in the labour market. The Court of Appeal agreed that as there was no perfect arithmetical way of calculating compensation because of the uncertainties, the judge was entitled to adopt a broad brush approach. 104. We find ourselves in that position here. We cannot be sure whether any employment which the plaintiff might have found but for the accident would have carried with it a money purchase pension scheme nor do we have any evidence before us as to what the level of contributions to or possible benefits from such a scheme might have been. However, we find that, on the balance of probabilities, the plaintiff has suffered some loss in this respect. There are too many uncertainties to calculate the matter on a mathematical basis, but doing the best we can, we award a figure of £10,000 for loss of pension benefits. Summary 105. We trust that we have made the necessary findings of fact to allow the parties to negotiate and hopefully agree the exact quantum of the claim (including general damages) after allowance for the finding of contributory negligence made by the previous court in 2006. We are of course ready to assist further in resolving any matters which cannot be agreed. In briefest summary, the parties should proceed on the following basis:- (i) The plaintiff suffered a soft-tissue injury as described by Professor Shearer and Mr Maurice-Williams which would normally have been expected to clear up within a relatively short period. We find that the physical consequences of the injury made it reasonable for the plaintiff not to have returned to work until the date of his dismissal on 2nd August, 2002. (ii) Since then the plaintiff has continued to suffer minor back pain as allowed for by Professor Shearer and Mr Maurice-Williams, but the major part of his perception of his level of pain is attributable to psychological overlay, in that he perceives his pain to be much more than it really is. (iii) That psychological overlay resulted from the May incident in that that incident was the tipping point, notwithstanding his long history of psychological difficulties; but for the May incident, he would have remained in full time work until the age of 45. (iv) Even allowing for the psychological overlay, there is no reason why the plaintiff should not undertake a modest amount of light office work and we consider that he could work for 12 hours a week and has been capable of doing this

since January 2003. (v) The plaintiff was suffering from pre-existing degeneration of the relevant disc at the time of the accident. In accordance with the evidence of Professor Shearer and Mr Maurice-Williams this would have become symptomatic within about 3 - 5 years in any event. We further find that the symptoms would have reached the severity which the plaintiff now perceives he is suffering from by the age of 45. (vi) The figure of £22,000 per annum should be taken as the gross salary which the plaintiff would have been earning at the present time but for the May incident. (vii) The plaintiff is entitled to full loss of wages until 2nd August, 2002. From January 2003 onwards, an allowance of 12 hours a week must be made. (viii) We allow a claim for care and assistance and DIY from the date of the May incident to 2nd August, 2002, but not thereafter. (ix) We award £10,000 in respect of loss of pension benefits. 106. Finally, we would add this. We have been informed since the hearing that Advocate Jordan no longer acts for the plaintiff. Naturally, we do not know the circumstances which have led to this, but we wish to place on record that Advocate Jordan presented the plaintiff's case with conspicuous skill and thoroughness and his interests have been extremely well served by her very professional and able conduct of the case on his behalf. Authorities *KR-v-Bryn Alyn Community (Holdings) Limited* (in liquidation)

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