

JERSEY / JUDGMENT

Williams v Fox [2023] JRC 026 (15 February 2023)

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judgment

the deputy bailiff: The accident and its consequences

1. The Plaintiff was born on 8 May 1981 and accordingly is 41 years old.
2. On 21 October 2016, the Plaintiff was injured in a road traffic accident at 8pm caused by the Defendant when the Plaintiff was sitting in her stationary vehicle. The Plaintiff instinctively turned her head to the right to see what the cause of a noise behind her was and as she did so she felt a rear end impact.
3. Liability is not in dispute.
4. The Plaintiff called the police and she began to feel pain in her neck and shoulders which inhibited her movement. Although she was in shock she felt the pain was getting worse. She was taken to hospital by ambulance and an x-ray ruled out any fractures. She was given intravenous pain relief.
5. At the time the Plaintiff was, and had been since 2009, a prison officer. We will return to her employment history and current employment status below.
6. Owing to continuing pain in her neck and shoulders, the Plaintiff attended an appointment with her GP on 24 October 2016 who prescribed medication and signed her off work.
7. On any view, the role of a prison officer is physically demanding and requires a high degree of fitness which is evidenced by the annual fitness test and obligation to carry out control and restraint training. Both experts who gave evidence on behalf of the Defendant emphasised the high degree of fitness required to carry out the role of a prison officer either in England and Wales or in Jersey, and the fact that all prison officers under the age of fifty need to demonstrate a high degree of fitness, and a substantial degree of fitness even beyond that time.
8. Due to ongoing symptoms in her neck and shoulder the Plaintiff did not return to work for some ten months after the accident. On the advice of her GP she immediately engaged in physiotherapy and initially she had no movement in her neck without intense pain which was further limited by pain in both shoulders.
9. The Plaintiff had difficulty sleeping, resorting to sleeping upright in the spare room, took painkillers which allowed her to start utilising her right arm although the limitations of movements in her neck and left arm remained. Although the Plaintiff felt the pain in her neck reduce over the following months, there was little to no improvement in her left arm and shoulder. We heard from the Plaintiff in evidence and, on any view, she was not one to exaggerate her symptoms. Nonetheless, she said that any movement at extension of her left arm would "spike" the pain going up to 8 or 9 out of 10 on the pain scale. During this period she was unable to lay down, sleep or drive and did not begin to drive until December 2016. Owing to the discomfort she experienced when driving,

she opted to use public transport where possible and now cycles in preference to driving. 10. Routine tasks such as washing her hair, getting dressed and undressed, were particularly difficult owing to inability to gain elevation in her left shoulder above sixty degrees. Things that she previously took for granted, such as getting in and out of the bath, gardening and shopping, and playing badminton or tennis, were not possible. 11. In order to accelerate her recovery and return to work, the Plaintiff sought private treatment. In early 2017, she was referred by a GP to a specialist in sports medicine who recommended and administered a cortisone injection. She was also referred for more physiotherapy. 12. The injection was successful and allowed her to regain movement for approximately six to eight weeks. She stopped taking medication and began to swim pain free. However, after two months the benefit of the injection diminished and the pain returned. She underwent two further injections which were not as successful. 13. Eventually, she was referred for surgery on her shoulder, namely an arthroscopic subacromial decompression, under the care of Mr Patrick Armstrong in July 2018. 14. The Plaintiff was also recommended to see a psychotherapist for counselling by AXA Occupational Health, appointed by the prison. She was entitled to five free sessions and thereafter paid for sessions herself during 2018 and 2019, which assisted her in coping with the physical symptoms she continued to experience, the stress arising from her inability to inter alia return to work, as well as in managing other consequences of the injuries she sustained. 15. Notwithstanding the success of the surgery the symptoms continued. After inflammation at the site of the surgery had reduced and some movement returned, the Plaintiff re-engaged with physiotherapy. Then (and now) she experiences intermittent flare ups of the pain in her neck and shoulder and her physiotherapy programme needed to be changed in early 2019. 16. In late 2019 the Plaintiff was referred to the Pain Clinic and underwent a pain management education day which she found helpful. 17. During 2020, the Plaintiff continued to experience symptoms in her shoulder and underwent sessions with a chiropractor, on medical advice. The chiropractic treatment that the Plaintiff received led to a maintenance programme being developed to reduce the impact of flare ups on her neck and left shoulder on her day-to-day life. 18. Although she makes no claim for this, the Plaintiff also engages with yoga sessions which she has found help manage her symptoms. She also continues to engage with the hospital pain management department. Flare ups in her symptoms can be brought on by over-exertion, prolonged sedentary work before a computer and vigorous activity involving her arm or left shoulder. In order to maintain her health, the Plaintiff now regularly cycles and swims, but has been unable to return to playing badminton. She feels, and we accept, that she has been reasonably successful in reducing the physical limitations and impact on her life. 19. We now turn to consider the Plaintiff's employment history, the effect on her employment after the accident and her current employment. Employment: history, the prison service and post-accident 20. Absent when unable to work through injury or illness, the Plaintiff has always worked. Her first significant job was for Jersey Bowl where she worked her way to Duty Manager and Guest Services Manager. She financed her degree as a mature student and obtained a 2:1 degree in education from Chester University. She had planned to take a degree to equip her to become a primary school teacher, but she learned at university that she was dyslexic and converted to a general education degree instead. 21. When she began to work at the prison in 2009, she perceived it to be the beginning of a fulfilling career where she could learn, develop

and achieve promotion through the ranks. She says, and we accept, that she genuinely believed that her employment in the prison service would stretch the length of her career. Counsel for the Defendant expressly accepted in her closing remarks that it was a job that the Plaintiff 'loved' . 22. From 2012 onwards she was encouraged to apply for promotion, having achieved one promotion to Residential Officer, and over the years had various conversations with senior members of staff and peers to the effect that she should apply for a further promotion, to Senior Officer. 23. The Plaintiff had a two-year secondment in the prison to the RSMU (Resettlement and Sentence Management Unit). During this period, she liaised with the Probation Service and worked with prisoners in order to maximise their chances of a productive life when they were released from custody. She found this a rewarding role and, notwithstanding her dyslexia, enjoyed the report writing aspect of the secondment. 24. Three of the Plaintiff's five colleagues in the RSMU have now been promoted to Senior Officers and she says, and we accept, she had the skills to apply for promotion. 25. When she returned to general duties in 2015, the Plaintiff was given the role of Officer in Charge of the female (H) wing which was regarded as one of the most complex and emotionally charged postings in the prison. 26. Prior to the accident, the Plaintiff by and large passed the regular fitness test that she was required to submit to. She accepted in her witness evidence that the role of a prison officer can be very physical in that there was from time to time the need to restrain inmates using approved control and restraint techniques. However, as she made clear, she saw her principal role as not to restrain or control prisoners but to assist in their rehabilitation, get to know them and support them. 27. Her last performance review appraisal ("PRA") took place in August 2016 just before the accident. It was an extremely strong appraisal. In our view it showed that the Plaintiff was ripe for promotion. The SVQ, a qualification essential for promotion (the Scottish Vocational Qualification) which usually took two years to complete, she had completed in eight months by October 2016. Her manager's assessment was that she had been 'working to a very high standard thus far this year and mostly on H wing' . He continued 'The issues on H wing have been demanding for all staff this year and it is to Thea's credit that she continues tirelessly without complaint' . The report continued 'I note her successful completion of the SVQ award as also worthy of a positive special note. I have never managed Thea before but I find her a very professional prison officer not worried about what her day will bring with a personal drive to support residents in their sentence management goals' . Each 'competency' resulted in a ranking of 'strong' or 'competent' . Under ' Self-Assurance' , it was noted that the Plaintiff ' is a confident Officer that has demonstrated an ability to deal with difficult issues during 2016' . Under 'Integrity' , it was noted that the Plaintiff 'has very good prisoner relations and this has helped the wing's [Senior Officers] form action plans to any situation enabling wing staff to stop concerns before they start' . In respect of her ability to work in a ' partnership' , it was noted that the Plaintiff ' uses her past work in the RSMU to support prisoners in achieving their personal sentence management goals' . It was also observed that her ' PO work is always of a high standard and completed on time' . The Plaintiff explained to us in evidence that this was ' Personal Officer' work. Each prisoner was allocated a Personal Officer and the relevant prison officer would coach, mentor and meet with the prisoner and write their sentence plans. The Plaintiff said that she had a good relationship not only with the prisoners she was to mentor, but also those dealing with their ultimate resettlement in the community. 28. In respect of 'Political

Shrewdness', it was noted that the Plaintiff 'will always get involved in the staff's discussions on the future of the prison. She allows others their point of view and is confident to have her say. She has always been supportive of the modernisation programme and keeps herself updated on current events'. In respect of 'Persuasive Communication', it was noted that the Plaintiff's 'written and IT communication skills are well above the average and she demonstrates this daily with the wing documentation'. 29. Although we have not dealt with all the competencies referred to in the report, we note that finally under 'Delivery and Implementation', it was recorded that the Plaintiff 'has become very adapt (sic) in her role as a residential Officer and she will always do her utmost to ensure the daily tasks are completed. Thea always ensuring this is done with as little fuss as possible even during moments out of the regime norm'. 30. We were also furnished with the unchallenged evidence of her Unit Manager (from time to time) at the prison, Mr Townsend, who worked at the prison until 2018 and gave a strong reference in respect of the Plaintiff's work and it was his opinion that her experience and character would have resulted in an application for promotion to Senior Officer being successful. 31. Although there were only twelve Senior Officer positions at the prison, the Plaintiff's unchallenged evidence was that she had the requisite skill set to apply for all of them. In fact, owing to retirement, six of those twelve positions fell vacant and were filled in 2018 and two were filled in 2019. 32. The Defendant's employment expert, Mr McNaught, when he saw (belatedly) the Plaintiff's 2016 appraisal, expressed the view that the Plaintiff was a competent prison officer with some skills that were ahead of her colleagues and that he 'would' (not 'might') have expected her to be ready for promotion to Senior Officer rank within three years of 2016, i.e. before 2019, dependent upon vacancies arising and that she would have a '50/50 chance of promotion' for each opportunity that arose. There were in fact at least two separate recruitment opportunities during which the six Senior Officers were promoted (all from existing prison officer employees as the roles were not advertised externally) and bearing in mind that in each of those opportunities for promotion in 2018 the Plaintiff would, even on the Defendant's evidence, had a 50/50 chance of success, we have little doubt and we are certainly satisfied to the civil standard that the Plaintiff would have been promoted to a Senior Officer in 2018. In such role she would have received an enhanced salary and annual increments, as she would have started at the lowest band of pay appropriate to a Senior Officer with annual increases on 1 January each year thereafter. We were emboldened in our view as to her prospects by the Plaintiff's evidence that she was one of the few of her peers to have a university degree, everyone expected her to apply for promotion, and that those who were promoted in 2018 were either her peers or joined the prison service just before or just after her. The reason, of course, that she could not apply in 2018 was because she was incapacitated and unable to work in her former role as a consequence of the accident. As the Defendant's employment expert noted in his report, 'The relationship between the accident, Ms Williams' symptoms, and the loss of her employment appears to be quite straightforward'. She had passed the prison fitness test in 2013, 2014, 2015 and 2016 (she could not take it in 2012 owing to a difficulty with her knee). She was only able to work light duties from August to September 2017, then restricted duties from October 2017 to June 2018 when she ceased work in order to have surgery, and then was only able to return to work again on light duties from November 2018 until her employment was terminated in March 2019 owing to her incapacity and her inability to take

the fitness test. During the final period of her employment, she was invited to re-write the prison standards manual which took her two months. This would normally have been a task carried out by a member of the senior management team, i.e. the governor and deputy governor, senior unit manager and the like. This is further evidence of the high regard in which the Plaintiff was held by her colleagues. 33. Notwithstanding the Plaintiff's progress post-surgery, in late 2018 she was informed that she had two months to complete the fitness test, otherwise her contract would be terminated. 34. The Plaintiff said that she was unable to take the fitness test in early February 2019 because prior to doing so, she had to complete a form and respond to questions designed to establish, inter alia, whether she had recently had surgery and was in various respects unfit to take the test. Her answers meant that she was ineligible to take the test. The Defendant accepted at trial that the Plaintiff's failure to take the fitness test and control and restraint training was not her fault. 35. At the end of January 2019, Mr Armstrong, who had carried out the Plaintiff's shoulder operation, recorded that the Plaintiff was very worried about the forthcoming control and restraint test and was concerned that she would not pass it. He spoke to the limitation of movement that she still experienced and her grip strength which was weak but slowly improving. 36. The Incapacity Hearing minutes are instructive. The meeting was chaired by the then prison governor and attended by the Plaintiff and others on 20 March 2019. Under the section entitled 'Outcome', the following points, inter alia, are recorded: "[The governor] stated that he understood that the reason that we are here considering [the Plaintiff's] capability is because of a car accident that [the Plaintiff] was involved in 2.5 years ago that was due to no fault of her own. [The governor] acknowledged that [the Plaintiff] had given her best effort in trying to pass the fitness test and return to her former fitness level. The SOJPS had accommodated [the Plaintiff] over the past 2.5 years and had made a reasonable adjustment to her duties during this period. However a reasonable adjustment to the role could not be made permanent. The role of a Prison Officer[r] requires an individual to use force and control and restraint. This requirement was for the safety of the Officer, their colleagues and the prisoners. The SOJPS assessed this capability with a fitness test. The role of a Prison Officer cannot be changed and the fitness element is a requirement.... For the last 2.5 years [the Plaintiff] has been trying to gain back her fitness level required for this role. 2.5 years is a reasonable period for the SOJPS to have waited. [The governor] reiterated that today was not a reflection of [the Plaintiff's] competence in the role or performance of the role over the last ten years. [The governor] stated that [the Plaintiff] did not have the option of redeployment under the capability policy and (sic) but could apply for alternative work (including within the SOJ) and was being supported with this. [The governor] stated that the decision reached was for [the Plaintiff] to be dismissed due to capability with a two month paid notice." 37. The governor went on to thank the Plaintiff for her service and said that he was 'sorry that the accident has caused this'. 38. In fact, and perhaps unfortunately, no steps were taken to redeploy the Plaintiff within the wider States of Jersey. She was merely informed of what vacancies existed in the same way as would be available to a member of the public. In any event, the Plaintiff did her best, not merely to re-train, but to resume employment as we now briefly summarise. 39. Prior to the accident, the Plaintiff had taken a counselling course which she had paid for herself. She said that when moving from her secondment at the RSMU back to general prison work, she saw the merit in seeking further skills and took the course. However, in

August 2017, after the accident, she became conscious that the pain in her arm and shoulder was not resolving and that it may be that she was unable to return to front line duties in the prison. She was aware that her health was now fragile. Accordingly, she undertook a counselling skills course in 2017, completed the level 2 course in 2018, the level 3 course in 2019 and recently completed the level 4 course which included over a hundred hours of counselling. She is now a qualified counsellor. She wishes in due course to take the level 5 counselling qualification which will enable her to operate as a private practitioner. However, attaining the level 4 qualification should allow her to command a salary of £30-£35,000 although she said positions are 'rare'. 40. As to the sum that the Plaintiff invested in obtaining this counselling qualification, namely £6,700, the Defendant argued that the whole sum should be disallowed. We concluded this expenditure was reasonable expenditure by the Plaintiff in order to mitigate her loss and equip herself for opportunities that might arise (in respect of the level 2 qualification) within the prison service and (in respect of level 3 and level

- 4) without the prison service. 41. Indeed, the Defendant's employment expert observed that the Plaintiff had a 'fine record of gaining qualifications necessary for her career' and this is what she was doing, and though she is not currently employed to provide counselling per se she says, and we accept, that her qualifications have assisted her in securing the employment that she currently has. 42. After her dismissal, the Plaintiff applied for various jobs and in June 2019 returned to Jersey Bowl as an assistant manager. She did not enjoy turning back the clock and returning to a job that she had done fifteen years before, but it allowed her to gain some 'much needed self-confidence' and earn some money. She did some volunteering in December 2019 at Sanctuary House, a halfway house where many of the occupants have recently been released from custody. She assisted in mentoring, advising and supporting the residents. She was offered a voluntary counselling placement which she could record as training hours towards her qualification. Owing to Covid 19, her employment with Jersey Bowl was suspended for a period until she was re-employed. During this period the Plaintiff lost earnings and she continues to be employed at a lower salary than she enjoyed as a prison officer, let alone at the rate of pay of a Senior Officer, which we have found that she would have obtained but for the accident. 43. In August 2020, the Plaintiff began working at the Jersey Women's Refuge as a residential support worker. The salary was £25,500 per annum and there was no pension provided. From November 2021 to February 2022, the Plaintiff studied part-time to qualify as an Independent Domestic Violence Advisor through a UK domestic abuse charity. She also took on another job as a liaison officer with the Jersey Association of Youth and Friendship which provides for the homeless. She continued to work for the Women's Refuge part-time to top up her wages. Between the two roles she averaged forty hours a week. In her spare time she was doing counselling on a voluntary basis. 44. In June 2022, she applied to become a team leader at the Women's Refuge. She was successful and her employment began in October 2022. The salary is £37,672 and upon completion of her probation she will have access to the Refuge pension scheme. Both her employers have been supportive and have made reasonable adjustments on an informal basis. This has included varying her shifts when her symptoms

have flared up, swapping shifts with others if need be for the purpose of attending medical appointments, and if she is in pain. Sometimes she needs to go for a walk and stretch as some of the work at the Refuge can be quite physical. The Plaintiff explained that she always made up any hours missed due to the flare ups. 45. The Plaintiff enjoys her work at the Refuge and hopes to spend many years working there. 46. The medical evidence to which we will return shortly is that her movements will become further restricted in the future. This will occur in her late fifties / early sixties and will be another consequence of the accident. The Plaintiff said in evidence that she would do what she could to cope with such further restrictions and if needed she would adjust her lifestyle again to cope with the changes. She hopes that she will be able to remain in her current employment in those circumstances. The medical evidence 47. Prior to the trial, the Court was informed by the parties that the medical evidence in this case was agreed and that the attendance of the two consultant surgeons, Mr Gregory, a consultant orthopaedic surgeon who provided reports on behalf of the Plaintiff, and Mr Michael Walton, a consultant shoulder surgeon who produced reports on behalf of the Defendant, could be dispensed with. The Court was sceptical about this assertion and directed that the experts hold themselves available on the second day of the trial to give evidence, if requested, by video link. 48. The Court was quite right to be sceptical as although the experts may well (and indeed were for all practicable purposes) agreed as to their evidence, the parties' respective interpretations of that evidence were at extremely wide variance from each other. This was demonstrated by the fact that their assessment of the Plaintiff's future losses of pension and earnings were several hundred thousand pounds apart. Accordingly, it was necessary for the experts to give evidence in order to clarify precisely what their joint statements dated January and November 2022 respectively meant and the extent to which, if at all, their evidence differed from each other. 49. It is not necessary to examine the expert reports in detail. Both experts noted that the Plaintiff had a documented report in 2012 of pain affecting her knee, hip and lumbar spine with an MRI scan of the lumbar spine in October 2012 and a consultation that year dealing with those symptoms and also left shoulder pain. Further, in August / September 2016, the Plaintiff went to the GP complaining of neck spasm. There were other references to back pain in the Plaintiff's GP records. 50. In the joint report of the experts, they agreed that following the accident the Plaintiff complained of pain and stiffness in her neck and both shoulders. The neck pain was related to a soft tissue injury of the cervical spine and but for the accident the Plaintiff would not have developed neck pain at that time. Both doctors agreed (via slightly different mechanisms) that the left shoulder pain was a consequence of the accident either by way of direct injury or referred from the neck. Both agreed that the Plaintiff's cervical spine and left subacromial region were the site of pre-existing degenerative disease and that the ongoing neck symptoms were related to the underlying degenerative disease in the cervical spine and that the accident has been responsible for accelerating the onset of those symptoms by a period of five years; that the symptoms in the left shoulder are also related to pre-existing subacromial degeneration with, again, the symptoms accelerated by a period of five years. In evidence, Mr Gregory (with whom Mr Walton in large measure agreed) said by way of confirmation that the degenerative disease

in the neck and left shoulder were consistent with symptoms arising at some point in the future; that the Plaintiff would have developed neck and left shoulder symptoms some time in the future and that those symptoms were accelerated by five years, i.e. from late 2021 to late 2016. 51. The experts agreed that the period that the Plaintiff was absent from work was reasonable; that the Plaintiff ceased working from June 2018 following the deterioration of her symptoms immediately prior to undergoing decompressive shoulder surgery and that it was reasonable to her to return to work (to light duties) in November 2018. 52. Importantly, and crucially, both experts agreed that the Plaintiff's termination of her contract of employment with the prison service in March 2019 was a consequence of her persisting symptoms which would not have occurred at that time in the absence of the accident. Accordingly, the Plaintiff lost her job because of the accident and for no other reason. 53. The experts agreed that absent the accident, the Plaintiff would eventually have been unable to continue to work at some time during 2023 - two years after the emergence of symptoms. This was on the footing that, but for the accident, her symptoms would have arisen in late 2021 and the additional period of two years (in fact nearly 2½ years) equated to the period during which the Plaintiff was able to continue working, on and off, assisted by interventions such as the shoulder decompression, until she was unable to continue working for the prison service. Mr Gregory said the Plaintiff's shoulder symptoms would not have emerged until 2021 and would not at that stage in all likelihood have been very severe. The accident had probably led to severe symptoms occurring more quickly although of course it was accepted that even work in the prison could, depending upon the nature of the work, result in symptoms of some severity occurring. Mr Gregory said that he thought it was likely that the Plaintiff would have been able to cope with continuing at work with injections and other relief but at some time in 2023 she would have required to undergo the treatment she had, i.e. the shoulder decompression or the non-surgical interventions, which may have allowed her to continue to work. 54. He felt that there may have been a period when the Plaintiff would have been unable to pass the prison test but ultimately, she would have improved. In those circumstances he could not say whether or not her contract of employment would have been terminated. 55. Mr Gregory said that but for the accident, the Plaintiff would have been able to return to work in 2023 after the shoulder surgery. However, Mr Gregory conceded that he was not satisfied that the Plaintiff's reduction in grip strength that she now suffers from is related to the accident. It is this which would be the principal reason for her inability to pass the fitness test. The required grip strength is 32 kilograms and, as things currently stand, the Plaintiff said that she is limited to 19 to 21 kilograms. When Mr Gregory was cross-examined he accepted the fact that the Plaintiff cannot now pass the grip test is difficult to attribute to the accident. It might have been possible to attribute some degree of weakness in grip to the pain associated with the accident in early 2019 which is during the five year period when the symptoms were accelerated, but he questioned whether the degree of weakness in the grip that the Plaintiff now suffers from may be related to the accident. 56. Mr Walton said that in 2023 the Plaintiff would have failed the fitness test irrespective of the accident owing to the weakness in her grip which was not a consequence of the accident at this time. 57. In the circumstances, having regard to the

evidence of both experts, we were compelled to find that the Plaintiff would now fail the fitness test irrespective of the accident, that accordingly her claim for lost earnings and associated lost pension is, contrary to her claim, limited in that we find that on or by 31 December 2023 the Plaintiff would have in any event ceased to work for the prison service and her employment would have been terminated even if the accident had not occurred. 58. As we have already found, she would have been promoted in mid-2018 and received increments in the years since up until the end of her employment with the prison service on 31 December 2023. 59. However, both experts were also agreed that as a result of the accident the Plaintiff is likely to suffer from further restriction in her ability to work, caused by a further deterioration (again, symptoms being brought forward by five years) in her neck and left shoulder. These changes will be, in the words of Mr Gregory, 'sufficient to restrict her ability to work'. He said this would occur in the Plaintiff's early sixties and Mr Walton said it would occur as early as her late fifties. 60. In evidence, Mr Gregory said that at that stage the Plaintiff will become 'significantly restricted in her ability to work'. Any work requiring the use of her left arm would be difficult - he gave an example of any manual work or work in a production line. He said the Plaintiff may be able to continue in sedentary roles and that the shoulder pain with accompanying restrictions might not affect screen work but the neck pain may affect her ability to work in front of a screen, although that is something that might be accommodated. Mr Walton agreed with this evidence and said that there would be 'challenges for her in the labour market' with 'limitations to occur in her late fifties / early sixties'

- this would be right across the 'normal labour market'. Consequences of our findings General damages 61. Having regard to the medical evidence, which we have summarised above, we regard this as a case as falling in the Judicial College Guidelines (16 th Edition) Neck Injuries Category B 'Moderate', sub-category ii, namely cases involving soft tissue or wrenching-type injury resulting in serious limitation of movement, permanent or recurring pain, stiffness or discomfort, and the possible need for further surgery or increased vulnerability to the trauma. We note that it is said that: "This bracket will also include injuries which may have accelerated and / or exacerbated a pre-existing condition over a prolonged period of time, usually by five years or more." 62. In this case, there was not merely a bringing forward of the Plaintiff's neck and shoulder restrictions by five years, but also, as noted above, a similar acceleration of her symptoms by five years from her mid / late sixties to her early / late fifties which will result in a further restriction in her ability to work. 63. The Guidelines suggest an award between £13,740 and £24,990. The Plaintiff seeks an award of £16,000 and we agree that such an award is appropriate. Loss of congenial employment 64. It was agreed by both parties that such an award is appropriate on the facts of this case. The Plaintiff contended for an award of £10,000 and our attention was drawn to the decision of the English High Court in *Marsh v Ministry of Justice*

[2017] EWHC 1040 , where a fifty-six year old claimant who worked as a prison officer who, due to the psychiatric injury he suffered as a consequence of the defendant's conduct, lost his employment. He was dismissed after a capability hearing. At paragraph 191, the judge said: "I agree there should be an award for loss of congenial employment. The claimant was proud to be a prison officer, it was part of his identity and he enjoyed the work. I take a conventional sum, £10,000, and reduce it because of the claimant's age to £7,500." 65. We reduce the conventional award of £10,000 by reference to the fact that, in view of our findings, the Plaintiff would have lost the job that she loved in any event. The Defendant said that in these circumstances, the award should be between £5,000 and £7,500. We make an award of £6,000 in favour of the Plaintiff under this head. Special damages (i) Net loss of earnings from the day of the accident until the date upon which the Plaintiff would have left the prison service in any event, i.e. 31 December 2023. Subsequent to the trial, we had further calculations carried out by the Plaintiff's expert. This yields an award on account of net loss of earnings taking into account her promotion, which we have found that she would have secured to Senior Officer, and scheduled pay increases, in the sum of £111,706. (ii) Medical treatment This claim consists of the costs of physiotherapy, sports massage, Dr Garnett (cortisone injections), Mr Armstrong (shoulder surgery), psychotherapy and a chiropractor. The total claim is for £8,634.33. The Defendant disputed the claims for psychotherapy (just over £1,000) and a chiropractor (just over £730). In respect of the psychotherapist (the treatment was from 2018 to 2019), this was recommended and referred by the prison service appointed occupational health officer and was addressed by the Plaintiff in her evidence. We allow this claim. We accepted the Plaintiff's evidence in relation to the utility of the treatment she received from a chiropractor referred to at paragraph 17 above and accept it was a consequence of the accident. The Plaintiff dealt with the assistance she received from the chiropractor at some length in her second statement at paragraphs 3 to 5 inclusive. The support she received from the chiropractor helped her to manage her symptoms and recover more quickly. (iii) Counselling tuition and retraining We have considered this at paragraphs 39 and 40 above and we allow this in the sum of £6,700. (iv) Travel expenses in the sum of £283.03 are agreed. (v) Policy excess for the Plaintiff's car insurance - again, in the sum of £100 is agreed. Loss of earning capacity 66. In her schedule of loss the Plaintiff made a claim on account of lost earning capacity. It was not quantified in the schedule or indeed during the trial and neither party drew the Court's attention to any authorities until their closing addresses, and even then no substantial submissions were made on this issue nor was the Court's attention drawn to Kemp and Kemp . Kemp and Kemp says at paragraph 10-026: "Smith v Manchester awards are made to compensate claimants for the loss of earnings which they may suffer in future if various eventualities occur. The loss is predictable but speculative." 67. Kemp and Kemp notes that the prognosis for the claimant is the trigger for a claim for loss of capacity on the labour market. If the claimant's condition is resolved by the time of the trial or settlement or (and this example is given) the back injury has led to a five years acceleration period but the acceleration period has ended before or at trial then no such award can be made. However, 'If the acceleration

period extends into the future then an award may be made' . 68. This, for the reasons set out above, is such a case. Further, to warrant an award, it is necessary that the symptoms will interfere with the claimant's future capacity to work or earn. In our view, there may be a substantial interference with the Plaintiff's future earning capacity for the five year period with which we are concerned, although the extent of that limitation is uncertain. Both experts were clear that the Plaintiff will be disadvantaged on the open labour market in such circumstances. Having established that the injuries gave rise to the potential claim, and that such a claim may interfere with the Plaintiff's earning capacity, the third pre-condition for making such an award is the likely arrival of the claimant on the labour market at some point before normal retirement age, i.e. 67 in Jersey. Kemp and Kemp suggests that there will be a real or substantial risk that the claimant will be on the job market before retirement if there is, on the evidence, a risk of 25% or more that the claimant will lose their job between the trial and their likely retirement. 69. In *Robson v Liverpool*

[1993] PIQR Q78, the English Court of Appeal held that the trial judge was wrong to dismiss the claimant's claim for damages on the basis that the level of risk (25%) was insufficient to trigger an award. The Court of Appeal said that such a risk was high enough to be real and substantial. 70. Further, even if a claimant decides to leave their job voluntarily prior to retirement and enters the labour market then they are still *prima facie* entitled to an award. Kemp and Kemp notes: "It would not be right that a claimant should be tied to one employer simply because he had suffered an accident." 71. As to the way in which *Smith v Manchester* damages are calculated, in *Forey v London Buses*

[1992] PIQR Q48, Taylor LJ said: "Finding the appropriate figure...must necessarily be imprecise.... It must involve weighing up all the circumstances as best one can and taking a stab... One cannot say that it is precisely right because no figure can be arithmetically calculated in a case of this kind..." 72. We note from the table of awards for handicap on the labour market in Kemp and Kemp that there are several instances of the Court awarding one year's net income as appropriate compensation under this head of loss. 73. The Courts take a broad brush approach and Kemp and Kemp goes on to say that it is possible to 'glean some guidance' from various decisions which the editors of Kemp and Kemp then go on to provide. They say that there are four relevant factors: (i) The net annual income of the claimant at the time of trial . This 'should be used as the basis for any S&M award' . In this case the Plaintiff's annual net income is approximately £32,000 per annum. (ii) The length and remainder of the Plaintiff's working life. This is perhaps of limited relevance in this case as the restriction on the labour market will be of five years' duration towards the end of the Plaintiff's working life. However, the key factor to bear in mind is the length of the restriction, i.e. five years. (iii) The level of risk that the Plaintiff will be on the labour market and the number of times that is likely to occur. Each time the Plaintiff is searching for work she will be exposed to further loss as a result of the restriction on the labour market caused by her injuries. Although the Plaintiff is content in her current employment, she has only been so employed for a few months. It is in our

view very likely indeed that during the next twenty plus years, she will change job, perhaps on many occasions, and in those circumstances she will be, during the period of the five years we are concerned with, likely to be exposed to the restriction on the labour market caused by the injuries to which we have referred. We also take into account the fact that her current employer is a charity whose sources of income vary from year to year and are, on the evidence we heard, uncertain. (iv) The effect of her disability / handicap on her work capacity . The Plaintiff will be affected when she is in her late fifties / early sixties and although the extent of the disability will be substantial it is unlikely to prevent her from working altogether but will make her less attractive on the labour market. She will doubtless make full disclosure of her symptoms to any prospective employer and it is possible that she may only be able to work part-time. 74. Doing the best we can, we have decided that the appropriate *Smith v Manchester* award to make on the facts of this case is £30,000. Interest 75. Kemp and Kemp note that the general rule is that interest is awarded on damages for pain, suffering and loss of amenity from the date of service of the proceedings. We have adopted that approach in this case. We use the rate of 2.01% as invited by the Plaintiff. 76. In relation to past losses and expenses, we award interest from the date that the loss was incurred to the date of judgment

- at the rate of 2.1%. 77. It may be complicated to calculate interest on the Plaintiff's lost earnings. The loss of earnings claim covers periods where there were significant and then less significant losses and the losses are higher for the later period owing to the increments the Plaintiff would have received after her promotion. Accordingly, we award interest on the sum due in respect of each calendar year from the end of that year until payment. Future loss of earnings and pension 78. In view of our findings, the Plaintiff's claim on account of loss of future earnings beyond 31 December 2023 is disallowed. Loss of pension 79. The Plaintiff's anticipated actual pension benefit from the prison service based on her membership of the scheme to March 2019, having assumed and assuming these benefits are taken at age sixty, amount to a net annual pension income of £5,539 per annum and a tax free lump sum of £30,763. On the basis that the Plaintiff would have left the prison service on 31 December 2023 and retired at age sixty, the lump sum necessary to compensate her for the net loss of pension benefits at age sixty has been calculated at £132,659. Had she been able to continue working with the prison service on the basis we have found to 31 December 2023, she would on retirement have received a pension of £10,931 and an enhanced lump sum of £63,245. The sum we award has been discounted to take into account the benefit of the early receipt having regard to the relevant discount rate (0.5%) under the Damages (Jersey) Law 2019 . 80. This results in a total award to the Plaintiff (excluding interest) of: General damages £16,000.00 Loss of congenial employment £6,000.00 Special damages: (i) £111,706.00 (ii) £8,634.33 (iii) £6,700.00 (iv) £283.03 (v) £100.00 Loss of earning capacity: £30,000.00 Loss of pension: 132,659.00 Total: £312,082.36 Authorities *Judicial College Guidelines* (16th Edition). *Marsh v Ministry of Justice*

[2017] EWHC 1040 . Kemp & Kemp. Robson v Liverpool [1993] PIQR Q78 Damages (Jersey) Law
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