Neutral Citation Number: [2005] EWCA Civ 864

Case No: B3/2004/2521

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SOUTHAMPTON COUNTY COURT

(MR RECORDER ANDREAE-JONES QC)

SO106381

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/07/2005

Before :

LORD JUSTICE CLARKE

LORD JUSTICE SEDLEY

and

LORD JUSTICE RIX

- -

Between :

Butler & Another **Appellan**

- and -

Thompson **Respond**

- -

- -

Martin Porter (instructed by **Messrs Weightmans**) for the **Appellant**

Mark Lomas (instructed by **Messrs Moore & Blatch**) for the R**espondent**

Hearing date: Thursday 19 May

- -

Judgment

Lord Justice Sedley :

1.
The claimant was involved as a front seat passenger in a collision on 7 September 1998. The family saloon car, a Ford Escort, which her husband was driving had halted in traffic on Shooters Hill in south London. The first defendant drove the second defendant's van into the back of it, propelling it into the car in front. The claimant, whose seat was equipped with a headrest and who was wearing a seatbelt, must have been jolted first back, then almost instantly forward. There was no obvious loss of consciousness and no external head injury, but she retained no recollection of the impact. The state of her residual memory, both immediately before and in the period after the accident, became a critical issue in the case.

2.

The defendants' liability was not in dispute. The proceedings eventually issued on the claimant's behalf went to trial before Mr Recorder Andreae-Jones QC at Southampton county court on damages only. He heard evidence and argument in April and May 2004. In a judgment distributed in September 2004 and formally delivered the following month, he made findings which resulted in an award of £215,209:15. On the defendants' application he granted permission to appeal without limiting the grant to any specific issues.

3.
It was the claimant's case that her continuing disabilities were the consequence of organic brain damage which she had suffered in the crash. It was the defendants' case that there was no acceptable evidence of brain damage, so that whatever the cause of Mrs Thompson's undisputed post-accident problems, the bulk of the claim failed. It was neither side's case that the sequelae must, if they were not organically determined, be psychogenic and therefore also compensable in damages. The claimant, relying principally on the evidence of a neurologist, Dr Peter Harvey, had advanced no such secondary or alternative case, and the defendants, believing that they could defeat the single claim advanced, had no interest in offering an alternative basis for a substantial award of damages. They went no further than to suggest that the claimant's state was a continuation of a previous history of poor reactions to stress.

4.
A stand-off of this kind, not uncommon in adversarial litigation, means that the judge has to decide between two versions neither of which may correspond with the truth. Although at one point of his evidence Dr Harvey pointed out that if there was no organic basis for the symptoms, they had to be psychogenic, with similar consequences for liability, there were no takers. The same has been the case in the argument before us.

5.
In relation to the issues which have been argued before us, the recorder's essential findings were these:

(a)
The claimant had not, as she claimed to have done, suffered two weeks of post-traumatic amnesia, but she had experienced difficulties with her memory ever since the accident.

(b)
She had undergone a personality change in the wake of the accident: she had become feebler, more anxious, less able to cope at work, more easily tired, depressed.

(c)
A mistaken diagnosis of severe brain trauma**,** based on a temporary misreading of a SPECT scan in late 2000, which had caused the claimant great distress, had not been a new intervening cause of her symptoms.

(d)
It was common ground that it was possible to suffer brain damage which did not show on a scan.

(e)
The profound change in the claimant's wellbeing following the accident, which "nothing in her medical and emotional background can explain", made it more probable than not that her symptoms

were the result of brain damage. The alternative hypothesis, that she had suffered a mild whiplash injury, could not explain the sequelae.

(f)
The claimant had had to give up teaching. Her current part-time earnings of just over £2,000 a year did not represent a failure to mitigate her loss: although she had agreed that she was able to work more hours, “there is no obligation to work harder than is reasonable”.

Was it open to the recorder to find brain damage?

6.
It is first necessary to set out the recorder’s reasoning on this aspect of the case in full:

12. I turn to consider the medical evidence. Mr Harvey was originally instructed as a joint expert, p. 236. He was heavily criticised by the defendants. He admitted that he was guilty of entering the arena and that he had overlooked the fact that he was jointly instructed. He was also confronted with judicial criticism from another case. He readily accepted the criticism. He recommended further investigation which led to the SPECT Scan, and he reported on the Scan p.244 as follows: “These abnormalities are wholly compatible with the production of the disabilities which she told me about….” This opinion he later retracted. He also considered Dr Leng’s report of 8.10.2000. He is a Chartered Clinical psychologist and Consultant Neuropsychologist. At his request the Claimant underwent certain psychological tests. Dr Harvey p.246 opined that “This report stands by itself but confirms that there is a pathological basis to her complaints.” Dr Harvey’s final report is dated 7.4.04 p.289.1. His conclusions are at p.289.9 paragraph 29.1 “on a strong balance of probabilities she did lose consciousness and was briefly knocked out and this is evidence of a brief period of retrograde amnesia that is probably two weeks or more long.” He rejects Dr Schwarz’s opinion that her subsequent symptoms are due to psychological cause. On p.289.10 he says “….the whole pattern, the overall picture, is one of somebody who is cognitively not as she was before the accident and I think this is cogent evidence of her having suffered from a traumatic brain injury.”

13. Dr. Schwarz was called for the defence. He himself was suffering from personal stress when he gave evidence, as he told me. I do not consider that his evidence was thereby affected. His first report was dated 17.1.02 and was based on various reports from other medical personnel. He analysed the Claimant’s medical reports at p.381 and pointed to numerous “episodes of migraine, stress related responses and extended otitis, and episodes of head injury in August 1984 and December 1990”. He also pointed to her history of headaches and migraine and depression p.382. At p.384 he states “There is no evidence that Mrs Thompson suffered more than a mild whiplash disturbance….” “Mrs Thompson had a long history of lethargy which went on for a year in association with depression in the period before the accident”. This observation was not supported by the evidence. At p.385 he attributed the post-traumatic amnesia “to be due to a mild whiplash disturbance and much more likely to be related to anxiety particularly as she had unfortunately had a previous problem in relation to her mother’s death and her responses were much more in keeping with an acute anxiety response”. His second report is dated 19.7.02 p.388 and follows an examination of the Claimant in the presence of her husband. He took a history p.389. He was sceptical that she had been knocked out p.393. The examination did not alter his original opinion. The Claimant was unhappy with Dr. Schwarz. She feels that he had already made up his mind and often cut her short.

14. The issue as between Dr Harvey and Dr Schwarz is at the heart of this case, I prefer the evidence of Dr Harvey. Although he concedes criticisms, I was impressed by his evidence. Although I cannot accept the Claimant’s evidence of two weeks post-traumatic amnesia, I do accept that there was some

degree of that condition, and I do accept that there was some loss of memory of the period before the accident. Notwithstanding the evidence of the Claimant's behaviour immediately after the accident, and the medical records of her examination at the hospital, I find on balance of probabilities that she was indeed momentarily knocked out. It follows that the probabilities are that the accident was the cause of her subsequent difficulties at her employment and at home and in her everyday life.

15. I was referred to some of the literature but I did not find this helpful.

16. I was less impressed by Dr Schwarz. He did come to a conclusion (albeit a provisional one) before seeing the Claimant, and I am of the opinion that the Claimant's reservations about his having made up his mind may have some substance. His qualifications were called into question, but I accept he had admissible evidence to give. In the end a choice between the doctors had to be made on the evidence in the case as a whole.

17. The evidential background to the case was the profound change in the Claimant's well-being after the accident. In my judgment, nothing in her medical or emotional background can explain this, particularly not the mild whiplash injury spoken of by Dr Schwarz. She loved her job, and was good at it. She gave it up for no discernable reason other than her condition. I have been careful to recognise the dangers of the aphorism "post hoc, ergo propter hoc" (it happened after the event, therefore because of the event), but the evidence is so striking that it is compelling.

18. I do not regard the erroneous interpretation of the SPECT Scan as interrupting the chain of causation. First, it was a procedure carried out by and on behalf of both parties. Secondly, there was brain damage caused by the accident in any event. Its misinterpretation does not afford a defence. Further, before the SPECT Scan, the Claimant's problems at work had in practical terms become insurmountable and the employers knew of her condition. They terminated her employment.

7.
There is nothing logically or scientifically wrong with a diagnosis of brain damage where, although a scan fails to show such damage, the patient's history and behaviour are consistent with it. The scientific limit comes where the symptoms are such that any causative brain damage would be clinically detectable. The forensic limit comes when a more probable, or in some cases a less improbable, aetiology is advanced. But whatever his or her decision, the judge has to have, and to give, tenable reasons for it, and the second ground of appeal – to which I will come – is that even if the choice he made was open to the recorder, he has failed to explain satisfactorily why he made it.

8.
The criticism of the recorder's finding of brain damage has been advanced by Mr Martin Porter, for the defendants, on two principal grounds. The first is that the evidence of the Dr Harvey, on which it was based, was more flawed and more suspect than the recorder recognised. The second is that, even on Dr Harvey's evidence, the recorder's finding about the diary made an inference of organic injury untenable. It is convenient to take the second criticism first.

9.
At a late stage in the proceedings the claimant had produced a manuscript diary with daily entries starting the day after the accident. The overt purpose of the entries was to record how the claimant was feeling and faring, not to chronicle her life: it was, in other words, written in anticipation of this claim. But her testimony about it was that she had not made the first two weeks' entries day by day: she had made them retrospectively with the help of her family because she herself had little or no recollection of events in those two weeks.

10.
The diary entries included a few which, had they been written contemporaneously by the claimant alone, would or might have indicated some degree of short-term memory. The first day's entry, for example, says: "I have had very little sleep, when I did sleep I had dreadful nightmares." On 11 September 1998 the diary records: "Peter asked the doctor to come and see me." And six days later: "Dad came home today. Awful day today, it was so difficult telling him about the accident." In this light, the evidence that the early entries had been made retrospectively looked unhappily like the tailoring of the claimant's account to what seemed to be Dr Harvey's evidence - that true post-traumatic amnesia involved a loss, for its duration, of the entire memory function.

11.
In any event, the recorder rejected Mrs Thompson's account. He said this:

9. The Claimant kept a diary page 142 to 190.12. This starts on the 8th September 1998, the day after the accident. The Claimant stated in cross-examination, "It reads as if made at the time". Her evidence was that she had no memory of the first two weeks after the accident. Her husband suggested she keep a diary. For the first two weeks she with the help of her husband jointly reconstructed events. The defendants point to the contents of the entries, and submit that they are clearly contemporaneous. Although I am satisfied that the Claimant is an honest witness, I find it quite impossible to accept her evidence as to how the entries for the first two weeks came to be made. I find that they were made contemporaneously. It follows that there was no complete post-traumatic amnesia. However, I do accept that she suffered difficulties with her memory, such as is referred to at pages 144 and 146.

12.
The recorder's inference from the contemporaneity of the early entries that "there was no complete post-traumatic amnesia" was evidently based on Dr Harvey's testimony. In paragraph 7.1 of a report of 6 July 2000 for which he was jointly instructed, Dr Harvey had written:

7.1 ….The most accurate assessment of the seriousness of a closed head injury is made by assessing the duration of the post-traumatic amnesia (PTA). Post-traumatic amnesia is defined as ending when clear and continual memory returns. During this period the patient may have snapshots or lacunae of memory. These may be very vivid and indelibly imprinted on the memory but they remain an isolated series of snapshots in a fog of non-remembering. Sometimes PTA ends abruptly and the patient can define a point at which clear and continual memory returns but very often there is a rather gradual improvement in which there is often a residual impairment of memory and it is very difficult to state categorically that clear and continual memory has returned. ….

13.
At that stage Dr Harvey believed that there had been a two-month period of post-traumatic amnesia; but the two-week period on which the claim came to rest is also indicative of very severe brain damage. Whether it had occurred depended, however, on the claimant's and her husband's testimony. In a subsequent report of 7 April 2004 Dr Harvey wrote:

14. What I must stress is that post-traumatic amnesia is due to a failure of the patient to lay down new memories. That which is called working memory, colloquially referred to as 'short term memory', can be normal, but no memories are laid down, and thus the patient appears to be sometimes confused, sometimes disorientated, 'not with it', very often repetitive in speech, asking the same question over and over again until another topic impinges, and very often seeming rather vague, lethargic, (just occasionally disinhibited and angry), usually rather lifeless and uninterested in events around them.

There is often a querulous questioning, a puzzlement. If a patient is in the throes of post-traumatic amnesia they will not be able to write diaries that contain contents that recall events earlier that day or the day before. By definition they are incapable of laying down these memories.

15. If it is the case that Mrs Thompson's diaries were written contemporaneously, that day, by herself, then she could not have been in PTA during that time. If on the other hand they were written afterwards, as she says in the "NB" I refer to, then she would have had to have been prompted by her family – she herself would have no recollection of these events.

17. I should stress that the recording of complaints in a diary, which are present as the author writes, is compatible with the writer being in the throes of PTA.

18. If it is indeed the case that the diaries of that fortnight were written after the fortnight was over, as long as the Court is satisfied that the content reflects wholly her family's memories and not hers, then there is no reason to doubt that she was in the throes of PTA for that fortnight.

14.
It needs to be observed that nothing in these passages explains why, even if at the end of a period the patient can recall nothing that happened during it, she may not be able to retain pieces of information for a few hours. Nothing in the expert evidence suggested that a patient does not function reasonably normally during a period which is later clouded by post-traumatic amnesia. It is not suggested that such patients cannot conduct a conversation or remember whether they have brushed their teeth or find themselves in a shop without knowing why they have gone there. Indeed, and to an extent inconsistently with the unqualified statements I have just quoted, Dr Harvey's second report included this paragraph:

16. However, it must be recalled that during PTA there are very often 'lacunae' or 'snapshots' of memory which are preserved during the amnesic period. These were first recognised by the late Professor Ritchie Russell, who first described the significance of PTA, and the theme of these lacunae was picked up by later authors, notably Sir Charles Symonds and Dr Peter Nathan, writing in the forties and fifties. It might be suggested that Mrs Thompson's memories during the period of PTA which she records in her diaries, if they were written contemporaneously, represent such snapshots of memory, but if that were the case it would be remarkable that none of them have been preserved in her memory after the period of PTA is over. It is one of the features of these snapshots of memory that they are often, but not invariably, recalled in vivid detail for many years afterwards. I have seen patients on whom I have prepared reports years previously, we have met again over different matters, and a repeat history of the patient's recollections after the accident have been identical. I find it improbable that if these diaries were made contemporaneously, and the apparent recording of memory is due to the "snapshots" of memory in PTA, that Mrs Thompson would not have retained these snapshots after her PTA was over.

15.
In the witness-box, however, Dr Harvey was dogmatic: "I made my position on the diaries absolutely clear in my last report. If your Honour finds that she is capable of laying down a continuum of memory during that fortnight, she was not in post-traumatic amnesia". Pressed by the recorder, he explained that "if she could record those details where she has obviously remembered things that have happened that day … or had a bad night … she is not in PTA." Hence, evidently, the recorder's conclusion: "It follows that there was no complete post-traumatic amnesia". Hence too, however, his rider that the claimant had nevertheless suffered difficulties with her memory. Although the two

citations he gives are not particularly relevant to these difficulties, the evidence that the claimant had experienced such difficulties continuously and increasingly since the accident was overwhelming.

16.
I am bound to say that I find this part of the case troubling. I am not in the least surprised that the recorder found the diary entries to have been made on the days to which they related, but I find it very hard to see why their contents for the first two weeks or so are inconsistent with the claimant's subsequently experiencing amnesia in relation to that period. Laying down an enduring memory of those days is one thing, and the evidence was that the claimant had been unable to do so: the period had become a blank for her. Retaining sufficient short-term memory to be able to record one day that she had had nightmares the previous night is another. The latter does not appear to me, in the general scenario described by Dr Harvey, to be inconsistent with an inability to lay down longer-term memories. But since (given Dr Harvey's oral testimony) there is no challenge to this part of the judgment, we must approach the balance of the recorder's findings on the footing that there was no total post-traumatic amnesia but nevertheless, from the start, an impairment of the claimant's memory.

17.
This impairment was described in short form by the recorder in the next paragraph of his judgment:

10. After the accident, the Claimant's evidence was that she was a changed woman. The central issue is whether this is to be attributed to brain injury caused by the accident or to psychological causes. The evidence that she was a changed woman came from many sources. The theme running through her witness statements and those of her witnesses was that she was no longer able to cope with everyday life either at home or at work as a teacher. Her memory was affected, for instance she did not remember that the 24th September 1998 was her birthday Hayley p.104. She was physically weaker and unable to lift or move anything heavy. She returned to work in November 1998 for two days a week, later increased to three days a week. Her difficulties at work are described in detail in the statement of Jennifer Coldwell dated the 2nd January 2002 at p.119. She has problems recalling "what she has to do and what the children had done" paragraph 7 p.121. She found staff meetings a struggle paragraph 8. She put in extra hours to compensate for her mental difficulties paragraph 11. She never really got to grips with the new curriculum paragraph 12. When she increased her working week to five days in January 2000 she struggled with tiredness paragraph 13. She became anxious about an OFSTED visit in March 2001 paragraph 14. Eventually she was signed off work due to depression and anxiety in January 2001. Mr Thompson p.87 paragraph 2.

18.
Mr Mark Lomas, for Mrs Thompson, has taken us through some of the evidence which the recorder was summarising. It is sufficient to say that it fully justified the view that, since no more probable cause could be identified, it was the accident which had brought about the serious decline in her capacity to cope with even simple tasks, much less to function properly in the demanding job of an infants' school teacher. The critical question was how it had done so, because each side for its own reasons had made the claim turn on the claimant's establishing an organic aetiology.

19.
I do not accept Mr Porter's submission that brain damage was logically excluded by the finding that the diary had been written up day by day. That finding not only could but had to coexist with the concomitant finding in paragraph 14, cited above that there had nevertheless been partial memory loss not only post- but pre-accident: in other words that there had been some post-traumatic and also

some retrograde amnesia. The latter, on the expert evidence, was certainly diagnostic of brain damage. The recorder cannot in my view be criticised for making the most coherent findings he could out of evidence which, as often happens, failed to slot into the hard-edged categories delineated by expert witnesses and which, moreover, was directed to an issue which had been artificially restricted for forensic purposes.

20.
Nor, in the end, am I able to accept Mr Porter's criticism of the judge for having been too ready to credit Dr Harvey's testimony. Dr Harvey, now a consultant emeritus, accepted in cross-examination that he had been criticised by two judges in the recent past for falling below a proper professional standard in giving evidence. Indeed he accepted without demur that the criticism had in both cases been justified. But the recorder, as has been seen, referred in paragraph 12 of his judgment to only one of them, and that very laconically.

21.
In Stotardt v Selkent Bus Co[2003] EWHC 2135 (QB) Douglas Brown J, while declining to find that Dr Harvey, who had been instructed for the defendants, had tailored his view of the case to fit the medical theories, expressed the view that he was "a witness who should be approached with considerable care". But the recorder had also had his attention drawn to the judgment of Mr John Leighton-Williams QC, sitting as a deputy High Court judge, in Ball v London Borough of Southwark[2003] EWHC 3499 (QB). There Dr Harvey's evidence for the claimant was rejected, and the deputy judge said this about his role in the case:

71. Miss Guggenheim QC has been highly critical of Dr Harvey. She has gone so far as to say he fails to qualify as an independent expert because he is neither independent nor am expert. Reluctantly I have concluded there is some substance in this submission. In my judgment in this case Dr Harvey has not demonstrated the independence a court is entitled to expect. Having started with a differential diagnosis of brain damage or depression he then held on to his preferred diagnosis of brain damage despite numerous warning bells which should have alerted him to revisit the question. Yet his reports assert that he had endeavoured to include in his report matters which might adversely affect the validity of his opinion and that he will notify his solicitors and confirm in writing if his report requires correction or qualification.

72. His expertise is also in question. Like many court medical experts he has retired from the NHS and now only undertakes privately paid work. There can, of course be nothing wrong with that. Sound experience is essential for medical experts but it is of crucial importance that experts keep up with the change. In his first report he said the Claimant had a dysexecutive syndrome. In his second report he said he had been wrong and corrected it to frontal lobe syndrome, a description which, on Professor Dolan's evidence which I accept, is out of date and far too imprecise. He was willing to engage in debate about the merits of SPECT without having the necessary expertise and in case where the merits of SPECT and PET were in issue confessed that he had not kept up to date with the literature on PET. That is not very impressive.

22.
When, therefore, the recorder in the present case found that Dr Harvey, forgetting that he was jointly instructed, had entered the fray on the claimant's side – something which he again, disarmingly, admitted – it is Mr Porter's submission that the recorder should not have gone on to treat Dr Harvey as an acceptable expert witness whose evidence he was entitled to prefer to that of Dr Schwartz. He

should, Mr Porter submits, have treated him at least with sufficient caution to refuse to adopt the already tenuous inference of brain damage to which Dr Harvey was testifying.

23.
I see the force of this submission. At first instance it might very well have carried the day with another judge. But it is extremely difficult, in my judgment, for this court to say that the recorder, having seen and weighed up the expert evidence knowing of Dr Harvey's past and present shortcomings, necessarily went wrong in accepting his view that some form of brain damage was more probably than not the cause of Mrs Thompson's state. He had been presented, it has to be remembered, with a stark choice: either her poor state was organically determined or it had some unexplored cause, since it was not of a piece with her pre-accident history and was not explicable by a mild whiplash injury or some other, unrelated, lesion to the cervical spine. His conclusion that, in effect, some injury to the brain in the course of the double impact was the more probable or at least the less improbable of the two causes canvassed before him was in my judgment a rational and defensible conclusion on the evidence.

24.
The momentary loss of consciousness was not an independent finding: it was a final inference from the other findings. Both Dr Harvey and the jointly instructed clinical psychologist Dr Leng had pointed out that some of the functions which had been impaired were associated with the frontal lobes of the brain.

Were the recorder's reasons adequate?

25.
It follows from the foregoing that the recorder's reasons, briefly expressed though they are, meet the minimum standard set by the decision of this court in English v Emery Reimbold and Strick Ltd [2002] EWCA Civ 605. They tell the reader what the recorder has decided and, in essence, why he has decided it, without undue recourse to the evidential material. The real criticism has been that the evidential material, properly analysed, does not accommodate what the recorder has decided. I have dealt with this argument in relation to aetiology, and now I turn to the remaining heads argued by Mr Porter.

Did the misreading of the SPECT scan break the chain of causation?

26.
In my judgment the short answer to this question is no. As has been seen, the claimant was driven for a time, as anybody would be, into a state of despondency by the erroneous belief that she had suffered brain damage so severe as to be visible on the scan. But by then she was already suffering the syndrome of effects described in the judgment, and when the scare abated she was left with the enduring sequelae for which the claim was made.

27.
The recorder's finding was to this effect. He said:

18. I do not regard the erroneous interpretation of the SPECT Scan as interrupting the chain of causation. First, it was a procedure carried out by and on behalf of both parties. Secondly, there was brain damage caused by the accident in any event. Its misinterpretation does not afford a defence. Further, before the SPECT Scan, the Claimant's problems at work had in practical terms become insurmountable and the employers knew of her condition. They terminated her employment.

This is in my judgment an adequate explanation of why the recorder did not find the chain of causation to have been broken.

Was the neck pain part of the continuing injury?

28.
There was evidence that the neck pain of which the claimant complained had remitted before becoming severe again, and there was a conflict of medical evidence about its origin. Mr Walker, the orthopaedic surgeon called for the claimant, regarded the symptoms as attributable to the accident and as likely to continue. Mr Good, the orthopaedic surgeon called for the defendants, considered that the neck symptoms were unrelated to the accident.

29.
The recorder's findings on this part of the claim were these:

20. The Claimant complained of neck pain. In her first statement p.28 the Claimant states paragraph 4 "As the pain in my neck was so severe and persistent, I wore a surgical collar until sometime in October 1998 and I attended a physiotherapist ….". Paragraph 5 "now, some twelve months after the accident I still experience pain and discomfort in my neck when I do the ironing, shopping, gardening DIYs and when I lift anything heavy….". In her second statement 13.2.01 p.37 paragraph 3. She described continuing pain and practical difficulties. In her third statement 3.6.02 paragraph 3 p.49 she complains of symptoms that have worsened. The defendants argued that because the neck seemed to improve before getting worse, there is no temporal link to the accident. Mr Walker was called on behalf of the Claimant and expressed the opinion that the symptoms are attributable to the accident and will continue. Mr Good for the defendant argued that this injury should have resolved itself. But the fact remains that it had not. I accept the Claimant's evidence on this issue.

30.
Although Mr Porter has sought to reargue these issues, they were in my judgment acceptably dealt with by the recorder. There is no detectable flaw in his reasoning.

The claimant's residual earning capacity

31.
The recorder accepted – and there is no challenge to this – that Mrs Thompson, in spite of her best efforts to resume teaching, was no longer capable of doing it. She had secured a local part-time job which brought in just over £2,000 a year, and it was suggested to her and to the recorder that, within her present capacities, she could quite reasonably be doing more hours and earning more money, possibly £7,000 a year or more.

32.
The recorder's findings on this part of the case were these:

25. I have already found that the accident necessarily caused the Claimant to give up her employment as a teacher. There is a joint statement of employment experts (Mr Horton, instructed by the defendants, and Mr Doherty instructed by the Claimant) at p.509. She currently has modest part time employment earning £2017.60 p.a. She obtained this employment through a government agency. She said in evidence that she was capable of working more hours, but there is no obligation to work harder than is reasonable.

26. I find that a return to teaching is just not practical. I take the view that her current earnings are sufficient mitigation. The employment market on any view is uncertain and I regard it as reasonable for the Claimant to earn what she does.

33.
Mr Porter submits, rightly, that if a claimant chooses to do less than she reasonably could to mitigate her loss, the difference should not fall on the defendant. He points to the evidence of his expert, Mr Horton, to the effect that Mrs Thompson could either look for part-time work in the clerical sector or seek advice and possibly rehabilitation and retraining. Mr Lomas's expert, Mr Doherty, regarded a return to the open labour market as no more than a possibility, but considered that "a return to some sustained work may be possible following a successful vocational rehabilitation programme". If this were to happen, Mr Doherty considered that it would produce an earning potential in the region of £2,000 to £5,000. But his opinion was conditional on Mrs Thompson's successful rehabilitation.

34.
The background against which the recorder had to judge what, in this light, it was reasonable to expect Mrs Thompson to do in order to mitigate her loss was her account, which was not directly challenged and which the recorder clearly accepted, of just how hard she was already finding it to cope at work. Her fourth witness statement contained this passage:

19. When I made my last statement I was doing a voluntary job at Fort Amherst in Chatham consisting of mainly administration work. I continued the voluntary work until the early part of this year. After that I went to Instant Muscle which is a government scheme based on getting people back into the workplace who are on incapacity benefit.

20. This has resulted in me being back at Fort Amherst on a paid basis. I commenced this paid work on 8 April 2003. I work for eight hours per week, doing two four hour sessions for which I receive the minimum wage resulting in £137.60 per calendar month. It is hard for me to accept that I receive the same pay per month in this job that I received for one day when I was teaching. I also receive £144.30 per fortnight incapacity benefit.

21. I cope physically but sometimes come home mentally exhausted. When I was there on a voluntary basis I was working in the afternoons. I now work mornings which I find easier to cope with. I am still on the Instant Muscle Books.

22.
I do go into work if I have a bad head day but I travel by bus and my manager is aware of my situation.

23.
In the souvenir shop I stock take every three months. I kept miscounting. Now I will do it in half hourly sessions and can cope with that. I have a job learning new things and have short term memory loss. I have not been able to master using the till. There are only three buttons to press and I still cannot do it. I have an entry in my diary dated 12 May 2003 which says "Still have to master the till. A huge issue with me. John gave me a whole hour using it". There is a further entry dated 27 May 2003 which says "two weeks have passed and I couldn't open the till. No matter what I did the till and I are not compatible. Why can I not manage this simple task?"

24.

We have recently had the busiest time of the year. This is because the Fort stages “Halloween Horrors”. The Fort is a series of underground tunnels and within the tunnels they set up different scenes. Thirty people are taken around every five minutes, around different scenes to try to frighten them. People come from all over the county to visit it. It is their largest money making scheme of the year. Thousands of pounds are made over the course of six days.

25.
I was asked to work extra hours and I was also asked to man the phones. From mid September until 1 November I was going to work these extra hours in readiness for this occasion. I was asked to be responsible for taking the bookings. I found it difficult to cope with. I got into a muddle by sending wrong card receipts to the wrong people. I gave out incorrect information and wrongly charged people. I sent out incorrect tickets. I sealed down an envelope having taken a credit card booking and I couldn’t match up the credit card slip with the tickets I was putting in the envelope. I realised I had put the wrong enclosure in. I had difficulty in multi tasking, phones ringing, people queuing up for tickets, etc.

26.
John, my Manager, was aware of what was going on and at the end of the day he quietly called me in and instead he arranged for two volunteer staff who he paid to do the job instead of me doing it. It made me feel terrifically inadequate. This cost the Fort a lot of money, but John is terrifically tolerant with me.

27.
Now I stay upstairs in the Office and do dull admin tasks such as sticking on stamps. Stamp sticking on is so deadly dull. I want so desperately to have a job that challenges me but also I can cope with but I don’t know where to draw the fine line. I have recently been provided with a computer at work but I cannot take on new information. I used one in the classroom previously without any problems, because the programmes were aimed at five year olds and not spread sheets etc. I feel I am slowly learning the basics, e.g. typing letters in Microsoft Word. I will master this computer, but it will be a struggle. I will not give in.

35.
The recorder’s acknowledgement that Mrs Thompson was capable of working longer hours than she was currently working arose from a passage in her cross-examination in which she accepted that if her present workplace closed she might look for another job with somewhat longer hours, and that if it did not close she might be able to do more than her present 8 hours a week. These fairly sanguine answers had to be placed by the recorder in the context of her overall problems. He did not hold, as he might well have done, that it was unlikely that Mrs Thompson would in fact be able to find and, if she found it, to hold down a job involving significantly longer hours. He held that she was not obliged “to work harder than is reasonable”. This seems to me to misstate the legal test, or at least to put it too elliptically. The recorder should have asked whether it was reasonable in all the circumstances to expect Mrs Thompson to earn more than she was by then earning; or, more drily, whether her earning capacity was greater than her earnings.

36.
On the evidence before the recorder, I think it was, but not by much. The prospect of finding an employer who would accommodate the claimant’s inability to do simple tasks except by slow stages cannot have been high. If, probably after retraining, she found such an employer, or if she stayed with her present one, it is unlikely that she would be able to work many more hours without again

succumbing to stress. On the other hand, she was showing a creditable determination to make the best of her situation. Taking all these considerations and contingencies together, I would put the claimant's residual earning capacity at £3,500 a year for the foreseeable future, as against the £2,000-odd she now earns. The award should be recalculated accordingly.

37.
To this extent only I would allow this appeal. For the rest, I would dismiss it.

Lord Justice Rix:

38.
I agree, for the reasons given by both Lord Justice Sedley and Lord Justice Clarke.

Lord Justice Clarke:

39.
Both in the course of the argument and in the course of my subsequent consideration of this appeal I have had some doubt as to whether the judge was entitled to reach the conclusion that the claimant's continuing disabilities were the consequence of brain damage which she suffered as a result of the accident. However, I have ultimately reached the conclusion that, for the reasons given by Sedley LJ, the answer is yes.

40.
It is clear from the recorder's judgment that he was struck by the evidence of the profound change in the claimant since the accident which was not explicable either by anything which had happened before the accident or by a mild whiplash injury. It is true that, as Sedley LJ has demonstrated and the recorder was aware, Dr Harvey was not a satisfactory witness but nor, in the recorder's opinion, was Dr Schwartz. In these circumstances the recorder was, as it seems to me, entitled to prefer the opinion of Dr Harvey.

41.
As I read his judgment, the recorder held that on the balance of probabilities the claimant's post-accident condition was caused by the accident and thus by the first defendant's negligence. In all the circumstances he was, in my opinion entitled so to hold. It follows that I agree that the appeal should be dismissed save as to earning capacity.