[2017 Gib LR 229]

WALKER v. ORMROD ELECTRICITY SUPPLY COMPANY LIMITED

SUPREME COURT (Jack, J.): August 10th, 2017

Tort—personal injuries—damages—ankle—serious injury causing severe mobility difficulties and continuing pain—quantum

The claimant sought damages for personal injuries.

In 2011, the claimant, while working for the defendant at its electricity generation site, had fallen 3.5m. and sustained injuries to both ankles, the injury to the left ankle being particularly serious. The claimant now suffered post-traumatic arthritis in his right ankle and permanent pain in his left. It was likely that he would require further surgery in the future to mitigate some of his symptoms, with the risk that he might be permanently wheelchair-bound. The claimant had severe mobility difficulties. He took daily analgesics. Before the accident, the claimant's job had involved monitoring diesel use at the generators and driving a bowser for diesel fuel (he had held an HGV licence). When he returned to work after the accident he had been given a sedentary role for a lower wage. He remained in this role when a new employer ("Bolaños") took over the electricity generating station. His social life was limited, he could no longer play sports and his pre-existing depression had also been exacerbated by his injuries. The claimant's life expectancy was 48.22 years.

The claimant sought an award of damages. Liability was admitted, subject to a deduction of 20% for contributory negligence.

Held, awarding damages as follows:

(1) The claimant would be awarded £3,845 for care provided to him by his aunt after the accident. This was based on (i) 3 hours per day, at £7.19 per hour, for the first 5 weeks after his discharge from hospital; and (b) 10 hours per week, also at £7.19 per hour, for a further 43 weeks (paras. 13–16).

(2) In respect of minor heads of damage, £100 for additional housing costs had been agreed as well as £402.39 travel costs for medical treatment. The claimant would not be awarded £100 p.a. for general house maintenance because he had given no evidence of anyone doing such work. The claim for £375 for prescription costs would be allowed in full. The defendant did not challenge the claimant's assertion that he had to take painkillers every day (paras. 17–19).

(3) For past loss of earnings, there had been some difficulty in establishing the claimant's pre-accident earnings. He had worked more overtime immediately before the accident than he would normally have done because his co-worker had been disqualified from driving for a period of time. He would be awarded £26,701.36 for earnings lost in the 97 weeks after his accident (to January 31st, 2013) during which he remained in the defendant's employment, plus £38,570.68 for the earnings lost in the 231 weeks (from February 1st, 2013 to August 10th, 2017) in which the claimant had continued, in his new and less well paid position, to work for Bolaños. For the first 36 weeks after the accident, the claimant's weekly loss was based on a figure that included the overtime he would likely have worked whilst his colleague remained disqualified. The claimant would also be allowed £4,097.81 for days when he had been off sick and not paid by his employers. As he had been receiving a disablement benefit pension, by s.15 of the Contract and Torts Act 1960 he had to give credit against his loss of earnings claim for half the amount received in the 5 years from the accident. The agreed deduction was £4,700.08 (paras. 20–29).

(4) For future loss of earnings, the claimant would be awarded £121,375.50. On the basis that the claimant would have earned £522.51 per week but for the accident, and was now earning an average of £441.92 per week, the weekly loss would be £80.59. As the claimant could not claim his state pension until 65, it was unlikely that he would retire before then. Working until 65 would give the claimant another 26.2 years of working life. Using the *Ogden Tables* with a discount rate of minus 0.75% gave 28.9632 years' purchase. The appropriate award for loss of future earnings was therefore £80.59 × 52 × 28.9632, *i.e.* £121,375.50 (paras. 30–37).

(5) The court would also make a *Smith* v. *Manchester Corp*. award of £54,341.04. This reflected the risk that, should the claimant be out of work, his disabilities would make it more difficult to obtain an alternative job. Although *Smith* v. *Manchester Corp.* awards were now less common in England because they were incorporated in the general award for future loss of earnings, in Gibraltar the statistics did not exist which allowed the compilers of the *Ogden Tables* to calculate the risk in England and Wales of a disabled person not obtaining work as readily as an able-bodied person. In Gibraltar the court must consider making a *Smith* v. *Manchester Corp*. award instead. In the present case, the claimant was severely disabled and his fear that he might become wheelchair-bound was well-founded. An award for two years, calculated at £522.51 a week, would be appropriate (paras. 38–42).

(6) The claimant would be awarded £82,750 for general damages. The court continued to hold the view, as expressed in recent cases, that the English *Guidelines for the Assessment of General Damages in Personal Injury Cases* issued by the Judicial College of England and Wales should no longer be followed as they were not appropriate for local conditions in

Gibraltar. In Gibraltar, there was low unemployment, good wages, low tax, excellent health care and cheap government housing. Life expectancy was nearly two years higher than in the United Kingdom. The court instead applied the *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*. Based on those Guidelines, the claimant fell within the category for ankle injuries: "7(M)(a) (Very Severe) £48,500–£100,000." The sum of £82,750 sought by the claimant for pain, suffering and loss of amenity was amply justified in the circumstances (paras. 44–60).

Cases cited:

(1) *Bernal* v. *Riley*, 2016 Gib LR 314, considered.
(2) *Cassidy* v. *Gibraltar Health Auth*., 2017 Gib LR 117, referred to.
(3) *Miller* v. *Imperial College Healthcare NHS Trust*, [2014] EWHC 3772 (QB), distinguished.
(4) *Mitchell* v. *Mulholland (No. 2)*, [1972] 1 Q.B. 65; [1971] 2 W.L.R. 1271; [1971] 2 All E.R. 1205; [1971] 1 Lloyd's Rep. 462, referred to.
(5) *Nutbrown* v. *Sheffield Health Auth.*, [1993] 4 Med. L.R. 187, referred to.
(6) *Povey* v. *Governors of Rydal School*, [1970] 1 All E.R. 841, referred to.
(7) *Scott* v. *Att. Gen*. *(Bahamas)*, [2017] UKPC 15; [2017] 3 LRC 704, considered.
(8) *Simmons* v. *Castle*, [2012] EWCA Civ 1039; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334; [2012] C.P. Rep. 43; [2012] 5 Costs L.R. 931; further proceedings, [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334; [2013] C.P. Rep. 3; [2012] 6 Costs L.R. 1150, referred to.
(9) *Smith* v. *Manchester Corp*. (1974), 17 K.I.R. 1, followed.
(10) *Sullivan* v. *Care Agency*, 2017 Gib LR 131, considered.
(11) *Wells* v. *Wells*, [1999] 1 A.C. 345; [1998] 3 W.L.R. 329; [1998] 3 All E.R. 481; [1998] IRLR 536; [1998] 2 FLR 507; [1998] P.I.Q.R. Q56; (1998), 43 BMLR 99; [1998] Fam. Law 593, referred to.

Legislation construed:

Contract and Torts Act 1960, s.15(1):

> "In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of any benefits under the Social Security (Employment Injuries Insurance) Act during the five years beginning with the time when the cause of action accrued."

Supreme Court Act 1960, s.15: The relevant terms of this section are set out at para. 49.

R. Devereux-Cooke for the claimant;
I. Winch for the defendant.

1 **JACK, J.:** On March 23rd, 2011, the claimant ("Mr. Walker") was working at the defendant's ("OESCO") electricity generation site at the Europa Business Centre on Queensway Road, Gibraltar. His primary duty was monitoring diesel use at the individual generators. This included driving a bowser for diesel fuel but he had other general tasks. Whilst changing a spotlight above the no. 6 engine, he fell 3.5m. and sustained injuries. Liability has been admitted, subject to a deduction of 20% for contributory negligence. This is the trial of quantum.

2 In assessing quantum, I shall only make the deduction of 20% at the end of the judgment. Until then all figures in this judgment are on a full liability basis.

The facts

3 Mr. Walker's injuries are recounted in two reports from Mr. Hammad Malik, a consultant orthopaedic surgeon, who was instructed as joint expert. His reports are summarized by Mr. Winch, who appeared for OESCO, as follows:

"[The first report, October 14th, 2014:]

1. The Claimant previously had a fracture of the shaft of the right fibula/tibia in 2004, treated with open reduction and internal fixation and later removal of metalwork. [This was caused by a football accident.]

2. The Claimant suffered low back pain in the past, as evidenced by x-rays taken in 2009. The Claimant also suffered with depression and migraines in the past.

3. As a direct result of the index accident the Claimant sustained a grade 2 open comminuted intra-articular left distal tibial fracture and a Ruedi-Allgower grade 3 closed pilon fracture of the right distal tibia.

4. The most recent x-rays of the left ankle in August 2012 demonstrate the fusion to be intact, and both tibia and fibula left side having united.

5. The most recent x-rays of the right side, in January 2012, showed a union of the distal tibia fracture but the degenerative disease of where the tibia is jointed to the ankle. However, the non-union of the right fibula arises from the previous football accident.

6. But for the index accident the Claimant would have only suffered from intermittent, minimally intrusive right leg pain from the 2004 accident.

7. Current symptoms in the left ankle will be permanent.

8. He is at no risk of degeneration in the left tibia ankle.

9. [The expert] is prepared to attribute 'a degree' of low backache to the accident, subject to seeing the [general practitioner's] records which were not available to him.

10. It would have been reasonable for the Claimant to have abstained from work for a period of up to twelve months but the Claimant states there was also a degree of psychological issues with regard to his delay in return to work.

. . .

[The second report, February 8th, 2017:]

1. The accident led to an approximate 12 months [of] moderate aggravation of pre-existing chronic low back pain. Any described low back pain beyond the above prognostic period is more likely to represent constitutional factors.

2. He does not fulfil the Budapest criteria for chronic regional pain syndrome.

3. Current symptoms and stiffness around the left ankle/foot will be [a] permanent degenerative disease of the ankle joint.

4. In 10 to 15 years the Claimant will require removal of metalwork from the right tibia and ankle joint fusion.

5. The Claimant is fit for office-based/sedentary work or light manual activity of an intermittent nature, with regular rest breaks."

4 This summary does not do full justice to the severity of the injury to the left ankle. Mr. Malik commented (first report, paras. 116–117) that "imaging . . . confirmed that he had a very comminuted fracture of the left ankle joint with disruption of the joint surfaces and extension of a complex fracture pattern to the distal tibia. His case was discussed with a surgeon in the [United Kingdom] and it was thought that the left ankle joint was unreconstructable." Mr. Devereux-Cooke described the left ankle as being "smashed." The X-rays bear this out.

5 Mr. Malik noted that Mr. Walker (first report, paras. 121–123)—

"subsequently underwent full union of the left tibial fracture and it appears that a sound arthrodesis has been obtained with regard to the tibio talar and subtalar joints on the left hand side. The Claimant

subsequently underwent removal of locking bolts from the left tibial implant although it does not appear that this has brought about much in the way of a decrease in described symptoms. On the right hand side it appears the Claimant has remained very symptomatic and the most recent x-rays I have had view of from 2012 confirm that he has developed post traumatic arthritis on the right hand side."

6 In his second report, Mr. Malik said (paras. 77–78):

"[I]t is more likely than not that in the next 10 to 15 years from the date of this report that the Claimant will require procedure in the form of removal of metalwork from the right tibia and ankle joint fusion. As a best estimate chances of success of such procedure would be approximately 90% with the aim of decreasing pain from end-stage degenerative disease although without increased function or range of motion given that the ankle joint will be fused."

7 When giving evidence to me, Mr. Walker explained that he was worried that, if both his ankles were fused, he would be confined to a wheelchair. As it was, he could not walk any distance without his feet swelling up with great pain the following day. He added that before the accident he had been a keen sportsman with a particular interest in athletics. That had completely ended. His social life was limited because he had difficulty getting out and about. He was having to take daily oral analgesics and, particularly during the Levanter, had to have injections of painkillers as often as twice a week.

8 He had had a heavy goods vehicle ("HGV") driving licence, which was necessary to drive the bowser, but because most lorries require the use of a clutch he had had to surrender the licence for that class of vehicle. Mr. Walker was a patently honest witness who did not exaggerate his injuries. His evidence was not substantially challenged by Mr. Winch.

9 Mr. Walker, before the accident, had periodically suffered depression. His depression was thus not caused by the accident. Nonetheless, if a depressed person suffers a serious personal injury, the effect of that injury on the depressed person is liable to be greater than that on a person who is not depressed.

10 Mr. Malik's conclusion was that (second report, paras. 80–81)—

"given the severity of the lower limb injuries that the Claimant sustained, on balance, as a direct result of the index accident I would regard his future position on the labour market as being permanently altered. I would regard him as currently being only fit for office-based/sedentary work or light manual activity of an intermittent nature but not at a low level with the provision of regular rest breaks and lack for need for any prolonged period of mobilisation, standing or repetitive stair climbing."

Special damages

11 Mr. Walker was born on September 28th, 1978 and is thus 38 years, 9 months old. His case is that he would work until he was 65. OESCO say he would have retired at 60.

12 Mr. Walker's advisers say his life expectancy is now 48.22 years. This is slightly more than the figures in the most recent *Ogden Tables* which give figures of 47.87 years for a 38-year-old female and 46.82 for a 39-year-old male. The *Ogden* figures are based on United Kingdom mortality figures from 2008, so may need adjustment in any event to reflect any general post-2008 increase in life expectancy. They may also need to be adjusted to reflect Gibraltarian life expectancy, which I understand is nearly two years greater than in the United Kingdom. In the event, Mr. Winch did not dispute the 48.22 year figure, so I shall use that.

Care after the accident

13 The first head of special damage is care after the accident. This is divided into the initial period of 4–6 weeks after discharge from hospital and then a further period when Mr. Walker stayed with his aunt. In the first period Mr. Walker claimed for his aunt's services at £7.19 per hour, 3 hours a day, 7 days a week, for 6 weeks ($3 \times 7 \times 6 = 126$ hours; 126 hours $\times$ £7.19 = £905.94). OESCO offers 2 hours a day, 7 days a week for 4 weeks at £7.19 per hour.

14 In the second period, Mr. Walker claimed 2 hours for 6 days a week for 43 weeks ($2 \times 6 \times 43 = 516$ hours; 516 hours $\times$ £7.19 = £3,710.04). OESCO offered 10 hours a week for 30 weeks at £7.19 per hour.

15 Mr. Winch pointed out that Mr. Walker's aunt had not given evidence. Mr. Walker's evidence had changed. In his witness statement he had said in the initial period his aunt had worked 4 hours a day.

16 In my judgment, 3 hours' care a day in the initial period seems likely in view of Mr. Walker's needs at that time. In view of the uncertainty as to the length of this initial period, I will award damages for 5 weeks. This gives £754.95, say £755 ($3 \times 7 \times 5 \times$ £7.19). In the second period, the need for care for 43 weeks is likely, but there is no evidence that more than 10 hours a week was needed or given. Accordingly, for this period I award £3,091.70, say £3,090 ($10 \times 43 \times$ £7.19). The total award under this head is therefore £3,845.

Minor heads of damage

17 Additional housing costs were agreed at £100, as were travel costs for medical treatment of £402.39.

18 Mr. Walker sought to claim £100 p.a. for general house maintenance. The difficulty with this head is that Mr. Walker gave no evidence about anyone else doing any work. After he had finished giving evidence, Mr. Devereux-Cooke said on instructions that Mr. Walker had had to employ someone to paint his flat. In the absence of evidence, however, I have to disallow this head completely.

19 Mr. Walker claimed 150 prescriptions of painkillers at £2.50 each. Mr. Winch said that he could not cross-reference this figure to the receipts produced by Mr. Walker. I note that Mr. Winch did not challenge Mr. Walker's assertion that he was having to take painkillers every day. In the light of that concession, the number of prescriptions does not seem excessive, given that Mr. Walker was taking at least two different analgesics a day. I allow the claim of £375 in full.

Past loss of earnings

20 The major areas of dispute were past and future loss of earnings. As regards past loss of earnings, Mr. Walker said that in the 13 weeks prior to the accident, he earned an average of £640.59 net per week. For 97 weeks after the accident, to January 31st, 2013, he remained in OESCO's employment, working in the control room in a sedentary capacity but at a generally lower wage. He received £35,435.87 in that period. His loss was therefore £26,701.36.

21 Initially, there was a dispute as to whether Mr. Walker had received £35,435.87 or £37,353.41 in this period after the accident. The figure of £35,435.87 is, however, correct. (Some six months of wage records were initially unavailable.)

22 At the beginning of February 2013, a new employer took over the electricity generating station, Bolaños General Mechanical Engineers ("Bolaños"). Mr. Walker's position continued as before. The schedule of loss divides the period into 78 weeks from February 1st, 2013 to October 30th, 2014. Based on pre-accident earnings of £640.59 per week, his losses on the same basis in this period were claimed at £16,618.60, comprising £49,996.02 notional earnings less £33,347.42 actually received. In the period October 31st, 2014 to July 17th, 2017 (138.57 weeks), the loss is claimed at £27,640.04 (£88,766.56 less £61,126.52).

23 Mr. Winch argues that the pre-accident figure of £640.59 is too high and should be reduced by 25%. The diesel service was performed by two men: Mr. Walker and a Mr. Gonzalez. Mr. Walker's evidence was that he and Mr. Gonzalez had split such overtime as was available. However, Mr. Gonzalez was disqualified from driving for 12 months following a drink-driving conviction. (The precise date is not in evidence.) As a result Mr. Walker was doing more overtime immediately prior to the accident than would have been normal.

24 The difficulty is establishing what the pre-accident earnings figures for Mr. Walker would have been were it not for Mr. Gonzalez being disqualified. In the pre-disqualification period, there was a spike in the week of January 5th, 2011 where Mr. Walker's net pay was £949.90, but there were weeks, like December 15th, 2010, where he earned no overtime at all. In the week of March 16th, 2010, immediately before the accident, his take-home pay was £345.03 with no overtime.

25 Nonetheless, from December 1st, 2010 there is general increase in Mr. Walker's take-home pay. It looks as if that may be when Mr. Gonzalez was disqualified. Mr. Walker's net earnings from July 7th, 2010 to November 24th, 2010 (21 weeks) were £10,972.80, a weekly average of £522.51. This is £118.08 (18%) less than £640.59.

26 In my judgment, it is right to make that reduction. The total period from the accident to July 17th, 2017 is 328 weeks (rounding the week down). Mr. Gonzalez was disqualified for 16 weeks before the accident and therefore also for 36 weeks after the accident. During those 36 weeks, Mr. Walker's weekly loss should be based on £640.59 and thereafter, on £522.51. The loss of earnings claim therefore needs to be reduced by £34,479.36 (£118.08 × [328 – 36]).

27 The loss of earnings figure to July 17th, 2017, plus 4 weeks (rounding the weeks up) to the date of the handing down of the judgment is therefore £38,570.68 (£26,701.36 + £16,618.60 + £27,640.04 + £2,090.04 – £34,479.36)

28 In addition, Mr. Walker claimed for days when he had been sick and not paid by his employers. It was common ground that the deductions amounted to £4,097.81. Mr. Winch disputed this claim on the basis that it was not proved that all of this head was related to the accident. He pointed out that Mr. Walker had had a motorcycle accident on January 13th, 2016 and had fallen down some stairs on July 26th, 2016. The difficulty with these points is that Mr. Walker does not in fact seem to have taken time off work in connection with these two accidents. There is no evidence he was off sick for any other reason than the accident. Given Mr. Walker's evidence that his legs would swell and become particularly painful if he overdid any walking, the likelihood in my judgment is that these absences were caused by the accident. I therefore allow £4,097.81 in full.

29 Mr. Walker has been receiving a disablement benefit pension. By s.15 of the Contract and Torts Act 1960, he must give credit against his loss of earnings claim for half the amount received in the five years from the date of the accident. It is agreed that the deduction should be £4,700.08 (half of £9,400.16).

Future loss of earnings

30 The claim for future loss is complicated by the fact that Gibraltar will soon have a new electricity generating station. Bolaños have no involvement with the new power station. All Bolaños staff, including Mr. Walker, will be made redundant when the new installation starts. The best estimate is that that will occur in January 2018. (It was not submitted to me that there would be a transfer of undertakings under Part VIB of the Employment Act 1932 between the old and the new power stations.)

31 Mr. Devereux-Cooke puts Mr. Walker's case in the period after January 2018 on the following basis. But for the accident, Mr. Walker would have earned £640.59 net per week. Instead he is now earning an average of £441.92 net per week, a loss of £198.67 per week or £10,330.84 p.a. Working until 65 gives him another 26.2 years of working life. Using the *Ogden Tables* with a discount rate of minus 0.75%, gives 28.9632 years' purchase. The claim is thus for £299,214.18 (£10,330.84 × 28.9632).

32 Mr. Winch took a number of points in relation to this. First, he produced the most recent collective bargaining agreement of August 2016 between Unite the Union and the Construction and Allied Trades Association. This showed HGV drivers receiving weekly basic pay of £275.88. Even with overtime, this would still mean, he submitted, that Mr. Walker (assuming the accident had not happened) would have been earning less than the £441.92 per week figure for future earnings on which Mr. Devereux-Cooke's calculation is posited. There was therefore no future loss at all.

33 Secondly, he disputed that Mr. Walker would have worked until he was 65. More likely, he submitted, would be that Mr. Walker would retire at 60.

34 Dealing with Mr. Devereux-Cooke's figures first, for the reasons I have given, I consider that on his methodology the weekly loss would be £80.59 (£522.51 – £441.92). This reduces the claim to £121,375.50 (£80.59 × 52 × 28.9632).

35 Secondly, so far as the retirement age is concerned, the difficulty with Mr. Winch's submission is that Mr. Walker can first claim the state pension at 65. It is unlikely that someone in Mr. Walker's position (whether or not the accident had happened) would be able to save sufficient to retire earlier. In my judgment, he is unlikely to be able to retire earlier than 65. However, I note that Mr. Walker would not be required to make social security payments after the age of 60, thus increasing his claim between the ages of 60 and 65. Mr. Devereux-Cooke's calculations do not take that into account. It seems to me that

ignoring this particular element of social security gives due allowance for the risk that Mr. Walker would have retired earlier than 65.

36 Thirdly, as to Mr. Winch's point on the collective bargaining agreement, my difficulty is that I have no evidence on how widely applied these terms are. Nor do I have information on what a realistic take-home pay might be for an HGV driver employed on these terms. The overtime terms are fairly generous (for example, double-time on Sunday and double-time after four hours overtime at time-and-a-half on a Saturday). Moreover, even taking Mr. Winch's case at its highest, it seems to me inevitable that a man with severe mobility difficulties like Mr. Walker would be paid less than a man, such as an HGV operator, without such difficulties. Mr. Walker left Bayside school at 15 without GCSEs. He is enthusiastic for work, but without qualifications his options are limited. I would have no difficulty finding that he would suffer an ongoing loss of £80.59 per week *vis-à-vis* a non-disabled man.

37 I therefore find that the appropriate award for future loss of earnings is £121,375.50.

Smith v. Manchester Corp.

38 Both parties accepted that I should make a *Smith* v. *Manchester Corp.* (9) award. Such an award reflects the risk that, if Mr. Walker should be out of work, with his disabilities he will find it more difficult to find an alternative job. Mr. Devereux-Cooke submits that two years would be appropriate; Mr. Winch, six months.

39 It is now less common in England to make such an award. This is explained in Kemp & Kemp, *The Quantum of Damages* (looseleaf) (2017 update), as follows (vol. 1, para. 10–025, at 10027):

> "The scope for making separate Smith v Manchester awards alongside multiplier/multiplicand awards for future loss of earnings was restricted when the Ogden Tables 6th edition separated off the multipliers for the claimant's 'but for earning capacity' from those applied to the 'residual earning capacity'. By doing so and taking into account the claimant's disability in the multiplier for the residual earning capacity, at a stroke the Ogden committee incorporated *Smith v Manchester* awards into the general award for future loss of earnings. So if the trial judge decides to use the Ogden 7th edition for the calculation of future loss there will probably be no need to claim a separate Smith v Manchester award."

40 Awards based on this method are usually higher than if a separate *Smith* v. *Manchester* award is made. The difficulty in Gibraltar is that the statistics do not exist which allowed the compilers of the *Ogden Tables* to calculate the risk in England and Wales of a disabled person not obtaining

work as readily as an able-bodied person. The court here must therefore consider making a *Smith* v. *Manchester* award instead.

41 Looking at matters in the round, I accept Mr. Devereux-Cooke's submission. Mr. Walker is severely disabled. His fear that after the fusion of his right ankle he may be wheelchair-bound is well-founded. Even before such a deterioration, his reduced mobility will make him an unattractive candidate in the job market. Mr. Winch prays in aid the fact that unemployment in Gibraltar is currently low. That, however, cannot be guaranteed for the next 26 years, particularly with the uncertainties caused by Brexit. Moreover, such unemployment as there is is likely disproportionately to affect disabled persons such as Mr. Walker. Two years in my judgment is appropriate.

42 This leaves the determination of the multiplicand. Mr. Devereux-Cooke's schedule of loss is based on £640.59 per week, but that is, in my judgment, wrong. The figure should be £522.51 per week or £27,170.52 p.a. The total *Smith* v. *Manchester* award is therefore £54,341.04.

43 The cost of future surgical treatment for the removal of metalwork and the fusion of the right ankle has been agreed at £7,567.50. There was a dispute as to whether this included non-remunerated care. In my judgment, Mr. Malik (who produced the figure for future medical costs) would be unlikely to be including any figure for this. When I indicated this view to Mr. Winch, he agreed the figure for future care at £1,407.62.

General damages: the submissions

44 I turn then to general damages. Mr. Devereux-Cooke invited me to apply the Judicial Studies Board for Northern Ireland's *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 4th. ed. (2013) ("the Northern Irish Guidelines"). He contended that Mr. Walker's injuries fell in the category "Ankle [Injuries]: 7(M)(a) (Very Severe) £48,500–£100,000." He submitted that not less than £82,750 was appropriate. Category 7(M)(a) provides (at 36):

> "Examples of injuries in this bracket include: Transmalleolar fracture of the ankle with extensive soft tissue damage resulting in deformity and the risk that any future injury to the leg might necessitate a below knee amputation. Bilateral ankle fractures causing degeneration of the joints at a young age necessitating arthrodesis."

45 The next category down, 7(M)(b), has a range of £42,000–£85,000 with, as can be seen, a large overlap with 7(M)(a). The Guidelines say (at 36):

> "Awards in this bracket are justified where the ankle injury is severe necessitating an extensive period of treatment and / or lengthy period in plaster or with pins and plates inserted and where there is

> significant residual disability by way of ankle instability, severely limited ability to walk *etc*. The position within the bracket will, in part, be determined by, *e.g.* a failed arthrodesis, regular disturbance of sleep, unsightly operational scarring and any need to wear special footwear."

46 Mr. Winch submitted that I should apply the English *Guidelines for the Assessment for General Damages in Personal Injuries*, 13th ed. (2013), issued by the Judicial College ("the English Guidelines"). He agreed that the injuries fell in the very severe category: "Ankle: 7(N)(a) £38,050–£55,000." This was without the *Simmons* v. *Castle* (8) uplift of 10%, now generally applicable in England. He submitted that £45,000 would be appropriate.

Bernal v. Riley

47 In *Bernal* v. *Riley* (1), I decided, at least as an interim measure, that when assessing general damages for personal injury the court should apply the Northern Irish Guidelines in preference to the English Guidelines. Mr. Winch invited me not to follow that decision.

48 In *Cassidy* v. *Gibraltar Health Auth.* (2), I held that it was open to me to reconsider my decision in *Bernal* v. *Riley*. Mr. Devereux-Cooke did not submit that I was bound by *Bernal*. Since I decided *Bernal* without the benefit of adversarial argument, it is in my judgment wholly appropriate that I should revisit the issues raised in it.

49 Mr. Winch submitted that the court was obliged to apply the English Guidelines under s.15 of the Supreme Court Act 1960, which provides:

> "The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

50 In *Bernal*, I dealt with this submission as follows (2016 Gib LR 314, at paras. 66–71):

> 66 Is the Supreme Court of Gibraltar bound to follow the English Judicial College Guidelines? The Guidelines are effectively the distillation of guideline cases decided mainly by the Court of Appeal from the 1960s onwards. As such they stand to be treated in the same way as the guideline cases themselves. They are in my judgment part of the practice of the English High Court, so that s.15 of the Supreme Court Act 1960 applies.

67 That does not mean, however, that this court is necessarily bound to follow them. First, as the passage from *Wright* v. *British Rys. Bd.* . . . I have cited shows, guidelines are not binding law. A judge at first instance is entitled—and indeed obliged—to go outside them if it is appropriate in a particular case. Accordingly, if the English guidelines are not appropriate for Gibraltar, then the court should not in my judgment follow them.

68 Secondly, s.2(1) of the English Law (Application) Act 1962 (omitting an irrelevant exception) provides:

> 'The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require . . .'

69 Insofar as the English guidelines are part of the common law of England, they stand to be modified if they are unsuitable to the circumstances of Gibraltar.

70 Thirdly, the rule of substantive law for assessing the quantum of damages is that defined by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* . . . as (5 App. Cas. at 39)—

> '. . . that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'

71 Insofar as the English Judicial College Guidelines do not do that, the courts in Gibraltar should not in my judgment follow them. Practice must give way to substantive law."

51 Mr. Winch did not advance substantive arguments against these points and cited no authority for the proposition that they were wrong. Indeed, he accepted that, because the Guidelines are just guidelines, it was open to the court to go outside them. Accordingly, in my judgment, s.15 of the 1960 Act does not oblige me to follow the English Guidelines.

52 Mr. Winch's second argument was that I was wrong to conclude that the standard of living in Gibraltar was better than in the United Kingdom. He argued in his skeleton:

> "18. . . . [M]easuring standard of living is conceptually very difficult, taking into account the different level of public services, for example, and more prosaically, the [different] items on which people spend money. The UK and Gibraltar also have very different tax regimes.

19. One method of comparing relative standard of living would be to look at average income, and this is made more straightforward between the UK and Gibraltar due to the common currency (in effect). However, even this is complicated by the significant differences in UK average incomes between, for example, Central London and the less prosperous regions.

20. Another method is to compare GDP [Gross Domestic Product] per capita and [this] is referred to at length in *Bernal* v. *Riley* which highlights the apparent differences between Gibraltar and the UK.

21. Be that as it may, it is also fair to comment that the dispassionate onlooker may not immediately feel that the average Gibraltarian is significantly better off than his UK counterpart.

22. This may be accounted for by the significant number of cross-border workers contributing to the Gibraltar economy, but spending the lion['s] share of their earnings in Spain; the unusually large number of high net worth individuals who would tend to distort per capita figures, and the greater number of Gibraltar companies per head of population, with profits being distributed outside Gibraltar."

53 Mr. Winch submitted that the median income of full time weekly paid employees as of October 2014 [*sic*] was in the region of £24,000. He exhibited to his skeleton Table 8.13 ("Full-time Weekly-Paid Adult Employee Jobs, Private Sector, 1992–2015") from the Abstract of Statistics 2015).[1] However, the relevant table in my judgment is Table 8.05 ("Average Annual Earnings and Index, All Employee Jobs, 1984–2015"), which showed average earnings in October 2015 (rather than 2014) of £28,090.78. By comparing Tables 8.01 and 8.06, it can be seen that Table 8.05 includes the earnings of part-time employees as well as full-time employees. Because part-time and full-time earnings are combined, there are, so far as I am aware, no comparable UK figures.

54 As to the general state of the economy, in his budget speech this year, the Chief Minister, Mr. Fabian Picardo, Q.C., M.P., said (Gibraltar Hansard, June 26th, 2017, at 16):

"GDP per capita of an economy is often used as an indicator of the average standard of living of individuals in that country, and economic growth is therefore often seen as indicating an increase in the average standard of living. It is not a strictly scientific measure, but it has been referred to every year since before we took over as the Government. As I have told the House, the latest forecast for

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1 http://www.gibraltar.gov.gi/new/sites/default/files/HMGoG_Documents/Abstract%20of%20statistics%202015%20whole%20report.pdf, accessed July 27th, 2017.

2016–17 estimates a nominal GDP per capita growth of 8.9% from the previous year.

On the IMF GDP per capita rankings the UK continues to feature in 28th position with a GDP per capita of $42,481 and Spain in 37th position with GDP per capita of $36,416. Gibraltar's GDP per capita for 2016–17 is forecast at $92,843, placing Gibraltar in fourth position, closely behind Macao Special Administrative Region and with a GDP per capita which they have of $95,150. We are ahead of Singapore, Switzerland, Hong Kong, the UK and Spain, Mr Speaker. As I have said before, my own view is that these measures are not entirely scientific because of the differing methodologies and fluctuating exchange rates on which they are based. Nonetheless, they are the measures that the rest of the world relies on.

. . . The important aspect of this exercise, however, is really only one to appreciate that the Gibraltar economy is estimated to have grown in real terms by 7.5% in 2015–16 with average earnings going up by almost 8%. This growth places us ahead of other small countries including Malta, Luxembourg, Singapore and Hong Kong."

55 As to Mr. Winch's submission as to what a "dispassionate observer" might perceive, there is a difficulty arising from the Privy Council decision in *Scott* v. *Att. Gen. (Bahamas)* (7). Lord Reed, giving their Lordships' advice, said ([2017] 3 LRC 704, at paras. 36–37):

"[36] The use of JSB guidelines with an uplift to cater for the difference in cost of living between the Bahamas and England was again canvassed in the case of *Grant v Smith* [Bahamas, Civil Appeal No. 32 of 2002, unreported]. The Court of Appeal (Churaman, Ibrahim and Osadebay JJA), while accepting that the JSB guidelines could be used, rejected the argument that an uplift should be applied. The observation of Osadebay JA that the cost of living in London was now higher than in the Bahamas was criticised by the appellant in this case on the basis that the cost of living in London was much higher than in other parts of the UK and the JSB guidelines were designed to apply to England and Wales generally.

[37] This observation does not appear to have been based on evidence. It was stated that 'it is now generally accepted' that this was the position. In those cases where an uplift was applied, however, it does not appear that evidence was adduced to support the claimed difference in the cost of living between England and the Bahamas. For reasons earlier set out, the Board considers that assumptions as to any difference in the cost of living in the two countries cannot be a sound basis on which to calculate the appropriate award of general damages."

56 The "reasons earlier set out" were as follows (*ibid.*, at paras. 23–26):

"[23] What is a reasonable sum must reflect local conditions and expectations. In para 38 of *Heil v Rankin* the Court of Appeal said:

> '. . . The decision [on the amount of general damages] has to be taken against the background of the society in which the court makes the award. The position is well illustrated by the decisions of the courts of Hong Kong. As the prosperity of Hong Kong expanded, the courts by stages increased their tariff for damages so that it approached the level in England. [See *Chan Pui-ki v Leung On* [1996] 2 HKLR 401 at 406–408.]'

. . .

[25] The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the backdrop to the examination of how those changes can be accommodated but they cannot, of themselves, provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to, different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.

[26] Cost of living indices are not a reliable means of comparing the two jurisdictions even if one is attempting to achieve approximate parity of value in both. Cost of living varies geographically and may well do so between various sectors of the population. The incidence of tax, social benefits and health provision (among others) would be relevant to such a comparison."

57 In applying these passages, there is a difficulty. On the one hand, judges are expected to take judicial notice of local conditions. On the other hand, it is said that Osadebay, J.A. should not have taken judicial notice of the cost of living in London. Judges have of course to be careful as to what they take judicial notice of. However, even a casual visitor to Spain, for example, could not fail to see the difference between the comparative poverty of Extremadura and the comparative wealth of the Basque Country (GDP per capita €15,394 and €30,829 respectively).[2] It would be odd that judges of Gibraltar, some of whom also sit judicially in England, are unable to take a broad brush view of prosperity there and here. This is particularly so if it is not safe to rely on cost of living indices.

58 The average Gibraltarian is blessed with low unemployment, good wages, low tax, excellent health care and cheap Government housing kept in reasonable repair. The life expectancy of a Gibraltarian is approaching two years more than in the United Kingdom, which is particularly striking given the prevalence of smoking here. Conditions, as in the Bahamas and Hong Kong, are good and getting better. For these reasons I continue to be of the view that the English Guidelines are no longer appropriate for Gibraltar.

The award: discussion

59 In the event that he did not persuade me that the court should continue to apply the English Guidelines, Mr. Winch did not submit that the figure proposed by Mr. Devereux-Cooke based on the Northern Irish Guidelines was wrong. In my judgment, his figure of £82,750 for pain, suffering and loss of amenity is amply justified.

60 Mr. Walker is in constant pain, so bad that he has, depending on the weather, regularly to be injected with painkillers. His mobility is greatly restricted. His participation in sport is at an end. His social life is limited. He is likely to require a further operation, which may well make him wheelchair-bound. Before the accident, he already suffered from depression. The injuries suffered in the accident will hit a depressive especially hard.

61 As regards the figure of £82,750, it is worth cross-checking to see what daily rate that represents. In *Bernal* (1) (2016 Gib LR 314, at para. 51), I pointed out that the compilers of neither the English nor the Northern Irish Guidelines had considered the impact on general damages of the spectacular drop in the discount rate, despite there being authority

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2 https://en.wikipedia.org/wiki/Ranked_lists_of_Spanish_autonomous_communities, accessed July 28th, 2017

that this was relevant: *Mitchell* v. *Mulholland (No. 2)* (4) ([1972] 1 Q.B. at 83).

62 In *Sullivan* v. *Care Agency* (10) (2017 Gib LR 131, at paras. 17 *et seq.*), I analysed *Povey* v. *Governors of Rydal School* (6). I showed how the court awarded a tetraplegic, in that case, a daily rate of damages of £63.61 (if the sum awarded in 1969 was adjusted in accordance with the UK Retail Price Index to October 2016) or of £101.31 (if the sum was adjusted in line with average earnings in the United Kingdom). I pointed out that with 50 years' life expectancy under the latest Guidelines (*ibid.*, at para. 27):

> "[A] tetraplegic awarded the English maximum of £337,700 would receive:
>
> (a) a daily rate of £33.23 using a 2.5% discount rate (£337,700 ÷ [27.84 years' purchase × 365]);
>
> (b) a daily rate of £21.61 at a 0.5% discount rate (£337,700 ÷ [42.82 years' purchase × 365]); or
>
> (c) a daily rate of £14.97 at a minus 0.75% discount rate (£337,700 ÷ [61.80 years' purchase × 365])."

63 In other words, awards now are much lower considered as a daily rate—whether in inflation-adjusted or earnings-related terms—than they were before the crash in interest rates following the global financial emergency of 2008.

64 Now, the figure of £82,750 proposed by Mr. Devereux-Cooke contains a number of elements. There is the initial shock and horror of the accident itself. There is the ongoing pain and diminution in quality of life. There is the likelihood of further surgery on the right ankle. However, even if one applies the whole of the sum to produce a daily rate, it is clear that the daily rate which it represents is very low.

65 The discount rate in the United Kingdom set under the Damages Act 1996 (UK) is now minus 0.75%: Damages (Personal Injury) Order 2017 (UK). Both Mr. Devereux-Cooke and Mr. Winch agreed that this discount rate should be used in assessing future loss in this case. (Mr. Winch wishes to reserve his position as to other cases, where the greater sums at stake might justify the instruction of economists and actuaries.) Mr. Walker's life expectancy is just under 50 years. The £82,750 converts into a daily rate of £3.86 (£82,750 ÷ [58.71 years' purchase × 365]). No one, I venture to suggest, would think that £3.86 was excessive for the pain and suffering which Wesley Walker experiences every day.

66 Moreover, the £3.86 is in fact more than the £82,750 represents. Not included are (a) the shock of the accident; (b) its immediate sequelae; (c) the period up to trial; and (d) the need for further surgery in 10–15 years.

These four elements would justify an award of at least £20,000. The balance of £62,750 turns into a daily rate of £2.93 (£62,750 ÷ [58.71 years' purchase × 365]).

67 The failure of both the Northern Irish and the English Guidelines to engage with the lower discount rate is particularly stark when damages for the elderly are calculated. In *Nutbrown* v. *Sheffield Health Auth.* (5), Potts, J. reduced an award to the plaintiff by half as partial reflection of his age. Curran, J., sitting as a High Court judge in *Miller* v. *Imperial College Healthcare NHS Trust* (3), was dealing with an extremely fit 63-year-old whose leg was amputated due to the defendant's negligence. On damages he said ([2014] EWHC 3772 (QB), at paras. 16–18):

> "16 Counsel for the defendant Trust . . . at the forefront of his submissions took a point on the age of the Claimant. He invited my attention to the case of *Nutbrown* . . . The principle to be derived from that case, counsel submits, is that in assessing general damages for pain, suffering, and loss of amenity the court should take as a starting point the appropriate award for a man or woman '*in the prime of life*' (which Potts J in that case set at the age of 30). The court should then reduce the award for any Claimant who was not in the prime of life. In Nutbrown the Claimant was aged 72 at the time of the cause of action, 76 at trial, and his life expectancy was limited to 6 years post-trial. The learned judge halved the award he would have made to someone in his prime, taking into account, inter alia , the age of the Claimant . . .
>
> . . .
>
> 18 The suggestion (if that is what it was) that Nutbrown is authority for a proposition that an award of damages for a 72-year old should be approaching half that which would have been appropriate for a 30-year old, does not bear detailed examination. It is perfectly clear that Potts J took into account in that case in particular the plaintiff's limited life expectancy and his limited insight into his condition. The facts of that case were very different from the facts of the instant case."

68 Of course, it is a truism that the particular facts of each case need to be considered in assessing the damages for that particular case. However, the judge could be interpreted as making a general proposition that general damages awarded to someone who will suffer pain and loss of amenity for less time should receive the same as someone who will suffer for longer. Insofar as he is making that proposition, I respectfully disagree.

69 Even when discount rates of as high as 5% were usual, the difference in years' purchase for people of different ages was significant. Now, with lower and negative discount rates, the difference is very great indeed. The

following table shows the differences between the 5% rate and the minus 0.75% rate. The rates for older claimants are shown as a percentage of the rate for a man in the prime of his life, which I have taken to be the mid-30s. (For reasons explained in the schedule to *Bernal* v. *Riley* (1) it is necessary to use both the 6th and the 7th editions of the *Ogden Tables*.)

Age	Life expectancy	YP @ 5%		YP @ –0.75%	
15/17	c.70 years	19.51	(108%)	94.55	(153%)
24/26	c.60 years	18.98	(105%)	78.25	(127%)
34/36	c.50 years	18.08	(100%)	61.80	(100%)
43/45	c.40 years	16.86	(93%)	46.92	(76%)
59/61	c.25 years	13.48	(75%)	28.05	(45%)
77/79	c.10 years	7.42	(41%)	10.77	(17%)
87/89	c.5 years	4.19	(23%)	5.22	(8.4%)

70 If an older person is awarded the same as a younger person, the daily rate awarded to the former for pain and suffering will be very much higher than that awarded to the latter. In the case of the 87- or 89-year-old and the 34- or 36-year-old, the octogenarian will receive 13 times as much a day as the younger man if one uses the minus 0.75% discount rate (100% divided by 8.4%). That cannot, in my judgment, be right. This is not to say that the award to the older person should be lower. On the contrary, it is an indication that the award to the younger person should be higher.

71 This is the answer to the point made by the learned editors of *Kemp & Kemp.* They argue that (*op. cit.*, para. 3–015, at 3015)—

> "the claimant's expectation of life is an important but not necessarily decisive consideration i[n] awards in respect of paraplegia or tetraplegia. Should the court make a significantly lower award to such a claimant who has 30 rather than 40 years to live? We think not. On the other hand, the difference between 10 and 20 years might be significant. The same applies to disparities of age. Should the 20-year-old paraplegic get substantially more than a 40-year-old suffering similar injuries? We doubt it. Perhaps, if explanation is needed, it is to be found in the fact that the upper limits for such awards as identified in the cases or to be found in the JSB Guidelines are not necessarily reserved for the worst imaginable example of that kind of injury. There is, in effect, an artificial ceiling to the various awards but the corollary thereof should be that injuries of great but inevitably varying degrees of severity are trapped at or just below that ceiling."

72 With the drop in the discount rate, the difference between a 20-year-old and a 40-year-old is now very significant. In the above table, I have treated a 34- or 36-year-old with 50 years' life expectancy as being in the "prime of their life." Whereas at a discount rate of 5%, the difference between someone with a life expectancy of 40 years as opposed to 60

years is only 13% (105% ÷ 93%), the difference at a minus 0.75% discount rate is 67% (127% ÷ 76%). The approach advanced by the editors of *Kemp & Kemp* was appropriate before *Wells* v. *Wells* (11). The court merely needed to tweak the damages to take into account the age of the plaintiff. After *Wells*, with the drop in the discount rate to 2.5%, and in particular after the further drop into negative discount rate territory, this approach is in my judgment no longer defensible.

73 In the example given in *Kemp & Kemp*, the award to the 20-year-old stands to be increased. The 20-year-old's entitlement to damages should not be subject to an "artificial ceiling." Such capping is contrary to principle. He or she should get the damages which reflect the harm suffered—including the length of time he or she must endure the pain and suffering and loss of enjoyment of life.

Conclusion

74 The £82,750 award for general damages sought for Mr. Walker is not too high in my judgment. As discussed, a higher award might be justifiable. However, Mr. Devereux-Cooke has not pressed for more, so that is the sum I shall award.

75 For completeness, I should say that if I am wrong on the applicability of the Northern Irish Guidelines and am obliged to apply the English Guidelines, I would consider Mr. Winch's £45,000 too low. I would award £52,500.

76 Putting all these figures together gives an award as follows:

Gratuitous homecare	£3,845.00
Additional housing costs	£100.00
Travel	£402.39
Prescriptions	£375.00
Loss of earnings to 31.1.13	£26,701.36
Loss of earnings 1.2.13 to 10.8.17	£38,570.68
Sick days	£4,097.81
LESS disability pension	(£4,700.08)
Future loss of earnings	£121,375.50
Smith v. *Manchester*	£54,341.04
Future surgery	£7,567.50
Future care	£1,407.62
General damages	£82,750.00
	£336,833.82
LESS 20%	£269,467.06

77 Accordingly, I assess damages at £269,467.06. Mr. Walker is entitled to interest on the general damages from the date of issue of the claim form

to trial at 2% p.a. Mr. Devereux-Cooke waived any claim to interest on past damages.

78 I shall hear counsel on the issue of costs.

Order accordingly.
