CA on appeal from Brighton CC (HHJ Coates) before Waller LJ; Dyson LJ. 5th April 2001.

JUDGMENT : LORD JUSTICE WALLER :

1. This is an appeal from Her Honour Judge Coates who assessed damages in the following sums in relation to an injury which Mr Murrell suffered in a road accident on 29th November 1995. The judge awarded £25,000 general damages; £1,000 for psychiatric treatment; and special damages of £25,000 loss of earnings, and other items for care etc at £4,114. The relevant background to the issues that arise on this appeal is as follows.

2. During 1995, the appellant Mr Murrell was involved in two car accidents. The first was on 22nd May and the second was on 29th November 1995. In relation to the first accident he was already pursuing a claim, and indeed had obtained medical reports, before the second accident occurred. In relation to the first accident a settlement was reached under which (1) he was paid £58,500; (2) CRU payments were made; and (3) Mr Murrell's costs of those proceedings were paid.

3. It would seem that although those defending the first claim became aware of the second accident before finally concluding the settlement, the aim of Mr Murrell and his advisers, once the second accident had occurred, was to settle the first claim as quickly as possible. No further medical examination took place prior to the settlement, so that the defence insurers on the first accident did not appreciate the full extent of any injury from the second accident before settling. Indeed, on the evidence of one file note recording what was said by the solicitor acting for Mr Murrell during the settlement negotiations, the solicitor was playing down the consequences of the second accident and playing up the likely effects of the first. When Mr Murrell's advisers came to plead the claim on the second accident, they reversed the position saying as little as possible about the first accident and enhancing the effects of the second.

4. I have to say that I for my part have some disquiet about the way the negotiations were conducted between the solicitor acting for Mr Murrell and the insurers in settling the first accident, and some disquiet about the way in which the Schedule of Special Damages were originally drafted in relation to the second accident by, as I understand it, the same solicitor. One letter from Richard Thorn & Co to the insurers of the defendant in the first accident case in discussing settlement of that claim dated 29 February 1996 says that "*We fear that our client's condition is such that he may never be able to work again. If you are prepared to concede this point we see no reason why settlement should not be discussed as soon as possible*". The claim with three medical reports and a Schedule of Special Damages was issued and served in October 1998, and, although the Particulars of Claim referred to pre-existing injury and the reports dealt with both accidents, the Schedule of Special Damages stated *"at the time of the accident [I emphasise the first accident] the plaintiff was unemployed but he expected to return to work within approximately two months"*. There is thus a significant inconsistency between the apparent presentation of the first and second accident claims. Claims for loss of earnings up to the date of the pleading, and for future losses of earnings, are then made on the basis that he was unable to work again as a result of that accident, quantified by reference to wages he would have expected to earn as a manual labourer.

5. On any view Mr Murrell's claim in relation to his injuries in the second accident should never have been quantified, other than on the basis that some damage to his ability to work resulted from the first accident. The fact that it was not was in my view regrettable.

6. It is fair however to say that ultimately the assessment of damages was conducted on the basis that he had suffered an injury in the first accident, which did affect his ability to work, but that he had suffered a great deal more serious injury in the second accident. But the complications which have arisen in this case might well have been avoided if once the second accident had taken place the full details of both accidents and the injuries suffered had been fully disclosed to both defendants. Any settlement could then have been negotiated on a basis that fairly divided up the liability for Mr Murrell's injuries between the two tortfeasors who had injured Mr Murrell.

7. Not only did that not happen, but at the hearing of the assessment of the damages with which we are concerned, the advisers for Mr Murrell sought to persuade the judge that the documents including the letter above quoted obtained from the insurers' file in relation to the claim made in relation to the first accident, should not be admitted in evidence. The judge ruled they were admissible on the basis that she

had to determine the relevant level of compensation in relation to the second accident, and that she needed to have the best evidence available showing for what the plaintiff had already been compensated. This ruling of the judge is one matter raised on the appeal.

8. The main point on the appeal relates to the assessment of damages for that second accident. Not surprisingly one of the major points which arises relates to the effect on that assessment of the injuries already suffered in, and compensation received for, the first accident.

9. Further complications in making a proper assessment relate to the fact that the most serious physical injury from each accident was to Mr Murrell's back, but before either accident occurred he had symptomatic back problems likely to reduce the period of his working life, at least for the heavy manual work he had performed, up until the accidents.

10. A further complication is produced by the fact that it was common ground between the experts, and established by a video covertly taken, that Mr Murrell undoubtedly exaggerated what he was alleging were the consequences of the second accident. That exaggeration has complicated matters in two ways. It made the assessment of what injury had in fact been caused by each accident more difficult, but it is also now relied on in Mr Murrell's favour as being a reason why the judge should not have accepted certain of Mr Murrell's answers at their face value. Mr Murrell's evidence was to the effect that he had suffered injury to his hips and knees as a result of the second accident, and that by the date of trial they prevented him carrying out any kind of work. The experts were agreed that neither accident caused any injury to his knees or hips. The judge concluded thus in the light of Mr Murrell's answers that since he would not have worked from the date of trial because of the condition of his knees or hips, he had no entitlement to future loss of earnings at all. That deprived him of what was a very substantial part of his claim to damages.

11. Mr Taylor, on his behalf, says that this evidence from Mr Murrell relating to the effect of his knees and hips on his working life was clearly Mr Murrell exaggerating, and that the judge should have found that but for the second accident Mr Murrell would have continued to work in light employment for many years after the date of the trial. He submits that finding was supported by the evidence of Mr Wynn-Davis the medical expert called on Mr Murrell's behalf which Mr Taylor told us was to the effect that Mr Murrell was physically fit to do light work even after the second accident, and that it was his psychiatric injuries which ultimately prevented him working after the second accident.

12. It should be said that the second accident was a much more serious accident than the first. Mr Murrell was hit head on by a driver on the wrong side of the road seeking to escape from the police. The medical evidence accepted by the judge showed that in addition to inflicting on him a lumbar flexion strain thereby causing further damage to an already damaged back, it caused mild to moderate post traumatic stress disorder.

13. The issues that arise on the appeal I can thus summarise as follows:-

i) The assessment of Mr Murrell's loss of earnings up to the date of trial; Mr Taylor, for the appellant Mr Murrell, submitted they were too low on the basis that the judge (a) should not have admitted in evidence the details of the settlement of the first accident; and (b) should not then have deducted from the damages being awarded for loss of earnings, the figure assessed as already recovered for loss of earnings in the settlement relating to the first accident. Mr Ashford-Thom, for the respondent, submitted that the loss of earnings figure assessed by the judge was too high, because she should have concluded that Mr Murrell had agreed to settle any claim that he had for loss of earnings in settling the claim on the first accident. It is under this heading that the admissibility of the documents obtained in relation to the first accident arises. He also takes a point on mitigation.

ii) The refusal to award any damages for loss of earnings from the trial date onwards. Mr Taylor argued that the judge placed too much weight on the answers given by Mr Murrell about his ability to work as a result of pain in his hips and knees, while Mr Ashford-Thom submitted there was no basis for reversing the judge on this finding of fact.

iii) General damages, which are the subject of a respondent's notice; it is submitted by Mr Ashford-Thom that they are too high, and Mr Taylor submitted that the award should not be interfered with.

Loss of earnings to the date of trial.

14. So far as loss of earnings is concerned the judge's findings can be summarised in this way. The judge awarded Mr Murrell 2 years 4 months loss of earnings for the period 1 March 1998 until 31 July 2000 (the date of trial). She did not find expressly that after the first accident Mr Murrell would have been fit for light work, **nor that he would have found light work, despite his previous working life being that of a manual worker**. It can be argued that by implication she must have so found, but the reality is that she did not need to address the point because of the deduction she in any event made. In particular she did not focus on the point whether Mr Murrell could in fact have found light work. The 2 years 4 months period was calculated on the following basis. 1. that the first accident removed Mr Murrell's ability to do heavy manual work, but would not have precluded him doing light work; 2. the second accident with its combination of further physical injury to Mr Murrell's back and the mild to moderate post traumatic stress disorder prevented Mr Murrell doing any work; 3. Mr Murrell's hips and knees would have prevented Mr Murrell doing any work as from the date of trial and that condition was not due to either accident; but 4. since he had been compensated for two years of that working period (1 March 1996 to 1 March 1998) by the settlement in respect of the first accident, two years should be deducted from the damages awarded for the second accident; 5. In making that assessment the judge allowed into evidence the documents obtained from the insurers of the tortfeasor in the first accident case and analysed the settlement figures being proposed by the insurers on their internal file notes so as to conclude that 2 years loss of earnings was paid in that settlement.

15. Both sides criticise the judge. For Mr Murrell, Mr Taylor submitted that it was wrong to admit into evidence the documents relating to the settlement of the first claim. He submitted they were part of a record of without prejudice negotiations and inadmissible; alternatively he submitted they were simply irrelevant to any issue in the second accident case. He submitted that on the evidence following the first accident Mr Murrell was fit to do light work, and that accordingly Mr Murrell was entitled to be compensated for the fact that the second accident prevented him from doing that work. The submission was simple, that what the plaintiff received in compensation for the first accident was irrelevant.

Admissibility of documents

16. Mr Ashford-Thom's submission was that the documents showed how the settlement was reached in relation to the first accident and were clearly admissible in order to provide the judge with a full picture as to what injuries had been caused by the first accident and for what he had already been compensated. He submitted that if the plaintiff had been compensated for being unable to work during the period up until the trial, it would be wrong that he should receive further compensation for the same damage. He submitted that the documents were relevant to that point.

17. I have no doubt that the documents produced from the insurers' file were admissible. It seems to me that the circumstances of this case are a long way from **Rush and Tompkins v Greater London Council** [1989] 1 AC 1280. The evidence was relevant to an inquiry as to what injury the plaintiff had suffered in the first accident. **Muller v Linsley & Mortimer** (1996) 1 PNLR 74 is the more relevant authority, and the reasoning of Hoffmann LJ would lead to the conclusion that this file was admissible. At page 80A-C he said as follows:- *"... the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this in which the Defendants were not parties to the negotiations, there can be no other basis for the privilege. If this is a correct analysis of the rule, then it seems to me that the without prejudice correspondence in this case falls outside its scope. The issue raised by paragraph 17 of the Settlement of Claim is whether the conduct of the Mullers in settling the claim was a reasonable mitigation of damage. That conduct consisted in the prosecution and settlement of the earlier action. The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the Defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them."*

Assessment of loss of earnings to trial

18. This case has disquieting features, because it certainly appears that the plaintiff was not suggesting to the insurers after the first accident that he could or would return to light work even if heavy manual

work was impossible; the thrust of his case was that the injury precluded heavy manual work and that was the only work for which the plaintiff was suitable [see Mr Wynn-Davies Report dated October 1995, and the solicitors' letter already quoted]. The importance of putting the case that way at that stage was that if a concession had been made that he could perform light work and would find light work, his earnings would apparently be close to those he could have made as a manual worker. His case against the respondents to this appeal, so far as the effects of the first accident were concerned, was always quite inconsistent with the above case.

19. I would emphasise thus this is not simply a case where a person has been injured by one tortfeasor to an extent which would have precluded him from working and then injured by another tortfeasor which injury would also have precluded him from working quite independently of the first injury. In such a situation the decisions of **Baker v Willoughby** [1970] AC 467 and **Jobling v Associated Dairies** [1980] AC 794 would be relevant. Those decisions demonstrate the difficulty of making an assessment as against each tortfeasor in such cases. In **Baker v Willoughby** the question was how the injury at the hands of a second tortfeasor affected the calculation of damage as against the first to which the answer in **Baker v Willoughby**, putting it shortly, was that it did not. In **Jobling** the question was how the discovery that a plaintiff was suffering from myellopathy at a date after he had been seriously injured at work affected the calculation of damage as against the employer, to which the answer was that it did with serious criticisms being made of the reasoning in **Baker v Willoughby**. But neither in fact considered the position of the assessment of damages as against the second tortfeasor, and it would seem to be accepted even in **Baker v Willoughby** that the second tortfeasor is only responsible for the additional damage that the second tortfeasor has caused. [see Lord Reid at 493G-H with which Lords Guest, Dilhorne and Donovan agreed, and the speech of Lord Pearson at 496 C-D].

20. I am sympathetic with the judge's starting point which is that it hardly seems just that Mr Murrell should receive double compensation by obtaining damages from one tortfeasor on the basis he would be unable to work during a specific period, and against the second tortfeasor the same damages on the basis that he would in fact have worked. That would have been the effect of Mr Taylor's submission.

21. On the other hand it is hardly attractive that because Mr Murrell made a claim against the first tortfeasor that he could not work but was compensated on the basis that he would ultimately find work, the second tortfeasor should not be liable at all. This seemed to be the effect of Mr Ashford-Thom's submission.

22. What then is the solution? The question for the court assessing the damages against the second tortfeasor must be what damage was suffered as the result of that tort to an already injured victim? If the answer to that was that Mr Murrell would in fact have been able to work following the first accident, but was prevented from working by the second accident, that would have to be the basis on which the damages should be assessed. Equity would not seem to me to enter into that calculation in the way the judge calculated the damages. But in answering the critical question, it would seem to me that the court should start by asking in a much more focused way than the judge did, not only whether Mr Murrell would have been fit for light work but whether he would in fact have found light work after the first accident if the second accident had not taken place. Indeed the question to be posed included whether even if he would have found light work for some period, whether he would always have been in light work. He had tried some light work after the first accident, but he was basically a manual worker. It hardly lies in his mouth, having regard to the way in which he put his claim as against the first tortfeasor, to say that he would have found light work even as at 1 January 1996. But it certainly seems against all probability that he would always have been in light work following the first accident, even if the second accident had not happened.

23. In my view it is not unfair to conclude against him, and in my view the judge should have concluded against him, that there would have been a period or periods when he would not, as a result of the first accident, have in fact worked. It further does not seem to me unfair to conclude against the appellant that the periods for which he would not have worked would have been of at least 2 years duration during the period 1 January 1996 until the trial of the present action. In that way, it seems to me that the decision actually reached by the judge can, and should, in fact be upheld by a more orthodox route.

24. Thus I would dismiss the appeal on this aspect of the case.

Future earnings – knees and hips point.

25. I should say straight away that my initial reaction to this aspect of the case was that it is unattractive in the extreme for an appellant to complain in the Court of Appeal that the judge should not have accepted the evidence he was giving and that his damages should be increased as a result. It seems to me that if a claimant is exaggerating, and in effect bringing a false claim, he or she is not entitled to have the court bend over backwards in his or her favour. That would simply be an encouragement to bring false claims on the basis that if the exaggeration does not work the court will still help out.

26. But Mr Taylor, in a very persuasive argument, sought to dismiss those initial reactions. He submitted that it was common ground that the plaintiff was exaggerating. He pointed to the finding of the judge that the exaggeration "*may, on the balance of probabilities, be partly due to his depression*" [page 16 at the top]. He also relied on the evidence of Mr Wynn-Davies that as at the date of trial the plaintiff was in the view of that doctor fit to do a number of pieces of light work, which contradicts Mr Murrell's own evidence that because of his hips and knees he would not be able to do any work at all as at the date of trial.

27. I have considered Mr Taylor's submission with care, but his difficulty is this. First, any disability being caused by the psychiatric injury did not *compel* the plaintiff to act in any particular way. It is clear from the video evidence that Mr Murrell acted differently when he did not know he was being watched. His exaggeration was not thus compulsive, and something he could not help. Second, the judge realised the importance of the answer that the claimant was giving and gave him a chance to think about it carefully as spelt out in her judgment. Third, it really cannot be right to disturb a finding of fact made by a judge on the basis of the claimant's own evidence, and admission.

General Damages

28. Mr Ashford-Thom did not begin to persuade me that the award of general damages should be disturbed. Mr Taylor reminded us of the well known passages in **Pickett v British Rail Engineering Limited** [1980] A.C. 136 cited in paragraphs 19-003 and 19-004 of Kemp and Kemp. He also referred to a number of authorities relating to the award of damages for physical injury where there was also psychiatric damage. Here the post traumatic stress disorder was plainly due to the second accident and an important element in the assessment of damages. In my view even if it might have been better to try and calculate the damages in the way I have previously identified, on this aspect the conclusion would not seem to me to be any different.

29. I would thus uphold the judge's assessment of the general damages.

Mitigation

30. The judge did not expressly deal with the question of mitigation, but by implication must have found that the claimant was not able to work at all for the period up until the trial by virtue of his physical and psychiatric injuries. In truth the question of mitigation does not in those circumstances arise.

Conclusion

31. I would dismiss the appeal in those circumstances.

LORD JUSTICE DYSON:

32. I agree.

ORDER: Appeal dismissed. (Order does not form part of approved Judgment)

Mr C Taylor (instructed by Richard Thorn & Co for the Appellant)
Mr I Ashford-Thom (instructed by Messrs Barlow Lyde & Gilbert for the Respondent)