CA on appeal from QBD (Mr David Mackie QC (sitting as a deputy High Court judge) before Alsous LJ, Robert Walker LJ, Lady Justice Hale : 2nd February 2001

1. **LORD JUSTICE ALDOUS**: I will ask Lady Justice Hale to give the first judgment.

2. **LADY JUSTICE HALE**: This is a defendant's appeal from the order of Mr David Mackie QC, sitting as a deputy High Court judge in the Queen's Bench Division, made on 18th June 1999 in a claim for damages for personal injuries. Liability had been admitted at an early stage. The total award of damages and interest was £188,902.81. The judge himself it appears gave permission to appeal.

3. The claimant suffered serious injuries in a road accident. There was a head-on collision with an oncoming car, the occupants of which were killed. The claimant suffered a head injury, fractures of both his left and right legs, a dislocation fracture of his right ankle joint, a fracture of his left big toe, several fractured ribs causing a flail chest and a neck injury. He also suffered from post-traumatic stress disorder and depression. He could not continue his previous work as a steel erector. By the time of the trial he was fit for lighter work, but the judge found that it might take him another year to find employment.

4. The award was made up as follows: first, general damages agreed at £29,000, with interest of £1,041.62; second, past loss of earnings of £43,278.20; third, future loss of earnings, £102,309; fourth, future do-it-yourself and maintenance costs of £3,000; fifth, miscellaneous special damage for the loss of the car, its contents and damage to his clothes and so on, of £3,482.50; sixth, past care costs of £2,300; seventh, his wife's subsistence in visiting him while he was in hospital of £150; eighth, travel costs of £214.59; and lastly, interest on the special damages of £4,126.90.

5. The principal ground of appeal relates to the awards for past and future loss of earnings: both the estimate of what those earnings would have been had the accident not happened and the appropriate multiplier for future losses.

6. There was a subsidiary ground of appeal relating to the judge's decision to admit late evidence in support of the miscellaneous items of special damage, the care costs and do-it-yourself and maintenance costs. But Miss Power today, on behalf of the defendants, has wisely abandoned that head of appeal.

7. It is fair to say that it is not at all easy to discern from the judgment how these precise figures were arrived at. The judge did not distinguish clearly between past and future loss of earnings, he did not explain in the judgment the way in which the calculations of each should be made, and it was extremely difficult for us, on reading the papers, to make sense of what had been decided. This was compounded by the deficiencies in the appeal bundle. It would have helped us greatly to have counsel's calculations, in conjunction with the judge, of the precise basis of the past loss of earnings and of the future loss of earnings; and it would have helped us even more to have in the bundle a copy of the report of Mr Halliday, dated 10th February 1999, the defendant's employment consultant. Fortunately, however, we have been able to make much more sense of what took place in the course of this hearing, and we are grateful to both counsel for their elucidation.

8. First, as to past loss of earnings. The claimant was born in 1950. He was aged 46 (nearly 47) at the date of the accident in February 1997 and 49 at the date of the trial in June 1999. He had been a steel erector all his adult life, having served an improvership with Braithwaite & Redpath Dorman Long. He had experience as a chargehand, foreman and supervisor. It is of the nature of such work that the person goes from project to project. There are large projects, such as that on which he was engaged at the time of the accident building a power station, where a steel erector is an employed person and has regular pay and away from home allowances and bonuses and the like. There are smaller projects on which he may be self-employed. The judge made some general remarks about the nature of this employment which were derived, it would appear quite considerably, from Mr Halliday's report: *"It is clear that steel erectors are highly skilled and respected workers at the top end of the construction and engineering trade. Their pay is good, and the better paid ones like Mr Eagleson was earn well over £20,000 a year. To stay in work you need to travel to where the projects are, often far from home. As men get older they may, but may not, become less willing to uproot themselves and to travel around the country. As they get older they may, but may not, limit themselves to work at ground level. It seems clear that more than in other trades steel erectors may remain valuable employees right up to*

*normal retirement age at 65. It seems that nowadays steel erectors are trained on the job, and people of experience are valued for that [sic] training abilities, now that there is no system of improvership or apprenticeship in force."*

9. The judge declined to take a broad-brush average of annual earnings which appears to have been put before him on behalf of the claimant. He took a weekly pay figure of £372 per week net from a recent payslip. This reflected a working year of 48 weeks. He then took figures presented by Mr Halliday to estimate the increases in those wage rates in the years between the accident and the trial. Counsel must then have done detailed calculations to apply those rates to each of the relevant weeks between the accident and the trial. The judge then downrated the total arrived at by five per cent to take account of potential gaps in employment.

10. The defendant had argued that the previous net earnings should be taken as no more than £17,500, and that in the light of the particular employment history of the claimant he would have in fact earned only half of that, i.e. some £8,750.

11. It is now argued that the judge took insufficient account of the combination of the nature of the work and, more importantly, the particular work record of the claimant. The effect of the judge's approach was to assume that he would have been working for 87 per cent of the available time. Yet in the 69 months before the accident he had worked for only 44 per cent of the available time, and in the 50 months he had worked for only 61 per cent. Miss Power therefore argues that he should have brought down the figures for the loss of past earnings to reflect a figure of 61 per cent.

12. The judge took all that into account. But he also had the benefit of seeing and hearing from the claimant, his wife, and from a fellow steel erector, a Mr Bartlett. All three of these impressed him as truthful and straightforward people. He also had the benefit of hearing from the medical witnesses, which will have helped him in his assessment of the general approach and attitudes of the claimant and in the importance of the job to him, which is mentioned more than once in the psychological reports. The judge concluded that: *"... a man of his determination would, if the work were available, be wanted for work and would want to do it. He is more likely than not to be someone who would have continued to do this trade."*

13. He considered the earlier gaps in his employment record, and he found that they were explained by two factors. The first was the recession in construction in the early 1990s and the second was the terminal illness of his step-grandson, which had led him to limit his commitments in the relevant time. He concluded that: *"But for this distressing circumstance, [the claimant] would undoubtedly have been in the sort of pattern of employment that was seen over the last couple of years before the accident."*

14. Miss Power argues that in looking at the effect of the recession he should have taken into account Mr Halliday's report which suggested that there were now fewer of the very large projects with favourable terms of employment of the sort upon which the claimant had been engaged in the two years before the accident, and that is one reason why the judge should not have given so much weight to that. However, Mr Halliday also said in his report, at paragraph 3(d): *"Construction output and employment generally has improved in the last two years or so, and there are general indications of skill shortages at present."*

15. Furthermore, the matter of the effect of the illness and untimely death of his step-grandson upon him was ultimately a matter for the judge himself to assess.

16. When the judge had before him Mr Halliday's evidence as to the typical employment of steel erectors, the high proportion of people of the claimant's age who were employed in this trade and his explanation for the absences and his impression of the man, the judge was entirely entitled to reach the view that he did. He did after all make some small discount to take account of the uncertainties of estimating what might have been. For my part, therefore, I would not see any ground to disturb the judge's findings as to the past loss of earnings.

17. As to the future loss of earnings, the judge did not distinguish very clearly between the two. But he obviously took forward his earlier findings as to the level of the claimant's prospects of work. He took the same earnings figures for the multiplicand. However, he also took Mr Halliday's report for the number of weeks which would be worked each year by a typical steel erector of different ages. He quoted Mr Halliday's figures, which were up to the mid-fifties, 44-48 weeks; in the mid to the late fifties, 40-45 weeks; and from 60 onward, 35-40 weeks.

18. It is not clear from the judgment, but it is clear from the calculations with which we have been supplied, that he in fact took a figure of 46 weeks for the ages 49-55; of 42 weeks for the ages 55-60; and of 35 weeks for the ages 60-65.

*19.* After multiplication - I will come to the multiplier later - the judge discounted the global figure by £20,000, which he says is to reflect his earlier findings of fact. It is not entirely clear what earlier findings of fact those are, but he may have had in mind what he said at page 9 of the judgment: *"I bear in mind, however, that he is obviously a rounded and balanced person. He has family responsibilities which he takes seriously. There will be bound to be some gaps in his employment, there are some jobs, no doubt, which are always available to workaholic single men forever on the move but which a family man in Mr Eagleson's position might not necessarily find attractive."*

20. Having reached that figure, the judge took a multiplier of eleven. This was on the assumption that the claimant would go on working until 65 - eleven is slightly below the figure that is derived from a straightforward application of Ogden Table 7 plus Table A - and he apportioned that between the years in a manner suggested by counsel for the claimant, which apportioned more to the years between 60 and 65 than it did to the years between 55 and 60. Nothing however turns on that because clearly, bearing in mind the manner of calculation adopted about the judge, that worked in the defendant's favour.

21. He then, having arrived at that figure, made findings as to the claimant's future prospects. He estimated that he might earn £8,000 per annum net, and applied a multiplier of nine to take into account the delay in finding employment and the greater difficulties of a man in the claimant's position in finding and sustaining such employment. There is, of course, no appeal against that.

22. The defendant now argues that the multiplier should have been eight rather than eleven because only a proportion of steel erectors go on to the age of 65, and therefore the appropriate table should have been that reflecting work to the age of 60. However, in my view the judge was entitled to take a multiplier to 65, partly because of the general evidence that steel erectors do go on to that age and partly because of his findings about the claimant and his character and his general determination to work if and when he could.

23. As far as the suggestion that the judge should have applied a greater discount to the multiplicand because of the particular characteristics of the claimant's work record, it is apparent that the judge did indeed adopt an approach which was not ungenerous to the defendant. Instead of taking an annual figure of average earnings and then applying the multiplier to it, he adopted the method of taking weekly earnings and tapering the number of weeks worked over the forthcoming years. That amply reflects Mr Halliday's picture of the typical steel erector.

24. The judge then stood back and considered that figure in the light of his view of the claimant, and decided that he might be less than wholly typical and might take a little more time off than other steel erectors of his age. Thus, balancing that figure with the particular qualities and character which he had found the claimant to have, he deducted his £20,000 and arrived at the figure that he did. It is of course very difficult to find any precise arithmetical justification for the deduction of £20,000. It could well be argued that he should not have made any deduction at all. It could be argued - as Miss Power has very powerfully done - that it should have been more. But at the end of the day, this court did not try the case; this court did not hear the evidence; this court did not make the findings of fact. For my part, I can see no possible basis for interfering with the judge's judgment in this case.

25. I would dismiss this appeal.

26. **LORD JUSTICE ROBERT WALKER**: I agree.

27. ***LORD JUSTICE ALDOUS***: I also agree.

**ORDER:** Appeal dismissed with costs, to include costs incurred in mediation, to be the subject of a detailed assessment if not agreed. (Order not part of approved judgment)

MISS E POWER (Instructed by Messrs Liddle Zurbrugg, London WC1R 4BW) appeared on behalf of the Appellant
MR B GALLAGHER (Instructed by Messrs Clifford & Co, London SE1 0NE) appeared on behalf of the Respondent