



Neutral Citation Number: [2024] EWHC 1352 (KB)

Case No: CF045/2023CA & CF046/2023CA

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**CARDIFF DISTRICT REGISTRY**

**ON APPEAL FROM THE COUNTY COURT**  
**AT SWANSEA**

Cardiff Civil and Family Justice Centre  
2 Park St, Cardiff CF10 1ET

Date: 7 June 2024

**Before :**

**MR JUSTICE GRIFFITHS**

**Between :**

**WENDY PRICE**  
**(Widow and Administratrix of the estate of**  
**DAVID WAYNE PRICE Deceased)**

**Claimant**

**- and -**

**MARSTON'S PLC**

**Defendant**

**David Haines** (instructed by Smith Llewelyn Partnership) for the Claimants  
**Johnathan Payne** (instructed by Kennedys Law LLP) for the Defendants

Hearing dates: 11 and 16 April 2024;  
further written submissions 17 April 2024

**Approved Judgment**

This judgment was handed down remotely at 2 pm on 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Approved Judgment**Mr Justice Griffiths:**

1. Mrs Wendy Price brought an action as widow and administratrix of the estate of her husband, David Price ("Mr Price"). Mr Price was employed by Marston's as a chef in the kitchen of the Copper Penny public house. Mr Price tripped over a raised metal strip on the floor of his workplace and fell against furniture, sustaining injury. He subsequently developed an infection from which he died. Liability was admitted by the defendant. A trial took place in the County Court at Swansea on issues of causation and quantum.
2. The defendant ("Marston's") appeals against the finding of the trial judge ("the judge") that the fatal infection was caused by the fall. The claimant ("Mrs Price") appeals against the judge's findings on two aspects of the quantum.

**Procedural history**

3. Mr Price was born in 1955. The accident was on 14 February 2015. He died on 23 April 2015.
4. Mrs Price issued proceedings in 2018. Pleadings and Schedules and Counter Schedules of Loss were served and from time to time amended. Experts were instructed on both sides and reports and joint statements from the experts were served.
5. There was a three-day trial on 12-14 December 2022.
6. The judge heard evidence (on behalf of the claimant) from the claimant herself (Mrs Price), Ryan Hancock (a work colleague of Mr Price who witnessed the fall), Hannah Price and Bethan Jones (daughters of Mr and Mrs Price, who saw the aftermath of the fall) and (on behalf of the defendant) Rachel James (a manager at Marston's).
7. The judge heard evidence from experts on both sides in three disciplines. The experts gave evidence in the form of reports and joint statements, and were also cross examined. The experts were:
  - i) Experts in Anaesthesia and Intensive Care: Dr Power for Mrs Price and Dr McCrirrick for Marston's.
  - ii) Experts in Life Expectancy: Professor Almond for Mrs Price and Dr Bodansky for Marston's.
  - iii) Experts in Microbiology: Dr Teare for Mrs Price and Dr Gray for Marston's.
8. On the final day of the trial, the judge directed the parties to file closing submissions in writing. Both parties did so, and both parties then responded to the written submissions of the other side.
9. On 3 March 2023, the parties were notified that judgment would be handed down on 4 April 2023, and they were provided with a copy of the judgment in draft. They were directed to use the judgment to agree figures for the heads of loss.
10. On 20 March 2023, the claimant served "Points Arising from the Judgment". Some progress was made in agreeing figures, but agreement could not be reached on the

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multiplicand for lost services. The handing-down of judgment was postponed by the court to 17 May 2023.

11. A hearing took place on 17 May 2023 but judgment was not handed down. Marston's indicated that it intended to appeal and the judge asked for written notification, in advance of the next hearing, of the basis of any application for permission to appeal. The parties were also directed to file skeleton arguments, limited to the issues of financial dependency and services dependency. A hearing was fixed for 25 July 2023.
12. In June 2023, both Mrs Price and Marston's filed written "Additional Submissions". On 23 July 2023, Marston's submitted a written "Outline for Application for Permission to Appeal".
13. A hearing took place on 25 July 2023. In the course of the hearing (of which I have a full transcript) the judge gave an oral explanation of some of the points in his draft written judgment which had been challenged in the written submissions and Outline for Application for Permission to Appeal. I will refer to the hearing as "the July Hearing" and I will refer to the transcript as "the July Transcript". In addition to providing these additional explanations for his reasoning, the judge at that hearing invited the parties to agree an order to follow from the proposed judgment. The parties submitted a draft Agreed Minute of Order of Judgment on 1 August 2023.
14. Marston's filed a Notice of Appeal and Grounds of Appeal on 15 and 16 August 2023. Mrs Price filed a Notice of Appeal and Grounds of Appeal on 22 October 2023. Both parties also filed skeleton arguments in support of applications to the judge for permission to appeal.
15. Judgment was handed down at a hearing on 5 September 2023. It was substantially in the form of the draft of March 2023 and did not (for example) include the additional points made by the judge at the July Hearing as seen on the July Transcript. The judge refused permission to appeal.
16. Permission to appeal was granted to both parties by Freedman J on 24 January 2024 by way of a reserved judgment (which I have not been shown) following a permission to appeal hearing on 18 January 2024.

**The issues in the appeals**

17. There are three issues in the appeals.
18. Issue 1 is whether the judge was wrong to find that Mr Price's fall was the cause of his infection and, therefore, the cause of his death from infection. This is Marston's appeal.
19. Issue 2 is whether the judge erred in his decision on Mr Price's life expectancy. This is Mrs Price's appeal.
20. Issue 3 is whether the judge erred in his assessment of financial dependency. This is also an appeal by Mrs Price.

**ISSUE 1: WAS THE JUDGE WRONG TO FIND THAT MR PRICE'S FALL WAS THE CAUSE OF HIS INFECTION AND DEATH?****The Judgment**

21. On Issue 1 (was the judge wrong to find that Mr Price's fall was the cause of his infection and death), the relevant history set out in the judgment handed down on 5 September 2023 ("the Judgment") was as follows.
- i) Mr Price was a stoic man, not prone to complaining about his health. He was a heavy man, weighing close to 24 stone (154kg) at the time of the fall, but otherwise in good health.
  - ii) Between 8 and 9 pm on 14 February 2015, when at work, Mr Price tripped and fell on the floor hazard for which Marston's subsequently admitted liability. The fall led him to collide with a metal preparation table. The evidence of Ryan Hancock was accepted as honest and accurate. He saw Mr Price fall and his description was that he fell with some force, his arms flailing out in front of him. His hip area came into contact with the edge of the table, after which he fell onto his knees.
  - iii) Mr Price made no complaint at the time, but he was never the type to complain. The judge found, taking into account the physics of Mr Price's great weight, that the fall resulted in "sudden acceleration and deceleration" which, in turn, resulted in "a significant impact on the stomach in the area of the hips at the point of impact."
  - iv) Mr Price continued working that evening. On the following day, 15 February 2015, "he returned to work in the morning but became too unwell to remain in work", leaving "at about noon". When he got home, he told his wife he had "had a fall and hurt his back". He said that "through the morning his pain had progressed becoming severe". Mrs Price saw him to be in great pain, and pale and stiff in his movements. She applied ice to the pain.
  - v) Mrs Price saw her husband's pain become worse "over time". As a result she went with him to the Accident and Emergency department at Morriston Hospital in Swansea. "Pain was, initially, focussed at the left buttock and thigh but developed to pain [in] his back". He was diagnosed with soft tissue injuries. By 9 pm that day (15 February), the hospital notes show pain present in the back, groin and right shoulder. He seems to have gone home.
  - vi) On 18 February 2015 Mr Price was still feeling "unwell". He had a telephone consultation with his GP. Prescribed painkillers were having little impact "and Mr Price could only mobilise with the use of crutches".
  - vii) Mr Price's state of health continued to deteriorate and at one stage, whilst watching television in the bedroom while sitting on the bed, he slid to the floor and was unable to move from that sitting position. His family noticed the appearance of jaundice, that he was sweaty, and that Mr Price was less than coherent.

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- viii) On 20 February 2015, the GP out of hours service was contacted and Mr Price was referred to Singleton Hospital in Swansea. The notes of the hospital assessment indicate generalised severe pains in the back, chest, arms and legs along with fever. Sepsis was diagnosed.
  - ix) Mr Price was admitted to hospital as an inpatient on 20 February 2015 and was kept in hospital and treated throughout the months that followed. There is no criticism of the treatment he received although it was, ultimately, unsuccessful in preventing his death.
  - x) On 21 February 2015, Mr Price's level of confusion continued, his temperature continued to rise, and his low blood pressure deteriorated. On 22 February 2015 he was transferred to a critical care unit. By then he was intubated and sedated. Further treatment followed but he died on 23 April 2015.
  - xi) The medical records demonstrate that, despite numerous physical examinations and investigations, "the source of infection was never specifically identified by examination during treatment".
22. There was no dispute that the cause of death was sepsis, which ultimately overwhelmed Mr Price. There was, however, a dispute about whether this was caused by the fall. Marston's case was that Mrs Price had not proved that sepsis had not already started before the fall or, therefore, that the fall was the cause of the fatal sepsis. In this respect, close attention was paid to what could be deduced about the time that sepsis first entered his body, and (consequently) whether it did so because of injury sustained in the fall or not.

*The expert evidence*

23. The judge considered at some length what the experts had said about this question and his treatment of this is at the heart of the argument advanced to me on Issue 1. The experts who had given evidence about it were (obviously) the experts in microbiology: Dr Teare for Mrs Price and Dr Gray for Marston's. But the experts in anaesthesia and intensive care also gave evidence on these points: Dr Power for Mrs Price and Dr McCrirrick for Marston's. The judge made two points about this:

- i) At para 18 of the Judgment, he said:

"I am concerned that Dr McCrirrick [Marston's expert in anaesthesia and intensive care] appeared to exceed his brief by engaging with questions of causation as to when the infection began and progressed. He did, however, make it clear that he deferred to the microbiologists on issues of the progress of infection."

- ii) At para 20 of the Judgment, he said:

"In so far as both [Dr Power and Dr McCrirrick] gave some evidence that deals with development of infection, I do not consider that it does anything other than provide me with factual information which relates to the evidence given by the

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microbiologists; it allows me a broader view of that evidence.”

*Dr Power and Dr McCrirrick*

24. The judge dealt, first, with the evidence of the experts who were not there to deal with microbiology, i.e. Dr Power and Dr McCrirrick, the experts in anaesthesia and intensive care. He noted that they had been asked specific questions about “the progress of disease, portals of entry for infection, the sources/focus of infection and sequence of events leading to death”. He summarised the essential difference between them on the commencement and development of sepsis as follows (Judgment para 15, with my emphasis added):

“They disagree that the sepsis condition which Mr Price presented with on the 20 February 2015 began with his accident on the 14 February. Dr McCrirrick considers that Mr Price was demonstrating symptoms of systemic illness on 15 February resulting in septic shock on 21 February **and that those symptoms were not related to mechanical injuries. Dr Power relates symptoms to the accident.** Both agree the infection was caused by staphylococcus aureus. Dr Power considers that the organism (which is generally harmlessly present on the skin surface of a proportion of the population) entered through a soft tissue injury to the skin caused by the fall.”

25. He summarised points of agreement between Dr Power and Dr McCrirrick as follows (Judgment para 15):-

“Both agree the infection was caused by staphylococcus aureus. (...) Both experts accept that examination during his stay at hospital had not identified any point of entry for the organism. Both agree that the infection, through multiple organ failure, a prolonged period in critical care and finally a pulmonary embolism led to Mr Price’s death. Both experts agree that potential entry points for infection include a break in the skin surface and through mucous membrane. Both experts agree that at post mortem examination nothing was discovered which identified a point of entry. Both experts consider that by the 15 February 2015 the symptoms were consistent with the early stages of staphylococcal infection.”

26. On the points of disagreement, he summarised the evidence of Dr Power (which he later preferred to the evidence of Dr McCrirrick) as follows (Judgment para 16):

“Dr Power makes it clear that Mr Price was not particularly vulnerable to the risk of infection from this organism. He also indicates that the probable source of infection is a breach in the skin, this being the commonest means by which an organism invades a body, he does not find it surprising that no injury was identified because of the nature of symptoms being reported. Dr Power relies on the temporal relationship between the fall and

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the development of illness as indicative that there was infection through a relatively minor break in the skin, either abrasion or laceration, although he made it clear in cross examination his original instructions had not required him to concentrate on point of entry of the infection. He further conceded that entry via mucous membrane was a possible point of entry and the nose was the most obvious source through such membrane. He indicated that initially he was examining critical care and not considering the issue of the accident and emergency attendance on 15 February 2015. He told me that in 50% of cases during treatment of infection a portal of entry is not identified and that it was unsurprising that this was the case in respect of Mr Price.”

27. The evidence of Dr McCrerrick, on the other hand, he summarised as follows (Judgment para 17):-

“Dr McCrerrick is of the opinion that the portal of entry is unknown because no skin breaches were identified during examinations and that, along with the skin breaches, mucous membrane is another portal of entry for the organism. In cross examination Dr McCrerrick indicated his view that in the absence of a lesion he would "assume" that entry was via mucous membrane. Dr McCrerrick relied on his understanding that there is an incubation period of "4 to 10 days" for the infection to develop as part of his reasoning for concluding that the source was unknown. However, he indicated that he deferred to microbiologists on the rate of infection. Dr McCrerrick was not prepared to accept that the presentation on 15 February could possibly relate to infection beginning through injury on 14 February 2015. His reasoning appeared to me to be somewhat circular as, in cross examination, he said because the notes showed muscular symptoms, from clinical experience, he worked back to an earlier entry by the organism entry. In contrast Dr Power was prepared to concede that there were other possibilities.”

28. The judge gave his reasons for preferring the evidence of Dr Power to the evidence of Dr McCrerrick on these points as follows (paras 18-20 of the Judgment):-

“18. I am concerned that Dr McCrerrick appeared to exceed his brief by engaging with questions of causation as to when the infection began and progressed. He did however, make it clear that he deferred to the microbiologists on issues of the progress of infection. However, I consider that his reading led to an assumption of 4 to 10 days for the development of infection. I consider that has, in turn, impacted on his view as to when Mr Price was infected and his analysis of possible portals of entry.

19. (...) I prefer the evidence of Dr Power, who seemed to me more balanced in his presentation of evidence, making concessions. I came to the conclusion that Dr McCrerrick had

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adopted a position, and was not prepared to concede there was even a possibility of other conclusions being reached.

20. (...) As far as their interpretation of presentation of symptoms on 15 February 2015 [is concerned], I conclude that the symptoms described are the early stages of infection. Secondly, the mechanism and physics of the fall, lends support to Dr Power's view that there was likely to be a skin abrasion or laceration, albeit not specifically identified in examinations from 20 February 2015 onwards. In my Judgment, Dr Power's description of the priorities of treatment along with the passage of time between the fall and admittance to hospital and the likely minor nature of any such abrasion or laceration are the reasons why it was not identified at the time."

*Dr Teare and Dr Gray*

29. After this, the judge turned to the expert evidence of the microbiologists, whose expertise was more obviously aligned with these questions than the expertise of Dr Power and Dr McCrerrick. The expert microbiologists were Dr Teare for Mrs Price and Dr Gray for Marston's.
30. The judge began by summarising the points on which Dr Teare and Dr Gray agreed, as follows (Judgment para 21):

"Both Dr Teare and Dr Gray agree that the organism causing sepsis was staphylococcus aureus. They also agree that bacteria present in the bloodstream for long enough and in large enough numbers may result in sepsis. It is agreed that Mr Price was bacteraemic (bacteria in the bloodstream) 4 to 5 days prior to presentation on 20 February 2015. They further agree that there must have been a source for this infection and that the most likely original source of infection came from a site on Mr Price. There is further agreement that the organism is carried on the body without symptoms on the skin and mucus membranes. They also agree that no clear source of infection was identified during the time Mr Price was in hospital and frequently examined and tested."

31. He then moved to the point of dispute between them: "Where they clearly disagree, as Dr Gray told me in oral evidence, is that the timing between the fall and the development of infection demonstrates a link" (Judgment para 21).
32. He summarised the evidence of Dr Teare (which he ultimately preferred) as follows (Judgment para 25):-

"Dr Teare considered that the mechanism of infection was connected to a trauma. She stated that it was well known that the organism on the skin could gain access through small breaches in the skin and or mucous membranes which are not obvious. She indicated that bruising was also a source of infection because



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small capillaries under the skin break and pooling of blood under the skin occurs. In her view, but for the fall, there would have been no breach in the integrity of the Claimant's skin or mucous membrane. When asked about bruising in cross examination, she spoke about tissue damage in different dermal layers including capillaries and blood associated with an injury was a better indicator of likelihood of infection than the size of injury necessarily, and that a cut was not necessary; an abrasion would be sufficient. When she was asked about the evidence for local infection resulting from the fall, she told me when a patient was examined there was an investigation into the source of infection (which is what the clinicians in this case did) and that what was left, after the investigation revealed nothing, was the history of a fall. Her conclusion was that Mr Price was developing the infection by 15 February 2015 as a result of trauma from the fall on 14 February 2015.”

33. The judge summarised the contrary evidence of Dr Gray, for Marston's, as follows (Judgment paras 22-24):-

“22. Dr Gray's view is that nose throat and perineal areas are the main areas where the organism is carried, and there is less likelihood of it being carried in other areas of skin. However, in cross examination he accepted that the groin area could carry the bacteria in millions and that the vast majority would have the gene which expresses virulence (leading to infection). He accepted that there were, generally, three sources of infection, and that the only source not excluded during treatment was skin, but qualified this by stating that he would be astonished to see skin infection without an obvious site of infection. However, he also accepted that there was no evidence of soreness in the nose and throat. Despite this, his conclusion was that the injury was probably in the mucous membranes of the nose.

23. Dr Gray accepted it was difficult to define incubation periods. This is because the more bacteria present the faster an infection can develop. He was not prepared to accept that peak infection could be reached in 36 hours. Dr Gray was referred to scientific literature and accepted that he had not relied on any in his report but said that he had some literature in mind alongside his experience in drawing these conclusions. He was taken to timing findings in a paper (bundle p.332) on infection. His view was that these studies could not be relied upon because there is a requirement to know the stimulus of infection (he said unknown in most cases) whereas the paper was prepared on the basis of known stimuli for infection. In cross examination it was suggested to him that the paper demonstrated that post surgery, despite the usual hygiene protocols involved, the paper showed infection to sepsis possible within two days. His answer was that surgical practice had changed and that there was no indication

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how this had been assessed. Dr Gray accepted that in 75% of cases the history given is the most useful indicator as to source of infection and that the history here was of a fall. It was at that stage that Dr Gray was most insistent; he said he would consider the fall but that the timing of the infection was his greatest difficulty in accepting that as the cause. The one common thread I took from his evidence was that it was the timing between the fall and the development of symptoms which led him to be doubtful of a link, the fall was too close in time to the symptoms occurring in his opinion. In his original report he indicates that he had discounted the possibility of infection via a skin break because nothing was identified in clinical examination.

24. Dr Gray has attempted a back calculation from a particular protein measurement (CRP) to support a conclusion of earlier infection. His basis for the conclusion in his report was from clinical experience and not a body of opinion or research. He accepted in cross examination, upon being referred to a research paper that there is a considerable difference between individuals and the impact of when a peak of CRP occurs. In the body of the report Dr Gray makes it clear that CRP "cannot be used to predict (sic) when infection began".

34. As to that last point, the judge said (final sentence of Judgment para 24):

"In my judgment this back calculation does not assist as it relies on too many variables and is undermined for the very reason outlined by Dr Gray that it cannot be used to date the start of infection."

*The judge's conclusion on causation*

35. Drawing all this expert evidence together, the judge stated his conclusions on the expert evidence as follows (Judgment para 26):-

"I prefer the evidence of Dr Teare as to the development of infection from the fall. Firstly I take account of the conclusion I have already drawn from the evidence of the intensivists [i.e. Dr Power and Dr McCrirrick]. Secondly it appears to me that Dr Gray's evidence that timing from infection to sepsis can be variable but that the infection was more probably developed before the fall is little more than that simple negative assertion. I temper that judgment with a recognition of Dr Gray's obvious experience, but that is undermined because of his acceptance of variability of timing. In my judgment, the temporal connection between the fall and development of infection, along with the likelihood of trauma, provides an explanation for the start of infection. It is for the Claimant to prove the connection and not for the Defendant to offer an alternative. However, when the evidence points to an explanation and the alternative is the

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absence of explanation for the start of infection, there needs to be something beyond assertion; I find that there is none.”

36. No specific criticism is directed at the judge’s self-directions on the law of causation. These included the following observations (Judgment paras 37-38):-

“A claimant can recover damages for personal injuries where those are caused or materially contributed to by the defendant’s negligence (see *Bonnington Castings v Wardlaw* [1956] 2 WLR 707), it is the causation of the injury that leads to infection and sepsis and subsequent death that are disputed in this case. If an injury is foreseeable arising from a breach of duty the claimant will be able to recover damages even if the extent of injury is not necessarily foreseeable. A claimant must establish a causal link between the negligence/breach of duty of and the injuries.

Counsel for Defendant argues that where there are multiple potential sources for infection the evidence must “rule out” the other sources. Whilst I understand the thrust of this submission it is, in my judgment, far too simplistic. The requirement on the Claimant is to prove, to an extent greater than 50%, that the source relied upon is the source causing infection. That will not “rule out” other causes, instead once the required 50% plus level is reached it will prove that a particular source is more probable the cause, or if that threshold is not reached that none of the competing sources are more probable than another.”

37. The judge’s final conclusions on causation were as follows (Judgment para 45):-

“Having concluded that the expert evidence of the Claimant’s witnesses is to be preferred I find the following: On 14 February 2015, because of a tripping hazard at the threshold of the refrigerator at work, Mr Price fell. (...) I find it more probable than not that, in consequence of the violence of the fall at work, Mr Price, colliding with a metal table, suffered a minor break in the integrity of the skin. I further find that he had staphylococcus aureus present on his skin in the region of that break in the skin. In addition I find that the portal of entry for the infection he developed was that break in the skin. From the time of the fall Mr Price became bacteraemic from the infection, which in turn lead to him developing sepsis over the ensuing days. The sepsis caused systemic illness, including organ failure. Because of this Mr Price required the treatment he received in critical care. The combination of these matters led to his premature death from a pulmonary embolism.”

### **Discussion and decision on Issue 1**

38. In support of their appeal, Marston’s argue that the issue of causation “could only be determined on microbiological evidence” (skeleton para 4). This is somewhat contrary to their conduct of the trial, in which (as the judge indicated) they had drawn other

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experts into that question. The judge's reasoning, which I have summarised and quoted above, both fully considered all the evidence put before him on the causation point, and explained his reason for preferring one side to the other.

39. Marston's argue that they provided "coherent scientific evidence" which "ruled out" the fall on causation grounds being the cause of infection on the balance of probabilities and this evidence was "ignored" by the judge (para 7). However, the judge considered all the evidence and gave cogent and coherent reasons for finding the claimant case preferable to the defence case on this point. It is not correct that the defence case "ruled out" the claimant's case on causation, although it certainly disagreed with it. The defence was entitled to put forward a case contrary to the claimant case, but this did not mean that the judge was bound to accept it.
40. Marston's object to distillation of 60 pages of transcript expert evidence into paragraphs 21-26 of the judgment, suggesting that "six paragraphs on the central issue in the case" was inadequate. Subject to the points I will consider below, this is not a persuasive argument. A judgment has necessarily to summarise and select. The fact that a judgment deals with a question more briefly than the evidence (on both sides) upon which the judgment is based is not objectionable. On the contrary, it is desirable and essential. I will deal below with specific criticisms of the judgment's treatment of the expert evidence.
41. Marston's submit in support of their appeal that Dr Gray (Marston's expert) was "resolute in his view" that (as Marston's skeleton argument puts it) "there was insufficient time between the fall on 14 February 2015 (at approximately 9 pm) and showing signs of bacteraemia in the morning of 15 February 2015" to support Mr Price's fall as the cause (para 15). However, the judge was not obliged to accept the defence expert's evidence simply because it was "resolute".
42. The judge gave specific reasons for preferring Mrs Price's case over Marston's, and for rejecting the opinion of Dr Gray, on the causation point. In particular:
  - i) It was agreed that the bacteraemia (and fatal sepsis) was caused by staphylococcus aureus ("staph") and that this is generally harmlessly present on the skin surface.
  - ii) It was agreed that examination during Mr Price's stay in hospital had not identified any point of entry for the organism (Judgment paras 15 and 21).
  - iii) It was agreed that potential entry points for the infection included a break in the surface and through mucous membrane. It was agreed that hospital and post mortem examinations had not identified a point of entry. The absence of evidence of surface injury entry was therefore balanced by the absence of evidence of mucous membrane infection or entry. Dr Power's evidence was that "in 50% of cases during treatment of infection a portal of entry is not identified" (Judgment para 16).
  - iv) Dr Power said that breach in the skin is "the commonest means by which an organism invades a body" (Judgment para 16).

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- v) The judge found that “the mechanism and physics of the fall lends support to Dr Power’s view that there was likely to be a skin abrasion or laceration, albeit not specifically identified in examinations” (Judgment para 20). This was common sense, and the judge cannot be criticised for this finding, notwithstanding the absence of corroborating evidence from medical examinations and records. Dr Power said that he did not find it surprising that no injury was identified in Mr Price’s case “because of the nature of symptoms being reported” (Judgment para 16). By the time Mr Price was seriously ill and being closely and regularly examined, he was not complaining of symptoms from a specific wound or obviously localised physical injury such as fracture. His symptoms were more generalised because (as was recognised from 20 February 2015) they were symptoms of an infection which ultimately proved to be fatal. None of the treating doctors were deciding how his illness began. Their job was to work out what his illness was and how it should be treated. That necessarily directed their enquiries at the time. This was exactly what Dr Power said in cross examination; e.g. in the transcript at Bundle p 112 lines 32-34, and p 113 lines 25-27. The death and post mortem examination did not take place until months after the accident (and even Marston’s agreed that the onset of infection was not later than the accident – their case was that it preceded the accident). All of this tends to support the evidence of Dr Power. That in turn supports the judge’s right, as the trial judge hearing the evidence and deciding the facts, to accept what Dr Power was saying in this respect.
- vi) Turning to the microbiologists, Dr Teare’s expert evidence was that it was “well known that the organism on the skin could gain access through small breaches in the skin and or mucous membranes which are not obvious” (Judgment para 25). She indicated that even bruising could be a source of infection (Judgment para 25). A cut was not necessary; an abrasion would be sufficient (Judgment para 25). This further strengthened Mrs Price’s case that bacteria had entered through an injury caused by the fall, even though no such site of entry was noted in any medical record or examination.
- vii) Dr Gray’s expert evidence, in favouring entry of bacteria other than by reason of an injury sustained in the fall, focussed on the “nose throat and perineal areas” as “the main areas where the organism is carried” (Judgment para 22). He said he would be “astonished” to see skin infection “without an obvious site of infection” (Judgment para 22). However, he “also accepted that there was no evidence of soreness in the nose and throat” (Judgment para 22). The judge was entitled to consider that this reduced the force of his first point.
- viii) Although Dr McCrirrick said that he understood there to be an incubation period of 4-10 days for the infection to develop, “he indicated that he deferred to microbiologists on the rate of infection” (Judgment para 17).
- ix) The microbiologist experts (Dr Teare and Dr Gray) agreed that Mr Price was bacteraemic “4 to 5 days prior to presentation on 20 February 2015” (Judgment para 21). By bacteraemic was meant “bacteria in the bloodstream” (Judgment para 21). The fall took place between 8 and 9 pm on 14 February 2015 and the diagnosis of sepsis was made based on symptoms when presented at Singleton Hospital on 20 February 2015 following referral by the GP out of hours service – i.e. towards the end of that day. Therefore, 4 to 5 days prior to that was either

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on 15 or 16 February 2015, both of which were dates after Mr Price's fall at work on 14 February.

- x) Marston's expert, Dr Gray "accepted it was difficult to define incubation periods", because it depended on matters including the volume of bacteria present (Judgment para 23). Even Dr Gray was not saying his time estimates were definitive, and that was a point repeated and emphasised later in his Judgment by the judge (Judgment para 26). This undermines Marston's argument on Issue 1 that Dr Gray's evidence about incubation periods should be treated as hard-edged to the point that it made the judge's conclusion on causation unsustainable. It was not hard-edged (and, as I will show when I discuss precisely what Dr Gray said, it was also not inconsistent with the judge's conclusion).
  - xi) Even if it had been hard-edged, the judge was not bound to accept Dr Gray's evidence. He was entitled to and did carefully evaluate it before deciding whether he found it persuasive.
  - xii) Dr Gray's evidence on incubation periods was both inconsistent with some of the medical literature to which he was taken (although he gave various grounds for saying that literature "could not be relied upon"; Judgment para 23) and not supported by any medical literature upon which Dr Gray could himself rely (his opinion being based on his own clinical experience, and "not a body of opinion or research" Judgment para 24). This was a very good reason for deciding (as the judge did) not to accept Dr Gray's opinion on this point.
  - xiii) Dr Gray also relied on a particular protein measurement (CRP) for a back calculation to support a date earlier than the accident for the infection diagnosed on 20 February, but his report also said that CRP "cannot be used to predict when infection began" (Judgment para 24). This supported the judge's conclusion that this calculation did not turn the case in Marston's favour (Judgment para 24, final sentence, quoted above).
  - xiv) Dr Gray's evidence based upon the incubation period can, therefore, be said to be weak, for the reasons given by the judge.
  - xv) The incubation period, and the date when sepsis was correctly diagnosed on a symptomatic basis on 20 February, were only part of the evidence upon which the judge was entitled to base his conclusions. The other evidence I have fully summarised, but it included the fact of the fall and at least the possibility of the fall causing injury which was sufficient to admit bacteria although not obvious or important enough to have been picked up in medical records from examinations made at the time.
43. On appeal, Marston's argue that Dr Teare had (unacknowledged in the Judgment) accepted that (as Marston's skeleton argument in support of the appeal puts it, at para 30.d.) "the usual period for exposure to signs of exposure was 4-10 days". The judge is then criticised for not considering a 4-10 day period and dealing with it in the Judgment. However, the basis of this submission is the joint statement of the microbiologists (Dr Teare and Dr Gray) dated 26 November 2021, which addresses this point as follows (Bundle p 520):

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- i) The experts were asked whether they agreed with a statement attributed to Dr McCrirrick (who was not a microbiologist) that the incubation period for staph “is usually in the region of 4 to 10 days”.
  - ii) To this, Dr Teare and Dr Gray indicated the following point of agreement between them, namely, that “the incubation period is defined as the time from exposure to an infectious agent until signs and symptoms of the disease appear. The range of 4 to 10 days is widely quoted in text books and on websites as the incubation period for *Staphylococcus aureus* infections”.
44. However:
- i) Dr Teare said that, in the case of bacterial infection such as staph (as opposed to viral infections such as chickenpox) “the variables (e.g. host factors such as age/immune competency, bacterial factors such as numbers/virulence) make this definition unreliable.”
  - ii) Dr Gray said “it is often difficult or impossible to accurately define the incubation period of endogenous infections. Even the time of an injury cannot be regarded as the beginning of the incubation period, because any wound may not be immediately exposed to the infecting bacterium.”
45. Therefore this passage did not, in my judgment, support Marston’s case so clearly, or undermine the judge’s conclusion and reasoning so significantly, that the judge can be criticised for not expressly referring to it in the Judgment. It did not, in fact, amount to very much. It supported a 4 day incubation period as a possibility (since it was measuring the period from entry of infection, not the period from the onset of symptoms), which was consistent with Mrs Price’s case that infection began at or after the accident and might therefore, on the evidence as a whole, be attributed to the accident. It was not, even in the literature referred to in the question, hard-edged (“usually in the region of 4-10 days”, rather than “no less than 4 days”). And Dr Teare, as an expert, explained why it was often “difficult or impossible to accurately define the incubation period”. Whilst Dr Gray did not endorse that comment by Dr Teare (which did not mean that the judge was not entitled to accept it from Dr Gray), even Dr Gray recognised “it is often difficult or impossible to accurately define the incubation period of endogenous infections.” This passage did not, therefore, support Dr Gray’s subsequent assertion in the joint statement that, in his opinion, an incubation period of “around 4 days or more would have been required between the time of any skin injury and the development of symptomatic bloodstream infection...” (emphasis added).
46. Dr Teare was clear in this passage of the joint statement (i.e. on p 520 of the Bundle, from which I have been quoting) that the first evidence of staph on which she relied in this context was “the blood culture of 20.2.15”. This was consistent with bacteria entering Mr Price’s bloodstream in connection with the accident on 14 February 2015, even if an incubation window of 4-10 days was accepted as standard.
47. The date on which incubation began was the date on which infection (bacteria) entered Mr Price’s body (and he became bacteraemic). It was not the date on which symptoms first appeared. That is clear from the joint statement’s agreement that “the incubation period is defined as the time from exposure to an infectious agent until signs and symptoms of the disease appear”.

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48. Dr Gray had no direct knowledge of when Mr Price became visibly symptomatic. He was not a treating doctor and he was only able to give an opinion (an expert opinion) based upon contemporary medical records and the other evidence in the case. However, when this evidence was put to him in cross examination, he did not assert that anything reported before 20 February should be interpreted as a symptom of bacteraemia; on the contrary, he insisted that his expert opinion about bacteraemia being attributable to an infection before the fall derived from the results of 20 February and not before (cross examination transcript Bundle p 244 line 25 to p 245 line 11). Therefore, it was not Dr Gray's evidence that the 4 day period (or 4-10 day period) should be counted back from any date earlier than 20 February in order to deduce the probable date of initial infection, and the judge was not required to deal with a case based on a 4 day period counting back from 15 February, as the appeal argues. Indeed, at the end of this particular passage of his cross examination, Dr Gray positively asserted (consistently with Mrs Price's case):

“In terms of bacteraemia, which is the presence of bacteria in the bloodstream, the evidence we have for that is working backwards from the 20th and the history of Mr Price having been, I think, hot and sweaty for four to five days, which would put the onset of a significant infection at somewhere around the 15th or the 16th.” (cross examination transcript Bundle p 245 lines 7-11)

49. Marston's arguments on appeal consistently confuse and conflate the question of when bacteraemia was present with the question of when it became symptomatic. The judge found that it was caused by the accident and therefore the bacteria had not entered his body before the accident and independently of it, as Marston's contended. The judge was entitled to reach that conclusion on the evidence, and he gave a sufficient explanation for his conclusion in that respect, which was entirely based in the evidence and closely referenced to it.
50. The separate question of when symptoms appeared and were noted is one upon which the microbiological experts were, in fact, agreed: both experts based themselves on the notes of 20 February and counted back from 20 February. That was so even though Mr Price was unwell and presenting himself to doctors before 20 February. His initial complaint was that he “had a fall and hurt his back”, which is what he said on 15 February, which was the day after the accident (Judgment para 5). When he went to Accident and Emergency at Morrision Hospital that day, pain was noted in his back, groin and right shoulder, and he was diagnosed as having suffered “soft tissue injuries” (Judgment para 5). In due course, Marston's Counter-Schedule of Loss said that the witness evidence “focusses on a back injury” and suggested an award “of £2,000 or thereabouts” in that respect (Marston's Counter-Schedule of November 2021 at p 2, para 1(i), in respect of pain, suffering and loss of amenity). It was not Dr Gray's evidence (or Dr Teare's evidence) that pain noted in the early days should be taken as symptomatic of bacteraemia. In subsequent days, Mr Price became sweaty (Judgment para 7) but the next medical diagnosis was the (correct) diagnosis of sepsis on 20 February 2015 (Judgment para 7) which was the basis of Dr Gray's evidence on this point (see para 48 above). Both the microbiological experts agreed on this. Their joint statement said (in answer to Question 3 on pp 9-10 of 15, Bundle pp 515-516):



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“3. When did the Deceased likely develop *Staphylococcus aureus* bacteraemia?”

**We agree:** that evidence for *Staphylococcus aureus* being in the blood stream comes from the history given on 20.02.15:

*‘started to feel feverish, hot and sweaty. 4 - 5 day history of fevers, general malaise and loss of appetite. Generally stiff all over, including neck.’*

On the balance of probabilities therefore, the Deceased was bacteraemic 4 - 5 days before the history he gave on 20.02.15, i.e. by 15.02.15 or 16.02.15.”

51. Marston’s rely on the judge’s observation that “Both experts [i.e. Dr Power and Dr McCrirrick] consider that by 15 February 2015 the symptoms were consistent with the early stages of staphylococcal infection” (Judgment para 15), but that would be so even though (as both Dr Teare and Dr Gray suggested in their evidence) the early stages of staph would not necessarily be symptomatic. Marston’s are on stronger ground in pointing to the judge saying (in reference to the evidence of Dr Power and Dr McCrirrick, the experts in anaesthesia and intensive care) “As far as their interpretation of presentation of symptoms on 15 February 2015 [is concerned], I conclude that the symptoms described are the early stages of infection” (Judgment para 20). Taken in isolation, one reading of that sentence is that the judge was making a finding, not only that Mr Price was bacteraemic after his fall (which everyone agreed he was, the issue being whether he was bacteraemic *before* the fall as well), but that he was showing symptoms of this as early as 15 February. However, in the context of the judgment as a whole, and of the evidence as a whole, as I have discussed it already, the judge must have meant (as he had earlier suggested in para 15 of the Judgment) that Mr Price was in the early stages of infection (as everyone agreed) and that his symptoms were consistent with that, rather than positive evidence of it. This was the thrust of the evidence of Dr Gray as well as Dr Teare. I do not think that Marston’s are entitled, based on this sentence in the judgment, to argue that the infection must have begun 4 days or more before 15 February, as opposed to 20 February. That argument was not supported by any microbiological expert, including Marston’s own expert Dr Gray, and it was not consistent with the agreed answer of both microbiologists to Question 3 in their joint statement, quoted above.
52. My conclusion is that Marston’s appeal is not well-founded on Issue 1. The judge reached a conclusion on causation which was consistent with the evidence presented to him and he explained it to the standard required by cases such as *Flannery v Halifax Estate Agencies Ltd t/a Colleys Professional Services* [2000] 1 WLR 377 at pp 381G-382C, *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112 at paras 46-47 and *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409.

**ISSUE 2: DID THE JUDGE ERR IN HIS DECISION ON MR PRICE'S LIFE EXPECTANCY?****The appeal on Issue 2**

53. Mr Price's life expectancy is addressed in paras 27-36 and paras 48-50 of the Judgment. Mrs Price appeals against the judge's finding that Mr Price's life expectancy, had he not died as a result of the fall, was reduced by 9 years on account of his obesity (Judgment para 50).
54. The judge heard expert evidence on life expectancy from Professor Almond (on behalf of Mrs Price) and Dr Bodansky (on behalf of Marston's). Mrs Price argues that there is "an irreconcilable discordance" between paras 36 and 50 of the Judgment. In para 36, the judge said he preferred the evidence of Professor Almond (whose opinion was that life expectancy indicated by UK tables should be reduced by 8 years on account of Mr Price's obesity) to the evidence of Dr Bodansky (whose opinion was that the reduction on account of obesity should be in a range of 8 to 10 years). In para 50, the judge adopted a figure of 9 years, saying that providing a range was "a more realistic approach on the part of Dr Bodansky" and that Professor Almond's 8 years "was a rather dogmatic position".
55. Mrs Price argues on appeal that the logical consequence of everything that had gone before was that Professor Almond's figure of 8 years should have been adopted and that I should substitute it under CPR 52.20.
56. Mrs Price argues that the Judgment does not explain or justify the figure of 9 years rather than 8 years and that it fails to meet the requirements of *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 as a result.
57. Opposing the appeal, Marston's argue that judge left no doubt in para 50 of the Judgment (or on the transcript of 25 July, or the Order that he made as a result of the Judgment) that the reduction in life expectancy he applied on account of Mr Price's obesity was 9 years, not 8 years. They argue that this was a finding of fact and, applying established principles on the approach of an appellate judge to the findings of a trial judge, this court must be slow to substitute a different finding for his. They argue that the judge did not have to choose one expert over another and was entitled to reach his figure of 9 years, which was within the range offered to him by Dr Bodansky and was not Dr Bodansky's own figure. They argue that, if there is any discordance between paragraphs 36 and 50 of the Judgment, it is remedied by para 50, and this was made clear at the hearing on 25 July. They suggest that the judge should have removed para 36 from the Judgment before handing it down. They submit that, if (contrary to their primary submission), the tension between paras 36 and 50 of the Judgment does require resolution on appeal, I should resolve the issue based on para 50 of the Judgment in accordance with CPR 52.13(b) and in conjunction with the judge's explanation on 25 July, and discount para 36 of the Judgment so as to leave the outcome in para 50 unaffected. This is the approach adopted in section 6(1) of Marston's Respondent's Notice. At the conclusion of the argument before me, Counsel for Marston's suggested as an afterthought that there should be a re-trial on life expectancy.

Approved Judgment**The Judgment on Issue 2**

58. The Judgment noted that both experts (Professor Almond for Mrs Price and Dr Bodansky for Marston's) used life expectancy tables, although Professor Almond used a UK-wide table whereas Dr Bodansky used a Wales-specific table (Judgment para 27). The judge did not criticise either expert for his choice of table (para 35) but gave his own reasons for preferring the Wales table in Mr Price's case (para 49) and there is no challenge to that part of his reasoning.
59. The Judgment noted that both experts agreed that the base figure should be increased by 2 years in Mr Price's case because he was a non-smoker (Judgment para 27). That remains common ground.
60. Both experts agreed that the only negative factors affecting or potentially affecting Mr Price's life expectancy were obesity and sleep apnoea. That is also common ground.
61. Professor Almond considered that no reduction fell to be applied because of sleep apnoea because of effective treatment (para 29). Dr Bodansky did not agree with that, although he appeared to accept that treatment must have some impact (para 34). The judge found Dr Bodansky's evidence "much less persuasive" than Professor Almond's on this point, because "he appeared unable to respond in any level of detail to questions about the impact of treatment" (para 34). The judge preferred Professor Almond's evidence with regard to the impact of treatment on sleep apnoea (para 36) and applied no reduction for that (para 50). There is no appeal against that aspect of his judgment.
62. That leaves only the question of what reduction should be made for Mr Price's obesity.
63. The Judgment dealt with obesity in the following passages:

"27. (...) [The experts] agreed there should be a reduction in the base figure because of obesity, but disagreed as to the correct reduction Professor Almond placing that at 8 years and Dr Bodansky putting it as a range between 8 – 10 rather than a fixed figure. The differences between them largely arise from the tables they have used.

(...)

30. In cross examination Professor Almond was asked to explain his choice of a discount of 8 rather than 10 years when considering the impact of the known obesity of Mr Price. His answer that 10 years would be suitable where a person had been obese for the greater proportion of their life whereas a lower figure would be appropriate where someone had developed towards obesity as they aged.

(...)

32. Dr Bodansky was asked about the depressive effect of obesity figures on life expectancy figures [sc. in tables] in any event given the high levels of overweight and obese males within

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the population. I was not clear what the purpose of this question was as both experts agreed there would be an impact and the marginal difference was reliance upon a range rather than the lower fixed figure. In any event I considered that this was a question that would apply to a statistician preparing tables as it required an analysis of base figures and their application to averages of life expectancy.

33. In addition, when Dr Bodansky was asked about the range he had given in relation to the gradual weight gain towards obesity rather than obesity from an early age, he told me he was not sure he could answer. He was not prepared to accept the argument but stated that he could understand the thrust of the argument.

34. Where I found Dr Bodansky's evidence was much less persuasive was in respect of the reduction due to sleep apnoea (...)

35. (...) In my judgment there is nothing to choose between the physicians as to their choices of table (...)

36. Professor Almond, using Lancet information made a reduction in life expectancy of 8 years due to obesity. He concluded the 8 year figure out of the range was appropriate where obesity developed over time. Dr Bodansky, placing a range of 8 to 10 years, relied solely on statistics. I prefer the evidence of Professor Almond in this regard as he has advanced reasons for positioning at the lower end of the range to which Dr Bodansky did not have a detailed response. Similarly I prefer his evidence with regard to the impact of treatment on sleep apnoea.

(...)

**DISCUSSION**

45. Having concluded that the expert evidence of the Claimant's witnesses is to be preferred I find the following: (...)

50. Given my view of the evidence of Dr Bodansky on sleep apnoea I would make no reduction from the baseline figure because of that. I have had much more difficulty with the question of obesity. In some ways obesity will form part of the overall population figures, however there is clearly a difference of some significance as both the Claim and Defence experts accepted. Providing a range, it seemed to me, was a more realistic approach on the part of Dr Bodansky but then he was not able to answer questions about the impact of when obesity began. Professor Almond was much firmer on eight years, but it seemed to me that was a rather dogmatic position. In the end I felt that a reduction at the middle of the range probably reflected

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reality. That was a period of 9 years leaving an age of 76.5 years as life expectation. (...)"

**Discussion and decision on Issue 2**

64. I can see that there is a tension between para 36, read in isolation from the whole of paras 27-36 of the Judgment, and para 50. Para 36 appears to set out the rival positions on life expectancy reduction for obesity ("Professor Almond... made a reduction... of 8 years..." and "Dr Bodansky, placing a range of 8 to 10 years") and firmly to plump for Professor Almond ("I prefer the evidence of Professor Almond in this regard"). That then jars with the decision in para 50 to assess the reduction at 9 years, not 8.
65. Even on a more careful and contextual reading, this tension remains.
- i) The Judgment shows both experts discussing a range. Dr Bodansky stuck with a range (of 8-10 years, see Judgment para 27). Professor Almond also recognised a range in general terms, placing Mr Price at 8 years but accepting, also, 10 years as "suitable where a person had been obese for the greater proportion of their life" (Judgment para 30). In giving his opinion that the correct reduction for Mr Price was 8 years exactly, he was moving Mr Price to the bottom of this range. Dr Bodansky was not doing that, but remained in his range of 8-10 years.
  - ii) Dr Bodansky was "not sure he could answer" questions put to him "in relation to the gradual weight gain towards obesity rather than obesity from an early age" (Judgment para 33).
  - iii) There does not from the Judgment appear to have been a difference between the experts on the use of a range of 8-10 years to account for obesity; the difference was between Professor Almond's opinion that Mr Price should be placed at the very bottom of that range (8 years) and Dr Bodansky's opinion that he should not (leaving the range at 8-10 years).
  - iv) Para 33 of the Judgment, which I have quoted in full, might be taken as a criticism of Dr Bodansky, because "he was not sure he could answer" questions about a distinction between lifelong obesity and later-acquired obesity.
  - v) This criticism is made explicit in the concluding paragraph of this section of the Judgment. Para 36 returns to the contrast between Professor Almond's adoption of "the 8 year figure out of the range" and "Dr Bodansky, placing a range of 8 to 10 years". Para 36 says that, when Dr Bodansky stuck with the range of 8 to 10 years (rather than moving with Professor Almond to the bottom of the range), he "relied solely on statistics".
  - vi) The Judgment then unambiguously and roundly prefers Professor Almond's figure at the bottom of the range to Dr Bodansky's refusal to move within it. The judge says "I prefer the evidence of Professor Almond in this regard as he has advanced reasons for positioning at the lower end of the range to which Dr Bodansky did not have a detailed response" (Judgment para 36).

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66. The Discussion section, similarly, opens (in para 45 of the Judgment) with the observation that the judge has “concluded that the expert evidence of the Claimant’s witnesses is to be preferred”. Professor Almond was the Claimant’s expert. This, taken with paras 27-36 of the Judgment, suggests that Professor Almond’s figure of 8 years (“at the lower end of the range”) rather than a mid-point of the 8-10 year range will be preferred as the reduction in life expectancy to be applied on account of Mr Price’s obesity.
67. But para 50 does the opposite. By adopting “a reduction in the middle of the range”, i.e. “a period of 9 years” (Judgment para 50), it contradicts the earlier decision that Professor Almond’s position was to be preferred, because he had given reasons for “positioning at the lower end of the range” (para 36). 9 years in a range of 8-10 years is not “at the lower end of the range”.
68. The reasoning of para 50 neither explains nor justifies this change. Whereas the summary of the experts’ evidence at paras 27-36 recognised that both saw a range, and the difference between them was Professor Almond’s reasoned decision to move Mr Price to the bottom of it, para 50 seems to suggest that only Dr Bodansky had a range, and this was “a more realistic approach”. The criticism of Dr Bodansky not being “able to answer questions about the impact of when obesity began” is reiterated in para 50, but now it is balanced (as it was not in para 36) by a finding that Professor Almond being “much firmer on eight years” was “a rather dogmatic position” (para 50). That was inconsistent with para 36 of the Judgment, which recognised that Professor Almond “advanced reasons for positioning at the lower end of the range”. The difference was so slight (a mid-point of Dr Bodansky’s 8-10 year range being 9 years, and Professor Almond’s downward movement within this tight range therefore being only one year less, at 8 years) that it is hard to understand why Professor Almond’s position could fairly or even rationally be described as “rather dogmatic” in this respect. It was no more dogmatic for Professor Almond to move down for the reasons he gave, than for Dr Bodansky not to move within the range at all for reasons he was not able to articulate.
69. I therefore accept the submission that there is a contradiction between the conclusion in Professor Almond’s favour at the end of the detailed discussion in paras 27-36 of the Judgment, and the opposite conclusion in para 50 which is not explained by further reasoning in para 50. This renders para 50 incoherent with the Judgment as a whole.
70. Both Counsel referred me to the judge’s response to being confronted with this contradiction at the hearing on 25 July 2023. It will be recalled that this hearing took place after circulation of a draft judgment on 3 March 2023 and after written submissions and a written submissions on permission to appeal, but before the Judgment was formally handed down on 5 September 2023 and (on the same date) permission to appeal was refused. In support of using the judge’s explanation on 25 July 2023 to elucidate the judgment he initially circulated in draft on 3 March and formally handed down on 5 September, I have been referred to *Greenwich Millennium Village Ltd v Essex Services Group plc* [2014] 1 WLR 3517 [2014] EWCA Civ 960 at para 7.
71. The transcript of the hearing on 25 July 2023 includes the following:

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“JUDGE: Let me have a look and perhaps I can explain. It may be just a poor explanation of what I am trying to set out rather than a real discordance. I will look at these two paragraphs.

MR HAINES [for Mrs Price]: Yes.

JUDGE: (After a pause) Yes, I think I am dealing there specifically with the issue of obesity and my sense that in terms of the question of obesity there was a realistic approach on the part of Dr Bodansky, but had that difficulty in that he was not approaching things on the basis of your questioning with regard to the effect of a slowly increasing level of obesity and in the end what I am trying to convey is that although I preferred Professor Almond generally, on that obesity problem it seemed to me that he was being far more dogmatic. That may not have been explained in terms of the overall preference of evidence, but that was my explanation in para 50. I do not know if that satisfies you as clarification.

MR HAINES: Your Honour, I just read-- It starts your analysis of the evidence in relation to life expectancy from para 30 to para 36 in which the evidence of Dr Bodansky is, frankly, criticised and then you prefer the evidence of Professor Almond unequivocally and then at para 50 Professor Almond is accused of being dogmatic, contrary to your earlier conclusions about his rational approach to it and you have then adopted the evidence of Dr Bodansky who you have said you did not---

JUDGE: I am not. I am choosing my own figure and if that is not clear to you, that is precisely what I am doing, based on my understanding of the evidence of both of them, because I thought in one aspect only that Professor Almond's position was rather, shall we say, fixed.”

72. In this passage, the judge essentially re-states what he said in his Judgment. He does not, therefore, resolve the inconsistency in his reasoning or his conclusions. He does say “I am choosing my own figure” but, since his figure is not “at the lower end” of the 8-10 year range, it is not consistent with his acceptance of Professor Almond's reasoning and, since it is at the mid-point of that range, it is not consistent with his criticism of Dr Bodansky. The judge's figure of 9 years is not supported by his assessment of the witnesses or by his own reasoning.
73. Instead, the logic of the Judgment read as a whole, even when it is read with the benefit of the judge's comments on 25 July, is that Professor Almond's movement downwards on account of Mr Price not having been obese throughout his life was to be preferred to Dr Bodansky's decision not to move at all on this account. Professor Almond had been preferred as a witness and had given reasons for his position which had not been refuted. Dr Bodansky himself accepted the logic of Professor Almond's position (“He was not prepared to accept the argument but stated that he could understand the thrust of his argument”; Judgment para 33). No reason for not accepting it had been provided by Dr Bodansky or, in paras 27-36 of the Judgment, by the judge. The only reason given

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for the change of mind in para 50 of the Judgment does not make sense, because Professor Almond was being no more “dogmatic” or “fixed” than Dr Bodansky: if anything, Professor Almond when giving reasons for placing Mr Price at the lower end of the range was being less “dogmatic” and “fixed” than Dr Bodansky when declining to move within the range without being able to explain why.

74. By CPR 52.21(3)(a), I should allow the appeal only where the decision of the lower court was “wrong”. This has a narrow application, because (per Lord Reed JSC in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 at para 67):

“...in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

75. For the reasons I have given, I am satisfied that the judge’s decision to reduce life expectancy by 9 years rather than 8 years on account of Mr Price’s obesity “cannot reasonably be explained or justified” and was wrong, given what he says about the evidence and his assessment of the evidence in the Judgment and in the transcript of his remarks on 25 July 2023. The only reasonable outcome of the judge’s consideration and evaluation of life expectancy in the Judgment was that the reduction should be 8 years and not 9 years.
76. Both parties initially invited me to decide the issue without ordering a re-trial if the appeal on this point was successful. Although Counsel for Marston’s changed his mind about that at the very end of his reply submissions, he did not suggest that there was any fresh evidence to be heard on this point. It is difficult to see what purpose a re-trial would serve and easy to see what a terrible expense of time and money it would involve. If a fresh view is to be taken, I am as well-qualified to take it as a judge would be after a new trial, and CPR 52.20(1) gives me “all the powers of the lower court”. Those powers are in addition to the power given to me by CPR 52.20(2) to “affirm, set aside or vary any order or judgment made or given by the lower court”. By CPR 52.21(4), I may draw any inference of fact I consider justified on the evidence.
77. The Judgment deals fully, clearly and logically with this issue in the passages I have quoted from paras 27-36 above. Rather than para 36 being the aberration, and para 50 the correct and logical conclusion (as the Respondent’s Notice argues), it is in my judgment obviously only a few words in para 50 which are both inconsistent with the body of the Judgment on this point and too weak in their reasoning to stand scrutiny or, therefore, to stand at all. Whereas the Respondent’s Notice asks me to remove para 36 and uphold para 50, to my mind, the only flaw in the Judgment is the phrase “but it seemed to me that was a rather dogmatic position” in para 50 after the words “Professor Almond was much firmer on eight years”; and that phrase should be deleted. The next two sentences should then be replaced by: “A reduction at the lower end of the range of 8-10 years for the reasons given by Professor Almond moves Mr Price’s life expectancy down by 8 years, not 9 years, leaving an age of 77.5 years as life expectation.”



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78. This makes para 50 follow the logic of the rest of the Judgment and produces the only rational outcome of that Judgment by amending it to read (with the altered passage underlined):

“50. Given my view of the evidence of Dr Bodansky on sleep apnoea I would make no reduction from the baseline figure because of that. I have had much more difficulty with the question of obesity. In some ways obesity will form part of the overall population figures, however there is clearly a difference of some significance as both the Claim and Defence experts accepted. Providing a range, it seemed to me, was a more realistic approach on the part of Dr Bodansky but then he was not able to answer questions about the impact of when obesity began. Professor Almond was much firmer on eight years. A reduction at the lower end of the range of 8-10 years for the reasons given by Professor Almond moves Mr Price's life expectancy down by 8 years, not 9 years, leaving an age of 77.5 years as life expectation. (etc.)”

79. The effect of that is I, like the judge, prefer Professor Almond's opinion to Dr Bodansky's on the impact of obesity on life expectancy and that I differ from the judge only in carrying his own logic to its only rational conclusion, which is that Mr Price's life expectancy was reduced by 8 years, not 9 years.
80. The appeal will be allowed to that extent.
81. Based on the 8<sup>th</sup> edition of the Ogden tables, it is common ground that the effect of substituting 9 years with 8 years in this respect will be that Mr Price's life expectancy (had he not died as a result of the fall) rises from 76.5 years to 77.5 years and the future loss multiplier thereby rises from 9.08 to 10.11.

**ISSUE 3: DID THE JUDGE ERR IN HIS ASSESSMENT OF FINANCIAL DEPENDENCY?**

82. Issue 3 is whether the judge erred in his assessment of financial dependency.

**The appeal on Issue 3**

83. Mrs Price argues that the judge failed to adopt a conventional or pleadings-based approach to the assessment of financial dependency and then got into difficulties because he lacked the material to support the approach he favoured, and then made what he himself recognised was an imperfect finding because of that lack of material.
84. Marston's argues that the judge was entitled to make the finding on the evidence that he thought best reflected the financial dependency loss and that he was not obliged to adopt Mrs Price's approach. Marston's argue that Mrs Price cannot complain of the consequences of the deficiencies in the evidence (particularly on benefits) that the judge noted when adopting his own approach to financial dependency because the onus was on her to provide the evidence in that respect.

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85. Mrs Price also challenges the judge's finding that there was no financial dependency loss in respect of the period after what would have been Mr Price's 73<sup>rd</sup> birthday, although (on both side's case, and on the judge's finding) Mr Price's life expectancy extended beyond that.
86. Marston's maintain that all the judge's findings were open to him on the evidence and, paying correct respect to him as the trial judge, they cannot be said to be wrong and should not be overturned on appeal.

**The first-instance case on Issue 3**

87. Mrs Price's Update Schedule of Loss dated 28 October 2021 (Bundle tab 20) put her loss of financial dependency claim on the basis of a net annual loss of income calculated from the figures at the date of Mr Price's death on 23 April 2015 when he was aged 59.
88. Para 4.4 put the net annual loss figure at £9,486.85 (Bundle p 377), calculated as follows:
- i) Mr Price's income from employment at the date of death: £18,130.28 per annum.
  - ii) Mrs Price's "approximate income from benefits" at the date of death: £7,800 per annum (£300 per fortnight).
  - iii) Adopting "a conventional dependency apportionment... following the principles of *Coward v Comex* [1998], namely to assume that the Deceased would have retained one third of his own and the Claimant's joint net income for himself personally and two thirds would have been used personally by the Claimant for their joint household expenses" (Counter Schedule of 28 October 2021 at para 4.4.1),
    - a) Two thirds of joint net annual income of (£18,130.28 + £7,800) = £17,286.85;
    - b) Deduct the Claimant's net annual income of £7,800;
    - c) Result: a net annual loss of £9,486.85 and a total claim for loss of financial dependency to the assumed date of trial of £59,814.59.
89. Para 4.4 claimed loss of financial dependency to the assumed date of trial (which was then 20 January 2022) accordingly (but discounted by 0.97% to reflect the possibility of Mr Price dying before the trial date for other reasons, and enhanced by interest at half the special account rate from the date of death).
90. For the period after the assumed date of trial, para 4.6 of the Updated Schedule said:
- "It is assumed that the Deceased would have retired on 5<sup>th</sup> June 2021 which would have been his 66<sup>th</sup> birthday.
- It is anticipated that upon his retirement the Deceased would have been paid in an equivalent sum to his pre-accident income and that upon her retirement the Claimant's statutory income

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will be paid in an equivalent sum as her pension. The net equivalent annual loss will likely be £9,486.85.”

91. Para 4.6 therefore used the same figure of £9,486.85 per annum for the claim after trial, multiplied by 15.66, producing a claim for loss of financial dependency after retirement and after the assumed date of trial of  $£9,486.85 \times 15.66 = £148,564.07$ . An essential component of this figure was the benefits income received by Mrs Price.
92. Immediately after the 3-day trial on 12-14 December 2022, Mrs Price served a further Update Schedule of Loss dated 16 December 2022 (Bundle tab 21) which made no change to the calculation of financial dependency, save to substitute the known trial date of 12 December 2022 for the previous estimated trial date of 20 January 2022. This altered the period of time over which the pre-trial calculation applied, and it also altered the multiplier for the post-trial period to 12.96 (including a PNBA Table F discount of 0.94), but it was otherwise identical in every material respect, including the base annual figure of £9,486.85.
93. Marston's served a Counter Schedule dated 18 November 2021 (Bundle tab 22), which was un-amended when the trial began on 12 December 2022.
94. In relation to the calculation of loss of financial dependency to trial, it said (p 5 para (iv), Bundle p 396):
  - i) “In terms of general application the claimant is put to proof in relation to retirement [i.e. of Mr Price] at age 66.”
  - ii) “The calculation is based upon an approximation of benefits received [i.e. by Mrs Price]. If £300 is received every fortnight the received figure is  $365/14 \times £300 = £7,821.43$ .”
  - iii) It noted that the witness evidence did not rule out a return to work by Mrs Price. This point has not been pursued, however, and is not relevant to the appeal.
  - iv) It said “The defendant calculates the net annual loss (without return to any earnings and the benefits remaining static) as £9,479.71”. A rise in benefits was not, therefore, suggested.
  - v) It concluded: “The defendant agrees the loss claimed of £59,814.59.”
95. In relation to the calculation of loss of financial dependency after trial and after retirement (p 6 (vi), Bundle p 397), it said:
  - i) “The claimed head of loss is not understood. It is claimed that upon retirement the deceased would have been paid the same.”
  - ii) “This head of loss needs to be clarified.”
  - iii) “At the date of calculation the deceased would have reached 66.63 years.”
  - iv) Marston's also modified the post-trial multiplier on the basis of the life expectancy evidence of its own expert, Dr Bodansky, to 7.44.

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96. At the trial, Mrs Price gave evidence that Mr Price intended to work as a chef until “at least” the statutory retirement age of 66, although not necessarily for the same employer (witness statement para 44, Bundle tab 23). She gave evidence that she had herself, for health reasons, not worked since 2014 and was receiving only benefits “amounting to approximately £300.00 per fortnight” (witness statement para 46). In cross examination, she said that, after retirement, “he would probably have done a part-time job because he was very active. Very fit.” (Transcript p A39, Bundle tab 8). In relation to benefits, she was not challenged on the £300 figure at the date of Mr Price’s death in 2015, but she was asked about the position at the date of trial in 2022 and she accepted “that’s increased now” (Transcript p A40).
97. In re-examination of Mrs Price by her own Counsel, the judge noted that he had been given increased figures of £400 for Personal Independence Payment and £280 for Employment and Support Allowance, which Mrs Price agreed, although “Not exact. I can find that out for you.” (Transcript p A41). She was asked (still in re-examination, this not being a point which had been explored with her in cross-examination) when the increase occurred and she said it was two years before, because she had given up her car then (Transcript p A41). I am told by Mrs Price’s Counsel that the benefits increased to reflect the change in her own needs when she no longer had her own car. The submission to me on behalf of Mrs Price is that this rendered her no better off overall: the increase in state benefits offset the loss of her use of her own car.
98. It will be recalled that, after the trial hearings on 12-14 December 2022, the judge requested and received closing submissions in writing.
99. The Closing Submissions on behalf of Mrs Price (dated 5 January 2023, Bundle tab 10) dealt with loss of financial dependency at para 44.m. and o. as follows:
- “m. Past loss of financial dependency is claimed in the sum of £71,458.15 inclusive of interest at half the special account rate. The calculation for loss of financial dependency should be based on the income of the Deceased and the income (from benefits) at the time of death. The Defendant agrees the previous figure for past loss of financial dependency but makes no admission in respect of interest. The Court is invited to award the full sum claimed of £71,458.15 for this head of loss.
- (...)
- o. Future loss of financial dependency is claimed in the sum of £122,949.58. Within the corrected multiplier, this equates to £121,526.55. The calculation for loss of financial dependency should be based on the income of the Deceased and the income (from benefits) at the time of death. The Defendant did not properly challenge the basis of the claim in cross examination. Within the Counter-Schedule of Loss the Defendant has failed to properly address this head of loss and should be deemed to have agreed the Claimant’s claim. The Court is invited to award the sum of £121,526.55 for this head of loss.”

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100. Marston's written closing submissions dated 5 January 2023 dealt with loss of financial dependency at paras 94-98. They did not challenge the original figure for Mrs Price's benefits of £300 per fortnight, but highlighted the evidence that this figure had increased "to somewhere nearer £700 at some point undefined" (Closing Submissions footnote 9), saying "This is highly relevant because it is the determinant of any reliance on income" (Closing Submissions para 95). They said that the figure in Marston's Counter Schedule "is withdrawn" and submitted that the claim for financial dependency therefore failed "on evidential burden grounds" (para 98). The logic of that submission was (as the Closing Submissions argued) that no loss should be awarded, but that position is not maintained on appeal. Marston's position on appeal is simply that the judge's assessment of financial dependency should stand.
101. In response to that, written Further Submissions on behalf of Mrs Price dated 18 January 2023 said loss of financial dependency could be inferred or presumed from the facts of the case and evidence upon which to assess it had been presented. "The starting point is the income of the Deceased and the Claimant at the time of death" (para 16.d.) and "In any event, the Court is required to do its best to assess the extent of the loss; see *Thompson v Smith Shiprepairers (North Shields)* [1984] QB 405". The judge was referred to relevant sections of the Ogden explanatory notes in *PNBA Facts and Figures 2022/23*.

**The Judgment and the Order on Issue 3**

102. The Judgment dealt with the claim for financial dependency at paras 10-11 and 51.
103. At paras 10-11 it said:

"10. I accepted that Mrs Price was honest in her evidence about earnings and benefits, however I did consider that her evidence was given on the basis of approximations and estimates on the subject of her benefits. Mr Price, at that stage was earning approximately £350 per week net (this has been calculated as an annual figure of a little less than that amounting to £18,130.28 net). He was the main earner and was also a carer for his wife at the time of his fall. Mr Price, was expected to change employment before retirement at 66 but would have probably earned at a similar level because he was a Chef. Mrs Price told me that she thought that Mr Price, on retirement would earn a similar amount to when he worked because she expected that he would have earnings from a part time job along with receiving his pension. I am convinced that this was the intention and expectation given his work ethic. However, I consider that the general risks in life could have prevented these intentions reaching fruition.

11. Mrs Price had stopped work in 2014 due to her health and in 2015 she was in receipt of benefits amounting to approximately £300 per fortnight. In her evidence to me she indicated this this had now increased and approached £680 per fortnight in various benefits, this had changed approximately 2 years before the hearing."

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104. The Judgment then drew the following conclusions on loss of financial dependency, at para 51:

“51. There is a claim for financial dependency. The Defendant argues that the evidential basis for such a claim is not made out due to but the Claimant contends a level of loss can be quantified from other facts. I have found that in 2015 she had benefits of approaching £300 per fortnight, however this had increased to a figure close to £680 per fortnight a change approximately 2 years before the hearing. I am persuaded by Mr Payne that this is not a proper basis for an accurate quantification of financial loss as this is information that could have been accurately obtained from the DWP. However, equally common sense tells me that, as the Claimant has been in receipt of benefits and remains in receipt of benefits, there is an upper limit on how much she would receive in those benefits. That upper limit would not equate to the amount earned by Mr Price and as such she has proved that there is some loss. On that basis I consider that given the approximations involved in her evidence I should make some award. It seems to me that the best basis for making such an award is to begin with the current figure for benefit of approximately £340 per week because that is the figure in which I have most confidence in. That figure would mean a £10 difference or an annual figure of £520. In my judgment, given that there would have been a period of lower benefits, and rates would have increased annually in any event, that figure is the best I can do in respect of annual loss of financial dependency both for past and future losses.”

105. Consequently, the Judgment proceeded on the basis of a loss of £350 per week earned by Mr Price less £340 per week received by Mrs Price in benefits, giving his net loss of £10 per week and his annual figure of £520, both before and after trial. This was much less than the figures in the schedules served by both sides assuming that the loss was not assessed (in accordance with Marston's submission) at nil on the basis of the burden of proof. It departed from the two thirds / one third analysis of joint income which had been urged upon the judge, following well-known authorities, on behalf of Mrs Price.
106. The Order appealed from in this case is dated 18 August 2023 (“the Order”). This pre-dates the formal handing down of the Judgment on 5 September 2023, but arose from the hearing on 25 July 2023 when the Judgment had been circulated in draft and oral submissions were made (as recorded in the July Transcript).
107. The Order does not break down the award for loss of financial dependency at all. For example, it does not distinguish between the loss until the date of trial and the loss after trial, and it does not identify any multiplicand or multiplier. It does not identify a retirement date and it does not explain what sum, if any, is awarded between the suggested date of retirement at age 66 (which preceded the trial), and age 73, or until Mr Price's projected death at age 76 (in 2031) based on life expectancy as found by the judge. In the Order, “Loss of financial dependency” for the whole period after Mr Price's actual death on 23 April 2015 is ordered in a lump sum of £6,357.79 (para 1.3.3).

Approved Judgment**Submissions after circulation of the Judgment in draft**

108. After the Judgment had been circulated in draft on 3 March 2023, the judge received both written and oral submissions on the loss of financial dependency claim before he formally handed it down on 5 September 2023 (and before he made his Order dated 18 August 2023). None of these are referred to in the Judgment.
109. On behalf of Mrs Price, written “Points Arising from the [draft] Judgment” dated 20 March 2023 were filed, which queried the treatment of loss of financial dependency and the judge’s figure of £10 per week and £520 per annum. At para 3 it said:
- “The Claimant is unsure how this figure was derived. As a point of principle, case law has established that the approach to be adopted is to look at the combined income (of the Deceased and the dependant partner) and not just the difference between the respective incomes; see *Harris v Empress Motors Limited* [1984] 1 WLR 212 and approved in *Coward v Comex Houlder Diving Ltd* (18 July 1988, CA); see also the Schedule of Loss.”
110. It then provided worked calculations of this conventional approach, producing a figure of £41,124.74 as past loss of financial dependency to the date of trial on 12 December 2022 and a figure of £25,217.19 from the date of trial to age 73 – a total of £67,032.83 (including interest in respect of the claim before trial).
111. Mrs Price’s “Points Arising” also queried whether the judge had awarded any loss after age 73 and, if not, why not. It said (at para 3.g.iv.):
- “...it is not clear to the Claimant what loss is provided for from the Deceased’s 73<sup>rd</sup> birthday until his anticipated date of death at age 76.5 years, as he would still have been in receipt of his pension. The remaining multiplier for life would be 3.06 (This is derived using Ogden table 36, 76.5 years – 67.52 years – 8.98 years, which provides a multiplier of 9.08. Then the 5.48 multiplier for the period 67.52 years to age 73 years has to be subtracted, which – 3.60. This then is discounted by 15% as per paragraph 50 of the Judgment).”
112. Helpfully, this calculation was applied to the judge’s figure of £10 per week to age 73 (notwithstanding the submissions on behalf of Mrs Price that this was wrong) to produce the figure of £6,357.79. See Mrs Price’s “Points Arising” at para 3.h.-k. (on p 5 of the “Points Arising”) which worked out this figure as follows (with underlining in the original heading):
- “If you work on out the dependency based upon a financial dependency of £10 per week, the calculation would be:
- h. The annual loss becomes £520 net as set out at paragraph 51 of the Judgment.

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i. Past loss of financial dependency =  $(£520 \times 6.12) + (£520 \times 1.52 \times 0.85) = £3,854.24 + \text{interest @ } 1.68\% (£64.75) = £3,918.99.$

j. Future loss of financial dependency =  $(£520 \times 4.69) + \text{any additional figure from age 73 years using the multiplier of } 3.06.$

k. Total financial dependency becomes:  $£6,357.79 + \text{any additional figure from age 73 years using the multiplier of } 3.06.$ ”

113. This sum of £6,357.79 for “Total financial dependency” was the exact figure which the judge then inserted into the Order, as I have said, in relation to the whole claim for loss of financial dependency. It is implicit in the judge’s adoption of this figure that he was adopting Mrs Price’s calculation based on £10 per week in every respect. In particular:

- i) He was adopting the multipliers and interest figures.
- ii) He was awarding the loss in full (at £10 per week) for the whole period between the accident and age 73 years. He was not applying any discount for the possibility that Mr Price might earn less than his salary at the date of death before the age of 66, or between the ages of 66 and 73. Marston’s do not appeal that. They say that the judge’s figure of £6,357.79 should be maintained.
- iii) He was awarding no loss at all for the period after age 73 years.

114. Marston’s filed no written submissions in response to this.

115. In June 2023, additional written submissions were filed (in advance of the hearing on 25 July 2023) by both parties, pursuant to an order by the judge on 17 May 2023.

116. Mrs Price’s “Additional Submissions” dated 8 June 2023 again (but in more detail, and citing more authority) set out their conventional approach to the loss of financial dependency claim (paras 5-22) supporting the figures set out in the “Points Arising” document. They cited *Cape Distribution v O’Loughlin* [2001] EWCA Civ 178, *Williams v Welsh Ambulance Services NHS Trust* [2008] EWCA Civ 81, *Harris v Empress Motors Ltd* [1984] 1 WLR 212, *Coward v Comex Houlder Diving Ltd* (18 July 1988, CA), and various passages from *Personal Injury Schedules – Calculating Damages* (4<sup>th</sup> edition, 2018) and the Ogden tables in favour of this approach. They cited *Piddock v Eastern Scottish Omnibuses Ltd* [1990] 1 WLR 993 in support of applying the same 2/3 principle to the calculation of dependency on the deceased’s pension.

117. Marston’s “Submissions”, on the other hand, dated 6 June 2023, emphasised the limited scope for protesting a judgment circulated in draft and, after referring to the pleaded case in the Schedules which I have quoted, reaffirmed Marston’s objection “to the approximation of benefits received” and criticised the divergence between Mrs Price’s Schedule figures and her oral evidence about later increases in benefit, and the lack of precision about “how much these benefits were and when they started (at the rate higher than mentioned in the Schedule of Loss)”. They acknowledged (in para 12) that Mrs Price had “pleaded the conventional apportionment (*Coward v Comex*)” but then said: “However, that approach is only appropriate when the figures are ascertainable”. Whilst acknowledging that the figures for loss of financial dependency was on Mrs Price’s



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case £70,305.15 for past financial dependency and £122,949.58 for future dependency “as claimed” (para 13), the Submissions said that the Claimant’s mathematical approach “can be departed from (in fact must be departed from) when there is insufficient evidence on which to base an accurate calculation” (para 18).

118. Quoting the Judgment, Marston’s “Submissions” said (at paras 23-24):

“23. There were no findings of fact on the figures, instead more of a ‘feel’ about what the figures indicated and what would be reasonable in the circumstances of evidential sufficiency. That should not be revised now.

24. There were findings of fact on the following:

- a. Life expectancy was 76.5 years.
- b. There was a chance (unquantified) that Mr Price would not have worked to age 66.
- c. He would not have worked beyond age 73.
- d. The change of him not working until 73 should be discounted by 15%.
- e. In any event there would have been winding down.”

119. Citing *Stanley v Saddique* [1992] QB 1 CA, Marston’s “Submissions” argued that “there was no mathematical basis for anything other than a lump sum award given all the other uncertainty and lack of evidence” (para 25). They said that there was “no scope to vary” the court’s award of £6,357.79 (para 28). But, if the court nevertheless decided “to follow some mathematical process”, the “Submissions” suggested an alternative to Mrs Price’s calculations. They tentatively applied a reduction of 10% to the claim up to 66 years (paras 29-30), and an additional reduction of 15% to the claim between age 66 to trial and from trial to age 73 years (paras 31-32), resulting in a calculation (para 32) of:

a. Past loss

i. To age 66:	£31,505.76
ii. 66 to trial:	£6,520.80
iii. Total:	<u>£36,885.76</u>

b. Future

i. Trial to 73 years	£18,912
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c. Past + Future = £55,798.65

120. None of these submissions are addressed in the Judgment, as I have said.

**Discussion at the July Hearing on 25 July 2023**

121. The July Hearing on 25 July 2023 took 90 minutes, and the July Transcript provides me with a verbatim record of everything that was said on that occasion. It is clear from the July Transcript that the judge had not been able to read let alone consider the written submissions, the accompanying caselaw or the other materials in advance, and that he did not always recall very well the relationship between the draft Judgment he had circulated and the submissions he had received on various points (July Transcript F1 lines 23-35; and, for example, F3 line 36 to F4 line 5). He explained that this was because of the weight of his commitments in other courts and hearings (which included the County Court, the Crown Court and the Employment Appeal Tribunal, F1 lines 20-22 and lines 32-35). He therefore conscientiously used the July Hearing to do his best to draw the threads together and review and reconsider the draft Judgment in the light of the submissions that had been made to him in writing by both parties. It was, however, a Herculean task given the technicality and complexity of the subject area, and he was not limited (as I am) to the issues raised on appeal, but was having to consider a range of points which it was being submitted to him required more detailed consideration than had been given to them in the draft Judgment.
122. In relation to the loss of financial dependency claim, the judge was referred to *Knauer v Ministry of Defence* [2016] UKSC 9 at paras 16-17 (which in turn cite the speech of Lord Lloyd of Berwick in *Wells v Wells* [1999] 1 AC 345 at 379F-G) in support of the proposition that the Ogden tables should be regarded as the starting point in Fatal Accidents Act claims (and Mrs Price's loss of financial dependency was a Fatal Accidents Act claim). Mrs Price's Counsel made the point that the Ogden tables factor in risk using actuarial data, including "the risk that somebody will not carry on working" (July Transcript F6 line 2).
123. Mrs Price's Counsel took the judge to para 11 of the judge's draft Judgment where he had referred to benefit increases a couple of years before the trial. He submitted, contrary to that approach, that "The starting point in the assessment of financial dependency is the position of the parties at the time of the death and the intentions of the parties at the time of the death. That is as set out at para 10 of my Additional Submissions"; and he cited *Welsh Ambulance Services NHS Trust v Williams* [2008] EWCA Civ 81 in support of that proposition. The Court of Appeal said in that case (per Smith LJ at para 50, with whom Lloyd LJ and Thomas LJ agreed):

"Judge Hickinbottom was right when he held that it was irrelevant that David and Sarah had made a success of the business. That was (...) because that financial benefit was irrelevant to the assessment of the dependency under section 3. He was correct when he said that nothing that a dependant (or for that matter anyone else) could do after the death could either increase or decrease the dependency. The dependency is fixed at the moment of death; it is what the dependants would probably have received as benefit from the deceased, had the deceased not died. What decisions people make afterwards is irrelevant. The only post death events which are relevant are those which affect the continuance of the dependency (such as the death of a dependant before trial) and the rise (or fall) in earnings to reflect the effects of inflation."

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124. Mrs Price's Counsel took the judge to extracts from *Personal Injury Schedules – Calculating Damages* (4<sup>th</sup> edition, 2018), highlighting its endorsement in a Foreword by Irwin LJ and its list of specialist authors and demonstrating the two thirds / one third approach to joint income as the default position for assessing loss of financial dependency (I too have been shown those passages) and emphasising the very limited circumstances in which the courts have agreed to depart from it, none of which (he submitted) applied to Mrs Price's case.
125. In the course of these submissions, the judge said (July Transcript F7-F9):-
- “The difficulty I had, Mr Haines, and this remains the difficulty, I do not know what the loss to the claimant was. I have got nothing but rough ideas. I know she was trying her best and I think I have indicated there is an honesty there, but this was all approximations.
- (...)
- “I understand your argument entirely, Mr Haines. What I am having difficulty with, and I had difficulty right from the beginning, I would have expected in a case like this to have chapter and verse, particularly in a case of benefits. They can be so easily provided and obtained and in the end I was— Let's put it in this way. I am looking at a position where at some point there were benefits of £300 per fortnight and at some point there was a figure closer to £680 a fortnight without being able to pin down either of those rates in any way and it was that difficulty that led me to, if you like, try and approach matters on the basis of approximations. It is how then I apply what are, as Mr Payne puts it, mathematical certainties to approximations.”
126. Mrs Price's Counsel responded to this by saying that this submission was wrong because
- “...the Ogden Tables are not based upon mathematical certainties, they are based on actuarial approximations and they do the best they can in the circumstances. Mr Payne is looking at this from the wrong perspective, your Honour. The courts advise working upon a multiplier/multiplicand basis unless there is good reason to depart from it. There is no good reason in this case (...) The proper approach is to follow the relevant case law, not to depart from it. As I said, the case law as established since 1984 in *Harris v Empress Motors Ltd* [1984] 1 WLR 212, *Coward v Comex Houlder Diving Ltd* (18 July 1988, CA)...”
127. The judge said “I have your argument on the point, so I do not think it is going to be strengthened by continuing on it.”
128. In relation to that part of the loss of financial dependency claimed after pension age, the judge said “I have not dealt with work related pension at all, because I was not aware of any evidence of a work related pension”. Mrs Price's Counsel conceded that

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“That was not put before the court about what benefit was obtained, because it was not relevant”, suggesting that the judge should, instead, have accepted evidence that Mr Price’s income would have continued “on about the same level”. The judge said that he had accepted that up to age 73, but “I could not, on the basis of the entirety of the evidence, accept it beyond that age.”

129. Responding, Marston’s Counsel reiterated that the judge was right to be dissatisfied with the lack of information or precision about benefit rates and increases prior to the trial and Mrs Price’s Counsel was wrong to try and get him to change his draft Judgment in any way. He said that the judge was not required to adopt what he described as Mrs Price’s “mathematical approach” and that he should stick with the lump sum of £6,357.79 which he had awarded for the whole loss of financial dependency claim, because “You did your best on what you had available”.
130. In reply, Mrs Price’s Counsel urged the judge to stick to the pleaded case from both sides and objected to Marston’s departing, now, from it. In answer to his opponent’s objection to the citation of further authorities, he said “If there are errors in the judgment then in order to avoid an appeal it is imperative upon counsel to flag these points up”.
131. The judge then explained his response to the submissions he had heard, as follows (July Transcript F18-19):

“Yes. I am afraid nobody is going to feel very happy with me today. I am afraid, Dr Haines, that the reasons for me approaching matters as I did in those paragraphs was my level of discomfort with the evidence before me and it is on that basis that I came up with a figure that I thought I could come up with on the basis of the evidence that would reflect the evidence before me and what information was available. It is on that basis that I consider that I cannot really depart from that. I understand what you are saying about the case law, but it seems to me that this falls into the category of case which has an exceptional element to it and that exceptional element was the evidence that was provided. As such, it seems to me that if you have a point it is an appeal point and not one for me at this stage...”

132. In relation to loss from age 73, he said:

“JUDGE: My position was that from 73 I had no real indication at all of what the loss would be.

MR HAINES: Thank you. So it is nil.

JUDGE: Yes. I have no evidence upon which I could come to a conclusion. I am sorry to put it as bluntly as that, but it seemed to me that is what it was.”

Approved Judgment**Discussion and decision on Issue 3**

133. I agree with Counsel for Mrs Price that the approach that he had put before the judge in relation to the quantification of the Fatal Accidents Act claim for loss of financial dependency (given that the judge found there was such a loss) was conventional and in accordance with high and long-established authority.
134. Per O'Connor LJ (with whom Robert Goff LJ and Stephenson LJ agreed) in *Harris v Empress Motors Ltd* [1984] 1 WLR 212 at 216H to 217D:

“In the course of time the courts have worked out a simple solution to the similar problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependants are wife and children. In times past the calculation called for a tedious inquiry into how much housekeeping money was paid to the wife, who paid how much for the children's shoes, etc. This has all been swept away and the modern practice is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentages have become conventional in the sense that they are used unless there is striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided upon its own facts. Where the family unit was husband and wife the conventional figure is 33 per cent. and the rationale of this is that broadly speaking the net income was spent as to one-third for the benefit of each and one-third for their joint benefit. Clothing is an example of several benefit, rent an example of joint benefit. No deduction is made in respect of the joint portion because one cannot buy or drive half a motor car. Part of the net income may be spent for the benefit of neither husband nor wife. If the facts be, for example, that out of the net income of £8,000 p.a. the deceased was paying £2,000 to a charity the percentage would be applied to £6,000 and not £8,000. Where there are children the deduction falls to 25 per cent., as was the agreed figure in the Harris case.”

135. This passage was cited with approval by the Court of Appeal in *Coward v Comex Houlder Diving Ltd* (18 July 1988, CA) and Ralph Gibson LJ (with whom Butler-Sloss LJ and Sir Edward Eveleigh agreed) added:

“Where both are earning and pooling their net earnings, application of the same principle requires that one-third of the joint earnings be treated as spent for the benefit of each and one-third for their joint benefit; and the justification for that is that a couple living together as a stable family are likely to divide their common resources fairly and equally. As O'Connor L.J. pointed out, the principle is always capable of being displaced by evidence. If the joint income is low, it is likely that more than a third will be applied to joint benefit. Next, a husband or wife may have special needs, or make special demands, which in fact

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require a larger share than can also be applied to the sole benefit of the other spouse. Further, when the joint net earnings are substantial, as they are in this case on the judge's findings, part of the one-third proportion retained by either spouse for his or her sole benefit may in probability be retained for purposes which will eventually pass to the benefit of the other.”

136. In *Cape Distribution v O'Loughlin* [2001] EWCA Civ 178 at para 14, Latham LJ said (although in a section of his judgment dealing with loss of services, rather than loss of financial dependency):

“...the court's task in any case is to examine the particular facts of the case to determine whether or not any loss in money or in monies worth has been occasioned to the dependants and, if it determines that it has, it must then use whatever material appears to best to fit the facts of the particular case in order to determine the extent of that loss.”

137. But this does not mean that the court should start from scratch and ignore the tools that earlier cases have provided to accomplish a task which is necessarily based on counterfactual and hypothetical speculation about what would have happened if the fatal accident in question had not occurred. The point of actuarial and statistical tools such as those based on the Ogden tables and of the two thirds / one third rule of thumb is that they counterbalance the uncertainties that would exist in a single case, were it to be looked at in isolation, by averaging over countless examples from other similar cases in order to produce a result which is reliable notwithstanding the uncertainties of the case. It is precisely because the task is difficult and speculative that these tools have been developed, and are of such value. They are not, lightly, to be discarded, especially if an unconventional approach leads to a result which does not seem correct or fair. This is a point made in *Cape Distribution v O'Loughlin* [2001] EWCA Civ 178, by Judge LJ (with whom Schiemann LJ agreed) at para 26:

“I merely sound the cautionary note that where the court is invited to adopt an unusual or unconventional approach in a case of this kind, an additional burden is imposed on the judge to ensure that the more conventional approach would not provide the fairest way to do justice between the parties, and, even if he is satisfied that it would not, he should stand back from the figure to which the unconventional approach had led him and examine whether it fairly reflected the practical realities of the case.”

138. In this case, the judge rejected Marston's submission that no loss of financial dependency had been proved, and he then had the task of quantifying it. The approach he took was not one suggested to him by either side, and it was not one which had any precedent in the caselaw, or which was based even on a modification of the approach (based on multipliers, multiplicands, the Ogden tables and the two thirds / one third rule of thumb) which had been demonstrated to him. In adopting his own approach, he produced a figure which was extraordinarily removed even from the figures proposed to him by Marston's (if he rejected, as he did, their primary case that the award should be nil).

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139. Exceptions to the usual approach have been adopted in unusual cases, and upheld on appeal. An example cited to me was *Stanley v Siddique* [1991] 2 WLR 459 (CA) at 470G to 471A.
140. This was not, however, an exceptional case.
- i) The fact that Mrs Price was on benefits before and after the fatal accident was not exceptional.
  - ii) The fact that those benefits had risen some 7 or 8 years after the fatal accident in 2015 (a couple of years before the trial in December 2022) was not exceptional; all benefits have a tendency to rise over time, not least because of inflation.
  - iii) The evidence that, because she had given up her car, Mrs Price had swapped increased benefit for the loss of the benefit represented by the car, was not evidence of a windfall or significant change in her financial position overall.
141. There is nothing in the Judgment or elsewhere in the case to support the judge's observation at the July Hearing that "it seems to me that this falls into the category of case which has an exceptional element to it and that exceptional element was the evidence that was provided." In context, he appears to be regarding the lack of precise evidence of benefit rises after the death as the exceptional element, but it was not an exceptional element on the facts of this case, and he did not at the July Hearing or in the Judgment explain why it should be seen as such. If the judge stuck to the conventional two thirds / one third calculation based on the figures at the date of Mr Price's death, he did not have to concern himself with later increases unless they truly represented a departure from the ordinary run of circumstances incorporated into the usual assumptions, including assumptions about variations which are usual with the passage of time. No such departure was evident from the evidence he had heard. Therefore, it was not exceptional that he had not been provided with precise details about them.
142. The Judgment was not altered substantially, if at all, between its circulation on 3 March 2023 and the hand-down on 5 September 2023, although important submissions had been made to the judge about the claim for loss of financial dependency, both in writing in March and June 2023, and orally at the hearing on 25 July, including submissions from both sides that the Judgment in its existing form left questions unanswered.
143. The Judgment was contrary to established principle and required elucidation. The judge had called for additional submissions and those from Mrs Price (not directly addressed by those from Marston's) cited the caselaw and established principle which the judge was bound to apply even if it had not been cited to him. The judge did not then make any change to the Judgment.
144. Applying *Greenwich Millennium Village Ltd v Essex Services Group plc* [2014] 1 WLR 3517 [2014] EWCA Civ 960 at para 7, it is fair and right that I should allow the judge to speak further to what he was saying and why from the July Transcript.
145. Even having done so, however, it does seem to me clear that he embarked on a course which was not justified. He departed from the established method and then complained

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that he did not have the evidence to allow him to do so reliably. That was a compelling reason for him not to depart from the established method in the first place.

146. The appeal on Issue 3 must therefore be allowed.
147. I do have considerable sympathy with the judge, who was in an unenviable position. He had a large number of issues to decide, many of them not challenged in this appeal. He was, understandably, not able to hear closing submissions and immediately deliver judgment at the end of the trial on 12-14 December 2022, and was then faced with the always difficult task of wrestling with written submissions filed over a number of months subsequent to that, followed by a period in which questions of permission to appeal and the order resulting from the judgment circulated in draft in March 2023 were being canvassed, including at the hearing of oral submissions in July 2023, well before he handed down the Judgment in September 2023. In the meantime, he was hearing other cases.
148. It may seem harsh to hold the judge strictly to account on the loss of financial dependency issue when it was only one of a number of issues, none of them entirely straightforward, and most of them not challenged by either side on appeal. However, the parties are entitled to pick out a single issue and focus attention on it and, when they do, as they have in this appeal, it is the duty of the court hearing the appeal to focus on it also and see whether the Judgment on that issue withstands the appropriate level of scrutiny, bearing in mind the due deference that must always be given to a trial judge, and without expecting the judge to be explicit about every point, or mention every point, so long as his conclusion is rational, and supportable, and sufficiently explained by him. I have come to the conclusion that it does not withstand that scrutiny and does not pass that test.
149. The question then arises about how the appeal on Issue 3 should be disposed of.
150. Fortunately, a combination of the reasoning the judge did provide, and the reasoning which can be supplied from his adoption of Mrs Price's calculations leading to the Judgment figure (or, rather, the figure in the Order which was made on the basis of the Judgment), points to a clear outcome.
151. The judge's figure for past and future loss of financial dependency (£6,357.79) incorporated Mrs Price's multipliers and interest figures (see para 113 above). It did not adopt Marston's submissions that there should be discounts, before age 73, to adjust (over and above the adjustments already incorporated into the standard tables) for an enhanced risk that Mr Price might have ceased work before the age of 66 or before the age 73 (see paras 118 and 119 above).
152. The error in the judge's calculation was that he based it on a figure of only £10 per week. The only correction that needs to be made, therefore, is to substitute for that figure the figures proposed by Mrs Price (para 110 above). This is because they were based on unchallenged figures taken at the conventional time, which was the date of death, and they were based, also, on conventional tools applied to those figures based upon life expectancy and other features (see paras 94 and 95 above). Although I have found that the judge underestimated the life expectancy, that does not matter at this stage of the exercise, because this calculation stops at age 73, which is within the life expectancy found by the judge, as well as the slightly increased life expectancy which



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I have concluded was correct (Issue 2). This produces, by way of loss of financial dependency until Mr Price reached the age of 73, a total figure of £67,032.83 including interest to the date of trial (para 110 above). Interest after trial was awarded by the judge at 7%, and I expect the parties to be able to agree the correct figure for that. Marston's have not on appeal challenged the components of Mrs Price's calculation supporting the figure of £67,032.83 and, as I have observed, their suggestion of additional discounts to reflect the chances of Mr Price ceasing employment before the age of 73 was not accepted by the judge and was not maintained before me.

153. That leaves only the question of whether the judge's finding that there was no loss after age 73 should stand. I have concluded that it should. This part of his decision was sufficiently reasoned both in the Judgment and, more clearly, in the July Transcript. Unlike the benefits position, which was put before him in the way that I have analysed, it was conceded at the July Hearing that the judge's impression that he had not been given evidence of loss to Mrs Price flowing specifically from Mr Price's future pension expectations was correct (see para 132 above and July Transcript F11 lines 2-4 and lines 16-18, F12 lines 6-9, F15 lines 22-23 and F19 lines 8-14). He was not bound to accept the general proposition that Mr Price's earnings in employment would not have diminished at all when they were replaced, after age 73 (when the judge found as a fact that Mr Price would no longer have been in employment) by pensions of one sort or another. He did not, in fact, accept that proposition (Judgment para 10 and July Hearing F12 lines 7-9). He had not been given any evidence of what Mr Price's pension would have been other than that. Therefore, he was entitled to reject the claim for loss of financial dependency after Mr Price's hypothetical retirement from paid employment at the age of 73. The burden of proving the claim was on Mrs Price. It had not been discharged.

**SUMMARY AND CONCLUSION**

154. The appeal on Issue 1 is dismissed. The appeal on Issue 2 is allowed. The appeal on Issue 3 is allowed save in respect of the period after Mr Price's retirement at the age of 73.