Neutral Citation Number: [2020] EWHC 1747 (QB)

Case No: C90BM293

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Date: 02/07/2020

Before :

MR JUSTICE CAVANAGH

- -

Between :

MARTIN GEORGE SCALES	**Claimant**
- and -	
MOTOR INSURERS' BUREAU	**Defendant**

- -
- -

Matthew Chapman QC (instructed by **Irwin Mitchell**) for the **Claimant**
Lucy Wyles (instructed by **Weightmans**) for the **Defendant**

Hearing dates: 18-21 May 2020

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JUDGMENT

If this Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Cavanagh:

INTRODUCTION

1. This is a quantum hearing in a personal injury case, in which I have to apply principles of Spanish law in order to assess the damages that are payable to the Claimant ("Mr Scales").

2. In October 2015, Mr Scales was an extremely fit and healthy man, aged 69. He was retired. He and his wife had a holiday villa in Southern Spain, where they spent several months a year. One of Mr Scales's main hobbies was cycling. On 23 October 2015, Mr Scales and a group of friends were cycling on the Camino de la Hoya in Almeria. Mr Scales and another of the cyclists were struck by a car which was travelling in the opposite direction. The car, which was being driven by Ms Annika Elena van der Plujim, was driving on the wrong side of the road. Ms van der Plujim did not stop at the scene.

3. Mr Scales was gravely injured. He was airlifted to hospital from the scene of the accident and spent the next weeks in a coma. He was flown back to the UK and spent a total of 134 days in hospital. He spent time in hospital in Spain, and then in Coventry and Leicester, and underwent a number of operations. I will refer to his injuries and, in particular, to the consequences of them, in greater detail later in this judgment, but, in short summary, he suffered, amongst other injuries, traumatic brain injuries, facial fractures, sight and hearing problems, loss of dentition, and a highly comminuted fracture of the left tibia. One of the doctors treating Mr Scales told his wife that if he had not been so fit at the time of the accident he would have died.

4. Mr Scales is now 74 years old. He walks with a stick and has restricted sight. He no longer drives. He cannot walk for more than 45 minutes at a time. He suffers from mild cognitive difficulties, and his wife does not feel that she can leave him alone in the house for more than two hours at a time. He is no longer able to undertake many of the activities that he previously enjoyed. He can do some things around the house, such as making a hot drink or a snack, and helping with the vacuum cleaning, but he needs constant supervision from his wife. Not surprisingly, he sometimes gets upset and frustrated with his situation.

5. I have been provided with a witness statement from Mr Scales. By agreement between the parties, he did not give evidence before me. Mrs Scales provided a witness statement and gave evidence. It is appropriate to record that Mr Scales has faced his changed circumstances with great fortitude. His later retirement years are very different, and far less rewarding and fulfilling, than they would have been if he had not been involved in the accident. Mrs Scales has, since the accident, devoted herself to caring for her husband, and has done so with great love, patience, and determination. It is no exaggeration to say that she has given up her life to care for him, and is missing out on the fulfilling and pleasurable retirement years that she would otherwise have enjoyed.

6. The Defendant ("the MIB") is involved in these proceedings because Ms van der Plujim was uninsured and, in accordance with the relevant EU Directives, the MIB stands in the shoes of the Spanish Guarantee Fund, the Consorcio de Compensacion de Seguros ("the CCS"), which is the Spanish equivalent of the MIB.

7. Proceedings were issued in this case on 19 October 2016. Liability was not admitted, and a trial on liability took place before HHJ David Cooke, sitting as a Judge of the High Court, on 24 and 25 April 2018. The judge found in favour of Mr Scales on liability, on a 100% basis, with no reduction for contributory fault.

8. Mr Scales was retired at the time of the accident and so there is no claim for loss of earnings. Mr Scales does not seek periodical payments and so the issues before me focus on the damages that should be awarded to Mr Scales for his injuries, and the consequences of his injuries, and (to the extent that such damages are available under Spanish law) damages to reflect his past and future costs and expenses.

9. It is common ground between the parties, that, for reasons I will shortly explain, Spanish law applies to the assessment of damages in this case. It is also common ground that I should endeavour to apply the Spanish law of damages for road traffic cases in Spain in the same way that a Spanish court would do so.

10. The principles and rules that determine the measure of damages in road traffic accident cases in Spain are set out in legislation that is known as the *Baremo* (which means "tariff"). The approach taken by Spanish law at the time of the accident to the assessment of damages in such cases was very different to the approach taken in English law. There is no clear distinction between general and special damages in Spanish law, as there is in English law. Moreover, it is fair to say that the version of the *Baremo* that was in force at the time of Mr Scales's accident was somewhat ungenerous to Claimants, and its provisions were confusing and difficult to follow (even for Spanish lawyers). In particular, again on the face of it, it was not drafted with a view to providing full compensation for what would be called in England "special damages". Indeed, Mr David Sanchez Almagro ("Mr Sanchez"), the expert in Spanish law who was instructed on behalf of Mr Scales, referred to the rules then in place as "bizarre". The *Baremo* was substantially revised, with effect from 1 January 2016, to change some of the rules which had been regarded as unfair and unsatisfactory, and I am told by the Spanish law experts that the current version of the *Baremo* is regarded as a great improvement on its predecessor, and is more generous to claimants. However, it is not in dispute that the version of the *Baremo* which must be applied in the present case is the version which applied on 23 October 2015, and therefore the one that applied before the reforms which took effect in 2016. Unless otherwise stated, when I refer in this judgment to "the *Baremo*", I should be understood to be referring to the version of the *Baremo* that was in place at the time of the accident. This was the *Baremo*, as amended by Act 7/2007 of 11 July 2007, which entered into force on 1 August 2007 and was derogated (ie repealed and replaced) on 01.01.2016 by Act 35/2015.

11. There are a number of major disagreements between the parties as to the meaning and effect of the *Baremo*, and as regards how it should be applied in the present case. For example, the parties disagree about the extent to which there is scope for a judge to adjust his or her award under the various headings in the *Baremo* in order to provide a Claimant with full *restitutio in integrum*, or, at least, to minimise the extent to which a rigorous and literal application of the *Baremo* rules would result in under-compensation.

12. Even where the parties agree on the meaning and effect of rules in the *Baremo*, there is a disagreement between the parties and their Spanish law experts on the way that the relevant rules should be applied to Mr Scales's case. So, for example, various

consequences (at least potentially) flow from the date of "Consolidation", which is the date when the victim's injuries have stabilised, his injuries have plateaued, and he has been discharged from further curative medical treatment. There is a disagreement as to whether the date of Consolidation in the present case is 23 October 2017 (as Mr Scales contends) or 3 April 2017 (as the MIB contends). Again, various important consequences will follow depending upon whether Mr Scales fits the definition of "*gran invalido*" (major invalid) in the *Baremo*. There is no disagreement as regards the definition of *gran invalido*, but the parties disagree as to whether Mr Scales falls within that definition. Still further, there are a number of disagreements as regards whether Mr Scales is entitled to compensation under various parts of a points-scoring system that is applicable to permanent symptoms, or sequelae, on a scale known as the Balthazar scale, and, if so, how many points he should be awarded under a particular head.

13. If this remedies hearing was taking place in a Spanish Court, the judge would be assisted by a Forensic Medical Examiner. This is a doctor, instructed either by the Court or the parties, who gives expert advice to the judge on matters of medical judgment, such as the date of Consolidation, whether the Claimant is a *gran invalido*, how many points should be awarded for various permanent symptoms, and on a number of other matters. The judge is not bound to adopt the advice of the Forensic Medical Examiner, but usually does so.

14. There is no equivalent of a Forensic Medical Examiner in the English High Court. Instead, I have been provided with a large number of medical expert reports and I have heard live evidence from two experts in ophthalmology (since the most significant dispute between the parties on the medical expert evidence relates to the state of Mr Scales's eyesight). Understandably, since they are not experienced in the Spanish *Baremo* system, these medical experts have not (with one exception I will come to) been asked to express a view on the date of Consolidation, the *Gran Invalido* question, the appropriate points for the various sequelae, or the other medical issues that arise under the *Baremo*. The Spanish legal experts have endeavoured to assist the Court by expressing a view on these issues, including suggesting the appropriate points score for each permanent symptom, but everyone is agreed that, ultimately, the decision rests with me. I have to apply the various tests in the *Baremo* to the medical evidence before me. I have taken account of the views of the Spanish experts, but they are not binding on me.

15. As I have already hinted, the medical and other evidence in this case is very extensive. I have seen reports from 12 medical experts and from two care management experts. The various medical and care expert reports run to 546 pages, and the Medical Records bundle runs to 1518 pages. The Spanish law expert reports run to nearly 100 pages.

16. In relation to a few matters, principally concerned with the appropriate points on the Balthazar scale for permanent symptoms or sequelae, the Spanish law experts have agreed an appropriate points score and counsel have invited me to adopt the score that the experts agree. In each case where a score is agreed, I have done so, whilst bearing in mind always that the final decision rests with me. Where there is a disagreement, I have done the best I can to come to the right decision in light of the relevant definitions in the *Baremo* and the medical and other evidence. None of this is an exact science. So, for example, the *Baremo* requires the Court to fix a specific date as the date of Consolidation, when the practical reality is that it is somewhat artificial to regard there as being a single day on which it can be said that a plateau has been reached. Again,

there is no magic formula for ascribing a particular number of points to, say, the permanent symptoms arising from Mr Scales's knee injury or the damage to his left eye. As I have said, all I can do is to do the best that I can. Both of the Spanish law experts have emphasised that the *Baremo* leaves the judge with a wide discretion.

17. As I have already said, each side has instructed a Spanish law expert. Mr Scales instructed Mr Sanchez, and the MIB instructed Professor Luis Carreras Del Rincon ("Mr Carreras"). Each of the experts is a practising Spanish lawyer, specialising in litigation, and is an eminent personal injuries expert. Mr Sanchez practises in Madrid, and Mr Carreras in Barcelona. I have been greatly assisted by their reports, and by the clear and helpful way in which they gave their oral evidence. Unfortunately, however, they differed substantially in their views on certain aspects of the applicable Spanish law. This is no criticism of them, but it did not make my task any easier.

18. Mr Scales has been represented by Mr Matthew Chapman QC, and the MIB by Ms Lucy Wyles. I am grateful to them for their excellent submissions, both oral and in writing.

19. The 4-day hearing in this matter took place remotely, via Skype for Business. Seven witnesses gave live evidence via video link, namely Mrs Scales, the two Opthalmology experts, Mr Halliday and Dr Starr, the two Care Manager experts, Ms Denzel and Ms Makda, and the two Spanish law experts, Mr Sanchez (from Madrid) and Mr Carreras (from Barcelona). Thanks to the efforts of all concerned (and to the assistance of my clerk), the hearing proceeded very smoothly. My ability to follow and evaluate the evidence of these witnesses was not diminished by the fact that they gave evidence remotely. Counsel were able to cross-examine in the normal way. This was not a case in which there was a significant dispute involving witnesses of fact, though there were major disagreements amongst the expert witnesses. It was possible, with relative ease, for all of the participants to find and review the same document in the bundle whilst a witness was giving evidence about it. Though I provided for short breaks from time to time during the morning and afternoon sessions, the length of the hearing was not significantly extended (if at all) because it was not conducted in a courtroom.

20. I should also express my gratitude to the parties' Instructing Solicitors for the efficient way in which they prepared the electronic bundles for the hearing. This is of the greatest importance in remote hearings, in which it is difficult for counsel to "hand up" a missing document.

21. In this judgment, I have not referred to every single aspect of the voluminous expert evidence. To do so would have made this judgment unmanageably (and unreadably) long. However, I have taken all of the evidence, both written and oral, into account.

THE LEGAL BASIS OF THE CLAIM AND THE APPLICABLE LAW

22. There is no disagreement between the parties as regards which national law is applicable, and so I can deal with this topic relatively swiftly. It is common ground that I must apply Spanish law, and must reach my decisions on the various remedies issues, so far as possible, by adopting the same approach that would have been adopted by a Spanish Court. (I will deal with the applicable law in relation to interest separately, later in this judgment.)

23. Mr Scales's claim is brought against the MIB pursuant to regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37) ("the 2003 Regulations"). The 2003 Regulations transposed into English law the obligations that are set out in Articles 5, 6 and 7 of the Fourth Motor Insurance Directive. Article 7 of that Directive entitles an injured party to apply for compensation to the Compensation Body in their member state of residence following an accident in another member state involving an uninsured vehicle. The MIB is the Compensation Body for the UK. Article 7 contains provisions regarding reimbursement of the Compensation Body by the relevant Guarantee Fund. In this case, the relevant Guarantee Fund is the CCG.

24. The liability of the Compensation Body is limited to the amount that the Spanish Guarantee Fund would be liable to pay. This is set out in Reg 13 of the 2003 Regulations.

25. Regulation 13(2)(b) of the 2003 Regulations provides that:

> "the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the second motor insurance directive as it if were the body authorised under paragraph 4 of that article and the accident had occurred in the UK."

26. The last few words of Regulation 13(2)(b) led, for a while, to some uncertainty. The question arose as to whether the rules and principles as to damages that should be applied should be those of the country in which the accident happened, or the country in which the victim was resident. This question was definitively resolved by the Supreme Court in **Moreno v MIB** [2016] UKSC 52. At paragraphs 29-32 of **Moreno,** Lord Mance, with whom the other Justices agreed, said that the aim of the scheme is that if the victim has recourse to the compensation body established in his own state of residence, he is entitled to the same compensation as that to which he is entitled against the Guarantee Fund of the state of the accident.

27. It follows that the issue of fact for the Court is to determine what compensation the Claimant would have been entitled to against the Spanish Guarantee Fund: MIB will be liable to the Claimant for that same compensation. This compensation is therefore to be assessed under Spanish law.

28. Guidance has also been given as to how the Court should go about this exercise. In applying the foreign law on assessment of damages, the judge must not only apply the black-letter law itself, but must also apply "soft law", i.e. adopt the practices, conventions and guidelines adopted by the foreign court: see **Wall v Mutuelle de Poitiers Assurances** [2014] 1 WLR 4263 (CA) at paragraphs 24, 34 and 49, and **Syred v PZU & Others** [2016] 1 WLR 3211 (Soole J), paragraph 44. If the foreign court has a discretion on a particular issue, the English Court must also exercise a discretion: see **Syred,** paragraphs 47 and 103.

29. The fact that it may be difficult to discern a clear and consistent approach by the relevant foreign Courts (particularly in a field of developing jurisprudence) does not mean either (i) that the English Court should revert to the application of English law; or, (ii) that the English Court should not continue to attempt to reflect the law (including the

conventions and practices) of the relevant foreign State. Instead, the English Court must do the best that it can on the basis of such foreign law expert opinion as is available: **Syred**, paragraphs 41 - 49.

30. Accordingly, the judge must approach the exercise of assessing damages in the same way that a Spanish judge would do. Even if the foreign law is unclear or difficult to apply, the English judge must still do his or her best: there is no question of defaulting to English law in such circumstances.

31. I have been provided with English translations of the key judgments of the Spanish Courts that are relied upon by the parties. It is no fault of the parties that these judgments are sometimes difficult to follow, partly because of the way that they have been translated, and partly because of the different judgment-writing style that is adopted in the Spanish courts.

OVERVIEW OF THE *BAREMO*

32. Article 1902 of the Spanish Civil Code provides:

> "A person who by an act or an omission causes damage to another when there is fault or negligence is obliged to compensate the damage caused."

33. Article 1106 of the Spanish Civil Code provides:

> "The compensation for damages will not only comprise the value of the loss suffered but also the loss of earnings of the creditor, save for the exceptions set out in the following articles"

34. The obligation to comply with the *Baremo* in assessing damages in road traffic accident cases is set out in Article 1.2 of the *Baremo*, which provides:

> "2.Damage and losses caused to persons, including the value of the loss suffered and the loss of earnings, foreseen, foreseeable or that are known to arise from the causal event, including moral damages, shall be quantified in any event in accordance with the criteria and within the compensation limits set out in the annex of this Act"

35. The translations from the Spanish in the three foregoing paragraphs were provided by Mr Sanchez. The Defence does not dispute that they are broadly accurate.

36. As I have said, it is common ground between the parties that the *Baremo* applies to the assessment of Mr Scales's damages.

37. At the relevant time, the *Baremo* did not provide for assessment of special damages for the victim by reference to multiplier and multiplicands, as in the English system. Rather, it provided for the calculation of compensation by reference to a number of defined categories.

38. These were:

(1) Compensation for the time spent in hospital by reference to a defined daily rate;

(2) Compensation at a daily rate for temporary disability in the period after discharge from hospital up to the Consolidation date. The rate differed according to whether the day was an "impeded" day or a "non-impeded" day, as defined;

(3) Compensation for specific permanent or on-going symptoms, or sequelae. A number of different categories of symptoms were identified in the *Baremo*. For each type of permanent symptoms, if they were present, the claimant would be allocated a number of points within a defined range. It was for the judge to decide whether the claimant had the relevant permanent symptoms and then to decide how many points to allocate to the symptoms. As I have said, in a Spanish Court the judge would be guided by the recommendations of the Forensic Medical Examiner. When the judge has allocated points to all of the permanent symptoms, the judge must tot them up and then, using a complicated formula, convert the points into a monetary value for compensation for permanent symptoms;

(4) Compensation for aesthetic or cosmetic damage, again in accordance with a scale and guidance provided in the *Baremo*;

(5) Further compensation for what is described in Table IV of the *Baremo* as "Permanent injuries resulting in victim's inability to carry out his or her usual occupation or activity". There are three categories, "Partial permanent incapacity", "Total permanent incapacity" and "Absolute permanent incapacity", each with a different range of compensation in Euros. It is for the judge to decide which of the three categories the victim falls into and to decide on the financial award within the relevant range. These payments are sometimes known as "corrective factors". The two Spanish law experts were agreed that the compensation in this category is not quite the same as general damages, in the English law sense: it covers compensation for general damages, but it may also reflect additional costs, which in English law would be treated as special damages;

(6) Pecuniary compensation for expenditure incurred up to the Consolidation date. There is no general right to recover special damages in the *Baremo*. However, there is an express right to recover certain categories of losses up to Consolidation. This was provided for by Article 1(6) of the Annex to the *Baremo*, which stated, at the relevant time:

> "1(6) In addition to the compensation established under the Tables, medical, pharmaceutical and hospitalisation costs will be in any case in the amount necessary until the healing of the injuries or their consolidation, provided that the expenditure is duly justified based on the nature of the assistance."

(7) Additional compensation for those who fall within the category of "*gran invalido*" (as defined in Table IV of the *Baremo*). On a literal reading of the *Baremo*, *gran invalido*s, but only *gran invalido*s, are also entitled to the following:

i. compensation for past and future gratuitous care and assistance in the form of an award for "moral damages to relatives" in addition to the compensation for permanent injuries and temporary disability.

ii. compensation for future personal care support in the form of an award for "need of another person's assistance".

iii. compensation for accommodation costs; and

iv. compensation for vehicle adaptation costs.

39. In addition to the question of whether, and how far, Mr Scales qualifies for compensation in the various heads set out above, there is a dispute between the parties as to whether certain types of expenditure fall to be compensated as "medical, pharmaceutical and hospitalisation" costs. Furthermore, there is an important dispute about whether Mr Scales is entitled to recover for certain types of losses for which he would be compensated in a claim governed by English law, but which are not specifically referred to in the *Baremo*.

40. Mr Carreras, the MIB's Spanish law expert, says that the position is clear and straightforward: if the *Baremo* does not specifically provide for recovery of certain types of costs and expenditure, they are not recoverable. Mr Sanchez, on behalf of Mr Scales, on the other hand, says that it is essential to bear in mind that the *Baremo*, at the relevant time, was unfair to victims in that, on its strict terms, it did not provide a victim with full compensation. The most glaring omission was that a victim could not recover his or her medical, pharmaceutical and hospitalisation costs that were incurred after the Consolidation date. He said that judges in Spanish courts are entitled to remedy this unfairness in a number of ways. He says that there is an overriding principle of *restitutio in integrum* in Spanish law, and that a Court would make use of this principle to exercise its discretion to grant compensation for medical, pharmaceutical and hospitalisation costs, even after Consolidation. He said that a Court would also grant damages for post-Consolidation personal care costs, even to those who are not *gran invalido*. Still further, he said that the Spanish Court would provide compensation for other costs that are not specifically referred to in the *Baremo*,

41. It follows that one of the issues that I will have to consider is whether a Spanish Court would award Mr Scales compensation for various heads of loss which are not specifically referred to in the *Baremo* for persons in his position.

42. A further point that arises is whether, if there are some costs, expenses or losses which are irrecoverable because they do not come within the *Baremo*, and this is unfair on the victim, the Court should compensate for this, at least to an extent, by enhancing the amounts awarded for the corrective payments. At one stage it appeared to be being argued on behalf of Mr Scales that the Court could move a victim up a category, say from the "total permanent incapacity" category to the "absolute permanent incapacity" category, or could classify him as a *gran invalido*, even if he strictly did not qualify, in order to compensate him for inadequacies in the protection provided by the *Baremo*. Mr Sanchez did not support this view, however, and Mr Chapman QC, for Mr Scales, has clarified that he is not saying that a victim can be re-categorised to compensate for under-compensation elsewhere, but he maintains his submission (supported by Mr Sanchez) that the award within a category can be "bumped up" to take account of under-compensation elsewhere.

43. One matter that I do not have to decide, because it is now agreed between the parties, is whether Mr Scales has to give credit for social security payments, in the form of Attendance Allowance, that he has received since his accident. Although this was at one stage in issue, the MIB conceded during the course of the hearing that credit does not have to be given for social security payments.

44. I will deal separately with interest, near the end of this judgment.

THE ISSUES THAT I HAVE TO DECIDE

45. There are a great number of matters that I have to consider and decide in this judgment. I will deal with them in the following order:

(1) Whether I am required to apply the letter of the *Baremo*, or whether I have flexibility to award compensation for some heads of damage which are not specifically covered by the express language of the *Baremo*.

(2) Alternatively, is a court entitled to take account of the costs which are not otherwise covered when assessing the award for permanent injuries (the corrective factors)?

(3) What is the date of Consolidation?;

(4) The award of compensation for temporary incapacity prior to the Consolidation date. This will be determined by reference to my decision on the Consolidation date and also as to whether all of the days before it were "impeded" days, or whether some were "non-impeded" days;

(5) The award of compensation for Mr Scales's permanent on-going symptoms;

(6) The award of compensation for aesthetic damage;

(7) Is Mr Scales a *gran invalido*?

(8) Compensation for financial losses and expenditure prior to, and after, Consolidation (including which types of loss are recoverable);

(9) The appropriate category for permanent injuries or corrective factors and the appropriate award of compensation under this head;

(10) Interest; and

(11) Conclusion.

(1) AM I REQUIRED TO APPLY THE LETTER OF THE *BAREMO*, OR DO I HAVE FLEXIBILITY TO AWARD COMPENSATION FOR SOME HEADS OF DAMAGE WHICH ARE NOT SPECIFICALLY COVERED BY THE EXPRESS LANGUAGE OF THE *BAREMO*?

46. This is an important question, because the answer will determine the following:

(1) Whether Mr Scales can recover for hospital, pharmaceutical and medical expenses, post-Consolidation;

(2) Whether Mr Scales can recover for expenses, pre- and post-Consolidation, which do not come within the meaning of "hospital, pharmaceutical and medical" expenses?; and

(3) If Mr Scales is not a *gran invalido*, can he nonetheless recover personal care and gratuitous care costs?

47. I have been confronted with two diametrically opposed views from the two Spanish law experts. My task has not been made any easier by the fact that both were impressive witnesses and were able fully and articulately to explain the views that they espoused.

48. The two Spanish law experts were agreed that there was no binding authority on this point. I was told that, under Spanish rules of *stare decisis*, a ruling on a point of law only became binding on lower courts if it was made in two different judgments of the Spanish Supreme Court. A single ruling by the Supreme Court is not sufficient to bind the lower courts. I assume that it follows that judgments of the Provincial appeal courts, the level between the trial court and the Supreme Court, are not generally binding on other courts. Single rulings of the Supreme Court, and rulings of the intermediate appellate courts are, however, of persuasive effect.

49. This question of whether awards can be made for heads of losses that are not specifically permitted by the *Baremo* has only been addressed once in the last few years by the Spanish Supreme Court. This was in judgment number 13/2017, of 13 January 2017. In this case, the Supreme Court held that, under the pre-2016 *Baremo*, only medical, pharmaceutical, and hospital care expenses incurred pre-Consolidation were recoverable, in accordance with the terms of the *Baremo*. The Appellant in that case had argued that post-Consolidation expenses of this nature should be recovered, because that would be consistent with the overriding principle that the law should provide full indemnity for the damage suffered. The Supreme Court did not accept this argument, ruling that Article 1(6) of the Annex to the *Baremo*, which specifically limited medical, pharmaceutical and hospital care expenses to those that were incurred pre-Consolidation, took precedence. The Supreme Court said that this was doubtless unfortunate because it left ongoing treatments without cover, but the Court nonetheless applied the restrictions in the *Baremo* as they were at the relevant time.

50. As I have said, however, this ruling is not formally binding on Spanish Courts because the issues had only been ruled upon once by the Spanish Supreme Court.

The parties' arguments

51. Mr Sanchez said that he expects this issue to return to the Spanish Supreme Court within the next two years. He thought that on that occasion the Supreme Court will take a different view, and will construe the pre-2016 *Baremo* at the relevant time in line with the new, post-2016 *Baremo*, which permits recovery of medical, pharmaceutical and hospital care expenses post-Consolidation. He said that this is because such an approach would be consistent with the overriding principle, in Spanish law, of *restitutio in integrum*, or full recovery, as reflected in Articles 1902 and 1106 of the Spanish Civil Code, and Article 1 of Royal Decree 8/2004, which states that a victim is entitled to

recover the financial loss resulting from the accident. He agreed that, read literally, Article 1(6) of the Annex to the *Baremo* restricted recovery to the particular heads that are set out in the *Baremo*, but he said that most Spanish courts would find a way around it. If they were satisfied that the victim has needs that require future medical treatment, the Courts would award compensation for future damages because the victim cannot be expected to pay for them "from the wrong pocket".

52. Mr Sanchez relied on an article written in 2011 in a legal journal, the Revista de Responsibilidad Civil y Seguro (the Civil Liability and Insurance Review), by Juan Antonio Xiol Rios LJ, the President of the First Chamber of the Spanish Supreme Court. Justice Rios raised the possibility that the restrictions set out in Article 1(6) of the Annex to the *Baremo* might be set aside by the Constitutional Court on the basis that they were unconstitutional, because they lack any justification from the care service standpoint, and because they are incompatible with the victim's dignity. Justice Rios also made clear that he hoped that, one way or another, the Spanish Supreme Court would find a way to circumvent the restrictions in Article 1(6).

53. Mr Sanchez said that the Supreme Court Judgment of 13 January 2017 was not directly in point, because this was a case in which an insurer, rather than the victim, was claiming the recovery of expenditure, and insurers do not have the same constitutional rights as individuals. He said that there had previously been other Supreme Court judgments that had gone the other way, namely Judgment No 229/2010 of 29 March 2010 and Judgment 786/2010 of 22 November 2010.

54. In addition, Mr Sanchez relied on a decision of the Provincial Court of Zaragoza, Number 177/2019 of 25 June 2019. This was a judgment on appeal. Mr Sanchez said that this was a case in which a young man had been compensated for his injuries, and who was allowed to come back to court and recover additional expenses which he had incurred. The first-instance court had disallowed the expenses, in reliance on the Supreme Court judgment of 13 January 2017, on the basis that they were not covered by Article 1(6). The Provincial Court allowed the appeal and permitted the expenses to be recovered. Mr Sanchez said that this demonstrated the overriding status of the principle of *restitutio in integrum*.

55. Mr Sanchez further relied on a judgment, number 119/2016, of the Provincial High Court of Justice in Badajoz. This was a case involving a victim who had suffered serious psychiatric injuries but who was not a *gran invalido*. Her only close relative was her son who had serious mental health problems and who would be unable to look after her. This meant that she would have to pay someone to look after her future personal care costs. Under the strict terms of the *Baremo*, as she was not a *Gran Invalido*, this meant that she was not able to claim for future personal care costs. The High Court in Badajoz nonetheless awarded her the future personal care costs.

56. Mr Carreras took a very different view from Mr Sanchez. He said that it is absolutely clear that if reimbursement of a particular expense is not specifically provided for in the *Baremo* that was in force at the particular time, the sum is not recoverable. He said that there was some debate in the case-law as to whether this was the position, but it was put beyond doubt by the important judgment of the Supreme Court on 13 January 2017.

57. Mr Carreras said that the Zaragoza case does not support the proposition for which Mr Sanchez cites it. This was a case in which a victim had returned to court because something had unexpectedly arisen which had not been addressed at the original compensation hearing. In this case, this was the need for the victim to take a growth hormone. Mr Carreras said that the appeal court did not deal with the case under Article 1(6) of the Annex to the *Baremo*, but under Article 1(9), pursuant to which a claimant can return to court to recover compensation for another unanticipated injury which is suffered some time after the original accident but which was caused by the original accident.

58. Mr Carreras said that the Badajoz judgment was not a strong persuasive authority, in particular because it was a decision of a criminal court.

Discussion

59. In my judgment, doing the best I can to analyse the relevant Spanish law and legal principles, Mr Carreras is right: at the relevant time the *Baremo* imposed strict limitations on the types of compensation that could be recovered by a victim of a road traffic accident. It is not possible to go beyond the *Baremo* in order to provide full restitution for a victim by compensating for losses which are not specifically provided for by the *Baremo*.

60. There are a number of cumulative reasons why I have come to this conclusion.

61. First, Article 1.2 of the *Baremo* states in terms that "Damage and losses …. shall be quantified in any event in accordance with the criteria and within the compensation limits set out in the annex of this Act". This is unequivocal.

62. Moreover, this conclusion is supported by the legislative structure and the purpose of the *Baremo* at the relevant time.

63. The legislative structure consisted of a number of detailed and specific rules which provided for compensation for particular types of general damage or expenditure. It would make no sense for the legislation to have provided these specific rules, if the Courts had a free rein to ignore them and a wide discretion to award damages by reference to what was perceived as being fair, or what amounted to *restitutio in integrum*.

64. As for the purpose of the *Baremo*, the legislative intention appears to have been to reach a balance between the needs of accident victims to be properly compensated and the desire of insurance companies to keep premiums down, by setting limits on what can be recoverable. It was deliberately less generous to victims than the previous version of the *Baremo*. It may well be that, at least with the benefit of hindsight, the line was drawn in the wrong place, and the *Baremo* rules operated unfairly so far as accident victims were concerned, but the fact remains that the intention was to set limits on what would be recoverable. It would be inconsistent with this for courts to be given a wide discretion to award compensation that was not specifically provided for in the *Baremo*. Moreover, if the pre-2016 *Baremo* had the flexibility which Mr Sanchez says it had, then there would have been no need to replace it with a different legislative regime with effect from 1 January 2016, which provided for a more generous approach to compensation.

65. I do not think that the journal article written by Justice Rioz in 2011 is sufficient to justify a conclusion that the limits of the *Baremo* need not be observed. Article 1(6) of the Annex to the *Baremo* has not been declared unconstitutional by the Constitutional Court, as Justice Rioz thought it might be. It does not appear that there has been a groundswell of case-law authority since 2011 in which the strict limits of the *Baremo* have been set aside. I do not think that there are good grounds for Mr Sanchez's optimism that in the next couple of years the Supreme Court will hold that it is permitted to award compensation for expenses that are not covered by the pre-2106 *Baremo*, especially as the judgment of 13 January 2017 said the opposite.

66. In my judgment, Mr Carreras was right to say that the judgment of the Spanish Supreme Court of 13 January 2017 is the key authority. This judgment was directly in point. Though it does not have the status of a binding authority, because it is not a second Supreme Court judgment on the same point, I am satisfied that it would be regarded by a Spanish Court as a clear and authoritative steer from the Supreme Court to the effect that the limits of the *Baremo* cannot be exceeded, even if they operate unfairly.

67. The Zaragoza case does not assist Mr Sanchez's argument because it was not concerned with awarding compensation under Article 1(6) of the Annex to the *Baremo*, but was a case about the award of compensation for an unanticipated consequential injury that came to light after the original award of compensation, pursuant to a different article of the *Baremo,* Article 1(9).

68. As for the Badajoz case, as Mr Carreras said, this does not have the same persuasive status as the other appellate cases, because it was a judgment of a criminal court, rather than a specialist civil court (in Spain, a criminal court can award damages to the victim as an adjunct to criminal proceedings). In addition, the reasoning in the Badajoz case is not easy to follow. It is not clear to me, from a reading of the judgment, whether the court was awarding the personal care costs as a separate head of damage that was not within the *Baremo*, or whether the court was awarding a sum in respect of the personal care costs within the award for corrective factors. If the court was awarding the personal care costs as a separate head of damage, the judgment does not make clear the basis upon which the court felt able to do so.

69. The very fact that the Badajoz case was the only case that Mr Sanchez cited which, even arguably, awarded compensation for losses which were not provided for in the *Baremo* is, in my view, a clear sign that Spanish courts do not award compensation for such losses.

70. Mr Chapman QC submitted that even if, contrary to his primary case, the 13 January 2017 Supreme Court case showed that medical, pharmaceutical and hospital costs post-Consolidation are not recoverable, it would be wrong to treat the ruling as applying also to financial expenses which do not fall within this definition, such as the costs of the cleaning and maintenance of Mr Scales's homes in England and Spain, and the cost of gardening that Mr Scales can no longer do himself. I do not accept this submission. If I am right that, under the *Baremo*, a claimant cannot recover even medical, pharmaceutical or hospital costs after the date of Consolidation, it would not make sense that they are nevertheless entitled to recover other costs, which do not fit that definition, and which are less directly connected to the accident, such as the costs of the upkeep of the victim's home and garden.

(2) ALTERNATIVELY, IS A COURT ENTITLED TO "BUMP UP" THE AWARD OF GENERAL DAMAGES FOR PERMANENT INJURIES TO TAKE ACCOUNT OF COSTS THAT ARE NOT OTHERWISE RECOVERABLE?

71. Once again, this is a difficult question. However, in my judgment, this is something that a Spanish court would be entitled to do, and so is something that would be within the scope of my discretion to do.

72. Under Table IV of the *Baremo*, the Court is required to consider compensation for correction factors including for "Permanent injuries resulting in victim's inability to carry out his or her usual occupation or activity". There are three categories. These are:

(1) **Partial permanent incapacity**, defined as "With permanent sequelae that partly restrict usual occupation or activity, without preventing the disabled individual from carrying out his or her essential tasks." The compensation range for this category is from zero to €19,172.54.

(2) **Total permanent incapacity,** defined as "With permanent sequelae that fully prevent carrying out of the disabled individual's usual occupation or activity." The range is from € 19,172.55 to €95,862.67.

(3) **Absolute permanent incapacity,** defined as "With sequelae that prevent the disabled individual from carrying out any occupation or activity." The range is from €95,862.68 to €191,725.34.

73. It might be thought, at first sight, that these heads of compensation are solely for what would, in English law, be called general damages. If so, then there would be no scope for including a figure for costs and expenses. However, both Mr Sanchez and Mr Carreras were agreed that the "permanent injuries" head of loss could compensate a victim not only for future pain, suffering, and loss of amenity, but also for costs and expenditure. The strict division between general and special damages does not exist in Spanish law.

74. In my judgment, this means that an award for permanent injuries may encompass a sum in respect of costs and expenses which are not specifically provided for elsewhere in the *Baremo*. It would, in my view, make no sense for the "special damages" aspect of the permanent injuries award to cover compensation for costs and expenses that are already catered for elsewhere in the *Baremo*. That would be double-counting. Rather, the "special damages" aspect enables the Court to take account of the fact that *Baremo* compensation for costs and expenses is not comprehensive, and that a victim may well suffer losses that are not compensated elsewhere, because they are not covered by the *Baremo* at all. The very fact that the award for permanent injuries is described as a "corrective factor" suggests that it is, in part, designed to correct for under-payments elsewhere in the regime.

75. This conclusion obtains some support from the article by Justice Rioz from 2011, and also from the Badajoz judgment. Indeed, on my reading of the Badajoz judgment, what the court was actually doing was to increase the permanent injuries figure by an amount that reflected the estimated personal care costs for the victim, which would otherwise have been irrecoverable. In that case, the Provincial High Court of Badajoz said:

> "… we cannot argue that [the permanent injuries correction factor award] for partial, total or absolute permanent disability only covers pain and suffering and that we can accept that, in a reasonable proportion, it may be intended to cover pecuniary damage caused by the victim's reduced income, but this cannot be accepted as its sole purpose, or even as its principal purpose."

76. Even though this was an appeal from a criminal, rather than a civil, court, I think that this reflects Spanish law as I understand it to have been at the relevant time.

77. This conclusion is also supported by a judgment of the Spanish Supreme Court, number 228/2010 of 25 March 2010. That case differed from the present in that it was concerned with the previous version of the *Baremo*, which was replaced in 2007 by the version with which this case is concerned, and in that the argument was that the permanent injuries award should be increased because the maximum award for loss of earnings was too low to reflect the victim's true loss. The guidance given is nonetheless of relevance. The Supreme Court held that, exceptionally, the permanent injuries award could be increased for this reason. The Supreme Court said:

> "The lack of structure of the types of damage covered by the evaluation system prevents confirming that this correction factor solely covers moral damage, and allows acceptance that in a reasonable proportion it may cover asset related and damages due to loss of income by the victim, but this may not be accepted as its sole aim, or as a principal [aim]."

78. The judgment said that this should be done "in exceptional circumstances relating to the personal and economic circumstances of the victim".

79. In my judgment, the logic of the Supreme Court's reasoning in the 2010 case would justify an increase in the award of permanent injuries compensation because otherwise some types of financial losses (rather than lost income, as in the Supreme Court case) would not be recovered.

80. Both Mr Sanchez and Mr Carreras were at pains to stress the breadth of the discretion that a judge has in relation to these correction factors. I do not think that a Spanish judge would perform a similar exercise to an English judge who is calculating special damages: a Spanish judge would not invariably seek to work out a precise figure for a particular uncompensated loss and then add it to the permanent injuries category (subject to the maximum figure). Rather, s/he would take a broad estimate of the additional uncompensated losses and would "bump up" the permanent injuries compensation in a rough and ready manner. The court in the Badajoz case took a round number as the appropriate compensation for the victim in relation to personal care costs (€60,000). In addition, as I understand it, the judge's discretion is so wide that it is up to him or her to decide whether or not to increase the permanent injuries factor to compensate for particular types of expenditure at all. There is no rule that in every case the judge will increase the permanent injuries award to take account of all or any uncompensated losses.

81. It is common ground, however, that a judge cannot alter the categorisation of the permanent injuries correction factor, for example, from total permanent to absolute

permanent, in order to give headroom to award the full amount of the otherwise uncompensated financial loss. The selection of the relevant permanent injuries factor must be determined by reference to the criteria set out in the description of the factor itself. The only potential flexibility relates to the monetary award within the appropriate correction factor.

82. Furthermore, in my judgment it would not be right to take account of the fact that Mr Scales would, in all probability, have received higher compensation if the accident had happened in England, rather than Spain. My objective must be to award Mr Scales the compensation that he would have been awarded in a Spanish court for an accident in Spain, not to seek to make an award that is as close as possible to that which Mr Scales would have received if the accident had taken place in England.

CONCLUSION ON ISSUES (1) AND (2)

83. Pausing here, in my judgment the approach that would be taken by a Spanish court, and so the approach that I should take, is as follows:

(1) I cannot award compensation for heads of financial loss of a type that are not specifically provided for under the *Baremo*, such as medical, pharmaceutical and hospital costs after the Consolidation date, and certain other types of losses;

(2) This is so even if the effect will be to under-compensate Mr Scales for his actual losses. I am not free to award compensation in the same manner as it would have been awarded if the accident had happened in England, and I am not free to make good any perceived unfairness in the *Baremo*, at the relevant time, by awarding compensation on the basis that Mr Scales should receive full recovery of all of his actual losses; but

(3) The potential harshness of this approach is somewhat mitigated by my discretion to increase the award for the appropriate permanent injuries corrective factor to take account of financial losses that would otherwise not be recoverable at all;

(4) However, in so doing, I cannot exceed the maximum figure permitted for the relevant permanent injuries correction factor.

(3) WHAT IS THE DATE OF CONSOLIDATION?

84. There is agreement between the parties as to what the test is that I should apply. This is that the date of Consolidation occurs when the injuries reach a point of plateau/stabilisation, after which the victim's injuries cannot improve significantly with medical treatment and medical discharge is given.

85. Mr Scales contends for 23 October 2017 as the date of Consolidation. The MIB contends for 3 April 2017. In each case, the party's Spanish legal expert supports the date put forward by the party.

86. I face two obvious difficulties in determining the date of Consolidation.

87. The first is that, if this case were being heard in Spain, the medically-qualified Forensic Medical Examiner would advise the judge of his/her view of the Consolidation date and, in practice, the judge would almost certainly accept it. I do not have a Forensic

Medical Examiner to assist me, and (with one exception referred to below) the many expert reports which I have been provided with do not specifically address the Consolidation date (and the concept of Consolidation would, in any event, be unfamiliar to a UK-based medical expert). The Spanish legal experts have done their best to assist me, but they are no more doctors than I am, and so their views can only be of limited assistance.

88. The second difficulty is that, certainly in a case like Mr Scales's, it is somewhat artificial to proceed on the basis that there was a specific date when recovery stopped and the treatment began to deal only with the maintenance of the status quo.

89. However, I must do my best. I am content to treat the two dates that the parties have put forward as the only two realistic possibilities.

90. Mr Chapman QC, for Mr Scales, reminded me that the definition of "Consolidation" refers both to stabilisation or plateauing and to discharge from medical treatment, and that both elements have to be borne in mind.

91. He drew my attention to a letter from Peter McCullough, Consultant Colorectal and General Surgeon, at BMI The Meriden Hospital, to Mr Scales's GP, dated 22 May 2017, which said, "He really has a lot of problems with his head injury, emphysema of the chest and multi-resistant Kebsiella and pseudomonas infections in his lungs and his bowels….." These infections were acquired by Mr Scales whilst he was in hospital in Spain after the accident.

92. Mr Chapman QC also took me to the Report of Dr Christopher Plowman, Consultant Neuropsychologist, dated 25 March 2019, who said,

> "…I notice that more than three years (39 months) have passed in the Index Accident and the normal trajectory of recovery would suggest that Mr Scales is now functioning at his likely permanent level…..
>
> From a solely neuropsychological (cognitive) perspective I believe Mr Scales's date of consolidation is likely to have occurred approximately two years post-Index Accident, in October 2017. During this period of time Mr Scales is likely to have experienced the majority of his organically-mediated recovery, whilst after this date, he is likely to be utilising compensatory strategies, with marginal organic improvement."

93. Mr Chapman QC submitted that, especially in light of Mr McCullough's view, a proposed Consolidation date of 23 October 2017 was somewhat on the conservative side.

94. Ms Wyles, on behalf of the MIB, reminded me that Mr Carreras has said that the test really comes down to whether the further treatment will be curative. Like it or not, the court has to fix on a specific date. The MIB proposes 3 April 2017, because that was the date on which Mr Scales flew to Spain, on a commercial flight, for his first trip to his Spanish villa since the accident. The MIB's point, in essence, is that if Mr Scales was fit enough to be allowed to fly to Spain, his injuries must have plateaued. The

Occupational Therapy records state that Mr Scales coped remarkably well on this holiday, and Mr McCullough was told in May 2017 that they had had a lovely holiday in Spain.

95. Ms Wyles also pointed out that Mr Scales was discharged from the fracture clinic in October 2016, and completed physiotherapy some weeks before that. He finished a course of counselling in early May 2017. She said that there was no evidence that Mr Scales had any further curative medical treatment after the holiday in April 2017. I was provided with a print-out of Mr Scales's private medical treatment, which Ms Wyles says shows that the treatment after April 2017 was for unrelated conditions, such as hernia and gall bladder problems, apart from a review in an eye clinic which was not said to be curative.

96. Faced with this evidence, it is not at all easy to select a Consolidation date. However, I am satisfied that the correct Consolidation date is 23 October 2017. I am not persuaded that the mere fact that Mr Scales was able to travel to Spain in April 2017 shows that he had reached a plateau by then. He was given a great deal of assistance in making the journey, and at least part of the reason for going was to help in preparation for his court case. Mrs Scales gave evidence that it was a difficult experience for them both. I think that the evidence in the form of the letter dated May 2017 from Mr McCullough, the Colo-rectal surgeon is important. This shows that, even after 3 April 2017, Mr Scales was still in the recovery phase from the head injury and the infections that he acquired in hospital in the immediate aftermath of the accident.

97. I also take account of the view expressed by Dr Plowman, albeit in 2019. He is the only medical expert who expressed a view on Consolidation. His evidence was criticised by the Defence on the basis that stabilisation in the sense that medical treatment will not create substantive improvements is not quite the same thing as "organically-mediated recovery", which refers to the patient's body getting better, but it is the closest I have to a medical view as regards the Consolidation Date.

98. In an interview with Dr Mazibrada, a Consultant Neurologist, on 17 December 2018, Mr Scales acknowledged that there had been no significant improvement in his neurological symptoms in the last 12 months. This is consistent with Dr Plowman's view of the date of stabilisation.

99. I think that Mr Chapman QC is right to say that Mr Scales's recovery from his catastrophic injuries was a slow one, and that the earliest possible consolidation date was 23 October 2017. Given the nature of the injuries, I think that it is unlikely that recovery up to stabilisation would have taken less than 2 years.

100. I therefore find that the Consolidation date was 23 October 2017.

(4) THE AWARD OF COMPENSATION FOR TEMPORARY INCAPACITY PRIOR TO THE CONSOLIDATION DATE

101. This award breaks down into two parts. There is an award for days in hospital, and an award for days spent out of hospital, but pre-Consolidation. The daily rate for the latter period is higher for days which are "impeded days" than for "non-impeded" days.

The award for days in hospital

102. It is agreed that Mr Scales spent 134 days in hospital, and that the appropriate daily rate, under the *Baremo*, was €71.84. This makes a total of €9,626.56.

The award for impeded days and non-impeded days

103. Mr Chapman QC, supported by Mr Sanchez, contends that all of the days from release from hospital up to Consolidation were impeded days. The number of days between Mr Scales's release from hospital until 23 October 2017 is 597, and the daily rate for impeded days is agreed at €58.41. Therefore, the amount claimed for this period is 597 x €58.41 = €34,870.77.

104. Ms Wyles, supported by Mr Carreras, contends that only 340 of the days following Mr Scales's release from hospital were impeded days, and the remainder were non-impeded days, which qualify for a lower daily rate of €31.43.

105. The Spanish legal experts were essentially in agreement about the difference between impeded and non-impeded days. This had to do with the day-to-day activities of the person concerned. The question was whether the claimant could resume their previous daily activities, such as hobbies, DIY, sports, gardening, household chores, driving, social life etc. An impeded day is one when the victim is completely prevented from going back to their previous daily activities. A non-impeded day is when they are prevented, but not "completely" prevented, from going back. This is not an easy line to draw.

106. Mr Sanchez said that, in a case such as this, it makes no sense to differentiate between impeded and non-impeded days up to the date of Consolidation. Where, as here, the victim has suffered severe life-changing injuries, the court should regard all days up to Consolidation as impeded days. The concept of non-impeded days is only relevant for persons who have suffered much less serious injuries, such as someone with a fractured leg. If that person goes back to work before Consolidation, but still suffers symptoms, it may be appropriate to regard the days before return to work as impeded days, and the days when the victim is able to return to work as non-impeded days. Mr Sanchez said that the general practice in Spanish courts, where the claimant is severely injured, is to treat the entirety of the period prior to Consolidation as impeded days.

107. Mr Carreras, on the other hand, said that the medical evidence showed that Mr Scales no longer needed physiotherapy in early 2017 and had shown a good response to an antidepressant by the time he went to Spain in April 2017. Mrs Scales told an occupational therapist that her husband had coped remarkably well during his trip to Spain.

108. In my judgment, it is absolutely clear that all of the days between Mr Scales's discharge from hospital and his Consolidation date should be treated as impeded days. Mr Scales was a very fit and active man, who spent his time cycling, swimming, gardening and doing DIY. He was completely impeded from doing any of these things in the two years after his accident and so all of the days in question were impeded days.

Award under this head

109. It follows that I award, under this head, the agreed sum of €9,626.56 for Mr Scales's period in hospital, and the sum of €34,870.77 for 597 impeded days between release from hospital and Consolidation. This is a total of **€ 44,497.33**.

(5) THE AWARD OF COMPENSATION FOR MR SCALES'S PERMANENT ON-GOING SYMPTOMS

110. This award is not for the severity of the original injury. Rather, it is for the permanent on-going symptoms, or sequelae, that Mr Scales is suffering from after the date of Consolidation. As I have said, the task of the judge is to allocate a number of points for each symptom and then convert the points into a cash value in accordance with the Balthazar scale in the *Baremo*. The *Baremo* provides for a range of points for each symptom and it is for the judge to decide on the appropriate points score for each symptom. I repeat, once again, that in a trial in a Spanish court, the judge would have the assistance of a Forensic Medical Examiner. I do not. Rather, I have had the benefit of a very great deal of medical evidence and a large number of medical reports, plus the observations and submissions of the Spanish legal experts and counsel.

111. There is no magic to the points score that is awarded for a particular symptom. Rather it is a matter of judgment, or, perhaps more accurately, a matter of "feel", in light of the relevant medical evidence. Fortunately, in relation to most of the symptoms, the parties' medical experts were broadly agreed and so there was no need to call them to give evidence. This does not mean, however, that the parties were necessarily agreed as regards the points score that should be awarded for a symptom in light of the medical evidence. In most cases they were not. In relation to one symptom category, the Claimant's eyesight, the medical experts could not agree and so I have heard oral evidence from two Consultant Opthalmologists, Mr Halliday for Mr Scales, and Dr Starr for the MIB.

112. In relation to a number of symptoms, the parties have helpfully agreed a points score. Where they have done so, I have adopted the agreed points score.

113. There are twelve sets of symptoms which need to have a score allocated to them. I will deal with them in turn.

(1) Neurological symptoms

114. There are four categories in the *Baremo* for neurological symptoms, namely mild, attracting 10-20 points, moderate (20-50), severe (50-75) and very serious (75-90). In addition, there is a separate scale for "post-concussion syndrome", which provides for between 5-15 points.

115. Mr Chapman QC invites me to adopt the proposal made by Mr Sanchez that I should find that Mr Scales's neurological symptoms are in the "moderate" category, and I should award points at the mid-point of that scale, namely 35. Mr Sanchez said that this category is for "moderate impairment of cognitive functions", and that this best accords with the neurologists' and neuropsychologists' reports.

116. Mr Carreras, on the other hand, says that it is not open to me to make an award in the neurological symptoms points category, because the heading for this category, in the *Baremo*, is "Impaired integrated upper brain functions, accredited by specific tests

(Outcome Glasgow Scale)". He says that points can only be awarded in this category if the diagnosis is confirmed by an objective test such as the Outcome Glasgow Scale (a scale which assesses the degree of recovery for patients with brain injuries which uses the same four classes as the *Baremo*). The test for the Outcome Glasgow Scale has not been used on Mr Scales, and nor has a similar test. The Mayo test, which was used, is different because it assesses the severity of the original injury, rather than the permanent symptoms. In these circumstances, Mr Carreras says that is simply not possible to use this categorisation. Instead, he invites me to use the post-concussive syndrome scale and to award Mr Scales a score of 10 points. In the alternative, if I am minded to use the neurological symptoms scale, he suggested that I should find that Mr Scales comes into the "mild" classification, which would result in a score of 10-20 points.

117. I do not accept Mr Carreras's argument that I am barred from awarding points on the neurological symptoms scale because there has been no Outcome Glasgow Scale test or similar test. The Defence does not dispute that Mr Scales should receive something for the injuries to his brain, as they propose that he should receive something for post-concussive syndrome. However, there has been no diagnosis of "post-concussive syndrome", and so I do not see how or why I should make an award under this heading. On the other hand, I have a wealth of objective evidence about the impairment of Mr Scales's cognitive functions. I have seen a report for the Claimant, from Dr Gordon Mazibrada, Consultant Neurologist, dated 14 January 2019, and one for the Defence, from Dr Oliver JF Foster, Consultant Neurologist, dated 13 January 2019. I also have two joint reports from the neurologists, dated 30 May and 17 July 2019. In addition, I have seen reports from two consultant neuropsychologists instructed by the parties, Dr Vicki Hall, whose report is dated 19 September 2018, and Dr Matthew Plowman, dated 25 March 2019. I have also seen a joint report dated 25 May 2019. These reports set out the results of a number of objective tests of Mr Scales's cognitive functioning (see, for example, paragraphs 4.4 and 4.5 of Dr Hall's report). Still further, I have seen reports from two expert Care Managers who describe the impact of Mr Scales's cognitive impairment. These were Ms Louise Denzel, who provided reports dated 17 September 2018, 8 July 2019, and 27 August 2019, and Ms Gazala Makda, who provided a report dated 23 March 2019. These experts provided a joint report dated 31 May 2019, and there was some subsequent correspondence. Ms Denzel and Ms Makda gave oral evidence before me and were cross-examined.

118. In circumstances such as these, I think that a Spanish judge, faced with this evidence, would feel able to determine, based on objective evidence, which classification within the neurological symptoms scale Mr Scales falls into, as do I.

119. It would not be proportionate to prolong this lengthy judgment by setting out the expert evidence that is relevant to this category at length, especially as the points score is, in the final analysis, a matter of my judgment. However, it is clear from the evidence that Mr Scales's cognitive functions are, as a result of the accident, significantly below what they used to be. The neuropsychologists agreed that Mr Scales showed evidence of mild deterioration in working memory, memory recall and executive functioning. There were also possible problems with processing speed. These impairments were likely to present on a day to day level, when Mr Scales was not well rested and settled in mood. The expert neurologists agreed that Mr Scales has a risk of developing epilepsy as a result of the accident, though they could not agree on the exact percentage

risk. They said that the other medical reports, including the joint neuropsychology report, demonstrate comparatively mild but significant neuropsychological defects which were insufficient to add significantly to Mr Scales's overall care requirements, given his extensive other injuries, or compromise his capacity. There is some evidence of executive dysfunction (e.g. disinhibited behaviours).

120. The evidence before me, including that of Mrs Scales and Mr Scales himself, showed that he has difficulty coping with everyday tasks. He lacks concentration. He cannot be left on his own for more than a couple of hours at a time. He can make himself a hot drink or a simple snack, but only under supervision. He cannot prepare a full meal on his own, and there is always a danger that he will forget what he is doing, or that he might forget, for example, that he had left the kettle or some milk on the boil. He can wash and dress himself independently, but he needs assistance from time to time. This is at least partly due to his cognitive problems, as well as his physical symptoms. Mrs Scales has taken over running all of the family financial affairs. She has to deal with the running of the house in England and the upkeep of the villa in Spain. Mr Scales cannot be trusted to go anywhere on his own. He can walk to the local shop, if accompanied, but he could not be left on his own to go on a more ambitious shopping trip. The neuropsychologists think that he will benefit from a course of treatment, and the Care Manager experts thought that Mr Scales would benefit from a support worker for several hours a day (although this support is not solely because of his neurological symptoms). Mr Scales is still able to enjoy reading and looking at his Android device, and he has capacity to conduct litigation.

121. In my judgment, taking account of all of the evidence, Mr Scales falls into the moderate cognitive impairment category, and the appropriate points score is mid-way within the appropriate range. This is a score of 35 points. I appreciate that the consultant neurologists said that Mr Scales's symptoms were "comparatively mild" but this was not an assessment by reference to the *Baremo* scale, and the fact that the neurological symptoms do not add significantly to Mr Scales's overall care requirements is a testament to the seriousness of his other injuries, rather than to the mildness of his neurological symptoms.

(2) Impact on smell and taste

122. This is agreed at 10 points.

(3) Damage to teeth

123. This is agreed at 6 points.

(4) Dental occlusion

124. The points range for this symptom is relatively low, from 1-5 points. There is expert evidence from Mr Speculand, a maxillofacial surgeon. Mr Sanchez suggests an appropriate score is 2 points. Mr Carreras says that nothing at all should be awarded under this head. The parties are, therefore, not very far apart.

125. The dental occlusion symptom reported by Mr Scales was that his jaw clunks on eating. Mr Speculand did not find any evidence of this when he examined Mr Scales. Mr Speculand assessed Mr Scales temporomandibular joint (TMJ) function as normal.

There is an undisplaced fracture line running to the fossa of the right TMJ, which has not caused any functional upset to the working of that joint.

126. In my judgment, Mr Scales has suffered a slight dental occlusion as a result of the accident and I have no reason to doubt his statement that sometimes his teeth clunks when he eats. However, this symptom is not serious and I think that 1 point should be awarded for this symptom.

(5) Hearing loss

127. This is agreed at 12 points.

(6) Loss of vision in the right eye

128. The two Spanish law experts agreed that the appropriate score for this symptom was 25 points. This is the appropriate score for the total loss of vision in an eye. However, the two Opthalmology experts, Mr Halliday and Dr Starr, disagreed about the extent of the loss of vision in Mr Scales's right eye. They both agreed that he had better than bare perception of light. However, Dr Starr went further and was of the opinion that Mr Scales had useful central vision in his right eye. Dr Starr suggested that Mr Scales exaggerated his lack of vision when he was examined in 2019. According to the results, his sight in this eye had deteriorated since earlier examinations in 2016 and 2017, though there was no ophthalmic reason for any such change. The main reason for the 2017 examination was to assess whether Mr Scales was fit to drive, whereas the main reason for the examination in 2019 was to assess the level of loss of eyesight for the purposes of the damages claim and it was suggested that, consciously or unconsciously, Mr Scales might have tried harder in 2017 than in 2019. In closing, whilst not inviting me to make a finding on exaggeration, Ms Wyles suggested that I allocate 20 points for the loss of vision in Mr Scales's right eye.

129. Mr Halliday's view was that the loss of visual acuity in Mr Scales's right eye was greater than Dr Starr thought. He said that Mr Scales had only 2-3% of vision in that eye. As Mr Halliday put it, his vision in this eye was "pretty dreadful". Mr Chapman QC invited me to award 25 points.

130. Although the different views between Mr Halliday and Dr Starr were expressed somewhat emphatically, there is not, in reality, a great deal of difference between them. I prefer Mr Halliday's evidence. I do not think that there is any reason to suspect that Mr Scales deliberately exaggerated his loss of sight in his right. Any differences between 2017 and 2019 are much more likely to be explained by how he was feeling on the day. Accordingly, I think that Mr Halliday's approach, which was to look at the average results for the three examinations (there were two in 2017), is the right one.

131. If this approach is taken, there is no doubt that Mr Scales has lost most of the vision in his right eye. Such vision as is left is, in lay terms, vestigial. At the very most, he can see some vague shapes. Mrs Scales gave evidence that Mr Scales bumps into things on his right side because he cannot see them. There is no doubt that Mr Scales's eye injuries are the result of the accident. Before the accident he had very good eyesight, and he suffered optic nerve damage as a result of his head injury.

132. In my judgment, the appropriate points score for this symptom is 24 points.

(7) Loss of vision in the left eye

133. So far as the loss of vision to Mr Scales's left eye is concerned, the experts are agreed that he can see better from this eye than from the other eye. There is no problem with loss of visual acuity: the problem is with partial loss of the visual field in the upper left quadrant. The *Baremo* score for this type of symptom is between 2 and 7 points. Mr Sanchez invited me to award 6 points and Mr Carreras invited me to make a "very restrictive" award. Ms Wyles invited me to award 4 points. Again, therefore, despite the serious disagreements between the experts, the difference in the proposed points score is modest.

134. As with the right eye, Dr Starr is dubious about the reliability of the 2019 eye test, mainly because it shows a significant improvement upon the 2017 test, when there is no ophthalmic explanation for this. He invites me to rely upon the 2017 results, whereas Mr Halliday says that the appropriate approach is to take an average of the results over the years since the accident. On the basis of the 2017 test, Mr Scales's eyesight was good enough to drive.

135. In my judgment, Mr Halliday's approach is the right one. There is plainly a real reduction in Mr Scales' visual field in his left eye and in my view the correct points score for it is 5 points.

(8) Psychiatric symptoms

136. There are a number of different categories for psychiatric symptoms in the *Baremo*. Mr Sanchez suggested that Mr Scales's psychiatric symptoms come within the category of "depressive reaction" which attracts 5-10 points, and invited me to award 7 points. Mr Carreras proposed that I conclude that Mr Scales's symptoms come within the lowest category, post-traumatic stress, which qualifies for 1-3 points.

137. I will award 7 points under this heading. In my judgment it is clear that, quite understandably, Mr Scales has suffered a permanent depressive reaction to the accident. His life has been transformed for the worse. Mr Scales takes Diazepam to help him to sleep and takes Mirtazepine for mood swings. He is particularly upset by his sight problems. Mrs Scales says that Mr Scales's personality has changed drastically. He becomes angry and gets very anxious over small matters.

138. There was no expert psychiatric evidence. However, there was expert evidence from neurologists and neuro-psychologists. The joint statement by the Consultant Neurologists said that "Mr Scales's presentation suggests that he has been angry, frustrated and at times depressed, although there has been some improvement with treatment" and that "Mr Scales presents with a profound sense of loss in relation to his previous life".

139. Mr Carreras invited me to take account of the fact that Mr Scales' medical records referred to a previous depression, but that was in 1975, 40 years before the accident, and there is no suggestion in the medical evidence that, since then, Mr Scales has suffered from depression. There is no evidence, therefore, that Mr Scales was someone who was regularly prone to depression, let alone that he would have suffered depression

since 2015 were it not for the accident. The evidence shows that Mr Scales was a positive and active man, making the most of a fulfilling retirement.

(9) Knee injury

140. The *Baremo* scale for "post traumatic osteoarthritis" runs from 1-10 points. Mr Sanchez invited me to award 10 points on this scale. Mr Carreras said that this is the wrong scale, and the appropriate scale is that for "non specific post-traumatic gonalgia [or knee pain]". The scale for this runs from 1-5 points and Mr Carreras invited me to award 5 points.

141. I have been provided with a joint expert report by Mr Roger Tillman, Consultant Orthopaedic Surgeon. Mr Tillman said that Mr Scales's left leg aches after walking for any distance, and after standing. Walking and physical activity is no longer enjoyable in the way it used to be. Mr Scales is constantly aware of his left leg. Mr Scales still needs assistance for example in tying shoelaces and putting on some items of clothing. Mr Tillman said that with increasing age and infirmity, the serious injury to Mr Scales's left knee will become more problematic and his care requirements in his later retirement years will be greater than they would have been. His mobility has not returned to anything like his pre-accident level of function and it will certainly do so. He has a 20% risk of needing a knee replacement.

142. In my judgment, taking into account the expert evidence and the evidence from Mr and Mrs Scales, Mr Scales should be awarded 10 points under this heading. Mr Scales's problems go far beyond non-specific gonalgia. He has to walk with a stick. He is unsteady on his feet and is liable to trip over. He is no longer able to go cycling, though he can do some static cycling (which he does not find very enjoyable). He cannot go hill-walking, as he used to do. He is not very active at all. He has to do exercises every day. Not all of this is the result of the knee injury, but it is a major contributing factor.

(10) Metalwork (in Mr Scales's leg)

143. This is agreed at 6 points.

(11) Erectile dysfunction

144. The *Baremo* provides for an award of 2-20 points under this head. Mr Sanchez invites me to award 12 points. Mr Carreras said that the problem cannot be solely attributed to the injury because Mr Scales has been treated with Finasteride for benign prostatic hyperplasia, and frequently this medication has an adverse side effect of erectile dysfunction. Mr Carreras invites me to decide to award no points in this category.

145. I am satisfied on the evidence that this symptom is the result of the accident. I will award 12 points.

(12) Urinary incontinence

146. The range for this permanent symptom in the *Baremo* is 2-15 points. Mr Sanchez invited me to award 8 points, and Mr Carreras invited me to make no award under this heading.

147. There is no doubt, on the evidence, that Mr Scales suffers from urinary incontinence. This is uncomfortable and embarrassing. Mr Carreras suggested that this symptom was not the result of the injuries sustained in the accident, but of urinary infections that Mr Scales has suffered since the accident, and as a side-effect of the Finasteride.

148. I am satisfied that the urinary incontinence can be traced back to the accident. It was caused by the combined effect of the injuries and the infections that Mr Scales suffered in hospital, to which he would not have been exposed but for the accident. This was not a problem that Mr Scales suffered from prior to the accident. I will award 8 points under this heading.

Total, and monetary value

149. In summary, the points I have awarded for permanent injuries are:

(1) Neurological symptoms, 35 points;

(2) Loss of smell and taste, 10 points;

(3) Damage to teeth, 6 points;

(4) Dental occlusion, 1 point;

(5) Loss of hearing, 12 points;

(6) Loss of vision in the right eye, 24 points;

(7) Loss of vision in the left eye, 5 points;

(8) Psychiatric symptoms, 7 points;

(9) Knee injury, 10 points;

(10) Metalwork, 6 points;

(11) Erectile dysfunction, 12 points;

(12) Urinary incontinence, 8 points;

150. The calculation that needs to be carried out in order to allocate a points score to permanent symptoms is complex. First, the points scores must be set out in order from the highest to the lowest. For the first step in the calculation process, "M" is the highest points score for any symptom, and "m" is the lowest points score. A calculation is done as follows: (100 – M) x m/100 + M. This will result in a points score that is rounded up to the next whole number. The exercise is then repeated, using the result of the previous calculation for "M", and the next lowest points score for "m". This is repeated until all of the points scores have been "m", apart from the highest points score. The resulting figure, rounded up to a whole number, is the points score for that is used for the scale of monetary values, known as the Balthazar scale, subject to a maximum score of 100.

151. I have carried out this exercise for the points scores I have awarded for Mr Scales's permanent symptoms and, by my calculations, this results in a score of 81 points. The points are allocated a monetary value by reference to the Balthazar table set out in the *Baremo*. There is a sliding scale. The higher the total, the higher the value for each point. As the total is between 80 and 84 points, the table provides that each point is worth €1,550.36.

152. This means that the sum that I award to Mr Scales for (non-aesthetic) permanent symptoms is 81 x €1,550.36 = **€125,579.16.**

(6) THE AWARD OF COMPENSATION FOR AESTHETIC DAMAGE

153. The *Baremo* provides a separate head of damage for aesthetic or cosmetic damage. This is concerned with any detrimental change to physical appearance. This provides for six categories, which may be translated as mild (1-6 points), moderate (7-12 points), medium (13-18 points), significant (19-24 points), more significant (25-30 points) and very significant (31-50 points).

154. There is no definition in the *Baremo* that was in force in 2015 of the types of cosmetic damage which falls into each of these six categories. However, the post-2016 *Baremo* provides definitions. Mr Carreras says that Spanish Courts will make use of the criteria for assessment of aesthetic damage which is used for post-2016 accidents even for cases that apply the rules under the previous version of the *Baremo*. He said that an example of this approach can be found in a judgment of the Court of Appeal of Barcelona of November 15, 2017.

155. Mr Sanchez agreed that a Court would refer to the definitions of the various categories in the new *Baremo* when deciding on the categorisation and points score under the pre-2016 *Baremo*.

156. On behalf of Mr Scales, Mr Sanchez proposes that I should find that the aesthetic damage suffered by Mr Scales comes into the "significant" category and that I should award 24 points. For the MIB, Mr Carreras invites me to conclude that Mr Scales's aesthetic damage falls into the "medium" category and suggests that I should award 18 points.

157. Under the new, post-2016, *Baremo,* the definitions of each category are, if I may say so, not entirely helpful, because they are partly defined in terms of each other, ie as comprising aesthetic damage which is less than the damage in the next-higher category. Very significant damage is defined as being aesthetic damage of enormous severity, such as that caused by large burns, large losses of substance, and major alterations of facial or body morphology. The next category down, more significant, covers aesthetic damage of lesser extent to the very significant category, such as that caused by the amputation of two limbs or tetraplegia. The third category, significant, applies to aesthetic damage which is of lesser extent than the more significant category, such as the amputation of a limb or paraplegia. The fourth category, medium, again applies to aesthetic damage that is of lesser extent than the significant category, and applies to damage such as the amputation of more than one finger of the hands or toes, significant lameness, or scars which are especially visible in the facial area or in extensive areas elsewhere in the body. The fifth category, moderate, applies to damage that is of lesser extent than medium, and applies for example to visible scars in the facial area, scars in

other areas of the body, the amputation of a finger or toe, or a mild limp. The final, and lowest, category, is mild. This is of lesser extent than moderate, and would correspond to small scars located outside the facial area.

158. In my judgment, it is appropriate for me to take account of the category definitions which are set out in the post-2016 *Baremo*. The same list of categories exists in this version of the *Baremo* as in the previous one and there is no reason to think that the definitions for the categorisations would be any different in the two versions. Both of the Spanish law experts agreed that this was the right approach.

159. Applying these criteria, in my view Mr Scales comes into the medium category, rather than the significant category. Aesthetic damage which comes into the significant category includes the amputation of a limb and paraplegia. Though Mr Scales's injuries were severe, in my view, in aesthetic terms, they do not equate to the loss of a limb or paraplegia. He has suffered, amongst other things, facial scarring, including a dimple and a 7 cm scar which has a 5cm vertical limb and a 2cm horizontal limb, a slight curve to his nose on the left side, a tracheostomy scar to his thorax, scarring to his left knee, including large surgical scars, a scar on his left calf. He also walks with a slight limp. Mr Scales is particularly sensitive about the facial scarring and this has undermined his confidence. In my judgment, this places him at the top of the medium category and I will allocate a score of 18 points.

160. Under the *Baremo*, the monetary value of this score is calculated by reference to the same table as was used for the permanent symptoms. As the score for aesthetic damage is between 15 and 19 points, each point is worth €731.43, and so 18 points results in compensation of **€13,165.74**.

(7) IS MR SCALES A *GRAN INVALIDO*?

161. The expression "*gran invalido*" is defined in Table IV of the *Baremo* to apply to victims:

> "with permanent sequelae that require the help of other people to carry out the most essential activities of daily life, such as dressing, travelling, eating or similar (tetraplegia, paraplegia, states of chronic coma or vegetative coma, important neurological or neurophysiological sequelae with severe mental or physical disorders, complete blindness etc)."

162. This translation was provided by Mr Carreras. Mr Sanchez did not criticise the translation.

163. The two Spanish law experts agree that the phrase "*gran invalido*" means a person who is severely disabled, and that the key characteristic of a *gran invalido* is that they require assistance from a third party to perform essential day to day activities. This was established by the Spanish Supreme Court in case RJ 2016/43574 of 19 February 2016. They disagree as to whether Mr Scales is a *gran invalido*.

164. Mr Sanchez said that Mr Scales's injuries, if taken individually, would not qualify him as a *gran invalido*, but that the combination of his multiple injuries cause him to have complex needs of care and assistance, and this means that he falls within the meaning

of "*gran invalido*". He relied upon two judgments of the Spanish Supreme Court, RJ 2016/43574 of 19 February 2016 and Judgment No 713/2018 of 19 December 2018 in support of his contention. Mr Sanchez submitted, in particular, that these cases show that the fact that a victim is able to perform some day-to-day activities on their own does not mean that they cannot be a *gran invalido*. I will return to these cases below. Mr Sanchez also relied upon the evidence given by the Care Manager, Ms Denzel, about Mr Scales's complex needs.

165. It is, as I understand it, accepted by the MIB that Mr Sanchez's description of the things that Mr Scales cannot do as a result of his accident, at paragraph 128 of the Joint Experts Report is accurate (see paragraph 150 of the Report). This description pointed out that:

(1) Mr Scales cannot drive;

(2) He cannot cook;

(3) He can only walk for 40 minutes at a time;

(4) He can no longer pursue his sex life;

(5) He has had to give up all of his sports hobbies, including cycling;

(6) He used to do all the DIY around the house but is no longer able to do DIY; and

(7) If Mr Scales had been working at the time of the accident, he would have been unable to return to the open labour market.

166. Mr Carreras said, in contrast, that there is "not the slightest doubt" that Mr Scales is not a *gran invalido*, and pointed out the things that he is still able to do. These include dressing himself, eating, and doing most of the essential activities of daily life unaided. He is able to walk outdoors and to travel to Spain. He said that in a judgment of 20 April 2009 the Spanish Supreme Court said that the law about the "*gran invalido*" status was clear and that the Supreme Court said that Courts are not able to "obviate what results from the literal wording of the norm."

167. I have taken account of all of the medical and other evidence that I have been provided with to show the effect of the accident on Mr Scales and his daily life. I have summarised some of this evidence above (see, in particular, paragraphs 119-120, above). I also accept that Mr Scales is unable to drive, notwithstanding the dispute between the ophthalmology experts on this issue: I have no doubt that the practical reality is that it would not be safe for Mr Scales to drive.

168. Nevertheless, in my judgment, Mr Scales is not a *gran invalido*. The definition of "*gran invalido*" in the *Baremo* is somewhat more specific than the definition of other concepts in the compensation scheme. It is clear that it is only the most severely disabled accident victims who qualify as *gran invalidos*. In my judgment, Mr Scales does not need the assistance of third parties to carry out the most essential activities of daily life, in the sense meant by the *Baremo*, as interpreted by the Spanish Supreme Court. This definition is directed at people who need assistance to get out of bed, to move around and to eat and drink, to go to the toilet etc. The section in the definition that is in parentheses makes this clear. It refers to five examples. Four of these are: tetraplegics,

paraplegics, those in a long-term coma, and those who are completely blind. Plainly, Mr Scales does not come within any of these categories. More than that, in my judgment, the day to day difficulties that Mr Scales faces, serious though they are, have nothing like the impact on his ability to carry out the most essential activities of daily life without assistance in the way that these four types of conditions would do. The fifth category is more open ended, "important neurological or neurophysiological sequelae with severe mental or physical disorders", but this must take its meaning from the context, and so must be interpreted to mean conditions that have an impact upon the victim that is broadly similar to the four other conditions in the list. This means that the phrase is a reference to brain damage (to use a colloquial term) which has severe mental and physical consequences which mean that the victim is incapable of looking after himself or herself in their basic day to day functions.

169. Mr Scales does not suffer from the severe degree of disability that would bring him within the definition of *gran invalido*. He can get himself in and out of bed. He can dress himself (mostly, he needs assistance occasionally, for example with tying shoelaces) and he can eat and drink without assistance. He can walk, albeit for a maximum of about 40 minutes at a time. He can go to the toilet on his own. He can shower independently, though his wife stays nearby in case he needs her assistance. He can make himself a hot drink, and he can make a basic sandwich. He can help with drying dishes and cleaning surfaces, and with some housework. Generally, therefore, he is independent of personal care tasks. The care experts were in agreement about this. He is able to communicate and to read and make use of his tablet. He is able to mow the lawn.

170. The fact that a person uses a walking stick, or is not able to drive, or even would not be able to find a job on the open market, all of which is the case for Mr Scales, is not enough to mean that they are a *gran invalido*. The fact that Mr Scales is unable to do the activities listed at paragraph 165, above, does not mean, in my view, that he is a *gran invalido*. Again, the fact that a person's quality of life is greatly diminished as a result of the accident does not mean that they are a *gran invalido*. The fact that Mr Scales's wife provides enormous help to him on a day-to-day basis, in the form of gratuitous care, and that he would benefit from a support worker and occupational therapy (as is the case) once again do not mean that he is a *gran invalido*. Nor does the fact that Mr Scales is not left alone for more than two hours at a time, or that he would need live in support (though not 24-hour care) if Mrs Scales were absent for a significant period of time.

171. Ms Wyles pointed out that the medical notes made by a doctor, Dr Alison Leckie, after speaking to Mr Scales at what I think was a ward round on 31 October 2019, recorded that Mr Scales told her that since coming out of hospital after the accident, "fitness has been less good but usually mobile and able to carry out A of DL independently." "A of DL" in this context means "activities of daily living". I do not think that this is of central importance, but this note provides some limited support for the conclusion I have reached.

172. In my view, the judgment of the Spanish Supreme Court of 20 April 2009 (2009/62992 STS) lends support to my conclusion. The Spanish Supreme Court emphasised that the focus must be on the "literal wording" of the definition of *gran invalido* (in another translation of this judgment that was provided to me, the language used was "the literal tenor of the rule"). Applying that literal wording, Mr Scales is not a *gran invalido*.

173. In the judgment of 20 April 2009, the Supreme Court said that *gran invalido* status applied to;

> "people affected with permanent consequences that they require the help of other people to carry out the most essential activities of daily life such as getting dressed, moving about, eating and the like."

174. In my judgment, Mr Scales does not fall into this category.

175. The case law authorities relied upon by Mr Sanchez, on Mr Scales's behalf, do not assist him.

176. The first case, RJ 2016/43574 of 19 February 2016, was a case involving a paraplegic who, despite her disabilities, was able to get in and out of her own adapted car and drive it and also go out on her own: she was, therefore, able to perform on her own some of her day to day activities. The Supreme Court said that, nevertheless, she was a *gran invalido*. In my judgment, Mr Carreras is right to say that this case was different from Mr Scales's. The claimant in the Supreme Court case was paraplegic and unable to walk, and this is one of the conditions which is specifically stated to qualify as *gran invalido*. The fact that the claimant was able to cope particularly well with her paraplegia did not detract from the conclusion that she came within the literal wording of the definition of *gran invalido*.

177. The second case relied upon by Mr Sanchez was Judgment No 713/2018 of 19 December 2018. In this case, the claimant was a leg amputee with multiple injuries who was, nevertheless, able to perform some of his day to day activities. The Supreme Court held that he was still a *gran invalido*, because, even though he could perform some activities on his own, he required assistance to perform other essential day to day activities as a result of his multiple injuries. In its judgment in that case, the Supreme Court observed that the claimant had limited functionality in the left hand, which affected eating, dressing and cleaning, and the leg amputation meant that he was at risk of falls, could not stand for more than 10 minutes, and had difficulty climbing ramps or stairs. The Supreme Court concluded on the evidence that the claimant needed help from another person to perform essential life activities.

178. For these reasons, I have concluded that Mr Scales is not a *gran invalido*. It gives me no pleasure to reach this conclusion, because it will mean that the special damages that he will be awarded will not come anywhere close to providing for his real needs. However, I remind myself that I must apply Spanish law in the way that a Spanish Court would apply it. In my view, it is very unfortunate that the version of the *Baremo* that applies to this case did not provide for anything close to full compensation, but I must apply the relevant Spanish law as it is, not as I would like it to be.

(8) COMPENSATION FOR FINANCIAL LOSSES AND EXPENDITURE PRIOR TO, AND AFTER, CONSOLIDATION (INCLUDING WHICH TYPES OF LOSS ARE RECOVERABLE)

179. I will look separately at types of loss that are claimed, and will, under each head, determine the sum, if any, that is recoverable under each head.

180. As I have already said, Mr Scales was retired and so there is no award for loss of earnings.

Subrogated insurance costs

181. It is common ground between the parties that subrogated insurance costs, incurred up to Consolidation date, are recoverable. This item is recoverable under Article 43 of the Spanish 50/1980 Insurance Contract Act.

182. I have ruled that the date of Consolidation is the date put forward by Mr Scales, 23 October 2017, not the date suggested by the MIB, 3 April 2017. This means that Mr Scales is entitled to reimbursement of subrogated insurance costs incurred up to 23 October 2017.

183. There are two subrogated claims. The first is made on behalf of HSBC for their outlay in regard to travel insurance. This is in the amount of £17,728.07, and is not disputed by the MIB.

184. The second subrogated claim is made on behalf of CIGNA in regard of their outlay in regard to private medical treatment. The full amount claimed in the Schedule of Loss was for £20,343.61, but this related to treatment for the period from 16 June 2016 to 19 June 2019. As I have said, an award can only be made under this head for costs incurred up to 23 October 2017. Based on the list of treatments annexed the Schedule of Loss, a total of £8,475.70 was expended by CIGNA prior to Consolidation date.

185. Accordingly, the award under this head is £17,728.07 + £8,475.70 = **£26,203.77**.

Medical, pharmaceutical and hospitalisation costs

186. Article 1(6) of the Annex to the *Baremo* states in terms that medical, pharmaceutical and hospitalisation costs incurred prior to the date of Consolidation are recoverable. This is not in dispute.

187. However, medical, pharmaceutical and hospitalisation costs incurred after Consolidation are not recoverable. They are not provided for in the *Baremo*, and I have held, in section (1) of this judgment, that heads of loss that are not specifically provided for in the *Baremo* are not recoverable. It is not easy to see why the *Baremo* takes this approach. It appears to be on the basis that all losses, whether in the form of general damages or special damages, that are incurred post-Consolidation, are to be compensated for by the sums awarded for permanent symptoms and for the corrective factors (plus the payments for *gran invalidos*, if they apply). There can be little doubt that this version of the *Baremo* under-compensated claimants, but I must respect its provisions and apply them nonetheless.

Hospital treatment

188. The *Baremo* does not define what counts as "medical, pharmaceutical and hospitalisation costs".

189. Plainly, this covers the costs of hospital treatment.

190. There is no claim in relation to hospital treatment for the pre-Consolidation period, no doubt because Mr Scales's hospital treatment was paid for either by medical insurance or by the NHS.

191. Mr Scales claims the sum of £12,815 in relation to future medical treatment, for the post-Consolidation period. I accept that this a good estimate of the actual costs that he will incur for scar revision surgery, removing metalwork from his knee and from a 20% chance of knee replacement. However, as I have said, medical, pharmaceutical and hospitalisation costs are not recoverable for the post-Consolidation period.

192. Accordingly, I make no award under this head.

Other costs and expenses within medical, pharmaceutical and hospitalization costs

193. Mr Scales also claims in respect of the following additional costs and expenses that are related to his medical treatment and/or hospitalisation:

Case management

194. This is the cost of case management of Mr Scales's rehabilitation process. The parties are agreed that this cost is recoverable for the pre-Consolidation period, and they are agreed that the correct sum to be awarded is **£2,809**.

195. The Schedule of Loss and Claimant's Skeleton Argument claims the further sum of £111,014 for future case management (or £162,619 if Mrs Scales was unable to help). For the reasons already given, however, this is not recoverable.

Travel expenses

196. Mr Scales claims the sum of £4,420 in respect of pre-consolidation travel expenses. The MIB accepts that travel expenses are recoverable, as part of the hospitalisation costs, but contends that only the travel costs attributable to Mr Scales's own travel to and from hospital and that of his closest family member, Mrs Scales is recoverable. The MIB submits that the appropriate sum is £917.

197. The Schedule of Loss shows that the figure of £4,420 consists of the cost of travel by Mrs Scales to Spain and to the Spanish Hospital, the cost of travel to the hospitals in England and parking costs. In addition, Mr Scales claims the cost of transporting the family Mercedes car from Spain to the UK, and the cost of registering it and purchasing a satellite navigation system. It also includes the cost of car washing. Finally, there is a claim for travel relating to Mr Scales's son and, in one case, his son's wife.

198. In my judgment a Spanish Court would award the travel expenses of Mrs Scales and of her son and his wife, as they were immediate family members whose attendance was necessary to support Mr and Mrs Scales. However, I do not think that a Spanish Court would regard the cost of transporting the Mercedes to the UK, or the cost of car washing as amounting to travel expenses. Mr Scales is not entitled to any sums incurred after Consolidation date.

199. On this basis, and having removed the costs that are irrecoverable, I award Mr Scales the sum of **£2,393**.

Equipment

200. It is agreed that Mr Scales is entitled to equipment costs pre-Consolidation and that the right figure is **£50**.

201. Mr Scales also claims the sum of £12,104.06 in respect of future aids and equipment. The Schedule of Loss states specifically that this sum is claimed on the basis that Mr Scales is a *gran invalido*. As I have found that Mr Scales is not a *gran invalido*, I cannot make any award for future equipment costs.

Therapies

202. It is accepted that in principle Mr Scales is entitled to the costs of therapies pre-Consolidation as part of his medical costs. Mr Scales has claimed the sum of £2,800.45, being the total of such costs that he has incurred since the accident (mainly consisting of the private medical insurance excess). Some of this was incurred post-Consolidation. Mr Scales also claims the sum of £14,915 in relation to future occupational therapy, £4,000 in relation to future neuropsychology, and £3,315 in respect of future other therapies.

203. I accept that the figures for the therapies that Mr Scales has already received are accurate and that the estimate of future therapies is a good estimate. However, consistent with my ruling, Mr Scales is only entitled to these costs up to the date of Consolidation, 23 October 2017. On that basis, I award **£1,816**.

Miscellaneous expenses

204. Mr Scales claims for a range of miscellaneous expenses. With some exceptions, these relate to the pre-Consolidation period. The bulk of them relate to expenses that were incurred by Mr or Mrs Scales whilst he was in hospital. These include the cost of hospital visitor accommodation, dining out, eating in hospital restaurants, toiletries, the purchase of continence products and the purchase of bedding. There is also a claim for the cost of attending the liability hearing in 2018. The total claimed is £3,712.33.

205. The MIB and Mr Carreras dispute a number of these expenses and say that the total to be awarded should be £1,237. In particular, Mr Carreras says that the cost of eating in hospital restaurants is not recoverable.

206. In my judgment, all of the types of miscellaneous expenses that were incurred prior to Consolidation date would have been recoverable in a Spanish court. In my view, it is consistent with the approach taken by Spanish courts to allow the closest family member to recover sums that were only incurred because they were visiting the accident victim in hospital, such as the cost of meals in hospital restaurants.

207. On that basis, I award the all of the sums under this head that relate to the pre-Consolidation period. This totals **£2,229.62**.

Third party care/personal care support

208. This is one of the largest heads claimed in the Schedule of Loss. Mr Scales claims £79,459 for past loss under his head, and £618,589 for future loss, or £956,484 if the loss is calculated on the basis that Mrs Scales will not be present to assist. These figures include a sum for family support/gratuitous care in respect of the support provided by Mrs Scales, which I deal with in the next section.

209. The *Baremo*, Table IV, provides that a claimant may recover up to €383,450.65 to defray the costs of the need for help from a third party, described as "weighting the age of the victim and degree of disability to carry out the most essential life activities. Cost of care in cases of coma vigil or chronic vegetative states is similar to this benefit." This is, therefore, the maximum that could, in any event, be awarded under this head under the *Baremo*.

210. However, such payment may only be recovered by a *gran invalido.* I have ruled that Mr Scales is not a *gran invalido*, and this means that he does not qualify for any compensation at all under this heading.

211. Mr Sanchez contended that Spanish law permits recovery for third party care, even if the victim is not a *gran invalido*, pursuant to the overriding principle of *restitutuo in integrum*. I have already addressed this argument in section (1) of this judgment. For the reasons set out there, I have concluded that sums can be awarded under the *Baremo* only for heads of loss that are specifically identified in the *Baremo*. As an award for third party care is only available for *gran invalidos*, and it follows that it is not possible to make such an award in cases, such as the present, when Mr Scales is not a *gran invalido*.

212. There is no doubt in my mind that this is a harsh and unfair outcome. Though the care experts could not agree on exactly the amount of third party care that would be of benefit to Mr Scales, they were in agreement that he would benefit from such care and support, from domestic workers and support workers, on a daily basis, and that Mrs Scales would benefit from third party carers providing her with a respite from time to time. The Spanish law experts were in agreement that the *Baremo* at the relevant time was unsatisfactory, but, unfortunately, I must still apply it, as this is what a Spanish court would do.

Emotional distress and gratuitous care costs/personal support by Mrs Scales

213. Mrs Scales has provided Mr Scales with a vast amount of devoted care. She has also suffered terribly herself as a result of the accident. Unfortunately, however, the Spanish law in force at the relevant time does not permit compensation for these gratuitous care services and this suffering, in cases in which the victim is not a *gran invalido*.

214. This is clear from Table IV of the *Baremo*. The parties agree that, on a literal reading of Table IV, the head of loss consisting of "Emotional distress of family members", defined as being "For family members closest to the disabled individual considering substantial change to life and cohabitation due to ongoing care, depending on circumstances" only applies to cases in which the victim is a *gran invalido*. In such cases, an award can be made up to a maximum of €143,734. Such an award can include

both emotional distress in the narrow sense and gratuitous care costs/personal support provided by Mrs Scales.

215. I have concluded that Mr Scales is not a *gran invalido.* Therefore, he does not qualify for an award under this head. As I have said, I have also concluded that there is no free-standing power for a court to award compensation for this loss, as the courts cannot make separate awards for heads of loss that are not set out in the *Baremo*.

Accommodation/property adaptation costs

216. Mr Scales has claimed the sum of £4,226.00 in relation to adaptations that have been made to his home as a result of his injuries. On the evidence, I accept that these sums were reasonably incurred in light of Mr Scales's injuries. However, they are not recoverable. On a literal reading of Table IV of the *Baremo*, accommodation/adaptation costs are only recoverable where the victim is a *gran invalido*. That is not the case here. That means that this head of loss is not, in Mr Scales's case, specifically covered by the *Baremo*. In section (1) of this judgment, I found that heads of loss that are not specifically provided for in the *Baremo* are not recoverable.

217. Mr Scales also claims a further £30,338.43 in respect of future accommodation equipment/adaptations. Once again, this is not recoverable. Some of the costs claimed under this head are to fit out the carer's bedroom and so a further reason why this sum is not recoverable is that Mr Scales is not entitled to recover compensation in relation to third party care.

Adaptation of own vehicle

218. The final head of special damage which can only be awarded to *gran invalidos* is compensation for the costs of adaptation of a vehicle. Mr Scales claims £4,217.

219. For the same reasons as in relation to the preceding heads, Mr Scales cannot recover any sum under this heading. In any event, however, the costs that are claimed under this head are not really costs for the adaptation of Mr Scales's car. Rather, they are the costs of car washing and valeting and they would not have been recoverable in any event.

220. According, nothing is payable under this head.

Other increased costs

221. Again for the reasons given in section (1) of this judgment, no other losses in the form of special damages are recoverable for the pre-Consolidation period. The only such losses that are recoverable are those that come within the phrase "medical, pharmaceutical and hospitalisation costs".

222. Mr Scales has claimed a total of £,9,883.53 as increased costs that he has already incurred. These related to laundry costs, holiday costs and heating costs. He claims a

further sum of £72,097.91 in respect of future costs, consisting of laundry costs, holiday costs for carers, gym membership.

223. I accept that the other expenses already incurred as set out in Mr Scales's Schedule of Loss, were incurred, that they were reasonably incurred, and that they were causally related to the accident. However, under the Spanish law of the time, they are not recoverable, apart from increased laundry costs up to the date of Consolidation. These costs are **£130.85**.

224. As for the future increased costs, the bulk of this cost relates to holiday costs for carers (just over £62,000). Since Mr Scales is not entitled, under Spanish law, to compensation in relation to third party care/personal support, he is not entitled to the holiday costs of carers accompanying him to his villa in Spain. Nor is he entitled to the other increased future costs, for the reasons I have already given.

Services

225. Mr Scales has claimed the costs of service that, but for the accident, he would have provided, from the time of the accident until trial, in the sum of £14,745. This covers the cost of DIY and decorating that Mr Scales would have done himself, the cost of villa maintenance in Spain, including pool maintenance, the cost of gardening, window cleaning and other cleaning.

226. Mr Scales has also claimed the sum of £67,622 in relation to future services of a similar nature.

227. If this head of loss was recoverable, I would have accepted that Mr Scales was entitled to the sums claimed. However, it is not recoverable and so I am unable to award anything under this head.

Conclusion on compensation for financial losses and expenditure

228. I have awarded the following sums for financial losses and expenditure:

Head of expenditure	**Amount Awarded**
Subrogated insurance	£26,203.77
Case Management	£2,809
Travel expenses	£2,393
Equipment	£50
Therapies	£1,816

Miscellaneous expenses	£2,229.62
Other increased costs	£130.85
Total	**£35,632.24**

229. In a Spanish Court, this compensation would be calculated in Euros, rather than Sterling, but it makes sense for me to award this part of the compensation in Sterling, because if it was converted to Euros, it would then be converted straight back into Sterling.

(9) THE APPROPRIATE CATEGORY FOR PERMANENT INJURIES OR CORRECTIVE FACTORS AND THE APPROPRIATE AWARD OF COMPENSATION UNDER THIS HEAD

230. Table IV of the *Baremo* contains a head of compensation for "Permanent injuries resulting in victim's inability to carry out his or her usual occupation or activity". This head of loss is in addition to the compensation that is awarded for permanent symptoms and is also separate from the compensation that is awarded for *gran invalidos*. A *gran invalido* would also be entitled to compensation under this head, but so are those who are not *gran invalidos*, and none of the three categories is equivalent to *gran invalido* status.

231. It was common ground between the parties that, even though the heading appears to refer to compensation which is to compensate for a victim's inability to carry out his usual occupation or activity, this compensation is not solely for those who were working and who have had to give up their job as a result of the road traffic accident. This head is also known as a "corrective factor".

232. There are three categories under this head, entitled "partial permanent incapacity", "total permanent incapacity" and "absolute permanent incapacity".

233. "Partial permanent incapacity" is defined as "With permanent sequelae that partly restrict usual occupation or activity without preventing the disabled individual from carrying out his or her essential tasks". This head attracts a lump sum award from €1 to €19,115.19.

234. "Total permanent incapacity" is defined as "With permanent sequelae that full prevent carrying out of the disabled individual's usual occupation or activity.". The award for this category is from €19,115.19 to €95,575.94.

235. "Absolute permanent incapacity" is defined as "With sequelae that prevent the disabled individual from carrying out any occupation or activity." The award for this category is from €95,575.94 to €191,151.88.

236. The judge has a discretion as to which category the case falls in and then a broad discretion as regards the amount to allocate within the category. If these proceedings had taken place in a Spanish court, the judge would have had the benefit of guidance from a Forensic Medical Examiner. The parties are agreed that this head of loss is not the equivalent of general damages, and that the judge, in exercising his or her discretion as to how much to award within a particular category, can take account of considerations which, in English law, would have been relevant to special damages, rather than general damages.

237. I have dealt with the right approach to the corrective factors in section (2) of this judgment. In brief recap, I said that the judge cannot take account of any sense that the claimant is being undercompensated when deciding whether the case comes within the partial permanent incapacity, the total permanent incapacity, or the absolute permanent incapacity category. That decision has to be made by applying the definition for each category to the evidence. However, once the correct category has been selected, the judge is entitled to take account of the fact, if it be the case, that the claimant has suffered or will suffer financial losses or expenditure which is not otherwise catered for by the *Baremo*. In other words, the judge has a very broad discretion which extends to a power to "bump up" the compensation under this head in an appropriate case.

238. I will first decide on a category and will then fix on the appropriate amount of compensation within the category.

The appropriate category

239. On behalf of Mr Scales, Mr Sanchez says that the appropriate category is absolute permanent incapacity.

240. He said that partial permanent incapacity is reserved for the mildest type of incapacity under Spanish law, such as where a victim sustains a broken wrist and recovers from the injury but suffers some restriction when playing golf or tennis, or when performing physically demanding tasks at work.

241. Mr Sanchez said that Mr Scales's incapacity is far more serious than that, and that Mr Scales should be awarded the maximum under the range for the absolute permanent incapacity category.

242. On behalf of the MIB, Mr Carreras referred to the extent that Mr Scales is able to do things independently, such as getting in and out of bed, showering, walking, and helping in the kitchen and around the house. He can go to the newsagent and help out with shopping at the supermarket. He can still go abroad on holiday and see his grandchildren.

243. Mr Carreras said that Mr Scales is essentially living the normal life of a retired person, and points out that he will separately be compensated for the particular permanent symptoms that he suffers from. Mr Carreras also said that the impact of incapacity is lower if you are over seventy years of age, as compared to being, say, twenty.

244. Mr Carreras invited me to conclude that Mr Scales is at the top of the partial permanent incapacity category, and so to award the maximum for that category, €19,115.19.

Discussion

245. I will not repeat the summary that I have given earlier in this judgment of the impact that the accident has had on Mr Scales. In my judgment, his case comes into the "absolute permanent incapacity" category. The reality is that Mr Scales's life has been transformed. Whilst it is true that he is retired and is in his early seventies, Mr Scales was, prior to the accident, an extremely fit and active man, with a zest for life. The contrast between his life before the accident and after the accident is stark. His horizons have narrowed, and he is essentially trapped in the home. He is no longer able to pursue his hobby of cycling. He cannot drive. He cannot be intimate with his wife. He can no longer do most DIY and gardening. He is not the confident and assertive man that he used to be, and his life is far less enjoyable and rewarding than it used to be. Leaving aside the most basic activities of life, Mr Scales has been disabled from "carrying out any occupation or activity".

246. Plainly, Mr Scales is not in the same position as someone who is in a coma or a persistent vegetative state. However, in my view it is clear that the absolute permanent incapacity category is not limited to those who qualify as *gran invalidos*. If this were the case, then Table IV of the *Baremo* would have said so. It is true that Mr Scales is not prevented from carrying out any occupation or activity at all. He can eat and drink without assistance and can move around the house with the help of a stick. But I do not think that this category is limited to those, such as those who are in a coma, who are unable to do anything at all. Rather, this category is appropriate for those for whom the impact of the accident has been transformative, and who are not able to live anything like the same life that they used to have.

247. Another way of testing this issue is to regard accident victims as being split more or less equally into the three categories. The third with the least serious incapacity are partial permanent, the middle third are total permanent, and the final third are absolute permanent. I have no doubt that Mr Scales falls within the final third.

248. Still further, it is clear, on the evidence, that if Mr Scales had been of working age, the effect of the accident would have been to make it impossible for him not only to return to his old job, but to carry out any occupation. This again strongly indicates that Mr Scales has absolute permanent incapacity.

249. For these reasons, I conclude that Mr Scales falls into the absolute permanent incapacity category.

What figure should I award under this heading?

250. Both Spanish law experts were clear that the judge has a very wide discretion in this respect. The category ranges from €95,575.94 to €191,151.88.

251. I will award Mr Scales the maximum figure in this category. Looking at the "general damages" aspect of this heading in isolation, the award range from about €95,000 for those who just creep into the highest category of incapacity, to about €191,000 for those who are at the very top end. In my view, if this were solely a general damages calculation, the right figure to award Mr Scales would be €160,000. He is, in my view, in the upper part of this category and I think that the highest figure is not solely reserved for those who are in a coma or a persistent vegetative state. Indeed, in some ways,

victims who have retained their mental faculties and who are aware of what they have lost are in a worse position. It is also worth bearing in mind that, though Mr Scales is in his early seventies, he still has every reason to expect to have many years of life ahead of him.

252. However, as I have already said, the determination of the right figure under this head is not limited to what, in English law, would be general damages. It is also appropriate for the Court to take account of the actual financial losses or expenses that are not catered for in the *Baremo*. It is for this reason that I have dealt with this head only after looking at special damages.

253. As I have made clear earlier in this judgment, the compensation which I am able to award Mr Scales under the other headings of the *Baremo* fall very far short of providing him with anything like full compensation for his losses. The shortfall is far in excess of the difference between €160,000 and the maximum for this head. The shortfall is just over €30,000 and so just under £30,000. Indeed, that figure is vastly below the sum that, ideally, Mr Scales would be allocated for care management, third party support, gratuitous support, and future therapies.

254. In those circumstances, I am fully satisfied that the right figure to award under this head is the maximum for absolute permanent incapacity, namely **€191,151.88.**

(10) INTEREST

The governing law

255. The existence of a right to claim interest as a head of loss is a substantive matter to be determined by reference to the foreign law, the lex causae. This was made clear by the Court of Appeal in **Maher and another v Groupama Grand Est** [2009] EWCA Civ, [2010] 1 WLR 1564, at paragraph 33. It is common ground that Spanish law provides a substantive right to interest.

256. In any event, whether or not such a substantive right exists, the English Court has a discretionary power, under section 35A of the Senior Courts Act 1981, to decide whether to award interest and to determine the amount of interest: **Maher,** paragraph 35 and 40. This power must, of course, be exercised judicially. In exercising the Court's discretion, the Court of Appeal said in **Maher** that the English Court might well take into account any relevant provisions of the foreign law relating to the recovery of interest (see judgment, paragraph 40).

257. There are, as I will explain, specific rules of Spanish law which govern the award of interest in cases such as these. In my judgment it is appropriate to apply these rules to the present case. It does not matter in practice whether, in theory, I do so because these rules are part of the substantive law that I must apply, or because I exercise my discretion to do so in accordance with section 35A of the Supreme Court Act 1981. For the avoidance of doubt, however, if the award of interest is a discretionary matter under section 35A, I exercise my discretion in accordance with what I understand would have happened if these proceedings had taken place in Spain. That is in keeping with the way in which I have determined the other issues in the case. Neither of the parties invited me to take any other course of action: all of their submissions on interest were made by reference to Spanish law principles.

The disputed question relating to interest

258. There is one important disputed question that must be decided in relation to interest. This is concerned with whether the MIB should pay a penalty rate of interest. Counsel have kindly offered, once I have determined this issue, to ask the Spanish law experts to calculate the amount of interest that is to be awarded.

259. The two Spanish law experts are in agreement as regards the principles that apply to the award of interest, but disagree about the application of the principles to the present case. The points of agreement and of disagreement are set out in a Supplementary Joint Report dated 9th March 2020.

260. Interest is a recoverable head of loss under Spanish law. Under Spanish law, there are two alternative types, and rates, of interest which are applicable in claims against insurers. First, there is "standard" interest under Spanish law, which was 3.5% in 2015, and, since 2016, has been 3%. Second, there is a "penalty" rate of interest.

261. The relevant statutory provision for the calculation of penalty interest in claims against insurers in Spain is Article 20 of the 50/1980 Insurance Contract Act of 8 October 1980 ("Article 20").

262. In a judgment of 1 March 2007 [RJ 2007/798], the Spanish Supreme Court laid down the general principle that applies to quantification of penalty interest under Article 20. This is that penalty interest is calculated as follows:

(1) For the first two years from the date when interest starts running (the *dies a quo*), interest will accrue at 150% of the current Spanish legal interest rate. The appropriate rate, therefore, is 5.25% in 2015, 4.5% in 2016 and 4.5% in 2017;

(2) Two years after the *dies a quo*, interest accrues at a rate of 20% per annum.

263. Interest under Article 20 is payable upon the full amount of the award for damages awarded by the Court, including the non-pecuniary and pecuniary loss.

264. The Spanish law experts are agreed that penalty interest under Article 20 is aimed at discouraging delays in litigation and, in particular, at discouraging insurers from deliberately delaying payment where they are aware of their payment duties under the insurance policy.

265. Article 20(8) provides that Article 20 penalty interest will not apply where there is a justified delay or the delay in payment is not attributable to the Defendant.

266. A specific regime applies to cases in which the award is made against the CCS, the Spanish equivalent of the MIB. This is set out in Article 20(9). It is common ground that this specific regime applies in the present case. Under Article 20(9), the CCS (and so, the MIB) will only have to pay penalty interest under Article 20 (even if the other conditions are satisfied) if they have failed to pay damages to the RTA victim within three months of being presented with a claim for damages by such victim.

267. In claims against the CCS, the *dies a quo* is the date when the claim for damages is first presented. In the present case, Mr Scales sent a formal letter before action to the MIB on 23 August 2016, which would have reached the MIB on 25 August 2016. It is

common ground that the *dies a quo* in the present case is therefore 25 August 2016. The three-month period referred to in the preceding paragraph expired on 25 November 2016.

268. It is accepted that the MIB did not make any payment of damages to Mr Scales in the period up to and including 25 November 2016. The MIB made a payment on account on 11 May 2018 in the sum of £20,000, and a further payment on account of £25,000 on 24 March 2020.

269. If Article 20 applies, therefore, the rate of interest is 4.5% from 25 August 2016 to 25 August 2018, and 20% thereafter. If Article 20 does not apply, the rate of interest is 3% throughout the period from 25 August 2016 onwards.

270. In these circumstances, the issue that arises for my determination is whether penalty interest under Article 20 should be awarded, or whether Article 20(8) applies, on the basis that there was a justified delay, or the delay in payment is not attributable to the MIB.

The parties' contentions

271. On behalf of Mr Scales, Mr Sanchez said that Spanish Courts have laid down the principle that Article 20(8) must be interpreted restrictively and that the fact that the insurer takes the matter to Court to address legal issues such as liability, contributory negligence, quantification, recoverability, etc. cannot be relied upon as a justified cause to delay payment under Article 20(8).

272. Mr Carreras accepted that Article 20(8) must be applied restrictively, and that penalty interest applies in general and will only cease to apply in special cases with a restrictive criterion. The exception applies where it was indispensable to wait for a judicial decision on the claim. He said that there were numerous cases in which the Spanish Courts had held that the exception in Article 20(8) applied. It is for the court to determine whether there is sufficient uncertainty regarding the claim to justify the delay.

Discussion

273. There is not, in reality, much, if any, difference between the views of the relevant law relating to interest as set out by Mr Sanchez and Mr Carreras. Both are agreed that the exception in Article 20(8) must be interpreted restrictively, and the mere fact that the Defendant insurer or national Guarantee Fund has decided to defend the claim, and thinks that it may have a good defence, does not mean that Article 20(8) applies.

274. This view is borne out by the Spanish authorities. For example, in a judgment of 7 February 2019 [EDJ 2019/506253 STS], the Spanish Supreme Court said:

> "…. in assessing this cause for exoneration this Chamber has maintained a restrictive interpretation in response to the sanctioning nature that can be attributed to the rule to the effect of preventing the use of litigation as an excuse to hinder or delay payment to the injured ...

> This interpretation rules out that the mere existence of a judicial litigation, the mere fact of starting litigation is a cause that justifies the delay, or allows to presume the reasonableness of the opposition. Litigation is not an obstacle to impose interest on the insurer unless there is an uncertainty or rational doubt about the birth of the obligation to compensate ... In application of this doctrine, the Court has assessed as justified the opposition of the insurer that binds the claimant or insured to a dispute when the judicial resolution becomes essential to clear the doubts about the reality of the incident or its coverage …."

275. In my judgment, the Spanish authorities show that it is only in an exceptional case that the defence of proceedings is treated as a justified reason to delay payment for the purposes of Article 20(8). This is more likely to be the case where there is some reason to doubt that the claim is covered by the wording of the insurance policy, as in the Spanish Supreme Court's Judgment Number 336/2012 of 24 May 2012 [RJ 2012/6539], or an issue about whether the insured had paid the insurance premiums, as in a Judgment of the Supreme Court of 18 January 2018 [EDJ 2018/1510], or an issue about whether the accident was an RTA at all, for which the CCS was liable (because it happened when the luggage compartment door fell on a bus passenger when she was collecting her luggage from a stationary vehicle), as in the judgment of 7 February 2019.

276. In contrast, in Judgment Number 510/2009 of 30 June 2009 [RJ/2009/4451], a six year old child died in a freak and tragic playground incident, after falling back and hitting her head when another child had pushed her. There were five teachers in the playground at the time, and the insurance company defended the claim on the basis that it was not liable. The insurance company said that it was justified in so doing because a criminal investigation had found no evidence of fault, and the company was, it said, entitled to believe the version of events given to it by the school and the teachers. Even in a case such as that, the Spanish Supreme Court held that penalty interest should be awarded. The Court stressed that the application of the exclusion clause in Article 20(8) is exceptional and must be restrictively applied.

277. In a Judgment dated 14 July 2016, the Supreme Court said,

> "The insurer's default only disappears when there is uncertainty about the insurance coverage that makes the intervention of the Court necessary due to the discrepancy between the parties".

278. Whilst I accept that, in an exceptional case, a dispute about liability or, even more unusually, a dispute about quantum, might provide a justification for delay for the purposes of Article 20(8), this is very rare. (An example is the judgment of the Supreme Court of 12 February 2020 [EDJ 2020/509884 STS], a medical negligence case in which there was overwhelming evidence that there had been no negligence.) In my judgment, it is clear that, in the present case, there was no justification for the delay in making payment, for the purposes of Article 20(8). There was a dispute about liability, and there has been a dispute about quantum, but in each case there is nothing that takes the present case out of the norm and nothing to bring it within the exceptional category

in which there was such a compelling reason to defend the claim in court that Article 20(8) applies.

279. The fact that the Defendant in this case is the MIB, which may not be as familiar with Spanish legal principles as the CCS or a Spanish insurer would have been, is not a reason to decline to apply Article 20 in the normal way. The MIB must be treated in the same way as the CCS would have been treated if these proceedings had taken place in Spain. The fact that there was no Forensic Medical Examiner in this case is not a reason to depart from the normal approach. By the same token, the fact that these proceedings have taken place in English Courts is not a reason to depart from the normal rule, nor does the fact that English Court procedures have their own methods of encouraging early settlement, in the form of CPR Part 36. There has been a delay in making payment of compensation which, applying the test that applies to Article 20(8), is not justifiable.

280. Accordingly, I decide that the MIB must pay interest to Mr Scales at the penalty rates.

(11) CONCLUSION

281. I have based compensation on a Consolidation Date of 23 October 2017 and upon my conclusions that all of the days between release from hospital and Consolidation were impeded days, and that Mr Scales is not a *gran invalido*.

282. The total compensation in Euros is:

(1) Temporary incapacity pre-Consolidation: €44,497.33;

(2) Permanent on-going symptoms: €125,579.16;

(3) Aesthetic damage: €13,165.74;

(4) Absolute permanent incapacity: €191,151.88;

(5) Total: **€374,394.11**

Plus compensation calculated in Sterling:

(6) Financial losses and expenditure: **£35,632.24**

283. Interest should be paid at the penalty rate from 25 August 2016, in accordance with Article 20 of the 50/1980 Insurance Contract Act of 8 October 1980. After I sent out this judgment in draft, the Spanish law experts helpfully worked out the correct figure for penalty interest as being **€180,359.08**.

284. The parties have agreed an appropriate Sterling conversion rate, namely £1 = €1.10187 or €1 = £0.907547.

285. Using the agreed conversion rate, this gives a total judgment sum of €374,394.11 + €180,359.08 = £503,464.59 + £35,632.24 = **£539,096.83**.

286. I have dealt with costs in a separate short judgment.

Approved Judgment