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# Burden of proof on taxation in claims involving foreign nationals to be considered by the Court of Appeal in May 2023

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Clinical Negligence , Personal Injury

Brexit notwithstanding, claims involving foreign nationals continue apace. Each brings its own unique considerations: residency status and right to remain, applicability of multipliers derived from UK tables on life expectancy, employment and the suchlike. This blog piece focuses on one aspect – the incidence of taxation in such claims.

In this country the effect of the rule in *British Transport Commission v Gourley* [1956] A.C. 185 and exemptions arising under the Income and Corporation Taxes Act 1988 and Taxation of Chargeable Gains Act 1992 is that any claim for loss of earnings in personal injury matters is calculated on the basis of income figures net of tax and national insurance because that is all that the claimant would have received were they to have earned their money in the uninjured scenario. For the rule in *Re Gourley* to apply, two factors need to be present: (1) loss compensated would have been subject to tax; and (2) the damages will not be subject to tax. Thus, if PI damages will be subject to tax then the rule does not arise and losses should be claimed gross of tax and national insurance.

The burden of proof in such cases was discussed in the well-known brain injury case of *Mathieu v Hind* [2022] EWHC 924 (QB). At the time of trial, C lived and worked as a highly successful artist in Quebec, Canada. His final schedule of loss averred he paid income tax in Canada and his damages would be taxed at State and Federal level. Neither party led expert evidence on tax, each preferring to argue the burden of proof lay on their opponent: D argued C should prove the loss he claimed as *"he who asserts must prove"*, a party who wishes to rely on a point of foreign law must plead that law and prove it as a matter of fact by expert evidence pursuant to *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [53] and produced both the Canadian law material which were said to be authority for the proposition that victims of personal injury are not subjected to taxation in Quebec; C, relying on the Court of Appeal's decision in *Stoke-on-Trent City Council v Wood Mitchell* [1980] 1 W.L.R. 25, said that if C proved he could be liable to pay tax on damages received it was for D to prove he would not be taxed.

In her April 2022 decision, Mrs Justice Hill resolved the question in favour of C finding that, as a matter of English law, the Wood Mitchell principle applied to the effect that the Gourley netting exercise is not undertaken unless it is *"clear beyond peradventure"* that the damages in question will **not** be taxed in the future. The Court, Mrs Justice Hill concluded, could have no regard to the Canadian law material relied upon by D as it should not conduct its own investigation into a matter of foreign law so as C's taxation position was unclear and D placed no foreign law evidence before the court, the rule in *Re Gourley* was ousted so the award for lost income was to be made on a gross basis.

Welcome clarification will be provided when D's appeal on this point is heard by the Court of Appeal on 23rd May 2023, together with C's delayed cross-appeal against the refusal of provisional damages in relation to the chance of developing dementia due to his brain injury. A further blog post will follow when the Court of Appeal's decision on this interesting case is handed down.

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