In The Supreme Court of Bermuda

CIVIL JURIDICTION

1999: No.163

BETWEEN:

JOHN COXWELL

Plaintiff

-v-

LESLIE MILLEN

Defendant

JUDGMENT

Assessment of Damages

(In Court)

Date of Trial: January 25-26, February 3, 2010
Date of Judgment: March 5, 2010

Ms. Juliana Snelling, Mello Jones & Martin,
for the Plaintiff
Mr. Craig Rothwell, Cox Hallett Wilkinson,
for the Defendant

Introductory

1. The present trial on quantum of damages for personal injuries arises from a road traffic accident which occurred on May 12, 1993. The accident admittedly was caused by the Defendant's negligence, with liability apparently being admitted by his insurers before proceedings were issued by the Plaintiff.

2. The Specially Indorsed Writ of Summons in this matter was filed on May 6, 1999 and issued on May 11, 1999. After obtaining an order for the provision of further and better particulars of the Plaintiffs' claim on September 30, 1999, the Defendant in his Defence dated March 7, 2000 formally admitted liability. Although the claim was initially brought by the Plaintiff and his wife, her claim was settled prior to trial.

3. The present trial took place over 15 years after the accident, although the Plaintiff himself was the only live witness with the remainder of the evidence being documentary. The most important controversy centred on the issue of causation of loss as it related to the Plaintiff's loss of earnings and future loss of earnings claims, it being argued that the Defendant was not responsible for the Plaintiff leaving work just over 12 years after the accident, any such losses being properly attributable (in whole or in part) to independent post-accident events.

4. At the beginning of the trial I heard argument on an opposed application by the Plaintiff to re-re-amend the Statement of Claim most significantly to (a) add particulars of injuries supported in evidence by medical reports, and (b) to retract credit initially given for insurance proceeds received by the Plaintiff from self-funded policies for disability, a concession initially made based on a mistaken view of the law. I indicated that I would include my decision on that application in the present Judgment, having heard all of the evidence.

5. A Joint Schedule on Special and General Damages was produced which set out those heads of damage which were, agreed, not agreed or not agreed on causation grounds. The most substantial items in financial terms fell into the latter category with the result that causation of loss is the most important contested issue this Court is called upon to determine.

Application for leave to re-re-amend

6. Ms. Snelling submitted that the main purpose of the re-re-amendments was to assist the Court. Mr. Rothwell objected to the proposed changes to the position previously reflected in a draft Joint Schedule on Special and General Damages on a variety of grounds. He broadly complained of the lateness of the amendments sought but conceded that if the application were to be granted no further amendment of the Defence would be required.

7. In my judgment, it is an integral part of the assessment of damages that the precise quantification of the global claim is subject to ongoing review until judgment is entered, unless the parties have unequivocally entered into a binding compromise in respect of all or part of the total claim. Absent such binding agreement, it always ought to be possible for items which have been provisionally agreed to be reviewed and revised with a view to ensuring that in factual and legal terms, properly due amounts are included and improperly claimed items are excluded. This does not mean to say that in appropriate cases there may be some consequences in terms of costs. But in the present case I was not satisfied that the parties' respective advisers intended to be legally bound when they marked various amounts in the Joint Schedule as "agreed" or "disputed" in the run up to the trial.

8. Accordingly, the Plaintiff ought not to be required to discount insurance receipts for disability which both parties now recognise he is entitled to claim, even if it increases his claim by some $150,000. And the Plaintiff ought to be able to claim more under various general damage heads, subject to the Defendant's right to contend that the uplifted or new items are not properly due. The application for leave to re-re-amend is accordingly granted, on the usual terms as to costs.

Chronology

9. The Defendant's Chronology set out a timeline of background facts which the Court is invited to have particular regard to. While most are un-contentious, some conclusory facts are hotly contested.

10. The Plaintiff was born on April 26, 1950, qualified as an accountant in 1973 and worked as a Certified Public Accountant with Deloitte Haskins & Sells ("Deloittes") between 1974 and 1978 and 1985-1990. He worked in industry between 1978 and 1985. He worked with Hazlett, Lewis & Bieter, PLLC ("HLB") as a partner between 1990 and June 30, 2005, with his last six months being on a transitional salaried basis only.

11. The accident occurred on May 12, 1993, resulting in the Plaintiff being hospitalised in Bermuda between May 12 and May 30. He was hospitalised in the US between May 30 and June 8 1993 and returned to work on August 1, 1993. On October 27, 1994, the Plaintiff underwent surgery to his right femur, resulting in his being on crutches for 4 to 6 weeks after the operation. In 1995 the HLB partners had a special meeting with the Plaintiff to discuss his performance, and he consulted Dr. Womack, a Psychologist, for the first time that same year. Between 1995 and 1999, the Plaintiff had 13 sessions with his Psychologist, who diagnosed him as suffering from Adjustment Disorder. The Plaintiff discovered he was unable to water-ski and only able to play golf less frequently than before the accident.

12. The Writ issued on May 11, 1999 sought damages for physical injuries only. However, on June 28, 2000 the Plaintiff was first prescribed anti-depressant medication which he only took for a matter of months. In 2002, an audit partner at HLB raised concerns about the Plaintiff's quality control. That same year the Plaintiff was confronted by his father's illness and his son's problems at University. On October 1, 2002, Dr. Duncan (on behalf of the Defendant's insurers) diagnosed the Plaintiff as clinically depressed but found no linkage with the accident of nearly 10 years previously. On October 7, 2002, the Plaintiff amended his claim to include psychological injury.

13. In 2003, the Plaintiff in front of his partners was told of concerns about quality control deficiencies. On September 15 he advised HLB that he would not seek re-election as Managing Member and on October 20 he announced his intention to leave the firm in 5 years time. On December 31, 2003, the Plaintiff resigned as Managing Partner. On January 19, 2004, the Plaintiff was prescribed anti-depressant medication by Dr. Butters. After his father died in April 2004, Dr. Butters referred the Plaintiff for treatment of major depression. The Plaintiff reports marriage and home problems. In September 2004, the Plaintiff first disclosed the full extent of his medical conditions to the HLB partnership as a whole. Afterwards, he requested a six months leave of absence although this was never agreed. Later that year a dispute with a sibling arose over family property, and in December he was diagnosed with acquired ADHD.

14. On January 20, 2005, Dr. Walker carried out a neuropsychological evaluation and concluded that, *inter alia*, the Plaintiff was not malingering and was moderately depressed due to "*chronic pain, family dispute, legal problems, occupational problems*". This doctor noted that the Plaintiff's wife did not consider him to be prone to negative moods although she did indicate he frequently forgot important events; the doctor did not attribute his depression solely to family concerns. In July 2005, after leaving HLB, the Plaintiff stopped taking his anti-depressant medication. Between September 2005 and February 2006, the Plaintiff was involved in dealing with the repair of damage to a family farm damaged by Hurricane Katrina. Throughout the course of 2006, the Plaintiff sought to address both general health issues and psychological issues. In July 2006, the Plaintiff reported to Dr. Butters that he still felt "*as productive as ever*".

15. On February 19, 2007, Dr. Butters reported that all symptoms were "*in apparent remission and well controlled*". Reports from Dr. Silver in March and Dr. DeFilippis in April concluded that the Plaintiff was both physically and cognitively capable of continuing to work as an accountant. On August 1, 2007, Dr. Dreskin advised that the Plaintiff could undertake low-pressure self-paced work not to exceed 40 hours per week. However, Dr. Wray concluded in September that the Plaintiff had lost reasonable access to 92% of skilled accounting jobs and 98% of unskilled jobs. In 2008, the Plaintiff did consulting work at the rate of $150 per hour. On February 9, 2009, Dr. Smith advised:

"*He is able to do some parts of a sedentary occupation, but not at the level or the efficiency, he could do prior to the impairments in the right leg, right arm and impairment from the chronic pain including decrease* [sic] *concentration and fatigue…*"

16. The Plaintiff received a partial disability allowance from his insurer for the period January 1, 2004 to June 30, 2006, but was refused further allowances thereafter on the grounds of his demonstrated capacity to work (a decision which resulted in an appeal refused in October 2009). In November 2009 the Plaintiff challenged this decision in a still pending Court action.

Causation of loss: applicable legal principles

17. Although the applicable principles of law were essentially agreed, I was assisted in appreciating the subtleties of applying the rule that the accident must have been a material cause of the loss claimed by the following extracts from '*Kemp & Kemp: The Quantum of Damages*'[1] upon which Mr. Rothwell relied:

> "*…However, it must always be remembered that for such a material contribution to be actionable it must be the consequence of a breach of duty.*
>
> *A recent example of the application of the test in practice is Green v DB Group Services in which Owen J. (at paras 170 and following) decided the question of causation on the basis that the campaign of harassment and bullying, for which the employer was vicariously liable, made a material contribution to the two episodes of depressive illness for which she was to be compensated. A different situation arose in Van Wees v Karkour and Walsh.*[3] *In this case, Langstaff J. had to consider the impact of a brain injury of moderate severity on a lady of high intelligence and ability who had lost "edge" as a consequence with a potentially major impact on her earnings capacity. At paragraph 61 of the judgment, the Judge quotes the Bonnington Castings line of authority in support of his findings that*
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> > *'If, however, a wrong materially contributes to an injury or medical condition, the injury is compensable'.*
>
> *That is, of course, entirely uncontroversial. The error, however, into which the Judge did not fall, would have been to equate that approach with saying that proof that a material contribution to a particular loss – i.e. to the consequences*

[1] Paragraph 2.003.9

of such an injury – would be sufficient to enable the whole of that loss to be recovered. On the contrary: as can be seen at para 94 et seq of the judgment, the evaluation of the impact of the injury on her prospects depended on an assessment of the likelihood of her having continued in that job – and of how long she would have done so and at what probable level of income.

However, there will be many cases where the mere fact that the accident has made a material contribution to the loss or is one of the causes will not lead to the same result. An obvious example is the case of the claimant whose accident precipitates a back condition but where there is good evidence that his back was vulnerable and likely to become symptomatic in due course. Clearly, the accident is one material cause of his condition but that does not mean that the "acceleration" approach that the court takes to such claims – treating it as a five year loss, for example – is not clearly correct. That is because five years down the line, the court considers that the accident is no longer an 'effective', 'substantial', perhaps not even a 'material' cause of that state.

The appropriate test of causation was once more in question in Clough v First Choice Holidays.[4] *The Court of Appeal held that the material contribution test must be applied differently depending on whether what was in issue was the question of material contribution to damage or to the risk of damage. To prove liability in a case where what had happened was a single, specific event which was said to be negligent, a claimant had to show that a breach of duty caused or materially contributed to the claimant's injury. Moreover, the Court – and particularly Judge L.J. at paragraph 43 of his judgment – makes it clear that the 'but for' test cannot be 'treated as a single, indivisible, test applicable to causation issues, in whatever circumstances they arise.'*

But neither the test nor the answer is always that easy to find. In a recent case that settled in the course of a mediation, Smith v Omega, the claimant suffered a serious injury, which was certainly one of the factors which influenced his decision to give up his very well-paid job and business interests in this country. "But for" the accident he would not have done so: the accident undoubtedly made a "material contribution" to his decision. Indeed, it caused him to reevaluate his life and, though the doctors did not advise him that, in terms of his health, the only reasonable thing to do was to move to Thailand, it was certainly understandable that he did so, and beyond argument that he felt physically fitter and more comfortable in a warm climate. He claimed his full amount of what he would have earned had he remained in the United Kingdom from the date of his move abroad.

Viewing the case from the perspective of the defendant, this seemed wholly unrealistic but it would have been no adequate solution to have applied concepts of imagination. In the first place, it would not be right to have said that he has acted unreasonably in taking the decision he did. In any case, it would be inappropriate to have imposed a solution in which the burden of proof and argument rested on the defendant. Nor could one easily say that the loss was too remote. But it could hardly be thought fair to impose upon he defendant the burden of meeting a huge loss of earnings claim for the rest of what would have been the claimant's working life when the continuing effects of the accident constituted only one part – or cause – of the decision to live overseas with its substantial impact on his earnings capacity.

In such a case, the "substantial" or "effective" cause test probably provided the right answer, but one might simply have preferred to apply Laws L.J.'s broad pragmatic solution (which we shall call "just outcome" test) of deciding no more than that it would not be just to hold the defendant responsible for the entirety of the loss beyond the date when he decided to move abroad. What we have called the "just outcome" test is probably more or less synonymous with what has otherwise been characterized as the "common sense" test. Nevertheless we agree that it is always imperative to recognize that the starting point is to decide upon what damages it is for which the defendant should be held responsible. As Lord Hoffmann put it

> *'There is…no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending on the basis and purpose of liability. One cannot separate questions of liability from questions of causation. They are inextricably connected. One is never simply liable; one is always liable for something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability'"*[2].

Findings: Causation

18. Whether the Plaintiff is entitled to recover all or any of his damages claim attributable from the termination of his employment was an issue fairly joined because of the passage of 12 years from the accident on May 12, 1993 until the

[2] *Kuwait Airways Corp.-v- Iraqi Airways Co (No.3)* [2002] 3 All E.R. 209 at 242-243.

termination of his employment on June 30, 2005. This issue turns in part on the oral evidence of the Plaintiff himself and the more objective data found in the medical reports.

19. I found the Plaintiff to be a credible witness who displayed an impressive ability to recall the details of various aspects of the events relevant to his case. The one exception was his inability to recall details of the complaints he made to psychologists about marriage difficulties. I did not consider that this undermined his general credibility, having regard to the fact that (a) marital difficulties did not seem to play a central role the reports, and (b) at worst the Plaintiff in the presence of his wife in Court was simply unwilling to reveal intimacies which he did not consider to be the business of the Court.

20. The Plaintiff seems to have come from a farming background and to have been extremely proud of his profession. At the time of the accident, he was 43 years old and a physically active man. He played golf three to four times monthly, and was involved in hunting, fishing and gardening on a weekly basis, but can no longer do so. As far as his lower body is concerned, he has 20% impairment due primarily to the fact that his right leg rotates out at 35 degrees and cannot straighten, is now shorter than his left leg, factors which are exacerbated by knee, hip and lower back injuries sustained in the accident. His gait problems are also a source of secondary back pain. He is right handed and has permanent reduced mobility and strength in his right wrist and nerve damage affecting his little finger, suffering 20% impairment to his right hand, according to orthopaedic surgeon Dr. Brown in an April 1, 1998 deposition. Dr. Brown also opined that the Plaintiff had reached his point of "maximum medical recovery" and overall was permanently physically disabled by 26%. Due to discomfort with his injured joints, he was taking anti-inflammatory drugs in 1998 for pain relief.

21. The main focus of the Defendant's attack on the Plaintiff's assertion that he terminated his employment with HLB due to performance problems caused by the accident involved pointing out that his performance was clearly satisfactory in the immediate aftermath of the accident. The Plaintiff countered by insisting that (a) his performance was not in fact satisfactory and (b) he continued to work as normal because he was unwilling to give up a profession he enjoyed, despite advice that he needed to make life-changes after the accident. He explained to my satisfaction that fee income attributed to him in the year immediately after the accident was in fact generated by a large contract. I also found it inherently believable that the Plaintiff would be (a) reluctant to give up the challenge, rewards and satisfaction of public accounting in the 1990's when he was only in his mid-40's; (b) reluctant to acknowledge and/or accept the advice of Dr. Womack, his psychologist, that his working capacities were permanently diminished when he ought to have been in his prime, and (c) accordingly, unlikely to share his psychological challenges with his partners as a whole until he was forced to admit that he could not continue as normal. It is also inherently believable, as the Plaintiff explained, that his attempt to resign as Managing

Member (or partner) in 1998 was rebuffed not simply because his general professional performance was impressive, but (to some extent at least) because this management role was a generally unpopular position amongst his peers.

22. A subsidiary broad challenge to the Plaintiff's case was the suggestion that any depression which was diagnosed in the period immediately preceding his premature retirement was demonstrably due to independent causes and not the accident at all. The Plaintiff did not undergo comprehensive psychological assessments until shortly before and after he made a full breast of his performance challenges to his partners in September 2004. It is difficult to accurately determine whether these assessments were undertaken and his retirement were caused either wholly by the accident in 1993, wholly by independent causes unrelated to the accident, or partially by both and, if the latter, to what extent in each case.

23. In my judgment it is simply not credible to suggest that the retirement decision was not caused to any extent by the accident. This is primarily due to the fact that: (a) credible medical evidence suggests that the Plaintiff's ability to concentrate has been impaired by the distracting impact of pain undoubtedly caused by injuries sustained in the accident, irrespective of psychological factors; (b) it seems inherently improbable that a successful and highly work-focussed professional man with no documented history of pre-accident depression would display the symptoms recorded during the period in question solely due to the loss of a parent, a family dispute over property and unspecified marital discord (which apparently never resulted in separation or divorce). It seems inherently probable that an athletic professional high achiever, physically disabled by an accident and mentally impaired by a continuous diet of pain and medication, would be at least mildly depressed by such life-changing events. This is particularly the case for a man, such as the Plaintiff, who appears to espouse traditional values and to have been the sole (or primary) provider for his family. Moreover, it is undoubtedly the case that the resultant lack of mobility contributed, to some extent at least, to weight gain and general health problems which had to be confronted alongside the more direct accident-related injuries.

24. In any event, in an April 15, 1998 letter sent to the lawyer who deposed Dr. Brown about the Plaintiff's physical diagnosis, Dr. Mark Womack stated as follows:

> "*I initially saw Mr. Coxwell in 3/08/95 regarding emotional adjustment complications to a traumatic accident which he sustained reportedly debilitating and chronically painful injuries. Mr. Coxwell had previously enjoyed tremendous health and a significant athletic history. Mr Coxwell indicated that he was having trouble adjusting to a lifestyle of pain and facing debilitating injuries that emotionally seemed to trouble him greatly. He indicated that he wanted help altering his perspective toward a positive focus (accepting pain and injury and learning how to grow from them) as*

well as wisdom on how to pull away from depression (facing the reality of a new lifestyle and feeling like a victim).

It appears that Mr. Coxwell's injuries were more than just physical. His level of confidence, self-worth and value and ability to continue in his present career were significantly challenged due to the traumatic accident and subsequent physical injuries."[3]

25. I find this to be cogent corroboration for the Plaintiff's own testimony at trial, that he concealed his concerns about his ability to continue to practise his profession as a partner in a prominent regional accounting firm and, in effect, battled on against the odds for as long he could. It could hardly be said to be a just outcome, in general terms, to conclude that the fact that the Plaintiff did not retire from the partnership at the earliest possible opportunity, disqualifies him from seeking compensation from the Defendant for loss of earnings after he returned to work. Such an outcome would promote malingering and discourage plaintiffs from seeking to mitigate their loss. On the other hand, it is still for the Plaintiff to prove that the decision to retire was materially caused by the accident.

26. Mr. Rothwell put to the Plaintiff four main post-accident events which he suggested were the real cause of the performance deficits which triggered the termination of his employment. The earliest in date was his father's diagnosis with cancer, which was referenced in the report prepared for the Defendant by local Psychologist Dr. Duncan in her report dated February 24, 2003. This report (based on assessments carried out on September 30, 2002 and October 1, 2002) does not itself suggest that the depression the Plaintiff suffered from in 2003 was attributable to any specific cause; a reference is made to the fact that the radiation treatment the father had recently received "*has caused great concern for the family*", but this is not posited as a significant independent cause of the Plaintiff's then condition. The Plaintiff testified that his father merely had a mole removed, and died from a heart attack in 2004. The illness of his father in 2002 or 2003 is not, on the evidence, a credible explanation for the depression which Dr. Duncan herself diagnosed and recommended the Plaintiff seek further treatment for. (The same report refers to the fact that the Plaintiff's son was at this time taking a semester at home rather than being at College, but does not conclude that this was a source of the depression).

27. Indeed, the Duncan report finds that there was no evidence of malingering, notes no history of depression and concedes that the Plaintiff's concerns related to his body and his ability to maintain his family's current lifestyle and that he "*blames*

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[3] This opinion was fleshed out further in a December 17, 1999 letter to the Plaintiff's Bermudian attorneys. In this letter, Dr. Womack also opined: "*John will not be able to continue in his current field as he has always planned. Prior to the accident John had the ability to continue to age 65 and it is my understanding that Mr. Coxwell's life plans were written based upon an age 65 retirement.*"

the accident for the difference between what he would have been doing and his current reality". The conclusion that his current status cannot be linked to the accident "*in a causative framework*" appears to be based on the somewhat technical grounds that he was not formally diagnosed with post-traumatic stress disorder by Dr. Womack. But Dr. Duncan fairly accepts that a PTSD diagnosis not only might have been "appropriate" in 1997, but that some of the symptoms of PTSD "*may have been converted over time into worry and anxiety*".

28. The second post-accident event which the Defendant's counsel suggested was likely material was the death of the Plaintiff's father in April 2004. The Plaintiff suggested that this had little impact on him because he and his father were not that close, but I put little reliance on this self-diagnosis on his own part. What must be noted is that the Plaintiff had already been diagnosed with depression by Dr. Duncan and advised to seek further medical help in this regard when this occurred. He followed this advice and was assessed in the US by Dr. Butters on March 23, 2004, who only confirmed the depression diagnosis. This report, incidentally, makes no mention of concern about his father's health. As this report preceded the Plaintiff's father's death in April 2004, it is clear that this bereavement was not the predominant cause of the cognitive deficits which triggered his resignation, even if it contributed to some extent which is not explicitly explained by reference to the medical evidence.

29. The third post-accident cause of the resignation relied upon was marital difficulties. Home life concerns were identified in the first Butters report, but in the following terms: "*While these may be projections of his own feelings…some of these feelings, among family, may be actual and may represent frustration at John's apparent failure to make any significant progress, in his postmorbid recovery from his auto accident and its sequellae.*" Thus Dr. Butters from the very first linked any domestic problems to the Plaintiff's response to the accident. The Court was not referred to any express medical opinion that the Plaintiff's depression during the period 2003 (when he resigned from the Managing Member position) or 2004 (when he admitted he could not continue as a Partner at all in September) was attributable to family problems to any material extent.

30. The fourth post-accident cause of the Plaintiff's resignation which was posited by the Defendant was the dispute between a sibling and the Plaintiff. This dispute was not substantial in financial terms yet the Plaintiff fairly admitted that he was distressed by it. The dispute started on April 26, 2004 on his birthday and was settled the following year by paying the sibling an additional $10,000. So it did arise before he asked for a leave of absence, a request which triggered his eventual resignation when it was refused by HLB. By this date, however, the Plaintiff had already retired effective year end 2003 as Managing Member and foreshadowed his retiring early from the firm altogether in 2008 when he was 58. Dr. Duncan's depression diagnosis of February 2004 had been confirmed by Dr. Butters in March 2004. So it is plausible that this property dispute, combined with the death of his father, did contribute to some extent to the Plaintiff's condition. It

is inherently improbable that these events were sufficiently traumatic to break the chain of causation and to constitute an entirely separate cause of the conditions which resulted in the Plaintiff terminating his employment in 2005.

31. In any event, the Defendant's case on causation appears to ignore the medical evidence which suggests that, 'pure' cognitive issues apart, the Plaintiff's ability to concentrate and general energy levels are materially impaired by a combination of pain and pain relief medication, directly attributable to the physical injuries he sustained in the accident: see e.g.: Independent Medical Examination of Dr. Dreskin (page 325) and Independent Medical Evaluation of Dr. Jerry Smith (page 350); Independent Neuropsychological Evaluation of Dr. Catanese (page 196) . So even if I was not able to find that the psychological impairments complained of were caused by the accident, I would still find (having regard to the medical evidence generally) that the premature termination of the Plaintiff's employment was substantially caused by the physical injuries he sustained in the accident. I do not place any reliance on the somewhat speculative evidence of psychological injury flowing specifically from the minor head injury sustained in the accident, however.

32. One final point which requires consideration is the suggestion that the Plaintiff might in any event have taken early retirement so that the Defendant cannot be said to have caused his post-retirement loss in any meaningful sense. This is a subtle point that might have considerable relevance in many cases. However, the preponderance of the evidence suggests that the Plaintiff's desire to continue working was so great that he (a) fully disclosed his health position to HLB in 2004, far later than he ought to have done (Dr. Womack reported that the Plaintiff was worried about having to resign as early as 1999 as he had financially planned to retire at 65), and (b) only mentioned the possibility of early retirement the previous year-suggesting the then distant date of 2008- as a desperate attempt to delay making that disclosure. His anxieties in this regard were vindicated, because the firm effectively required him to retire in 2005, refusing his request for a leave of absence. I accept that the Plaintiff regarded his professional position as his "crowning glory", to use his own phrase. There is no tangible evidence which suggests that the Plaintiff would, absent the accident, have voluntarily retired before 65. Interestingly the Plaintiff's wife, interviewed by Dr. Duncan in 2003 did not obviously help the Plaintiff's claim by stating that she did not consider he was depressed at all and when "*asked about his leaving the firm… reported that she believes that he will never leave as he enjoys the role of manager in the firm too much.*"[4] This seemingly casual remark, recorded by the psychologist retained

[4] Dr. Duncan noted that it appeared that the Plaintiff kept most of his problems from his wife. Interestingly, the wife subsequently told another doctor that he had never been punctual, again declining to bolster the Plaintiff's claim. I believed the Plaintiff's explanation that her view of his punctuality was based on his approach to family events, because it seemed plausible that his wife was completely sheltered from her husband's professional life.

by the Defendant, provides vivid support for the Plaintiff's own evidence that he would have worked until 65 but for the accident. There are some people who regard a career as drudgery and long to escape it; there are others who plan or dream of second careers. The Plaintiff did not appear to me to be such a person in light of the evidence.

33. In my judgment the preponderance of the evidence supports a finding that the Plaintiff terminated his employment with effect from June 30, 2005 because of physical and cognitive deficits caused by the Defendant's negligence on May 12, 1993. The fact that the Plaintiff's claim for permanent disability status was rejected, seemingly on grounds that he could still work as an accountant, does not undermine this conclusion.

34. I find that family stressors in April 2004 (the Plaintiff's bereavement and the consequential property dispute) likely contributed to some extent to the Plaintiff reaching the point of realising that he had to bring his full-time employment to at least a temporary end in or about September 2004. However, there is no or no cogent evidence to suggest that the impact of these independent factors was so significant as to make it appropriate to reduce the measure of the Plaintiff's damages below 100% in order to achieve a just outcome. There is no evidence that the Plaintiff had any history of depression nor vulnerability to depression, yet he was (a) recorded as being depressed by Dr. Womack in 1998, three years after the accident[5], (b) diagnosed with depression by Dr. Duncan in February, 2003 based on assessments carried out in late September-early October 2002, and (c) Dr. Duncan's diagnosis was confirmed by Dr. Butters in March, 2004. The decision to seek a leave of absence was not made by the Plaintiff in a vacuum in September 2004 based on underperformance and diminished capacity which materialised out of thin air in the middle of 2004, as the Defendant's case on causation implies the Court should find. The crucial decision, which resulted in his full-time employment ending, was based on a history evidenced by documents dating back to 1998 of the Plaintiff's high levels of anxiety about the impact of the accident on his professional competencies and capacities, in the wake of an accident which left an athletic man in his mid-40's partially but visibly physically disabled.

Findings: what is the measure of the Plaintiff's loss of earnings claim?

35. The principal dispute is what the Plaintiff's earning capacity should be assessed to be after he left HLB, having regard to an initial period when he contends he could not work and from 2007 onwards when the Defendant says he must be deemed to have been capable of returning to work.

[5] As the first paragraph of the April 15, 1998 letter also notes he first consulted Dr. Womack in 1995.

36. The Plaintiff fairly uses his 2003 earnings, which are less than 2002 and 2004, as his base year: $253,878 gross/ $170,098 net. He makes no upwards adjustment to take into account possible increases in income. For 2005 (six months), he claims the difference between his base earnings and what he actually earned in the first six months of 2005 ($155,842 gross/$104,414 net): $98,036 gross/$65,684 net. This aspect of his claim was not seriously challenged and succeeds.

37. For 2006, the Plaintiff contends he was unable to work at all because he was dealing with health issues. The Defendant contends that he was capable of working at the recommended rate of 1200 hours a year at $150 per hour earning $180,000 gross/$120,600 net resulting in a net loss of only $49,498 for 2006. Two issues fall to be determined. Firstly, was it reasonable for the Plaintiff to make no attempts to seek employment for the entirety of 2006? If the answer to this question is negative, what should the residual earning capacity be found to be.

38. In my judgment it was reasonable for the Plaintiff to take approximately a year from the termination of his employment to deal with health issues and develop fresh employment plans. There is no convincing evidence, apart from the Plaintiff's own self-assessment, that he could not return to work by June 1, 2006. I reject his claim for full loss of earnings for 2006. However, I also reject the Defendant's contention that he could have got a fulltime job working 1200 hours a year at $150 per hour. This rate is what he earned in the first half of 2005 when working on a consultancy basis for HLB and there is no fair basis for concluding such an arrangement could have been negotiated elsewhere. He negotiated a 1200 hour per year assignment with the Chattanooga Housing Authority in 2008-2009 at the rate of $113,100 gross $75,777 net, but I accept that he found these job requirements too taxing. It seems highly improbable that the Plaintiff would have been able to secure and hold down a full-time accounting job earning at that level although I find that with his contacts and drive he could likely with reasonable efforts have earned roughly half that amount in 2006. This takes into account the fact that the present litigation and his permanent disability claim were still being pursued at this stage.

39. Accordingly, I find that he is entitled to claim lost earnings (a) for the first half of 2006 in the amount of his 2003 full earnings of $ 253,878 gross/ $170,098 net, and (b) based on a residual earning capacity of $ 56,550 gross or $37,888.50 net for the second half of 2006. As I have based this conclusion on the parties' arguments with respect to 2007, it follows that I would reach the same conclusion in respect of this year, namely to allow his claim for the difference between his base annual income and his residual earning capacity assessed at $56,550 gross or $37,888.50 net.

40. I accept the submissions of the Plaintiff's counsel that his actual lost earnings should be awarded for 2008 and 2009 namely $125,661 gross or $84,193 net (2008) and $189,167 gross or $126,742 net (2009). This takes into account my acceptance of the Plaintiff's evidence that he resigned for good cause in 2009 and

my assumption that he was reasonably unable to work thereafter due to the need to assist in focussed trial preparations.

41. As far as future earnings are concerned (2010-2015), the assessment is somewhat more complicated. I have already indicated that I find that the Plaintiff would more likely than not have worked until 65. The evidence reveals that his medical conditions are currently reasonably controlled and that would suggest some uplift from the residual earning capacity found for the second half of 2006 and 2007. On the other hand, the employment opportunities may be limited by the fact that the Plaintiff will soon be 60 and it is a notorious fact that America is blighted by an economic downturn. This reduces the prospects of the Plaintiff finding full-time low-stress employment, even though in the accounting area his experience might well make him an asset in consulting terms in difficult times. The very fact that he is not seeking full employment might make the Plaintiff more attractive in difficult economic times. Moreover, the Plaintiff's work history suggests that despite having to disclose his medical condition the Plaintiff's contacts are such that he would likely be able to access work if he let it be known that he needed to do so.

42. The Defendant's suggestion that he is capable of earning $180,000 a year seems wholly unrealistic even if one assumes that the Plaintiff's depression will continue to be in remission and that his main challenges are likely to be pain from his physical permanent injuries and the limitations in energy and movement which naturally flow from his accident-related physical disabilities. On the other hand, the Plaintiff's contention that his residual earning capacity is only $42,873 seems rather low. The Defendant should be liable to pay the difference between what the Plaintiff would have earned and what he can potentially earn assuming he is making reasonable attempts to find employment (and not, in effect, choosing to retire early), having regard to a substantially successful professional career in a profession the services of which are always in demand. Professional and business services jobs are projected to increase by 2.0%, more than any other job category, in Tennessee over the decade ending 2016[6]. I also take into account that the Plaintiff will no longer be distracted by the present case going forward and may not pursue his permanent disability lawsuit, the status of which is unclear. But it also is necessary to have regard to the possibility that pain from his physical injuries will increase as the Plaintiff continues to age.

43. On balance, I find that his residual earning capacity should be assessed at a level commensurate with the terms he was able to agree with the Chattanooga Housing Authority, namely $113,100 gross or $75,777 net. This takes into account the possibility that he might be able get consulting assignments which would generate this level of income over less time, and broadly assumes that he would earn

[6] www.tennessee.labor-Wfd/Employment . The Annual Workforce Report, published in September 2009 by the Tennessee Department of Labor, was not referred to in argument.

roughly 50% of what his base 2003 HLB income was. His net annual future loss is therefore $140,778 gross or $94,321 net (to be multiplied by 5.57, which takes into account a 2.5% discount for early payment as submitted by the Plaintiff's counsel).

Findings: miscellaneous disputed items

44. Firstly I find that the Plaintiff is not required to deduct the disability insurance payments which he received because the evidence shows that he fully paid the relevant premiums. Accordingly he falls within the "insurance exception" as contended by Ms. Snelling in reliance on *Gaca-v-Pirelli General plc* [2004] 1 WLR 2683.

45. As far as DIY past expenses are concerned, I award the Plaintiff only the amount actually paid to third parties, namely $13,141, and disallow the notional $2000 claimed for work done by family members. As far as future expenses are concerned, the Plaintiff proposes $2,500 per annum as the multiplicand and 11 years as the multiplier. The Defendant proposes a multiplicand of $1,314 and a multiplier of 8. I think the appropriate multiplier is 8 (i.e. assuming the Plaintiff would have done the relevant work until 70, not 75) and the multiplicand $2,000 per annum and so I award $16,000 for this item. It is possible in my view that the Plaintiff or family members may be able to do some of the work.

46. With respect to the future costs of drugs to manage inflammation, arthritis and pain, the Plaintiff fairly relies on evidence of past costs to prove this head of loss. I allow the amounts claimed in paragraph 13(a) of the Joint Schedule and accept the argument set out on page 34 of the Plaintiff's Closing Submissions. The same applies to the amounts claimed under paragraph 13(b). The claim in respect of future office visits to Dr. Cranwell and Dr. Butters under paragraphs 13(g) and (h) of the Joint Schedule are allowed for the reasons submitted at page 35 of Ms. Snelling's Closing Submissions. In addition, if it is assumed in the Defendant's favour that the Plaintiff will be continuing to work, it seems only logical to assume that he will likely need continuing support from a psychologist.

47. I also allow the claim for $10,000 for loss of congenial employment under paragraph 17 of the Joint Schedule. This clearly applies to any business or profession and in *Pratt-v-Smith*, December 19, 2002 (unreported)[7], a 51 year old man (45 at the date of the accident) made redundant and unable to work as an executive again due to injuries sustained in a road traffic accident was awarded £8,750 ($17,500[8]) on these grounds. The Plaintiff in the present case was 43 at the time of his accident and 51 when his full-time employment ended, managing to

[7] *Kemp & Kemp*, paragraph A3-021-1.

[8] Or $21, 175 if this amount is updated to today's value.

work for a further 9 years before being forced to leave his firm and full-time public accounting for ever. The amount claimed under this head is accordingly reasonable as an allowance has been made for the fact that the duration of loss of congenial employment for the Plaintiff is 14 years as opposed to 22 years in the case of *Pratt-v-Smith* (i.e. approximately 2/3^{rds} of the time in the latter case). The $10,000 claimed is less than the proportional equivalent of the amount awarded in that case.

48. The Plaintiff has been granted leave to re-re-amend to increase the amount originally claimed for pain and suffering and loss of amenity (and agreed in principle just before the trial) from $70,000 to $125,000. Based on the various cases relied upon by the Plaintiff's counsel at pages 38-42 of her Closing Submissions, the most similar is *Pratt-v-Smith* where the current equivalent of $217,800 was awarded to a claimant who, as indicated above, was never able to return to work. Mr. Rothwell referred the Court to cases dealing with single injuries, and suggested that $30,000 was appropriate for the wrist injury, and (relying on JSB Guidelines) $34,000-$48,000 for the leg injury. An additional $5,000 could then be added, it was submitted, for any psychological damage. Counsel accepted that an overall view had to be taken for multiple injuries and then a discount applied. On this basis $70,000 was appropriate.

49. On balance, I find that $100,000 is an appropriate assessment for general damages in all the circumstances of the present case.

Findings: handicap on the labour market claim

50. The first of the two remaining contentious issues is the Plaintiff's claim under paragraph 13 of the Joint Schedule for what is known to personal injuries lawyers as a *Smith and Manchester* award. Mr. Rothwell submitted that this was inapplicable to a case where the Plaintiff seeks full compensation for future loss of earnings. This submission is supported by the following passage in *Kemp & Kemp* at paragraph 10-030:

> "*One must not lose sight that the court is attempting as best it can to estimate the current value of the claimant's prospective loss of income, so where one can be reasonably confident that a claimant will suffer a quantifiable loss of earnings for an appreciable time the multiplier/multiplicand approach should generally be taken.*"

51. Ms. Snelling relied on a passage supporting the contrary view in paragraph 10-037: "*Awards for handicap on the labour market are frequently made in conjunction with an award for future loss of earnings*". But the remainder of the cited paragraph in *Kemp & Kemp* makes it clear that such awards are not intended to duplicate compensation for loss of future earnings. For instance:

"*In Cornell v Green Stuart-Smith L.J. stated:*

> *'The Smith v Manchester element is designed to compensate a plaintiff who is in employment for handicap in getting a new job if he loses his present one and for longer than normal periods out of work between jobs because of his disability. It is not as a rule awarded to cover continuing partial loss of earnings'.*"

52. Nevertheless, if "*an award for handicap on the labour market is made together with an award for partial loss of earnings, logically the award for handicap on the labour market should be by reference to the allowance given for residual income*": *Kemp & Kemp*, paragraph 10-037. The Plaintiff's counsel referred to three cases illustrating the combination of a future loss of earnings award with a *Smith and Manchester* award.

53. *Green-v-DB Group Services (UK) Ltd.* [2006] EWHC 1898 (QB) was a case where the claimant was hospitalised for major depression following harassment and bullying at work. She was anticipated to return to work in an academic career "*having been unable to work for many years as a result of her psychiatric illness* [and because she was] *at markedly at risk of further psychiatric disorder.*"[9] The claimant had been out of work for four years at trial and would likely be out of work for some years more. She was only 30 when she was hospitalized and 36 at trial. This case is not analogous to the Plaintiff's case in that liability occurred in more egregious circumstances and the injuries complained of completely disabled the claimant for years.

54. *Winters-v-Haq* (Kemp & Kemp paragraph 12-004) also illustrates the grant of both future loss of earnings and a handicap on the labour market award. The claimant here was a builder aged 29 at the date of the accident and 32 at trial who had a leg amputated following a road traffic accident. He was unemployed at the date of the accident and the award and was contemplating two years training. So this case also involved a young claimant who had been prevented from working altogether for an extended time and who was not at the date of the award in a position to immediately seek employment.

55. *Hussain-v-Fazil* [2002] 1 QR 12 was also cited by Ms. Snelling as illustrating a dual award where the claimant was at trial ready to return to work. This was a case where the taxi driver claimant, 35 at the date of the accident and 39 at the date of the trial, had not yet returned to work. The Court therefore, as in the two

[9] At paragraph 182.

other cases, had no reliable data to use to assess the handicap element of the future of loss of earnings claims which likely embodied difficult to assess contingencies over a remaining work life spanning more than 30 years.

56. In the present case I have assessed the future loss of earnings claim specifically taking into account the extent to which the 60 year old Plaintiff is likely to be handicapped on the labour market over the next six years. In my judgment to award a further amount in this regard on the facts of the present case would be duplicative and so the *Smith-v-Manchester* claim is refused.

Findings: extent to which interest ought to be reduced by reason of delay

57. Mr. Rothwell for the Defendant submitted that the Court should exercise its discretion to depart from the usual award of 3.5% from the date of the accident on May 12, 1993 (special damages) and from the date of the issue of the Writ on May 11, 1999 (general damages). He relied upon the following dictum of Lord Denning in *Jefford-v-Gee* [1970] 2 QB 130 at 151F:

> "*In exceptional cases, such as when one party has been guilty of gross delay, the court may depart from the guidelines by diminishing or increasing the rate of interest, or altering the periods for which it is allowed.*"

58. He submitted, by reference to the Chronology attached to the Defendant's strike-out Summons filed on June 2, 2008 that the trial ought to have taken place within 18 months of Dr. Brown opining on January 20, 2000 that the Plaintiff had reached his maximum point of medical recovery. There can be little doubt that there has been gross delay. In summary, it seems clear that the Defendant's attorneys have been seeking to move this action forward since after the Writ was filed in 1999 shortly before the expiry of the limitation period. The main reasons for the delay appear to be a combination of a series of changes of attorney combined with a unilateral decision by the Plaintiff's attorneys to place this action on hold pending the determination of his US permanent disability claim.

59. The Plaintiff initially instructed a sole practitioner who was replaced on November 14, 2000 because he was unable to handle the case. The lawyer with carriage of the Plaintiff's case at his second firm of attorneys was a personal injuries specialist and the matter seems to have progressed somewhat actively through 2003. Within this period, this lawyer left Bermuda and was replaced by another British lawyer at the same firm. On September 24, 2003, trial directions were ordered by consent and shortly thereafter (a) the Plaintiff was interviewed by Dr. Duncan and (b) the claim of the Plaintiff's wife was settled. The replacement lawyer herself in turn left Bermuda in or about late 2004 or early 2005, and no

satisfactory replacement could be found. This resulted in a third firm coming onto the record on May 29, 2007, the Plaintiff's current attorneys.

60. Between 2007 and the strike-out application in 2009, when the Defendant was seemingly chasing the Plaintiff for further discovery, it appears that the lawyer with carriage of the matter left Bermuda. Ms. Snelling explained that the view was apparently taken during this period that the case ought not to be progressed until the disability claim in the US was concluded. An Unless Order was entered by consent against the Plaintiff in respect of discovery on May 25, 2008, before final pre-trial directions were ordered on the Defendant's strike-out application which was heard by me on July 2, 2009.

61. When ought the Plaintiff to have brought the matter to trial? The record does not suggest that this was reasonably possible as early as 2001 as the Defendant's counsel contends. The crucial time-frame in terms of identifying when the case went off the rails in terms of gross delay in my judgment begins with the date when trial directions were ordered by consent on September 24, 2003. What happened after this juncture ought fairly to form the basis of determining to what date pre-judgment interest should be found to run.

62. On October 28, 2003, the Plaintiff's then attorneys wrote the Court advising that the Defendant's attorneys had agreed not to submit trial dates until the Plaintiff had submitted a Supplemental List of Documents. This List was served by the Plaintiff on November 21, 2003, but the Defendant's attorneys seemingly never received a response to queries raised in January 2004, despite numerous chasing letters over the next four years prompting the successful application for an unless order in 2008. Bearing in mind that the Plaintiff did not apply to stay the present action pending the determination of the permanent disability claim application in the US, no acceptable explanation for the delay after 2004 has been advanced.

63. If the discovery requested had been promptly provided, the trial ought to have taken place by the end of that calendar year at the very latest. It is obvious from the available evidence that the Plaintiff's medical and professional challenges may have resulted in his preoccupation with matters other than the distant Bermuda litigation, but he did not admit that he was the cause of his lawyers' inactivity during this period. Ms. Snelling conceded that a fair approach would be to cap the interest at 12 years post-accident for special damages and six years post-Writ for general damages. I agree that this approach is a helpful one in a case where the selected cap corresponds in a general way to the date when the grossly delayed trial ought to have been held, although the cap proposed is somewhat too generous.

64. I accordingly find that the cut-off date or cap for the Plaintiff's interest claim in respect of general and special damages is 5 and 11 years from the date of the Writ's service and from the date of the accident, respectively.

Conclusion

65. As far as the principal issues in controversy are concerned[10], I find in favour of the Plaintiff on the causation issues. The termination of his employment at HLB in 2005 was caused by the accident which also caused the Plaintiff psychological injury. I grant leave to re-re-amend the Writ and allow the general damages claim at $100,000 rather than the provisionally agreed $70,000 or the $125,000 the Plaintiff sought.

66. I find that the Plaintiff is entitled to claim lost earnings in the amount of his 2003 base annual earnings of $253, 878 gross/ $170,098 net (a) in "full" for the first half of 2006 and (b) taking into account a residual earning capacity of $ 56, 550 gross or $37,888.50 net, for the second half of 2006 and all of 2007. I accept the submissions of the Plaintiff's counsel that his actual lost earnings should be awarded for 2008 and 2009 namely $125,661 gross or $84,193 net (2008) and $189,167 gross or $126,742 net (2009). The Plaintiff's future residual earning capacity is found to be $113,100 gross or $75,777 net. His net annual future loss is on this basis assessed at $140,778 gross or $94,321 net (to be multiplied by 5.57, taking into account a 2.5% discount). The Plaintiff's claim for an additional award for handicap in the labour market is refused. However, he is not required to give the Defendant credit for the $144,733.95 disability benefits that he received under an insurance policy wholly funded by himself.

67. The Plaintiff is awarded interest at the rate of 3.5% for 5 years from the date of service of the Writ on or about May 11, 1999 (general damages) and for 11 years from the date of the accident on May 12, 1993 (special damages), having regard to the gross delay in prosecuting this claim.

68. I will hear counsel as to costs and any other matters arising from the present Judgment.

Dated this 5th day of March, 2010 _____

KAWALEY J

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[10] See paragraphs 45-47 above for the findings on comparatively minor matters.