In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 238

BETWEEN:

VINCENT JEROME BEST

Plaintiff

-v-

WARREN JENSEN
THE MARKET PLACE LIMITED

Defendants

JUDGMENT
(In Court)

Date of Trial: July 25-26, 2012
Date of Judgment: August 28, 2012

Mr. Larry Mussenden, Mussenden Subair, for the Plaintiff

Mr. Jai Pachai, Wakefield Quin, for the Defendants

Introductory

1. The present action was commenced by Generally Indorsed Writ of Summons issued on July 19, 2010 pursuant to which the Plaintiff seeks damages for personal injuries sustained in a road traffic accident caused by the negligence of the 1st Defendant and, vicariously, the latter's employer, the 2nd Defendant. Although medical negligence was initially alleged against three other local defendants, the action was discontinued against them on October 6, 2011.

2. The Plaintiff's Statement of Claim was filed on August 24, 2011 and alleged that the 1st-2nd Defendants were liable for the "First Injuries", namely those sustained in the road traffic accident which occurred on July 20, 2004 when the plaintiff's motor cycle was in collision with a van driven by the 1st Defendant. The three local medical defendants were said to be responsible for damage attributable to their negligent medical treatment (the "Second Injuries").

3. The 1st to 2nd Defendants very promptly admitted liability for the First Injuries in their Defence filed on August 26, 2011 subject to an assessment of damages. On October 28, 2011 pursuant to leave granted by me the previous day, the Plaintiff filed an Amended Statement of Claim alleging, in effect, that the 1st-2nd Defendants were also responsible for the Second Injuries (or Subsequent Injuries) as well. Not, of course, on the basis of medical negligence; rather on the basis that the medical treatment received after the accident and any persistence of symptoms was a natural consequence of the original accident. In their Amended Defence dated November 4, 2011, the Defendants denied liability for the Second or Subsequent Injuries.

4. The trial accordingly centred on an assessment of damages based primarily on the Plaintiff's evidence (damages generally) and the determination based on contested medical evidence of the factual dispute as to what proportion of the Plaintiff's injuries were attributable to the original accident as opposed to the medical treatment received by the Plaintiff in the United States which the Defendant alleged included unnecessary surgery which aggravated the Plaintiff's post-accident condition.

5. Somewhat unusually, the Plaintiff adduced no oral evidence at trial. This was firstly because it emerged, shortly before the commencement of an abortive trial on May 14, 2012 which the Plaintiff was unable to attend for mental health reasons, that the Plaintiff was a vulnerable witness. With some encouragement from the Court, Mr. Pachai creditably decided by the time of the effective trial date that it was possible to challenge the Plaintiff's written evidence as to the quantum of his loss by way of argument without the need for cross-examination.

6. The failure of the Plaintiff's medical expert to attend at the effective trial date was more significant and surprising, however. On May 14, 2012, the trial was adjourned in part to enable Dr. Mark Lemos of the Lahey Clinic to attend and give evidence on the Plaintiff's behalf. I encouraged the parties at that hearing, with a view to promoting settlement and avoiding the costs of trial, to arrange a meeting between their respective experts. Before the effective trial date, Dr. Mark Lemos and Dr. Joseph Froncioni did confer and reached agreement on the severity of the Plaintiff's original shoulder injury but, unsurprisingly, failed to agree that the Plaintiff's present symptoms are to a material extent attributable to complications arising from surgery conducted at the Lahey Clinic.

7. The Defendant's case fundamentally was that the gravity of injury sustained by the Plaintiff in the accident did not warrant the type of surgery carried out at the Lahey Clinic. The Plaintiff's documentary medical evidence appeared to justify the surgery carried out abroad based on a severity of injury which Dr. Mark Lemos belatedly conceded did not exist. His failure to attend the rescheduled trial (without any satisfactory explanation) seriously weakened the evidence advanced on this important aspect of the Plaintiff's case.

Findings: to what extent are the Plaintiff's current injuries attributable to the negligence of the Defendants and the accident itself?

Legal principles

8. The applicable legal test to the present causation dispute is found in Lord Simonds' following *dictum* in *Hogan-v-Bentinck West Hartly Colleries (Owners) Ltd* [1949] 1 All ER588 at 596:

> "*I start from the proposition, which seems to me to be axiomatic, that if a surgeon, by lack of skill or failure in reasonable care, causes additional injury and so renders himself liable in damages, the reasonable conclusion must be that his intervention is a new cause and that the additional injury or the aggravation of the existing injury should be attributable to it and not to the original accident....*"

9. Where issue is joined on a question as to whether all or some of the injuries the Plaintiff admittedly suffers from at trial were caused by the Defendants or wholly or partially caused by an intervening operation or series of operations, the Plaintiff must prove that the Defendants did as a matter of fact cause all of the injuries in relation to which compensation is sought. In addition, the Defendants are obviously entitled to be given credit in any award for the interim payments they have already made ($42,452.73).

Plaintiffs' medical evidence

10. The Plaintiff was born on December 3, 1964 and was therefore 39 when the accident occurred on July 19, 2004. The first medical report from Dr. Olesak dated February 15, 2005 concluded as follows:

> "*Clinically he had a dislocated acromioclavicular joint with minimal tenderness. An MRI scan was ordered to assess the rotator cuff. These were performed on 1//11/04 at the King Edward Memorial Hospital. These confirmed the acromioclavicular joint separation with no evidence of coracoclavicular ligament injury. The rotator cuff appeared intact...*
>
> *OPINION: It is my opinion that this gentleman sustained a grade II subluxation of his right acromioclavicular joint as a direct result of his motorbike accident which occurred on 19/07/04. This was treated initially in a conservative manner with physiotherapy and analgesia. He was unable to continue working regularly as pain was hampering his activities of lifting heavy weights. He is also an avid weight lifter and experienced pain during exercise. An MRI scan was subsequently ordered to assess the rotator cuff, which did not demonstrate a cuff tear. Due to the ongoing nature of his pain he then underwent an excision of his distal clavicle under general anesthesia. He made an uneventful post operative recovery and at last follow up visit shortly after surgery he was pain free.*
>
> *PROGNOSIS: His prognosis following the injury and surgery is excellent. Acromioclavicular joint injuries are usually treated in a conservative manner and remain with a small lump together with some discomfort. In a small minority of cases pain becomes an issue due to osteolysis of the distal end of the clavicle. This is a well-known feature in heavy weight lifters. In his instance this was treated with excision of the distal end of the clavicle and an acromioplasty. Functional rehabilitation should be close to 95% at one year following surgery.*"

11. The first surgery was performed on December 6, 2004; the prognosis suggested close to 95% rehabilitation by December 6, 2005, subject to the pain caveat. However, as early as March 28, 2005 the Plaintiff was examined by Dr. Stephen Lemos of the Lahey Clinic who assessed the injury as a "*Grade 3-4 AC joint dislocation*" and contemplated ligament reconstructive surgery if physical therapy did not work. No explanation was given for disagreeing with Dr. Olesak's initial view that it was a Grade II injury with no ligament damage at all. Dr. Wilk carried out this surgery on March 30, 2006. He was treated for an infection to the wound by Dr. Shaw in Bermuda in May 2006. Dr. Mark Lemos first saw

the Plaintiff in November 2006 when he had symptoms of an infection in his right shoulder. In light of this, a second overseas operation was carried out on March 14, 2007 which successfully mitigated the infection problems which emerged after the first overseas operation. In his February 22, 2008 Report, Dr. Lemos stated that he envisaged that the Plaintiff would be able to return to work by March 2008, a year after the third operation.

12. In his July 11, 2011 Report, Dr. Mark Lemos concluded as follows:

> "*With respect to this patient's shoulder currently, he was involved in a motor vehicle accident where he suffered a significant injury to his right shoulder. He has undergone 3 subsequent operative procedures with a postoperative complication of infection, which appears to have resolved.*
>
> *This ultimately left him with a permanent disability with respect to the right shoulder secondary to the motor vehicle accident on July 20, 20, 2004. I feel that although he has over 50% of his motion and strength, he has pain which is chronic at this time and significant deconditioning as I had noted back in 2007. I think that a course of physiatry consultation may be appropriate to alleviate some of this discomfort. Certainly from a functional standpoint, his shoulder would be able to do light duty, but the pain may preclude this.*
>
> *It is my opinion that Mr. Best has a permanent disability resulting from the accident on July 20, 2004. He cannot return to any occupation, which requires significant lifting of greater than 10 pounds above shoulder level and really any lifting above shoulder level.*"

13. The main difficulty with this evidence is that Dr. Lemos did not respond (in any reasoned way at least) to the crucial challenges raised by the Defendants' expert in his subsequent report, opining that: (a) the gravity of the initial injury was not as severe as stated in the Lahey Clinic reports; and (b) the overseas operations contributed to the Plaintiff's current condition. Dr. Froncioni's May 2, 2011 Report raised these key issues and Dr. Lemos reviewed his Report. However all he said in reply in his January 17, 2012 Affidavit was:

> "*9. In relation to the Patient, I stand by my opinions and the contents of the reports that I have produced above.*"

14. The net result, in light of Dr. Mark Lemos's failure to attend for cross-examination at trial, his minimalist written response to Dr. Froncioni's Report and his ultimate agreement with Dr Froncioni as to the actual severity of the original injuries, was that the

only direct evidence to address explicitly the medical issues in controversy was the documentary and oral evidence of the Defendant's expert, Dr. Froncioni.

15. The Plaintiff also relied on the report of a pain specialist, Dr. John Gaugin. He concluded that it was "*probable that the head and neck symptoms are a result of the inability to mobilise his arm fully and the resulting strain transferred to the neck and shoulder muscles. He also describes symptoms of depression, which is very common in patients with chronic illness (including chronic pain).*"

The Defendants' expert evidence

16. Dr. Froncioni was an impressive expert witness. He admitted that he was a general orthopaedic surgeon and did not have a sub-speciality as did Dr. Mark Lemos. He admitted that he was not an academic/practitioner engaged in teaching and writing learned articles, as was Dr. Lemos. When questioned by Mr. Mussenden about the structure of the ligaments in a chart the doctor referred to for illustrative purposes, the Defendants' expert conceded he was not completely certain of the names of each ligament to which he was referred. His doubts later appeared to have been misplaced; but a cautious expert witness is usually more credible than a cocksure one. He gave his evidence in a balanced and objective manner and addressed three issues of relevance to the present case.

17. Firstly, in his oral evidence, he demonstrated with reference to very clear and simple charts the various grades of shoulder injury which are generally recognised in the orthopaedic field. Type I is a sprain, Type II is a tear while Types III-V are far worse. Other diagrams using the term "Grade" showed these levels of severity in greater detail clearly illustrating that the need to reconstruct ligaments would not likely arise in relation to a Type II or Grade II injury. Not only did Dr. Olesak initially diagnose a Grade II injury after looking at an ultra sound chart shortly after the accident:

    (a) Dr. Froncioni himself confirmed this diagnosis by examining the actual ultra sound image of the post-accident injury; and

    (b) as stated in his supplementary report dated May 23, 2012, "*Dr. Lemos concurs*" with that assessment of the classification of the original injury.

18. The assertion that Dr. Lemos now agreed that the injury was a Grade II one was neither challenged nor contradicted by any other subsequent documentary expert evidence. Any contrary earlier references in the reports relied upon by the Plaintiff to a more severe

category of injury were rendered wholly unreliable in terms of demonstrating the extent of the injury in the immediate aftermath of the accident.

19. The second and related issue addressed by Dr. Froncioni was the necessity for the second and third operations at all. His unequivocal and unambiguous evidence was that a Type II or Grade II injury did not justify the overseas operations which occurred (in particular the reconstructive surgery based on the premise that the injury in question was of Grade III or IV severity). This evidence was impossible to discredit. Having regard to the illustrative charts and the absence of any directly rebutting expert evidence, I found the Defendants' expert's evidence on this issue compelling. The simple point was that if there was no ligament damage or, at best, no evidence that the ligaments were completely ruptured, no need to reconstruct the ligaments could possibly arise.

20. The third issue Dr. Froncioni addressed in his oral evidence was the high risk and low benefit ratio linked to the operation that Dr. Wilk performed and (confirming his written evidence) the likelihood that a post-operative infection exacerbated the Plaintiff's injuries. It was clear on the face of the Plaintiff's own medical evidence that the third operation was needed to remediate the infection which set in after the second operation. However no positive reasoned opinion was advanced in response to the Defendant's expert's view (expressed in a more muted form in his written report than in his oral evidence) that the infection was a significant contributing cause of the Plaintiff's current physical disability. This left the Court with no cogent basis on which to reject Dr. Froncioni's opinion that the post operative infection triggered by the reconstructive surgery aggravated the Plaintiff's condition beyond the parameters of the Defendants' responsibility.

21. The Defendant's expert was not invited by either counsel to be more specific about what extent of aggravation he felt was attributable to the post-operation infection. The Plaintiff's primary case was that the operation was needed and had no impact on the Defendant's liability. The Defendants' primary case was that the Court should look at the condition the Plaintiff was in before his overseas operation and no further in determining the extent of his recoverable loss. I found this "either/or" approach overly simplistic having regard to a nuanced reading of the documentary medical evidence.

22. In answer to the Court Dr. Froncioni stated with some conviction (but obviously answering in broad-brush terms a question he did not appear to have considered before in these terms) that the post-operative infection in his estimation contributed more than 50% to the Plaintiff's disability. With the benefit of hindsight he could perhaps instead have been asked what the prospects of the Plaintiff's symptoms worsening to their present condition were prior to the infection; however, to my mind that would simply have been

another way of formulating the same question. It was noteworthy that the Defendant's expert's written evidence and primary oral evidence went no further than asserting the post-operative infection as a "significant" cause of the Plaintiff's disability; he was unable to say that but for the infection, the Plaintiff would clearly not have developed the symptoms from which he now suffers.

The extent of disability which is attributable to the accident and the Defendants' admitted negligence

23. Mr. Mussenden rightly emphasised in his closing submissions that although Dr. Olesak assessed the Plaintiff's prospects of recovery as being 95% (or a 5% disability) before he had the overseas operations, this was subject to the important caveat that "[i]*n a small minority of cases pain becomes an issue due to osteolysis of the distal end of the clavicle. This is a well-known feature in heavy weight lifters.*" Having regard to the fact that the Plaintiff's work entailed lifting heavy weights and that his principal hobby was weightlifting (which he had seemingly resumed at the time of Dr. Olesak's February 25, 2005 Report), the Plaintiff was already in a high risk category in terms of not making the optimum recovery.

24. There is no evidence one way or another as to whether the Plaintiff resumed weight-lifting too soon or did not follow a prudent course of physiotherapy. Mr. Pachai queried why he sought overseas medical assistance long before the one-year recovery period predicted by Dr. Olesak. In my judgment the only reasonable inference the Court can sensibly draw is that the Plaintiff did not recover as smoothly as had been hoped and that, before he had the second operation which was not seemingly needed and acquired an aggravating infection, the Plaintiff was experiencing the sort of pain that Dr. Olesak did not rule out. When he was first seen by Dr. Stephen Lemos on March 28, 2005, this was "*because of continued pain*".

25. On balance I find that roughly 50% of the Plaintiff's present disability is attributable to the original accident. The Plaintiff has failed to prove that the Defendants are wholly responsible for his present disability. Having regard to the necessarily unspecific nature of the evidence about the precise extent to which the post-operative infection aggravated the pre-existing injury, I am unable fairly to find that its contribution was more than 50%.

26. Another way of analysing the same central issue is as follows. Before the injury for which the Defendants are liable was aggravated by the reconstructive surgery and the consequent post-operative infection, there was at least a 50% possibility that the chronic pain and greater disability which ensued would have occurred anyway because the Plaintiff's employment and primary hobby involved lifting heavy weights.

27. How this impacts on the assessment of damages will be addressed below.

Assessment of damages

Pain and suffering and loss of amenity

28. The Plaintiff's claim for $150,000 under this head of loss almost seemed to presuppose an assessment by a jury unconstrained by any legal precedents whatsoever as occurs in the United States. Certainly from an American perspective, the measure of damages which can be recovered by way of general damages for personal injuries claims may appear parsimonious in the extreme.

29. The accident caused a moderate injury which required partially successful initial surgery and caused some long-term disability to his dominant arm and chronic pain with attendant psychological symptoms and impaired the Plaintiff's ability to pursue his principal hobby of weight-lifting. The Plaintiff was in effect required to either give up his hobby of weight-lifting (and change his established job altogether), or continue with an enhanced risk of suffering long-term pain. These symptoms were exacerbated by the intervening operations to a significant extent. However a significant loss of amenity is attributable to the accident itself.

30. The Defendants' Submissions (paragraph 36) assert that "*a sum of $50,000 would be adequate compensation for his pain, suffering and loss of amenity, without prejudice to the Defendants' main submissions on the issue of causation.*" That is a fair concession having regard to the legal precedents for general damages placed before the Court. Accordingly, taking into account the extent to which the Defendants are not responsible for the full extent of the Plaintiff's general damages, he is awarded the sum of $25,000 under this head.

Loss of earnings (past)

31. The Defendants concede that putting causation of loss to one side, the Plaintiff would be entitled to recover $98, 130.02. Their calculations make the appropriate deductions to the gross figures claimed by the Plaintiff so I shall use them for computing this head of loss. The following amounts are conceded to the date of the operation (March 30, 2006):

- 2004: $13,274.97
- 2005: $32, 194.07
- 2006: $ 8, 726.94 ($34,907.75 -$26,180.81(April-December deducted)

  $54,195.98

32. Based on my finding that 50% of the Plaintiff's present disability was not caused by the accident, a straightforward approach to the post-March 2006 loss of earnings claim is to reduce it by 50%. This is a very rough and ready approach but the best assessment that can be made having regard to the evidence and my firm view that the Defendant's hypothesis that a full recovery would have been achieved by this point but for the second operation is not supported by the available evidence. Accordingly, the Plaintiff is also awarded the following sums based on the Defendants' loss of earnings calculations:

    - $13,090.41 (50% of April-December 2006)
    - $ 8,876.61 (50% of 2007)

      $ 21,967.02

33. Accordingly, the total award for loss of past earnings is $54,195.98+ $21,967.02= $76,163.00.

Miscellaneous misconceived heads of loss

34. For the reasons submitted by Mr. Pachai, the claims for loss of marriage prospects (not applicable to male claimants in the circumstances relied upon, if at all), loss of enjoyment of a holiday (not evidence of a planned holiday ruined by accident), accommodation and home maintenance (not supported on the evidence) and home services and care (not applicable to comparatively moderate injuries) are refused.

Largely undocumented expenses

35. It is conceded by the Defendant that the claims for medical expenses ($11, 501.02- increased at trial by $779.79 to $12,281.11 based on documentary support) and travel expenses ($1500) do not appear unreasonable. I agree that ordinarily all such claims ought to be substantiated by documentary support. Some documentation was provided. The Defendant submits that the accommodation claim of $4000 should be reduced to $2000 to give credit for a contribution by Argus. These concessions are all subject to appropriate deductions being made to take into account the limited extent of the Defendants' responsibility for the post-March 30, 2006 portion of losses which are claimed.

36. I award the Plaintiff the following sums with respect to past expenses:

- Medical expenses: $12, 281.11-$1084.66 (50% of medical reports)= $11,196.45
- Travel expenses: 50% of $1500 = $ 750.00
- Accommodation: 50% of $2000 = $ 1,000.00

$ 12, 946 .45

Loss of future earnings

37. Mr. Pachai submitted that the loss of earnings claim was wholly unjustified and that, in any event, the appropriate calculations should be based on the standard multiplier tables typically used for calculating future loss. However Simmons AJ (as she then was) in the authority counsel cited in support of this proposition -*Jennings-v-Ball* [2001] Bda LR 82- while using the tables for certain heads of long-term annual future loss, adopted the following approach to loss of future earnings (at page 7):

> "*…Bearing in mind such cases as Foster -v- Tyne and Wear CC (1986) 1 All E.R. and Allen -v- Eubanks (1998) CILR 190, cases where the two stage test was met, I am of view that any financial loss that the plaintiff risks sustaining will be adequately met by a payment to her now of the equivalent of 2 years of her current salary.*" [emphasis added]

38. Justice Simmons adopted this somewhat broad-brush approach based on the following legal principles which she summarised (at page 6) as follows:

> "*The leading authority on an award of damages under this head is Smith -v- Manchester Corporation [1974] 17 K.I.R. 1. Lord Scarman characterised this type of loss in the following way 'the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market?' Lord Scarman went on to say, that, 'the court has to look at the weakness, so to speak 'in the round', take a note of the various contingencies, and do its best to reach an assessment which will do justice to the plaintiff.' Building on that authority, guidance was given on how a court should approach a claim under this head in Robeson -v- Liverpool City Council (1993) P.I.Q.R. Q 78 (CA) by Neill J. who reviewed a line of cases on the topic and confirmed the two stage test laid down by Browne L.L. in Moeliker -v- A Reyrolle & Co. Ltd.*
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> > *'The consideration of this head of damages should be made in two stages. (1) Is there a 'substantial' or 'real' risk that the plaintiff will lose his present job at some time before the estimated end of his working life? (2) If*

> *there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors both favourable and unfavourable, which in a particular case will, or may affect the plaintiff's chances of getting a job at all or an equally well paid job.'*
>
> *Neill J. in analysing the two-stage test made several observations from which guidance can be sought. First, that the word 'real' meant that the risk was not a fanciful or speculative one, even though, on the facts of the case it might be an unlikely one. Secondly, that 'substantial' did not mean that the facts must show that the risk is likely to occur on the balance of probabilities. Thirdly, the factors to be taken into account when assessing the risk will vary with the particular facts of each case. He further observed that the ceasing to remain in a particular employment may result from the plaintiff giving up the employment voluntarily.*"

39. I have found (based in particular on the evidence of Dr. Froncioni and the initial report of Dr. Olesak) that the Plaintiff 's permanent disability is attributable at least to the extent of 50% to the original accident in relation to which the Defendants admitted liability. Due to the accident, there was a real risk that the Plaintiff's condition as assessed by Dr. Olesak would worsen and not improve because this was a well-known occurrence for heavy weight lifters. The evidence does not in any way support a finding that the Plaintiff is unable to find any form of employment.

40. The Plaintiff's future loss of earnings claim appeared to be based on the unsupportable premise that he would never work again rather on the far more plausible assumption that the range of jobs reasonably open to him are likely to be diminished because of his accident-related injuries. The possibility that his light employment might generate the same or more income than his pre-accident job cannot be ruled out; nor can the eventuality that he might re-train and acquire new skills.

41. The Defendants are responsible to exposing the Plaintiff to the risk that, apart from the effects of the second operation, he would have developed chronic pain symptoms which would at some point uncertain resulted in his inability to continue his pre-accident employment and leaving his future job prospects impaired. The Court cannot ignore the Plaintiff's duty to mitigate his loss and the absence of any or any convincing evidence that the Plaintiff has made attempts to return to work in the absence of any medical evidence that he is unfit for work altogether.

42. In *Jennings-v-Ball* [2001] Bda. LR 82, two years pay based on current wages was awarded to a plaintiff who had a more serious injury (the loss of a limb) but was expected to be able to continue in her chosen field of teaching until retirement. There was a somewhat remote possibility that she might be forced to retire from teaching at some point and that if this occurred, her injury would handicap her in seeking alternative employment. In the present case although the severity of the injury caused by the accident was far less, the risk of handicap in the labour market from a worsening of his condition was far greater than in *Jennings-v- Ball* (because he was employed in job which involved lifting and was an amateur weight-lifter and fell within a high-risk category), even before the post-operative infection occurred.

43. Because the Plaintiff appears to have no formal qualifications which would make him a strong candidate for sedentary jobs or jobs involving light physical work, loss of his job due to a worsening of his pain symptoms would clearly leave him handicapped in the labour market. There was also a risk of impairment of job prospects based on psychological challenges caused by chronic pain, if not the disappointment of giving up his main hobby. On the other hand, as is the position now, the Plaintiff would be under a duty to mitigate his loss by seeking to enhance his re-employment prospects through retraining and/or by taking whatever unskilled jobs became available. It also appears that the Plaintiff has a good work record and a good reputation on his side, invaluable assets in the Bermudian marketplace for a Bermudian, even in recessionary times.

44. I would award the Plaintiff two year's net wages based on the Defendant's calculations for 2005, namely $64, 288.14. I would have awarded him the equivalent of four years net wages had the Defendants been wholly responsible for his present handicap in the labour market. As Simmons AJ aptly noted in *Jennings –v-Ball* (at page 7): "*The authorities suggest that there is implicit in this type of exercise….varying degrees of speculation depending on the facts of the specific case before the court.*"

Future medical expenses

45. The Plaintiff's original claim was for $23,500. This was increased at trial to $140,500 based on an estimated $10,000 per annum and a multiplier of 14.05. The actual expense should be reduced by 50% on the grounds that the Defendants are only responsible that portion of the future costs. Alternatively, prior to the aggravation of the injury caused by the accident, the prospects of it worsening to the extent it did might fairly be estimated to be no higher than 50%.

46. Accepting the Defendants' submission that the discount rate should be 4% (the rate utilized in *Jennings-v-Ball* [2001] Bda LR 82 at page 12) and noting that the Plaintiff is

47 years old at trial, the appropriate multiplier for this annual future expense is 12.27. The Court is bound to view the un-particularised estimate of $10,000 as an inflated "guesstimate".

47. The total annual future costs are in my judgment more fairly (but still generously) estimated (in the absence of documentary support) at $5000, taking into account the likelihood that certain costs are likely to fall away in early course (e.g. psychological and physiatry counselling). The award for future medical expenses is accordingly $2500 x 12.27= $30,625.

Summary

48. The main issue in controversy, causation of loss, was resolved in the following manner. The Plaintiff's present disability is only attributable to the Defendants' negligence to the extent of 50%. Or, alternatively, before the second operation was carried out abroad, which on the evidence before this Court was not proved to have been reasonably required, there was only a 50% prospect that the Plaintiff's condition would worsen to the extent it ultimately did.

49. The Plaintiff is awarded the following amounts:

• General damages (PSLA):	$25,000.00
• Past loss of earnings :	$76, 163.00
• Past expenses :	$12, 946.45
• Future labour handicap :	$64, 288.14
• Future medical expenses :	$30, 625.00
	$209,022.59
(less interim payments received)	-$ 42,452.73
	$166,599.86.

50. I will hear counsel as to interest and costs and as to the terms[1] of the formal Order required to be drawn up to give effect to the present Judgment.

Dated this 28th day of August, 2012 _____

IAN R.C. KAWALEY CJ

[1] Including the correction of any arithmetical errors.