In The Supreme Court of Bermuda

CIVIL JURISDICTION
2008 No: 66

BETWEEN:

CARLA JEAN FORTH

Plaintiff

And

APPLEBY SPURLING & KEMPE
(APPLEBY (BERMUDA) LIMITED)

Defendant

JUDGMENT

Personal Injury – Slip and fall accident - orthopaedic and psychiatric injury
Quantum – Causation – "Material Contribution"-
Legal Principles on Interest on Damages

Date of Hearings:	Monday 19 October 2020 - Wednesday 21 October 2020
Date of Decision:	Thursday 19 November 2020
Plaintiff:	Ms. Sara Tucker (Trott & Duncan Limited)
Defendant:	Mr. Jairaj Pachai (Wakefield Quin Limited)

JUDGMENT of Shade Subair Williams J

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INTRODUCTION:

1. This case dates back to nearly 20 years ago when the Plaintiff, a then 42 year old employee of the Defendant law firm, slipped and fell in a puddle of water in the staff kitchen area of the Defendant's premises on 21 June 2001 ("the 2001 fall"). The Plaintiff, Ms. Forth, suffered serious personal injury and has prosecuted this claim on the basis that the Defendant is wholly responsible for her ensuing orthopaedic and psychiatric injury and related disabilities. The Plaintiff's case is that the Defendant's negligent breach of its statutory duty of care under section 4 of the Occupiers and Highway Authorities Liability Act 1978 is the cause of all of her pain, suffering and loss.

2. The Defendant accepts on its amended pleadings that it was negligent as alleged. The issue for resolve by this Court is on quantum of damages as the Defendant denies that its negligence was the sole cause of the Plaintiff's condition.

3. Having received evidence at trial together with submissions ably made by Counsel, I reserved judgment which I now provide with the below reasoning.

PLEADINGS ON INJURIES, LOSS AND DAMAGES

4. On the Plaintiff's Amended Statement of Claim, Ms. Forth claimed as follows in respect of injury and damages:

"PARITCULARS OF INJURIES

The Plaintiff, who was born on the 13th day of December, 1958 ... has suffered from soft tissue injuries within her back and shoulders which have left her in chronic pain. Additionally the Plaintiff claims damages for depression and psychological injuries which have impacted her overall mental health as a result of the 21 June 2001 fall.

PARITCULARS OF SPECIAL DAMAGE

Loss of past and future earnings ;	*$296,693.1- [sic]*
Loss of pension contribution	*$77,722.38*
Loss of future expenses and costs of care	*$145,624.50*

Out of pocket expenses	*$11,095.23*[1]
Costs of insurance premiums	*$141,656.50*
Adjustments to property and transport	*To be assessed*

SUMMARY OF FUTURE LOSSES

(2) Costs of medical treatment (To be assessed)
(3) Costs of future medications (To be assessed)"

AND the Plaintiff claims:

1. *Damages;*
2. *Special Damages as pleaded above;*
3. *General Damages to be assessed;*
4. *Interest pursuant to the Interests and Credit Charges (Regulation) Act, 1974 at such rate and for such period as the Court shall deem fit;*
5. *Further and other relief; and*
6. *Costs.*"

PRE-TRIAL RULING ON THE CALLING OF EXPERT WITNESSES

5. On 4 April 2019 the Registrar, Ms. Alexandra Wheatley, directed the Plaintiff to file affidavit evidence in support of her claims for damages and leave was given for the filing of responsive evidence on behalf of the Defence and further evidence in rejoinder from the Plaintiff. At para (d) the Registrar ordered: "*Leave is granted for one medical expert to file a report no less than 30 days prior to the trial and to give evidence on behalf of each party.*"

6. Accordingly, the Plaintiff filed expert reports from Clinical Psychologist, Dr. Shawnee Basden in the form of three letters dated 28 March 2017; 16 May 2018 and 9 October 2020. The Defence filed an expert report from Orthopaedic Surgeon, Dr. Froncioni, in the form of two letters to Mr. Pachai dated 20 July 2016 and 24 August 2016. No issue of contention arose as to the calling of these witnesses to give expert opinion evidence or in relation to the admissibility of these experts' evidence.

[1] Ms. Tucker informed the Court that the cited figure of $915,618.67 was a drafting error and that the quantum pleading was intended to be consistent with paragraphs 24 and 26 of the Plaintiff's affidavit evidence i.e. $11,095.23.

7. However, on 12 October 2020, Ms. Tucker on behalf of the Plaintiff, filed writs of subpoena *ad testificandum* for Dr. John Gaugain and Dr. Annie Pinto to be called to give evidence. Ms. Tucker contended that their evidence would be of a factual nature as opposed to that of expert opinion evidence. However, Counsel for the Defendant, Mr. Jairaj Pachai, objected to the calling of Dr. Gaugain and Dr. Pinto on the grounds that their evidence qualified as undisclosed expert opinion evidence tendered without leave of the Court.

Ruling on the Calling of Dr. Gaugain

8. Ms Tucker proposed to call Dr. Gaugain to rebut Dr. Francioni's opinion evidence on causation. I had no difficulty in concluding that Dr. Gaugaun's evidence would qualify as expert opinion evidence. Ms. Tucker accepted that Dr. Gaugain's last examination of the Plaintiff was on 19 November 2011, as evidenced by his most recent report of 19 December 2011. Thus, the Defence could not be expected to know from any written report what Dr. Gaugain might say on the witness stand in addressing Dr. Froncioni's opinion evidence. On this basis, I refused leave to call Dr. Gaugain.

9. That being the case, I allowed the Plaintiff to rely on the statements reported by Dr. Gaugain and later directed that I would reconsider the application for leave if any of the opinions stated in Dr. Gaugain's reports of 19 December 2011 or 18 February 2008 were to be disputed by Dr. Froncioni. However, no such further application was made.

Ruling on the Calling of Dr. Pinto

10. The Plaintiff's Counsel also sought leave to call Dr. Pinto who produced a single page, three-sentence report dated 15 May 2017 containing the following expert opinion evidence:

"*This letter is to certify that (Carla Forth) (DOB 13/12/1958) suffers from chronic back pain and radicular symptoms. This pain is aggravated by sitting on or over low surfaces, which include her car. I am writing this letter as per the above patient's request.*"

11. Ms. Tucker proposed to call Dr. Pinto in support of the Plaintiff's special damages claim for the cost of a 2017 ASX model of a Mitsubishi car priced at $55,658.96 (insurance included). I refused the application but permitted Ms. Tucker to rely on Dr. Pinto's Report without calling

her as a witness. Dr. Pinto's reported opinions were not needed to resolve any disputed issue so her evidence would have been of no real assistance to this Court. There was no dispute between the parties that Ms. Forth suffers from chronic back pain and radicular symptoms and it was never disputed on the Defence's case that Ms. Forth's pain is aggravated by sitting on or over low surfaces.

SUMMARY OF THE EVIDENCE OF THE PLAINTIFF'S INJURIES

The Evidence of Orthopaedic Injury and Causation:

The Plaintiff's Evidence of her Physical Injury and Disability

12. It was common ground between the parties that Ms. Forth suffers from chronic pain syndrome and that she sustained a musculo-ligamentous injury resulting from the 2001 fall. Her chronic pain is not confined to her back area. Ms. Forth deposed that she has continuous pain in her hip and thigh area which radiates, traveling down the left side of her body affecting even her heels and toes. This pain was non-existent prior to her fall.

13. The impact of the chronic pain on Ms. Forth's life was not the subject of any challenge by the Defence. It is most unlikely that Ms. Forth will ever regain the competence to return to her previous physicality. Her reality is that she no longer enjoys interacting with her family and friends as she did prior to the 2001 fall. She has also had to forego the joys of intimate companionship.

14. Ms. Forth has been placed under the care of multiple pain specialists in both Bermuda and in the United States. She has undergone epidural treatments, nerve-root and facet injections and radiofrequency ablations only to find temporary bouts of physical relief over the past several years. Because of her chronic pain, Ms. Forth has been unable to resume regular employment and she has had to depend on a walking stick since 2005.

The Expert Opinion Evidence on the Plaintiff's Orthopaedic Injuries

(Prior to the 2001 Fall) The Plaintiff's 1989 X-Ray Report showing "No Abnormality..."

15. Dr. Froncioni told the Court that he was presented with a plain film of the Plaintiff's lumbar spine which was made on 29 March 1989 and reported as "no abnormality seen". This had been ordered by Ms. Forth's General Practitioner, Dr. Mayall.

16. Dr. Froncioni stated that in 90% of all cases, a plain film is ordered on account of a patient's complaint of back pain. He opined that the ordering of the x-ray strongly implied that the patient must have had back pain at that time because it is unlikely that an x-ray would have been ordered for any other reason.

The Plaintiff's July 2001 X-Ray showing no Structural Damage

17. Dr. Froncioni explained that a lumbar spine plain film taken on 2 July 2001, 11 days after the fall, showed no sign of structural damage in Ms. Forth's back. He explained that examples of structural damages would include a fracture, subluxation, disc space narrowing or significant bony degenerative change.

August 2001 CT Scan showing Early Degenerative Spinal Changes in the Facet Joints

18. A CT[2] scan subsequently taken on 30 August 2001 of the Plaintiff's lumbar region showed early degenerative changes in the facet joints but no other significant abnormality. Dr. Froncioni explained that this could be regarded as the beginning of deterioration in the spine and likened it onto an inflamed knuckle on the finger. He confirmed that no other abnormalities were reported by the radiologist.

[2] Computed Tomography ("CT")

The Plaintiff's 2002 MRI:

Congenital Canal Narrowing in Lumbar Region and Mild Central Disc Bulge

19. Dr. Froncioni qualified that he never had first-hand access to the MRI[3] images of the Plaintiff's spine as these were done at Lahey Clinic on 4 April 2002. His analysis was formed wholly in reliance on the radiologist's report. He explained that the reported narrowing in the lumbar region is an anatomical variant which is commonly identified. He also said that this narrowing could predispose the Plaintiff to problems in the future and that it was probably congenital. When asked if the canal narrowing was likely to be caused by the 2001 fall, Dr. Froncioni stated in absolute terms that this was most unlikely given the gradual nature of the narrowing. In explaining the "*mild central disc bulge at L3/4*" Dr. Froncioni said that although he could not state it with certainty, this was not likely to be attributable to the 2001 fall as this is another common finding which generally forms over a period of years.

The May/June 2002 Fall on Vacation

20. The Defence pointed to an email from the Plaintiff to the Defendant sent on 5 June 2002 where Ms. Forth disclosed that she had another fall on a subsequent occasion and "re-injured" her back:

"...

Good Afternoon Everyone:

This email is an update on recent developments with regard to this ongoing back injury.

Last week while I was on vacation I slipped in the bathroom and re-injured my back. I cannot explain how the water got on the floor – perhaps while I was showering or reaching for the towel – I stepped out of the tub and the next thing I knew I slipped and was on the floor.

I had a pre-scheduled physiotherapy appointment for Monday (past) and a doctor's appointment for today. My physiotherapist wanted to see me again today before seeing the doctor. Her feeling was that I should continue with half days, at least until I got over this setback but also said that I should wait to see what Dr. Whalley said. Unfortunately, he feels that I should not work at all until I have had new x-rays done on my back and spine. He wants to be certain that nothing has broken, chipped cracked, etc. etc. To be honest, the pain has been intense at times, but overall I still don't feel as bad as I did a few months ago. At any rate,

[3] Magnetic Resonance Imaging ("MRI")

I have an appointment at the Hospital on Friday at 3:15 p.m. Dr. Whalley did tell me that if I feel up to it, I can go to work on Tuesday (Monday is a public holiday) and should see him again on Wednesday – if he has the x-ray results back by then. He has given me a further medical certificate.

Basically, my back is considered a 'weakend area' as a result of the initial slip and fall and Dr. Whalley is leaning to the side of caution. I have to continue icing my back every waking hour and also do some simple exercises.

My apologies if I sound bitter but I cannot express how I am feeling right now and for the first time since this nightmare began, I wish that this had happened to someone else…"

21. Ms. Forth, in her evidence on the stand, expressed some regret for her choice of words in stating that she "re-injured" her back as she was adamant that she was suffering from chronic back pain prior to this second fall in 2002. Dr. Froncioni declined to opine on the significance, if any, of this email message. He stated that he never examined Ms. Forth after the 2002 fall and that he would not be prepared to re-interpret her words. He said he could not be expected to know whether or to what extent the Plaintiff "re-injured" her back.

Dr. Froncioni's July 2003 Examination of the Plaintiff

22. Dr. Froncioni reported from his 7 July 2003 examination of Ms. Forth that she was overweight. He did not observe any weight loss in 2003. He stated that there was an abundance of literature which supported a high correlation between excess weight and chronic or acute back-ache. He explained that back ache is due to stress on the lower spine and that persons who are overweight, particularly of the female gender, face an increased risk of severe or chronic back pain.

23. Dr. Froncioni said the Plaintiff had mild tenderness in the lumbo-sacral region while a neurological examination of the lower extremities was shown to be within the normal limits. He reported that although there was a mild altered sensation in the left S1 dermatome (the area behind the calf and outside border of the foot), there was normal strength and full straight leg raising. He clarified that this simply means that nerve-root compression in the Plaintiff's back was unlikely.

Dr. Froncioni's Opinion Evidence on the Causes of the Plaintiff's Chronic Pain

Opinion that Musculo-ligamentous Injury Triggered Chronic Pain Syndrome

24. In his report Dr. Froncioni connected the cause of the chronic pain to the 2001 fall:

"*My impression based on the history and physical examination was that of chronic pain syndrome, possibly related to the musculo-ligamentous injury she sustained in a fall in June 2001.*"

25. He elucidated that muscular injuries are only identifiable by eliminating other possible injuries because an x-ray film would not detect a muscular injury as it would a fracture.

26. Mr. Pachai asked Dr. Froncioni why he described the cause as being "possibly" related to the musculo-ligamentous injury. In response, Dr. Froncioni stated that the initial complaint made by Ms. Forth after her fall was of her knee and wrist injury. He said that had she complained of immediate pain to her back, this would have more likely been an indicator of a structural injury such as a fracture or partial rupture of a disc. However, in cases where a trauma causes inflammation leading to the tearing of muscular ligaments the pain tends to be at more of a delayed pace over the ensuing 3 or 4 days. Dr. Froncioni shared that it was his understanding that Ms. Forth first complained of back pain in a similar 3-4 day aftermath period. (The Plaintiff maintained on her evidence that the back pain that she felt was immediate. However, this particular variance is of no significance because it was of common ground between the parties that Ms. Forth's injury was musculo-ligamentous.) In his 20 July 2016 report he stated:

"*In summary, this patient appears to have sustained a musculo-ligamentous injury of the low back when she slipped and fell on 21st June, 2001. The patient then seems to have developed chronic pain which persists to this day. She has never been able to return to work. She has had a variety of treatments ... She has also suffered a depressive disorder for which she is still under psychiatric treatment. There is no substantial evidence that she had pre-existing damage to her lumbar spine. There is also no evidence based on plain films, CT scan, MRI after the injury that she sustained significant bony or disc injury to her spine.*

At least temporarily the fall on 21st June 2001 seems to have triggered a chronic pain syndrome. This has left the patient with a longstanding disability which has prevented her from returning to work. Judging from the longstanding nature of her back pain, it is unlikely that it will improve significantly in the future. In my opinion no other interventions are indicated at this time although she should continue with the Pain Specialist…"

27. In describing how common place it is for a person with a spinal abnormality to be without pain, Dr. Froncioni opined that there was a real likelihood that 50% of the 5-6 persons sitting in the Courtroom without back pain would have a visible presence of a spinal abnormality.

Dr. Froncioni's Opinion that 2001 fall was 60% of the Chronic Pain Syndrome

28. Giving rise to the real controversy in this case, Dr. Froncioni opined that the 2001 fall was an approximate 60% contributing factor for the Plaintiff's currently disabilities. He expressed this view in his 20 July 2016 report as follows:

It is difficult to estimate how much of her present disability is a direct result of the injury she sustained on 21st June 2001. There is no doubt in my mind however that that incident was the trigger for her chronic pain syndrome. I would therefore estimate that approximately 60% of her present disability is a direct result of the incident in question

29. He said that his 60% estimation was formed with regard to the evidence that there was already a presence of degenerative changes in the Plaintiff's spinal region. Further, he factored Ms. Forth's age and weight into the analysis together with the fact of commonness of back pain in the human species.

Dr. Froncioni's Opinion on the other Contributing Factors: Obesity and Age

30. The Plaintiff stated in her affidavit evidence that she was 270lbs in weight when she fell in June 2001 and that as of August 2019 she had lost a total of 80lbs due to the stress of her condition. At paragraph 17 of Ms. Forth's affidavit she deposed:

"... I can confirm that my significant weight loss has benefitted my overall health, as I have been able to positively tackle my ongoing rehabilitation. I do not accept that my weight at the time of the accident had anything to do with my fall or the resulting complications. Furthermore no doctor which I have been examined by has mentioned this to me. I think it likely that had I been a thinner woman I may have suffered the same fate or perhaps injuries more serious in comparison, and I have been told this by doctors at the John Hopkins medical facility."

31. Dr. Froncioni rejected any suggestion that a thinner person would have likely sustained less injury. Referring to Lahey Clinic's 2001 description of the Plaintiff as 'morbidly obese' and his own observations of Ms. Forth in July 2003 as 'overweight', he concluded that the Plaintiff's weight was a contributing factor to her present disability.

32. On the subject of age and the process of aging, Dr. Froncioni noted that the Plaintiff was 58 years of age when he saw her on 15 July 2016. He explained that the risk of back pain increases with age and is less common among younger people. Given Ms. Forth's age and the 20 year aging period since the 2001 fall, Dr. Froncioni suggested that Ms. Forth's back pain is likely to be partly attributable to these factors.

Dr. Froncioni's Opinion on the other Contributing Factors: Commonness of Back Pain

33. Dr. Froncioni explained that a human being who never experiences a fall or crash is nevertheless very likely to develop lower back pain. He emphasized that chronic back pain is so common in the human species that up to 80% of all people will experience at least one episode of severe back pain in their adult lives. He said that another significant majority of all persons, although not up to 80%, will develop chronic low back pain.

34. Dr. Froncioni also told the Court that studies show that there is very little correlation between back injuries and the development of significant low back pain. He said the mere act of walking upright on two legs predisposes the human species to low back pain. He described a causal link between injury-related lower back pain and litigation involving a lawyer. He said that the latter will likely provoke more back pain than the original injury score. He also added

psychological and psycho-social issues to the list of factors which would trigger a greater level of pain than the original injury score.

The Evidence of Psychological Injury and Causation:

The Expert Opinion Evidence on the Plaintiff's Psychological Injury:

35. The Plaintiff called Clinical Psychologist, Dr. Shawnee Basden who is a registered clinical psychologist with the Bermuda Hospitals Board specializing in head injury, stroke, pain management and rehabilitation. Dr. Basden reported that Ms. Forth has been under her professional care since 2012 and that she was originally referred to her for pain management which is a common treatment for persons with chronic pain. Dr. Basden disclosed that the Plaintiff had an active major depressive disorder with co-morbid anxiety. She said that it was readily clear to her upon her first encounter with the Plaintiff that Ms. Forth was experiencing significant psychological distress brought on by her June 2001 back injury and the subsequent chronic pain, disability and life changes resulting thereafter.

36. Dr. Basden explained that the nature of chronic pain is that the longer it persists, the more stressors that arise from it. So, although the injury occurred several years prior, Ms. Forth developed a sense of helpless and hopeless from the injury because of how long it has endured. This, she said, is one of the biggest triggers for Ms. Forth's depression.

37. In explaining the term "co-morbid dependency" Dr. Basden referred to "generalized anxiety disorder". She said that these conditions co-occur so frequently that it is now standard practice to use the terms synonymously. Co-morbid dependency is most prominently characterized by persistent and obsessive worry. Dr. Basden reported that initially, Ms. Forth had hope for recovery from her chronic pain, having undergone extensive treatment programs. However, as the years passed by without a cure of pain, her psychological state worsened. This had an obvious impact on her social life which narrowed and saw the loss of many friendships. Equally, Ms. Forth's depression impacted on her family relationships.

38. Dr. Basden advised that depression very rarely occurs as a one off episode. She said that the World Health Organization released statistics showing that up to 80% of all people who

experience a bout of depression will incur at least another episode of depression. In terms of treatment, Dr. Basden spoke about available treatments including psychotherapy treatment. She explained that a patient may experience relief from a bout of depression but that it is liable to reoccur with continued stressors which may likely trigger another episode. So, without any significant change to Ms. Forth's physical state, it is likely that she will continue to undergo subsequent occurrences of depression which may become more intense as her physical limitations worsen with age.

SUMMARY OF THE EVIDENCE OF THE PLAINTIFF'S LOSS

Evidence of General Damages

39. In her affidavit Ms. Forth stated that she is seeking an award of $73,615.29 (£58,300.00) for her injuries. Additionally, in respect of her chronic back pain which she referred to as ancillary, she deposed that she would be seeking an award of $66, 541.54. For the impact that the accident has had on her mental health, Ms. Forth deposed that she would be seeking $64,572.52. However, the parties agreed at the stage of closing submissions that the evidence supported a claim for general damages in the rounded sum of $80,000.00, putting aside the contested issue of causation.

Evidence of Special Damages

Evidence of Loss of Past and Future Earnings

40. On the Plaintiff's Amended Statement of Claim a total of $296,693.10 is claimed for past and future earnings. However, at paragraph 28 of Ms. Forth's affidavit she stated; "*I have calculated my loss wages from the point of my having to stop work to the age of 65 years which numbers 185 months (15 yrs and 5mths). At a pay differential of $1303.00 p.c.m. I calculate my past and future loss of earnings at $241,055.00. I, therefore, am claiming the sum of $241,055.00 with respect to my total loss of earnings.*"

41. It was unchallenged on the evidence that Ms. Forth, immediately prior to her termination of employment, was being paid at the monthly gross rate of $4,342.00. Her monthly net pay was $3,668.37.

42. By way of monthly deductions, Ms. Forth was paying $104.82 towards her Social Insurance benefits. This was matched in equal value by the Defendant who also contributed the monthly sum of $104.82 towards her Social Insurance account. During the course of the trial, the Plaintiff's Counsel produced a letter dated 13 October 2020 from the Department of Social Insurance wherein it was confirmed that Ms. Forth has been in receipt of a monthly disability pension benefit in the sum on $502.57 from 2006 to present.

43. It was also uncontentious on the evidence that since 1 August 2005 Ms. Forth has been receiving the monthly sum of $3039.40 under a corporate "Group Long Term Disability" policy issued by BF&M Life Insurance Company Limited.

Evidence of Loss of Pension Contribution

44. The Plaintiff's pleaded claim in respect of loss of pension contribution is for the total sum of $77,722.38. During the Plaintiff's period of full-time employment, her monthly contribution of $217.10 was matched by the Defendant's $217.10 employer payments.

Evidence of Loss of Future Expenses and Costs of Care

45. Under this head of loss, the Plaintiff claims the sum of $145,624.50. This is made up of the co-payment costs of regular visits to a physician and psychologist in addition to the costs of massage therapy, gym membership and domestic cleaning services.

46. The Plaintiff relied on the recommendations made by Dr. J. Gaugain in his 18 February 2008 report where he opined on the costs of co-payment for her medical visits:

"...Ms. Forth will have physician office visits. The full expense of these is not usually covered by insurance. I estimate that she will have 12 visits per year with an average cost of $50 on top of insurance reimbursement to the physician- $600.
I am unsure if full psychiatric management is covered under comprehensive insurance- there may be a limit in the number of sessions allowed, however these sessions cost $125 each (MWI outpatient).

This insurance does not usually cover the expense of a psychologist- one that I am familiar with, due to the amount of experience that she has treating patients suffering from chronic illness, charges $200/hour. Initially it is anticipated that Ms. Forth will require up to 10 sessions over short period of time (approximately 2 weeks) as she is introduced to cognitive behavioural [sic] therapy, followed by regular weekly sessions as determined by her progress and needs."

47. At paragraph 35 of Ms. Forth's affidavit evidence she stated her claims for the costs of massage therapy, gym membership and cleaning services:

"*As I have been excluded from Appleby's group policy as of February 2012, I am forecasting the costs of these needs as follows:*

...

a. *Massage therapy/holistic treatment $150.00 p.c.m., cleaners $150 p.c.m., and gym membership $200.00 p.c.m. for the next five years: $30,000.00.*"

48. The Plaintiff pointed to Dr. J. Gaugain's recommendations for Ms. Forth to secure gym membership for basic fitness and muscle tone and massage therapy for low back muscle spasm. In his report he stated:

"*Ms. Forth also needs to keep up her basic level of activity and fitness. Gym membership is currently $100 per quarter. I recommend a personal trainer who has experience with medically difficult patrons. This may cost $50 per hour on a sessional basis.*
Massage currently runs between $70 and $100 per session. Ideally, Ms. Forth should have a massage per week, again with a masseuse with chronic pain management experience."

49. When Ms. Forth gave her evidence on the stand she expressed a disinterest for the re-use of a treadmill or bike machine or other like equipment. However, when asked if she would use the gym if aided by a personal trainer, she agreed that she would. On the subject of massage therapy, Ms. Forth stated that she currently attends massage therapy sessions conducted by a person she only knows from memory as "Ashwin". She confirmed that she submitted an

insurance claim for recovery of the expense of these sessions but was advised by an Argus representative that these sessions were not recoverable. She outlined that a half hour session cost $100.00 and a full hour is a $175.00.

50. In relation to the costs of home cleaning services, Dr. Gaugain reported:

"*Although Ms. Forth can carry out light household duties, she cannot perform tasks which will exert her to the extent that she will have physical 'payback' after the exertion. Someone to clean the house and perform heavier chores costs between $20 and $30 per hour.*"

Evidence of Costs of Out of Pocket Expenses

51. This head of loss relates to the Plaintiff's payment for medical visits and prescription medication. The Plaintiff deposed in her affidavit evidence [paras 24 and 26]:

"*24. From June 2001 until April 2018 I claim a total of $8,227.29 for my costs of prescriptions as evidenced by my spreadsheets and People's Pharmacy invoices. From May 2018 to July 2019 I have exhibited the amount paid out in my People's Pharmacy invoices. From May 2018 to July 2019 I have exhibited the amount paid out in my People's Pharmacy Invoices totalling $241.94. ... ...*

26. For my co-pay for medical visits between 2003-2009 I claim $2,626.00"

Evidence of Costs of Insurance Premiums

52. The Plaintiff claims on the Amended Statement of Claim the sum of $141,656.50 for the cost of health insurance premiums. However, in her affidavit evidence she states [paragraphs 36-37]:

Argus Insurance Premiums

36. I am [claiming] for insurance costs which I would have otherwise not incurred had I been under Appleby's corporate policy of insurance. At the time I was employed I did not contribute to my health insurance as this was covered by the Defendant. Since I have been out of work I have had to retain my own insurance. My total out of pocket loss for that benefit totals

b. *February 2012 – April 2018: $72, 565.51 (Tab 109 "QB-2")*
c. *May 2018 – Dec 2023: $190,495.20 (140 months (age 70) at the current rate of $1,360.68 exhibited at "CJF-1")*

37. The total sum I am claiming under this head is $263,060.71."

53. There was no challenge made to Ms. Forth's evidence on her monthly health insurance premiums in the sum of $444.36 which were fully paid by the Defendant when Ms. Forth was under its full-time employment. The Defendant thereafter continued to pay for the Plaintiff's health insurance up until December 2011 or thereabouts, having given written notice by letter dated 13 December 2011 that the payments would cease.

54. The Plaintiff also produced a letter from Argus dated 9 September 2008 stating; "*...it would appear that Ms. Forth has exhausted the Medical Aid benefits afforded her under Part III, section 34 of the Workmens Compensation Act 1965...*". The Plaintiff also pointed to Dr. Gaugain's remarks on her need for health coverage in his 18 February 2008 report where he said: "*Ms. Forth will require commencement and continuance in perpetuity of Health Insurance to include Major Medical Cover. Local insurance companies will be able to give competitive quotes but for a patient with pre-existing chronic illness I estimate that the premium will be close to $1,000/month.*"

Evidence of Costs of Adjustments to Property and Transport

55. In Dr. Gaugain's 2008 report, he recommended an assessment of Ms. Forth's residence for property adjustments:

"*Other costs pertaining to Ms. Forth's disability are:*

1. *Occupational Therapy home assessment. This will allow identification of any appliances / adjustments to Ms. Forth's physical environment and the costs related to the recommended changes e.g. raising the height of the toilet, bathtub replacement, more easily accessible kitchen cupboards etc.*
2. *Having a special mattress. This will require regular replacement...*"

56. On the subject of a special mattress, Dr. Fronciono shared that there is no medical evidence which would support any conclusion that a particular type of mattress would alleviate back pain.

57. Ms. Forth deposed:

"*30. Due to my injury I am now classified as disabled. My disability requires adjustments to both my transportation needs and property, which I otherwise would not have had to make but for this injury causing my impairment.*

...

32. With respect to my property I will need adjustments made to both my kitchen and my bathroom. The adjustments needed to my kitchen require the upper cabinetry to be lowered and fitted with handicap accessible shelving. This is because I am not able to reach upwards without pain and discomfort.

33. My bathroom also requires the raising of my cabinetry which is fitted from the floor as I cannot bend over to retrieve the items I require without aggravation to my back. I also require handicap accessible shower and railing fitted. Further I am seeking to have a laundry installed in my bathroom taking the form of a stacked washer and dryer. These are requested as I currently carry my laundry to the property next door to use the laundry facilities. My walking with a cane and laundry bags is no longer adequate. I will need at home facilities, as often times I am in so much pain that I cannot wash my own clothing and my current arrangements will not suffice."

58. Dr. Gaugain also recommended the Plaintiff's use of a special-seat car; "...*Having a car/means of transportation that is suitable to minimize the discomfort of the disability e.g. a vehicle that has a higher seat or swivelling seat for access with minimal climbing in and out.*" However, Ms. Forth did not suggest, in response to Mr. Pachai's direct question to her about her driving ability, that she had any difficulty in driving her car. She told the Court that she currently owns a two-door Mitsubishi Colt model insured to the approximate value of $4000.00-$5000.00. She purchased this car anew in or around May 2001.

59. Ms. Forth's evidence was that the problem with her car is related to parking. She explained that she is unable to park at an incline because her car sits too low to the ground. Notwithstanding, Ms. Forth described her car to be a 'good size' and further stated under cross examination that she drives her car 2-3 times per week as needed to attend her medical appointments. In quantifying Ms. Forth's claim for the cost of a new car, the Plaintiff produced a 2018 sales estimate for a 2017 ASX model of a Mitsubishi car at the sale price of $55,658.96. Ms. Forth said that she test drove this car and likened in part to an SUV[4].

60. On the Defence case it was contended that while it would be beneficial and more comfortable for Ms. Forth to have a new car with higher seating and more modern and accommodating features, a new car did not qualify as a medical necessity. Illustratively, Dr. Froncioni remarked in his evidence that thousands of people who suffer from chronic back pain drive around in unsuitable vehicles.

Evidence of Costs of Future Medications

61. In Dr. Gaugain's 18 February 2008 report he said: "*Insurance companies usually cover 80% of the cost of medication with the patient having to co-pay for the balance. Ms. Forth will be able to advise you as to her current costs regarding medication, however as newer, more effective medications arrive on the market the cost will increase.*"

62. The Plaintiff in her affidavit evidence stated [para 24]:"*...As to my future out of pocket expenses for co-pay I would ask this Court to consider my Co-pay over the last year at $241.94 and multiply that figure until I reach the age of 70. If multiplied by 9.5 years I am claiming my future out of pocket expenses for my prescriptive medications at the sum of $2,298.43.*"

[4] Sport Utility Vehicle ("SUV")

THE RELEVANT LAW:

The Law on Causation

63. As a starting point, a Plaintiff is entitled to damages for all consequential loss and expense which flows from an injury caused by a tortfeasor's negligence unless such loss and expense is found to be too far removed from the wrongdoing. In this case, the Defendant relies on the principle of remoteness of damage in that it is averred that the Defendant's negligence caused up to only 60% of the Plaintiff's pain, suffering and loss. The Defendant's case is that the remaining 40% was caused by other factors. As a matter of legal principle, Mr. Pachai submits that the Defendant has a legal responsibility to pay damages only to the extent of the Defendant's contribution to the risk of damage.

64. The test for establishing cause of harm in personal injury cases is pre-eminently described as the "but-for" test, the provenance of which being English common law. (See Chapter 2 of Kemp & Kemp The Quantum of Damages Volume 1). In *Donachie v Chief Constable of Greater Manchester* [2004] EWCA Civ 405 Auld L.J. (with whom Latham and Arden L. JJ. Agreed)) observed; "*The general rule in personal injury cases remains the 'but for' test laid down by the House of Lords in Bonnington Castings...as interpreted by the majority of the House in McGhee... a general rule that Lord Bingham re-iterated in paragraph 8 of his speech in Fairchild...*".

65. As seen through a century's worth of reported English case law, the "but-for" test has been stripped and redressed in garbs of judicial interpretation. At its nub, unchanged by any colourful description, it simply means that on a balance of probabilities, but for the tortfeasor's breach of duty, the Plaintiff would not have suffered the loss, damage and injury subject to the claim. In establishing whether the breach of duty caused the injury, damage and loss the Plaintiff need only prove that negligent act *materially contributed* to such injury.

66. Generally, the chain of causation will not be broken by a pre-existing injury or vulnerability which renders a plaintiff more liable to injury than other persons. By common example, a haemophiliac who would likely be more gravely harmed from a laceration injury than the

average person is no less entitled to full recompense than the latter. This principle is commonly referred to as the "thin skull rule", otherwise known as the "eggshell rule" or by its Latin maxim the "*talem qualem* rule". The sibling doctrine under criminal law requires accused persons to "take their victims as they find them". (Also see Clerk & Lindsell on Torts Nineteenth Edition [para 2-132]).

Apportionment of Liability and Contributory Negligence

67. The Defendant's liability in this case is established under section 4 of the Occupiers and Highway Authorities Liability Act 1978 ("the 1978 Act") which provides:

"*Duty of care to visitors*

4 An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there."

68. Section 15 of the 1978 Act imports the applicability of section 3 of the Law Reform (Liability in Tort) Act 1951 in cases where a Defendant is found to have contributed in part to the injury:

"*Application of other Acts*

15. Where the occupier does not discharge the common duty of care to a visitor and the visitor suffers damage partly as a result of the fault of the occupier and partly as a result of his own fault, section 3 of the Law Reform (Liability in Tort) Act 1951 applies."

69. Section 3(1)-(2) of the Law Reform (Liability in Tort) Act 1951 provides:

"*Apportionment of liability where contributory negligence*

3 (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the amount of damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that – ...

(2) Where damages are recoverable by any person by virtue of subsection (1) subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault..."

70. Of course, a conclusion on the issue of causation of liability does not necessarily run parallel to a determination of causation in respect of quantum of damages. The two must be separately considered (see Volume 1 of Kemp & Kemp, Sweet & Maxwell (Kemp R.123: May 2012) para 2-002.2). In *Fagundo v Island Cleaning Services* [2009] Bda L.R. 53 Mr. Justice Ian Kawaley (as he then was) considered the issue of contributory negligence and cited English case law on the approach to deciding whether damages should be reduced:

"The correct approach to the issue of contributory negligence, in the particular context of a negligence claim brought by an employee against his employer, was lucidly summarised by da Costa JA in Trustees of the Seventh Day Adventist Church v Wilson [1986] Bda LR 31 at page 12 as follows:

> *"The section therefore enables the court to reduce the damages in proportion to the degree of responsibility for the accident; and the court may take into account not only the share of each party in causing the accident, but also the degree of blameworthiness. In Davies v. Swan Motor Co. (Swansea) Ltd. (1949) 2KB 291 at 326 Denning L.J. said:*
>
> > *'While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of reduction is such an amount as may be found by the court to be 'just and equitable', having regard to the claimant's share in the responsibility for the damage. This involves a consideration, not only of the causative potency of a particular factor but also of its blameworthiness.' "* "

71. On appeal from Kawaley J's decision, the Bermuda Court of Appeal held (*Island Cleaning Services v Fagundo* [2010] Bda L.R. 40 [para 11], per Auld JA):

"*The evidence of these matters before the Judge, which he accepted and summarised in paragraphs 33 - 38 of his judgment, showed that the risk of slipping in such work, whether by momentary inattention, error or some risk-taking by a workman, however experienced and/or, like Mr Fagundo, particularly vulnerable by reason of disability, could be, and should have been, materially reduced by the provision of available special footwear, say in the form of over-shoes with a special grip, as Marshall's Maintenance had done. It is for risks such as those that an employer has a broad duty to take reasonable care to provide a safe system of work for his employees, as famously and eloquently laid down by Lords Oaksey and Reid in the House of Lords in General Cleaning Contractors Ltd v Christmas [1953] AC 180, HL, at 189-190 and 192-193, and by Lord Oaksey in Paris v Stepney Borough Council, [1951] 1 AC, 367, at 384-385. In this case, in the Judge's words at paragraph 28 of his judgment:*

> "*... it is obvious that ... [Island Cleaning] as a company in the cleaning business owed a general duty, as part of the umbrella duty to provide a safe place of work, system of work and safe equipment, to have regard to what footwear was required for potentially hazardous work and to direct employees to wear appropriate footwear for any tasks where special protection was required.*" "

72. Approving Kawaley J's finding that there was no contributory negligence, the Court of Appeal held:

"*Contributory Negligence*

On the issue of contributory negligence, the Judge's finding in paragraphs 59 to 61 of his judgment that there was none was, in the circumstances, a question of fact for him on which this Court should not normally intrude. The relevant facts and circumstances going to consideration of the extent of Mr Fagundo's blameworthiness, if any, for his accident, overlap in part with those going to the issue of primary liability on Island Cleaning's duty of general care, not least of which is the need to guard against risks of inevitable inattentiveness in long,

arduous and repetitive work. It may be that Mr Fagundo, if he had worked more slowly, could have ensured that he left no "missed patches" when applying the paint stripper to the section of floor in question, and/or could have dealt with problem by allowing the recently applied stripper to dry and then returning to the missed patches. The reality was that such risk as he took in stepping back on to the slippery section of the floor was taken in the context of very long hours of repetitive work and in the interest of completing his work speedily and thoroughly in the interest of his employer. It was certainly, on the evidence, not in defiance of any instruction or policy of Company to the contrary. There is also the important factor that the Judge rightly noted. Mr Fagundo was a migrant worker on a job-specific work permit and, therefore, vulnerable to loss of employment and of the right to remain in the country if he failed to retain the goodwill of his employer. He should not reasonably be condemned as blameworthy in his claim for damages for serious personal injury because he got on with his job, albeit in a somewhat risky manner in the interest of his employer. See e.g. Davies v Swan Motor Co. (Swansea) Ltd. [1949] 2 KB 291, CA; and Trustees of the Seventh Day Adventist Church v Wilson [1986] Bda LR 31, CA.

In our view, there is no basis on which this Court can properly interfere with the Judge's assessment of no contributory negligence on the part of Mr Fagundo.

Accordingly, we dismiss the appeal. "

73. Counsel for both sides referred me to the first instance decision in <u>*Best v Jensen and the Market Place Limited*</u> [2012] Bda LR 53, per Kawaley CJ (as he then was). The facts of that case involved a road traffic collision between the Plaintiff, Mr. Vincent Best, who was lawfully operating a motor bike on Somerset Road and the First Defendant, Mr. Warren Jensen, who was an employee of the Second Defendant, Market Place Limited. The Defendants accepted liability for the accident which occurred on 20 July 2004. However, much dispute arose on the subject of causation in respect of damages.

74. Mr. Best, an avid weight-lifter, suffered serious orthopaedic injuries to his shoulder. He had not suffered from any issues of shoulder pain or injury prior to the accident. The results of an MRI examination done at KEMH on 1 November 2004 revealed that Mr. Best had a dislocated acromioclavicular joint with minimal tenderness and no evidence of coracoclavicular ligament

injury. His rotator cuff appeared to be intact. However, due to the relentless pain he suffered an operation was performed on his distal clavicle on 6 December 2004 by Consultant Orthopaedic Surgeon, Dr. Oleksak who reported Mr. Best to be pain-free in the short aftermath of his surgery.

75. In Dr. Oleksak's February 2005 report, he opined that the grade II subluxation was a direct result of the motor bike accident but that Mr. Best's post-surgery prognosis was excellent. In providing the trial Court with expert opinion evidence, Dr. Froncioni stated that in most cases such an operation is successful but that the minority of patients, like Mr. Best, would continue to experience pain. Dr. Froncioni further reported that Mr. Best's resumption of weight lifting severely interfered with his chances of making optimal recovery.

76. Within months of the 6 December 2004 surgery, Dr. Stephen Lemos of Lahey Clinic reported a grade III subluxation, being more serious than the grade II subluxation shown from the 1 November 2004 MRI at KEMH. Mr. Best accordingly underwent further surgeries. Kawaley CJ found [paras 25-26]:

"*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%.*
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..."

77. Kawaley CJ then assessed damages by applying a 50% reduction [para 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…"

78. Kawaley CJ's decision was upheld by the Court of Appeal in *Best v Jensen and the Market Place Ltd* [2014] Bda LR 23.

79. In the *Kamal Williams v The Bermuda Hospitals Board* [2013] Bda LR 1 the Plaintiff, Mr. Kamal Williams, had developed acute appendicitis. Thereupon, he rushed to KEMH in complaint of abdominal pain. After a period of culpable delay on the part of the hospital, he underwent an appendectomy but suffered serious resulting complications before recovery. To that extent the trial judge found that "*Sepsis from the ruptured appendix caused injury to his heart and lungs*". Mr. Williams thereafter commenced legal proceedings against KEMH alleging negligent delay in providing him with proper treatment and care.

80. Having tried the matter, Mr. Justice Stephen Hellman found that the Defendant had been negligent in failing to obtain a CT scan on a "STAT" (immediate) basis. However, Hellman J held that such negligence had not been shown to cause the post-op injury. Mr. Williams was awarded with only a moderate sum reflecting his pain and suffering for the period leading up to his surgery. At paragraph 116 of his judgment he found; "*I conclude that the Plaintiff has not proved that the BHB's breach of duty caused the complications arising during and after surgery. However, the BHB's breach of duty did cause Mr. Williams several hours of additional pain and suffering, for which I award him damages of $2,000.00. To that limited extent his claim is successful.*"

81. Hellman J's decision was reversed by the Court of Appeal's unanimous decision in *Williams v Bermuda Hospitals Board* [2013] 84 WIR 155 where a re-assessment of damages by the trial judge was directed. (On Hellman J's reassessment of damages, an award of $60,000.00 was made). The Court of Appeal scrutinized Hellman J's narrowed approach to the question of causation in promotion of the 'material contribution' test. Delivering the judgment for the Court of Appeal, Ward JA held [paras 36-42]:

"...

36. As regards that finding, we hold that the learned judge was in error by raising the bar unattainably high. The proper test of causation was not whether the negligent delay and inadequate system caused the injury to the appellant but rather whether the breaches of duty by BHB contributed materially to the injury. That those breaches did contribute is beyond argument.

37. Originally where causation was alleged it was for the claimant to establish that the defendant owed him a duty of care, that the defendant was in breach of that duty and that the breach of that duty caused the damage or loss of which the claimant complained. It was for the plaintiff to prove 'the real substantial, direct or effective cause'. Stapley v Gypsum Mines Ltd [1953] 2 ALL ER 478 at 489-490, [1953] AC 663 at 687 per Lord Asquith.

38. More recently the boundaries of tortious liability have been expanded and, as explained in Clerk and Lindsell on Torts (19th edn, 2006) para 2-69, the 'but for' test is sometimes relaxed to enable a claimant to overcome the causation hurdle when it might otherwise seem unjust to require the claimant to prove the impossible. It was described in Barker v Corus (UK) Ltd [2006] UKHL 20...quoting from Fairchild v Glenhavn Funeral Services Ltd [2002] UKHL 22...as a different and less stringent test of causation. In Fairchild a defendant who had created a material risk of mesothelioma (a disease contracted from inhaling dust from asbestos fibres) was deemed to have caused or materially contributed to the contraction of the disease.

39. In Bailey (by her father and litigation friend) v Ministry of Defence [2008] EWCA Civ 883, (2008) 103 BMLR 134 the 'but for' rule was modified and the correct question was whether the negligence had caused or materially contributed to the injury and if 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant would have discharged the burden of proof.

40. Counsel for the BHB referred to Gregg v Scott [2005] UKHL 2... which was a claim for damages for loss of expectation of life in which there was a wrong diagnosis of a lump under an arm and as a result of which treatment was delayed for nine months and the chances of a cure were reduced from 42% to 25%. It was held by a majority that there was not a sufficient causal link between the defendant's conduct and the claimant's injury. But there were two dissenting opinions and two statements by Lord Hoffmann are instructive namely that for loss

to be recoverable it must be shown that the damage in question was attributable to the defendant's wrongful act and there must be a sufficient causal link between the defendant's conduct and the claimant's injury.

41. It is no longer a question of all or nothing but one of sufficiency.

42. In my view in the case at bar causal or causative links between the inordinate delays coupled with the defective system which together contributed to the appellant's injury were clearly established."

82. On further appeal, the Defendant appealed to the Privy Council in *Williams v The Bermuda Hospitals Board* [2016] UKPC 4 for a determination on the proper approach which ought to have been applied to the issue of causation and contributory negligence. The Board closely examined the House of Lords' judgment in *Bonnington Castings v Wardlaw* [1956] A.C. 613 which it described as central and parallel to the case before them.

83. In the judgment of the Board in *Williams* [para 42], it was held that the correct inference to be drawn from the evidence heard at trial was that on a balance of probabilities "*the hospital board's negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs.*" The Judicial Board also pointed out, at the invitation of Ms. Caroline Harrison QC for the Bermuda Hospitals Board ("the BHB"), that it did not agree with the Bermuda Court of Appeal (per Ward JA) that the "but for" test was modified by the English Court of Appeal in the *Bailey* case; "*The Board does not share the view of the* [Bermuda] *Court of Appeal that the case involved a departure from the "but-for" test. The judge concluded that the totality of the claimant's weakened condition caused the harm. If so, "but-for" causation was established. The fact that her vulnerability was heightened by her pancreatitis no more assisted the hospital's case than if she had an egg shell skull.*"

Burden of Proof: Balance of Probability in Personal Injury Cases

84. The House of Lords in *Bonnington Castings* cemented the rule on burden of proof in personal injury cases arising out of negligence. In Lord Justice Tucker's judgment, concurring with Lord Justice Reid, he referred to Lord Justice Scott's judgment for the Court of Appeal in

Vyner v Walldenberg Brothers, Ltd. [1946] K.B. 50 on the origin of the suggestion that there is an onus on defenders in cases of alleged breach of statutory duty. In *Vyner* Lord Justice Scott was reported to have said; "*If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that the principle lies at the very basis of statutory rules of absolute duty.*" Lord Justice Scott's judgment in *Vyner* cited Lord Justice Goddard's judgment in *Lee v Nursery Furnishings Ltd.* [1945] 1 All E R 387 where Lord Justice Goddard said; "*In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident.*"

85. Lord Justice Tucker recognized that while this statement had been subsequently explained and even modified to some extent in later cases, the ongoing existence of some level of onus remained and was in need of a statement of clear disapproval. In a clear statement rejecting any such onus on a Defendant, Lord Justice Tucker said:

"*My Lords, I think it is desirable that your Lordships should take this opportunity to state in plain terms that no such onus exists unless the statute or statutory regulation expressly or impliedly so provides, as in several instances it does. No distinction can be drawn between actions for common law negligence and actions for breach of statutory duty in this respect. In both the plaintiff or pursuer must prove (a) breach of duty and (b) that such breach caused the injury complained of...In each case it will depend upon the particular facts proved and the proper inferences to be drawn therefrom whether the pursuer has sufficiently discharged the onus that lies upon him...*"

86. Lord Keith of Avonholm in his concurring judgment in *Bonnington Castings* added:

"*...The onus is on the pursuer to prove his case, and I see no reason to depart from this elementary principle by invoking certain rules of onus said to be based on a correspondence*

between the injury suffered and the evil guarded against by some statutory regulation. I think most, if not all, of the cases which professed to lay down or to recognise some such rule could have been decided as they were on simple rules of evidence, and I agree that the case of Vyner in so far as it professed to enunciate a principle of law inverting the onus of proof cannot be supported. The correct principles governing the matter were laid down by this House in Caswell v Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152, and by the Master of the Rolls in Stimpson v. Standard Telephones and Cables Ltd. [1940] 1 K.B. 342"

87. In a recent decision of this jurisdiction of Court in *Kemar Maybury v The Bermuda Hospitals Board et al* [2020] SC Bermuda 6 Civ (23 January 2020) Hargun CJ addressed the proper approach to determining the standard of proof in personal injury claims by reference to persuasive English case law [paras 30-31]:

"...

30. In Gregg (FC) v Scott [2005] UKHL 2, Baroness Hale explained at [193] that it is now "hornbook law" that damage is the gist of the action in negligence. The defendant owes a duty to take reasonable care of the plaintiff, the breach of which has caused the plaintiff actionable damage. It must also be shown on the balance of probabilities that what the defendant negligently did or failed to do caused the plaintiff's damage. Baroness Hale referred to the following passage in Tort Law by Tony Weir (Oxford University Press, 2002) pp 74-75:

> *"Classically all that need be shown is that it would probably have made a difference if the defendant had not been in breach of duty. Certainty is now required. The essential thing is to persuade the judge that the harm would probably have been avoided if the defendant had acted properly: it does not matter whether he is easily persuaded, because it is obvious or is persuaded only with difficulty, because the matter is far from clear. The tendency to state the matter in terms of percentages is to be avoided. 'More likely than not' is a matter of persuasion, not of proof."*

31. Lady Hale explained at [194] that the "balance of probabilities" test is not designed to produce proportional recovery to the cogency of the proof of causation:

"If it is more likely than not that the defendant's carelessness caused me to lose a leg, I do not want my damages reduced to the extent that it is less than 100% certain that it did so. On the other hand, if it is more likely than not that the defendant's carelessness did not cause me to lose the leg, then the defendant does not want to have to pay damages for the 20% or 30% chance that it did. A 'more likely than not' approach to causation suits both sides."

32. *To the same effect is Lord Phillips at [174]:*

"Under our law as it is at present, and subject to the exception in Fairchild, a claimant will only succeed if, on balance of probability the negligence is the cause of the injury, the claimant will recover nothing in respect of the breach of duty: "Hotson v East Berkshire Health Authority [1987] AC 750; Wilsher v Essex Area Health Authority [1988] AC 1074.""

ANALYSIS AND DECISIONS ON DAMAGES:

Decision on General Damages

88. At the outset of Ms. Tucker's closing speech, a consensus on a base assessment of general damages in the sum $80,000.00 was reached between the parties. Mr. Pachai maintained, however, that a 40% reduction of the $80,000.00 sum was necessary and supported by the evidence on causation and contributory negligence. Ms. Tucker, on the other hand, strongly resisted any such reduction, arguing that causation had been fully established on the evidence.

89. It is clear and undisputed on the evidence that Ms. Forth's June 2001 fall caused her to sustain a musculo-ligamentous injury. The fact that Ms. Forth subsequently developed chronic pain syndrome resulting in her present disabled state is also unchallenged on the evidence. Mr. Pachai, however, submits that real question for my determination is how this chronic pain developed and the causal link between the chronic pain and the musculo-ligamentous injury.

90. The Defence say that approximately 40% of Ms. Forth's pain is collectively attributable to the following other causes:

(i) The fact that Ms. Forth was "morbidly obese" and weighed approximately 270lbs when she sustained her injury in June 2001;

(ii) The degenerative changes in Ms. Forth's facet joints which were first identified in its early stages by a CT scan taken on 30 August 2001;

(iii) The mild narrowing of the canal in the lumbar region together with the mild central bulging disc at L3/4 as disclosed by the radiologist's report of the MRI images produced on 4 April 2002;

(iv) The commonness of back injury as seen at an approximate rate of 80% of all human beings and

(v) Ms. Forth's second fall while she was on vacation in late May/early June 2002.

I find that Dr. Froncioni's estimation on causation is not to be taken as a legal analysis on causation. It is rather a medical opinion on the composition of various factors which could have directly resulted in her present disability. On Dr. Froncioni's opinion evidence, the most material contributing factor to Ms. Forth's chronic pain was her fall. His view was that there were also other less significant factors which likely contributed to her chronic pain. On an alternative analysis of his evidence, he concluded that there is a 60% chance that her fall was the sole cause of her current condition.

91. Mr. Pachai made much of the Plaintiff's state of "morbid obesity" at the time of the June 2001 fall. I accept Dr. Froncioni's evidence that Ms. Forth's weight made her more prone to injury than a thinner person would have been. However, I find that such a vulnerability cannot be held against the Plaintiff. This is because the thin skull doctrine requires a victim to be taken as he or she is at the time of the wrongful act. It is plausible that a defence of *novus actus interveniens* might have arisen if Ms. Forth had been a thin and fit person at the time of the fall but had later become obese having ignored her treatment care advice and subsequently developed chronic pain syndrome. However, that is not the case here. To the contrary, Ms. Forth was approximately 270 lbs at the time of the 2001 fall and she has since which lost approximately 80lbs without experiencing any relief of pain. I would therefore find that the case of *Best v Jensen and the Market Place Limited* can be properly distinguished on the basis

that Mr. Best's continued weightlifting became an intervening factor to his otherwise high prognosis for full recovery. The same cannot be said for this case as Ms. Forth's weight was not an intervening occurrence.

92. Ms. Forth's early stage of spinal degeneration was first identified by CT scan in August 2001. Some nine months later leading up to April 2002 the canal narrowing in the lumbar region together with her L3/4 central bulging disc was classified as 'mild'. I find that it is most unlikely that these immature spinal abnormalities caused Ms. Forth's 2001 agonizing back-pain in any material way. The back pain described by Ms. Forth in her evidence was intense and abrupt. It started in June 2001 immediately after her fall or within the few days which followed. On Dr. Froncioni's evidence, early spinal abnormalities commonly form without any real physical burden. This was illustrated by Dr. Froncioni's hypothesis that half of the unsuspecting persons sitting in the Courtroom during his testimony are likely to test positive for an identifiable spinal abnormality. However, Ms. Forth experienced intense radicular back pain in 2001 after her fall in June and her inability to resume her regular hours of employment and lifestyle norms commenced in June 2001. On this analysis, I would eliminate Ms. Forth's spinal abnormalities as any materially contributing cause of the onset of her back pain in 2001.

93. It then follows that I should consider whether Ms. Forth's spinal abnormalities, in a more developed state given the passage of time, later contributed to her chronic pain and disability. It cannot, on any serious argument, be contended that Ms. Forth's present disabled state is a natural result of the development of the common degenerative spinal changes seen on her exams and reported by the radiologist. I find that at best it is open to the Defence to argue that her spinal changes aggravated the long-term impact of her June 2001 fall. However, these spinal abnormalities were opined by Dr. Froncioni to be congenital. That is to say that Ms. Forth was predisposed to these degenerative conditions prior to her June 2001 fall, evidenced by the visibility of spinal degeneration within months of the slip and fall accident. That being the case, the thin skull rule applies because Ms. Forth cannot be faulted for any of her pre-existing vulnerabilities.

94. As for Ms. Forth's 2002 fall, I reject any claim that this intervening act was likely to be a materially contributing cause of the Plaintiff's physical suffering which started in June 2001. Ms. Forth's evidence before this Court was that her back pain has been unrelenting since June 2001 and that the hip and thigh pain she experienced was non-existent prior to June 2001. I accept her evidence as reliable and truthful.

95. Having considered the evidence in its totality, I find that it is most probable that Ms. Forth would not have suffered the musculo-ligamentous injury and resulting chronic pain and psychological depression but for the Defendant's breach of statutory duty. On my assessment of the evidence, that breach of duty caused the Plaintiff's injury and chronic pain. In this case, the Defendant is wholly and solely to blame. I therefore find that it would be unjust and inequitable to apportion any liability for loss and damages elsewhere. Proportional recovery is not an entitlement available to a tortfeasor where causation has been proved.

96. For these reasons, I award the Plaintiff the whole sum of the $80,000.00 assessment representing general damages.

Decision on Special Damages

97. It follows that my findings on causation apply equally to awards for special damages as it does to general damages.

Decision on Loss of Earnings

98. A total sum of $296,693.10 is claimed for past and future earnings. Ms. Tucker ambitiously argued for the Plaintiff to recover the gross sum of her unpaid salary while Mr. Pachai correctly submitted that only her net salary is recoverable. At paragraph 42 of his written submissions Mr. Pachai stated: "*For the purposes of assessing a claimant's loss of earnings, the Court is always concerned with net rather than gross income since the loss to an individual is what he or she would otherwise have received in actual terms.*"

99. The net income is the actual loss because the Plaintiff's gross salary would have never been paid to the Plaintiff in any event. After all, salary deductibles are only incurred when the

earnings are paid. Thereafter, the employer remains liable under separate heads of loss for payment of its share of deductibles such a health insurance and pension contributions. On this reasoning, loss of earnings should only be calculated on the basis of net earnings. (See *Parry v Cleaver* [1969] 1 ALL ER 555). In *British Transport Commission v Gourley* [1956] AC 185 at 206 Lord Goddard said: "*The basic principle so far as loss of earnings and out-o,f-pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened.*" Claims for loss of future earnings are subject to the same rule. In Volume 1 of Kemp & Kemp Quantum of Damages (R.115: May 2010) [para 9-022] the authors state: "*Future loss of income…All loss of income claims should be set out net of Tax and National Insurance. If pension loss is claimed then the loss of income claim should be set out net of the pension contributions which the claimant would have made…*"

100. The Plaintiff is thus entitled to recover for the loss of her past earnings based on her net salary as it was when she was previously and most recently employed by the Defendant and remunerated according to the monthly net rate of $3,668.37. Her past earnings shall be calculated to commence from August 2005 given that her final payment of salary was made in July 2005. The period between 1 August 2005 to 31 October 2020 totals 183 months. This would entitle the Plaintiff to a total net sum of $671,311.71 representing the 183 month timeframe from which deductions need be made to reflect (i) 183 months of insurance benefits paid at the monthly sum of $3039.40 ($3,039.40 x 183 = $556,210.20) and (ii) 178 months of disability pension payments in the sum of $502.57 from the Department of Social Services in respect of the period running from 1 January 2006 to 31 October 2020 ($502.57 x 178 = $89,457.46). Deducting the total of 183 months of insurance benefits in the sum of $556,210.20 and deducting the total of 178 months of disability pension payments in the sum of $89,457.46 from the total of the Plaintiff's net salary over the past 183 months brings about a total of $25,644.05 in loss of past earnings.

101. Loss of future earnings relates to the period between 1 November 2020 and 13 December 2023 (when the Plaintiff will attain the age of 65 years) totalling 37.25 months. Thus the sum of $137,319.31 ($3,668.37 x 37.25 = $136,646.78) must be reduced to reflect the ongoing and

future payments for: (i) 37.25 months of insurance benefits at the monthly sum of $3,039.40 ($3,039.40 x 37.25 = $113,217.65) and (ii) 37.25 months of disability pension payments in the sum of $502.57 from the Department of Social Services ($502.57 x 37.25 = $18,720.73). Deducting the total of 37.25 months of insurance benefits in the sum of $113,217.65 and deducting the total of 37.25 months of disability pension payments in the sum of $18,720.73 from the total of the Plaintiff's net salary sum for the next 37.25 months brings about a total of $4,708.40 in loss of future earnings.

102. I should highlight that the Court did not receive any expert evidence on inflationary trends and in calculating the claims for loss of future earnings, both sides proposed a simple exercise of multiplication of the annual loss using a pay differential by the number of years until retirement without any proposal for a discount rate on the resulting lump sum.

Decision on Loss of Pension Contribution

103. The Defendant paid the monthly sum of $217.10 in pension contributions when Ms. Forth was under its employment. On the basis that the period between 1 August 2005 and 31 October 2020 totals 183 months, the loss of pension contributions (already owed) totals the sum of $39,729.30. In calculating the future loss in respect of pension contributions, I would look to the period between 1 November 2020 and 13 December 2023 (when the Plaintiff will attain the age of 65 years). This brings forth the total of 37.25 months resulting in the sum of $8,086.98.

104. On Ms. Tucker's submissions before the Court, she sought to include social insurance contributions and life insurance contributions in her pleading for loss of pension. In my judgment, these are separate heads of loss which were not pleaded. In any event, I find that no such losses were proven on the evidence before the Court.

Decision on Loss of Future Expenses and Costs of Care

105. Ms. Tucker estimated that the costs of future co-payments for the Plaintiff's medical care would come to $167.50 per month. Dr. Gaugain opined in his 18 February 2008 report that the co-payment costs of regular visits to a physician would give rise to a monthly cost of $50.00 i.e. $600.00 per annum. As for the costs of future psychological care, I was not directed to

any evidence of the costs of Ms. Forth's visits to Dr. Basden, save that Dr. Gaugain reported that the costs of therapy sessions would approximate $200.00 per hour and that a comprehensive insurance policy would not cover this. In each of Dr. Basden's reports, the most recent being 9 October 2020, she confirmed that she would continue to treat Ms. Forth on a weekly or fortnightly basis. During her oral evidence Dr. Basden also expressed concerns that Ms. Forth may likely be prone to more intense bouts of depression as she ages and her physical condition weakens.

106. Having considered all of this uncontroversial evidence, I readily accept the reasonableness of the Plaintiff's claim for the sum of $167.50 per month to cover future co-payments in respect of her medical care-providers. I also accept Ms. Tucker's submission that a life expectancy multiplier should be used to calculate this loss. Ms. Forth's future medical care at this level of frequency is clearly a lifetime expense which has resulted from her injury. Ms. Tucker proposed a multiplier of 17.5. However, I deem it more fair to use the multiplier of 18.17 years which applies to the life expectancy of a 62 year old female suffering a lifetime loss under Table 2 (2.5% column) of the 2020 eighth edition of the Ogden[5] Tables published by UK Government Actuary's Department. (Ms. Forth will attain the age of 62 on 13 December 2020). Using a multiplicand of $2,010.00, it then follows that the Plaintiff should be awarded the total sum of $36,521.70 for the costs of future co-payments for the Plaintiff's medical care.

107. I now turn to the costs of massage therapy, gym membership and domestic cleaning services which are all included under this head of loss. In Ms. Forth's affidavit evidence, she estimated that the costs of her massage therapy would total $150.00 per month. Mr. Pachai did not object to this estimation, save for the Defendant's reserved stance on causation. Notwithstanding Dr. Gaugain's elevated approximations and the higher cost range outlined by Ms. Forth during her evidence on the stand, I think it only fair and reasonable to cap the massage therapy costs to align with the Plaintiff's affidavit evidence on the quantum of her losses. On this basis I would find that Ms. Forth's future loss is in the sum of 150.00 per month i.e. a multiplicand of $1,800.00. Using the same multiplier of 18.17 years, the award in respect of massage therapy shall be $32,706.00.

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[5] The name Ogden is a known shorthand reference to Sir Michael Ogden QC who chaired the Working Party for the first four publications.

108. Applying the same reasoning, I would award Ms. Forth the sum of $32,706.00 for the costs of future cleaning services. I have considered this a lifetime loss as Ms. Forth will never likely be able to personally perform her own household cleaning. Had she not been negligently injured it is reasonably arguable that she would have been able to perform her own domestic cleaning for the next 18.17 years.

109. In respect of the claim for the costs of gym membership and a personal trainer, I find that the evidence demonstrated that Ms. Forth will need professional assistance in order to maintain some basic level of physical fitness. I also accept Ms. Forth's evidence that she would attend the gym if assisted by a personal trainer who could direct her with the appropriate level and type of activity. On her affidavit evidence she estimated these costs to be $200.00 per month. This, in my judgment, is a reasonable estimate which should be awarded for a 10 year period. The award for the future costs of gym membership shall therefore be to $24,000.00.

Decision on Costs of Out of Pocket Expenses

110. Subject only to the issue of causation, the parties agreed that the out of pocket expenses comprising of the co-pay for prescription medications and medical visits amounted to $10,767.66 and $2,626.00 respectively. Given that I have found against the Defendant on the issue of causation, I shall award the Plaintiff the total sum of $13,393.66 for this head of loss.

Decision on Costs of Insurance Premiums

111. Mr. Pachai stated during his closing submissions that Ms. Forth is entitled to recover the full sum of her health insurance premiums in the sum of $444.36, setting aside his causation arguments. These premiums were fully paid by the Defendant when Ms. Forth was under its full-time employment. The Plaintiff's unchallenged affidavit evidence was that she started paying her own health insurance at the rate of $1,360.68 from February 2012 onwards. This sum is relatively consistent with the estimation provided by Dr. Gaugain which was supported by Dr. Froncioni during his evidence under cross-examination by Ms. Tucker. I see no reasonable basis to impose an award at the artificial monthly rate of $444.36 since such a rate is clearly not available to Ms Forth as a now disabled unemployed person, that being a direct consequence of the Defendant's negligence. I will thus award her the sum reflective of the

actual loss of $1,360.68 multiplied by 105 months (the period between 1 February 2012 and 31 October 2020) to calculate her actual past loss for the expense of health insurance. This brings forth a total sum of $142,871.40 for the Plaintiff's past loss for health insurance premiums.

112. However, in relation to the calculation of future loss, I accept Mr. Pachai's submission that the Plaintiff ought only to recover the costs of the premiums up until the age of 65 yrs. The timeframe between 1 November 2020 and 13 December 2023 totals 37.25 months. Thus the Plaintiff shall be awarded a total sum of $50,685.33 for the Plaintiff's future loss for health insurance premiums.

Decision on Costs of Adjustments to Property and Transport

113. I accept the Plaintiff's evidence that adjustments will need to be made to Ms. Forth's residence to accommodate her state of disability, particularly as she ages. I also accept her evidence that she will need to replace and/or adjust the height of her kitchen cabinetry and bathroom fixtures (including toilet, basin and tub) in addition to installing a washer and dryer in her home. Further, she will require the instalment of special railing in her home. That being said, the Plaintiff did not provide any evidence of the actual costs of these changes and has instead left the matter to be assessed by this Court on a *quantum meruit* basis.

114. Ms. Forth agreed during cross examination that her father was a well-known building contractor and that she resultantly gained a familiarity with the building industry. She accepted that she could have obtained a quote directly from a building contractor on the costs of the necessary changes. In any event, I consider the adjustments described to classify as minor adaptations. As such, I have not been satisfied on the evidence that such changes are dependent on the services of an architectural firm. I, therefore, reject the claim for the costs which were estimated by Ms. Charlita Saltus of Saltus Associates on the basis that the Plaintiff failed in this respect to mitigate her loss.

115. Mr. Pachai invited me to assess these property adjustments at a cost of $5,000.00 taking judicial notice of such costs in Bermuda. However, I would take notice that the average costs

of a new washer and dryer would range between $2,000.00 and $3,000.00 in Bermuda. Adding the costs of labour for a building contractor which will also likely entail plumbing services, I think it fairer to assess the property adjustments costs between $8000.00 and $10,000.00. Conservatively, I will award the total of these costs on the lower end of this range at $10,000.00 (as opposed to $13,000.00).

116. Mr. Pachai objected to the Plaintiff's claim for the costs of a new car and relied on Dr. Froncioni's opinion evidence that thousands of people with severe back pain drive around in normal vehicles. Ms. Tucker argued, however, that where the severe back pain is attributable to negligence, the tortfeasor should assume the costs of a special-purposed vehicle. She pointed to the case of *Woodrup v Nicol* [1993] P.I.Q.R. Q104 where the English Court of Appeal where considered reviewing the trial judge's assessment of the costs of a suitable motor car adapted for the special needs of the Plaintiff. In that case, the Plaintiff had suffered serious personal injury as a result of a road traffic collision negligently caused by the Defendant. Mr. Pachai emphasized, however, that the Plaintiff in that case, unlike Ms. Forth, was a paraplegic whose need for a specially suited car was more convincing.

117. In principle, the Plaintiff is no less entitled to special adjustments to her car than she is to her residence. My task is thus centered on evaluating the appropriate sum to be awarded. However, I cannot find on the evidence that Ms. Forth is entitled to the full costs of a brand new car. Under cross-examination Ms. Forth conceded that she has not experienced any difficulty in driving her car and that her real challenge arises with parking. It may very well be the case that adaptive equipment would suffice in assisting Ms. Forth in achieving better comfort for parking and entering and exiting from her current motor car. Maybe not. This means that the Plaintiff, who bears the burden of proving that she needs a brand new car, has not satisfied me on this portion of her claim. For these reasons, I will broadly assess the costs of adaptive car equipment to the value of $500.00 using a *quantum meruit* approach.

118. Having considered Dr. Fronciono's opinion evidence on the minimal effects of a mattress as a measure to relieve back pain, I make no finding in support of the Plaintiff's claim for the cost of a new mattress.

Decision on Costs of Future Medications

119. This Court has been asked to assess the costs of Ms. Forth's future medications. The evidence is that Ms. Forth's co-payments for the period of one year leading up to the making of her affidavit evidence was $241.94. I would thus use this figure as the multiplicand against the multiplier of 18.17 years. This produces the sum of $4,396.05 which shall be the award under this head of loss.

ANALYSIS AND DECISIONS ON INTEREST

The Disputes Issues on Interest on Damages

120. The subject of interest was much disputed between the parties. Ms. Tucker argued for interest at the statutory rate of 3.5% per annum to be awarded by this Court in respect of both past and future loss for general and special damages. However, Mr. Pachai steadily defended, the established legal principle that interest accrues only on past losses. Mr. Pachai also argued in favour of a 50% reduction on the statutory rate of interest (i.e. 1.75%) where the Court is concerned with interest. Mr. Pachai also outlined that the interest period for general damages ordinarily accrues from the date of service of the writ through to the delivery of the Court's judgment. For special damages, he argued that the usual practice is to award interest from the date on which the cause of action arose through to the delivery of the Court's judgment. Ms. Tucker, on the other hand, invited me to award interest at the full statutory rate of 3.5% to cover the full period between the date of the loss and the date of judgment.

Whether Interest on Damages may be awarded at a Reduced Rate

121. Section 10 of the Interests and Credit Charges (Regulation) Act 1975 provides:

"Courts may award interest on debts and damages

In any proceedings tried in any court for the recovery of any debt or damages, including proceedings in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, the court may, if it thinks fit, order that there shall be included in the sum for

which judgment is given interest at the statutory rate on the whole or any part of the debtor damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment:

Provided that nothing in this section—

a) shall authorize the giving of interest on interest; or

b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any enactment or otherwise; or

c) shall affect the damages recoverable for the dishonor of a bill of exchange."

122. (Section 1, as amended since 2 June 2017, defines the statutory rate as 3.5% per annum.)

123. Mr. Pachai referred to his previous appearance before the Honourable Chief Justice, Mr. Narinder Hargun, in the case of *Maybury v Bermuda Hospitals Board.* He contended that Hargun CJ accepted that interest on damages is to be assessed at the rate of 1.75%. However, there is minimal assistance to be gained by this citation because the subject of the rate of interest was agreed by the parties without the need for adjudication by the Court. That being said, it is indeed correct that Courts of this jurisdiction have previously awarded interest rates lower than the statutory rate in respect of damages for personal injury claims.

124. In *Correia v Dublin and the Minister of Works & Engineering* [2005] Bda L.R.10 Ground CJ (as he then was) held [page 6, para 13]:

"*INTEREST*

13. The plaintiff has pleaded a claim for interest. The basic approach to interest on special damages is to allow half the normal rate for the full period since the injury. That is a rough and ready way of dealing with the differing times of accrual of the damage: see Jefford v Gee [1970] 2 QB 130. The normal rate is the statutory rate allowed under the Interest and Credit Charges (Regulation) Act 1975, which is 7%. In the case of general damages for pain, suffering and loss of amenity, the normal approach is to allow 2% per annum from the service of the writ. That is what I would have allowed in this case."

125. Ground CJ's summarized approach was approved and followed by Kawaley J (as he then was) in *Fagundo v Island Cleaning Services* [2009] Bda L.R. 53 [paras 79 – 82] :

"Interest

79. The Plaintiff in his Amended Specially Indorsed Writ seeks interest on general damages from the date of the Writ until judgment at the rate of 3.5% and interest on special damages from the date of the accident until judgment at the same rate. The Defendant contends no interest should be awarded at all by reason of the Plaintiff's delay. This submission was not supported by reference to any correspondence pressing the Plaintiff to expedite the action; the action never went to sleep altogether, prompting a strike-out application on grounds of want of prosecution. The relevant principles as to the grant of interest in personal injuries cases have been summarised by Ground CJ in Correia v Dublin and Minister of Works and Engineering [2005] Bda LR 10 at page 6 of the Judgment, following Jefford v Gee [1970] 2 QB 130.

80. The general rule under Bermuda law is that interest on general damages will be awarded at the rate of 2% from the date of the Writ's issue until judgment and on special damages at the rate of 3.5% from the date of the accident until judgment. Nevertheless the discretion to award interest is essentially designed to penalize a defendant for the delay in paying sums which have been found to be due to the plaintiff and which ought properly to have been paid at some earlier date. In Jefford v Gee, Lord Denning M.R. (giving the judgment of the English Court of Appeal) noted: "Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him."

81. In the present case, (a) the Plaintiff took three years to commence proceedings, and (b) his medical prognosis was unclear both immediately after the accident and when the writ was issued and beyond. The fact that he would have a 60% disability in his right hand with no further pain and the extent of his future earning capacity would first have come to the Defendant's attention when he ought reasonably to have been in a position to return to work, on or about January 1, 2005. Prior to that, the Defendant would not reasonably have been

able to reliably assess the amount of either the general damages or loss of earnings element of the Plaintiff's special damages claim. The Defendant continued to employ the Plaintiff for more than a year after the accident until Mr. Thompson seemingly lost patience with no clear resolution in view. Taking into account the fact that this case has taken nine years to come to trial, it would be unjust for the defendant to be ordered to pay interest on special damages for a more than four year period during which the vast majority of the relevant sum could not reasonably have been assessed.

82. Accordingly, I award the Plaintiff interest on general damages and special damages from January 1, 2005 until judgment at the rate of 2% (general damages) and 3.5% (special damages) respectively. Thereafter, interest at the statutory rate of 7% is awarded in the usual course."

126. Ground CJ in *Correia v Dublin* and Kawaley J in the *Fagundo* case both relied on *Jefford v Gee* [1970] 2 QB 130 as the authority establishing a discretionary judicial power in determining the interest rate to accrue on an award of damages. Lord Denning, sitting in the English Court of Appeal as the Master of the Rolls, delivered the leading judgment in *Jefford v Gee*. Lord Denning M.R. explained that section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 had been amended by section 22 of the Administration of Justice Act 1969 which had the effect of making it mandatory for interest awards to be granted by the Courts in personal injury claims where judgment for damages exceeded £200.00.

"...

9. The power of the Court to award interest in these cases was contained originally in Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. It said: "(1) In any proceedings tried in any Court of record for the recovery of any debt; or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, interest at such rate as it thinks fit, on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment provided that nothing in this section shall authorise the giving of interest upon interest".

10. It should be noticed that the power of the Court was then discretionary. But, since 1st January, 1970, it has become compulsory in personal injury cases. This is by reason of Section 22 of the Administration of Justice Act, 1969, which adds these sub-sections to the above sub-section (1):- "(1A) Where in any such proceedings as are mentioned in sub-section (1) of this Section, judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, then (with- out prejudice to the exercise of the power conferred by that sub-section in relation to any part of that sum which does not represent such damages) the Court shall exercise that power so as to include in that sure [sic] [sum] *interest on those damages or on such part of them as the Court considers appropriate, unless the Court is satisfied that, there are special reasons why no interest should be given in respect of those damages. (1B) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in sub-section (1) of this Section".*

127. I would first observe that Lord Denning M.R. in the case of *Jefford v Gee* was interpreting a differently worded statutory provision from section 10 of the Interest and Credit Charges (Regulation) Act 1975. Section 22 (1B) of the Administration of Justice Act 1969 (now repealed and superseded by section 15(4)-(5) of the Administration of Justice Act 1982) expressly allowed an English Court to calculate interest "*at different rates in respect of different parts of the period for which interest is given*". However, section 10 expressly requires that interest, if the Court sees fit to award it, shall be given at the statutory rate. The only power of discretion conferred by section 10 is in respect of whether interest at the statutory rate will be applied to the whole or any part of the damages awarded. In making this determination the Court will consider whether interest shall be applied to damages for the full period or for part of the period provided for under section 10.

128. Mr. Pachai pointed to a narrow portion of Mr. Justice David Hull's judgment of concurrent jurisdiction in <u>Glenda Kelland v Rene Lamer</u> [1988] Bda LR 69. Looking more closely at the holdings of Hull J in *Kelland v Lamer* (the principles of which were repeated by Hull J in <u>Rowland v Arnold and McKenna</u> [1990] Bda LR 52) I would observe that the Court in that

case expressly disagreed that section 10 confers a discretion on a judge to award a rate of interest lower than the statutory rate. Hull J went so far as to postulate an alternative wording that might have conferred such a discretion. He reckoned that had section 10 instead provided *'at a rate not exceeding the statutory rate'* it would have been open to the Court in the proper exercise of its judicial discretion to impose a lower interest rate.

129. That being said, Hull J found that the Courts have a discretion to abridge the period for which interest at the statutory rate would be payable. This was the approach he adopted in *Kelland v Lamer* by awarding interest at the full statutory rate on general damages to cover half of the period between the date of service of the writ and the date of judgment. Similarly, he awarded interest on special damages to apply only to half of the period between the date on which the cause of action arose and the date of the judgment. Hull J then remarked, from a calculative perspective only, that this amounted to 3.5% (half of the then statutory rate at 7%) for the whole period.

130. A fuller recital of Hull J's findings on the proper interpretation of section 10 in *Kelland v Lamer*, beyond that which I was invited on Counsel's oral submissions to consider, is quite instructive [pages 9-10]:

"*Now if one compares the wording of section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 with section 10 of the Bermuda Act, it is obvious that the Bermudian draftsman has taken his section directly from the English subsection, as amended by section 22 of the Administration of Justice Act 1969. They are in all material respects identical except for two things. Instead of adopting section 3(1A), the draftsman here has inserted the words 'including proceedings in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death' directly in section 10. The other thing is that instead of saying 'interest at such rate as it thinks fit', the draftsman has used the words 'interest at the statutory rate'.*

I have myself only been able to find two Bermudian cases in which the interpretation of section 10 has been considered.

The first is Van Gallen v. Russell to which counsel referred me. The trial judge there noted that in Bermuda, unlike England, interest on awards for damages for personal injuries is entirely in the court's discretion. I respectfully agree that that is one distinction.

He also proceeded on the basis that the statutory rate is a ceiling, beneath which the court has under section 10 a discretion to order a lower rate, and, following Wright, he accordingly allowed interest at the rate of two percent per annum from the date of service of the writ on the general damages for non-economic loss and, following Jefford, interest on the special damages at half the statutory rate from the date on which the cause of action arose. Mr. Unwin submitted that this was correct.

Van Gallen subsequently went to the Court of Appeal, as Russell v. Van Gallen (Civil Appeal No. 21/84, reported in Volume 18 at page 162). The appeal against the decision of the trial judge was dismissed, but no issue was taken there by the appellant on the award of interest and with great respect I am unable to agree that section 10 confers on the courts any discretion to award a lower rate of interest than the statutory rate.

The difference in wording in section 10 is of course to be taken as having been deliberately adopted, and in any case I have no doubt that that was so. The section does not say that the court may award interest 'at a rate not exceeding the statutory rate'. The Legislature has, in the first instance, fixed the rate itself—and it has also given to the Bermuda Monetary Authority, but not to the courts, delegated authority to alter this rate of interest from time to time, by order.

In Wright, Lord Diplock emphasised the importance of uniformity and predictability in the assessment of damages, including interest on damages. The particular matter that concerned him was that in England, where at the time personal injuries cases were such a large part of the courts' civil business, the system could quickly become overloaded if, through a lack of certainty, too many cases came to trial instead of being settled out of court. Although that may not be such a concern in Bermuda, it seems to me obvious that in principle predictability is equally desirable here.

Although the jurisdiction to award interest here is discretionary, a discretion is nevertheless something which is given to be used on proper occasions. Moreover, to the extent that it reflects the position in England under the 1934 Act, section 10 does so as it stood after it had

been amended by section 22 of the Administration of Justice Act 1969. By that, I mean that although couched in discretionary terms, section 10 explicitly contemplates that interest may be awarded on damages for personal injury or death..."

131. Hull J continued [pages 12-13]:

"*Subject, but subject only, to giving consideration to the effect of the difference, between Bermuda and England, as to the rate of interest that may be awarded, I see no reason why the principles in England governing the award of interest on the heads of damages in issue in this case should not also apply here. In particular I see no reason not to follow the guideline established in England that the rate of interest to be awarded should be such as to compensate the plaintiff for the loss of the use of the money prior to trial. The date on which the cause of action arose (in relation to special damages) and the date of service of the writ (in the case of damages for pain and suffering and loss of amenities) are also in my view plainly convenient and logical reference points in calculating that interest.*

In England, however, because the courts have a discretion as to what rate of interest to award, the date of service can be used directly as a starting point for the accrual of interest, so as to produce a result which takes into account the relationship between the award of damages calculated at the date of trial (which reflect inflation) and the fact that interest should be by way of compensation for the temporary loss of use of the money.

Section 10 gives the courts discretion, within overall limits, to determine the period for which interest as damages may be awarded and discretion as to whether to allow such interest on all or only on part of the damages. Apart from the two differences I have already referred to, it is as I say in the same terms as the English provisions, from which it is derived. Beyond fixing the overall limits of the period for which interest can be allowed and the rate of interest, it gives no guidelines for the exercise of the discretion.

I think there are three obvious inferences to be drawn. One is that except insofar as it gives discretion in all cases, and fixes the rate of interest, section 10 of the Interest and Credit Charges (Regulations) Act 1975 is not concerned to re-state the common law governing the award of damages, or interest as damages in tort. It follows that except in those respects, the

English case law on the English statutory provisions is apt here, and in my view should be followed.

The third thing, however, is that although it is appropriate to follow English principles, and for that purpose to use the date on which the cause of action arose and the date of service of the writ as logical, convenient points of reference, it is in my view necessary to adopt a somewhat different method of computing interest to allow for the fact that the rate in section 10 is a specific rate. (In case my point here is not clear, I should say in parenthesis that, taking into account the considerations I have mentioned, I do not think that the intention of the Legislature has to be taken as being that the courts must treat seven percent per annum, from the date on which the cause of action arose in the case of special damages and from the date of service of the writ in the case of general damages, for pain and suffering and loss of amenities, as being the correct rate of interest to produce results that will compensate the plaintiff for temporarily foregoing the use of the amounts of those damages.)

...

In relation to the damages for pain and suffering and for loss of amenities, the approach I propose to adopt is to allow interest, at the statutory rate of seven per centum per annum, for the period extending half way back from the date of judgment to the date of service of the writ, i.e. for the period from 9th February, 1988 until the date of judgment, i.e. 23rd May, 1988. The effect of that is to produce the same amount that a rate of interest of three and a half percent per annum on those damages, calculated from the date of service, would have yielded to the plaintiff. That is rather higher than would be awarded in England, but it is a conventional, rough and ready figure, and in the circumstances of Bermuda, and having regard to the statutory bench mark of seven per centum per annum, I consider it to be an appropriate award.

In relation to the special damages, I propose to allow interest at the statutory rate for the period extending half way back from the date of judgment to the date on which the cause of action arose, i.e. from 11th July, 1987 until 23rd May, 1988. The effect is the same as allowing interest at one half of the statutory rate for the whole period from the date on which the cause of action arose.

132. I agree with the analysis outlined in *Kelland v Lamer* and Hull J's well-reasoned interpretation of section 10. Regrettably, it appears that Hull J's judgment was not placed before Ground CJ in *Correia v Dublin* or Kawaley J in *Fagundo v Island Cleaning* as no reference to *Kelland v Lamer* was made in either of these more recent rulings. Instead, the previous approach which was reportedly led by the Supreme Court's decision in *Van Gallen v. Russell* was followed and carried into modern day practice, leap-frogging *Kelland v Lamer*. It begs to question how the Courts in *Correia v Dublin* and *Fagundo v Island Cleaning* might have otherwise approached the question on the Courts powers to reduce the statutory interest rate in awarding interest on damages in personal injury claims.

133. I am now bound to consider afresh whether the Court is empowered with a discretion to award interest on damages at varying rates. As I have observed herein, the notion of such a discretionary power is rooted in Lord Denning's straightforward interpretation in *Jefford v Gee* of an English High Court's powers under section 22(1B) of the Administration of Justice Act 1969. Section 22(1B) is differently worded from section 10 of the Interest and Credit Charges (Regulation) Act 1975. Section 10 plainly requires this Court to impose interest at the full statutory rate if the Court thinks it fit to grant interest in the first instance. Where the Court does think it fit to order interest on damages, the Court must then find that any such interest must be awarded at the statutory rate of 3.5% per annum. The Court will then go on to decide whether interest at 3.5% per annum should be awarded for the whole or any part of the award of damages.

The Bermuda Law Approach to Awarding Interest on General Damages

134. Notwithstanding the clear differences between the Bermuda and English provisions, there is no real meaningful disparity between the scope of discretionary powers given to the English Courts under section 22(1B) and to the Bermuda Courts under section 10. Both statutory regimes require the Court to exercise a wide discretionary power in deciding on the extent to which interest will be awarded.

135. Respectfully departing from previous judicial statements in *Correia v Dublin* and *Fagundo v Island Cleaning* on the Bermuda law approach to interest, I would simply describe the general rule in saying that the Court will first determine whether it thinks it fit to award interest and if so, whether interest at the full statutory rate will be awarded on all or part of the damages between the period when the cause of action arose and the date on which judgment is delivered.

136. Volume 1 of Kemp & Kemp on Quantum of Damages [para 26-006] (R.114: February 2010) provides some assistance as to how the Court may exercise its discretion in awarding interests on damages:

"*GENERAL GUIDELINES WHEN AWARDING INTEREST ON DAMAGES*
The court shall award interest (unless there are special reasons to the contrary) but the amount of interest awarded is discretionary. There are three parts to the discretion:

(1) which heads of damages will attract interest?
(2) for what period shall the interest accrue?
(3) *what rate of interest shall be awarded?*"

137. Question (1) may be resolved with minimal difficulty since it is most largely determinable by whether the damages in question are referable to a past loss or a future loss. Of course, interest ought not to accrue in respect of any future loss because damages for future loss cannot be properly said to be owed. The point of interest awards is to compensate the Plaintiff for the absence of monies that should have already been in the Plaintiff's possession.

138. I have made a determination in respect of question (3) by applying a plain and literal interpretation of section 10 of the Interest and Credit Charges (Regulation) Act 1975. The rate of interest shall be awarded at the statutory rate. My reasoning on this point has been expounded further above.

139. Thus, I am left with question (2) which is where the Court's discretionary powers lay under section 10. The relevant period in respect of general damages must be considered separately

from special damages. Further, the various heads of special damages must be considered separately from one another.

140. I have not seen any reported Bermuda case law recording controversy on the application of the longstanding English legal principle that interest on general damages will ordinarily be granted and that it will commence from the point of service of the writ (See *Wright v British Railways Board* [1983] 2 AC 773 and *Pickett v British Rail Engineering Ltd.* [1980] A.C. 136 overruling *Cookson v Knowles* [1979] A.C. 556 on its findings that damages do not accrue on general damages). Lord Diplock in *Wright* reasoned that non-economic loss in personal injury cases is not sustained *co instanto* when the accident takes place. He held: "*The loss is not capable of being quantified then and, when injuries are serious and stabilisation of medical condition slow, some considerable time may have to elapse before it is possible to make an informed estimate of the amount that ought to be awarded. Furthermore, a person can hardly be said to be "wrongfully withholding" a sum of money owing to another at a time when the amount, if any, that will ultimately be found to have been owing to another at a time when the amount, if any, that will ultimately be found to have been owing remains unknown and no demand has yet been made for it...*" This reasoning has been consistently accepted by the Bermuda Courts and is the clear standard approach to be followed.

141. I have found, in agreement with the reasoning of Hull J in *Kelland v Lamer*, that section 10 does not confer on the Court a discretion to impose an interest rate lower than the statutory rate. So, the more difficult question for my determination is whether it is equitable to further abridge the applicable period to produce a result consistent with the previous decisions of this Court's jurisdiction in *Van Gallen v. Russell; Correia v Dublin* [page 4] and *Fagundo v Island Cleaning Services* [para 79] where a reduced interest rate of 2% was employed (at which time the statutory rate was 7%). The fixture of interest on general damages at the rate of 2% was lifted from the English case law approach: *Jefford v Gee* which was later cited in *Birkett v Hayes* where Lord Justice Watkins held in his concurring judgment [para 52]: "*For the reasons provided by Lord Denning, M.R. and for those just given by Lord Justice Eveleigh, I agree that (1) the appeal should be allowed so that the rate of interest awarded to the plaintiff on general*

damages will be 2 per cent, and (2) in future all awards of general damages should bear the like rate of interest".

142. Lord Diplock sitting in the House of Lords in *Cookson v Knowles* cited Lord Emslie in *Smith v Middleton* 1972 S.C. 30 as saying the discretion to award damages must be exercised judicially and not arbitrarily... "*for otherwise the rights of parties to litigation would become dependent upon judicial whim...*". Thereafter, in *Wright* Lord Diplock remarked [paras 5]:

"*My Lords, claims for damages in respect of personal injuries constitute a high proportion of civil actions that are started in the courts in this country. If all of them proceeded to trial the administration of civil justice would break down; what prevents this is that a high proportion of them are settled before they reach the expensive and time-consuming stage of trial, and an even higher proportion of claims, particularly the less serious ones, are settled before the stage is reached of issuing and serving a writ. This is only possible if there is some reasonable degree of predictability about the sum of money that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability.*"

143. Predictability and consistency permeate a healthy judicial anatomy. Evidently, a uniformed approach to the calculation of interest awards is particularly key to larger Court systems where the volume of personal injury claims has the potential to exhaust a roster. Although the Courts in Bermuda are not nearly as inundated with personal injury claims, this Court bears the responsibility of employing all reasonable efforts to the keep interest award in this case within the general ambit of previous awards. On this reasoning, I am bound to ensure that this Court's award of interest safeguards the valued principle that justice is to be meted out to all litigants of comparable cases in an even-handed manner.

144. On my reading of section 10 the starting point is that plaintiffs will receive interest at the statutory rate, where the Court sees fit to award interest. So, absent any special reasons, interest shall be award on general damages at the statutory rate. The next step is for the Court to consider the period for which interest shall run. In this case, as will generally be the position in respect of general damages, interest shall be awarded from the date of service of the writ. Moreover, I see fit to further reduce the period for which interest shall accrue so to reflect the

Plaintiff's age and the fact that a portion of the general damages award is aimed to compensate for future pain and suffering and future loss of amenity. In *Jefford v Gee* Lord Denning M.R. described the non-economic loss for which general damages are recoverable as being a loss which is "*indefinitely spread into the future*". As it is hardly possible to attain precision in formulating a calculation which recognizes the fullness of each of these factors; the Courts have long had recourse to a rough and ready approach.

The Effect of the Plaintiff's Delay in Prosecuting the Action through to Trial

145. Mr. Pachai forcefully argued that the coverage period for both interest on general and special damages should be significantly shortened so not to penalize the Defendant for the Plaintiff's overall delay in prosecuting her claim to an end. Mr. Pachai's argument was that it would be inequitable to require the Defendant to pay interest on the entire sum and period for which damages is to be awarded. He submitted that the Defendant ought not to be scrutinized for any of its own inaction because it is not the responsibility of the Defendant to get on with the Plaintiff's case. Thus the years of case inactivity, on Mr. Pachai's submission, ought not to give rise to accruing interest on general or special damages.

146. It is necessary to examine the procedural history of the file following the service of the Generally Endorsed Writ of Summons ("the writ") on 23 March 2009. A Memorandum of Appearance was filed on 3 April 2009 and a Statement of Claim was filed on 21 April 2009. The first occurrence of delay transpired when the Defence was filed approximately 9 months later on 3 February 2010. Thereafter, the matter slipped into a dormant state for a period exceeding four years until the Plaintiff filed a Notice of Intention to Proceed on 29 August 2014. The Plaintiff subsequently filed a summons for directions which the then Registrar, Ms. Charlene Scott, dated 9 October 2014. This summons was heard before Kawaley CJ on 30 October 2014 and standard pre-trial directions for the inspection of documents and the exchange of witness statements within a 21 day period were made. Kawaley CJ also granted each party leave to call two expert witnesses and directed for the matter to be set down for a 3 day hearing (on liability and quantum) within 28 days of the 30 October 2014 Order.

147. Neither party appears to have complied with any of the trial directions made by Kawaley CJ in his Order of 30 October 2014. It appears from the pleadings bundle before me that no

witness statements were exchanged. Further, no expert reports were exchanged in 2014 or 2015, save possibly Dr. Gaugain's and Dr. Anandagoda's earlier reports of 2008 and 2011.

148. The Defendant, having been previously unrepresented by external Counsel, appointed Mr. Pachai of Wakefield Quin Ltd as its attorney of record some 21 months later by a Notice of Change of Attorney filed on 5 July 2016. No further action was taken by either party for a near three-year period until the Defendant's Counsel filed a summons application dated 6 March 2019 for leave to file an Amended Defence admitting liability and seeking directions for the assessment of damages. This is the summons application which was heard before the Registrar, Ms. Wheatley, on 4 April 2019.

149. A couple of months later on 15 July 2019 the Defendant filed a summons application for an Unless Order compelling the Plaintiff to comply with the Registrar's direction for her to file an affidavit in support of her claims for damages. The Plaintiff's evidence was approximately 2 ½ months delayed by this point. On 25 July 2019 I made an Unless Order requiring the Plaintiff to file her evidence by 6 August 2019. The Plaintiff accordingly complied on 6 August 2019. Ironically, it then took the Defendant over 4 months to file its reply evidence which was filed on 19 December 2019. On 6 March 2020 the Defendant then wrote in to the Court advising on agreed trial dates for September and October 2020 which brings me to the present proceedings.

150. Thus, the largest bouts of delay are attributable to the following factors:

(i) It took the Plaintiff nearly 7 years to file the Writ from after the June 2001 fall;

(ii) It took the Defendant nearly 9 months to file a Defence;

(iii) The litigation of this matter was inactive for 4 years following the filing of the Defence; and

(iv) No action was taken by either side for approximately 4 years and 4 months following Kawaley CJ's 30 October 2014 pre-trial directions.

151. Apart from the Defendant's15 July 2019 summons application for an Unless Order which relates to an overall 3½ month delay period occasioned by the Plaintiff between 26 April 2019

and 6 August 2019 (which was outmatched by the Defendant's 4 month delay in filing evidence in reply), I have not seen any documentation which might suggest that the dormant periods throughout these proceedings were a source of frustration or complaint by either party. After all, had it been the case that the Plaintiff was authoring unreasonable delays, one would expect a Defendant law firm to be fully cognisant of its ability to file a strike-out application for abuse of process or on other grounds for dismissal arising out of a want of prosecution of the claim.

152. The only reasonable inference available to me to make, given the absence of other applications or correspondence by the Defendant for the Plaintiff to expedite matters, is that the parties were actively seeking (or inactively hoping) to resolve the case outside of the Court's walls during the extended periods when the case slept. Such an inference could reasonably be drawn from the Defendant's belated admission of liability following the second 4 year bout of case dormancy. For these reasons, I am unable to find that the Plaintiff has been responsible for unjustifiable delays.

153. Notwithstanding, I accept as a matter of legal principle that unjustifiable delay by a plaintiff is a factor for the Court to consider in exercising its discretion on the subject of interest. In *Birkett v Hayes* [1982] 1 WLR 816, Lord Justice Eveleigh (sitting in the English Court of Appeal with Lord Justice Watkins and presided by Lord Denning M.R.) said:

"There have been various statements giving reasons for the award of interest. In many we find a reference to the defendant wrongfully withholding the money from the plaintiff. Thus in London Chatham & Dover Railway Company v. South Eastern Railway Company (1896) Appeal Cases 429 Lord Herschel, L.C. said at page 437: "I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the money due to him, the party who is wrongfully withholding that money from the other ought not in justice to benefit by having the money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use". However, I do not think it is right in determining the rate of interest to proceed upon the basis that a defendant should be penalised. Indeed, I do not understand Lord Herschel to be suggesting this. There are many cases where the plaintiff does not wish to have his damages assessed as quickly as possible. The medical reports may be uncertain.

His prospect of employment may be difficult to determine. There are a number of reasons where neither side is anxious to proceed expeditiously. On the other hand, it is fair to say that the plaintiff has not had the money, while the defendant has had the advantage of not having been compelled to pay. It seems to me that we should seek to discover a rate of interest which will compensate the plaintiff in recognition of the fact that a sum of money in respect of general damages should be considered, over the relevant period, as existing for his benefit."

154. Widespread judicial opinion weighs in favour of reducing interest payable on damages where the Plaintiff is shown to be responsible for unjustifiable delay. Lord Justice Watkins made the following *obiter* remarks in relation to the question of interest on general damages where there has been unjustifiable delay caused by a plaintiff:

"*Usually this period will run from the date of the writ to the date of trial, but the court may in its discretion abridge this period when it thinks it is just so to do. Far too often there is unjustifiable delay in bringing an action to trial. It is, in my view, wrong that interest should run during a time which can properly be called unjustifiable delay after the date of the writ. During that time the plaintiff will have been kept out of the sum awarded to him by his own fault. The fact that the defendants have had the use of the sum during that time is no good reason for excusing that fault and allowing interest to run during that time.*"

155. (See also <u>*Spittle v Bunney*</u> [1988] 3 ALL ER 1031 and the twentieth edition of McGregor on Damages [paras 19-097 to 19-098] where the authors remarked that "*the commonest type of claim where interest has been reduced* [for delay] *is…for personal injury*" claims.

156. Moving beyond the question of unjustifiable delay caused by the Plaintiff, it seems to me that a Defendant ought not to be penalised in interest for periods of case inactivity which may have resulted from the parties' mutual silence or efforts to settle the matter outside of Court. I would simply describe this as 'extended delay' which in this case is to be distinguished from unjustifiable delay. Equally, the Plaintiff ought not to be made to forego interest altogether in respect of such a period. I would therefore find that a Plaintiff should only be able to recover

half of the interest which would have otherwise been awarded for the unexplained periods of case dormancy.

157. Where it might be suggested that a Plaintiff be deprived of an interest award altogether for such periods, I would highlight that the purpose of imposing interest on general damages is to compensate the Plaintiff for the period of loss of capital and the foregoing of its use during the time that the money was owed to the Plaintiff. In assessing whether the Defendant has been prejudiced by any excessive prolongation of the litigation, it must be remembered that the longer that the litigation continues without final judgment (regardless as to which party has authored the delay), the longer that the Defendant has had the benefit of that capital sum in its possession, thus the more time for interest to accrue to the Defendant's benefit. This simply means that the tortfeasor has held that capital sum with all of its accompanying benefits throughout the period when it was owed to the Plaintiff.

Decision on Interest on General Damages

158. Approximately 11 ½ years have lapsed since 23 March 2009 when the writ was served and 19 October 2020 when this matter finally came to trial. This case was dormant for over 8 of those years. In my judgment, the Plaintiff in this case should be entitled to recover half of that 8 year period because there is no evidence before me from which I can infer anything other than the fact that the dormant periods resulted from a mutual position taken by the parties to press pause on these Court proceedings. Thus, the Plaintiff cannot fairly recover interest for a period exceeding 7 ½ years from 23 March 2009.

159. From this 7 ½ year period I will further reduce the interest period to avoid, as best as can be done in these circumstances, awarding interest on the portion of general damages which is intended to compensate the Plaintiff for future pain and suffering and future loss of amenity. The Plaintiff was 42 years of age when the accident occurred. That was 20 years ago as she is now 62 years old and is entitled to damages in respect of future loss using a multiplier of 18.17 for life expectancy. This would bring her to the age of 80.17. The difference between 80.17 years and 42 years is 38.17 years. Thus the award of general damages applies to a total period

of 38.17 years, 20 years of which represents pass lost. It then follows that approximately 52.4% of the Plaintiff's general damages is attributable to pass lost.

160. For all of these reasons, the Plaintiff shall be awarded simple interest at the statutory rate on the $80,000.00 award for general damages. This shall apply to 52.4% of the 7 ½ year entire period commencing on 23 March 2009. The statutory rate between 23 March 2009 and 1 June 2017 was 7% and shall be calculated as such. The statutory rate has been 3.5% since 2 June 2017 and shall be calculated accordingly.

Decision on Interest on Special Damages

161. For special damages, interest will normally accrue from the date on which the cause of action first arose. In this case, that occurred on 21 June 2001. However, it took the Plaintiff nearly 7 years to file the writ which was first dated 26 March 2008. Having regard to the delayed filing of the writ, which will need to be balanced against the Plaintiff's gradual development of the chronic pain syndrome, I consider that fairness requires the Plaintiff to recover interest on special damages commencing from 1 July 2005.

162. The period of loss between 1 July 2005 and the date of this judgment is 184.5 months. This is equal to 15.38 years. A further reduction of 4 years from this period is necessary in order to equitably apportion the 8 year case dormancy periods between the parties. That result is 11.38 years. Fairness then demands that I consider the general scope of past awards of interest so to attain at least some degree of judicial consistency. Accordingly, I see fit to reduce this period of 11.38 years by a further period 2. 38 years resulting in a 9 year term for which interest may accrue on special damages for past loss.

Decision on Interest on Award for Loss of Earnings

163. Interest at the statutory rate of 7 % (as it then was) shall accrue on the $25,644.05 award in respect of past earnings. That interest shall accrue for a 9 year period commencing on 1 July 2005. No sum of interest shall be made to accrue on the award of $4,708.40 for future earnings.

Decision on Interest on Award for Loss of Pension Contribution

164. Interest at the statutory rate of 7 % (as it then was) shall accrue on the award of $39,729.30 for the Plaintiff's past loss of pension contributions. That interest shall accrue for a 9 year period commencing on 1 July 2005. No sum of interest shall accrue on the award of $8,086.98 for future loss of pension contributions.

Decision on Interest on Award for Future Expenses and Costs of Care

165. No sum of interest shall accrue on the award of $36,521.70 for the costs of future co-payments for the Plaintiff's medical care. No sum of interest shall accrue on the award of $32,706.00 for the costs of future massage therapy sessions. No sum of interest shall accrue on the award of $32,706.00 for the costs of future cleaning services. No sum of interest shall accrue on the award of $24,000.00 for the costs of future gym membership.

Decision on Interest on Award for Out of Pocket Expenses

166. Interest at the statutory rate of 7 % (as it then was) shall accrue on the award of $13,393.66 for the Plaintiff's out of pocket expenses which comprised of the past co-payments on prescription medications and medical visits. That interest shall accrue for a 9 year period commencing on 1 July 2005.

Decision on Interest on Award for Costs of Insurance Premiums

167. Interest at the statutory rate of 7 % (as it then was) shall accrue on the award of $142,871.40 for the Plaintiff's past loss for health insurance premiums. That interest shall accrue for a 9 year period commencing on 1 July 2005. No sum of interest shall accrue on the award of $50,685.33 for the Plaintiff's future loss for health insurance premiums.

Decision on Interest on Award for Costs of Adjustments to Property and Transport

168. Interest at the statutory rate of 7 % (as it then was) shall accrue on the award of $10,000.00. However, as these costs result from both past and future pain and suffering, I would further reduce the period during which interest shall accrue having regard to the fact that 52.4% of the 9 year period commencing on 1 July 2005 represents past loss. That calculation results in a

4.72 year period, which I see fit to round up to 5 years. Accordingly, interest at the then statutory rate of 7% shall accrue on the $10,000.00 award for property adjustments for a total period of 5 years commencing on 1 July 2005. Applying the same reasoning to the $500.00 award for the costs of adaptive car equipment, I grant interest using the then statutory rate of 7% for a total period of 5 years commencing on 1 July 2005.

Decision on Interest on Award for Costs of Future Medications

169. No interest shall accrue on the $4,396.05 award under this head of loss.

CONCLUSION:

170. The total sum in damages awarded is $505,948.87 plus interest as outlined herein:

171. I have awarded the Plaintiff the full sum of $80,000.00 in **general damages** and simple interest at the statutory rate. This shall apply to 52.4% of the 7 ½ year entire period commencing on 23 March 2009. The statutory rate between 23 March 2009 and 1 June 2017 was 7% and shall be calculated as such. The statutory rate has been 3.5% since 2 June 2017 and shall be calculated at that lower rate where the relevant period post-dates 2 June 2017.

172. I have awarded the Plaintiff the sum of $25,644.05 for **loss of past earnings**. Interest at the statutory rate of 7 % (as it then was) shall accrue for a 9 year period commencing on 1 July 2005. No sum of interest shall be made to accrue on the award of $4,708.40 for **future earnings**. I have awarded the Plaintiff the sum of $39,729.30 for **loss of past pension contributions**. Interest at the statutory rate of 7% (as it then was) shall accrue for a 9 year period commencing on 1 July 2005. No sum of interest shall accrue on the award of $8,086.98 for **future loss of pension contributions**. I have awarded the Plaintiff the sum of $36,521.70 for the **future loss for co-payments for her medical care**. No sum of interest shall accrue on this award. I have awarded the Plaintiff the sum of $32,706.00 for **future loss for massage therapy sessions**. No sum of interest shall accrue on this award. I have awarded the Plaintiff the sum of $32,706.00 for **the future loss for the costs of cleaning services**. No sum of interest shall accrue on this award. I have awarded the Plaintiff the sum of $24,000.00 for the **future**

costs of gym membership. No sum of interest shall accrue on this award. I have awarded the Plaintiff the sum of $13,393.66 **for the out of pocket expenses comprising of past co-payments on prescription medications and medical visits**. Interest at the statutory rate of 7 % (as it then was) shall accrue for a 9 year period commencing on 1 July 2005. I have awarded the Plaintiff the sum of $142,871.40 for the Plaintiff's **past loss for health insurance premiums**. Interest at the statutory rate of 7 % (as it then was) shall accrue for a 9 year period commencing on 1 July 2005. I have awarded the Plaintiff the sum of $50,685.33 for the Plaintiff's **future loss for health insurance premiums**. No sum of interest shall accrue on this award. I have awarded the Plaintiff the sum of $10,000.00 for the **costs of adjustments to property and transport**. Interest at the statutory rate of 7 % (as it then was) shall accrue for a total period of 5 years commencing on 1 July 2005. I have awarded the Plaintiff the sum of $500.00 for the **costs of adaptive car equipment under the transport head of loss**. Interest at the statutory rate of 7 % (as it then was) shall accrue for a total period of 5 years commencing on 1 July 2005. I have awarded the Plaintiff the sum of $4,396.05 for the costs of future medications. No interest shall accrue on this award.

173. Pursuant to section 9 of the Interest and Credit Charges (Regulation) Act 1975, interest on shall accrue at the statutory rate of 3.5% per annum commencing from the date of this judgment until the judgment is satisfied.

174. Unless either party files a Form 31TC to be heard on costs within 14 days of the date of this Judgment, costs on a standard basis shall follow the event in favour of the Plaintiff, to be taxed by the Registrar if not agreed.

Thursday 19 November 2020

THE SEAL OF THE SUPREME COURT OF BERMUDA

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT