In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: 139

ARGUS INSURANCE COMPANY LTD

Plaintiff

-v-

SOMERS ISLES INSURANCE COMPANY LTD

First Defendant

-and-

HAROLD TALBOT

Second Defendant

-and-

BF&M LTD.

Third Defendant

-and-

KIRKLAND J. WILLIAMS

Fourth Defendant

JUDGMENT

(In Court)[1]

[1] The Judgment was circulated without a hearing.

Date of hearing: November 3, 2014
Date of Judgment: November 25, 2014

Mrs. Lauren Sadler-Best, Trott & Duncan Limited, for the 1st Defendant
Mr. Jai Pachai, Wakefield Quin Ltd, for the 2nd Defendant

Introductory

1. The Plaintiff, which did not appear at trial, issued an Interpleader Originating Summons issued on April 7, 2014 supported by the Affidavit of John Cooper, a consultant to Williams Barristers and Attorneys. The Cooper Affidavit explained the background to the present proceedings, which was not contentious between the parties appearing at trial.

2. The Plaintiff issued a comprehensive motor insurance motor policy to its insured, a company which owned a truck involved in an accident on July 7, 2012 which caused the Second Defendant ("Mr. Talbot") serious leg injuries and seriously damaging the car owned by the Fourth Defendant. Third party liabilities under the Plaintiff's policy were limited to $1 million. On February 25, 2014, the driver of the truck insured by the Plaintiff was convicted of causing actual bodily harm to Mr. Talbot by reckless driving.

3. The Plaintiff has undertaken to pay in accordance with this Court's Order herein an amount equal to the limit of its third party liability under the motor policy, namely $1 million. It has interpleaded these monies because of a dispute between Mr. Talbot and the 1st Defendant ("Somers Isles"), as to the priority in which those payments ought properly to be made. The subrogation claim of Somers Isles, Mr. Talbot's medical insurer under a group health policy issued to his employer Princess Properties, and Mr. Talbot's own claim against the Plaintiff exceeds $1 million.

4. The issues this Court was asked to determine were (1) the quantum of Mr. Talbot's personal injuries claim against the Plaintiff, which made a commercial decision not to contest that claim, and (2) whether Somers Isles' subrogation claim was entitled to be paid in priority to Mr. Talbot's own claim against the Plaintiff. The latter question involved questions of legal principle while the former question involved questions of both law and evidence.

Findings: quantum of Mr. Talbot's claim

Loss of future earnings

5. I accept Mr. Talbot's evidence that he would have worked until 70 years of age as a houseman and that the appropriate annual earnings figure to be multiplied (the multiplicand) is $26,533.97. I also accept Mr. Pachai's submission that the established Bermudian practice has been to use a multiplier based upon a discount rate of 4-5%. Counsel referred in this regard to two local cases.

6. Firstly, in *Crockwell-v-Haley* [1993] Bda LR 7 at page 15, da Costa JA stated:

> "*The "Diplock approach" has been consistently followed in assessing damages in Bermuda. As I have observed it has its critics. It is not a perfect system but then it operates in a realm in which perfection must remain beyond the wit of man. On the whole however it produces results that are substantially just. There does not appear to be any valid reason why Bermuda should seek to depart from it a system of assessment that has become well established here.*"

7. Counsel expressly referred to the Judgment of Telford Georges JA where he stated (at page 33):

> "*Whatever its imperfections, the "Diplock approach" has been consistently applied in Bermuda in assessing damages. It was the view of Lord Oliver that that approach had "been found over the years to produce a substantially just result." By this I understand a result which over a broad range has been accepted as satisfactory compensation by litigants. I would not, therefore, seek to tinker with it on the basis of lack of elegance or logic.*"

8. The relevant principles were those articulated by Lord Diplock in *Cookson-v-Knowles* [1979] AC 556 at 571:

> "*Quite apart from the prospects of future inflation, the assessment of damages in fatal accidents can at best be only rough and ready because of the conjectural nature of so many of the other assumptions upon which it has to be based. The conventional method of calculating it has been to apply what is found upon the evidence to be a sum representing "the dependency", a multiplier representing what the judge declared to be the appropriate number of years purchase. In times of stable currency the multipliers that were used by judges were appropriate to interest rates of 4 percent to 5 per-cent whether the judges using them were*

conscious of this or not. For the reasons I have given I adhere to the opinion Lord Pearson and I had previously expressed which was applied by the Court of Appeal in Young v Percival [1975] 1WLR.27-29, that the likelihood of continuing inflation after the date of trial should not affect either the figure for the dependency or the multiplier used. Inflation is taken care of in a rough and ready way by the higher rates of interest obtainable as one of the consequences of it and no other practical basis of calculation has been suggested that is capable of dealing with so conjectural a factor with greater precision."

9. The leading authority on this topic before legislative changes in England and Wales which changed the common law was *Wells-v-Wells* [1998] 1 AC 345. This established the practice of assessing the present day value of future earnings by reference to the income which would be generated by notionally investing the lump sum in index-linked government stock ("ILGS"), the average rate of returns on which were then published in *Kemp and Kemp on Damages*. Simmons AJ (as she then was) in a case where expert evidence was adduced and both *Wells –v-Wells* and *Crockwell-v-Haley* were cited applied a 4% discount rate in *Jennings-v-Ball* [2001] Bda LR 82.

10. In *Best-v-Jensen and The Market Place Limited* [2012] Bda LR 53, where Mr. Pachai appeared for the Defendants and relied upon *Jennings-v-Ball*, with *Simon-v-Helmot* not being cited in argument[2], I held:

"*59. Accepting the Defendants' submission that the discount rate should be 4% (the rate utilized in Jennings-v-Ball [2001] Bda LR 82 at page 12) and noting that the Plaintiff is 47 years old at trial, the appropriate multiplier for this annual future expense is 12.27…*"

11. Meanwhile on March 7, 2012, the Judicial Committee of the Privy Council had decided a case which Mr. Pachai submitted in the present case should now be followed. In *Simon-v-Helmot* [2012] UKPC 5; 126 BMLR 73 (Guernsey), the Judicial Committee of the Privy Council upheld the approach adopted by the Guernsey Court of Appeal (Sumption JA, as he then was) of adopting a locally relevant discount rate instead of mechanically following the rate used in England and Wales. Based on expert evidence adduced at trial which lasted six weeks and resulted in an award of more than £9.3 million, an earnings related discount rate of -1.5% (minus 1.5%) was approved. He rightly submitted that the Bermudian position is similar to Guernsey in that:

[2] *Best* was argued at trial on July 25-26, 2012 and judgment delivered on August 28, 2012[2]. The Privy Council decision and/or its potential application to Bermuda only appears to have come to the attention of local practitioners long since then.

(a) lump sum awards are still required because there is no statutory provision for periodical payments as in England and Wales since 2003;

(b) there was no statutory basis for fixing the discount rate from time to time, as in England and Wales where the rate was last fixed at 2.5% in 2001;

(c) the value of awards is higher in the hands of claimants because of the more favourable tax position;

(d) even in the absence of expert evidence it is a notorious fact that over the last five or so years interest rates have fallen so dramatically that there is no commercial rationale for using a discount rate which was considered appropriate when the return that could be earned by investing a lump sum award was far greater.

12. Counsel invited the Court to adopt a rate of 0%, without requiring the claimant in the present case to incur the expense of adducing expert evidence on an application which did not involve massive sums and which was not an opposed one. Mrs. Sadler-Best submitted that departing from the established practice without expert evidence would be ill-advised. Moreover, the difference between applying the 0% to 2.5 discount rate range contended for by Mr. Pachai was approximately $76,000 in monetary terms, far from a trifling sum.

13. The governing principles for assessing damages including future loss of earnings are determined by the common law. As Lord Hope opined (in relation to Guernsey in terms which apply with equal force to Bermuda) in *Simon-v-Helmot* [2012] UKPC 5:

> "*26. Statutes of the United Kingdom Parliament may relate to the bailiwick, either because they are expressed to apply there directly or upon the making of a subsequent Order in Council or ministerial order: Jersey Fishermen's Association Ltd v States [2007] UKPC 30, [2007] GLR 36, para 1. But the Damages Act 1996 is not one of them, and it has no equivalent in the laws of Guernsey. Guernsey law and English law both accept that the injured party is entitled to be provided with a sum of money which will put him in the same position as if he had not sustained the wrong for which he is to be compensated. But there is no provision in Guernsey for the award of damages for personal injury other than by way of a lump sum. And there is no statutory discount rate. Regard may be had to the common law of England for guidance as to how to adjust the present value of a lump sum to allow for the fact that it is to be paid now to cover losses that will be incurred in the future. The common law which is relevant is that which was analysed and developed in Wells v Wells. Significant changes in the yields on ILGS would justify adopting a different rate from that which was*

adopted in that case. But decisions about the effect of the 1996 Act or its application have no bearing on the way the lump sum is to be calculated according to Guernsey law.

27. It is common ground that there are other factual differences too. They were listed by the Court of Appeal in para 14 of its judgment. First, the rate of inflation within the bailiwick has been fairly consistently about 0.5% higher than in the UK RPI which is tracked by ILGS. This state of affairs can be expected to continue. Second, income tax rates are lower in Guernsey than those that are payable by persons ordinarily resident in the UK. This means that the net yield of ILGS to a Guernsey resident will be different from that which will be enjoyed by a person holding the same securities who is taxable in the UK. Third, the statistical information which is available to track the movement of prices and earnings is more limited for Guernsey than it is for the UK. For that reason at least, it is less reliable. These factual differences are all capable of being accommodated by adjustments to the calculation of the award that would be appropriate if this case was being decided in England."

14. Ascertaining the appropriate discount rate for lump sum payments was treated by the Judicial Committee as a matter of fact to be determined based upon evidence. Lord Hope went on to observe as follows:

"*49. Sumption JA said in the Court of Appeal that the Lord Chancellor's rate was irrelevant in Guernsey: para 20. He also said that it had no current evidential basis: para 21. I would prefer to adopt the second alternative. The Jurats were well aware that they were not required by any Guernsey statute to apply the rate fixed by the Lord Chancellor. That rate might have had something to offer if the Lord Chancellor had adopted the same approach as the House of Lords did in Wells v Wells. As it is, the evidential value of his determination was wholly undermined not just by the passage of time but also by the fact that, as the Jurats themselves appreciated, the Lord Chancellor took account of things that played no part in the analysis in Wells v Wells at all. He had consulted widely and he took account of the experience of the Court of Protection and, as Mr Daykin said in his evidence, of the consequences for the Ministry of Defence and the National Health Service. It is true that the courts in England and Wales have not given any encouragement to the idea that they might be willing to take a fresh look at the issue. But that is because of the statutory context in which the determination was made.*

50. The proper course, in all the circumstances, would have been for the Jurats to disregard the Lord Chancellor's rate altogether. The effect of doing this would have been to start with the current Guernsey net return in ILGS of 1.13%, reduce it by 0.5% for the higher rate of inflation to

0.63% and then round it down to 0.5%. The Court of Appeal said that this was what they should have done, and that 0.5% was the figure that they should have arrived at for the non-earnings related elements of the respondent's loss. I agree with that conclusion, although I confess that I have more sympathy with the Jurats' reasoning in the face of the very complex issues that were before them than the Appeal Court's discussion of this issue might suggest."

15. While purporting to rely upon *Simon-v-Helmot*, Mr. Pachai was in substance inviting the Court to depart from the discount rates established by previous cases on a basis which itself departed from the approach taken by the Guernsey Court of Appeal and approved by the Privy Council in the following significant respects:

    (1) rather relying on ILGS as a starting point, the Court was invited to use HSBC deposit rates, without any expert evidence to support a finding that these rates were comparable to the ILGS rates in local terms (after the midday adjournment, he produced an "SLGS TABLE FOR USE ON September 16, 2013", showing an annualised effective rate of 0.01% and a current US Treasury Department chart showing 20 year yields on Treasury Inflation Protected Securities ranging between 0.84% and 0.61%in October 2014) ;

    (2) rather than relying on expert evidence about the present and projected difference between the rate of inflation and projected rate of return on the lump sum payment and the impact of the absence of local tax, the Court was invited to accept counsel's guesstimate based in the former respect on non-expert evidence of the annual rate of inflation in Bermuda over the last ten years.

16. The justification for not adducing expert evidence was that as the multiplicand in the 2nd Defendant's case was so low, the amount in controversy (i.e the difference between using the higher traditional discount rates and the rate proposed by counsel) was comparatively small. I accept that achieving costs efficiencies can often be a justification for deciding certain issues summarily by virtue of the principles embodied in Order1A of the Rules. However, Mr. Pachai relied upon the Courts' historical reticence about reliance on expert evidence in this area, referring to the following passage in Lord Dyson's judgment in *Simon-v-Helmot*:

    "*100. It was well understood that accurate quantification was impossible. The courts were unwilling to admit expert evidence as to future costs based on attempts to predict the economic or social future of the nation. The objections to such evidence were stated, for example, by Lord Oliver in Hodgson v Trapp [1989] AC 807, 833C where he*

drew attention to the 'inherently unscientific' nature of the exercise, saying memorably that 'to assess the probabilities of future political, economic and fiscal policies requires not the services of an actuary or an accountant but those of a prophet." No doubt, he would have excluded economists as well."

17. However, Lord Dyson went on to explain that the need for expert evidence was avoided in England (a) by ignoring the impact of inflation, (b) by the Lord Chancellor fixing the rate at 2.5% in 2001, and (c) by the amendment in 2003 of the Damages Act 1996 to permit periodical payments. As the common law position prior to 2001 in England appertained in Guernsey (as it does in Bermuda), Lord Dyson crucially described the position in England as follows:

> "*106. It is important not to lose sight of the fundamental principle that a claimant is entitled to full compensation and that the duty on the court is to do its best, using all tools that are available to it, to achieve that end. Before the advent of the ILGS, the courts were unwilling to take account of expert evidence about future economic trends because (i) it was too uncertain, (ii) it would be likely to involve the use of contentious expert evidence which itself was undesirable, and (iii) inflation was sufficiently taken care of by assuming that lump sums would be prudently invested. The arrival of ILGS gave the courts a better and more precise way of taking inflation into account and the result was Wells. But as I have said, the solution propounded in Wells was not set in stone pending a decision by the Lord Chancellor. It would require a "marked change in economic circumstances" before the debate could be reopened. The only way in which such a change in circumstances could be proved to a court would be by expert evidence, almost certainly from an economist. In other words, the House of Lords recognised that it might be possible to persuade a court that the principle of full compensation would be better satisfied by adopting a different discount rate from that adopted in Wells.*
>
> *107. That is precisely what was sought to be done in the present case. The claimants attempted to persuade the court that there has been a marked change in economic circumstances and that, if the calculation of the earnings related losses was based on a discount rate derived from the return on ILGS, substantial under compensation would result. To that end, expert evidence was adduced on behalf of Mr Helmot. It seems that no objection was taken to the admission of this evidence. Indeed, the defendant instructed an accountant, an actuary and an economist, but only called the accountant (Mr Gregory). The crucial evidence was that given by two witnesses, Mr Bootle and Mr Daykin. It was not challenged. Lord Hope has already referred to some of it at paras 31 to 35 above. It led the Court of Appeal to assess it as "strong, indeed, unchallenged evidence of both the existence of a gap between price and earnings inflation in Guernsey of the order of 2%, and of the likelihood that over the long term it would persist" (para 44 of the judgment of Sumption JA)…*

118…..Until recently, the rate of return on ILGS has exceeded inflation, so that a discount has been required for the accelerated receipt of the money. But if inflation outpaces the rate of return, then the lump sum needs to be increased to reflect that fact. That is done by increasing the number of years used as the multiplier. The term "negative discount" may be somewhat odd, but the concept is logical and it reflects a correct principle." [emphasis added]

18. There is no rational basis in the Bermudian legal terrain for this Court to be diffident about requiring expert evidence about materially changed economic conditions. Having considered the above legal principles, I determine that it would not be appropriate for this Court to depart, as dramatically as counsel for the claimant suggests, from the longstanding discount rates upon which local litigants have relied and which have been applied by this Court after *Simon-v-Helmot*, without expert evidence from either an economist, actuary or chartered accountant addressing the following issues:

    (1) what is the most appropriate measure in Bermuda for the rate of return on a lump sum conservatively invested (e.g. ILGS/US TIP securities/local bank term deposit rates?);

    (2) what provision if any should be made for a gap between price and earnings inflation;

    (3) within the constraints of a modest retainer and providing a very basic guide, what range of discount percentage appears appropriate for the 2nd Defendant's case.

19. Rather than dispensing with the need for expert evidence altogether, due account can be taken of the fact that the present application is unopposed and that the impact of applying a lower rate will have comparatively modest financial implications by requiring (a) only a very concise and summary form report, and (b) filing of such report (if any) within 35 days. Such evidence must be adduced if the claimant in the present case or any future cases wishes to justify a discount rate reduction as substantial as moving from 4-5% (4% was the rate used in *Best-v-Jensen and The Market Place Limited* [2012] Bda LR 53) to 0%. It appears to me to be wrong in principle to make a major departure from such a settled practice of this Court in an area of the law in which consistency and predictability is desirable in order to promote settlements, without having an appropriate evidential foundation for so doing. I accept Mrs. Sadler-Best's submission in this regard.

20. On the other hand the Overriding Objective requires the Court to justice in an efficient and cost-effective manner and, where possible, to determine issues summarily. And, if the claimant in the present case lacks the resources to obtain an expert report, the very obvious disparity between current economic conditions and those which led to the adoption of discount rates of 4-5% years ago must be taken into account to some extent and cannot be ignored altogether. In these circumstances I find that sufficient material has been placed before the Court, particularly the 7th edition of the British

'*Ogden's Tables*', to justify the Court marginally reducing the established Bermudian rate of 4 to 5% by way of summary assessment to do justice to litigants not able to make out a case for a more generous adjustment through expert evidence. Ogden's Tables now cover the range of -2.5% to 3%.

21. Absent expert evidence being adduced on the terms directed in paragraphs 18 to 19 above, I would apply the upper rate in that modern UK range of 3% in the present case and, subject of course to hearing argument in such cases, in future cases as well.

Pain and suffering

22. The claimant sought $296,000, comprising $200,000 for the leg injury, $36,000 for a finger injury and $60,000 for "mental unwellness". Mrs. Sadler-Best suggested that the claim for the leg injury was on the high side while submitting that there was no medical evidence in support of the other two elements of this limb of the 2nd Defendant's claim.

23. As regards the leg injury, the competing contentions based on the Judicial College Guidelines were for the injury to be treated as the most serious short of amputation (maximum award £100,000) or very serious (maximum award £62,150). On August 14, 2014, just over two years after the accident, Dr. Chelvam reported that the claimant's broken tibia was still healing, but that he would be left with a 50% partial permanent disability preventing him from ever resuming physical work. He described the injury as "*life and limb-threatening*". A plate and screws in his upper leg were only removed in March this year, some 20 months after the accident. In his February 17, 2014 Report, Dr Chelvam had previously described:

    (a) fractures of the femur and tibia and extensive degloving of the right shin;

    (b) various surgical procedures in Bermuda resulting the claimant being "*airvacced*" to Boston for extensive reconstructive surgery on July 8, 2012;

    (c) various surgical procedures overseas (these were detailed in the Massachusetts General Hospital Discharge Report, which also referenced, *inter alia*, injuries to his right foot)

    (d) the claimant returning to hospital in Bermuda on September 15, 2012, being released on October 12, 2012 after having seen a psychologist for depression. Dr Chelvam noted: "*Obviously he was depressed and angry about the whole thing*".

24. Mr. Pachai put two illustrative cases before the Court. *Paul Burwood Lloyd-v- Steve Woolsaton & Son* (2010) involved a crushed foot and partial amputation; after the Court found the plaintiff was 20% contributorily negligent, an award worth £90,264.55 in 2014 was agreed. In *Christopher Murphy-v-Headcorn Parachute Club* Ltd. (2000) where the plaintiff suffered somewhat similar fracture injuries which were permanent (both feet were injured) but was only in hospital for one month, the award was £112,176.59 in 2014 terms.

25. It is difficult to imagine a more serious injury short of amputation when all the circumstances of the present case are taken into account. Mr. Talbot's claim is not excessive in light of the authorities placed before the Court. He is granted $200,000 (based on a UK award of £100,000) for pain and suffering in respect of his leg injury.

26. The hand injury is not addressed in Mr. Talbot's medical evidence. He mentioned it in his Victim Impact Statement signed on February 25, 2014 for the purposes of the sentencing of the driver who caused the accident. He stated: "*The fingers in my right hand are bent and can't straighten out*". Mr. Pachai submitted that so much attention focussed on his leg, that the hand was neglected. I find it surprising that in an apparently comprehensive list of injuries recorded in the King Edward Memorial Hospital ("KEMH") Nurse's Notes, including a laceration to the head and "*Adipose tissue observed to left calf*", no mention is made of any hand injury. The claimant was apparently admitted to KEMH for observation and plate removal on March 19, 2014, and was discharged on March 26, 2014, after he had prepared his Victim Impact Statement and after the obvious crisis relating to his right leg was past. The Discharge Notes certified as accurate by a doctor make no mention of any injury to the patient's hand, despite recording an apparently full physical examination.

27. While I have no reason to doubt that Mr. Talbot's right hand has since at least February 2014 been disfigured as he stated in his Victim Impact Statement, he has failed to prove that he sustained this injury in the accident. This limb of his claim is refused.

28. Mrs. Sadler-Best rightly pointed out that there was no psychological evidence in support of this aspect of the general damages claim. However, as noted above, the medical records do support the unsurprising assertion that the claimant suffered adverse mental effects from the dreadful injuries he sustained and did receive some psychological support. The applicable range suggested by the Judicial College Guidelines runs from £1,125 to £4,300 ("*Less Severe*") and £4,300 to £14,000 ("*Moderate*"), to £14,000 to £40,300 ("*Moderately Severe*") and £40,300 to £85,000 ("*Severe*").

29. There is evidence before the Court, apart from his own evidence, which suggests that Mr. Talbot has suffered from possibly moderate depression attributable to his inability to work again and his inability as a partially disabled person to enjoy the same social life that he had before. However, the medical evidence suggests that he received initial treatment from a psychologist with no recommendation that further treatment was required. Although the prognosis in this regard appears good, I accept that the claimant may well have continued to suffer from at least mild depression at a level which is not so severe as to prompt him (as a traditionally masculine man) to seek psychological help for. In fact, he would be superhuman if he is not continuing to experience mild to moderate symptoms for which a more sensitive person might well have sought (or be seeking) professional help.

30. On balance, I would assess his psychological injuries as falling at the upper end of the moderate range, rather than within the moderately severe range contended for by his counsel. I award him $25,000 (based on an English award of £12,500).

31. In summary, the claimant is awarded $225,000 by way of general damages for pain and suffering.

Findings: priorities as between the 2nd Defendant's claim and his medical insurer's subrogation claim

32. The claimant's submission that he was entitled to be paid in priority to the subrogation claim of his medical insurers was supported by authority and produced a commercially sensible result. The contrary argument, to the effect that his medical insurers claim took priority over the 2nd Defendant's claim against the Plaintiff, was not supported by any relevant authority and produced a commercially improbable result.

33. Mrs. Sadler-Best's submission was not without apparent and eminent judicial support. Somers Isles' counsel relied on the following passage in Lord Templeman's speech in *Lord Napier and Ettrick-v-Hunter* [1993] 1 All ER 85 at 398f-g:

> "*I would dismiss the cross-appeal by the names against the declaration made by the Court of Appeal in these terms:*
>
> *'That, when determining the amount which stop loss insurers are entitled to be reimbursed any indemnity paid by them to an assured before that assured is fully indemnified by applying his share of the Settlement monies to a loss occurring below the excess in that assured's policy.*"

34. As Mr. Pachai rightly argued, the subrogation claim was given priority in this case not because of a general rule that subrogation claims enjoy priority over an insured's claim when he recovers from a third party, but rather because such priority rights reflected the contractual bargain between the insured and the subrogation claimant on the facts of the relevant case. The insureds in *Lord Napier* had recovered by way of settlement monies in respect of various insurance and reinsurance layers. They had agreed to be liable for a layer of liability above the layer for which their stop loss insurers had already indemnified them and the settlement sum recovered from the third party covered both the layer they were insured for and the layer they were liable for. The rationale for affording the subrogation claim priority in the Lord Napier case was explained by Lord Templeman (at 391d) as follows:

> "*In my opinion an insured is not entitled to be indemnified against a loss which he has agreed to bear.*"

35. This reasoning has no application to the present case. There is no suggestion that Mr. Talbot (or, strictly, his employer) contracted with his medical insurers on terms that he would be liable for his own medical expenses or any portion of those expenses. Any such argument would be wholly inconsistent with the commercial and legal basis upon which medical insurance policies operate and are generally understood.

36. The general rule as regards priorities when an insured makes a recovery from a third party and his own insurer has a subrogation claim is found in '*McGillivray on Insurance Law*', 12th edition, paragraph 23-068 upon which the claimant's counsel relied:

> "*If the insured makes a recovery from a third party, after the insurer has made a payment under the policy, the assured can retain what he has recovered until he is fully indemnified, but he holds the rest subject to any equitable lien in favour of the insurer up to the value of the insurer's payment. The assured is, however, entitled to deduct the costs of recovery from the third party before he is obliged to account to the insurer*…"

37. I find that Mr. Talbot is entitled to be paid as regards both damages and costs in priority to his medical insurers, Somers Isles, out of the monies which Argus has paid into Court.

Summary

38. The claimant is awarded $225,000 in respect of general damages for pain and suffering. As far as loss of future earnings is concerned, unless he files an expert report in accordance with paragraphs 18 to 19 above within 35 days (or such longer time as may be directed), he is awarded $26,533.97 x 12.70 = $336,981.42.

39. Mr. Talbot is also granted his uncontroversial claims as regards interest on special damages at the rate of 3.5% from July 7, 2012 (the date of the accident) and on general damages from April 7, 2014 (the date of the Interpleader Summons), together with costs to be taxed if not agreed.

40. I will hear counsel, if needed, as to the terms of the final Order and any other matters arising from the present Judgment[3].

Dated this 25th day of November 2014 _____
IAN R.C. KAWALEY CJ

[3] The 2nd Defendant was also awarded under the slip rule other uncontroversial heads of damage which were omitted from the body of this Ruling. This slip was partly due to my desire to expedite delivery of this Ruling so that it would be available to counsel in another case where *Simon –v-Helmot* was in issue which was being tried on the date hereof. The additional items were $58, 316 (past loss of earnings), $10,518.96 (special damages), $3900 (past health insurance premiums), $59,436 (future insurance premiums) and $2000 (future transportation expenses).