In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 311

BETWEEN:

DENNIKA WARREN

Plaintiff

-v-

TINEE HARVEY

Defendants

JUDGMENT (ASSESSMENT OF DAMAGES)

(In Court)

Date of Trial: November 24-26, 2014
Date of Judgment: January 9, 2015

Mr. Jai Pachai, Wakefield Quin Limited, for the Plaintiff
Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the Defendant

Introductory

1. The Plaintiff was injured in a road accident in which she was a pillion passenger on a motor cycle which was driven into by the Defendant on August 19, 2007. She primarily suffered what was described as a "degloving" injury to the left heel and foot. Liability was admitted on February 11, 2008. The Plaintiff's Generally Endorsed Writ was issued on December 12, 2008.

2. Although the Plaintiff issued a Summons for Directions on December 21, 2009, voluntary discovery appears to have taken place before trial directions were ordered by consent on March 31, 2014 for a three day trial on quantum. The principal issues in controversy were:

    (1) the Plaintiff's claim for some $1.6 million by way of future loss of earning which the Defendant contended was wholly speculative;

    (2) whether or not the Plaintiff had failed to mitigate her loss by ignoring medical instructions;

    (3) the appropriate award for past loss of earnings;

    (4) what the appropriate award should be for pain and suffering;

    (5) for what period it was appropriate for interest on medical expenses to run.

The Evidence: an overview

3. The Plaintiff herself, the Plaintiff's mother Mrs. Debra Swan, Mr. Matthew Crumley of Argus Insurance Company Limited ("Argus"), the Plaintiff's medical insurers and orthopaedic surgeon Dr. Joseph Froncioni gave evidence for the Plaintiff.

4. The Defendant's case was advanced by way of cross-examination of these witnesses and counsel's submissions. The Plaintiff's three witnesses all gave their evidence in a straightforward manner and I found them to be entirely credible.

5. The only witness whose evidence was vigorously challenged, albeit in an impressively sensitive manner, was the Plaintiff herself. She was in general terms a credible witness. However, she appeared to have difficulties in admitting certain weaknesses however, and Mr. Pachai effectively conceded that she had exaggerated her academic achievements at school. She was somewhat vague in describing a significant period of time when she was seemingly travelling without being gainfully employed, between High School and College, and in describing efforts to obtain employment after she gave birth to her daughter. This raised questions about the extent to which her claim for loss of earnings as a fitness instructor were entirely realistic, in the short term at least, having regard to the Plaintiff's relative youth the level of consistent application and self-discipline that self-employment requires.

6. It was obvious, however, that the Plaintiff's injuries had a significant impact on her because she placed considerable importance on her physical appearance, having been

genuinely interested in acting in and after school. It was accepted that she will never be able to run again and will always have difficulty in standing for long periods. She also gave the distinct impression of being used to having her own way and appeared to me to be a person that would not easily adapt to a change of life options. She casually mentioned in cross-examination having had to get rid of around 200 pairs of shoes, which she described as her "best friend", which her injuries made it impossible to wear (unless she has further highly risky surgery which no one positively recommends). However, her own misfortune seems to have generated an interest in the Plaintiff in helping others and she has worked with a brother on community projects and has done other voluntary work. The Plaintiff, a self-proclaimed "people person" seemed clearly capable, when motivated, of being quite productive, and reflected an engaging blend of toughness and sensitivity.

7. It is common ground that the Plaintiff was only 21 at the time of the accident. She obtained a Diploma in Fitness and Lifestyle Management from CompuCollege in Halifax, Canada. I accept her evidence that she obtained some work experience there before returning to Bermuda in March, 2007. Back in Bermuda, she decided to start her business servicing "Plus size" women. She produced documentation from some 9 clients most of whom she started working with in July 2007. That is evidence of an impressive capacity on the part of a 21 year old woman to 'make things happen' at a stage of life when her peers were probably mostly either employed on a salaried basis or still in full-time education.

8. The Plaintiff was admitted to Hospital on August 19, 2007 and operated on by Dr. Chelvam. Her left foot was operated on and cream applied to facial injuries. She was discharged on August 27, 2007. An air cast boot was fitted in November, and she attended the fracture clinic over the next three months. In mid-January 2008 she saw a clinical psychologist. In a February 18, 2008 Report, Dr. Chelvam stated as follows:

> "*To conclude, Dennika has survived a life-altering and limb threatening injury to her left heel and sole….she has gone through a lot of psychological trauma and depression as a result of this injury…she is advised to have counselling by a psychologist as necessary…*"

9. Although she was still using crutches, light work was recommended from March although the Plaintiff explained under cross-examination that she was still in pain. In November Dr. Chelvam reported significant improvement, save for loss of sensation in the heel which made a normal gait and running and jumping impossible. A foreign body was removed from the knuckle of her left index finger. The Plaintiff was able to wear sneakers and walk without a cane. The doctor recommended a review of her prognosis in two years' time.

10. The Defendant's insurers referred the Plaintiff to Dr. Froncioni in March 2009. He saw her on April 20, 2009 and recommended that she consult a plastic surgeon for her

heel to alleviate "painful callosity". He noted that all lacerations to her face and arms had healed well, but opined that she would never likely recover sensation in her heel, and was left with "*slightly unsightly*" scars on her left hand and right forearm. He recommended light duties only as she was "markedly handicapped" in her ability to resume work as a fitness instructor. In May 2009, the Plaintiff started work as a bartender with MEF Ltd. at Tucker's Point. In July, she became covered by her employer's health insurance policy with Argus. Thereafter, the following treatment took place:

(a) in October 2009 and February 2010, she had the callosity removed and related follow-up treatment from Dr. Hodgson in Bermuda. Prior to this surgery, having failed to travel to California to see a specialist in September, she saw a psychologist;

(b) having returned to work in March 2010, the Plaintiff saw Dr. Hodgson in August. She was still unhappy with her heel and saw Assistant Professor Weg, a New York-based Orthopaedic Surgeon, who advised against further surgery because the "*heel area is a notoriously problematic area for plastic surgery*". He opined that she would be permanently partially disabled by the injury;

(c) on March 10, 2011, the Plaintiff had an MRI which resulted in Drs. Pelham and Fernandez-Madrid carrying out debridement surgery on April 4, 2011, taking cultures and diagnosing the Plaintiff as suffering from a serious bone infection known as osteomyelitis. Dr. Froncioni testified that this infection often lay dormant for many years and was most likely attributable to the injuries sustained in the accident as opposed to any subsequent event;

(d) on April 11, 2011, the Plaintiff was discharged from the NYU Hospital for Joint Diseases and required to administer intravenous antibiotics and stayed in New York until Dr. Pelham certified her fit to return to Bermuda on May 25, 2011, although she was still required to take antibiotics and warned not to stand for long periods if she returned to work;

(e) on July 5, 2011, the Plaintiff was admitted to the King Edward VII Memorial Hospital ("KEMH") with an inflamed left heel. After verbally abusing KEMH staff, she was admitted to the NYU Medical Center where Drs. Levine and Pelham carried out various procedures, notably a free flap reconstruction using skin from her back, and leeching post-operatively. Medical notes recorded her admitting to anger management problems and being uncooperative and rude. She was discharged on September 2, 2011 but remained in New York for follow-up consultations

until released by Dr. Pelham to return to Bermuda on March 6, 2012 under instructions to avoid any extensive physical activity;

(f) Dr. Froncioni opined on November 30, 2012 that she could return to work as a bartender. Apart from discomfort when wearing closed shoes and an inability to run, her main permanent disability was "poor cosmesis". He warned that further surgery to improve the appearance of the flap could have complications;

(g) in late October 2013, the Plaintiff returned to NYU for a final assessment from Dr. Levine and also saw a psychotherapist. In his December 17, 2013 Report, Dr. Levine said the Plaintiff was "doing well overall" and, understandably, cautioned her against having further risky surgery done by non-specialist institutions;

11. The Plaintiff gave birth to a daughter on October 28, 2012 and worked at the Cake Shop between December 2012 and August 2013. She has not worked since.

12. The medical expenses incurred by Argus on the Plaintiff's behalf total $679,905. The Defendant's attorneys tendered a cheque payable to Argus in this amount under cover of a September 19, 2014 letter (a) inviting Argus to accept the cheque in full and final settlement "*of all claims they may have in this matter*", and (b) complaining about late disclosure of those expenses. No clear explanation was advanced for the delay, on the face of it attributable to the Plaintiff's former attorneys, in forwarding the medical expenses to Colonial until they had all been incurred. Equally, it is unclear what material prejudice flowed from it bearing in mind that the Plaintiff's final assessment took place in New York in October 2013. No positive evidence was adduced on behalf of the Defendant's insurers to the effect that the tender of payment would have been made at an earlier date if the expenses had been disclosed sooner.

13. On the other hand, no positive challenge was made to the global figure claimed. As Mr. Crumley pointed out, the original medical bill was over $1.3 million; but Argus, using US-based representatives, cut the final bill in half. It was hard to take the poor case management complaints of the Defendant/Colonial seriously in light of this evidence.

14. In addition, I am bound to find, although this point was effectively conceded at the end, that it was reasonable for the Plaintiff to stay in New York from October 2011 until March 2012 (after her medical insurance lapsed) within easy reach of her doctors. I accept Dr. Froncioni's evidence in this regard. It might not have been strictly necessary, but the Plaintiff has had no further complications since she returned to Bermuda which has limited the scope of her claim. The Plaintiff is accordingly

entitled to recover the expenses claimed for this period the quantum of which was ultimately agreed.

15. She is also of course entitled to recover by way of special damages various other special damage items which the Defendant (Skeleton Argument paragraphs 16-18, 20, 24) agreed before trial.

Findings: future loss of earnings claim

The Plaintiff's claim

16. Mr. Pachai assessed the Plaintiff's likely post-accident earnings on the basis of an average of her last two jobs which resulted in an amount of $26,460.06.She could have earned $66,402 net as a self-employed personal trainer, it was submitted. This was based on a generic estimate of average earnings provided by the proprietor of a gym (40 hours per week @ $66 per hour or $2640 per week/$10,560 per month). The claim was merely $1650 per week gross, reduced by 7% to cover tax and health and social insurance to a figure of $66,402 per annum or $5500 per month net. The gross figure claimed assumes the Plaintiff would work an 8 hour day five days a week charging around $40 per hour. I should add that the earnings estimate relied upon was just over 50% of what an established (and presumably highly successful) personal trainer would earn. Six months is discounted to allow for the Plaintiff earning less in her first year. The future loss of earnings claim is based on the difference between $66,402 net and $26,460 net or $39,942 per annum. Using a multiplier of 40.99 and a discount rate of 0 %, the future loss of earnings claim was $1, 637,222.50.

17. However at the end of his closing submissions, Mr. Pachai invited the Court to grant him leave to adduce expert evidence to support a claim to a 0% discount rate departing from the higher 4%-5% traditionally used in Bermuda, following the approach approved by the Privy Council in *Simon-v-Helmot* [2012] UKPC 5. This was in light of my judgment dealing with this issue in *Argus Insurance Company Ltd-v-Harold Talbot et al* [2014] SC (Bda) 93 Civ (25 November 2014), which was delivered on the second day of the three-day trial of the present matter. I concluded on the discount rate issue as follows:

> "*18…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."

The Defendant's response

18. Mr. Rothwell submitted that there was no reliable basis for the Court to find that the Plaintiff would not be able acquire a sedentary job and earn as much or more than what she could earn as a personal trainer. She was bright and could retrain. There was

in any event no clarity at all about what her future employment prospects were likely to be, particularly since she was 21 at the time of the accident and had barely started working. He submitted the multiplier multiplicand approach was inappropriate and invited the Court to follow the approach adopted in *Blamire-v-South Cumbria Health Authority* [1992] EWCA Civ 22. Steyn LJ (with whom Hoffman LJ and Balcombe LJ concurred) held (at pages 7-8):

> "*The two principal issues that confronted the judge were: (a) What was the likely pattern of the plaintiff's future earnings had she not been injured? (b) What was the likely pattern for the plaintiff's future earnings given the fact she has now been injured? In respect of those issues the burden rested squarely on the plaintiff. Of course, issues of mitigation can arise in the assessment of damages in personal injury claims, such as an allegation that a plaintiff acted unreasonably in refusing to take a lesser job. That is not this case. The legal burden on the two main issues rested throughout on the plaintiff…*
>
> *Counsel submitted that even if the legal burden did not rest on the defendants, nevertheless the judge should have taken as his starting point a multiplicand and multiplier basis. Counsel said that the judge should thereafter have applied what is put forward as a relatively moderate discount. …It is clear, in my judgment, that the judge took the view that the conventional measure was inappropriate. He had ample material to take that view. First, there was uncertainty as to what the plaintiff would have earned over the course of her working life if she had not been injured. It is not necessary to mention all the difficulties which confronted the plaintiff. One was the possibility that she might have more children. Another was the fact that she clearly would have liked to have done part-time work rather than full-time work. It is true that it was necessary for her to assist with the payment of the mortgage, but, as the judge pointed out, that particular figure*

would become less of a burden through the years. The second aspect was the uncertainty as to the likely future pattern of her earnings, and here the uncertainties were very great. Bearing in mind that the burden rested throughout on the plaintiff, it is in my judgment clear that on the materials before him the judge was entitled to conclude that the multiplicand/multiplier measure was not the correct one to adopt in this case."

19. In that case £25,000 was awarded for loss of future earnings and handicap on the labour market. Mr. Pachai suggested that this broad-brush approach was not appropriate here because the uncertainties were not so great. He relied on two passages from the more recent case of *Bullock-v-Atlas Ward Structures Ltd* [2008] EWCA Civ 194. In this case the judge was faced with uncertainties as to whether or not the claimant would have earned the average wage for a window cleaner. Firstly, Ward LJ held:

> "*17. In those circumstances, it seems to me that the court is not only able to find a multiplicand, but bound to do so as a much more appropriate method for fairly assessing damages than taking the broad-brush approach under Blamire . In my judgment the judge erred in not adopting the conventional approach in this case.*"

20. Secondly, reliance was placed on the following passages from the judgment of Keene LJ:

> "*19. I agree. All assessments of future loss of earnings in personal injury cases necessarily involve some degree of uncertainty. As far as possible, the task of the court is to seek to arrive at the best forecast it can make of the scale of such loss, normally on the well-established basis of multiplying an anticipated annual loss by an appropriate multiplier.*
>
> *20. Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges therefore should be slow to resort to the broad-brush Blamire approach, unless they really have no alternative...*" [emphasis added]

21. Mr. Pachai also submitted that the *Smith-v-Manchester* type award which I made in *Best-v-Jensen* ([2012] SC (Bda) 44 Civ (28 August 2012), [2012] Bda LR 53) was

inappropriate in both that case and in the present case because it was meant to be deployed to compensate a claimant for the risk of losing an existing job and being handicapped in obtaining new employment by the relevant injury: *Ronan-v-Sainsbury's Supermarkets Ltd.* [2006] EWCA Civ 1074. That type of award was correctly made by Simmons AJ in *Jennings-v-Ball* [2001] Bda LR 82 where the claimant was still employed, but had no application to a person not employed when damages were assessed.

22. Mr. Rothwell did not oppose the application for leave to adduce expert evidence with respect to the appropriate discount rate for this head of damages.

Findings: basis of award

23. I find that the Plaintiff has, perhaps somewhat marginally, established a sufficient factual foundation for the Court to base its assessment on the usual multiplier/multiplicand approach. Unlike in *Blamire*, there is no tangible basis for considering the possibility that the Plaintiff may decide to be a "stay at home Mom" and never work again. Despite the fact that she has received family support in the wake of her accident which occurred when she was only 21, and has not worked at all for over a year, she did take a job shortly after her baby was born which she held for more than six months. There is no solid basis for doubting that she will seek full- time employment and could, but for the accident, have worked as a personal trainer for many years.

24. I also accept Mr. Pachai's submission that a *Smith-v-Manchester* [1974] 17 KIR 1 type award is not appropriate in a case such as the present and that my contrary holding in *Best-v-Jensen* on this issue ought not to be followed, albeit that the compensatory award itself was upheld on appeal[1]. The uncertainties are significant but not insurmountable. Did she have the actual or potential discipline and drive to generate the suggested average earnings of a fitness instructor at the date of the accident? Would she have possibly opted for other more or less remunerative employment in any event?

Findings: award

25. I find that the Plaintiff has proved:

    (a) that she obtained a vocational qualification as a personal trainer and had the drive to attract at least a handful of clients over a comparatively short period of time (roughly April to July 2007);

[1] The Court of Appeal dismissed an appeal against the award made in this case without being required to consider the legal basis of the award as argument centred on the issue of apportionment of liability: *Best-v-Jenson* [2012] CA (Bda) 13 Civ (17 March 2012); [2012] Bda LR 23 .

(b) that based in particular on the evidence of her mother as to the circumstances in which she abandoned an administrative/technical course in favour of a more athletic course, that she has no demonstrated capacity[2] for clerical or professional/technical office work likely to generate more income than her skilled personal trainer work, even if she earned less than the average personal trainer did;

(c) that the accident has made it impossible for her pursue her career as a personal trainer, and limited her employment options to comparatively modestly paid sedentary jobs.

26. On the other hand, based on Mr. Rothwell's cross-examination and submissions, I find that the Plaintiff has failed to prove that she had the necessary discipline, drive or commitment to generate and/or sustain a fulltime clientele for the rest of her working life. Having regard to her family support, there is no basis for believing that she would, the accident apart, have had any pressing need to work "full tilt" as assumed by her claim. Moreover, her target clientele was apparently local individuals and families of ordinary means. As any lawyer who has serviced local clients of ordinary means well understands, one has to work far more than 8 hours a day five days a week to generate 8 billable and collectible hours' worth of income. The position with lawyers applies by analogy to any profession or trade where the service provider charges on a time basis and is unable to demand payment in full up front all the time, even if on occasion this occurs.

27. It also seems inherently unrealistic to assume, as the Plaintiff's claim based on a multiplier table for females working up to aged 70 assumed, that she would have worked full time as a fitness instructor until age 70. That would require, to my mind, an above average degree of athleticism and I have no basis for finding that the Plaintiff had such athletic prowess. Her main school extra-curricular activities appear to have been dramatic, rather than athletic. It seems to me to be unrealistic to assume that she would have pursued this career past the age 60 (being generous in the Plaintiff's favour), having regard to the physical demands of such an occupation and the absence of any evidence of a real passion for the field.

28. Doing my best to resolve the various uncertainties, I find:

(a) the Plaintiff has proved on a balance of probabilities that she would, but for the accident, likely have earned marginally more than the average $26,460 p.a. net she earned as an employee, from the date of trial when she was 28 years of age[3];

[2] It is possible to speculate that in later years presently hidden capacities may emerge, but no evidential support for any positive findings to this effect.
[3] I deal separately below with this same issue in relation to past lost earnings.

(b) taking into account a likely rise in productivity after the age of 30 and a likely decline in productivity after the age of 50, I would assess her likely earnings at 50% of the prospective personal trainer earnings she contended for of $66,402 net or $33,201. This assumes that the Plaintiff would have done four billable and collectible hours of work five days a week at the rate contended for. The difference between what she might have earned but for the accident and is now likely to earn (the multiplicand) would accordingly be $6741 p.a.;

(c) following the Table in '*Ogden's Tables*' 7th edition for females working to the age of 60[4], and subject to any further finding based on expert evidence adduced and accepted in support of a lower discount rate, I would apply a discount rate of 3% and a multiplier of 20.49 to the multiplicand of $6741 and award $138,123.09 in respect of a loss of future earnings.

Findings: mitigation of loss (were medical instructions ignored?)

29. I am unable to find that the Plaintiff failed to mitigate her loss. The Defendant's case in this regard relied primarily upon medical records tending to show that:

(a) the Plaintiff on several occasions during her treatment verbally abused staff;

(b) the Plaintiff on at least one occasion refused to take antibiotics;

(c) the Plaintiff on numerous occasions smoked cigarettes;

(d) the Plaintiff occasionally used marijuana.

30. Dr. Froncioni, the only medical expert who testified, was vigorously cross-examined on these issues and accepted the Plaintiff's conduct (i.e. (b) to (d)) might theoretically impair the healing process in terms of broken bones and eliminating infections. However, quite understandably, he did not accept that there was any scientific basis for concluding that any impairment actually took place in the Plaintiff's case. No expert analysis of this issue has ever been carried out. Mr. Rothwell put to him research[5] about extended healing periods for broken bones caused by smoking, which the witness fairly discounted as inapplicable to the healing time for infections. It should also be added that he did not consider the Plaintiff's repeated 'misbehaviour' was particularly unusual for a patient in her position. Nor did he consider there was

[4] Which I downloaded from the UK Government website; the Plaintiff's counsel only placed the Table for females working to 70 before the Court.
[5] Castillo et al, '*Impact of Smoking on fracture Healing and Risk of Complications in Limb-Threatening Open tibia Fractures*', '*Orthop Trauma*', Volume 19, No. 3, March 2005.

any clear body of evidence that marijuana impeded the healing process for injuries such as those sustained by the Plaintiff.

31. Dr. Froncioni gave two pieces of evidence which I found to be of particular significance. Firstly, he also stated that the orthodox medical view was that osteomyelitis, even if only discovered years later, was attributable to a physical injury. In the Plaintiff's case, but for the accident caused by the Plaintiff's admitted negligence, the infection would not have occurred. Secondly, the idea that the healing time for the infection once identified had been aggravated by the Plaintiff's own conduct was contradicted by the fact that after the major surgery occurred she made a timely and complete recovery.

32. In my judgment the Defendant's case on failure to mitigate loss could only have succeeded if it was supported by positive expert medical evidence. The case was not based on facts of which judicial notice could be taken-for instance, an injury being aggravated by playing a contact sport contrary to common sense, let alone medical instructions.

Findings: past loss of earnings

33. As indicated in relation to the loss of future earnings claim, I am not satisfied that the Plaintiff would likely have developed so large a clientele within her first two or three years of work so as to earn more than her base average post-accident earnings had the accident not occurred. She was only 21 at the time of the accident, and there is no tangible basis for finding that she would have devoted herself diligently to her new career with the level of maturity and discipline that the loss of earnings claimed would require.

34. I also take into account the fact that the Plaintiff appeared to have no employment record of note, despite having left full time school some years earlier, and she appeared to have generous family support both before and after the accident. She also has not satisfied me that she has been truly diligent in seeking fresh employment since she lost her last job at the Cake Shop in August 2013 although it cannot be ignored that employment conditions were difficult during this period. I would accordingly reduce the award she would otherwise have obtained by 25%.

35. The Plaintiff claimed $236,343 for past loss of earnings. The Defendant was only willing to concede that the Plaintiff was entitled to be awarded $1,826 per month for the 22 month period between March 2011 and December 2012-based on her Tucker's Point earnings ($40,172). The Plaintiff conceded that the first six months after the accident should be ignored altogether as a start-up period. I would ignore the first six months altogether and find that she would have been earning no more than $1000 net from her gym business for the next 15months. I would find that she would have not earned more than she actually earned while she worked at Tucker's Point or the Cake

Shop, and find that she suffered no loss of earnings while she was so employed. By August 2013, however, I find that her potential earnings as a personal trainer of six years' standing would have been the figure the Plaintiff contended for, so that the maximum loss of earnings from then until trial would have been her basic average earnings of $2025 per month + $ 561.75 (1/12th of the annual shortfall of $6741).

36. Doing my best to make a fair assessment based on admittedly uncertain evidence, I make the following award in respect of past loss of earnings:

    (a) August 19, 2007-February 19, 2008: no award;

    (b) February 2008-May 2009: $1000 per month (15 months: $15,000);

    (c) May 2009- March 2011: no award while employed by Tucker's Point;

    (d) March 2011-December 2012: $1826 per month (22 months: $40,172);

    (e) December 2012-August 2013: no award while employed by the Cake Shop;

    (f) August 2013-trial: $2205 per month + $561.75 ($6741/12)= $2766.75 less 25% for failure to mitigate loss ($691.69)=$2075.06 per month (15 months: $31,125.90);

    (g) Total past loss of earning award: $86, 297.90.

Findings: general damages for pain and suffering

37. The Defendant relied on the open offer made by the Plaintiff's former attorneys on July 4, 2013 of $67,000 for general damages. Mr. Pachai submitted that $140,000 was a more appropriate figure. The severe range the Plaintiff's former attorneys contended for, based on the Judicial Studies Board Guidelines, was £30,850 to £51,500. In my judgment the Plaintiff's injury clearly falls within that range.

38. I was inclined in the course of the hearing, when Dr. Froncioni himself grimaced whilst describing the leeching procedure the Plaintiff was subjected to, to view the present case as falling near the top of that range. Having regard to the cases cited by Mr. Rothwell at paragraphs 47 to 48 of his Closing Submissions, and considering the matter more objectively and less sentimentally, I am bound to find that the admitted sum of $67,000 proposed by the Plaintiff's former attorneys is a reasonable sum to award in all the circumstances of the present case.

39. The Plaintiff additionally sought $60,000 for psychological damage on the basis of a "moderately severe' injury and based on the Judicial Studies Board Guidelines. The Defendant submitted that the $67,000 general damage claim asserted by the Plaintiff's former attorneys was adequate inclusive of psychological damage. On balance I find that there should be an additional award but that the harm suffered by the Plaintiff clearly falls within the less severe range (£1,125 to £4,300). There were only passing references in the evidence to counselling being received but no psychologist's report was produced suggesting that the harm suffered was initially severe and/or setting out a prognosis for the future. On the other hand I find that, having regard to the severity of the injury, the length of treatment and the Plaintiff's temperament (highlighted in part by the Defendant's own cross-examination), the impact caused by the accident on the Plaintiff's mental wellbeing falls within the upper level of the "less severe" category.

40. I award the additional sum of £4,000 or $8,000 for this limb of the general damages claim. The total sum awarded for general damages is accordingly $75,000.

Findings: interest on medical expenses

41. Mr. Rothwell invited the Court to depart from usual approach of awarding interest at the rate of 3.5% from the date of the accident on medical expenses because this would give Argus a windfall in circumstances where:

    (a) the majority of the expenses were incurred in 2011;

    (b) Argus unreasonably delayed disclosure of the expenses depriving Colonial of an opportunity of paying sooner to limit its interest exposure;

    (c) Argus failed to properly manage the medical expenses.

42. As I indicated in the overview of the evidence at the beginning of this Judgment, I reject the complaint that Argus failed to properly manage the Plaintiff's expense claim. It negotiated a 50% discount and no evidence was led to suggest that the total amount paid was excessive for the medical services rendered. In any event, Colonial has tendered a cheque for the full amount of the medical expenses and only in substance disputes its interest obligations.

43. Mr. Rothwell firstly referred the Court to a statutory provision which has never before been considered by this Court. Section 32 of the Health Insurance Act 1970 provides that (a) an employer's health insurer has the right to pursue a claim for medical expenses against a motor car policyholder directly, and (b) where such a claim is pursued, the insurer is entitled to interest from the date of payment of the expenses at no more than the statutory rate. It has never previously been suggested that this

provision is engaged where the health insurer does not pursue its claim directly, but relies on its subrogation rights in respect of monies recovered on its behalf by the injured party. The section provides so far as is relevant as follows:

> "***Motor vehicle accident; rights of insured vest in licensed insurer***
> *32. (1)Where a licensed insurer or an employer who operates an approved scheme pays a claim for hospital treatment in respect of standard hospital benefit in respect of his insured by reason of his insured having been injured in an accident involving a motor vehicle, and a person who is insured under a policy of insurance issued to him pursuant to the Motor Car Insurance (Third Party Risks) Act 1943 either admits liability for the injuries or is adjudged by a court of competent jurisdiction to be so liable, then notwithstanding anything to the contrary in any contract or any enactment or the common law, the injured person shall have a right to recover the expenses incurred for hospital treatment in respect of standard hospital benefit for which such person is insured pursuant to this Act, and such right shall be transferred to and vest in the licensed insurer or employer who operates an approved scheme, as the case may be.*
>
> *(2)Where, pursuant to subsection (1) a claim is made by the licensed insurer or employer who operates an approved scheme, such insurer or employer, as the case may be, shall be entitled to be paid interest on the amount of the claim calculated from the date of payment by him of the hospital expenses in respect of standard hospital benefit to the date of reimbursement to him of those expenses; so however that in no case shall the rate of interest exceed the statutory rate as defined in section 1 of the Interest and Credit Charges (Regulation) Act 1975 and in every case where a judgment has been obtained payment of interest shall be subject to any order made by the court.*
>
> *(3)…*"

44. I find that section 32 does not apply to Argus' present subrogation claim in an action to which it is not even a party. It is possible that this conclusion might merit review in light of fuller argument. However, I err in favour of maintaining the accepted view of the law in this area in the absence of clear and compelling grounds for disturbing the status quo. The Defendant's counsel more pertinently referred the Court to the following passage in *McGregor on Damages*, 18th edition, at paragraph 15-094:

> "*Moreover, the courts are becoming more prepared to abandon the halving procedure and follow Prokop v DHSS, where there has been a decidedly irregular loss of special damages over the years between cause of action and trial. Thus in Hobin v Douglas (No.1), where with over eight years between accident and trial the claimant's loss of earnings was attributable largely to the years immediately prior to the trial rather than the years immediately following the accident, the trial judge was prepared to*

calculate the interest for each year separately , thereby avoiding, in this case, not undercompensation but quite substantial overcompensation…"

45. Mr. Pachai suggested that this approach would be impracticable in the present case because of the complications of working out when each item of expenditure occurred. He also asserted that there was little monetary difference between applying a 3.5% rate of interest from the date of the accident and a 7% rate from the date the expenses were actually incurred. This did not encourage the Defendant's counsel to abandon his contention that the usual approach should not be followed because the interest payable would be unjustly high. It was submitted that:

    (a) of the $679,905 claimed in respect of medical expenses and particularised in a Table at TAB 27 of Trial Bundle 1, only $5000 was likely attributable to prior to 2011 (this estimate was not discredited);

    (b) interest at 7% should be awarded from 2011 at the earliest but due to delay in notification of the expenses to Colonial between February 2012 and April 2013, interest should in fact only run from November 2013, allowing a reasonable time to consider the information received in April.

46. Having regard to how well established the usual interest rule is and the fact that Colonial did not put Argus on notice that it would take a point on interest if information about the expenses was not promptly supplied, I reject the second submission. In Colonial's February[6] 28 2012 letter to Argus, concerns were raised about the merits of the medical expenses claim, but no hint was given that time was considered to be of the essence. As I noted briefly above, no positive evidence was led by Colonial to the effect that had the expense data been forwarded a year earlier, the cheque would have been positively tendered unconditionally at that point or sooner than in the event occurred.

47. On the other hand, it is impossible to ignore the more fundamental point that, as the losses in question were overwhelming incurred after 2011, there is no logical basis for interest being awarded at 3.5% from the date of the accident on August 19, 2007. It is not necessary for me to take into account the precise monetary difference between applying the usual rule and the modified rule contended for, because either:

    (a) less interest is payable as the Defendant (on behalf of Colonial) contends and this would be a just result; or

    (b) (improbably) the same amount or more interest is payable and the Plaintiff (on behalf of Argus) is not prejudiced and Colonial suffers the consequences of taking a bad point.

[6] The letter was dated "March" but this was apparently an error.

48. Accordingly, I award interest on the medical expenses at the rate of 7% from January 1, 2011.

Conclusion

49. The Plaintiff is awarded (subject to hearing counsel on arithmetical and similar errors or omissions):

    (a) $138,123.09 in respect of a loss of future earnings, applying a discount rate of 3% and subject to her right to apply within 35 days for leave to adduce expert evidence in support of a lower rate;

    (b) $86, 297.90 in respect of past loss of earnings;

    (c) the agreed sums in respect of various other special damage claims including expenses incurred during the Plaintiff's uninsured six month stay in New York after her July 2011 procedures;

    (d) $75,000 in respect of general damages for pain and suffering, together with interest at the rate of 3.5% from February 15, 2008 until judgment;

    (e) interest at the rate of 7% on the agreed medical expenses claim in the amount of $$679,905 from January 1, 2011 until judgment, together with interest at the rate of 3.5% from the date of the accident in respect of other elements of the special damages claim.

50. I will hear counsel on the terms of the final Order, costs and any other matters arising from the present Judgment.

Dated this 9th day of January 2015 _____

IAN R.C. KAWALEY CJ