

she would retire altogether at the age of 59. I expressed a preference for the Principe approach to the calculation of income loss and perhaps should have expressed more clearly that his approach was preferred to that of the defence expert. Because the Principe report did not contemplate a scenario consistent with my findings of fact, it was left with counsel to arrive at the necessary calculations. Unfortunately, they have been unable to reach an agreement although there are other matters on which consensus was reached, which will be elaborated below. I have received and reviewed their written submissions.

Future Income Loss Calculation

[2] The first topic of disagreement between the parties is the calculation of future income loss. Both parties acknowledge the finding that Mrs. Placzek would have worked full-time until mid 2005 and then halftime to the age of 59 (para. 64, Reasons for Judgment). They also acknowledge that in para. 65, a preference for the calculations made by Mr. Principe was expressed.

[3] At the time of trial, Mr. Principe had included two scenarios for future income loss calculation in his report of December 15, 2009. The plaintiff argues that the first scenario should be used for income loss calculation and the defendant asserts that the second scenario should be used.

[4] As stated in the December, 2009 report, scenario I was calculated on the basis that “had the accident not occurred, Mrs. Placzek would have continued to work as a realtor on a full-time, competitive basis until her retirement at age 65”. Scenario II was calculated differently and reflects the assumption that “had the accident not occurred, Mrs. Placzek would have continued to work as a realtor on a full time competitive basis until her retirement at age 59”. The defendant appears to refer to this report in his submissions.

[5] The plaintiff notes in her reply submissions that the defendant's reliance is misplaced because Mr. Principe adjusted his calculations to reflect the reasons for judgment in a further report dated October 19, 2010. This report assumes a retirement age of 59 for both scenarios and includes the gradual reduction of work from full-time to halftime in 2005. The plaintiff refers to this report in her submissions. The plaintiff favours scenario I as detailed in the October, 2010 report because it includes income earned in 2003, the year of the collision, while scenario II only includes income earned by the end of 2002. Further, Mr. Principe used an average market share percentage for his calculation although he indicated that the Placzeks' market share was rising.

[6] The market share percentages are addressed on p. 6 of Mr. Principe's original December, 2009 report. It shows that the Placzeks' market share percentage increased steadily from 1999 to 2003 and when averaged was 0.036, while the market share when averaged for the years 1999 to 2002 is only 0.034.

[7] The plaintiff argues that the use of the 0.034 percent market share in scenario II is not appropriate. First, the plaintiff claims that it is standard practice in this type of calculation to include the income earned by the plaintiff "in the last year of work" before the collision, which is 2003. The plaintiff notes that the 0.034 percent market share average, which results in the exclusion of 2003 earnings, actually places the plaintiff's future income rate at a level lower than the market share held in 2000.

[8] The plaintiff also suggests that the 0.036 percent averages used in scenario I is conservative. She submits that her 2003 market share percentage of 0.041 would actually be the most appropriate figure because the use of the averaged market share by Mr. Principe ignores the fact that the plaintiff's market share was steadily increasing. In addition, she notes that 1999 should be considered a "start up" year because she and her husband had reconciled in late 1998. As a result, 1999 is said not to be reflective of the

couple's true market share potential. If 1999 were excluded from the average market share calculation, the average market share would actually be over 0.037 percent.

[9] The other major difference between scenario I and II is an assumption regarding Mrs. Placzek's ability to work on a limited part-time basis. In scenario I, Mr. Principe's calculations assume no such ability. Scenario II contemplates limited part-time work from the time of the collision to the age of 59 at an estimated fair market value of \$7,664.00 per year, adjusted for expected mortality and an agreed six month period away from work in 2010 for surgery unrelated to the motor vehicle accident. This figure attempts to capture Mrs. Placzek's residual income earning capacity. The plaintiff says that this amount should not be included because the plaintiff is not paid for the work that she performs for her husband.

[10] Because the defendant relies on the December, 2009 report instead of Mr. Principe's October, 2010 report, his submissions do not address the plaintiff's market share percentage submissions or those regarding notional income. The defendant focuses only on the need for the report to reflect the findings with regard to an expected retirement age of 59.

[11] The defendant submits an additional report by Mr. Wollach, calculated to reflect the findings regarding the age of retirement and gradual change from full-time to part-time work. The problem, the defendant submits, with Mr. Principe's report is that it does not provide a figure for the net loss of income to January 14, 2008, a date which is significant in calculating interest. Mr. Wollach's report is consistent with Mr. Principe's December, 2009 report subject to several adjustments requested by the defendant but only examining scenario II. This report provides a figure for net loss of income to January 14, 2008, but it is calculated differently from Mr. Principe's figures due to the interest calculation dispute.

[12] I find that Mr. Principe's second scenario is the preferable approach for two reasons. The first is that Mrs. Placzek was involved in the motor vehicle accident in early March, 2003. Her earnings for January and February may not be reflective of what the balance of the year would bring. There was evidence at trial that Mrs. Placzek had a slip and fall just prior to the March accident which caused an exacerbation of her pain symptoms and that would likely have impacted her ability to earn income. The second reason is that scenario II contains a reasonable assumption regarding Mrs. Placzek's ability to work on a very limited part-time basis. It seems to me that Mrs. Placzek has some residual income earning capacity and that it is only reasonable to include that in the calculation.

Calculation of Post-Judgment Interest

[13] In December, 2007, the parties exchanged letters regarding the calculation of post-judgment interest. As the plaintiff notes in her reply submissions, she consented to an adjournment of the trial requested by the defendant on condition that the parties make an agreement regarding post-judgment interest. The letters that constitute the alleged agreement are reproduced at pp. 6 and 7 of the plaintiff's written submissions. The essence of these letters is that post-judgment interest would be calculated from January 14, 2008 at the applicable interest rate in effect on January 14, 2008, notwithstanding that the actual judgment in the case would be made after that date. The dispute centres on the amount to which this post-judgment interest rate applies.

[14] The plaintiff asserts that these letters constitute an agreement that she receive post-judgment interest on the total sum found payable to her from January 14, 2008 onward.

[15] The defendant submits that his intention was that the post-judgment interest rate would not be payable on housekeeping and income losses from January 14, 2008 to

January, 2011, because by the time of trial, these losses would be past and not future losses. Because the plaintiff now asserts that post-judgment interest should be calculated on the entire amount of damages owing, including housekeeping and income losses from January 14, 2008 to January, 2011, the defendant argues that there was never a meeting of the minds. Accordingly, the defendant submits that there was never an agreement on the question of interest and that post-judgment interest should be allowed at the statutory rate, subject to the exercise of the court's discretion.

[16] I am satisfied that there was an agreement between the parties. On December 13, 2007, defendant's counsel wrote the first letter, the contents of which were agreed to and confirmed in a letter sent the next morning by plaintiff's counsel. At that point, if the defendant required further clarification, he could have sought this information but did not. The plaintiff thus reasonably assumed that an agreement had been reached.

[17] It seems to me that the plaintiff sacrificed a tangible right – the right to argue against an adjournment – as consideration for the receipt of the post-judgment interest set out above. If the court were to find that there was never an agreement, the plaintiff could not easily recover her loss of that consideration.

[18] More importantly, the plain language of the letters reflects the plaintiff's interpretation that the post-judgment interest rate was intended to apply to the total sum payable to her and not just future losses. The defendant's letter reads in part as follows:

2. Your client will be entitled to claim post-judgment interest on all damages at the post-judgment interest rate as of January, 2008, notwithstanding the delay in the trial and what would otherwise be the continuation of the pre-judgment interest rate between January, 2008 and the date of trial. [Emphasis added.]

[19] There is no exception articulated for housekeeping expenses and past income loss. The defendant uses the phrase "all damages". The plaintiff responded with

a confirmatory letter and received no response or correction from the defendant. She noted as follows:

1. Post-judgment interest on the entire sum found payable to Mrs. Placzek for damages will be calculated at the applicable rate from January 14, 2008 until payment. The applicable rate will be that which is in effect for post-judgement [sic] interest on January 14, 2008.

[20] A reading of the plain language used by the parties does not allow for an implied exception for housekeeping expenses and past income loss. The phrase “all damages” cannot be meaningfully distinguished from the phrase “entire sum found payable...for damages”. As a result, it is not necessary to consider the balance of the defendant’s submissions.

Matters agreed

[21] The parties are agreed on the following:

-past housekeeping and home maintenance: \$12, 240.00

-future housekeeping and home maintenance: \$25 per hour x 2 hours per week + HST. The reasons refer to an hourly rate of \$50, which counsel agree and I concur, is a typographical error. It should be amended to read \$25 per hour for a total of \$50 per week + HST of 13%. The figure submitted by Ms. Legate is \$68,673.50. I would note that this is calculated over the remainder of Mrs. Placzek’s life expectancy. It seems to me that Mrs. Placzek would have required housekeeping assistance as she aged regardless of the accident. As a result, I would adjust this figure slightly. Further, housekeeping expenses have been calculated for 52 weeks of the year. It occurs to me that it is a more likely scenario that housekeeping assistance would be cancelled during periods of vacation. As a result, I am

of the view that the figure advanced is high and I would round it down to \$60,000.00.

-past income replacement benefit collateral offset: \$89,525.00

-future income replacement benefit collateral offset: \$64,215.00

[22] No care costs were claimed and as a result my judgment should be amended to delete paras. 68 and 69.

[23] I will receive brief written submissions with respect to costs within 30 days.

"Justice H. A. Rady"

Justice H. A. Rady

Released: March 9, 2011

CITATION: Placzek v. Green, 2011 ONSC 1287
COURT FILE NO.: 46392
DATE: 2011/03/09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CARMEN PLACZEK

Plaintiff

- and -

ALBERT GREEN

Defendant

SUPPLEMENTARY REASONS FOR JUDGMENT

RADY J.

Released: March 9, 2011