NMG

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 96/2002

BEEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN:	**ALCAN JAMAICA COMPANY**	**APPELLANT/DEFENDANT**
AND:	**CARL MARCH**	**RESPONDENT/PLAINTIFF**

Stephen Shelton and Christopher Kelman instructed by Myers, Fletcher & Gordon for the appellant

Carol Davis for the respondent

November 1, 2, 3, 4, 2004 and February 1, 2005

FORTE, P.

Having read in draft the judgment of Cooke, J.A. I entirely agree with his reasoning and conclusion and there is nothing I could usefully add.

COOKE, J.A.

1. Carl March, the respondent in this appeal was in 1991 employed as a veterinary surgeon to the appellant. The latter had a substantial herd of cows and at the relevant time the respondent was particularly concerned with fertility testing. To facilitate this testing each cow is entered into a chute which is approximately 40 ft. in length. The cow to be tested is confined in a limited area to curtail its movement. There are two gates which provide barriers for this

confinement. One is to the front of the cow and the other behind. The gate to the hind of the cow has a "barstick" – its purpose is to guard against the kicking of the cow. These gates were operated by two workers known as "cattlemen." When the cow to be tested is secured the respondent would enter the chute from a side gate to the rear of the cow. He would approach the hind of the cow and from behind the gate he would insert his hand into the rectum as far as was necessary to ascertain whether that cow was pregnant or not. After completing the procedure he would then exit the chute through the side gate from which he had entered. Having exited he would then say "bubble" which was the password for the "cattleman" to open the gate at front of the cow thereby releasing it from its confinement. Thereafter another cow would take its place for the fertility testing procedure to be continued. Outside the chute was a supervisor who recorded the results of the pregnancy testing. On the day in question that supervisor was Mr. Courtney Miller.

2. On an unascertained date in September, 1991, the respondent said he was conducting fertility testing at the appellant's farm at Grier Park in St. Ann. He had already tested about 300 cows when the accident occurred. A cow was placed in the testing area. He inserted his hand 6-7 inches above his wrist and having held on to the reproduction tract of the cow he came to the conclusion that, that cow was pregnant. He communicated his finding to Mr. Courtney Miller after which he opened the side gate and stepped out of the chute. At this stage he was informed by Mr. Miller that, that same cow had been "passed" as

pregnant the previous year but it did not have a calf. Recognising that he had to do a more detailed examination he reopened the side gate re-entered the chute and again inserted his hand into the rectum of the cow. This time his hand was inserted 6-7 inches above the elbow in order to feel the uterus. His finding was that there was pus on the uterus and while he was communicating this to Mr. Miller he felt himself being pulled forward with a sudden movement from the cow. This caused him to slam into the "bar stick" while his hand was still deeply inserted in the cow. The "cattleman" Mr. Kevin Wright had opened the gate and the cow had run off. He had done so although the respondent had not given the password "bubble". When the respondent slammed into the "barstick" his left arm and neck were jerked. The respondent further said that Mr. Wright apologized as "he thought he had heard the word bubble despite the fact that I was still standing in the chute with my arm in [the] cow."

3. The respondent continued in his employment until November 1996 when as a result of the down-sizing of the farm operations at the appellant's company he was made redundant. In June 1997 he filed a writ claiming damages in negligence and or for breach of contract arising out of the occurrence previously set out in paragraph 2 (supra).

4. The particulars of injury were:

"(a) Cervical nerve root irritation.

(b) Intermittent neck pains.

(c) Spasms of the neck muscles with numbness in the left upper limb and right fourth and fifth fingers.

(d) Radiation of pain from the neck to the upper back.

(e) Pains along the left trapezius muscle with radiation of pain into the dorsal spine

(f) Seven percent permanent partial impairment of the whole person."

5. At the trial the appellant's defence was that the event described by the respondent of what took place at Grier Park never happened. The learned trial judge accepted the account given by the respondent and on the 16th July 2002, made an award in the sum of $850,000.00 for damages for pain and suffering and loss of amenities with interest at 6% per annum from 4th October 1997 to 16th July 2002, as well as $5,000,000.00 for handicap on the labour market.

6. Two grounds of appeal were argued. These were:

"1) The Judgment of the learned trial Judge was unreasonable in light of the evidence and that the said Judgment made herein should therefore be set aside.

Further and/or alternatively

2) That the award for handicap on the labour market was manifestly excessive in light of the evidence and should be disallowed or be significantly reduced.

GROUND 1

7. It was contended that there was a material conflict in the description of how the incident occurred as between the respondent and his supporting witness Mr. Courtney Miller. Both agreed as to the premature opening of the gate by Mr. Kevin Wright and his apologizing for his error. Both agreed as to the respondent being slammed against the "barstick". However, while the respondent described how he had exited the side gate after his first examination and then re-entered, Mr. Miller said that at no time did the respondent ever leave the chute or take his hand from the cow. There can be no doubt that there is a difference in the account of these two witnesses in their account in respect of an aspect of how the drama unfolded. The learned trial judge in his written judgment never adverted to this discrepancy. Nonetheless, he found that:

> "On a balance of probability I accept the Plaintiff and his witness Mr. Courtney Miller as witnesses of truth. I find that the Plaintiff was injured in an accident that occurred in September 1991."

In view of this conclusion it has to be assumed that the learned trial judge either did not appreciate the discrepancy or considered that such a discrepancy was not relevant to the determination of whether or not there was the incident at Grier Park in September 1991. Bearing in mind that the appellant's defence was a denial of the occurrence it would seem to me that the sequence of events culminating in the respondent being slammed against the "barstick" cannot be regarded as insignificant. It is my view that the learned trial judge

failed to have regard to the whole picture and apparently only focused his attention on the evidence given on the respondent's behalf as to whether the gate had been prematurely opened. This is a discrepancy that ought not to have been ignored. If this is so, then, since this discrepancy is material the characterization of the respondent and Mr. Miller as witnesses of truth may be inapt as regards the totality of the circumstances.

8. The respondent attributed his injuries solely to the incident at Grier Park in September 1991. He said that before that incident he never had any problems with his arm or neck. The appellant complains that there was evidence from medical personnel which undermined the credibility of the respondent in his adamant assertion that he was free from pain in his neck and arm prior to September 1991. It was submitted that the learned trial judge failed to recognise the significance of evidence which would tend to challenge the veracity of the respondent.

9. In his evidence the respondent said he went to see Dr. Owen James, who was the medical director of the appellant, the day following the incident at Grier Park. Dr. James in his evidence-in-chief stated that the respondent, in the latter part of 1992, complained to him about pains in his neck. According to Dr. James the respondent told him that in 1992 while doing a pregnancy test on a cow it moved and jerked his shoulder. Under cross-examination Dr. James said he could not recall the respondent making any complaint to him about pains in his neck in 1991 but he would not rule out the possibility that he

may have so done. Apparently the relationship between the respondent and Dr. James was one of friendship rather than the professional nexus of doctor and patient.

10. The respondent was a patient of Dr. Ivy Turner-Jones. The latter was on the list of doctors to whom the appellant's employees were entitled to consult. She saw the respondent in November 1989 when he complained of neck pains at which time her diagnosis was that of muscular spasms. In August 1992 he called her about pains in his neck. Dr. Turner-Jones subsequently saw the respondent at various times between January 1993 and February 1997.

11. Dr. Lloyd Quarrie was on the panel of doctors who looked after the appellant's employees. The respondent in May 1993 complained to him about pains in his neck. This prompted Dr. Quarrie to refer the respondent to Dr. Christopher Rose an orthopaedic surgeon. It is the evidence that the respondent told him that the pains to the neck started in 1990.

12. The learned trial judge in his judgment rehearsed the evidence of the doctors of whom reference has been made (except for Dr. James) but made no comment as to his assessment of it and in particular whether the credibility of the respondent was thereby affected. The respondent's claim is that his pains to his neck was a direct result of the incident in September 1991. Therefore the evidence as to when the pains started is relevant to the ultimate determination of this case. This is an issue to which the court below ought to have addressed its mind. It did not.

13. There is evidence from two "cattlemen" Mr. Kevin Wright and Mr. Paul Campbell (the same two who on the respondent's case handled the gates in September 1991, and who denied that any such incident took place) that in June 1992 there was an incident at the Rhoden Hall Farm.

The record reveals the evidence of Paul Campbell as follows:

> "Incident happened at Rhoden Hall with Dr. March in June 1992. I was present. They were testing some Brahman cows for pregnancy I was at the race side calling the number of the animals at the right side. Race has two gates, I was standing behind the back gate where vet would go in.
>
> Dr. March went inside was putting his hand in cow to test it. The animal jumped forward. Dr. March came out and flashed his hand and said it was hurt. I asked him if it was hurt badly and he said yes. He said to let go the animal. He took off his glove."

The respondent denied that any such incident took place at Rhoden Hall. However there is documentary evidence (exhibit 16) to the effect that "Dr. March received very slight injury while attending animals at Rhoden Hall." The date of this report is the 16th June 1992. At first the respondent was reluctant to admit that this report related to him. The learned trial judge made no finding as to whether or not the Rhoden Hall incident occurred. If in fact there was an incident as described by Paul Campbell at Rhoden Hall (supra) then there would have to be the further consideration of the lack of forthrightness on the part of the respondent. Perhaps it is not without significance that there was an increase in medical activity in respect of the respondent after June 1992. Dr. James referred him to Dr. Cuellan September 1992. Dr. Turner-

Jones sent him for an x-ray in September 1992. In May 1994 he was referred by Dr. Quarrie to Dr. Rose an orthopaedic surgeon.

14. It would seem that the learned trial judge was not unaware of the effect of discrepancies. In his judgment he said:

> "There were discrepancies between the cattlemen who were present. Kevin Wright admitted that in 1991 he would handle the gate during pregnancy testing with the Plaintiff. He spoke of an incident in 1992 in which the Plaintiff damaged his hand but he never handled the gate on that occasion. Paul Campbell said that Kevin Wright never handled a gate in 1991, a notable discrepancy."

I am somewhat taken aback as to the learned trial judge's view that there was this "notable discrepancy." The use of the epithet "notable" would tend to indicate that this "discrepancy" was of telling effect in his rejection of the defence that had been put forward. In any event the discrepancy as between the respondent and his witness Mr. Miller adverted to in paragraph 7 (supra) is certainly not any less "notable." As earlier said, this discrepancy was incorrectly ignored. Further, as indicated previously there were other aspects of the evidence which did not receive adequate judicial attention.

15. Since it is my view that there was a want of the proper judicial approach in the court below with respect to the assessment of the evidence the question now arises as to the disposition of this appeal. The choice is between upholding the appeal or remitting the case for a re-hearing below.

16. In **Union Bank of Jamaica Limited v Dalton Yap** (Privy Council Appeal No. 17 of 2001 delivered 28th May, 2002 unreported) their Lordships' Board in paragraph 4 said:

> "The approach which an appellate court must apply when dealing with an appeal on fact from a judge who has seen and heard the witnesses giving evidence is not in doubt. Their Lordships refer for convenience to the decisions of the House of Lords in **Thomas v Thomas** [1947] AC 484 and of the Board in **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303. One situation where, exceptionally, an appeal court may be entitled to differ from the judge of first instance on such questions of fact is described by Lord Thankerton ([1947] AC 484, 488) in these terms:
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> 'The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'
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> As Lord Shaw of Dunfermline observed in the earlier case of **Clarke v Edinburgh and District Tramways Co** 1919 SC (HL) 35, 37, the appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong".

17. In **Lascelles Augustus Chin v Audrey Ramona Chin** (Privy Council Appeal No. 61 of 1999 delivered the 12th of February 2001 unreported) the advice in paragraph 14 was that:

> "The normal and proper function of an appellate court is that of review. An appellate court can, within well-recognised parameters, correct factual findings made below. But where the necessary factual

> findings have not been made below and the material on which to make those findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a re-hearing below."

18. In this case it cannot be said that the learned trial judge was "plainly wrong." There were no objective factors which could justify such a conclusion. Essentially the crux of this case centered on a determination of the critical issue of the credibility of the witnesses of the contending parties. This court has neither seen nor heard these witnesses. Findings of fact which ought to have been made were left unattended. Since such findings of fact would largely be decided on the basis of hearing and seeing the witnesses this court ought not to enter into that arena. I am therefore of the view, despite the long passage of time, that this case should be remitted for a re-hearing below.

19. Since the issue of liability is yet to be determined it is unnecessary to speak to ground 2 of this appeal. The parties' costs incurred in the court below and in this court should be costs in the re-hearing.

K. HARRISON, J.A.

I agree.