[2011] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 125/2009

BEFORE: **THE HON. MR JUSTICE PANTON, P**
THE HON. MRS JUSTICE HARRIS, JA
THE HON. MR JUSTICE DUKHARAN, JA

BETWEEN	**THE ATTORNEY GENERAL**	**APPELLANT**
AND	**PHILLIP GRANSTON**	**RESPONDENT**

Miss Tamara Dickens and Harrington McDermott instructed by The Director of State Proceedings for the appellant

Miss Carol Davis for the respondent

12 & 13 October, 20 December 2010 and 20 January 2011

PANTON, P

[1] I have read the reasons for judgment written by my learned sister Harris JA.

I agree with her reasoning and conclusion and have nothing further to add.

HARRIS, J A

[2] In this appeal the appellant challenges the judgment of Sykes, J which was delivered in favour of the respondent on 10 August 2009. The learned judge made the following awards:

> "General damages:
>
> pain, suffering and loss of amenities - $8m at 3% interest from the date of the service of the claim to the date of judgment;
>
> handicap on the labour market - $524,430.38 with no interest.
>
> cost of future medical care:
>
> pumps and catheter – US$108,000.00 with no interest.
>
> Cost of the refill - $960,000.00 with no interest
>
> special damages:
>
> loss of overtime - $671,154.00 at 3% interest from the date of the amended particulars of claim to the date of judgment.
>
> Costs to the claimant to be agreed or taxed."

[3] On 20 December 2010 we made the following order:

> "The appeal is allowed in part. The judge's order on liability is affirmed. The order on quantum is varied by reducing the award for loss of overtime pay from $671,154.00 to $161,541.12. In all other respects the order on quantum is affirmed.

Costs to the respondent to be agreed or taxed."

We promised to put our reasons in writing which we now do.

[4] On 20 November 1997, the respondent, a fireman, in the course of his duties, was travelling in a fire truck along the Williamsfield main road in the parish of Saint James, driven by its duly authorized driver, Sergeant Liston Reid. The truck was involved in an accident and overturned, as a result of which the respondent sustained injuries.

[5] He subsequently commenced proceedings against the appellant claiming that the accident was caused by the negligent driving of Sergeant Reid. His claim as particularized is outlined as follows:

> "4. The Claimant was a passenger in the front seat of the said vehicle, which was travelling along the Johns Hall Main Road when it capsized and fell into a river bed on the right side of the road.
>
> 5. The collision was caused by the negligence of Sgt. Liston Reid, the driver of the vehicle and servant and/or agent of the Crown.
>
> **Particulars of Negligence**
>
> 1. Driving over a mound of dirt on the road, so that the vehicle became unbalanced and capsized.
>
> ii. Failing to keep any or any proper look out.

iii. Driving without due care and attention

iv. Failing to take any or any effective measures to prevent his motor vehicle from capsizing.

iv. Failing to stop, slow down, to swerve or in any other way so to manage or control the motor vehicle so as to avoid the accident.

vi. The Claimant will rely on the principle of res ipsa loquitur.

6. As a result of the negligence of the Defendant's servant and agent, the Claimant who was born on 4th June 1966 suffered injury loss and damage.

Particulars of Injury

i. Failed back syndrome.

ii. Fractures of the pars interarticularis at L5

iii. Bulging of the intervertebral disc at L5/S1.

iv. Chronic back pains

The Claimant will require further operation for the insertion of a pain pump. The pump is expected to cost US$6,500.00 and the operation US$6,500.00

8. (sic) Since the accident the Claimant has been examined by numerous doctors, but

the back pains continued, and on the instructions of the Fire Brigade Doctor, Dr Barry Hastings, the Claimant was in 2001 sent to Dr Randolph Cheeks. Following and as a consequence of the report of Dr Cheeks the Claimant was assigned to light duties by the Jamaica Fire Brigade. The Claimant was also sent by the Jamaica Fire Brigade to Dr Kevin (sic) Ehikhametalor.

9. The Plaintiff intends at the trial of the matter herein to rely on the medical reports of Dr. Kelvin Ehikhametalor and Dr Randoph (sic) E. Cheeks, F.R.C.S. and consultant neurosurgeon. A copy of the said report is attached hereto marked "OPI"

10. As a result of the matters complained of, the Plaintiff has suffered loss and damage. A schedule of the special damages claimed to date is set out hereunder:

Particulars of Special Damage

Loss of overtime for 13 months, at an average of 96 hours per month @ $129.44 per hour $161,541"

[6] The appellant, in her defence, denied that there had been negligence on her part. The appellant averred that it was raining heavily and the roadway was covered with water and Sergeant Reid, travelling approximately 5 miles per hour, was in the process of passing a stationary vehicle when the truck began to sink, and eventually tilted and capsized.

[7] The evidence of the respondent was that the fire truck was conveying 8000 gallons of water to a designated place and while proceeding there, Sergeant Reid drove over a mound of earth which was on the roadway. A Honda motor car was parked on the opposite side of the road. Sergeant Reid stopped, blew his horn and then proceeded. In an effort to manoeuvre the truck away from the motor car, although there was insufficient room for him to pass, the accident occurred.

[8] Evidence in support of the appellant's case was given by Sergeant Reid, Miss Teri Ann Leslie and Senior Deputy Superintendent Allan Goodwill. Sergeant Reid stated that the road in the area at which the accident occurred was about 18 feet in width and had broken away due to saturation by water coming from excessive rainfall during the period. He stated that the truck passed the Honda Civic motor car, then began to skid, sank in mud, tilted and overturned.

[9] Miss Terri Ann Leslie, who was a passenger in the truck, said that the road was about 12 to 15 feet in width, its surface was paved in some areas and unpaved in other areas and that there was sufficient room for the truck to have passed the car. She also asserted that Sergeant Reid was driving very slowly when the truck capsized.

[10] Deputy Superintendent Goodwill, who investigated the accident, stated that the road is approximately 18 feet wide and on his visit on the day of the accident, he observed that the right side of the road had broken away and was

on the same level as the rest of the road. He did not recall seeing a mound of earth at the site of the accident.

[11] Several grounds of appeal were filed. Grounds of appeal (a), (b) and (c) were argued simultaneously.

> "(a) The learned trial judge erred when he found that Sergeant Liston Reid was negligent, and by extension the Appellant is variously (sic) liable in the circumstances.
>
> (b) The learned trial judge erred in not finding as a fact that the road on which the accident occurred had broken away in circumstances where there was direct and unchallenged evidence indicating same.
>
> (c) The learned judge erred in law in not finding that the requirements of **Brown** [sic] **v Dunn 6 R. 67** were not satisfied by the Appellant (Defendant in the circumstances.

[12] It was submitted by Miss Dickens that the narrowness of the road was not in issue. There being no dispute that the road was narrow, she contended, the necessity would not have arisen to challenge such evidence. Despite this, she argued, the learned trial judge erroneously focused on the narrowness of the road as a vital consideration in determining the appellant's liability. The real issue, she argued, was whether there was sufficient space for the fire truck to have safely passed.

[13] Miss Davis argued that the learned trial judge had not only taken into consideration the fact that there was no cross examination as to the narrowness of the road but had also carefully examined all the evidence before him, prior to coming to his decision. The learned trial judge, having accepted the evidence of the respondent in all the circumstances of the case, was entitled to find as he had done, she contended.

[14] The issue is not merely a question of the narrowness of the road but whether in view of the size of the road, the width of the truck and of the Honda Civic motor car, the truck could have had safe passage at the section of the road where the accident occurred. The real question therefore is whether liability can be ascribed to the appellant on account of Sergeant Reid's driving, he having endeavored to pass a stationary vehicle on that area of the roadway where the accident happened. Was there evidence to show that Sergeant Reid had not exercised the requisite care in his manner of driving at the time the respondent sustained his injuries?

[15] There was evidence from Miss Teri Ann Leslie that the road was about 12 to 15 feet in width. There was also evidence from Sergeant Reid and Senior Deputy Superintendent Goodwill that the road was approximately 18 feet wide. Sergeant Reid, however, stated in cross examination that the road was less than 15 feet wide. No issue was joined on the question of the road's narrowness.

[16] Sergeant Reid said that the truck was five feet wide. Miss Leslie stated that it was four feet in width while Superintendent Goodwill estimated the width to be between seven and eight feet. Sergeant Reid's and Miss Leslie's estimate of the width of a Honda Civic motor car was 4 feet. Senior Deputy Superintendent Goodwill testified that the part of the road which had been torn away was on the same level as the rest of the surface of the road. Sergeant Reid asserted that when he approached the Honda motor car, his assessment of the situation was that it was safe for him to have passed the vehicle.

[17] With this evidence before him, the focus of the learned trial judge was whether Sergeant Reid could have effectively negotiated the path along the narrow roadway without causing the truck to capsize. This was the critical issue. In determining the issue, the learned trial judge embarked upon a detailed analysis of the evidence and at paragraphs 41, 42 and 43 of his judgment he said:

> "41. On the issue of the actual width of the road I have concluded that it was not 18 feet wide as testified to by Sergeant Reid and Senior Deputy Superintendent Goodwill. These are my reasons. Taking Sergeant Reid's testimony first. If the road was 18 feet wide (see paragraph 7 of witness statement); if the car was 4 feet wide and if the truck was only 5 feet wide and add to the width of the truck rear view mirrors (using Sergeant Reid's estimate of an additional one foot on either side of the

truck), there would be no need for the truck to be so far to the right so that its right wheel sank on the right side of the road. On Sergeant Reid's evidence the total width of the truck would be 7 feet which would mean that the truck would have had 14 feet of road to pass the car. It is more important to note that there is no evidence indicating how near or far from the left side of the road the car was parked.

42. However, during Sergeant Reid's testimony the width of the road reduced from 18 feet to less than 15 feet. If the road was 15 feet wide and the car was approximately 4 feet wide, then the truck had 11 feet to manoeuver. Again with 11 feet of road with a truck with a total width of 7 feet, there would still be no need to go over to the right to the extent that the wheel sank and rolled over. Therefore even if the word (sic) were 18 feet wide, the fact that Sergeant Reid went so far over to the right that the truck got into difficulties, would be, in my view, evidence of negligent driving. The negligence would be failing to take proper care when executing the manoeuvre of passing the car when there was ample room for him to pass the car without getting into the difficulties that he did. The wheel sank, apparently on the extreme right side of the road.

43. If the road was only 12 feet wide, as stated by Sergeant Reid at one point in his evidence, then with the truck taking up a maximum of 7 feet and a car taking up 4 feet, then this would place the truck on the

> extreme right side of the road where the right wheel began to sink and the truck began to tilt."

[18] The learned trial judge accepted Superintendent Goodwill's evidence that the part of the road which had been torn away was on the same level as the rest of the surface of the roadway. He found that if the road were wide enough, as Sergeant Reid contended, then as any reasonable competent driver would do, he would endeavour to drive away from the right edge of the road in light of the condition of the road due to the rain and mud. It was his further finding that he went too far over to the right edge of the narrow road, the manoeuvering space being considerably reduced by the presence of the car.

[19] It is without doubt that the focal point of the learned trial judge's findings and conclusions revolved around the question as to whether there was sufficient room on the roadway for the fire truck to have passed the motor car without capsizing. There was sufficient evidentiary material for him to have made a finding in this regard. He found that Sergeant Reid's driving was such that he failed to take due care and attention in his manner of manoeuvering the truck along the narrow roadway, there being a motor vehicle parked on the opposite side of the road. We cannot say that he was incorrect, having so concluded.

[20] In the alternative, it was argued by Miss Dickens, that the learned trial judge erred in finding that the rule in **Browne v Dunn** [1893] 6 R 67 had not been

satisfied, for the reason that the appellant had not challenged the respondent's testimony that the road was narrow. The rule in **Browne v Dunn** is a rule of professional practice which stipulates that if a witness is unchallenged on any part of his testimony which is not accepted, then save and except in cases where the witness has been severely discredited or his evidence has been overwhelmed, it is difficult for the court to reject the unchallenged part of his evidence. In the course of his judgment, the learned trial judge correctly outlined the rule. The issue as to the width of the road was in fact a critical issue. This Miss Dickens failed to appreciate. It is evident from Sergeant Reid's and Miss Leslie's testimonies that the road was narrow. The respondent's testimony that the road was narrow was not challenged while he was giving his evidence. Clearly, the fact that the road was narrow was not only a part of the appellant's case but had also been accepted by the appellant in not cross-examining the respondent as to this fact. The respondent was not discredited, nor was his testimony overtaken by that of the appellant's witnesses. It follows therefore that the rule in **Browne v Dunn** would be of no relevance in this case, as rightly found by the learned trial judge.

[21] It was also a complaint of the appellant that the learned trial judge failed to take into account Sergeant Reid's evidence in which he said that he had not stopped and blown his horn. This complaint is devoid of merit. There was evidence that the road was narrow and the presence of the stationary car on the left of the road, left inadequate space to allow the truck to pass. There was

evidence from the respondent that Sergeant Reid stopped for a minute and blew his horn and he, the respondent, said he could hear someone say "Me a come, Me a come". However, before the car was removed Sergeant Reid drove off, causing the truck to overturn.

[22] In dealing with this aspect of the evidence the learned trial judge said at paragraphs 46 and 48.

> "46. A critical fact to determine is whether the truck stopped as alleged by Mr Granston. Mr Reid denied that he stopped and blew the horn. It will be recalled that Mr Granston was not challenged on this specific evidence and I have not found that he was discredited. The contrary evidence is not overwhelmingly cogent. It is true that Mr Granston does not give any approximate measurements of the road in his witness statement or evidence in court. If Mr Granston is accepted as a credible witness, and I do so accept him, the question is, based on the evidence, what is the best explanation for the truck stopping and blowing its horn?
>
> 48. Mrs Dixon-Frith submitted that I should not accept Mr Granston's evidence that he heard somebody shouting "Mi a come! Mi a come!", because it was raining and therefore, even if someone did utter these words, it is unlikely that Mr Granston would have heard. The regrettable fact is that Mr Granston was not cross examined in a manner to foreclose this probability. On the contrary, it is common ground that a house was nearby and after the accident

> people came out. If this is so, I do not see what is so improbable about Mr Granston hearing these words. I therefore accept that he heard these words and they were uttered by some unknown person in response to the horn blowing of Sergeant Reid. "

[23] The learned trial judge went on to find that on a balance of probabilities the truck had stopped and the horn was blown for the reason that Sergeant Reid knew that he had a small space within which to manoeuvre the vehicle. He took the risk of proceeding with the truck on the narrow road before the car was removed. The fact that the road was wet and muddy there was the risk of the truck skidding which increased the risk of the truck becoming unbalanced. Sergeant Reid appreciated the risks but nevertheless made the decision to take it.

[24] The learned trial judge had satisfactorily taken into account all relevant evidentiary material. He, as the arbiter of the facts, was at liberty to accept such evidence as he found credible. He carefully assessed the evidence and correctly concluded that Sergeant Reid was negligent in his driving. As a general rule an appellate court will not interfere with a trial judge's evaluation of the facts of a case unless he can be shown to have been plainly wrong - see **Industrial Chemical v Ellis** (1986) 35 WIR 303; (1986) 23 JLR 35 (PC) and **Eldemire v Eldemire** (1990) 27 JLR 129. There is absolutely no reason for us to conclude that the learned trial judge was wrong in finding that Sergeant Reid's negligence

resulted in the respondent sustaining his injuries. His findings and conclusions ought not to be disturbed.

[25] Before departing from these grounds, it is important to mention that Miss Dickens contended that there was evidence from Sergeant Reid that the road was torn away at the area where the truck overturned, which clearly shows that the overturning of the truck was as a result of an inevitable accident. This, she argued, the learned trial Judge failed to have taken into account. Consequently, she contended, liability ought not to have been ascribed to the appellant.

[26] The defence does not disclose that an averment of inevitable accident had been pleaded. The appellant having not raised such an allegation in its pleading, there would have been no averment before the leaned trial judge regarding such a defence. It follows therefore that, it would have been improper for him to have given consideration to the question of an inevitable accident.

[27] We will now turn to grounds (d), (e) and (f).

> "(d) The learned trial judge erred when he found that the negligence (if any) committed by Sergeant Liston Reid caused the Claimant's current injuries and medical complaints.
>
> (e) The learned trial judge erred in making a manifestly excessive award for general damages in the circumstances.

(f) The learned trial judge erred when he failed to take into account in the calculation of the award of general damages, the subsequent injuries suffered by the Claimant of which greatly aggravated and/or changed the nature of the Claimant's original injuries that he suffered on the 20th November 1997."

[28] Mr McDermot submitted that there was sufficient evidence that the injuries sustained by the respondent in 2001 and 2004 changed the nature of those which he sustained in 1997. The report of Dr Thompson, who saw him in 1997, shows that he suffered no fractures, he contended, but the medical report of the respondent, when examined by Dr Cheeks in 2001, shows that he had old fractures and a bulging disc. The fact that he sustained a fall in 2001 and was involved in an accident in 2004 indicates that there were supervening events causing new injuries and the learned trial judge ought to have taken these factors into consideration, he argued.

[29] It was further contended by him that Dr Thompson's report was uncontradicted and the learned trial judge, having placed reliance on it to some extent, ought not to have imposed liability on the appellant for the complaints of the respondent with respect to the claim for failed back syndrome, fractures and chronic back pain. The appellant, he argued, ought to be made liable only to the extent of the damage caused to the respondent and not the substantial cause thereof. In support of this submission he cited the

cases of **Holtby v Brigham & Cowan (Hull) Ltd** [2000] 3 All ER 421 and **Allen v British Rail Engineeering Ltd** [2001] 1CR. 942; [2001] EWCA Civ 242.

[30] Miss Davis argued that the learned trial judge reviewed all the medical evidence before him and properly found that the respondent's injuries were caused by the appellant. Although the report of Dr Thompson speaks of the respondent's chronic ailments secondary to the injuries received by him, he was seen by a number of other doctors and when Dr Cheeks saw him in 2001, a CAT scan and MRI revealed that he had fractures and bulges, she argued. No scans or X-rays were done by Dr Thompson to have discovered the fractures, she submitted. Despite the respondent experiencing a fall in 2001, this fall would be of no serious consequence, she argued. Dr Webster's report refers to a history of chronic back pains, Dr Ekinhametalor's report suggests degeneration of the discs and he diagnosed the respondent as suffering from back pain syndrome. Dr McDowell's report speaks to trauma to the lower back, she argued. The learned trial judge was correct in finding that the injuries were as a result of the appellant's negligence, she submitted.

[31] In **Holtby v Brigham & Cowan**, for several years the claimant was exposed to asbestos dust and for half of the period he worked for B Ltd. He later worked for other employers in similar conditions as those under which he worked for B Ltd. He developed asbestosis and instituted proceedings. The trial judge held that B Ltd was liable only for a portion of his disability. On appeal it was held,

among other things, that where a person suffers injury from exposure to a noxious substance by two or more persons, if he claimed against one person, liability ought to be attributed to that person only to the extent of his contribution to the claimant's injuries.

[32] In **Allen v British Caribbean** the plaintiff developed "vibratory white finger" caused by exposure to the use of percussive tools, over a number of years during which he was employed to the defendant. He ceased working with the defendant but continued to use vibratory tools which resulted in his sustaining further damage. The judge assessed the compensation for the full amount of the claimant's injury but the liability was apportioned and the sum awarded was reduced by one half. On appeal, it was held, inter alia, that given that an apportionment was a question of fact and the amount at stake was fairly small, it was proper for the judge to have adopted a broad brush approach and on the evidence an attribution of 50% was not inappropriate for the defendant's liability.

[33] It is trite law that the burden of proof of negligence is on a claimant and also, as a matter of law, the onus of proof of causation is on the claimant. That is, the claimant must establish on the balance of probabilities, a causal connection between his injury and the defendant's negligence. For him to succeed he must show that the tortuous act materially contributed to his injury - see **Alphacell Ltd v Woodward** [1972] 2 All ER 475; **McGhee v National Coal**

Board [1972] 3 All ER 1008, [1973] 1 WLR 1; **Holtby v Brigham & Cowan** and **Allen v British Engineering.**

[34] Lord Salmon in **Alphacell Ltd v Woodward,** speaking to the nature of causation, said at 489-490:

> "The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."

[35] The crux of the appellant's complaint is that the fall sustained by the respondent in 2001 is a contributory factor to his pain and suffering and any award made in this regard must be discounted. As shown in the cases, where a supervening event contributes to a claimant's injuries, the claimant can recover no more than such contribution made by the defendant to his disability. The consideration therefore, must be, whether on the totality of the evidence, a claimant has shown that a defendant bears the responsibility for all or for a quantifiable part of his injury. The question is whether the respondent's disability could be regarded as originating from more than one cause, namely, the accident of 1997, the fall in 2001 and the accident in 2004.

[36] In dealing with the question of causation, the learned trial judge had this to say at paragraph 50:

> "In the law of tort, causation is not a metaphysical concept. In *tort law,* as long as the negligent conduct is a substantial cause of the claimant's injuries, then the claimant can recover."

[37] He went on to state that Dr Thompson anticipated that the respondent was likely to develop chronic ailments secondary to his injuries but although he had not stipulated a time frame within which the secondary ailments were likely to develop it was obvious that he was making a direct connection between the likelihood of such ailments and the respondent's initial injuries. He then continued at paragraph 65 by saying:

> "Also from the totality of the evidence Mr Granston was complaining about back pains and other matters from the time of the accident. It would seem to me that Dr Thompson's prognosis began to come true over time and that the development of the chronic conditions seemed to have coincided in time with the fall in 2001 and the accident in 2004."

[38] We now turn to the evidence relating to the respondent's injuries. The evidence of the respondent reveals that after the accident in 1997, he experienced pain in the neck, in his lower back and numbness in his legs and waist. He testified that in 2001 he fell to the ground while extinguishing a fire but he received no injury then. However, since 2003 he continued to experience excruciating pain in the lower back and numbness in his legs. He had undergone surgery and obtained the implant of a morphine pump to assist in alleviating the pain. He also had to take morphine tablets orally and have had

injections administered. He stated that since the accident he is unable to play cricket, swim, ride a bicycle, play football or dance.

[39] The respondent was seen by Dr Ucal Thompson twice. He first saw him on 21 November 1997 at which time he complained of injuries to his neck, shoulder and thigh and numbness in his extremities and difficulty moving around. He was diagnosed as having "significant hyper reflexion in both upper and lower limbs, decreased range of movement and decreased power". He later saw him on 28 November 1997. At that time, his complaint was in respect of pains in the neck and waist. Dr Thompson diagnosed him as having persistent brisk reflexes. An X-ray which was done did not reveal any fractures. It was Dr Thompson's opinion that the possibility existed that he may develop chronic ailment secondary to his injuries.

[40] A report from Dr Randolph Cheeks shows that when he saw the respondent on 14 December 2001, he complained of low back pains radiating to the posterior aspect of his thighs. A CAT scan and a MRI, which was done revealed "old fractures of the pars interarticularis at L5 and bulging of the intervertebral disc at L5/S1".

[41] Dr Michele Lee's report on 10 June 2002 shows the respondent's complaint being that he was travelling in a fire truck which overturned and as a result he has had back spasms. In 2001 he fell down while on the job and had

been experiencing stiffness around the waist and cramps in both legs. Her findings were as follows:

> "On physical examination he was alert with normal language. His cranial nerves were intact. On motor exam his strength was 5/5 throughout with normal bulk, his tone was increased bilaterally in the lower extremities. His coordination finger to noses (sic) was intact. Reflexes in his upper extremities were 2+/4 and the patellar was 3+/4 bilaterally with cross adductors. His ankle reflexes 2/4 and toes were equivocal bilaterally."

[42] The report of Dr Dwight Webster states that the respondent's complaint was that of neck and lower back pain, pain which radiated along the upper and lower limbs, and numbness and stiffness in the lower limbs. In paragraph 2 of the report he states as follows:

> "He has had Magnetic Resonance Imaging (MRI) of his cervical, thoracic and lumbar spines. The cervical spine was normal and the lumbar spine (done over a year ago) showed no lesion requiring surgical intervention. His thoracic spine showed moderate size disc herniation at T6-7, T7-8 and T8-9. His radiological pathology cannot explain most of his symptomatology. Of note his most bothersome symptom is his lower back (lumbar) pain."

[43] The respondent was also seen by Dr Kelvin Ehikhametalor on 13 February, 4 September 2003 and again on 10 March 2008. When he saw him he had severe low back pain. Radiological investigation suggested degeneration at L/S

and L/L of the cervical region. Two epidural steroid injections were administered but his improvement was minimal. He opined that if there is no improvement after the next intervention, the respondent had to be "considered for trial and possible placement of an epidural (or spinal) nerve stimulator". It was also his opinion that this may have to be done by referring him to a pain centre abroad.

[44] There was also a report from Dr Derrick McDowell which essentially stated that the respondent was involved in a motor vehicle accident in 2004 and suffered trauma to the lower back.

[45] The learned trial judge reviewed the medical reports of Drs Thompson, Cheeks, Lee and Webster, which reports were given as a result of the respondent's attendance between 1997 and 2002, and found that the reports did not attribute most of the respondent's complaint to the fall in 2001 and the old fractures. In dealing with Dr Mc Dowell's report, the learned trial judge found that the accident in 2004 aggravated the respondent's pre existing condition. He concluded that the accident in 1997 was a substantial and a continuing cause of the respondent's injuries and the subsequent events had not overshadowed the initial cause of his complaint. He further concluded that on the balance of probabilities, the injuries sustained by the respondent were caused by Sergeant Reid's negligence.

[46] The respondent's complaint after the accident in 1997 related to neck and back pains. Although Dr Thompson stated that X-ray investigations did not

reveal fractures, his prognosis was that the respondent's ailments would be chronic, as the learned trial judge found. It is true that the CAT scan and the MRI done in 2001 revealed that he sustained old fractures but it is not improbable that the earlier X-ray could have failed to detect what the more advanced technical equipment did and in any event, the learned trial judge found that the medical reports did not attribute most of the respondent's complaints to the old fractures. The respondent's fall while putting out a bush fire did not result in any injury to him. His complaint remained constant since 1997 and importantly, the severity of his pain became significantly worse by 2003. As the learned trial judge rightly found, the damage suffered at the time of the accident in 1997 was material and a substantial cause of the respondent's pain and suffering which were aggravated by the 2004 accident.

[47] In arriving at an appropriate compensatory sum for an award for the respondent's pain and suffering, the learned trial judge secured some assistance from the case of **Rubin v St Ann's Bay Hospital & The Attorney general** CL 1987 R 206 delivered 26 January 1999 and reported in Khan's Volume 5 at page 250. He awarded the sum of $8,000,000.00 for pain and suffering and loss of amenity. We are of the view that the award is adequate and ought not to be disturbed.

Grounds (g) and (h):

> "g) The learned trial judge erred in making an award for loss of overtime in the circumstances.
>
> h) The learned trial judge erred in making a manifestly excessive award for loss of future earnings."

[48] Miss Dickens submitted that the respondent was not entitled to be paid overtime as he was not automatically entitled to overtime which was not compulsory and therefore no award ought to have been made therefor.

[49] The learned trial judge made an award of $671,154.00 for overtime. The question is whether he could have received such an award. The learned trial judge, in paragraphs 78 to 80 of his judgment, dealt with the issue in this way:

> "78. The claim under this head is not speculative or remote because the clear evidence from the witnesses is that at the time of the accident, overtime had really become the norm because of the shortage of fire personnel. In other words, overtime had become the norm and not the exception. Also there was evidence that established that working overtime was not a choice once the person was detailed for such duty. Any failure to work overtime, once assigned to that duty, was a disciplinary offence. It is fair to say that but for the injury, Mr Granston would have worked overtime.
>
> 79. The evidence further establishes that Mr Granston worked overtime up to January 2000. There is no evidence that he was not paid for the overtime worked between the

> time of the accident and January 2000. There is further evidence that the payment of overtime became a drain on the resource of the fire service and in July 2002, a decision was taken to replace over time with a duty allowance. This decision was implemented in October 2002. Thus the period for loss of overtime would be January 2000 to October 2002 (thirty three months inclusive of October 2002).
>
> 80. It is common ground that the firefighters worked extremely long hours in any given month. It was quite surprising to learn that 200 hours per month overtime was considered normal. From the evidence, it is fair to say that although the overtime hours worked fluctuated between 190 and 240 hours, a fair mean would be 200 hours. I use 200 hours as the average time Mr Granston would have worked per month as overtime.

[50] There is evidence which discloses that the payment of overtime for a fireman was replaced by the payment of duty allowance as of October 2002. This being so, the respondent would have had the advantage of reaping the benefit of this allowance but for the accident. The fact that the accident deprived him of this benefit must be considered a substantial loss to the respondent. Consequently, entitlement to receive an award under this head of damages for duty allowance in lieu of overtime is unquestionable. However, in making this determination that the respondent is entitled to an award for loss of overtime pay, the learned trial judge wrongly awarded a sum of $671,154.00

which is in excess of that which was claimed. He would only be entitled to the sum of $161,541.12 which he claimed.

[51] The claim for loss of future earnings will now be addressed. The appellant submitted that there was no medical evidence that the respondent is totally incapacitated, unable to work and has lost the ability to earn in the future. It was further contended that the learned trial judge failed to take into account the fact that the respondent has a duty to mitigate his loss. It was further submitted that the sum awarded should be reduced by one third.

[52] Miss Davis submitted that the respondent was unable to function as a result of which he had been medically boarded. The report of Dr Ehikhametalor, she argued, speaks to the respondent's disability and even shows the need for him to have a replacement pump.

[53] The respondent was age 41 at the time of the trial of the action. An award of $5,608,908.60 was made by the learned trial judge based on a fireman's salary of $560,890.76 using a multiplicand of 10. The respondent has retired on medical grounds on the recommendation of the medical board. The respondent has been severely incapacitated and is unlikely to be able to work. We cannot say that the learned trial judge was wrong in making the award. We regard this sum as a reasonable amount.

[54] For the foregoing reasons, we dismissed the appeal as to liability and allowed it in part as to quantum, with costs to the respondent to be agreed or taxed.

DUKHARAN, JA

[55] I too have read the reasons for judgment of Harris JA and agree.