JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 26/2007

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	**CHERRY DIXON-HALL**	**APPELLANT**
AND	**JAMAICA GRANDE LIMITED**	**RESPONDENT**

Dr. Lloyd Barnett and Manley A. Nicholson instructed by Nicholson Phillips for the appellant

Mrs. Symone Mayhew and Miss Camille Wignall instructed by Nunes, Scholefield, DeLeon & Co., for the respondent

November 7, 8, 2007 and November 21, 2008

PANTON, P.

1. The appellant is aggrieved by the decision of Marva McDonald-Bishop, J. (Ag.) delivered on February 13, 2007, wherein she assessed damages in favour of the appellant as follows:

> "General Damages: Pain and suffering and loss of amenities in the sum of JA$650,000.00 with interest thereon at 3% as at September 5, 2005 to February 13, 2007.
>
> Costs to the claimant to be agreed or taxed."

The main complaint by the appellant is in respect of the manner in which the learned judge dealt with the evidence of one of the doctors who examined and treated her. That doctor was Dr. Eric J. Williams.

The Medical Reports

2. On or about May 9, 2003, the appellant was a guest at the Jamaica Grande Resort Hotel, Ocho Rios, St. Ann, when she slipped on a wet floor and fell. She was seen and examined by Dr. Lodian Wright on that very day. His medical certificate dated 7th June, 2003, states that the appellant gave a history of slipping on a wet floor, and injuring her left elbow and right chest area. The certificate adds that she complained of moderate pain to the left elbow and severe pain of the right chest, exacerbated by the slightest of movements, deep breathing and cough. The doctor's examination revealed slight tenderness of the right elbow, which was exacerbated by movements of the same elbow. There was moderate to severe pain and tenderness of the left chest area, the point of maximum tenderness being in the region of the 7th and 8th rib which area was also slightly swollen.

3. Dr. Karlene Neita, consultant radiologist, to whom Dr. Wright had referred the appellant, reported on May 13 that she examined the appellant on May 10 and that x-rays of the chest and ribs revealed an undisplaced fracture of the right 7th rib. There was no abnormality of the left elbow. Consequent on the result of the examinations, Dr. Wright diagnosed a fracture of the 7th rib as

well as soft tissue injury of the right elbow. He treated the appellant with panadeine F and cataflam, and advised rest and continued medication. The prognosis, he felt, was good and estimated that the appellant "should recover sufficiently within two (2) months to carry out her daily active living".

4. The appellant, who resides in Queens, New York, returned to the United States of America on or about May 20, 2003. She stated that she was reviewed by Dr. Wright on three separate occasions prior to her return. When she returned to the United States of America, she attended on Dr. Eric J Williams. He wrote three medical reports which were admitted in evidence. Two of these reports bear a date; the other does not. The earlier of the dated reports bears the date July 2, 2004, and was admitted as exhibit 3. It states that the appellant began treatment for her injuries under Dr. Williams' care on May 20, 2003. It reads further:

> "Ms. Dixon suffered multiple injuries secondary to her fall including a closed fracture of the 7th rib, a severe left wrist sprain, sciatica and muscular injuries to the lower back. Ms. Dixon has been under my treatment with analgesics, non-steroidal anti-inflammatory agents and steroids. She has also completed a four-month course of physical therapy for her injuries. Ms. Dixon has shown some mild improvement in her condition however she remains disabled.
>
> Ms. Dixon has also been diagnosed with systemic lupus erythematosus a deleterious disorder of the immune system. Previously Ms. Dixon's condition had been quite stable in regards to this illness. However, since her fall in May of 2003 she has had several lupus flares as evidenced by an elevated esr

> of 70 and an anti-DS DNA of >200. Since May 20th Ms. Dixon has been hospitalized twice and has numerous small lupus flares. She is now steroid dependent for the management of lupus."

5. The undated report was admitted as exhibit 5. It has been put forward as an addendum to exhibit 3, and reads:

> "Firstly, Ms. Dixon suffered a severe sprain to wrist that in my opinion was caused by the fall. The acute sprain and resulting reactive arthritis were both a direct result of the injury. The pre-existing Lupus would have had no bearing on the injury, as her Lupus flares did not begin until after the fall."

The third report, dated June 17, 2006, was admitted as exhibit 6A. It reads:

> "I submit this letter on behalf of Ms. Cherry Dixon, as she has been a patient under my care for some time. The intent of this is to add clarity to my assessment of Ms. Dixon's injuries. As a result of the fall Ms. Dixon suffered a severe wrist sprain that has resulted in a reactive arthritis that will remain with her permanently. Ms. Dixon continues to suffer chronic pain and stiffness in this joint that negatively impacts her functional capacity. Ms. Dixon also suffers with chronic lupus eythmatosis (sic). The natural history of this disorder is typified by episodic exacerbations. We do know that both emotional and physical stressors can trigger exacerbations. At the time of the accident Ms. Dixon's lupus had been quite stable for and (sic) extending (sic) period of time. While recovering from the fall injury Ms. Dixon experienced a major flare and ultimately required hospitalization and aggressive medical treatment. The clinical presentation supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus."

The Appellant's Evidence

6. According to the appellant, after she returned to the United States of America, she started experiencing severe pain and difficulties in using her left wrist, and was later diagnosed as suffering from arthritis to her left wrist, "which was a direct result of the severe sprain (she) had sustained to (her) left wrist in the fall". She had physiotherapy once weekly from October 20, 2003, to January 26, 2004. It was during the process of this physiotherapy course, that is, in or about November, 2003, that she had a "sudden and unexpected flare of (her) lupus erythematosus condition". There was another flare in February, 2004, and other small flares since then. These flares, she said, have rendered her steroid dependent. Incidentally, the lupus condition had been diagnosed in or about 1998.

7. The appellant's dependency on steroids has changed her life in that she has gained unwanted weight, and her general appearance no longer meets with her satisfaction. She has had what she describes as "(an) intensive course of medical treatment", but continues to experience pain over her "entire body and at times, to such areas as (her) lower back, left wrist and elbow". She is now "barely able to take care of (herself)" and experiences difficulty in walking. Her relationship with her common law husband "has been severely affected especially as it relates to matters of intimacy, as the impact of the fall has left (her) disabled".

8. Apart from the pain and suffering that the appellant has said that she has experienced, and continues to experience, she has lost financially and materially in a significant way. Her life's savings have been depleted as she has incurred significant medical and travelling expenses, and she is unable to work.

The findings

9. The learned judge delivered a comprehensive judgment. She rejected that part of the appellant's case which was built around the evidence of Dr. Williams. Consequently, the damages assessed were considerably less than the appellant had claimed. Her ladyship's major findings may be summarized thus:

(i) The appellant told Dr. Wright only about severe pain to her chest and moderate pain in her elbow; consequently, it was difficult to accept her assertion that immediately after the fall she had severe pain to her entire body.

(ii) the opinion of Dr. Williams that the appellant had lupus that was exacerbated by the fall is unacceptable;

(iii) the injuries to the chest and elbow as seen by Dr. Wright were consistent with a fall;

(iv) the displaced fracture to the right 7th rib and soft tissue injury to the right elbow was the nature and extent of the appellant's injury as a result of the fall;

(v) there is no permanent residual disability of the nature and extent described by the appellant as resulting from the fall;

(vi) there has not been any substantial loss of amenities to the extent claimed, as a result of the fall; and

(vii) the longest period of the appellant's incapacity, as a result of the fall, would be six months.

The Grounds of Appeal

10. Nine grounds were filed, but four (4) were abandoned at the start of the proceedings before us. The other grounds read thus:

- The trial judge erred in treating the Claimant's immediate identification of the points of impact and areas of pain as conclusive of trauma she sustained in the fall for which the Defendant is liable;

- The learned trial judge's treatment of Dr. Williams' reports, as not coming from an expert, is artificial as well as misconceived;

- The medical reports of Drs. Wright and Williams ought to have been treated by the learned trial judge as reconcilable;

- The learned trial judge erroneously concluded that, not all the items claimed for Medical Expenses flowed from the Defendant's breach; and

- The learned trial judge erred in failing to recuse herself from the matter having previously made case management orders in furtherance of the assessment proceedings over which she presided.

This latter ground was not really pursued as the thrust of the appellant's arguments was in relation to the nature of her injuries arising from the fall, and the learned judge's treatment of the medical evidence, particularly that contained in the reports of Dr. Williams. Indeed, the remaining grounds were argued together.

Expert witness

11. Dr. Lloyd Barnett, on behalf of the appellant, in taking issue with the learned judge's stance on the evidence of Dr. Williams, referred us to paragraphs 49 and 52 of the judgment wherein she stated as follows:

> "It is for the court, however, to ultimately accept that a particular witness is an expert and not the parties and that is the reason for the requirement that the court's permission must be obtained for a person to be regarded as an expert. So even though the defendant has agreed to the admissibility of Dr. Williams' reports, it has not agreed that he is an expert. It is for me to rule that he is one. [para. 49] ...
>
> In the end, the question of the effect of the fall on lupus is a medical question on which the court must be assisted in order to come to a proper finding as a matter of fact. This assistance must come from a person qualified to speak from his qualification and training and on whose opinion the court may safely rely in coming to its findings on the ultimate issue. Having seen the medical reports tendered in this case, I see no basis on which I can safely accept the word of Dr. Williams in order to arrive at a conclusion that the claimant was properly diagnosed by him with the other injuries not diagnosed in Jamaica. In particular, I cannot accept his opinion that the claimant had lupus that was exacerbated by the fall because I do not take him as an expert. His opinion, for all practical purposes, on this issue, is really inadmissible and of no value, being one not coming from a person who is an expert witness."[para.52]

12. Dr. Barnett submitted that the learned judge was in error in treating the doctor's evidence as inadmissible as it had been admitted by the consent of the parties, and there had been no issue as to the doctor's competence. He said

that up to the close of the hearing, the only criticism made of the doctor was that his specialty was not known and there was no evidence as to what tests were considered. It was, he said, unfair for the judge to be saying at the time of judgment that she was not going to consider the medical reports, without giving the affected party an opportunity to deal with the matter. Having acquiesced in the receipt of the reports consented to by the parties, the judge cannot at the time of judgment decide to ignore same as evidence, he said. Dr. Barnett described the position adopted by the judge as extreme and unreasonable, and one which could not have been anticipated by the appellant. The approach of the judge was flawed, he said, as she failed to take into account a practical situation that arose where the appellant received serious injury and experienced severe pain.

13. Mrs. Mayhew supported the judge's approach in not regarding the doctor as an expert as it was the appellant's responsibility, she said, to indicate at the case management conference her wish to have the doctor regarded as an expert. However, Mrs. Mayhew added that in the light of the discrepancies between Dr. Wright and Dr. Williams, the judge was entitled to make a decision as to whom to accept.

14. I am somewhat puzzled as to why the learned judge thought it necessary to devote so much of her judgment to determining -

(a) whether Dr. Williams was an expert witness; and
(b) whether his evidence was admissible,

Dr. Williams' reports were admitted in evidence by consent of the parties. The question of their admissibility was therefore not an issue, unless there was some legal provision which barred their admission. I see nothing in Rule 32 of the Civil Procedure Rules, 2002 which forbids the admission of the reports. Of course, the question of relevance is always important; but it could not be said that the opinion of a doctor in this situation was inadmissible. Although we have been referred to several cases, I do not think any authority is required for saying that the reports were properly admitted in evidence. In the circumstances therefore, I am of the view that the learned judge was in error in holding that the evidence was inadmissible.

15. Having said that, I must go on to record that, notwithstanding holding that the reports were inadmissible, the learned judge obviously gave full consideration to them in arriving at her decision. She clearly analyzed them with great care. In doing so, it is my view that she did the correct thing. The reports having been admitted in evidence, she was obliged to assess them to determine what weight should be given to them.

Assessment of the evidence and conclusion

16. This Court has been asked to substitute its findings for that of the trial judge [see para.(b) of the orders sought on p.3 of the record]. We may only do so if there has been an erroneous assessment of the factual situation by the judge, or there has been an error of law on her part which has produced an

unjust result. In my view, the learned judge cannot be faulted in the conclusions at which she has arrived so far as the extent of the liability of the respondent is concerned.

17. There is no doubt that the appellant fell and sustained injury. At the very first opportunity that she had to communicate with a doctor with a view to having herself examined, and treated if necessary, she complained (to Dr. Wright) of moderate pain to her left elbow, and severe pain to her right chest. On examination of her, the doctor found slight tenderness of the right elbow and moderate to severe pain and tenderness of the left chest area. The point of maximum tenderness in the region of the 7^{th} and 8^{th} rib, posteriorly to the mid auxillar line, area was also slightly swollen. The appellant, having been x-rayed, was then diagnosed by Dr. Wright as having a fracture of the 7^{th} rib as well as soft tissue injury to the right elbow.

18. At no time did the appellant, who was seen by Dr. Wright on three subsequent occasions, inform the doctor of the additional injuries mentioned in Dr. Williams' reports. She never mentioned anything that suggested she had received a sprain to the wrist, or injuries to the lower back. Nor did she mention the severe pain to her "entire body" which is noted in her witness statement. There has been no explanation as to why she would have failed to disclose these to Dr. Wright. It follows therefore that there is a yawning chasm between the fall the appellant sustained and the disability of which she

now complains. Dr. Wright estimated that the appellant would have recovered "sufficiently within two (2) months to carry out her daily active living". Her lupus condition was diagnosed in 1998. The fall was in May 2003. The first flare attack was in November 2003, that is, six months after the fall. Clearly, on the available medical evidence, no link has been made between the flares and the fall. At the time of the first flare, the appellant would have already recovered from the effects of the fall, according to Dr. Wright's prognosis. There is no medical evidence that has countered that prognosis. Dr. Williams seems to have merely chronicled that which the appellant told him.

19. In my view, there has been no satisfactory link made between the appellant's existing condition and the fall. The learned judge was correct in her assessment that causation has not been established. It follows that the disability and the expensive and extensive treatment claimed for cannot be laid at the respondent's door. The appeal is really hopeless. I would order its dismissal with costs to the respondent to be agreed or taxed.

HARRISON, J.A.:

Introduction:

1. This appeal raises questions of general importance under the Civil Procedure Rules 2002 ("the CPR") first, as to the approach which the court should adopt where there is agreement between the parties for the admission

of agreed medical reports in respect of personal injuries; and second, as to whether the court should retrospectively refuse to admit the agreed medical reports for failure to comply with Part 32 of the Civil Procedure Rules 2002.

2. The appeal is brought by the claimant in the action, Mrs. Cherry Dixon-Hall, against a judgment delivered by Mrs. Justice McDonald-Bishop on the 13th February 2007.

The Relevant Provisions of the CPR

3. It is convenient at this point to summarize those provisions of the CPR which are of direct relevance to the issues in this appeal.

4. Rule 1 which deals with the overriding objective of the CPR provides as follows at 1.2:

> "1.2 The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules".

It is the duty of the parties to help the court to further the overriding objective – Rule 1.3.

5. There are special requirements applying to claims for personal injuries and rule 10.6 provides as follows:

> "10.6 (1) This rule sets out additional requirements with which a defendant to a claim for personal injuries must comply.

(2) Where the claimant has attached to the claim form or particulars of claim a report from a medical practitioner on the personal injuries which the claimant is alleged to have suffered, the defendant must state in the defence –

(a) whether all or any part of the medical report is agreed; and

(b) if any part of the medical report is disputed, the nature of the dispute.

(3) Where –

(a) the defendant intends to rely on a report from a medical practitioner to dispute any part of the claimant's claim for personal injuries; and

(b) the defendant has obtained such a report, the defendant must attach that report to the defence."

6. Rule 27.9(1) (c) provides that the Court may give directions for the service of experts' reports by dates fixed by the Court.

7. Rule 32 which deals with the evidence of experts and assessors provides so far as is applicable, the following:

"32.1 (1) This Part deals with the provision of expert evidence to assist the court.

(2) In this Part 'expert witness' is a reference to an expert who has been instructed to prepare or give evidence for the purpose of court proceedings.

...

32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.

(2) This duty overrides any obligations to the person by whom he or she is instructed or paid.

...

32.4 (1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation.

(2) An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness's expertise.

(3) An expert witness must state the facts or assumptions upon which his or her opinion is based. The expert witness must not omit to consider material facts which could detract from his or her concluded view.

(4) An expert witness must state if a particular matter or issue falls outside his or her expertise.

(5) Where the opinion of an expert witness is not properly researched, then this must be stated with an indication that the opinion is no more than a provisional one.

(6) Where the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.

(7) Where after service of reports an expert witness changes his or her opinion on a material matter, such change of view must be communicated to all parties."

8. Rule 32.13 provides as follows:

> "32.13 (1) An expert witness's report must –
>
> (a) give details of the expert witness's qualifications;
>
> (b) give details of any literature or other material which the expert witness has used in making the report;
>
> (c) say who carried out any test or experiment which the expert witness has used for the report;
>
> (d) give details of the qualifications of the person who carried out any such test or experiment;
>
> (e) where there is a range of opinion on the matters dealt within in the report –
>
> (i) summarise the range of opinion; and
> (ii) give reasons for his or her opinion, and
>
> (f) contain a summary of the conclusions reached."

The Factual and Procedural Background

9. The claimant, is an American citizen, and was injured on May 9, 2003 when she slipped on wet floor whilst she was a guest of the Jamaica Grande Hotel Limited, Ocho Rios. She was then aged 58 years and had sustained injuries. She was seen and examined by the hotel doctor, Dr. Lodian Wright, on the day of the accident. X-rays were done on May 10, 2003 and she was diagnosed with an un-displaced fracture of the 7th rib and soft tissue injury of the right elbow. She was given an injection and medication.

10. The claimant contends that she continued to experience severe pain on her return to the United States of America on 19th of May 2003. She had difficulties using her left wrist so she went to North Central Bronx Hospital where she was treated by Dr. Eric J. Williams. She was diagnosed by Dr. Williams with fracture of the 7th rib, severe left wrist sprain, arthritis to her left wrist, sciatica and muscular injury to lower back.

11. In or about November 2003, the claimant had sudden and unexpected flares of her "lupus erythematosus" condition which she claimed had been diagnosed in 1998. She also said that she had not experienced any flares previous to the fall. She had to be hospitalized on two (2) occasions because of the flares. She said that she became steroid dependent as a result of the lupus flares and that this has changed her life completely. She contends that she has been put to considerable expense, and due to her inability to work now, she has become a financial burden to members of her family.

12. Mrs. Dixon-Hall filed a claim in the Supreme Court and sought damages for negligence and/or breach of statutory duty. She alleges at paragraph 3 that as a result of the accident she suffered the following injuries:

(a) fracture of the 7th rib;
(b) severe left wrist sprain;
(c) sciatica and muscular injury to lower back;
(d) systemic lupus erythematosus;
(e) several lupus flares

(f) becoming steroid dependent for the management of the lupus;

and had to undergo four (4) months of physiotherapy.

13. A Defence was filed on the 4th January 2006. It pleads inter alia:

> "...
>
> The defendant disputes the quantum of damages on the following grounds:
>
> 1. The Defendant admits paragraphs 1 and 2 and the Particulars of Negligence thereto of the Particulars of Claim.
>
> 2. The Defendant does not admit the paragraphs 3 (sic) of the Particulars of Claim and the Particulars of Injury therein and puts the Claimant to strict proof of same.
>
> 3. The Defendant will agree to the medical reports of Dr. Eric Williams, dated July 2, 2004 and Dr. Lodian P. Wright dated June 7, 2003 but reserves the right to submit questions to Dr. Williams and Dr. Wright and to ask that they be called at the trial/Assessment to be cross-examined depending on the answers they provide in response to the aforesaid questions.
>
> 4. The Defendant does not admit the Particulars of Special Damages set out in paragraph 5 of the Particulars of Claim and puts the Claimant to strict proof of same.
>
> 5. Save as is herein before admitted or not admitted, the defendant denies each and every allegation contained in the Particulars of Claim as if same were hereinbefore set out and traversed seriatim."

14. Judgment on admission was entered on behalf of the claimant and on October 23, 2006, Justice McDonald-Bishop (Ag.), conducted a case management conference. She ordered inter alia: (i) that the assessment of damages should take place on January 29, 2007; (ii) there be standard disclosure and inspection of documents; (iii) witness statements to be filed and exchanged and; (iv) that each party prepare and file and exchange a memorandum as to damages.

The Medical Reports

15. The medical reports of Dr. Wright, Dr. Williams and Dr. Karlene Neita, a Consultant Radiologist, were admitted by consent into evidence at the hearing of the assessment of damages on January 29, 2007. The Claimant was briefly cross-examined. She was asked questions about her employment, her income tax returns and when she had first seen Dr. Williams.

16. Dr. Wright's medical report of the 7th June 2003 states as follows:

> "7th June 2003.
> ...
>
> Re Cherry Dixon
>
> The above-mentioned was seen by me on the 9th of May 2003. She gave history of slipping on wet floor and fell injuring her left elbow and right chest area. She complained of severe pain of the right chest exacerbated by the slightest of movements, deep breathing and cough.
>
> Also complained of moderate pain in the left elbow.

On Examination

Slight tenderness of the right elbow, no bruises detected. Tenderness was however exacerbated by active or passive movements of same elbow.
Moderate to severe pain and tenderness of the left chest area. Point of maximum tenderness is in the region of the 7th and 8th rib (sic) posteriorly to the mid auxillar line, area was also slightly swollen.
X-Ray of Chest and right elbow was (sic) subsequently done.

Result

Chest: COPD – Undisplaced right 7th rib fracture.
Left Elbow: No abnormalities detected.

Diagnosis
Fracture of the 7th Rib. Soft tissue injury of the right elbow.

Treatment

Patient was subsequently put on Panadeine F and Cataflam. Miss Dixon was subsequently reviewed by me on three separate occasion (sic) and advised to rest and continued medication.

Prognosis Good

In my estimation patient having been injured on the 9th of May 2003 should recover sufficiently within two (2) months to carry out her daily active living.

Yours truly,

Sgd. Dr. Lodian P Wright".

17. The medical report of Dr. Eric J. Williams dated July 2, 2004 states as follows:

"July 2, 2004.

...

I submit this letter on behalf of Ms. Cherry Dixon, as she is a patient under my care. Ms. Dixon suffered traumatic injuries sustained in a fall while on vacation in Jamaica on May 9, 2003. After a period of convalescence she returned to the United States and began treatment for her injuries under my care on May 20, 2003. Ms. Dixon suffered multiple injuries secondary to her fall including a closed fracture of the 7th rib, a severe left wrist sprain, sciatica and muscular injuries to the lower back. Ms. Dixon has been under treatment with analgesics, non-steroidal anti-inflammatory agents and steroids. She has also completed a four month course of physical therapy for her injuries. Ms. Dixon has shown some mild improvement in her condition however she remains disabled.

Ms. Dixon also has been diagnosed with systemic lupus erythematosus a delirious disorder of the immune system. Previously, Ms. Dixon's condition had been quite stable in regards to this illness. However, since her fall in May of 2003 she has had several lupus flares as evidenced by an elevated ers of 70 and an anti-DS DNA of >200. Since May 20th Ms. Dixon has been hospitalized twice and has numerous small lupus flares. She is now steroid dependent for the management of lupus. Please contact me with any further question regarding her care.

Sgd.

Eric J. Williams, M.D
Attending Physician
North Bronx Healthcare Network."

18. A letter dated April 4, 2006 was written by the Claimant's Attorneys to Dr. Eric Williams. This letter was admitted into evidence as exhibit 6(b) and it states inter alia:

> "... Ms. Dixon was your patient at North Central Bronx Hospital and we have in our possession (and hereby enclose a copy to you), an undated medical report (presumably an addendum to a previous report dated 2 July 2004) citing among other things that 'the pre-existing Lupus would have had no bearing on the injury, as her Lupus flare did not begin until after her fal'.
>
> Opposing Counsel takes the view that their client should not be held fully accountable, as there was always the likelihood of a recurrence of the pre-existing Lupus and that the accident merely precipitated it.
>
> In the circumstances and in particular the undated report, we ask that you re-examine this patient and address with further clarity in another report your prognosis of the pr-existing condition vis-à-vis her accident and importantly please quantify any permanent disability that you may have diagnosed arising from the accident."

19. Dr. Williams responded in a letter dated June 17, 2006 and states as follows:

> "6/17/2006
>
> I submit this letter on behalf of Ms. Cherry Dixon, as she has been a patient under my care for some time. The intent of this is to add clarity to my assessment of Ms. Dixon's injuries. As a result of the fall Ms. Dixon suffered a severe wrist sprain that has resulted in a reactive arthritis that will remain with her permanently. Ms. Dixon continues to suffer with chronic pain and stiffness in this

> joint that negatively impacts her functional capacity. Ms. Dixon also suffers with chronic lupus eythmatosis. The natural history of this disorder is typified by episodic exacerbations. We do know that both emotional and physical stressors can trigger exacerbations. At the time of the accident Ms. Dixon's lupus had been quite stable for and (sic) extending period of time. While recovering from the fall injury Ms. Dixon experienced a major flare and ultimately required hospitalization and aggressive medical treatment. The clinical presentation supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus. Please contact me with any further questions regarding this matter."

The Findings and Assessment of Damages

20. The learned judge accepted the report of Dr. Wright and found that the claimant had only sustained a fractured right rib and soft tissue injuries to the right elbow as a result of the fall. She also found that the doctor's diagnosis was supported and clearly influenced by an x-ray done by Dr. Karlene Neita, a consultant radiologist. She did not treat Dr. Eric J. Williams as an expert witness and rejected the evidence in his reports. The judge said at paragraph 43 of her judgment:

> "43. Given the differences in the finding of Dr. Williams and Dr. Wright – both claimant's witnesses (sic) – the court ought to be assisted by proper and credible evidence as to the correlation, if any, between the fall and the resultant injuries that were not diagnosed in Jamaica. The guidance of an expert is imperative particularly as it relates to the alleged effect of the fall on the pre-existing lupus condition and the resulting steroid dependency that has allegedly wreaked havoc on

> the claimant's life. As the tribunal of fact, I cannot, of my own knowledge and without the assistance from suitably qualified persons, conclude that the fall has ultimately led to the disability now claim (sic) by the claimant. Under general principles of evidence, expert evidence is only admissible where the matters in question fall outside the court's experience. This case involves such questions. Expert evidence is, therefore required".

She concluded as follows:

> "52. ... Having seen the medical reports tendered in this case, I see no basis on which I can safely accept the word of Dr. Williams in order to arrive at a conclusion that the claimant was properly diagnosed by him with the other injuries not diagnosed in Jamaica. In particular, I cannot accept his opinion that the claimant had lupus that was exacerbated by the fall because I do not take him as an expert. His opinion, for all practical purposes, on this issue, is really inadmissible and of no value, being one not coming from a person who is an expert witness.
>
> 53. Upon a close scrutiny of the claimant's case, I find that apart from her say so, there is no credible and independent evidence to satisfy me, on a preponderance of probabilities, that the claimant had lupus as a pre-existing condition at the time of her fall and which has been exacerbated by the fall. I cannot find her, therefore, as having a 'thin skull' at the time of the fall for the 'egg shell skull rule' to apply making the defendant liable for all the losses and injuries alleged by her."

At paragraphs 58 and 66 respectively she also said:

> "58. In the absence of cogent and credible evidence to the contrary, I find that a displaced fracture to the right 7th rib and soft tissue injury to

> her right elbow was the nature and extent of the claimant's injury as a result of the fall.
> ...
>
> 66. In the end, I find that any serious disability that might have resulted from the fall would have been a temporary one as contemplated by Dr. Wright. He stated that he had advised bed rest when he reviewed her condition. I will accept, therefore, that there was a period of inability to enjoy her daily living as she would have liked and that whatever discomfort there might be remaining is not as extensive as that following in the aftermath of the fall."

21. Damages were assessed in the sum of $650,000.00 in respect of pain and suffering and loss of amenities and was restricted to the fracture of the 7th rib and soft tissue injury to the appellant's right elbow. No award was made under the head "special damages" since the Claimant had failed to discharge the burden of proof in relation to the items claimed.

The Grounds of Appeal and Arguments

22. The following grounds of appeal were argued:

> "3 ....
>
> (b) The trial judge erred in treating the Claimant's immediate identification of the points of impact and areas of pain as conclusive of trauma she sustained in the fall for which the Defendant is liable;
>
> (c) The learned trial judge's treatment of Dr. Williams' report, as not coming from an expert, is artificial as well as misconceived;

> (d) The medical reports of Drs. Wright and Williams ought to have been treated by the learned trial judge as reconcilable;
> ...
>
> (h) The learned trial judge erred in failing to recuse herself from the matter having previously made case management orders in furtherance of the assessment proceedings over which she presided."

23. Dr. Barnett submits that it was not reasonable for the learned judge to have concluded that shortly after the trauma, the claimant would necessarily have identified every section which had been injured or in which pain was being or would subsequently be felt.

24. He further submits in his skeleton arguments as follows:

> "12. The learned trial judge correctly stated that Dr. Wright's examination was carried out on the Claimant's chest, ribs and elbow. Dr. Williams found her to be suffering from fracture of the 7th rib, severe left wrist sprain, sciatica and muscular injury to lower back and arthritis to her lower back. Dr. Wright did not exclude any of those injuries, and still less did he say or could have said that she was not suffering from the other after effects that she complained of which might either have manifested themselves at a later stage or intensified comparatively at a later stage. It was therefore unreasonable for the learned trial judge to hold (para. 58) that:
>
> > 'a displaced fracture to the right 7th rib and soft tissue injury to her right elbow was the nature and extent of the Claimant's injury as a result of the fall'.

> and that she was guilty of misrepresenting the position.
>
> 13. Taking into account that Dr. Williams, stated that the Claimant has been a patient under his care from May 2003 and that he is the Attending Physician at the North Central Bronx Hospital, and that he would have had more extensive opportunities to examine the Claimant, the conclusion that he had not or may not have done any relevant tests or examination to form his conclusions or was not in a position to state the relationship between the lupus and the injuries from the fall is not reasonable. His identification of after effects of the fall in areas of the body not identified by Dr. Wright does not mean that there is a disagreement or irreconcilable difference as their treatment of the patient occurred at different times and under different circumstances.
>
> 14. The learned trial judge formed the opinion that the Claimant had not disclosed to Dr. Wright that she had suffered from lupus merely because this was not mentioned in his report. Additionally, without any evidential basis the learned judge formed the opinion that such a condition would have been disclosed by a patient who had suffered injury in a fall, thus assuming that the lay patient would be aware of a probability that the trauma would trigger a particular reaction or be relevant to her immediate accident and injuries."

25. Dr. Barnett strenuously criticized the reasons given by the learned judge for her rejection of Dr. Williams' "opinion evidence" and diagnosis and argued as follows:

> "5. ... it is inconsistent and unfair to the appellant to find the reports of one of the doctors to be inadmissible. The Reports having been admitted as medical reports, it is inconsistent and unfair to the Appellant to hold that Dr. Williams is not an

> expert. While the Respondent was critical of sections of Dr. Williams' conclusions and stated that his speciality was not known, **p.50** this was not a contention that he was not an expert witness. In fact with specific reference to lupus there was no basis for assuming that a general medical practitioner did not have the expertise to assess its effects and symptoms. Lupus erythematosus is a well-known disease which is described even in standard English Dictionaries. ...
>
> Nevertheless, this is the essential basis on which the learned trial judge rejected the evidence of Dr. Williams and treated it as of no value ..."

He continues at paragraph 6 and 7:

> "6. The learned trial judge stated that the court had not been asked for permission to treat the reports of Dr. Wright and Dr. Williams as being evidence of experts. Para. 45.This is not strictly accurate because the court was specifically asked to admit medical reports and did admit them into evidence. This conclusion was erroneous or at least unfair to the appellant, because the Defence (R.p. 9) filed and expressly stated that the defendant "will agree the medical reports of Dr. Eric Williams dated July 2, 2004 and Dr. Lodian Wright dated June 7, 2003, but reserves the right to submit questions" to them. No questions were submitted and no request was made to cross-examine them was made. Although the same factors are applicable to the Reports of both doctors the court subsequently accepted and relied on Dr. Wright's reports as did the Defence. (**Para 32) R. 14.** It is a basic principle of the law of evidence that no evidence is required of matters which are formally admitted for the purposes of the trial. *Phipson on Evidence* (14th ed.) paras. 2-01-2-04; *The Rothbury* (1893) 10 TLR.
>
> 7. While it is correct that the parties did not follow the provisions of Part 32 of the Civil Procedure

> Rules which deals with the evidence of experts, the learned Judge should have taken into account the fact that:
>
> > (i) there was express consent to the admission of the Medical Reports;
> >
> > (ii) a clear statement of the particulars of injuries in the pleadings; and
> >
> > (iii) there was no denial of the particulars of injuries but only a "non-admission";
> >
> > (iv) no contrary indication on the subject had been given in the Orders made at the Case Management Conference. See CPR 27.9(1)(c), 32.6(2).
>
> The Order merely provided for witness statements to be filed and exchanged."

26. As regards the Court's general duty in relation to expert witnesses Dr. Barnett submitted at paragraph 8:

> "8. Additionally, the Court has a general duty in relation to expert witnesses and may give directions to an expert or direct a party to arrange for an expert witness to give a report. Such steps should have been taken rather than to assume only at the trial stage a strict position which undermined the Claimant's claim and failed to meet the overriding objective of enabling the Court to deal with the case justly. ***Daniels v Walker*** [2000] 1 W.L.R. 1382. Impliedly, the Judge at the Case Management Conference had acquiesced in the parties' agreement and should therefore not retrospectively impose strict limitations and onerous sanctions. The learned Judge should at the least have given the parties

> and in particular the Claimant an opportunity to remedy the perceived defects. ***Stevens v. Gullis*** [20001 1 All E.R. 527; [1999] EWCA Civ. 1978; ***Vasiliou v. Hajigeorgiou*** [2005] 1 W.L.R. 2195"

27. Finally, Dr. Barnett submitted that it was inappropriate for the Judge who conducted the Case Management Conference to try the claim since the deficiency in the Case Management Order was of importance to the issues raised by the Judge herself in relation to expert evidence.

28. Mrs. Mayhew, for the Respondent, submitted inter alia in her written submissions as follows:

> "4. In order to address these arguments it is important to recall the factual context. The Claimant tendered the reports of Dr. Lothian Wright and Dr. Eric Williams in support of her claim for general damages for pain and suffering and loss of amenities. Dr. Wright saw and examined the Claimant at the Defendant's hotel following her fall. In his report, he notes that the Claimant sustained a fracture of her 7th rib and soft tissue injury to her elbow. He further notes in his report that x-rays of the chest and elbow were done subsequently. His diagnosis was therefore supported by independent investigations.
>
> 5. Dr Williams saw the Claimant after she had returned to the United States. In his reports he notes that she suffered multiple injuries including a closed fracture of the 7th rib, severe left wrist sprain, sciatica and muscular injuries to the lower back. He also opined that the Claimant's recent flares in respect of her lupus condition were as a result of the fall. Dr Williams did not state the basis on which he reached this conclusion. The judge after assessing the medical evidence found

> that the only injuries suffered by the Claimant as a result of the fall were the fracture to the 7th rib and the soft issue injury to the Claimant's elbow".

29. Mrs. Mayhew further submits that even though the medical reports were not expert reports in the technical sense, the dicta in ***Davie v Magistrates of Edinburgh*** [1953] Sc 34 and 40 is quite relevant. There the Lord President Cooper noted in respect to the duty of experts as follows:

> "Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

30. She submits: that although: (i) the doctors were not appointed as experts pursuant to Part 32 of the CPR, and; (ii) the medical reports were admitted into evidence by consent, the learned judge was not bound to accept their findings since it was for the judge as the tribunal of fact to say what injuries, if any, that the Claimant sustained as a result of the fall. She submits that the Claimant ought to have known from the outset that expert evidence would be required in relation to the lupus flares and other injuries not mentioned by Dr. Wright and that she ought to have sought the Court's permission to rely on expert evidence.

31. Mrs. Mayhew readily acknowledged that the judge still manages the case during a trial and has powers to direct it, but she submits that it would

not have been appropriate in the instant case, for the learned judge to have exercised her case management powers at the assessment of damages hearing. At paragraph 13 of her "Speaking Notes" she submits:

> "13. The duty of the judge in giving the directions is not to make up for the evidential weaknesses that may (sic) present in a party's case as this is a matter for the parties and their legal advisors. With respect to the complaints of the Appellant before this court she appears to be doing nothing more than blaming the learned trial judge for the evidential deficiencies of her case."

32. She submits that since the appellant did not lay the proper foundation procedurally, that is, obtaining leave and complying with the provisions of rule 32 of the CPR, the learned trial judge was correct in refusing to accept the opinion evidence of Dr. Williams. She therefore submits: (a) that there was insufficient information for the judge to "ground the reputability of Dr. Williams' conclusions"; (b) there was no evidence of the qualifications of Dr. Williams and there was nothing before the court to indicate that he was competent to proffer an opinion on the cause of the lupus flares and; (c) there was no clear indication that Dr. Williams understood that his duty was to the court and not to the claimant.

33. Mrs. Mayhew also submits that the Respondent did not agree that Dr. Williams should be treated as an expert witness so they would be entitled to challenge any opinion given by Dr. Williams. She said:

> "...even if the Respondent had agreed that Dr Williams should be treated as an expert the court was still not bound by his opinion. This is clear when one considers that the duty of the experts is to assist the court in arriving at its decision. Even if the expert evidence is unchallenged (for example if as it is contended in the case at bar that the Respondent agreed the report, then the court must still at the end of the day consider the expert evidence in light of the other evidence adduced This was clearly established in the case of the ***Coopers Paven Limited v Southampton Container Terminal Ltd.*** [2003] EWCA Civ 1223".

34. She also referred the court to the cases of ***Eachus v Leonard*** reported at [1963] Solicitors' Journal Vol. 106 – Part 2 page 918 and ***Armstrong v First York*** [2005] EWCA Civ. 277. She argues that there were discrepancies between the accounts of Dr. Williams and that of Dr. Wright who had examined the Claimant immediately following the fall so, on the question of causation, the learned judge was "duty bound" to assess all the evidence including the agreed report of Dr. Williams and was entitled to reject the opinion evidence that was proffered by Dr. Williams.

35. Finally, Mrs. Mayhew submits that the language used in Rule 27.7 of the CPR that is: "The judge who conducts the Case Management Conference may not try the claim", does not preclude the judge who conducts the case management conference from trying the claim. Furthermore, she submits that

there were no objections by the claimant at the commencement of the assessment of damages.

The Authorities

36. In ***Harrison v Liverpool Corporation*** [1943] 2 All ER 449 Lord Greene M.R said at page 450:

> "....the phrase "agreed medical report" means, and means only, a report where the facts stated are agreed as true medical facts, or other facts as the case may be, and the medical opinions expressed are accepted as correct".

37. Ormerod L.J is reported to have said in ***Eachus v Leonard*** [1963] Solicitors' Journal Vol. 106 – Part 2 page 918 that:

> "...the effect of agreeing medical evidence was to avoid the necessity of calling doctors at the trial and of discussing medical matters which might be controversial. The reports were evidence of the plaintiff's symptoms and condition at the time they were made, but prognosis in a report either had to be specially agreed as an agreed fact or else it was no more than an intelligent estimate by experienced doctors of a plaintiff's future condition. The prognosis in this case fell into the latter category, and in such circumstances a judge had to form a conclusion on the basis of all available evidence, including that of the injured plaintiff. There was nothing wrong in the method adopted by the registrar for assessing the loss of earnings".

38. In ***Jones v Griffith*** [1969] 2 All ER 1015 Widgery L.J said at page 1019:

> "...where a medical report is agreed, the effect is that the words of the report are treated as though they had been given in evidence, and it is not open to counsel to embellish them beyond, perhaps, some necessary reference to dictionaries to indicate the meaning of some of the terms. All too often in cases of this kind the argument becomes an argument as to the proper construction of the words used by the doctors, when, if the court is properly to be assisted, it should have the opportunity of itself examining the doctors".

39. Where experts are appointed by the court their duty is to the court and not to the party calling them. ***Armstrong & Anor*** (supra) held that there is no rule of law that the uncontroverted evidence of an expert in an unusual field should be dispositive of a claim. Rather, it was for the trial judge to determine the case on all different types of evidence before the Court. The case also held that the judge's conclusion that the claimants were telling the truth may be a sufficient reason in itself for rejecting the evidence of an expert.

40. ***Coopers Payen Ltd v Southampton Containers Terminal Ltd*** [2003] EWCA Civ. 1223 dealt with the approach to the evidence of a single expert. The case decided inter alia, that a judge should very rarely disregard the evidence of a single joint expert; the judge must evaluate such evidence and reach appropriate conclusions with regard to it and that appropriate

reasons should be given for any conclusions reached. Clarke LJ stated at paragraph 42 of the judgment:

> "42. All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will only be part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate."
> (emphasis by Counsel)

41. In ***Stevens v Gullis*** [2000]1 All ER 527 Lord Woolf M.R stated at page 535:

> "... Under the CPR, the court has power, as I have indicated, to control the evidence which is to be placed before the court. It would be wholly wrong, where a judge has appropriately exercised his discretion in relation to that matter, for the parties to override that discretion merely because the parties are content to allow the matter to be dealt with otherwise".

42. In ***Daniels v Walker*** [2000] 1 WLR 1382 Lord Woolf M.R said at page 1387, letter C:

> "...Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert or, if appropriate, to rely on the evidence of another expert".

43. It is also a basic principle of the law of evidence that no evidence is required of matters which are formally admitted for the purposes of the trial. See ***Phipson on Evidence*** (14th ed.), paras. 2-0 1-2-04 and ***The Rothbury*** (1893) 10 T.L.R.

Conclusions.

44. There are two aspects of the case that need to be considered at this stage. The first concerns the extent and nature of the injuries sustained by the appellant and the second has to deal with whether the fall had exacerbated the appellant's pre-existing lupus condition. The vexed issue is whether Dr. Williams could and should be treated as an expert witness for the purposes of the assessment of damages.

45. The learned judge had concluded that the appellant was only entitled to damages in respect of the fractured rib and the soft tissue injuries to the

elbow. Both doctors had spoken of the rib fracture but Dr. Williams had also referred to a severe left wrist sprain, sciatica and muscular injuries to the lower back. He made no reference to any injuries to the right elbow. In my judgment, the learned judge was correct in accepting the evidence of Dr. Wright and Dr. Neita, the Consultant Radiologist. Dr. Wright had seen and examined the appellant on the very day that she fell. There would have been early signs of the wrist and muscular injuries yet no compliant was made to Dr. Wright.

46. I turn now to consider the medical evidence of Dr. Williams regarding the lupus flares. The issue which the learned judge had to determine was whether Part 32 of the CPR has to be satisfied before any "opinion evidence" can be accepted by the court. The court has several options open to it in respect of its general duty regarding expert witnesses. First, it may give directions to an expert or secondly, it may direct a party to arrange for an expert witness to give a report. The learned judge in the instant matter stated that the appellant had not sought the court's permission to treat Dr. Williams as an expert but one wonders whether this was necessary since:

> (i) there was an express consent to the admission of the Medical Reports;
>
> (ii) there was a clear statement of the particulars of injuries in the pleadings; and
>
> (iii) there was no denial of the particulars of injuries but there was only a "non-admission.

47. I therefore agree with Dr. Barnett when he submitted that the reports having been admitted by consent as medical reports, it was inconsistent and unfair to the appellant to hold that Dr. Williams is not an expert and that his reports were inadmissible. It is my view that the learned judge ought to have given the Claimant an opportunity to remedy any perceived defect in the procedure rather than retrospectively imposing strict limitations and sanctions. She ought to have borne in mind the court's general powers of management.

48. One of the fundamental principles underlying the holding of a case management conference is that invariably, the court will endeavour to identify the legal issues and sort out those that are appropriate for prompt disposition. The judge has complete control over the case, and he or she must rationally and expeditiously manage the case in order to meet the overriding objective set out in Part 1 (supra). In my judgment, it would therefore have been in the best interest of the parties, if the learned judge had explored the need for the court to make an order in relation to experts at the case management conference since there was an admission in the defence that the medical reports would be agreed.

49. In the circumstances, I think it would be grossly unfair to the appellant for the learned judge to have ruled at the stage when she handed down her judgment that since there was non-compliance with Parts 32(1) and 32.13 of

the CPR the reports of Dr. Williams would be inadmissible. Furthermore, no issue had been raised regarding his medical competence. I would therefore hold that in the circumstances of this case the learned judge had fallen into error when she ruled that she could not treat the opinion stated by Dr. Williams, without the claimant's compliance with Para.32 of the CPR.

50. It has been stated and often restated that, if the wrong is established, the wrongdoer must take the victim as he finds him. The question now for determination is whether or not there is any medical basis for the opinion stated by Dr. Williams that the fall had exacerbated the appellant's pre-existing lupus condition.

51. The appellant claims that she was diagnosed with lupus since 1998 and says that she has never experienced any flares prior to her fall. Dr. Williams has stated in his report of July 2, 2004 that the appellant came under his care on May 20, 2003 and that was when he began treatment for her injuries. He did state in this report that she was diagnosed with systemic lupus erythematosus but it has not been disclosed who made this diagnosis. It seems to me therefore, that Dr. Williams would not have been in a position to make any proper assessment of her pre-existing condition or for that matter give an opinion about a medical condition that he has no personal knowledge of. In my judgment, the learned judge was therefore correct to have rejected his opinion that the fall had exacerbated her lupus condition.

The Outcome of the Appeal.

53. It is my view that the appeal ought to be dismissed with costs to the respondent.

HARRIS, J.A.

1. In this appeal, the appellant challenges a judgment of McDonald-Bishop, J.(Ag.), on an assessment of damages, delivered on February 13, 2007.

2. On May 9, 2003, the appellant, a United States citizen, during a sojourn as a guest at a hotel owned and operated by the respondent slipped and fell. She sustained injuries as a result of the fall.

3. On August 31, 2005 she commenced proceedings against the respondent, claiming damages for negligence and or breach of statutory duty. In her claim, her injuries were particularized thus:

> "PARTICULARS OF INJURY
>
> (i) Fracture of the 7th rib
> (ii) Severe left wrist sprain
> (iii) Sciatica and muscular injury to lower back
> (iv) Systemic Lupus Erythematosus;
> (v) Several lupus flares becoming steroid dependent for management of the lupus
> (vi) Four months of physiotherapy ..."

The particulars of special damages were stated as follows:

> "Medical expenses US$13,603.27
>
> Loss of Earnings
> (27 months @ $2,000.00) US$54,000.00

Transportation	US$ 1,460.00
Total	US$69,063.27"

4. The respondent admitted liability but disputed quantum. On February 10, 2006 judgment on admission was entered in favour of the appellant and for damages to be assessed.

5. On October 23, 2006, McDonald-Bishop, J. conducted a case management conference and made the following orders:

> "1. Assessment of Damages Hearing be adjourned to 29 January 2007;
>
> 2. That there be Standard Disclosure by 30 November 2006;
>
> 3. That there be Inspection of Documents by 18 December 2006;
>
> 4. Witness Statements to be filed and exchanged on or before 18 December 2006;
>
> 5. Each party to prepare, file and exchange Memorandum as to Damages with List of Authorities on or before 15 January 2007;
>
> 6. Claimant's Attorneys-at-Law to prepare Bundle of Documents for use at the hearing per Rule 39.1 of the CPR;
>
> 7. Claimant's Attorneys-at-Law to prepare, file and serve the Orders made herein; and
>
> 8. Cost to be Costs in the Claim."

6. The appellant's evidence discloses that she was seen by Dr. Lodian Wright on the day of the accident. His examination revealed slight tenderness of her right elbow, moderate to severe pain and tenderness of the left chest area. An x-ray which was subsequently done showed that she had sustained a fracture of her 7th rib. Dr. Wright thereafter, reviewed her on three occasions. His prognosis for her recovery was good.

7. On her return to the United States, she was treated at the North Central Bronx Hospital by Dr. Eric J. Williams. She asserted that she was diagnosed as suffering from arthritis and sciatica emanating from the fall. She underwent physiotherapy once weekly from October 20, 2003 to January 26, 2004.

8. It was further stated by her that in or about November 2003 she experienced an attack of lupus erythematosus, a condition from which she had previously suffered. She was first diagnosed with the condition in 1998. She complained of having recurrent attacks since November 2003 which she declared had caused her to become steroid dependent. This, she related, had dramatically changed her life and appearance. Several medical reports submitted by Dr. Williams essentially regurgitated most of that which she asserted.

9. The following documents were admitted into evidence by consent:

1. Dr. Wright's medical report dated June 7, 2003.
2. X-ray report dated May 13, 2003.

3. Medical report from Dr. Eric Williams dated July 2, 2004.

4. Physiotherapist report dated November 18, 2004.

5. Medical report of Dr. Williams (undated).

6. Medical report of Dr. Williams dated June 17, 2006.

10. At the trial, the learned trial judge concluded that special damages were not proved and consequently made no award under that head. She awarded the sum of $650,000.00 as general damages with interest thereon at the rate of 3% per annum from September 5, 2005 to February 13, 2007.

11. The following grounds of appeal were filed:

> "(a) The learned trial judge applied a higher standard of proof than that which is justifiable and is required of a Claimant in a civil trial;
>
> (b) The trial judge erred in treating the Claimant's immediate identification of the points of impact and areas of pain as conclusive of trauma she sustained in the fall for which the Defendant is liable;
>
> (c) The learned trial judge's treatment of Dr. Williams' reports, as not coming from an expert, is artificial as well as misconceived;
>
> (d) The medical reports of Drs. Wright and Williams', ought to have been treated by the learned trial judge as reconcilable;
>
> (e) The learned trial judge erroneously concluded that, not all the items claimed for Medical Expenses flowed from the Defendant's breach;

(f) The learned trial judge erroneously concluded that the claim for Loss of Income had not been specifically proven;

(g) The learned trial judge failed to properly consider the evidence led by the Claimant in support of her claim for Loss of Income within the context and according to the peculiarities of the nature of the Claimant's employment.

(h) The learned trial judge erred in failing to recuse herself from the matter; having previously made case management orders in furtherance of the assessment proceedings over which she presided; and

(i) The manner of the learned trial judge's conduct towards Counsel for the Claimant was plainly hostile and intimidating; having the cumulative effect of belittling Counsel in the eyes of the Claimant as to imbue the Claimant with the notion that she stood no chance of a fair trial."

Grounds (a), (f), (g) and (i) were abandoned.

12. It was Dr. Barnett's submission that the learned trial judge admitted the medical reports of Dr. Wright and Dr. Williams in evidence, by consent, yet she rejected Dr. Williams' evidence as inadmissible for the reason that he was not an expert. He further argued that rule 10.6 (2) of Civil Procedure Rules (C.P.R.) treats a medical report annexed to a claim as evidence forming part of a claimant's case. He also submitted that the defence raised no objections to Dr. Williams' competence or his ability to furnish a medical report and his report ought to have been accepted by the learned trial judge.

13. Mrs. Mayhew argued that the appellant was under a duty, as claimant, to prove her injuries. She failed to comply with the requirements of Part 32 of the Civil Procedure Rules and that Dr. Williams not being a duly appointed expert could not have been treated as one by the learned trial judge, she argued.

14. There is no dispute that the appellant failed to comply with the procedural requirements laid down by Part 32 of the Civil Procedure Rules 2002 and in particular rule 32.6 (1) – (3) which reads.

> "32.6 (1) No party may call an expert witness or put in an expert witness's report without the court's permission.
>
> (2) The general rule is that the court's permission is to be given at a case management conference.
>
> (3) When a party applies for permission under this rule –
>
> (a) that party must name the expert witness and identify the nature of the expert witness's expertise; and
>
> (b) any permission granted shall be in relation to that expert witness only."

15. The learned trial judge accepted Dr. Wright's report as evidence of facts. She acknowledged that no permission had been obtained for Dr. Wright and

Dr. Williams to be treated as experts in obedience to the relevant provisions of Part 32 of the rules. At paragraph 45 of her judgment, she went on to say:

> "I do not accept that the result of a fall, where it is without complications and involves no complex medical questions, is ordinarily not a matter that would require specialized medical skill and training over that of a general practitioner. Here, however, the claimant has gone beyond direct and simple results of a fall into the realm of indirect and latent results".

She continued at paragraphs 46 – 50 by stating:

> "46. The claimant is asking the court to accept the opinion of Dr. Williams that her sprained wrist and resultant arthritis, sciatica and lower back pains were direct results of the fall and that *"the clinical presentations supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus."* The defendant, through its counsel Mr. Morgan, has challenged the reliability of the report and asked the court to reject Dr. William's opinion it being one not coming from an expert. Mr. Nicholson stated, in response, that the reports were admitted by consent and so the defendant cannot now challenge its contents.
>
> 47. In light of the documents being rendered admissible by consent, does it mean the court is bound to accept the contents of the document, without more? I think not. The credibility and reliability of the document (as of that of the witness had he been called) are issues for the tribunal of fact to determine. The evidence having now been admitted, it now becomes a question of weight rather than of admissibility. The question of weight is thus a matter that falls exclusively within the purview of the fact finder. The parties,

therefore, cannot tell the tribunal of fact what weight should be attached to a particular document and how it should be treated once it had become evidence.

48. My inherent duty to evaluate the evidence in the exercise of my jury function is not ousted merely by admissibility of the document by consent of the parties. Of course, where properly admitted evidence is placed before the court and it is found credible and reliable and it stands unchallenged, then there would be no proper basis for the court to reject it. The first hurdles to be crossed, however, before evidence may be accepted as unchallenged is that it is admissible and credible and so can be acted on.

49. In this case, the claimant is relying on the opinion of a witness (who is said to be a doctor) on the ultimate issue which has to be determined by the court. The general rule is that opinion evidence is inadmissible. However, it admits to an important exception in the case of expert witnesses. It is for the court, however, to ultimately accept that a particular witness is an expert and not the parties and that is the reason for the requirement that the court's permission must be first obtained for a person to be regarded as an expert. So even though the defendant has agreed to the admissibility of Dr. Williams reports, it has not agreed that he is an expert. It is for me to rule that he is one.

50. It is totally a question of law for the court as to whether the purported 'expert' witness has undergone a sufficient course of study or is of sufficient experience to qualify as an expert in order for his opinion to be admissible and acceptable. Such evidence is usually introduced by a statement of qualification. The CPR has incorporated this basic requirement in **r.32.13 (1)(a)** where it

> is provided, inter alia, that *"an expert witness's report must give details of the expert witness's qualification."* Accordingly, a party relying on opinion evidence must ensure that the court is presented with proper information in this regard so that it can safely accept a witness as an expert so that the opinion evidence intended to be adduced may be properly admitted." [emphasis supplied]

At paragraph 51 she made the following findings:

> "This has led me to ask at this juncture: what do I have in this case for me to admit and accept opinion evidence as an exception to the general rule? This question has propelled me to closely scrutinize the reports of Dr. Williams because he is the one who has proffered an opinion as to the effects of the fall on the claimant. Upon a consideration of his reports, I made the following findings:
>
> - There is no distinction between what he was told by the claimant or seen from other sources and what is in his personal knowledge. He spoke to no clinical examinations or tests personally conducted by him on the claimant on which his independent findings could be based. Neither has he referred to any other examinations conducted by any other medical personnel on which he had relied to properly base his conclusions.
>
> - He indicated no diagnostic test done or ordered by him to analyse the claimant's condition particularly as it relates to sciatica, sprain to the wrist and the muscular back pains. He mentioned that the claimant was diagnosed with a fractured 7th rib, for instance, but he gives no indication as to from which source he has derived such diagnosis. There is no reference that he

might have confirmed this by any x-ray he caused to be done in New York or from any medical or x-ray report from Jamaica that he might have examined and on which he could have based such a conclusion.

- The question that arises is: on what clinical basis has he concluded that the claimant had the injuries he spoke about? Is it just based on what the claimant told him or is it based on his own personal examinations and findings as a doctor? These are critical questions that remain unanswered on the terms of Dr. Williams' report. The court cannot speculate. These questions do arise because at no place in his reports, for instance, does he say the claimant made complaint to him of pain in the areas noted or that she complained of injuries allegedly sustained in a fall. He wrote as if he found pain but he has not indicated any examinations done by him to arrive at such conclusion. He spoke definitively of injuries she sustained in 'the fall' as if it is within his personal knowledge that there was a fall and not what was told to him by the claimant.

- There is no indication that he has independently diagnosed the claimant with lupus and had himself treated her for the flares. He has not indicated for how long he has had the claimant as a patient and have been treating her pre-existing condition, if at all. He spoke about her not having any flares before the fall all mirroring what the claimant herself has said. From which source has he derived such information? This is not stated. The claimant has said she started attending Dr. Williams in 1999 or 2000, she cannot remember. This would have been after 1998 when she said she was first diagnosed with lupus. Where is the medical report from a doctor or institution

confirming her diagnosis with lupus and her course of treatment since 1998? One cannot tell from Dr. Williams' reports whether he had in fact confirmed by his own diagnosis that the claimant has lupus. He has stated several conclusions without showing the court how he arrives at them. The claimant stated that she has been hospitalized twice for lupus. There is no proper medical report confirming this as to dates of admission, complaint, treatment administered, by whom and so forth.

- One of the troubling things about Dr. Williams' reports is that he has presented hearsay as facts in his report and so I am not able to distinguish what are, indeed, facts within his own knowledge and what constitute hearsay. It is accepted as a matter of law that an expert need not have personal knowledge of every relevant matter within his field of expertise and may base his testimony on the research and findings of others to arrive at his conclusion but these must be indicated in his report and the basis on which he grounds his conclusions must be stated. **R.32.13 (1)** has confirmed this principle. There is nothing put before me to ground the reputability of Dr. Williams' conclusions.

- Above all else, the court is left asking: what is the competence and qualification of Dr. Williams to proffer an opinion as to the causal nexus between the fall and the lupus condition that is now being blamed for the resultant disability of the claimant? Dr. Williams has disclosed no qualification and specialized training in the treatment of lupus that would qualify him to speak on the cause and effect relationship between a fall and lupus. Apart from placing "MD" behind his name and signing as "Attending

> Physician," he has not indicated any qualification nor has indicated any area of specialty and competence for me to treat him as an expert witness so as to properly accept his opinion in this regard. In fact, even the condition with which the claimant is allegedly afflicted is spelt differently in his reports and so I am not even certain as to the type of lupus with which she is afflicted, if any at all.
>
> - I will even go further and say that I am not satisfied that he understands his duty while, purportedly, acting as an expert witness and stating his opinion. His duty is to the court and not to the person whom he has treated. This is expressly declared in the provisions of the CPR **r.32.3** where it is stated:
>
> 32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his expertise.
>
> 2) This duty overrides any obligations to the person by whom he or she is instructed or paid.
>
> Following from this, there is a requirement for a certificate of understanding to be declared by persons acting in such capacity **(r.32.13 (2)**. There is no demonstration or declaration on the part of Dr. Williams that he understands that his overriding duty is to the court."

16. It appears to me that a fundamental issue arising in this appeal is whether, having regard to the learned trial judge's findings of fact in respect of the injuries sustained by the appellant and in particular her findings and

conclusions regarding Dr. Williams' report, this court can properly interfere with those findings.

17. The role of an appellate court is generally one of review. It may not interfere with the findings and conclusions of a trial judge unless it is satisfied that the judge exercised his or her discretion on wrong principles or that the decision is palpably wrong. See **Watt v. Thomas** [1947] A.C. 484; 1947 1 All E.R. 582; **Industrial Chemical Co. (Jamaica) Ltd. v. Ellis** 35 W.I.R. 303. There will be cases in which an appellate court will be of the view that a trial judge formed the wrong conclusions. In such cases that court is at liberty to substitute its own findings and decision. See **Watt v. Thomas** (supra).

18. Rule 10.6 of the Civil Procedure Rules demonstrates that a claimant, in an action for personal injuries may attach to his claim form or particulars of claim, a medical report. Where this has been done, the defendant is required to do certain things. Section 10.6 (2) of the rule reads:

> "10.6 (2) Where the claimant has attached to the claim form or particulars of claim a report from a medical practitioner on the personal injuries which the claimant is alleged to have suffered, the defendant must state in the defence –
>
> (a) whether all or any part of the medical report is agreed; and
>
> (b) if any part of the medical report is disputed, the nature of the dispute."

19. The appellant attached medical reports of Drs. Wright and Williams to his particulars of claim. Dr. Wirght's report states as follows:

> "7th June 2003
>
> TO WHOM IT MAY CONCERN
>
> RE: CHERRY DIXON
>
> The above-mentioned was seen by me on the 9th of May 2003. She gave history off slipping on wet floor and fell injuring her left Elbow and right Chest area. She complained of severe pain of the right Chest exacerbated by the slightest of movements, deep breathing and cough.
>
> Also complained of moderate pain of the left Elbow.
>
> ON EXAMINATION
>
> Slight tenderness of the right Elbow, no bruises detected. Tenderness was however exacerbated by Active or Passive movements of same Elbow.
>
> Moderate to severe pain and tenderness of the left Chest area. Point of maximum tenderness in the region of the 7th and 8th rib, posteriorly to the Mid Auxillar line, area was also slightly swollen.
>
> X-Ray of Chest and Right Elbow was subsequently done.
>
> RESULT
> Chest: COPD — Undisplaced right 7th rib fracture.
>
> Left Elbow;
> No abnormalities detected.
>
> DIAGNOSIS: Fracture of the 7th Rib
> Soft Tissue injury of the right Elbow
>
> TREATMENT: Patient was subsequently put on

Panadeine F and Cataflam.

Ms. Dixon was subsequently reviewed by me on three separate occasion and advised to rest and continued Medication.

PROGNOSIS GOOD

In my estimation patient having been injured on the 9th of May 2003 should recover sufficently within two (2) months to carry out her daily active living."

20. The following were Dr. Williams' reports:

".July 2, 2004

To Whom It May Concern,

I submit this letter on behalf of Ms. Cherry Dixon, as she is a patient under my care. Ms. Dixon suffered traumatic injuries sustained in a fall while on vacation in Jamaica on May 9, 2003. After a period of convalescence she returned to the United States and began treatment for her injuries under my care on May 20, 2003. Ms. Dixon suffered multiple injuries secondary to her fall including a closed fracture of 7th rib, a severe left wrist sprain, sciatica and muscular injuries to the lower back. Ms. Dixon has been under treatment with analgesics, non-steroidal anti-inflammatory agents and steroids. She has also completed a four-month course of physical therapy for her injuries. Ms. Dixon has shown some mild improvement in her condition however she remains disabled.

Ms. Dixon also has been diagnosed with systemic lupus erythematosus a deleterious disorder of the immune system. Previously, Ms. Dixon's condition had been quite stable in regards to this illness. However, since her fall in May of 2003 she has had several lupus flares as evidenced by an elevated esr of 70 and an anti-DS DNA of > 200. Since May 20th Ms. Dixon has been hospitalized twice and has

numerous small lupus flares. She is now steroid dependent for the management of lupus. Please contact me with any further question regarding her care."

"To Whom It May Concern

I submit this letter on behalf of Ms. Cherry Dixon, as she is a patient under my care. This letter is to serve as an addendum to my previous report regarding the injury to Ms. Dixon's wrist. Firstly, Ms. Dixon suffered a severe sprain to wrist that in my opinion was caused by the fall. The acute sprain and resulting reactive arthritis were both a direct result of the injury. The pre-existing Lupus would have had no bearing on the injury, as her Lupus flares did not begin until after the fall. Please contact me with any further questions at 718-519-2195."

"6/17/2006

To Whom It May Concern,

I submit this letter on behalf of Ms. Cherry Dixon, as she has been a patient under may care for some time. The intent of this is to add clarity to my assessment of Ms. Dixon's injuries. As a result of the fall Ms. Dixon suffered a severe wrist sprain that has resulted in a reactive arthritis that will remain with her permanently. Ms. Dixon continues to suffer with chronic pain and stiffness in this joint that negatively impacts her functional capacity. Ms. Dixon also suffer with chronic lupus eythmatosis (sic). The natural history of this disorder is typified by episodic exacerbations. We do know that both emotional and physical stressors can trigger exacerbations. At the time of the accident Ms. Dixon's lupus had been quite stable for and extending (sic) period of time. While recovering from fall injury Ms. Dixon experienced a major flare and ultimately required hospitalization and aggressive medical treatment. The clinical presentation

> supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus. Please contact me with any further questions regarding this matter."

21. The appellant averred in paragraph 3 of her particulars of claim that as a result of the accident she suffered injuries. A statement that she intended to rely on the medical reports was specifically pleaded in paragraph 5 of the particulars of claim as follows:

> "The Claimant will rely as part of her case on the medical reports by Dr. Eric J. Williams, dated 2 July 2004, and Dr. Lodian P. Wright dated 7 June 2003; copies of which are attached hereto."

22. In response to the appellant's averments, at paragraphs 2 and 3 of the defence the respondent stated:

> "2. The defendant does not admit paragraph 3 of the Particulars of Claim and Particulars of Injury therein and puts the Claimant to strict proof of same.
>
> 3. The Defendant will agree to the medical reports of Dr. Eric Williams, dated July 2, 2004 and Dr. Lodian P. Wright dated June 7, 2003 but reserves the right to submit questions to Dr. Williams and Dr. Wright and to ask that they be called at the trial/Assessment to be cross-examined depending on the answers they provide in response to the aforesaid questions."

23. Generally, where there is an express admission of facts by way of pleading, these facts are conclusive and adducing evidence for or against the

matters admitted is impermissible. Disputed facts may, however, be challenged.

24. In the case of **the Rothbury** [1893] 10 T.L.R. cited by Dr. Barnett, a salvage action was brought by the plaintiff against the defendant. The defendant, in its defence, admitted the facts but denied inferences drawn from those facts by the plaintiff in their statement of claim. The plaintiff was precluded from adducing evidence as to facts with respect to salvage services, these facts having been admitted in the defence. Proof of the plaintiff's case was limited to disputed facts only.

25. In the case under review, liability was admitted by the respondent. The fact that the medical reports were annexed to the pleadings, that the respondent agreed to Dr. Williams' report of July 2, 2004 and Dr. Wright's report of June 7, 2003 and that all reports were admitted into evidence does not mean that the respondent admitted that the appellant sustained the injuries which she particularized. The respondent expressly denied in its defence that she had suffered injuries and had accordingly put her to proof. The agreement to the medical reports was distinctly subject to their contents being questioned. This was done in respect of Dr. Williams' report as to whether there was a connection between the appellant's claim of experiencing recurrent lupus flares and the fall.

26. The issue with which the learned trial judge was faced was whether, on a balance of probabilities the appellant had suffered the injuries as claimed by her, as a result of the fall and in particular, whether the claim for frequent recurrence of lupus was exacerbated by the fall.

27. The learned trial judge was aware that the requirements of Part 32 of Civil Procedure Rules had not been fulfilled. However, she admitted the medical reports in evidence, by consent. It is obvious from the appellant's pleadings that she sought to rely on the medical reports. The learned trial judge conducted the Case Management Conference. At that time she ought to have made inquiry as to whether the appellant intended to seek permission to place reliance on the reports as coming from experts. This she had not done. Although her order on Case Management Conference is silent in this regard, the inference is that, in admitting the reports in evidence, she implicitly granted permission for the reports to be treated as the product of experts. As a consequence, it could not be said that the reports ought not to be regarded as the opinion of experts. It follows that any diagnosis or prognosis proffered by either doctor must be classified as an opinion of an expert and not as evidence of facts as found by the learned trial judge.

28. It is somewhat mystifying that although she admitted Dr. Williams' reports into evidence, she rendered it inadmissible. This is clearly inconsistent.

She however, considered the contents, made findings and arrived at a conclusion thereon.

29. It is my view that the learned trial judge had erred in not treating Dr Williams as an expert. His report was admitted in evidence. Dr. Williams is a medical practioner. He, obviously, having been trained in the field of medicine, would have undergone the requisite course of study to have been equipped with special knowledge of the symptoms and the effects of diseases on the human body. His competence was not challenged. It cannot be said that as a medical practioner he was not armed with the necessary competency to have formed an opinion acquired in his course of study as physician to give a diagnosis as well as prognosis in relation to the appellant, someone to whom he had attended over a period. His reports ought to have been treated as being issued by an expert.

30. It was submitted by Mrs. Mayhew that even if Dr. Williams is treated as an expert, the learned trial judge was not bound by his opinion. She argued that it was the duty of the expert to assist the court and even if the expert's evidence is unchallenged, the learned trial judge is obliged to consider the evidence as a whole and decide what weight to attach to it. In support of her submission she cited the case of **Coopers Payen Limited and anor v. Southampton Container Terminal Ltd.** [2003] E.W.C.A. Civ 1223.

31. A trial judge is called upon to make a determination based on the evidence as proved. It is perfectly true that, in order to arrive at a decision, the judge is under an obligation to take into account the evidence in its totality and in so doing, consider the weight to be given to the opinion of an expert. In **Coopers Payen Limited v. Southampton Container Terminal Ltd.** (supra) Clarke, L.J. in observing the weight to be attached to the evidence of a joint expert appointed to give assistance to the court, said:

> "All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will only be part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the Court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the Court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate."

32. It is also true that it is open to a trial judge to accept or reject the opinion of an expert. He or she may reject the expert's opinion even in circumstances where it is unchallenged. The role of experts is to assist the trial

judge. The experts' duty is to provide the court with the necessary material for testing the accuracy of their findings and conclusions. This was eminently stated by Lord President Cooper in **Davie v. Edingburgh Magistrates** [1953] S.C. 34 p 40 when he said:

> "Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria..."

33. The learned trial judge treated Dr. Wright's report as evidence of fact and accepted it. Although his report ought to have been treated as the opinion evidence of an expert, the fact that it was not so regarded, would in no way mean that his evidence could not have been accepted. The question therefore is whether in assessing the evidence in its entirety, the opinion of Dr. Williams can be regarded as being of assistance in supporting the appellant's claim.

34. The report of Dr. Williams of July 2, 2004 shows that the appellant began treatment under his care for injuries sustained by the fall on May 20, 2003. Besides making reference to her suffering from a closed fractured rib, he also alluded to her suffering from severe wrist sprain, sciatica and muscular injuries resulting in residual arthritis as well as recurrent lupus flares as a consequence of the fall.

35. Dr. Wright, however, diagnosed her as suffering from 7th rib fracture and soft tissue injury to the right elbow, but made no mention of those other injuries or complaints recited by Dr. Williams. Dr. Wright said her complaint was that she fell hitting her chest and elbow. She was seen by him on the date of the incident and on three occasions thereafter. His prognosis was for her recovery within two months.

36. An important question is whether the appellant's complaint of recurrent lupus flares can be said to have been triggered by the fall. The learned trial judge observed that the appellant did not inform Dr. Wright of the pre-existing condition. This does not, in itself, mean that at the time of the accident the malady did not exist. The issue is whether the opinion of Dr Williams does in fact give credence to the appellant's claim that the fall contributed to her frequent recurrence of lupus

37. The appellant declared that she was diagnosed with lupus in 1998. There is nothing in the report to show that Dr Williams could speak from his own knowledge that the appellant had suffered an attack of lupus in 1998. His opinion that at the time of the accident her disorder was stable for an extended period, that the pre-existing condition was unconnected to the fall, that the lupus flares did not commence until subsequent to the fall and that "clinical presentations support a trigger and response relationship between the fall and recurrent lupus flares", would clearly be unreliable. It is significant that

he stated that he began treating her for the injuries in May 2003. There being no evidence from him that he was the appellant's attending physician between 1998 and May 2003, it appears that May 2003 was the first time he had ever seen her.

38. As a medical practitioner giving expert evidence, he is not at liberty to rehearse information given to him by the appellant about her past lupus attacks as evidence of the existence of the lupus. He may however give evidence of what the appellant told him to explain the basis of his opinion. His report was unhelpful. Nowhere in the report did he state that the appellant had given him a history of her past malady. The contents of the report can only be construed as conjectures. Consequently, the court had not been placed in a position to find that his opinion bolsters the appellant's claim that she had the preexisting lupus condition which accelerated recurrent attacks of the disease subsequent to her fall.

39. So far as the claim for sprained wrist, muscular injuries to the lower back and sciatica is concerned, Dr. Williams' report being speculative, no reliance can be placed on it in support of this claim. The report, in this regard, could only be construed as a rehearsal of those injuries which the claimant informed him that she had sustained. It is of interest to note that if the appellant had sustained a sprained wrist, it is without doubt that she would not have failed to disclose this to Dr. Wright, as, this would have been an injury

requiring immediate attention. It can reasonably be inferred that she had not suffered from a sprained wrist as a result of the fall which ultimately resulted in an arthritic condition, as stated by Dr. Williams.

40. Dr. Barnett argued that the learned trial judge having not treated Dr. Williams as an expert, the appellant was denied the opportunity of having the case of **Smith v. Leech Brain & Co. Ltd.** [1962] 2 Q.B. 405, 1961 3 All E.R. 1159 considered by her.

41. **Smith v. Leech Brain & Co (**supra) supports the principle that a tortfeasor must take his victim as he finds him. The principle is inapplicable to this case. There is no evidence to show that the appellant had suffered repeated attacks of lupus, which were precipitated by the fall to bring her within the rule.

42. Liability may only be imposed on a tortfeasor where evidence exists to show that the victim had in fact sustained injuries as a direct result of the tortfeasor's negligence. In the case under review, the injuries which are proven to have been suffered by the appellant when she fell on May 9, 2003 were reasonably foreseeable, she having sustained a fractured rib and soft tissue injury to the right elbow. Liability for only these injuries is attributable to the respondent. In all the circumstances, it could not be said that the learned trial judge had been plainly wrong in rejecting Dr. Williams' evidence.

43. It was the appellant's contention that the learned trial judge ought not to have presided over the trial, she having conducted the Case Management Conference. This is without merit. No objections were raised by either party to her conducting the trial. It must be taken that the parties consented to her doing so. Parties consenting to a trial by a judge in circumstances where that judge conducted the Case Management Conference is permissible by the Civil Procedure Rules.

44. I would dismiss the appeal. Costs of the appeal to the respondent to be agreed or taxed.

PANTON, P.

ORDER:

The appeal is dismissed with costs to the respondent to be agreed or taxed.