NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. HCV 1680 OF 2003

BETWEEN PHILLIP GRANSTON CLAIMANT

AND ATTORNEY GENERAL OF JAMAICA DEFENDANT

IN COURT

Carol Davis for the claimant

Trudy-Ann Dixon-Frith and Tova Hamilton instructed by the Director of State Proceedings for the defendant

May 27, 28, 29 and August 10, 2009

NEGLIGENCE - OVERTURNING TRUCK - WHETHER DEFENDANT LIABLE - WHETHER NECESSARY TO CHALLENGE WITNESS ON ANY PART OF TESTIMONY NOT ACCEPTED - THE RULE IN BROWNE v DUNN - LOSS OF FUTURE EARNINGS - LOSS OF EARNING CAPACITY - FUTURE MEDICAL CARE

SYKES J.

1. Mr. Phillip Granston was a firefighter. On November 20, 1997, he was traveling in a water truck from the St. James Fire Department located in Montego Bay that was transporting 8,000 gallons of water to the home of a private citizen, when it overturned. Mr. Granston alleges that he was injured during this accident. His injuries were such, he says, that he was eventually retired on the ground of ill health, that is to say, a medical examination found that he was no longer able to carry out the duties of a fireman. According to Mr. Granston, his injuries were caused by the negligent driving of Mr. Liston Reid who was a Sergeant in the fire service at the material time.

2. Mr. Granston is of the view that the Sergeant was negligent when, on a narrow road, he tried to maneuvre the truck around a parked car. Mr. Granston's case is that so narrow was the road that the right rear wheel of the truck went over and off to the right side of the road into or through soft earth, skidded, loss its equilibrium and rolled over. The skidding caused the rear wheel of the truck to sink into the soft earth which in turn caused the 8,000 gallons of water to slosh around in the water tank, which further destabilized the truck, thereby culminating in a further loss of its balanced position with the result that the truck over turned. The evidence revealed that the rain was falling heavily and driving conditions were far from ideal.

3. The defendant seeks to repel the allegation of negligence by stating that (a) the road was not narrow; (b) Sergeant Reid was executing the maneuvre in a non-negligent manner; (c) the edge of the road was already broken; (d) it was this uneven road surface that caused the truck to lose its balance; and (e) in this state of affairs the accident was inevitable. In these circumstances, the defendant submits that Sergeant Reid was not negligent because he was driving in a manner that was consistent with how a reasonably competent driver of a truck laden with 8,000 gallons of water would have driven on a wet, muddy and unpaved road which was being subjected to a heavy down pour of rain at the time of the roll over.

Was the road narrow?

4. The first issue that has to be determined is whether the road was as narrow as contended by Mr. Granston. A determination of this factor is vital because the claimant is saying that trying to pass the car in the circumstances that existed at the material time was the negligent act which led to the overturning of the truck and the consequential injuries to the claimant.

5. Three witnesses testified about the accident itself. These are Miss Terri-Ann Leslie, Mr. Granston and Sergeant Reid. All three were in the front of the truck at the material time. According to the evidence, four persons were in the front of the truck at the material time.

6. Miss Leslie, stated that rain was falling. Along the route, in the vicinity of the accident she recalled seeing a car parked on the left side of the

road. She also said that the road was approximately 12 - 15 feet wide. She also testified that the truck was approximately 4 feet wide. She also recalls that the road was not a smooth paved road. It was paved in some sections and unpaved in others. She does not recall if there was a mound of dirt to the right side of the road across from the car but she does say that as Sergeant Reid was passing the car, he was driving very slowly, the truck began to tilt and then it overturned. Miss Leslie cannot recall the make of the car and neither does she recall if Sergeant Reid blew the horn of the truck. She was not able to say what the width of the car was.

7. Mr. Granston gave evidence. He specifically asserted in paragraph 6 of his witness statement and during cross examination that the space to the right of the parked car was not sufficient to enable the truck to pass. He added that when the truck came up to the car, it stopped, blew the horn and some one was heard to shout "Me a come! Me a come!" meaning (for those unfamiliar with Jamaica Patois) that he would soon be there. He testified further, that before the person could remove the car, Sergeant Reid moved the truck forward in an attempt to pass the car. At this point, the wheels of the truck began to climb a pile of dirt. This elevated the right side of the truck. He added, in cross examination, that truck skidded and then sank in the dirt. This caused the truck to become unbalanced and then rolled over.

8. I have examined the notes of cross examination carefully and I do not see where Mr. Granstons' testimony that the road was narrow was challenged. Neither was his testimony that the truck stopped and blew the horn. Thus at the end of the cross examination no issue was joined with the witness on this aspect of the testimony.

9. Mrs. Dixon-Frith, in responding to Miss Davis' submission that this part of Mr. Granston's testimony passed without challenge and therefore was no longer in issue, submitted that it was not necessary to challenge the witness specifically on this point because it was clear from the witness statements of the defence that they were not accepting Mr. Granston's testimony on this point. If this is really the position of the defendant, it is indeed a high risk strategy with pitfalls that have untold consequences.

10. I do not agree with Mrs. Dixon-Frith. It is important to go back to important foundations. A witness statement prepared before trial is not evidence. At best, it is what it is hoped that the witness will say. Evidence is oral testimony given by the witness from the witness box after he is properly and lawfully sworn or affirmed. Evidence may also be put before the court pursuant to the provision of the Evidence Act.

11. The provision in the Civil Procedure Rules ("CPR") stating that the witness statement stands as the evidence in chief does not alter the general position that evidence is what comes from witness box (see rule 29.8 (2)). Rule 29.8 (2) provides that when the "witness is called to give oral evidence ..., his or her witness statement shall stand as evidence in chief unless the court orders otherwise." It is clear that when witness statements are being used, the witness has to be called to give evidence. I am ignoring here the provisions of the Evidence Act that permits statements made in documents to be placed before the court without the maker being called. This Act does not arise for consideration here.

12. Rule 29.8 (2) is only activated when the witness comes into the witness box and after being properly and lawfully sworn or affirmed he expressly states that what is contained in the witness statement is true and he adopts it as his evidence. This is why the witness, at the trial, is free to correct anything said in the statement. Thus the fact that some fact is alleged in a witness statement does not make it a fact for the purpose of the trial. Even if the witness expressly adopts the witness statement, it is, until accepted by the court or tribunal of fact, mere evidence, and it is the acceptance of it by the court or the tribunal of fact that transforms the evidence into a fact.

13. It is clear then, that asserting in a witness statement a contrary position to that of the opposing side, cannot be a fact, and, in my view, surely does not do away with the necessity to confront the witness while he is testifying with the contrary version, so that he has an opportunity to respond to the assertion. I shall deal with this in more detail below under the heading of the rule in Browne v Dunn.

14. I accept that it is possible for a court or tribunal of fact to reject a witness' testimony on a point even if he is not confronted with the

contrary version. However, this would be reserved for instances in which either (a) the witness has been so severely discredited to the extent that his whole testimony is rejected or (b) the evidence contrary to the witness' assertion is so strong and overwhelming that to accept the witness' testimony on the specific point would be contrary to reason. Neither of these circumstances applies to Mr. Granston. Mr. Granston has not been severely discredited to the extent that he is unworthy of belief.

15. Sergeant Reid testified that the road was narrow. Narrow for him meant approximately 18 feet wide. This was his witness statement. He stated that as he drove along the road he saw a Honda Civic parked on the left side of the road. He formed the view that there was sufficient space for the truck to pass safely. He went on to say that as the truck passed the car, the truck began to skid because the roadway was muddy. The truck began sinking in the mud and tilting to the right. This tilting caused the truck to become unbalanced to the point where it rolled over.

16. Sergeant Reid stated in his witness statement that shortly after, "persons came from a nearby house came to our assistance. In addition, other persons came on the scene who advised me that a section of the road was broken away and that earlier that day a tractor had filled out with dirt. Due to the water on the road, I was unable to see that that section of the road consisted only of loose dirt" (see para. 12). It is this statement on which the defendant relies to prove that the road way had broken away. This evidence was clearly and obviously hearsay and had no place in the witness statement. Sergeant Reid, or more accurately, the Attorney General, was relying on what was said by unknown and unnamed persons to prove a fact, namely, that road was broken away, and that it was filled in by a tractor earlier that day. This is really a text book example of hearsay, and as such is not acceptable. In England, the hearsay rule has been rendered impotent but it still applies in Jamaica with full rigour. The Civil Procedure Code has not altered that position.

17. If the Attorney General wished to put in the statements of these persons without them being called as witnesses then there would need to have been compliance the relevant provisions of the Evidence Act.

Another route would to be rely on some common law exception to the hearsay rule. Neither route was attempted in this case.

The rule in Browne v Dunn

18. The position I have stated regarding the necessity to challenge a witness while he is in the box is supported by long established authority. To summarise the position: if a witness is not challenged while he is in the witness box on any part of his evidence which is not accepted by his opponent then it is taken barring the circumstances where it can be said that the witness's testimony has been severely discredited or overwhelmed by other evidence it is very difficult for a court to reject the witness's testimony on the unchallenged part of his evidence.

19. This important rule of practice was most clearly recognised in the important case of ***Browne v Dunn*** 6 R. 67 is not widely reported. The only known report is found in a very little known set of reports known as ***The Reports*** which were published between 1893 - 1895.

20. I have had to resort to secondary sources, that is, relying on summaries and quotations from the case, from more recent cases. In the discussion to follow, I shall not be concentrating on the ambit of the rule in criminal cases.

21. I rely on the following extracts from the judgment of David Hunt J. in ***Allied Pastoral Holding Pty v Commissioner of Taxation*** [1983] 1 NSWLR 1 462 - 463 as a secondary source for ***Browne v Dunn***. His Honour set out his position and as he comments on the case as well as other cases, he cites passages from ***Browne v Dunn***:

> *It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination, the nature of the case upon which it is proposed to rely on in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the*

proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in Browne v. Dunn (1893) 6 R. 67.

No doubt because that decision is to be found only in an obscure series of law reports (called simply "The Reports" and published briefly between 1893 and 1895), reliance upon the rules said to be enshrined in that decision seems often to be attended more with ignorance than with understanding. The appeal was from a defamation action brought against a solicitor, and based upon a document which the defendant had drawn, whereby he was to be retained by a number of local residents to have the plaintiff bound over to keep the peace, because of a serious annoyance which it was alleged he had caused to those residents. Six of the nine signatories to the document gave evidence on behalf of the defendant that they had genuinely retained him as their solicitor and that the document was really intended to be what it appeared on its face to be. No suggestion was made to any of these witnesses in cross-examination that this was not the case and, so far as the conduct of the defendant's case was concerned, the genuineness of the document appeared to have been accepted. However, the defence of qualified privilege relied upon by the defendant depended in part upon whether the

retainer was in truth genuine or whether it was a sham, drawn up without any honest or legitimate object but rather for the purpose of annoyance and injury to the plaintiff. This issue was left to the jury. The plaintiff submitted to the jury that the retainer was not genuine and was successful in obtaining a verdict in his favour. In support of that submission, the plaintiff asked the jury to disbelieve the evidence of the six signatories who had said that the retainer was a genuine one.

Lord Herschell L.C., said (at 70-71):

"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

His Lordship conceded that there was no obligation to raise such a matter in cross-examination in

circumstances where it is "perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling". His speech continued (at 71):

"All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

Lord Halsbury said (at 76-77):

"My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

Lord Morris (at 78-79) said that he entirely concurred with the two speeches which preceded his, although he wished (at 79) to guard himself with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. The fourth member of the House, Lord Bowen, is

> *reported (at 79-80) to have said that, on the evidence of the six signatories, it was impossible to deny that there had been a real and genuine employment of the defendant. But his Lordship made no statement of general principle.*

22. The opening paragraph of this long quotation is important because it speaks to giving advance notice of an intention not to accept part of the witnesses testimony, thereby suggesting that once that is done, then the rule in ***Browne v Dunn*** may not apply with full rigour. As I shall attempt to show this aspect of the rule is difficult to justify either logically or in principle. His Honour David Hunt J. after reviewing a number of cases, stated at page 472:

> *I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings.*

23. This approach by David Hunt J. does indeed find support from the passages cited from ***Browne v Dunn***. However, it is not clear what is meant by notice before hand that the testimony of the witness is to be impeached. It could be said to include witness statements from the opposing side. This seems to be the interpretation of Mrs. Dixon-Frith. For reasons given above when dealing with witness statements I do not agree with this position. I give additional reasons for not accepting this position.

24. The difficulty with this approach is as follows: until a witness goes into the box and expressly adopts the witness statement as his, there is no evidence before the court (ignoring evidence by affidavit). The fact that a witness statement makes an assertion does not mean that at the time of trial when the witness is in the witness box the assertion will

necessarily be adopted by the witness. Instructions may change between the time the witness statement was served and the time the witness goes into the witness box. Just recently in the case of ***Chambers v Holiday Inn*** C.L.C. 205 of 2002 (delivered February 1, 2007), I had the experience where the witness for the defendant, under cross-examination, promptly disavowed knowledge of the contents of the statement.

25. The advance notice is not evidence. Any purported statement by the witness before hand is only what it is expected what the witness may say, but until he actually says it is not evidence. If it were otherwise one could even argue, if the particulars of claim and defence are sufficiently particular, then each side would have notice of what is being challenged so that when the witness comes, any thing he says, which is contrary to what is pleaded by the opposing side, that pleading is sufficient notice that his evidence is not accepted.

26. I take another example from the instant case. The witness statement for Sergeant Liston Reid indicated that there was no pile of dirt near the car at the time the truck approached. This was, I suppose, to contradict, Mr. Granston's evidence on this point. Mr. Granston said in his witness statement that a pile of dirt was present. So following the logic of giving notice of the challenge it would seem that Mr. Granston need not be challenged specifically on this issue.

27. However, during the cross examination this question was asked of Mr. Granston: *Wasn't a pile of dirt there?* To which he answered, "*A pile of dirt was on the right hand side. ... The dirt was a little behind the car. The pile of dirt was a foot high.*" It was never suggested that the pile of dirt was not present. From this line of questioning, it seemed to me that Mrs. Dixon-Frith was accepting that there was a pile of dirt. However, when Sergeant Liston came to give evidence, he placed in issue the presence of this pile of dirt, by saying it was not present. All this suggests to me that it is a better rule of practice to specifically indicate to the witness what aspect of his testimony is not accepted rather than rely on this notion of prior notice.

28. It would seem to me that advance notice cannot obviate the necessity to indicate to the witness any challenge to an important part of his testimony. Any failure to do this, particularly in circumstances where the witness has not been discredited can have detrimental consequences for the party that fails to make the challenge.

29. The rule in ***Browne v Dunn*** was applied in the recent case of ***Markem Corp. v Zipher Ltd*** [2005] R.P.C. 31 (case reversed on the substantive issue by a later House of Lords decision of ***Rhone-Poulenc Rorer International Holdings Inc and another v. Yeda Research and Development Co Ltd (Comptroller General of Patents, Designs and Trademarks intervening)*** [2007] Bus L.R. 1796). In ***Markem***, a witness gave evidence in chief which was not suggested was false. The learned trial judge found that it was false. On appeal, it was argued that this finding was not open to the judge. Jacob L.J. referred to the ***Allied Pastoral*** case and held that the finding of the trial judge could not be supported. Jacob L.J. seemed to have accepted the proposition that advance notice of the challenge to the witness's testimony is sufficient notice. However, despite this apparent acceptance of the notice in advance idea, the court held that because the witness was not challenged on his credibility while he was in the box, it was not open to the judge to make an adverse finding against the witness. This outcome again proves the point that witnesses need to be challenged on points where there testimony is not challenged when they are giving evidence.

30. Thus despite the dicta in the cases cases, it is my view that the true position ought to be that part of ***Browne v Dunn*** which speaks to the necessity to challenge the witness while he is in giving evidence. The rule should be shorn of this advance notice idea because it has not proven to be workable in practice. It leads to unnecessary and avoidable complications.

31. I much prefer the manner in which the rule was stated by Wells J. in ***Reid v Kerr*** 9 SASR 367, 373 - 374:

> *The jurisprudence and practice of the courts does not imperatively require counsel in every case to abide, to the letter, by the general rule laid down*

by their Lordships; that rule will, I apprehend, yield to special circumstances. For example, as Lord Morris pointed out in Browne v. Dunn itself. "a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box". More importantly, it was never intended, and their Lordships' speeches have, so far as I am aware, never have been understood, to cut across the techniques and the discretions of cross-examining counsel. Those techniques and those discretions must stand unimpaired; what is essential is compliance with the spirit of their Lordships' pronouncements, which, I apprehend, are derived from two basic precepts designed to ensure a fair trial according to law. The first is one of common justice: no witness should be attacked - and it is of prime importance that no party and no witness should think that it has happened - behind his back; he should have a fair opportunity of meeting whatever challenge is offered to his evidence and the substance of any testimony that is to be adduced to contradict it. The second precept is based on the practical needs of a trial under the adversary system: a judge (or jury) is entitled to have presented to him (or them) issues of fact that are well and truly joined on the evidence; there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because Browne v. Dunn has not been observed, have not been brought into direct opposition, and serenely pass one another by like two trains in the night.

32. There is no reference in this passage to advance notice and such like. What it does is to take account of the fact that the nature of the cross examination of the witness may be such that it is clear that the witness

is being challenged on the basis that he is not to be believed at all. If this is the case, then the failure to challenge the witness on the specific point is not fatal. Where, however, this is not the case and the witness's testimony is accepted in part and not in other and the witness's testimony is not such that it is inherently incredible, it is vital that the witness be challenged.

33. My position is supported by this exposition of Doherty J.A., of the Ontario Court of Appeal in ***R v Paris*** 150 C.C.C.(3d) 162 at paragraph 22 - 24:

> *Where a witness is not cross-examined on matters which are of significance to the facts in issue, and the opposing party then leads evidence which contradicts that witness on those issues, the trier of fact may take the failure to cross-examine into consideration in assessing the credibility of that witness and the contradictory evidence offered by the opposing party. The effect of the failure to challenge a witness's version of events on significant matters that are later contradicted in evidence offered by the opposing party is not controlled by a hard and fast legal rule, but depends on the circumstances of each case: ...*
>
> *23 The potential relevance to the credibility of an accused's testimony of the failure to cross-examine a complainant on matters that the accused subsequently contradicts in his testimony will depend on many factors. These include the nature of the matters on which the witness was not cross-examined, the overall tenor of the cross-examination, and the overall conduct of the defence. In some circumstances, the position of the defence on the matters on which the complainant was not cross-examined will be clear even without cross-examination. In other circumstances, the areas not touched upon in*

cross-examination will not be significant in the overall context of the case. In such situations, the failure to cross-examine will have no significance in the assessment of the accused's credibility. In other circumstances, however, where a central feature of the complainant's evidence is left untouched in cross-examination or even implicitly accepted in that cross-examination, then the absence of cross-examination may have a negative impact on the accused's credibility.

24 The connection between the failure to cross-examine a complainant on significant matters and the accused's credibility seems to me to be straightforward. In discussing the "costs" of the failure to cross-examine, Professor Mewett puts it this way in his text, supra at 2-32:

> *... The cost is how much credence a fact finder will give to evidence that is introduced for the first time after the witness whose testimony is now being questioned has finished testifying and who no longer has an opportunity to tell his or her side of the story. As such, it may be unwise not to cross-examine an opposing witness when he or she is on the stand if it is intended to contradict that witness's evidence. ... The trier of fact may well wonder why there was no cross-examination, and take that into account in determining what weight to give to the contradictory testimony.*

34. This exposition is much more realistic and accords with current practice and I therefore adopt his passage as a providing correct guidance on the issue. It avoids the debate of advance notice and gets straight to the heart of the issue. Much depends on how the case is actually conducted.

35. I would therefore agree with Miss Davis that the failure to challenge the witness on the width of the road meant that his evidence on this point was not being challenged and therefore, I should accept it as correct. However, in the event that I am wrong on this I proceed to examine the evidence further in order to demonstrate that the same conclusion can be arrived at, namely, that the road was narrow.

36. It appears to be common ground that the truck sank on the right edge of the road as it proceeded to its intended destination. Under cross examination, Sergeant Reid said that the truck was approximately 5 feet wide. The Honda Civic that was parked on the left was approximately 4 feet wide. He also stated that truck has wing mirrors that extended about one foot on either side of the truck. He said that the car had a mirror on its right side, which would be the side on which the truck was attempting to pass.

37. In further cross examination, he said that the road on which the truck was traveling was approximately less than 15 feet wide. He stated, at one point, that it was 12 feet wide. By, Sergeant Reid's approximate measurements (on a 12 feet wide road), the truck would take up a minimum width of 7 feet (5 feet for the width of the truck and the mirrors of 1 foot each). He gave no measurement concerning the rear view mirror on the right door of the car. This state of affairs would give Sergeant Reid, at most, inches within which to maneuvre. The car without the mirror took up 4 feet of the road; with the mirror, a few more inches. The margin for error was very small indeed.

38. However, I do not accept that the truck was just 5 feet across. Neither do I accept Miss Leslie's evidence that the truck was just 4 feet in width. The evidence is that there were four firemen in the front of the truck. They were sitting beside each other. If there were four adults sitting in the truck, this would suggest that the distance from the passenger on the left to the driver on the right would be more than 5 feet. Then one adds to this the doors with their own thickness, it does seem and I do decide that the truck was more than 5 feet wide. When the rear view mirrors are taken into account, even using the 8 inches on either side given by, another witness, Senior Deputy Superintendent

Allan Goodwill as opposed to the one foot given by Sergeant Reid, the total width of the truck including the mirrors would be a minimum of 6 feet 4 inches.

39. I should state who Senior Deputy Superintendent Allan Goodwill is. He was employed in the fire service in the rank just mentioned at the material time. He knew the truck in question and he went on the scene of the accident after it had happened. When he got there the car had left. He said that road was narrow (approximately 18 feet wide).

40. Regarding the width of the truck, Senior Deputy Superintendent Allan Goodwill stated that the truck was about 7 - 8 feet wide. This seems a more likely width that the 4 feet given by Miss Leslie and the 5 feet given by Sergeant Reid. I accept Mr. Goodwill's evidence on this point because it is more consistent with four adults sitting in the front of the truck. There was no evidence that the four persons were cramped for space. All that was said, in evidence was that the truck was designed to seat three but there as a space on the cover for the engine where a fourth person could sit.

41. On the issue of the actual width of the road I have concluded that it was not 18 feet wide as testified to by Sergeant Reid and Senior Deputy Superintendent Goodwill. These are my reasons. Taking Sergeant Reid's testimony first. If the road was 18 feet wide (see paragraph 7 of witness statement); if the car was 4 feet wide and if the truck was only 5 feet wide and add to the width of the truck rear view mirrors (using Sergeant Reid's estimate of an additional one foot on either side of the truck), there would be no need for the truck to be so far to the right so that its right wheel sank on the right side of the road. On Sergeant Reid's evidence the total width of the truck would be 7 feet which would mean that the truck would have had 14 feet of road to pass the car. It is important to note that there is no evidence indicating how near or far from the left side of the road the car was parked.

42. However, during Sergeant Reid's testimony the width of the road reduced from 18 feet to less than 15 feet. If the road was 15 feet wide and the car was approximately 4 feet wide, then the truck had 11 feet to maneuvre. Again with 11 feet of road with a truck with a total width of 7

feet, there would still be no need to go over to the right to the extent that the wheel sank and rolled over. Therefore even if the word were 18 feet wide, the fact that Sergeant Reid went so far over to the right that the truck got into difficulties, would be, in my view, evidence of negligent driving. The negligence would be failing to take proper care when executing the maneuvre of passing the car when there was ample room for him to pass the car without getting into the difficulties that he did. The wheel sank, apparently on the extreme right side of the road.

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

44. I have been referring to the width of the car as being 4 feet. I need to explain how this measurement came about. Sergeant Reid did not say that the car he saw was 4 feet wide. However, he did agree that the car he saw was a Honda Civic. The Honda Civic is quite a popular car in Jamaica and so, using my jury mind, I conclude that such a car would be at least 4 feet wide. This is why 4 feet has been used as the width of the car seen by Sergetant Reid.

45. From all that has been said about Sergeant Reid's evidence, it would seem to me that the best explanation for the truck going so far over to the right edge of the road was that the road was indeed narrow and the maneuvring space was reduced considerably by the presence of the car. If the road were wide enough as Sergeant Reid is trying to make out, then a reasonably competent driver would not be driving so close to the right side of the road. He would try to drive away from the right edge particularly if it was raining and the ability to have a good vision of the road surface was impaired because of the rain and mud.

46. A critical fact to determine is whether the truck stopped as alleged by Mr. Granston. Mr. Reid denied that he stopped and blew the horn. It will be recalled that Mr. Granston was not challenged on this specific evidence and I have not found that he was discredited. The contrary evidence is not overwhelmingly cogent. It is true that Mr. Granston does

not give any approximate measurements of the road in his witness statement or evidence in court. If Mr. Granston is accepted as a credible witness, and I do so accept him, the question is, based on the evidence, what is the best explanation for the truck stopping and blowing its horn?

47. On a balance of probabilities, I accept that the truck stopped and blew the horn. The best explanation for this arising from the evidence is that Sergeant Reid knew that the space for him to maneuvre was very small indeed. He wanted to have more space and that is why he blew the horn. Before the car was removed he decided to take the risk of passing the car on a narrow road. Given that the road was wet, muddy and partly asphalted and partly dirt, there was always the risk of the truck skidding or sinking into soft earth as it tried to pass in the already-too-small-space. This skidding increased the likelihood of the water sloshing around and making the truck unbalanced. This is precisely what happened. I therefore conclude that Sergeant Reid was negligent when he tried to pass the car on this very narrow road after stopping. This act of stopping showed that he appreciated that he might not have been able to negotiate the car safely. He saw the risk, appreciated the risk and decided to take it nonetheless.

48. Mrs. Dixon-Frith submitted that I should not accept Mr. Granston's evidence that he heard some body shouting "Mi a come! Mi a come!", because it was raining and therefore, even if some one did utter these words, it is unlikely that Mr. Granston would have heard. The regrettable fact is that Mr. Granston was not cross examined in a manner to foreclose this probability. On the contrary, it is common ground that a house was nearby and after the accident people came out. If this is so, I do not see what is so improbable about Mr. Granston hearing these words. I therefore accept that he heard these words and they were uttered by some unknown person in response to the horn blowing of Sergeant Reid.

Did the negligence cause the injuries to Mr. Granston?

49. Mrs. Dixon-Frith submitted that the injuries suffered by Mr. Granston were not caused by the accident in question. She submitted that Mr. Granston had two other accidents and it is those which caused his injuries about which he now complains. I do not agree.

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

Report of Dr. Thompson

51. After the accident, Mr. Granston was seen by Dr. Ucal Thompson on November 21, 2001. According to this report, Mr. Granston complained of injuries to the neck, shoulder and thigh. He had "numbness in his extremities and difficulty moving around." The doctor found that Mr. Granston had "significant hyper reflexion in both upper and lower limbs, decreased range of movement and decreased power." It is important to note that Dr. Thompson did not find "significant external injuries." The doctor diagnosed "soft tissue injuries and maningeal irritation."

52. He saw the claimant one week later. At that time, Mr. Granston complained of "neck pains as well as waist pain and was found to be having persistent brisk reflexes." The X-ray investigation did not reveal any fractures. Then comes a vital paragraph which is set out in full.

> *It is anticipated that he may develop chronic ailment secondary to these injuries.*

53. The doctor's prognosis was that Mr. Granston may get worse over time. The ailments would be chronic not acute. In other words, even in the absence of fractures and the absence of any significant external injuries, Mr. Granston may have chronic ailments.

54. It is important to note that Mr. Granston's basic complaint never changed from the time of fire truck accident to the present, even taking account of the two accidents.

Report of Dr. Randolph Cheeks

55. This report is dated December 14, 2001. It reports that Mr. Granston presented with a history of complaining of low back pains radiating to the posterior aspect of his thighs. These pains began in 1997 after the fire truck accident. Dr. Cheeks reports that Mr. Granston has CAT and MRI done. These showed evidence of "old fractures of the pars interarticularis at L5 and bulging of the intervertebral disc at L5/S1."

Report of Dr. Michelle Lee

56. This report is dated June 10, 2002. The report states that Mr. Granston fell in 2001. Mr. Granston said in evidence that he slipped and fell on some grass while putting out a bush fire. It seems he was able to perform normal duties.

57. The report states that after the fall, Mr. Granston had feelings of stiffness around the waist and cramps in both legs. He spoke of feeling weak after walking a short distance. The sensory examination revealed decreased sensory sensation in left lower extremity. He had pain in lower back with straight leg raising and also significant pain with "palpation of the lower back around the thoracic and lumbar sacral area."

58. The neurological examination showed significant evidence of myelopathy. The MRI revealed disc herniation at T 6 - 7, T 7 - 8, T 8 - 9. There were no spinal abnormalities.

Report of Dr. Dwight Webster

59. According to Dr. Webster, Mr. Granston presented with a five year history of chronic back pain. He noted that Mr. Granston was in an accident in 1997 and he fell in 2001. This fall "reportedly aggravated his back problems." Mr. Granston was complaining of "neck pain, lower back pain, pain radiating down both upper and intermittent numbness and stiffness in both lower limbs." It is to be noted that these complaints in June 2002, were virtually identical to the complaints Mr. Granston made to Dr. Thompson in November 1997.

60. Dr. Webster made reference to the MRI and disc herniation but observed that his "radiological pathology cannot explain most of his symptomatology. Of note his most bothersome symptom is his lower back (lumbar) pain." A repeat MRI was recommended.

61. This last observation by Dr. Webster is crucial because it takes full account of the 2001 fall as well as the MRI result yet he was of the view that despite the history and the medical evidence available, Mr. Granston's complaints are not explained away by the "radiological pathology." This is important because Mrs. Dixon-Frith sought to say that

the fall in 2001 and the accident in 2004 and the old fractures are the cause of Mr. Granston's injuries. However, as has been shown up to 2002, the balance of medical opinion did not attribute most of Mr. Granston's complaints to the 2001 fall and the old fractures. This leaves the 2004 accident which will now be dealt with.

Report of Dr. Derrick McDowell

62. Mr. Granston was involved in a motor vehicle accident in 2004. He was hospitalized. The report from Dr. McDowell indicates that Mr. Granston suffered trauma to the lower back. Beyond that, the report is silent. This report was relied on by Mrs. Dixon-Frith to say that Mr. Granston's complaints can be attributable to this accident and the 2001 fall. However, Dr. McDowell's report does not support this position.

63. It seems to me that all that happened in 2004 is that Mr. Granston's existing condition was aggravated. The previous injury made any trauma to the back more likely to have more serious consequences than if he did not have the prior injuries.

Cause of injuries

64. Mr. Granston was eventually retired from the fire service on the grounds of ill health. He was diagnosed with having what was called failed back syndrome. Mrs. Dixon-Frith wanted to attribute this condition solely to the fall in 2001 and the accident in 2004. This submission ignores the report of Dr. Thompson that it was anticipated that Mr. Granston may develop chronic ailments secondary to the injuries. Dr. Thompson did not indicate the likely time frame within which the secondary ailment would develop but what is clear is that he was making a direct link between the possibility of such ailments and the initial injuries received when the truck rolled over.

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

66. In my view, after reviewing all the medical evidence and hearing the submissions, the accident in 1997 was the substantial and still operating cause of Mr. Granston's injuries. The subsequent events have not been overwhelmed the initial and substantial cause of Mr. Granton's complaint. I therefore conclude, on a balance of probabilities, that Mr. Granston's injuries were caused by the negligence of Sergeant Reid.

Damages

The gravity and extent of resulting physical disability

67. The medical evidence has been stated in some detail and need not be repeated here. He is now retired from the fire service. He said that he is unable to get work because of the constant pain that he is in. In fact, when he filed his witness statement, he stated that he was likely to lose his job since he could not function in that job as an active fireman. That likelihood has become a reality. The injury is life lasting.

Pain and suffering endured

68. It will be recalled that Mr. Granston has been complaining of pain in his back and numbness in lower limbs from the time he visited Dr. Thompson 1997. Those complaints have not ceased.

69. According to Dr. Kelvin Metalor, "Mr. Granston has severe low back pain which has extended to thoracic and cervical region" (see report dated February 13, 2003). Up to the time of this report, Mr. Granston had received two epidural steroid injections and scheduled for a third. His improvement was minimal.

70. In another report of March 10, 2008, Dr. Kelvin Metalor (now referred to as Ehikhametalor), stated, that "after extensive investigations and diagnostics interventions an intracathecal pain pump was recommended." In other words, the pain was so severe that mere injections were not sufficient. A pump had to be installed under the skin of Mr. Granston with a tube running from the pump to the pain site. The pump has now broken (July 2008 and Mr. Granston says that he now has to be taking pain medication orally).

71. In short, Mr. Granston has been in pain from the accident in 1997 to 2009 and that is expected to continue. The best relief seems to be a working pain pump.

General damages for pain, suffering and loss of amenities

72. Mrs. Dixon-Frith submitted that Mr. Granston should not receive more than $850,000.00 for pain and suffering. She relies on ***Babara Brady v Barling Investment Co. Ltd. & Anor.*** (Khan's Vol. 5 at page 254) and ***Iris Smith v Arnett McPherson*** (Khan's Vol. 5 at page 258). In my view, these cases are not of much assistance here. They are not cases in which it was said, from the earliest time, that chronic ailment may develop. From the medical evidence in this case, part of the chronic ailment is constant severe pain which has become worse with the passage of time.

73. The cases cited by Miss Davis were not the best either but seems to be better than those cited by Mrs. Dixon-Frith. Miss Davis cited ***Rubin v St. Ann's Bay Hospital*** (Khan's Vol. 5 at page 250) and ***Burnett v Metropolitan Management Transport*** (Khan's Vol. 6 at page 195). It appears that there is dearth of cases dealing with injuries similar to the one before me. In the former case, there was evidence that there was a 90% chance of continued severe pain. The claimant also had experienced ten years post injury pain at the time of the trial. The damages awarded there was $3m. The current value is $8,372,374.00. The second case does not have any element of life long pain and so will not be used.

74. In assessing damages, there is a subjective and an objective component. The subjective aspect is the specific effect on the particular claimant. The objective element focuses on similar injuries in the past. The goal of looking at past awards is to make sure that awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases.

75. Loss of good health is the loss of something of intrinsic value. In the case before me the claimant says that he is in constant pain. The medical evidence indicates that it is likely to be life lasting. The claimant is now forty three years old. Life expectancy in Jamaica, for men, is

approximately 72 years old. He may live longer. It would seem to me that the sum of $8m is appropriate.

76. This sum of $8m is not just for the subjective impact of the pain and the objective component. It also takes into account the loss of amenity. It must be remembered that although it is convenient to refer to the head of damages as pain, suffering and loss of amenity, it really comprises two concepts. The pain and the suffering are the objective and subjective components to which I have already referred. The loss of amenity deals with the reduction of the claimant's quality of life. Mr. Granston enjoyed swimming, playing cricket and football, riding his bicycle, going to parties and dancing. He is also having problems with his sex life. He does not sleep soundly at nights because of the pain. He is now constantly on morphine.

Loss of overtime earnings

77. Mrs. Dixon-Frith submitted that Mr. Granston could not claim any loss of overtime because there is no right to overtime. She relied on ***Junior Doctors Association et al v Ministry of Health et al*** (1990) 27 JLR 148. I agree with Miss Davis when she submitted that that case was a claim in contract. The case before me is one in tort. Mr. Granston is not saying that he has a right to overtime. What he is saying is that he was deprived of the opportunity of working overtime because of the negligence of the driver. For this reason, the case cited by Mrs. Dixon-Frith is not applicable.

78. The claim under this head is not speculative or remote because the clear evidence from the witnesses is that at the time of the accident, overtime had really become the norm because of the shortage of fire personnel. In other words, overtime had become the norm and not the exception. Also there was evidence that established that working overtime was not a choice once the person was detailed for such duty. Any failure to work overtime, once assigned to that duty, was a disciplinary offence. It is fair to say that but for the injury, Mr. Granston would have worked overtime.

79. The evidence further establishes that Mr. Granston worked overtime up to January 2000. There is no evidence that he was not paid for the overtime worked between the time of the accident and January 2000.

There is further evidence that the payment of overtime became a drain on the resource of the fire service and in July 2002, a decision was taken to replace over time with a duty allowance. This decision was implemented in October 2002. Thus the period for loss of overtime would be January 2000 to October 2002 (thirty three months inclusive of October 2002).

80. It is common ground that the firefighters worked extremely long hours in any given month. It was quite surprising to learn that 200 hours per month overtime was considered normal. From the evidence, it is fair to say that although the overtime hours worked fluctuated between 190 and 240 hours, a fair mean would be 200 hours. I use 200 hours as the average time Mr. Granston would have worked per month as overtime.

81. I agree with Mrs. Dixon-Frith that there is no evidence of what the overtime rate was between January 2000 and October 2002. The evidence showed that overtime in September 1999 was $101.69. I shall use this figure. The total overtime lost for the period is $671,154.00 (200 x $101.69 x 33).

Loss of opportunity for promotion

82. Miss Davis claims that had Mr. Granston not been injured, he would have been eligible for promotion and any loss of future earning should be calculated on the basis that he would have been a Sergeant by now.

83. I cannot agree with this. The evidence is that promotion in the fire service was dependent on the candidate passing a practical and a written test. The candidate also had to be disciplined. According to Deputy Commissioner Findlay, the physical test is just as important as the written. A candidate for promotion must pass both. It did not matter how smart one was, or how well one did on the written test, failure to pass the practical test would not lead to promotion in the service. It is too speculative, based on the evidence, whether Mr. Granston would have reached a Sergeant by now.

84. Further, it is difficult to say that Mr. Granston would necessarily have passed the practical examination even if he was not injured. No evidence was presented to me indicating what this practical test entailed and whether an uninjured Mr. Granston would have been likely to pass the

test. I have no basis to say that he would have been promoted but for the injury. No award is made here.

Handicap on the labour market

85. There is no doubt that Mr. Granston is handicapped on the labour market. He is unable to compete effectively with able bodied males of the same age and skills. He has lost his job because of his injury. He said the pain he experiences makes it such that finding and keeping employment will be quite difficult if not impossible. I do not need medical evidence to tell me that a man in Mr. Granston's condition cannot compete effectively on the labour market.

86. Under this head of damages it is important to go back to the source of this measure of damages to see what it is that is being compensated. It seems that the first major case which this head of damages was awarded is the case of ***Ashcroft v Curtin*** [1971] 1 W.L.R. 1731. In that case the risk of losing the job was low but an award was made nonetheless because the injuries reduced the claimant's ability to compete on the open labour market. As Edmund Davies L.J. put it at page 1738, "[h]is capacity to engage himself outside the company, finding the sort of work for which he has been trained since he was a boy of 14, has been virtually extinguished. I agree that the risk of his being placed in such a predicament is not great. But it does exist, and I think it justifies some award being made in respect of it."

87. The next important case is ***Gladys Smith (feme sole) v. The Lord Mayor, Aldermen and Citizens of the City of Manchester*** (1974) 17 K.I.R. 1. In that case Miss Smith was employed to the Manchester Corporation. One day at work, she slipped and fell with the result that her elbow was injured. She was 49 years old at the time of the accident but 51 years old at the time of the trial. Liability was accepted by the defendant and so the matter became an assessment of damages. Her employers undertook to employ her until age 60 with the possibility that it could go up to age 65.

88. The learned trial judge found that Miss Smith was severely disabled. That finding was supported by the medical evidence. The trial judge also found that her capacity for work was reduced by injuries received.

89. It is interesting to note how this issue was approached by the Court of Appeal. Edmund Davies L.J. (as he then was) held that there was a present loss which was her reduced earning capacity even though there was no present or foreseeable financial loss. Nonetheless held that she had to be compensated but the multiplier/multiplicand method would not be used because there was no present or foreseeable financial loss. The lump sum method was used. The judge had awarded £300 which the Court of Appeal increased to £1000. This shows that the fact that risk of loss of job is low is not a bar to substantial award.

90. Scarman L.J. (as he then was) stated:

> *Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure. Fortunately in this case there is no such loss sustained by the plaintiff because, notwithstanding her accident, she has continued with her employment at the same rate of pay and, as long as she is employed by the Manchester Corporation, is likely, if not certain, to continue at the rate of pay appropriate to her pre-accident grade of employment. That element of loss, therefore, does not arise in this case.*
>
> *The second element in this type of loss is the weakening of the plaintiff's competitive position in*

> *the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain:-- that, in the event (which one hopes will never materialise) of her losing her employment with the Manchester Corporation, she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a "possible" loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.*

91. Other than the opening sentence of the Lord Justice I do not disagree with the passage. My difficulty with the opening sentence is that it may suggest that loss of future earnings and loss of earning capacity are referring to the same thing but that is not the case.

92. What this passage makes clear is that the claimant is being compensated for the loss of the competitive position in the labour market. The fact that Miss Smith was protected from experiencing the financial loss that would have resulted had she lost her job or was going to lose her job in the foreseeable future, did not prevent an award under this head. Again, at the risk of repetition the risk of job loss was low but that did not mean that her competitive position in the labour market was not weakened. This is the crux of the matter.

93. Neither ***Ashcroft*** nor ***Smith*** case has been overruled and neither have they been adversely commented on, so far as I have been able to see, by the Court of Appeal of England and Wales.

94. The case of ***Moeliker v A. Reyrolle*** [1977] 1 W.L.R. 132, is said to be the leading case in this area of law and has been the one consistently cited by courts in Jamaica, at first instance and in the Court of Appeal. However an important point needs to be made about this case.

95. There are two reported versions of this case. One is found at [1976] I.C.R. 253 where Browne L.J. held that this head of damages can only be awarded if the claimant is still working at the time of the trial. Browne L.J. corrected this, when the judgment in Moeliker was presented to him for editing for publication in the Law Reports. The correction he made was to substitute "only" with "generally", thereby moving away from the proposition that this head of damages can only be awarded if the claimant is still working at the time of the trial.

96. The admission and correction can be found in Browne L.J.'s judgment in ***Cooke v Consolidated Industries*** [1977] I.C.R. 635, 640 - 641

> *I agree that this appeal should be allowed and the figure increased from £500 to £1,500 for the reasons given by Lord Denning M.R. I only add anything because I was a party to the decisions in Moeliker and Nicholls to which Lord Denning M.R. has referred, and this gives me a chance of correcting something which I now think is wrong which I said in Moeliker's case.*
>
> *This case differs in one respect on the facts from any of the three previous cases cited. In all those cases the plaintiff was in fact in work at the date of the trial. In fact, in all the cases he was still in the employment of his pre-accident employer. This case is different because at the date of the trial the plaintiff was not in work at all, although his previous employer would have been willing to employ him and he could have continued to work as a deckhand if he had ignored the advice of his doctor.*
>
> *In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. The trial judge*

said: "Looking ahead as best I can with the information before me, I expect that [the plaintiff] will obtain employment pretty well immediately." The judge turned out to be quite right, because he did. In Moeliker's case at p. 261 of the report in [1976] I.C.R. 253, I said: "This head of damage only arises where a plaintiff is at the time of the trial in employment." On second thoughts, I realise that is wrong. That was what I said, but on second thoughts I realised that was wrong; and, when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally," and that appears at [1977] 1 All E.R. 9, 15. Accordingly, in my judgment, the trial judge here was absolutely right to apply the principles of Moeliker's case and Nicholls'; case. Those cases were cited to her by counsel in some detail, and it is plain from the judgment that she did apply those cases.

97. It was the corrected version of ***Moeliker*** that the Court of Appeal of Jamaica approved in ***Gravesandy v Moore*** (1986) 40 WIR 222. It is true that Gravesandy did not refer to ***Cooke's*** case and it may be said that the Court of Appeal may not have approved Browne L.J.'s correction but the plain fact is that the corrected ***Moeliker*** which means that the Jamaican Court of Appeal accepted the that the correct legal statement should have read "generally" instead of "only."

98. The legal position is therefore very clear. The claimant does not have to be working at the time of the trial to have an award under this head of damages. From the cases, the issue under this head of damages is not whether the claimant will or might lose his job but whether his ability to compete on the open labour market is impaired. If yes, then it matters not whether he is working or not.

99. An important to fact to note is that in ***Cooke***, the claimant elected not to work on the trawler and decided to drive lorries instead but at the time of the trial he was not fully qualified to drive lorries and so was unemployed. If this is so, I cannot think of any logical or legal reason why a claimant whose injuries have impaired his earning capacity to the point

where he cannot work and so is unemployed at the time of the trial cannot secure an award under this head (see Courtney Orr J. in the case of ***Mark Scott v Jamaica Pre-Pack Ltd*** Suit No. C. L. S 279 of 1992 (delivered October 26, 1993)).

100. I must deal with the case of ***Dawnette Walker v Hensley Pink*** S.C.C.A No. 158/01 (June 12, 2003) which clearly decided that the claimant must be working at the time of the trial before he can become eligible for an award under this head of damages. The learned President even went as far as saying that "[t]here must however be some medical evidence confirming the likelihood of such a risk" (see page 11) and such an award "may be made in circumstances where a plaintiff suffers injury and resumes his employment at the same wage or with an increased wage, but the injury is of such a nature that a real risk exists that he may lose his job in the future."

101. This case is at variance with ***Gravesandy***. We now know that ***Gravesandy*** approved the corrected version of ***Moeliker***. The corrected version rested on the underlying premise that the claimant did not have to be working at the time of the trial before he could become eligible for an award. Browne L.J. accepted that an unemployed person could receive this award. Thus in approving ***Moeliker***, the court in ***Gravesandy*** must be taken as approving this premise as well. If, then, the two decisions, ***Gravesandy*** and ***Walker***, are in conflict then I am free to chose which way to go.

102. It cannot be seriously contended that Mr. Granston received injuries that have become worse over time. It cannot be seriously contended that when a person is suffering from pain that the medical opinion is that the best relief for pain relief is the addictive drug morphine (a drug of last resort) that that is of itself proof that Mr. Granston cannot compete effectively on the labour market with person who are either pain free or those whose pain is not so severe.

103. The final point I wish to make is that an award for loss of earning capacity does not preclude an award for loss of future earnings. They are separate and distinct head of damages (see Lord Denning M.R. in ***Fairley***

v. John Thompson (Design and Contracting Division) Ltd. [1973] 2 Lloyd's Rep. 40; ***Zielinski v West*** [1977] C.L.Y. 798).

104. I agree with Mrs. Dixon-Frith that a lump sum should be awarded here in light of the multiplier/multiplicand method that will be used to calculate the loss of future earnings. I accept that her figure of $524,430.38 is a just one in the circumstances here.

Loss of future earnings

105. Mrs. Dixon-Frith submitted that Mr. Granston is not entitled to any award under this head because he has a duty to mitigate his losses and he could undertake employment that is not physically demanding. I fear that this submission overlooks the plain fact that Mr. Granston is in constant pain. The pain is so severe that a pain pump that administers the powerful drug of morphine was inserted in his body.

106. Miss Davis has asked that this calculation should be based on a Sergeant's pay. For the reasons given in relation to loss of chance of promotion I decline this invitation. I therefore accept Mrs. Dixon-Frith's submission that it should be based on the fireman's income. I also agree with her calculations. The multiplicand I use is $560,890.76. The last remaining figure is that of the multiplier. I have to take into account that Mr. Granston is receiving the money now. I have to give some weight to the imponderables of life. Having regard to all the authorities, a reasonable multiplier is 10. The loss of future earning is $5,608,908.60.

Future medical care

107. There is evidence to support the view that the pump, the refill and the catheter are expensive and will need replacing for the rest of his life.

108. The pump is now broken. It costs US$30,000.00. The pump, if working, needs to be refilled four times per year at a cost of $20,000.00 per refill. The replacement cost of a catheter is US$6,000.00.

109. Both sides have suggested that I use a multiplier/multiplicand approach to the cost of refilling the pump. At four times per year at

$20,000.00 per refill, the annual figure is $80,000.00. I use a multiplier of 12 (Miss Davis' figure). This gives $960,000.00.

110. Mrs. Dixon-Frith has come to halt under this head of damages. She submits that no more damages should be awarded under this head because any other projected loss is too speculative. I cannot accept this. There is the undeniable fact that the pump is now broken and so too is the catheter.

111. Taking into account Mr. Granston's present age, the medical report from Ehikhametalor's medical report on this aspect of the case, I would think that provision should be made for at least three more pumps and at least three more catheters. I also take into account that the pump and catheter that were installed are now broken. I am of the view that he ought to be able to replace the pump and catheter that are now broken with provision made for two additional pump replacements and two additional catheter replacements.

112. At present prices, this translates into an award of US$90,000.00 to purchase three pumps and US$18,000.00 to purchase three catheters.

Conclusion

113. Sergeant was negligent. His negligence caused the truck to overturn which caused the injury to Mr. Granston. Therefore, the Attorney General is liable on the basis of vicarious responsibility.

114. The award of damages is as follows:

general damages:

pain, suffering and loss of amenities - $8m at 3% interest from the date of the service of the claim to the date of judgment;

handicap on the labour market - $524,430.38 with no interest.

cost of future medical care:
pumps and catheter – US$108,000.00 with no interest.

Cost of the refill - $960,000.00 with no interest

special damages:

loss of overtime - $671,154.00 at 3% interest from the date of the amended particulars of claim to the date of judgment.

Costs to the claimant to be agreed or taxed.