NMLS ✓

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 12 OF 2003

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS J.A. (Ag.)

BETWEEN: **GARFIELD HAWTHORNE** **DEFENDANT/APPELLANT**

AND: **RICHARD DOWNER** **PLAINTIFF/RESPONDENT**

Mr. Christopher Samuda instructed by Piper and Samuda for the Appellant.

Miss Nesta Clare Smith and Miss Marsha Smith instructed by Ernest Smith and Co. for the Respondent.

May 16, 17 and July 29, 2005

FORTE, P.,

Having had the opportunity of reading in draft the judgment of Harris, J.A. (Ag.), I agree with the reasoning and conclusions therein and I have nothing further to add.

SMITH, J.A.

I also agree with the reasoning and conclusions of Harris J.A. (Ag.) and I have nothing to add.

HARRIS, J.A. (Ag.)

The present appeal is brought against a judgment of the Honourable Mr. Justice Pitter in favour of the Respondent in a claim in which he had sought to recover damages for negligence. The appeal rests on the issue of liability and the consequential damages.

On October 30, 1993, the Respondent sustained relatively severe injuries after being hit by a car owned and driven by the Appellant.

The allegations of negligence were particularized in the statement of claim as follows:

> "4. That the collision was a result of the negligent driving of the Defendant.
>
> PARTICULARS OF NEGLIGENCE
>
> a. Failing to keep any or any proper look out;
>
> b. Failing to observe the presence of the Plaintiff on the sidewalk;
>
> c. Failing to stop, slow down, swerve or manoeuvre so as to avoid a collision;
>
> d. Driving at a speed that was excessive in the circumstances;
>
> e. Driving without due care and attention;
>
> f. Driving onto the sidewalk and thereby colliding into the Plaintiff."

In response to the claim, the Appellant alleged that the accident resulted from the Respondent's negligence or his contribution thereto, when he

suddenly ran from a sidewalk into the road, across the path of the defendant's motor vehicle.

The evidence of the Respondent was that he was a Security Guard and a handyman. He related that he was walking on the sidewalk in the vicinity of the St. Ann's Bay Library when he heard a sound like the brakes of a car coming from behind him. He then felt a heavy jerk to his legs. He fell to the ground, his legs being pinned beneath his body.

After the collision, the driver of the car left without speaking with him. He was taken to the St. Ann's Bay Hospital by a man, treated and sent home. Two days later, he returned to the hospital and was seen by Dr. Paul Wright who had him admitted. He was also seen by Dr. Geddes Dundas about eight months later.

It was the Appellant's evidence that he was driving his motor car on the main road, keeping closely to his left. He was proceeding at a rate of speed of 25-30 miles per hour when he saw someone dash across the road within the vicinity of a bus stop close to the St. Ann's Bay Parish Library. The person collided with the left front section of his car.

A Mr. Paul Burnett testified as an eye witness on the Appellant's behalf. He related that he had just left a telephone booth when the defendant's car passed him. The Respondent was about 82 feet and the defendant's car 40 feet from him when he saw a woman of unsound mind, who was at a bus stop,

chase the Respondent for about 3 feet. The Respondent then ran into the Appellant's car.

The Respondent's evidence is diametrically opposed to that advanced by the Appellant. The learned trial judge rejected the Appellant's account of the accident and found that on the balance of probabilities the Respondent was hit on the sidewalk by the Appellant's vehicle. He awarded the Respondent $512,360.00 as special damages and $1,854,480.00 as general damages.

The Judgment was subsequently amended to read:

> Special damages of $354,360.00 with interest thereon at the rate of 6% per annum from October 30, 1993 to February 18, 2003.
>
> General damages in the sum of $1,854,480.00 as follows:
>
> (a) Pain and suffering - $ 850,000.00
>
> (b) Handicap on the Labour Market - $792,480..00
>
> (c) Cost of future surgery - $212,000.00
>
> with interest on the sum of $850,000.00 at the rate of 6% per annum from January 9, 1995 to February 18, 2003.

Mr. Samuda filed six Grounds of Appeal. Grounds 1-3 revolve around the issue of liability. These grounds are stated as under:

> "1. The Learned Trial Judge failed to consider or to properly consider the conflicts, inconsistencies and improbabilities in the Plaintiff's/Respondent's evidence in entering Judgment for the Plaintiff/Respondent on the issue of liability and misdirected himself as to the relevant issues therefor;
>
> 2. The Learned Trial Judge's findings on the issue of liability cannot be supported in light of the evidence

adduced on behalf of the Plaintiff/Respondent and particularly the evidence of the Defendant/Appellant and adduced on behalf of the Defendant/Appellant;

3. The Learned Trial Judge took into consideration factors which he deemed to be relevant to the material questions as the place of impact and whether the Defendant kept a proper look out articulated by him which were not pertinent or alternatively not critical to the issue of liability."

It was submitted by Mr. Samuda that the Respondent's evidence was riddled with inconsistencies, irreconcilable conflicts and improbabilities, which ought to have moved the learned trial judge to have reject it.

His first point of challenge to the learned trial judge's decision was that he erred in finding that a conflict in the Respondent's evidence as to whether he did or did not see the Appellant's vehicle before the impact could have been resolved by the Respondent's natural reaction, given his apparent level of intelligence.

The learned trial judge accepted that the left side of the Appellant's car mounted the sidewalk. In the course of his assessment of the Respondent's evidence, the learned trial judge said:

> "Cross-examined he said all of the vehicle did not come on the sidewalk, the left front section including the left front wheel- all the left hand side of the car was on the sidewalk. He said he could not see when the car was climbing the sidewalk as it came from behind, and that he did not see the vehicle before it hit him. Further cross-examination he said he "turned and looked behind him" demonstrating this action by his head. He explained that when he "looked behind", he just looked behind. Is this a discrepancy or just a natural reaction to being hit from behind?"

The learned trial judge did not regard the discrepancies material. He opined that in light of the apparent level of the Respondent's intelligence he would not regard the discrepancy one which would have discredited him on the issue as to whether he had seen the vehicle before he was hit. The learned trial judge saw and heard the Respondent. He would have been in a position to assess and evaluate his evidence and arrive at his conclusion. He was entitled so to do.

A further submission by Mr. Samuda was that the learned trial judge's findings that the Respondent would have been unable to tell whether the vehicle was traveling at a fast rate of speed, having been hit from behind, conflicts with his finding that the Respondent had looked behind and saw the vehicle.

The learned trial judge had found that the Respondent had looked behind and saw the Appellant's vehicle. However, even if he had not found that the Respondent had looked behind, it could not be argued that there was no evidence to satisfy the first allegation in the particulars of negligence that the defendant failed to keep a proper look out.

The Respondent said he could not say whether the vehicle was traveling at a fast rate of speed. Although he was unable to do so, this would not in anyway operate against the proof of his claim. The question as to whether or not he was driving at an excessive speed has to be determined within the

context of the circumstances. Excessive speed, as the cause of an accident may be inferred.

In **Almon v Jones** (1974) 12 J.L.R. 1474 at 1476 Graham Perkins, J.A. stated:

> "...it is a mistake to think that because a witness is unable to give evidence of relative speeds and distances the cause of an accident cannot reasonably be inferred."

A Respondent may prove his case by direct as well as circumstantial evidence. An observation of Graham Perkins, J.A. in **Almon v Jones** (supra) at page 1476 lends support to the foregoing proposition when he said:

> "Equally it is a fallacy to think that in order to succeed in an action of negligence a plaintiff must place before the court direct evidence of negligence. He may always prove his case partly by direct, and partly by circumstantial evidence. Over one hundred years ago WILES, J., said in **Daniel v. Metropolitan Railway (2)** ((1868) L.R. 3 C.P. 216):
>
> > 'It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to'."

In this regard the learned trial judge stated that:

> "the pleadings refer to driving at an excessive speed in the circumstances, but this could only be determined from the plaintiff's point of view by inference, given the severity of the injuries he received."

Inferentially, the learned trial judge was satisfied that due to the nature and severity of the injuries sustained by the Respondent, the speed at which the Appellant was traveling was excessive in the circumstances.

It was also a complaint of Mr. Samuda that the learned trial judge's finding that the accident occurred on the sidewalk is contrary to the evidence.

The fundamental and critical issue for the learned trial judge in this case was whether the Respondent was hit on the sidewalk or on the roadway. However, the learned trial judge had failed to take into account evidence of the Respondent, in which he had, in cross-examination, also said that not only the left front section of the vehicle came on the sidewalk, but also the right front wheel. Although the learned trial judge had not dealt with the discrepancy, it is clear that he did not regard it material to the issue as to whether the defendant's car had climbed the sidewalk. He accepted that all the left section of the car was on the sidewalk.

He found that the Respondent was hit from behind by the car mounting the sidewalk. It was also his finding that the Appellant was driving at a rate of speed which was excessive in the circumstances. The obvious inference is that the Appellant was not keeping a proper look out.

He rejected submission by Mr. Samuda that it was necessary for the Respondent to adduce evidence to show that the Appellant was intoxicated, or had slept off, to have caused him to have lost control and climbed the sidewalk. Any question as to the appellant's intoxication, or, as to whether he

had slept off, would have been matters peculiarly within the knowledge of the Appellant, not the Respondent.

In dealing with the Appellant's case the learned trial judge found that although Mr. Burnett, the Appellant's witness, spoke of observing the Respondent being chased by a woman of unsound mind for a distance of 3 feet, no mention was ever made by the Appellant of this chase. At that time, the Respondent being 40 feet away from the Appellant, would have been closer to the Appellant than to Mr. Burnett.

The learned trial judge rejected Mr. Burnett's evidence that the Respondent was interfering with the woman at the bus stop. This bus stop, he said, was made of decorative concrete blocks. It was 7:30 p.m., therefore it would have been difficult for Mr. Burnett to have seen anyone at the bus stop, he being a distance of 82 feet away.

Dr. Geddes Dundas who had been called as a witness for the defence, had examined the Respondent on June 6, 1994. He testified that the Respondent had told him that he was "making a call from a phone booth and as he stepped from it he fell (sic) a sudden jerking of his body." The learned trial judge rightly rejected Dr. Dundas' evidence on the ground that he was seeing the Respondent several months after the accident and the history the doctor gave was from "quotes as well as his own paraphrase of things the plaintiff said."

The learned trial judge accepted the evidence of Dr. Paul Wright who had seen the Respondent two days after he received his injuries, the Respondent having reported to him that he was struck by a car while he was on the sidewalk.

It is obvious that the learned trial judge found the Respondent's account as to where and how the accident happened more credible than the appellant's.

Only in exceptional circumstances will an Appellate Court disturb a trial judge's findings. It will only interfere with a trial judge's exercise of his judicial discretion if it is satisfied that he has erred in law or misdirected himself on the facts as would entitle an Appellate Court to say it would be manifestly unjust to allow the verdict of the learned trial judge to stand. See **Clarke v Edwards** (1970) 12 J. L.R. 133.

Several palpable probabilities arose from the evidence of the Respondent, which in substance, had clearly been accepted by the learned trial judge. Although I would differ, with respect, to some of the reasons for his findings of facts, on examination of the evidence, I cannot conclude that such findings are obviously wrong. There would therefore be no basis for this Court to interfere with the trial judge's findings of facts.

I now turn to the three remaining grounds of appeal.

Ground 4 states thus:

> "4. The Learned Trial Judge failed to consider or properly consider the evidence in relation to

> loss of income and the costs of extra help and erred in making the awards therefor."

Mr. Samuda urged that the learned trial judge, in his assessment of the Claimant's evidence, failed to adhere to the rule requiring strict proof of income. In support of his contention he cited **Murphy v Mills** (1976) 14 J.L.R. 119 and **Bonham Carter v Hyde Park Hotel Ltd.** (1948) 64 T.L.R. 177.

In **Murphy v Mills** (supra) this court endorsed the principle propounded by Lord Goddard C.J., in **Bonham Carter v Hyde Park Hotel Ltd.** (supra) when, at page 178, he said:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

Judicial authorities have nonetheless shown that there can be a departure from this principle. A court must, however, be very guarded in its relaxation of the rule.

In **Ratcliffe v. Evans** (1892) 2 Q.B. 524 at 532 Bowen L.J. declared:

> "As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

A case which also demonstrates that the rule may be relaxed, is that of **Grant v. Motilal Moonan Ltd. and Another** (1988) 43 W.I.R. 372. In that

case, the plaintiff brought an action for negligence against the defendants following damage done by their motor vehicle to her house and certain contents. Her claim for $22,044.00 for special damages for loss of furniture and other household items failed in the court of first instance for want of documentary evidence in support of the purchase of the items lost. On appeal, the Claimant was awarded the full amount claimed notwithstanding the absence of supporting documentary evidence in proof of her loss.

In the present case, the learned trial judge allowed the following items of special damages:

"Taxi to St. Ann's Bay – 20 weeks @ $500 per week	$10,000
Taxi to Kingston	2,000
Doctors Fee	13,200
Medication	500
Helper	3,600
Hospital Fees	760
Medical Report	9,500
Clothing	2,500
Watch	300
Loss of Income 260 weeks at $1,270 per week	$312,000"

In dealing with these claims he said:

> "I take judicial notice of the prevailing conditions and circumstances in this country and am able to make a distinction regarding proof of earnings and not follow slavishly the authorities requiring strict proof. A

> person such as the plaintiff must not be denied his claim which I regard as more than reasonable because he is unable to produce supporting documents in proof thereof."

The loss of earnings and cost of extra help are in issue.

It was accepted by the learned trial judge that, as a handyman, the Respondent would have earned $550.00 weekly as claimed and $720.00 weekly as claimed as a private security guard. He went on to state that as a car washer, a handyman and to some extent a security guard, the Respondent would not be expected to have kept books, nor would he have received a salary slip to indicate his earnings as a handyman or a car washer.

The Respondent's evidence was that he was unable to work between October 1993 and December 1998 and in addition to his earnings as a handyman and security guard he also earned $300.00 weekly washing cars. Dr. Wright testified that he would have been unable to work for five years.

The learned trial judge allowed a sum of $1,270.00 weekly for loss of the Respondent's income for 260 weeks. It appears to me that he had only taken into account the Respondent's earnings as a security guard and a handyman. He had erroneously taken the view that the sum of $1,270.00 per week was less than the National Minimum wage. However, in 1993, the National Minimum Wage stood at $300.00 per week. This notwithstanding, it is clear that he accepted the Respondent's evidence that his wages as a handyman was $550.00 weekly.

As a handyman, the Respondent would not have been in possession of documentary evidence to support his earnings. It would not therefore be reasonable to expect him to produce salary slips or any other evidence in support of his income.

The learned trial judge was satisfied that the Respondent earned $550.00 weekly and that he was incapacitated for 260 weeks. I see no reason why the Respondent should be denied this claim. The learned trial judge's award ought not to be disturbed in respect of this aspect of the claim.

So far as the claim for loss of income as a security guard is concerned, the Respondent ought to have placed before the trial judge some evidence in support of this claim. As a security guard, he should and ought to have been in a position to tender some form of documentary or other evidence to prove his earnings. This having not been done, the claim cannot be treated as proved and therefore the award in this regard cannot stand.

I now turn to the next head of loss which has been disputed. This relates to the claim for extra help.

The Respondent stated that he was unable to take care of himself for three months and he paid a woman $300.00 weekly to do his laundry.

His injury would have rendered him immobile for at least three months. He would require assistance with his laundry. The sum of $300.00 weekly is reasonable. The learned trial judge correctly allowed the sum of $3,600 for this item of the claim.

Ground 5 was outlined as follows:

> "5. The Learned Trial Judge's award for pain and suffering and loss of amenities is inordinate and not supported by legal authority."

Mr. Samuda contended that the award for pain and suffering ought not to exceed $200,000.00, not only in light of the evidence and opinions given by Doctors Wright and Dundas but also taking into account comparable cases. He further urged that the Respondent's condition would not have been as it was, had he co-operated with Dr. Wright so far as the management of his treatment was concerned.

The injuries sustained by the Respondent included fractures to the right ankle and shaft of the fibula, fracture of the lower third of the left fibula and fracture of a dislocated metacarpal joint of the right hand. The disability manifested was a shortening of the right leg which resulted in 10% disability of the right lower limb and a 8% permanent physical disability of the whole person. This disability was not expected to improve with time.

Dr. Wright recounted that he first saw the Respondent on November 5, 1993, and thereafter on several subsequent occasions. Initially, both of the Respondent's legs were reduced and immobilized in cast. The left leg improved but the right did not. Further attempts at reduction of the ankle failed. A decision by Dr. Wright to do surgery was not carried out as the Respondent's wound was infected at the time. He subsequently arranged for

him to have surgery at the University of the West Indies Hospital without success.

Dr. Wright further stated that when he saw the Respondent in 1994, he told him he could walk without crutches. It was Dr. Dundas' opinion that the Respondent's weight bearing on the dislocated joints caused significant deterioration of the ankle. He added that if the Respondent had not subjected the ankle to weight bearing, his condition might have been marginally better.

The learned trial judge accepted Dr. Dundas' opinion but found that there was unchallenged evidence from Dr. Wright that several attempts were unsuccessfully made to correct the defect with respect to the Respondent's right leg. He went on to say:

> "It cannot be said without more that Dr. Wright or the plaintiff himself, as difficult and uncommunicative as he may have been, contributed to his present medical condition."

I see no reason to disagree with the learned trial judge's findings.

Both doctors testified to the severity of the Respondent's injuries. Dr. Dundas opined that even if surgery was done some incapacity would have persisted. The learned trial judge came to the conclusion that the sum of $850,000.00 was an appropriate amount to be awarded for the Respondent's pain and suffering and loss of amenities.

An Appellate Court is usually reluctant to set aside an award on the issue of general damages unless, in all the circumstances of the case, the award is manifestly excessive, or very low. In order to determine whether the

learned trial judge arrived at a conventional figure regard must be had to awards in reasonably comparable cases.

Mr. Samuda cited a number of cases with respect to his perception of an appropriate award. It is my view that only one of these cases which could offer some assistance on the question of what ought to be a reasonable award for pain and suffering and loss of amenities for a claimant who suffered permanent partial disability of the kind suffered by the Respondent in the present case. This is the case of **James v Lawrence** Suit No. CL1991/J186, Harrison's Assessment of Damages for Personal Injuries p. 366.

In **James v Lawrence** (supra) the plaintiff sustained a compound fracture of the right tibia and fibula and a dislocated right shoulder. He suffered a 15% permanent partial disability of the right lower limb. By consent, a global award of $141,590 was made. Assuming such award related to pain and suffering and loss of amenities, in February 2003 it would have amounted to $560,000.00.

The cases of **Barrett v McLeod** Suit No. CL 1983/B 301 and **Craig v Lee** Suit No. CL 1988/C181, Harrison's Assessment of Damages for personal injuries, pages 372 and 208 respectively were cited by Miss Smith.

The Claimant in **Barnett v McLeod** (supra) suffered a fracture of the neck of the talus (the ankle), abrasions, swelling and tenderness of various parts of the body. Her disability was assessed at 21% of the lower limbs, which resulted in 8% permanent partial disability of the whole person. In

January 1989, she was awarded $45,000.00 for pain and suffering and loss of amenities. In February, 2003, such an award would have converted to $627,574.09.

In **Craig v Lee,** (supra) the plaintiff's injuries were a compound fracture of the right tibia, fibula, abrasions to the left knee and shoulder. The resultant disability experienced was a ¼" shortening of the right leg amounting to 10% permanent partial disability of the whole person. On February 2, 1991, the plaintiff was awarded $106,000.00 for pain and suffering and loss of amenities. An award in February, 2003 would have translated to $965,000.00.

It is my view that the injuries suffered by the Respondent in the case under review are somewhat similar to those sustained by the plaintiffs in the abovementioned cases. His resultant disabilities are also similar, or in some cases, strikingly similar to those of the plaintiffs. His enjoyment of life has been curtailed by his inability to walk since the accident. He can no longer play cricket or football. Taking all these factors into account, the sum of $850,000.00 for pain and suffering and loss of amenities is an appropriate award.

The final ground of appeal is as follows:

> "The Learned Trial Judge's awards for Handicap on the Labour Market and the cost of Future Surgery are not supported by the evidence and, in making those awards, the Learned Trial Judge misdirected himself respecting the appurtenant law."

Mr. Samuda urged that the award for handicap on the labour market was misconceived and unsupported by evidence.

As a rule, if at the time of trial a Respondent's income exceeds or is equivalent to that which he earned before his injury, he would not be entitled to compensation for prospective loss of earnings. He may, however, maintain a claim for loss of earning capacity should he lose his job or take a job at less pay. See **Moeliker v A. Reynolle & Co. Ltd.** [1977] 1 All ER 9. Similarly, a claimant who is unemployed, may also have a claim for loss of earning capacity, should he be employed at a salary less than that which he earned before his injury. A claimant who has suffered some permanent partial disability may still be able to work. However, his disability may render him unfit for the occupation in which he had been involved prior to his injury. He would suffer some loss of earning power on the ordinary labour market.

The principles applicable in assessing loss of earning capacity were recognized by Carey J.A. in **Gravesandy v. Moore** S.C.C.A. No. 44/85 (unreported) when he stated:

> "We can now refer to **Moeliker v. A. Reyrolle and Co. Ltd.** ([1977] 1 All E.R. 9) which considered the principles to be applied in an award of damages for loss of earning capacity. We quote from the headnote which accurately, in our view, reflects the general principles applicable to assessing damages for loss of earning capacity...
>
> 'In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial the Court should only make an award for loss of earning capacity if there is a substantial or

> real and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk the Court must, in considering the appropriate award assess and quantify the present value of the risk, of the financial damage the plaintiff would suffer if the risk materializes, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable which in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds will be appropriate'."

The learned trial judge awarded the present Respondent the sum of $792,480.00 under this head. He arrived at this sum by the use of $1,270.00 as the weekly income of the Respondent as a handyman and a security guard and applying a multiplier of 12 thereto. In calculating the award, he mistakenly stated that the figure of $1,270.00 was within the National Minimum Wage. It would not have been within the National Minimum Wage at date of trial in February 2003, which then stood at $1,800.00 weekly.

At the time of trial the Respondent was unemployed, but was employed at the time of accident. Although having a permanent partial disability of one foot, he is still a candidate for the labour market. His injury has not left him totally incapacitated. He worked at the end of December 1998 washing cars at National Depot. He thereafter worked for seven weeks at F.D.R. Hotel as a

buffet attendant. Both jobs required much standing and walking. He had to relinquish these jobs due to swelling of the ankle.

He was 33 years old at the time of the trial. His disability would render him handicap in securing employment either as a car washer, handyman or security guard or in any occupation which requires much walking and standing. However, his handicap would only extend to positions requiring much walking and standing. He would be able to do some form of work.

There is some risk, probably not a considerable risk, to be taken into account that he might have to seek other type of employment at a much lower pay than he previously received.

Before the accident he had full use of both feet. Since the accident there has been a remarkable deficiency in his right foot. This would affect his earning capacity as a handyman, car washer or security guard.

However, despite his earnings as a security guard not proved and there is only proof of his income as a handyman, in all the circumstances, an amount of $1,270.00 as his weekly earnings would not be unreasonable, albeit, this sum would have been less than National Minimum Wage at the date of trial. Although the basis of the learned trial judge's computation of the award was erroneous, an award of $792,480.00 under this head would be appropriate. The award ought to stand.

It was also contended by Mr. Samuda that an award ought not to be made for the cost of future surgery. He urged that Dr. Wright was unable to

present an opinion regarding the necessity and benefit of future surgery. The Respondent had ceased to be under Dr. Wright's care for over seven years preceding the trial.

The learned trial judge made an award of $212,000.00 for future surgery based on Dr. Wright's opinion of the estimated cost of $158,000 - $186,150.00. He observed that the future surgery "would only bring about minimal recovery but will minimize future pain." This finding was anchored on a conjecture by Dr. Dundas. In my opinion, the learned trial judge ought to have taken into account Dr. Dundas' evidence that he was unable to give an opinion as to whether future surgery would be of benefit to the Respondent as he had not seen him since 1994.

The learned trial judge also failed to take into account Dr. Wright's evidence as to his inability to form an opinion as to whether future surgery would be necessary or beneficial to the Respondent. He also failed to consider Dr. Wright's evidence that if the Respondent had followed his advice since 1995 he would have been rehabilitated.

In light of the foregoing, the learned trial judge ought not to have made an award for future surgery. The award of $212,000.00 for future surgery is disallowed.

The appeal is dismissed as to liability. Appeal allowed in part as to damages by disallowing the sum awarded for future medical expenses.

Judgment is accordingly entered for the plaintiff/respondent as follows:

General Damages

For pain and suffering and loss of amenities - $850,000.00

For handicap on the labour market - 792,480.00

With interest on the sum of $850,000.00 at the rate of 6% per annum from January 9, 1995 to February 18,2003.

Special damages

$354,360.00 with interest thereon at the rate of 6% per annum from October 30, 1993 to February 18, 2003.

Costs of the appeal to the Respondent to be agreed or taxed.

FORTE, P.

ORDER

1. The appeal is dismissed as to liability.

2. Appeal allowed in part as to damages by disallowing the sum awarded for future medical expenses.

3. Judgment is accordingly entered for the plaintiff/respondent as follows:

General Damages

For pain and suffering and loss of amenities - $850, 000.00

For handicap on the labour market - 792,480.00

With interest on the sum of $850,000.00 at the rate of 6% per annum from January 9, 1995 to February 18, 2003.

Special damages

$354,360.00 with interest thereon at the rate of 6% per annum from October 30, 1993, to February 18, 2003.

4. Costs of the appeal to the Respondent to be agreed or taxed.