IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 00526

BETWEEN	KENYA TULLOCH	CLAIMANT
AND	DISTRICT CONSTABLE LLOYD JONES	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. Alexander Williams instructed by Usim, Williams and Company for Claimant
Miss C. Barnaby instructed by the Director of State Proceedings for the Defendants

Assault – Vicarious liability – Whether 1st Defendant servant/agent for 2nd Defendant – Whether 1st Defendant acted maliciously – Whether 1st Defendant's purported post factum behaviour deems him to be a police officer – Damages – Aggravated Damages

Written submissions from Claimant received 7th January 2011

Heard: 27th June, 2010; and 7th June 2011

CORAM: MORRISON, J

Hinc ilae lacrymae is the Latin expression for: hence these tears. More to the point, it is the cause of the vexation.

[1] In this vexation it is alleged by the Claimant that the first Defendant, a District Constable, maliciously and without reasonable cause or probable cause, assaulted him in that the first Defendant pushed and then shot him after their engagement in a verbal spat. This incident, it is to be noted, took place at the Canton Enterprise in Bridgeport, St. Catherine and not at the Total Care Pharmacy where the first Defendant was ostensibly engaged as a Security Guard when he was not on duty.

[2] The second Defendant is sued by virtue of the Crown Proceedings Act.

What are the facts?

[3] In the case of the Claimant the witness statements mirrors his pleadings. For the defence the pleadings were unsupported for want of relevant witness statements and evidentiary support.

The Claimant's Particulars

[4] The Claimant who resides in the Drewsland area of Kingston 20, conducts his jerk chicken vending business from a stall that is located in front of a popular entertainment club called Cactus Night Club located in the Bridgeport area of St. Catherine. This self-help informal entrepreneur is no freeboater. He is purposive in action and is at full tilt (5) nights per week from 6.00 p.m. to 4.00 a.m. the forthcoming morning in peddling his produce. This he has been doing since he was fourteen years old.

[5] At about 7.00 p.m. on Saturday 25th February 2006, the Claimant went to a wholesale shop called "Canton Enterprise" and there ordered some goods. He then proceeded to the delivery section of the Enterprise where he "saw a man

who I always see in a Pharmacy on the Plaza." This man, he says, "come and stand in front of me." The Claimant was less than urbane in his intemperate use of colourful language in reacting to the affront: "Shit belly, yuh nuh nave no manners." A shoving match, initiated by the first Defendant ensued. Continuing,, exclaims the Claimant, "I saw when he pulled a gun from his waist and painted it at me and shot me. I tried to run but I fell at the door outside"…

[6] The Claimant's account of the incident is unsupported. His brother, Kevin Tulloch, also a jerk chicken vendor, was by his stall along Port Henderson main road in the vicinity of Magic Wholesale. His stall is near to that of Kenny's.

[7] At about 7.30 p.m. he heard, he says "… a shot fire and after (3) minutes I went over to the door of Canton enterprise." There he saw a crowd, which had ostensible gathered amidst the excitement. He saw his brother lying on the ground. However, he asserts, that before he got to his injured brother "I saw Jones in the pathway. He stuck me up with gun. By that I mean he pointed gun at me … asked him, what happen, what!" He said to me 'Police, police!' He then walked away into the Total Care Pharmacy."

[8] The Claimant's injuries are particularized as: gun shot wound to lower abdomen; painful distress; abdomen tender throughout with rebound and guarding; bilateral renal angle tenderness; acute abdomen ladder injury. A medical report from Dr. Dave Marshall of the Spanish Town Hospital is annexed to the claim form.

The Defence

[9] The plaint of the Claimant was traversed by the second Defendant. Except for admitting that the first Defendant was a District Constable the particulars of claim were peremptorily refuted. In fact, though there is a Defence for the second Defendant, the first Defendant having met his decease in December 2006, there is no Defence filed on his behalf. In the result the announced representation was for the second Defendant only. Paragraph 4 of the Amended Defence is therefore more than passing curious. "Paragraph 4 is denied. The 2nd Defendant further says that a struggle developed between the Claimant and the 1st Defendant as a consequence of what the 1st Defendant was hired to do as a "Security Guard."

[10] Paragraph 5 avers that at the material time the first Defendant was licensed to carry a private firearm and did carry a Smith and Wesson revolver serial No. CBP 3144, while paragraph 7 avers that, the injuries occasioned to the Claimant were not the result of the actions of its servant or agents.

[11] The factual divide having been brought into relief I now set out rival contentions and the resultant issues.

Submissions By The Claimant

[12] The Claimant has urged this Court to say that on the facts: -

a) there is clear evidence, on the Claimant's case, that he was shot by the first Defendant;

b) the first Defendant by shouting the word "police!" was *co ipso* asserting the authority of his office as a police officer;

c) it matters not whether he acted from motives peculiar to him or that he acted under the auspices of his police function. Either way, he sought to so closely connect his actions with that of being a police officer and in so doing he vicariously constituted the second Defendant's liability;

d) the second Defendant, on its pleadings, "has not proven almost any aspect of the pleaded case"; as

   i) there is no proof that the first Defendant was off duty;

   ii) there is no proof regarding the first Defendant's engagement as a Security Guard on the 25th day of February 2006;

   iii) the incident did not occur in the alleged designated working area of the Pharmacy where the first Defendant ought to have been at the germaine time;

   iv) on the second Defendant's case, there is nothing to suggest that the alleged struggle was as a result of what he was hired to do as a Security Guard;

   v) there is no proof that the Claimant shot himself;

   vi) there is no proof that the offending bullet which injured the Claimant had come from the private firearm of the first Defendant, even if it was pleaded, which it did not.

The Claimant anchored his repose on these facts and on the authority of **Clinton Bernard v Attorney General of Jamaica**, 65 W.I.R. 245

Submissions By The Second Defendant

[13] Firstly, it is posited, that the first Defendant was assigned to the Central Police Station and from early as June 2001, was exclusively assigned to secure the buildings and content of the Court of Appeal or the Supreme Court.

[14] Therefore, as the first Defendant was "never detailed to work anywhere else other than these Courts" any unassigned, unauthorized activity undertaken by him took him outside the place of his authority and bailiwick

[15] Secondly, they insist that there is no nexus between the acts which the first Defendant was authorized to perform and the wrongful acts he allegedly committed on the Claimant. In order to fix the second Defendant with vicarious liability, they further contend, the alleged wrongful acts would have to be unauthorized modes of doing that which the first Defendant was authorized to perform.

[16] Thirdly, *pro confesso*, even if it is accepted that the first Defendant had used the expression, "Police, police!", it was not contemporaneous with the altercation between the Claimant and himself and indeed the eventual shooting of the Claimant.

[17] Further, they advance, the fact that the Claimant was not arrested and charged with an offence arising from the evidence, cannot be regarded as retrospectant evidence to suggest that that Constable had purported to act as a policeman.

[18] The second Defendant's rebuke of the claim apart from its factual contention is built upon the rampart of statute law and on the authorities of

Clinton Bernard v The Attorney General [2004] U.K. P.C. 47; **Lister v Hesley Hall Ltd** [2002] 1 A.C. 215; **Attorney General v Oswald Reid and Others** (1994) 31 J.L.R. 237.

The Issues

[19] In fine the issues are:

a) whether at the material time the first Defendant was acting or purported to act as a police officer at the time of the shooting: Was he on duty?;

b) whether assuming that he was so engaged he acted maliciously and without reasonable and probable cause;

c) whether he was the servant and/or agent of the second Defendant at the material time.

The Law

[20] What is the statutorily prescribed power, authority and duty of a District Constable?

[21] According to the Constables (District) Act "the Act", the Commissioner of Police may, with the sanction of the Governor-General appoint in any parish, such number of persons as he may think necessary, being house holders resident in such parish, to be district constables, whose power and authority under this Act shall extend to all parts of the Island: See Section 2(1).

[22] Section 4 of the Act provides that "every district constable shall throughout the Island all the powers of constables, and shall exercise his office at all times when required to do so by any Justice, or any officer of Constabulary to whom

such district constable is by this Act made subordinate, and also, whenever in his judgment the public safety or welfare, or the ends of justice demands it."

[23] Under Section 5, "every district constable shall be subject to the orders of the Commissioner of Police and the officers and sub-officers of the Constabulary Force, and the district for which any district constable is appointed, shall be attached to a constabulary station." He is also subject to the orders of the sub-officer of Constabulary in charge of such a station.

[24] A District Constable powers are not only those as defined in Section 4 for as Section 6 delineates, "in case of any crime occurring in the district", in his sphere of operation, he is empowered to make an inquiry into the circumstances and he shall immediately send notice of the occurrence to the Constabulary station to which he is attached. However, it is apparent that his powers are circumscribed to that "if he suspects that any stolen property is concealed in the house, premises or land, occupied by any convicted of larceny, or of knowingly receiving stolen goods", to enter upon and search the aforementioned premises.

[25] It is quite clear from the above extracts that the powers of a District Constable is not only subordinate to but is exercisable in consort with a Justice of the Peace or any officer of Constabulary Force.

[26] Further, his powers are also exercisable <u>whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice.</u> At all events, as Section 5 makes manifest, a District Constable is subject to the orders of the Commissioner of Police and the officers and sub-officers of the Constabulary Force. In other words, the autonomy of a District Constable is not

as wide and fluid as that of his counterpart, a Constable. According to the Jamaica Constabulary Force Act, Section 13: “The duties of the Police under this Act shall be to keep watch by day and night, to preserve the peace, to deter crime, apprehend or summon before a Justice persons found committing any offence or whom they may reasonable suspect of having committed any offence, or who may be charged without having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices and criminal process issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a constable …” However, in respect of a District Constable, whereas the Commissioner of Police may appoint in any parish “householders resident in such parish to be district constables” their powers and authority shall extend to all parts of the island …” Note, however, that the Minister may make regulations for carrying out the provisions of the Constable (District) Act including …” the duties of the Rural Police (District Constable): See Section 3 while “duty” as defined under The Constabulary Force Act entails a legal obligation or responsibility to do as Section 13 demands, “power” speaks to the authority that is given or delegated in the exercise of that office be it that of a Constable or a District Constable.

[27] In the case of the latter it is exercisable in the circumstances adumbrated under Sections 4 and 5 of the Constables (District) Act, supra. The subordination of the District Constable to the Commissioner of Police, the officers and sub-officers of the Constabulary Force is also in respect of, “the district for which any District Constable is appointed,” which is a “constabulary station”. However, the

ambit of his powers are significant by the use of the words “whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice.” It seems to me that the words “whenever in his judgment” incorporates the notion of a legal obligation or duty, and responsibility with respect to public safety and welfare and to serve the ends of justice. On this view, it seems that a District Constable is always on duty.

[28] I now repair to the substantiality of the defence.

It is singularly devoid of evidentiary support, and if I might add, is characterized by generalities as I shall endeavour to demonstrate.

[29] I begin with the gaps in the presentation of the evidence for the defence. According to the evidence of Inspector of police, Julian Rowe, she is responsible for the general supervision and day to day management of the Kingston Central Police Station for officers from the rank of District Constable up to Sergeant. She is also responsible for the assignment of officers for various duties.

[30] Further, she says, “when I was transferred to the Kingston Central Division, District Constable Lloyd Jones was already a member of staff assigned duties at the Court of Appeal or the Home Circuit Court. These duties were of a security nature … District Constable Jones was never detailed to work anywhere else other than these courts.”

[31] She goes on to say that, “when officers are assigned duties their assignments are recorded in the station diary.” Also, she expands, “ the officers are required to hand over any firearm or ammunition that is issued at the time of commencement of duties. Officers are not allowed to keep and carry any firearm

or ammunition unless special permission is given by the Commanding Officers or Commissioner of Police." She advanced that, to the best of her knowledge, District Constable Jones was not given any such permission.

[32] Be it noted, however, that there is not a shred of evidentiary support for that bold and bland assertion. It speaks, I suspect, to her speculation which is not a good advisor. Something more was required and it was not forthcoming. Thus, there was nO evidence that D/C Jones had returned the firearm that he had been dispatched with on 24th February 2006 and which duty he concluded at 7.40 a.m. on the 25th February 2006.

[33] Remarkably, Inspector Rowe's evidence elides the gap therein that at 12.30 a.m. on the 26th February 2006 D/C Jones was dispatched on duties to the Court of Appeal and was issued a .38 Smith & Wesson service revolver with serial number DG33947. It does not address the obviously important consideration of the issue and return of the firearm and ammunition concerning the material time. I therefore lean in favour of finding that D/C Jones was in possession of the officially issued items.

[34] Not dissimilarly, is the issue concerning whether or not D/C Jones was on duty. The record, or the absence thereof bears the default evidentiary proof that he was not, bearing in mind the absence of any record of the return of the firearm and ammunition by D/C Jones' supervisors. Also, the deficit on the evidence comes from the fact that the incident did not occur at the Total Care Pharmacy, where D/C Jones worked when off duty, but at the Canton Enterprise establishment which is at a remove from that Pharmacy.

Furthermore, it appears to me to be more probable that not, it not having been deflected by the Second Defendant, that, D/C Jones' account of the incident being unforthcoming it cannot be said that he was not purporting to exercise his powers, "whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice."

[35] The defence and evidence suffers the signal failure of proof that it was the Claimant who had shot himself.

[36] The evidence of Constable Guy Wright, Michael Dixon and Deputy Superintendent Carlton Harrisingh as to the receipt, ownership and testing of firearm CBP 3144 does not, in my view, address the crucial question whether it was the firearm and ammunition issued to D/C Jones that was involved in the shooting. All that occurred is that D/C Jones handed to Constable Guy Wright his personal firearm sometime after the incident. In any event the testing of his firearm and the result of the testing does not advance the defence so filed if, only on the basis that, the projectile taken from the body of the Claimant was not compared to that of any from CBP3144. Apropos, the second Defendant did not allege that CBP 3144 was the offensive weapon that was the cause of the Claimant's injury.

[37] Finally, while it is true that D/C Jones did not use the word "police" to the Claimant, contextually and instantly, his use of this word to the Claimant's brother, makes it plain that D/C Jones purported to act as a policeman. The materiality of the word "police" Is to be referenced by its use before, during or

after the incident. Thus, it was a retrospective claim to his police authority by D/C Jones.

Having made the above findings of facts I have now to apply them to the law as is laid down in **Clinton Bernard v. The Attorney General of Jamaica** [2004] U.K. P.C. 47.

The facts in that case is as follows:

[38] At about 9.00 p.m. on February 11, 1990, Mr. Bernard and his parents went to the Central Sorting Office, Kingston to make an overseas call. In pursuit of that mundane endeavour, he joined a queue of persons similarly intent to use the telephone Mr. Bernard's time came to the use of the telephone having come he proceeded to use. Unexpectedly, one Constable Morgan, intruded himself upon the cloister of the moment by demanding the use of the telephone. "Police!", the constable then asserted, "I am going to make a long distance call, boy leggo this, police." Mr. Bernard refused Constable Morgan's brusque and imperious demand whereupon the latter in a fit of pique proclaimed, "boy me naw join no line, give me the phone." Again, Constable Morgan was rebuffed. As if possessed of the spirit of contumely, Constable Morgan's actions had now escalated into truculence as he proceeded to slap Mr. Bernard on the wrist whom he also shoved. Still, Mr. Bernard was defiant. Stung by the principled, stout defiance of Mr. Bernard, Constable Morgan retreated by two steps, pulled his service revolver and shot Mr. Bernard in his head. Insult was not added to injury as when Mr. Bernard had awakened from unconsciousness he discovered that

he was handcuffed to a hospital bed by police officers including Constable Morgan.

[39] The dastardly act of Constable Morgan visited upon Mr. Bernard was to receive an attempt at sanitization in that false charges were laid against Mr. Bernard. However, all the false charges against him were withdrawn by the Prosecution.

[40] It was on those horrendous facts that Mrs. Justice McCalla, as she then was, found judgment in favour of Mr. Bernard against the Attorney General for Jamaica. However, an appeal by the Attorney General's Department, the Court of Appeal overturned the first instance decision on the basis that vicarious liability had not been established. Aggrieved by the decision of the Court of Appeal Mr. Bernard sought redemption from the Privy Council.

[41] I now wish to throw the spotlight on the reasoning of the Court of Appeal that failed to resonate with their Lordship of the Privy Council.

[42] In the Court of Appeal Bingham, J.A. with whom Walker, J.A. and Panton, J.A. (as he then was) agreed said: "In the instant case, the constable was in possession of a service revolver issued to him by a superior officer which could be regarded as authorizing him to be at large in carrying out his sworn duty to uphold the law. By his unlawful action in shooting and injuring the respondent the constable could not be seen as acting in the lawful execution of his duty. His conduct was of such a nature as fell out outside the class of acts authorized by Section 13 of the Constabulary Force Act, and did not render the state as his employer vicariously liable to the respondent."

[43] Concomittantly, Walker, J.A. was content to say that the trial judge had misdirected herself by placing hearsay reliance on two pieces of evidence that he found to be less than salutary: that in demanding the use of the telephone Constable Morgan had announced "police!" and, following on the incident Constable Morgan causes Mr. Bernard to be arrested on a charge of assaulting a police officer.

[44] In his view Walker, J.A. did not agree that those segments of the evidence whether taken singly or together could support a basis for the finding of vicarious liability as it had nothing to do with the execution of Constable Morgan's duties and as the arresting and charging of Mr. Bernard was a mere ruse calculated to give legitimacy to his conduct.

[45] It was Lord Steyn who delivered the judgment of the Board. The Board's observations bears repeating: "… one does not know whether the constable was on duty at the time of the shooting. The importance of this gap in the evidence is, however, reduced by the fact … that a Constable may exercise his powers outside his assigned hours of duty … Secondly, it is not clear whether the Kingston Sorting Office where the shooting took place was within the area for which the Constable's police station was responsible. Again, however, the importance of the gap is reduced by the fact that a Constable may exercise his powers outside the immediate area covered by his police station … Thirdly, it was not clear on the evidence whether the Constable demanded the handing over the phone in the context of a police function or because he wanted to make a private call …" The Board well recognizing the parties of the evidence was

prepared to assume in favour of the Attorney General that a Constable's power is not prescribed by his assigned course of duty, that his power is not confined to the immediate area covered by his police station and that by saying "police" to Mr. Bernard that the Constable did so as a pretext to overcome Mr. Bernard and so gain the use of the telephone ahead of him. It was against that backdrop that the arguments of both sides were to be viewed.

[46] As far as the Plaintiff was concerned pre-eminence was to be given to these factors:

a) the statutory duty of the Constable to keep watch by day and by night and to preserve the peace irrespective of his mode of dress or his hours of official duty;

b) the assertion of the authority of his office by saying, "police leggo" irrespective of his motive;

c) the shooting of the Plaintiff with the service revolver given to him as a police officer which he was permitted to carry while off duty;

d) the arresting and charging of the Plaintiff under the aegis of the Constabulary Force Act served to confirm that at the time of the incident he was acting in the execution of his duty.

[47] The Attorney General was of the contrary view to wit: the Constable was not on duty and as such was acting for his own private purposes; that the utterance of the Constable, "police, leggo" was irrelevant to the issue of vicarious liability; that the shooting of the Plaintiff was unconnected with the duties of a Constable and that the arrest of the Plaintiff was irrelevant to the issue.

[48] The Board then set about to review the authorities. In this regard they confirmed that **Lister**, *supra* emphasizes the intense focus that is required on the closeness of the connection between the tort and the tortfeasor's employment. In so doing the two paradigm test of Salmond's well-known formula, that is, whether the act is a wrongful and unauthorised mode of doing some act authorised by the master, was no longer tenable as far as intentional wrongs are concerned. The Board laid it down that the correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort. One then asks whether looking at the matter in the round, "is it just and reasonable to hold the employer's vicariously liable?" having regard to the factor that the risks to others were created by an employer who entrusts duties, tasks and functions to an employee.

[49] To like effect was the decision of the **Dubai Aluminium Company Limited v. Salaam and Others** [2003] 2 A.C. 366, reviewed: "the wrongful conduct must be so closely connected with acts the partner or employee was authorized to do … in the ordinary course of the firm's business or the employee's employment."

[50] In the end the Board was of the view that the reasoning of the Court of Appeal was unsupportable thought not wrong in the retrospective light of the **Lister** principle.

[51] In the instant case though the facts are not co-termirous with the **Bernard** case the mined principle therefrom is applicable, *pari passu.*

[52] The assertion by D/C Jones of his police authority is one factor. The lack of evidentiary proof that D/C Jones was not on duty. The lack of evidentiary proof that D/C Jones was not in possession of the official issue of the firearm and ammunition. The lack of evidentiary support that the Claimant had shot himself.

[53] Finally, the pleadings of the second Defendant with its deficit of material support rendered its purported defence, indefensible, if not, nugatory.

[54] In the final analysis, looking at the matter in the round and having regard to the fact that the risk of harm to the public by D/C Jones was created by his superiors, I am led on a balance of probabilities to say that the wrongful conduct of D/C Jones was so closely connected with his employment that it is just and reasonable to hold the employers vicariously liable.

Measure of Damages

[55] The polarity of the rival contentions as to the measure of damages finds them $1,000,000.00 adrift of each other. Mr. Williams has asked for general damages in the sum of $2,500,000.00 whereas Miss Barnaby says a sum of $1,500,000.00 represents fair compensation.

[56] Mr. Williams hinges his support on the median between the award in **Pauline Douglas v. Damion Dixon and Nicholas Williams**, Suit No. C.L. 199/D-023 and **Mary Hibbert v. Reginald Parchment**, Suit No. 1986 H-129 both reported in Ursula Khan's Recent Personal Injury Awards, Volume 5. Miss Barnaby, on the other hand anchors her repose in **Renford Facey v. Constable Burnett Hall and The Attorney General for Jamaica**, Suit No. CL 1987 F09311 reported in Khan's supra, Volume 4.

[57] From the report of Dr. Dave Marshall, of the South East Regional Health Authority, dated November 20, 2006, Kenya Tulloch suffered from gunshot wound to the supra-pubic region of the abdomen, acute abdomen and bladder injury. His treatment included exploratory lapatomy and repair of injury to terminal ileum and bladder.

[58] According to Dr. Marshall, Kenya Tulloch was discharged after spending (11) days in hospital and he was given take home medication. The Claimant, he says, "… was for follow-up in surgical outpatient department (6) weeks after discharge. He was also for follow-up by the psychiatrist (due to periods of inappropriate behaviour).

[59] As to the latter recommendations there is no documentary indication that the Claimant adhered to his treatment plan. However, it cannot escape observation that his period of recovery was prolonged. Additionally, it is to be noted, the Claimant suffered some amount of mental agony.

[60] From the cited cases I am to say that no reliance was placed on **Pauline Douglas** if only for the reason that the injury in that case did not result in trauma from a gun shot wound. However, in the **Mary Hibbert** case the victim had suffered injury from gunshot to the abdomen. There was damage to the small bowel which had to be repaired she had to undergo loop colostomy and following surgery she developed fecal fistula. Also, she had visible scars which were the result of surgical incisions. She suffered pain and discomfort and had to endure the unpleasantness of wearing the colostomy for five months.

[61] In the **Renford Facey** case the gunshot injury was to the back on the right lumbar region that resulted in fractures to L4 and L5 of the vertebrae and a compromised right kidney. In the result he had to undergo right nephoectmy and right hemicoloctomy as his right colon was badly damaged. Also, his spinal nerves was badly damaged and militated against his inability to leg raise.

[62] It seems to me that of the triad of cases **Mary Hibbert** is more analogous to the case at bar. The **Renford Facey** case in my view far outstrips all the others, including the instant, in terms of the surgical procedures that had to be applied.

[63] Having made the above observations I am to say that the instant case would fetch a lower current yield to that of **Mary Hibbert's** current worth. Accordingly I award a sum of $2,000,000.00 for general damages.

[64] The claim for special damages is resisted on the basis that there is no documentary proof of the payment of money for the accident report.

[65] On the principle that claims for special damages are subject to strict proof the amount claimed for the accident report is disallowed. The criticism of the claim of $840,000.00 for loss of earnings is well appointed. It is inconsistent with the medical prognosis. If one bears in mind that the Claimant was discharged from hospital after being there for (11) days; that (6) weeks follow-up in out patient department was recommended; that there is no evidence of the Claimant abiding the term of the recommendation, then it seems improbable that the claim for loss of earnings for the period 25/2/06 to 9/11/06, and continuing up to the filing of the suit, is maintainable. In any event the Claimant has a legal obligation

to mitigate his loss which on the evidence, he has failed to demonstrate that he has done.

[66] I therefore award the sum of $200,000.00 for loss of earnings being (10) weeks at $20,000.00 per week.

[67] On a balance of probabilities then, judgment is awarded in favour of the Claimant in the sum of $2,000,000.00 for general damages with interest thereon at 3% from the date of service of the writ 27.2.2007 to the 7th June, 2011; special damages in the sum of $206,523.00 with interest thereon at 3% from the date of the incident 26.2.2006 to today's date 7.6.2011.

[68] Costs of $40,000.00 in respect of (1) day's trial is to go to the Claimant.