[2014] JMCA App 35

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 155/2013

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**DAYNE SMITH**	**APPLICANT**
AND	**WILLIAM HYLTON**	**1ST RESPONDENT**
AND	**ANNMARIE HYLTON**	**2ND RESPONDENT**

21, 31 July and 5 December 2014

Richard Reitzin instructed by Reitzin & Hernandez for the applicant

Ms Sherry Ann McGregor and Ms Michelle Phillips instructed by Nunes Scholefield DeLeon & Co for the respondents

MORRISON JA

[1] I have had the advantage of reading the reasons prepared by Mangatal JA (Ag) for the court's decision given on 31 July 2014. I agree with them and there is absolutely nothing that I can usefully add.

PHILLIPS JA

[2] I too have read the reasons prepared by Mangatal JA (Ag). I agree with them and have nothing to add.

MANGATAL JA (Ag)

[3] We heard submissions on 21 July this year in respect of this amended application for permission to appeal, filed 13 December 2013. We reserved our decision until 31 July 2014.

[4] On 31 July 2014, the court announced its decision as follows:

> "Application is refused. Costs to the respondents to be taxed if not agreed."

At that time, we promised to provide written reasons during this court term. These are my reasons for concurring in the decision of the court.

[5] The applicant sought permission to appeal against the following orders of C Brown J (Ag), made on 22 November 2013:

> "1) Assessment of Damages against the Second Defendant is adjourned until trial as between the Claimant and the First Defendant.
>
> 2) No Order as to Costs.
>
> 3) Permission to appeal is refused.
>
> 4) Case Management Conference against the First Defendant is scheduled for Monday, April 28, 2014 at **12:30 p.m**.

5) Order to be prepared by the Defendants' Attorneys-at-Law."

Background to the application

[6] The claim herein was commenced by claim form and particulars of claim filed on 3 November 2011, in which the applicant claimed against the 1st and 2nd respondents to recover damages for personal injuries arising from a motor vehicle accident which occurred on 25 March 2011.

[7] In the particulars of claim the applicant alleged that the 2nd respondent was the driver of the 1st respondent's vehicle and that the 2nd respondent was negligent. It was further alleged that the 2nd respondent was the servant and/or agent of the 1st respondent or alternatively, the 1st respondent had authorised the 2nd respondent to drive his vehicle.

[8] By an amended defence filed on 5 July 2013, the respondents denied that the 2nd respondent was the servant and/or agent of the 1st respondent and stated that the 2nd respondent was at all material times on her own business. It was however admitted that the 2nd respondent was negligent.

[9] On 23 July 2013, a case management conference was held before Marsh J, at which time the following orders, according to counsel's note, no formal order being yet available (see paragraphs 4 and 7 of the applicant's amended application, and respondents' written submissions, paragraphs 7-8), were made:

"(i) By consent, the Claimant be permitted, pursuant to rule 32.6(1), to call Dr Belinda Barrett-Robinson as an expert witness, and that the Claimant be permitted to put in the medical report of Dr. Belinda Barrett-Robinson dated September 13, 2011.

(ii) Judgment for the Claimant against the 2nd Defendant on admission contained in Amended Defence filed July 5, 2013.

(iii) Matter fixed for assessment of damages on November 19, 2013.

(iv) Witness Statements to be filed and exchanged on or before October 4, 2013.

(v) Claimant's Attorney to draft, file and serve the order herein."

[10] There seems to be some dispute between the parties as to precisely what transpired on 19 November 2013, when the matter was fixed for assessment of damages. The applicant's counsel Mr Reitzin appears to be of the view that the respondents' counsel applied for an adjournment of the assessment of damages (see in particular paragraph 11 (iii) of the amended application and paragraph 64 of the applicant's written submissions). On the other hand, according to paragraph 9 of the respondents' written submissions, no application was made for an adjournment.

[11] In her reasons for judgment, the learned trial judge puts the matter this way:

"**Reasons for Judgment**

[1] On the Assessment of Damages coming on for hearing on the 19th November 2013, Counsel for the defendants submitted that the Assessment of Damages against the 2nd defendant should not proceed as there was a

triable issue outstanding against the 1st defendant. In the circumstances, the claimant was required to elect to discontinue against the 1st defendant, otherwise the Assessment of Damages must await the outcome of the trial.

.....

[3] The claimant contended that not to proceed would render the order by Marsh J as nugatory. It was submitted further that where one defendant admits liability and the other doesn't, that there is no automatic stay of proceedings against the other defendant.

[4] The court considered that the practical issues that arose were:

> 1. Would the 1st defendant have an amount awarded against him in proceedings that he could not participate in?
>
> 2. Would the judge subsequently determining the matter be bound by the same quantum of damages upon hearing different evidence and went on to consider the relevant law.

[5] Paragraph 833 of **Halsburys' Laws of England Volume 12(1)** relied on by the 2nd defendant states:

> 'The damage that results from one and the same cause of action must be assessed and recovered once and for all....'
>
> and would support the 2nd (defendant's contention).
>
> ....

[8] I would....agree with Counsel, Mr. Reitzin that this was not an instance, it concerning vicarious liability, in which an election had to be made.

[9] The Notice of Application for Court Orders filed on November 28, 2012 included Case Management Orders. It must have been an oversight on the part of Counsel not to

have sought the Case Management Orders against the 1st defendant, judgment having been entered for [sic] the 2nd defendant only.

[10] The possible trial date for the 1st defendant would therefore not have been in the contemplation of the judge when fixing the date for the Assessment of Damages and so it could not have been contemplated by the judge that the Assessment of Damages would proceed prior to the trial of the matter against the 1st defendant.

[11] After considering all the authorities cited by Counsel, I accept as a correct statement of the law, the earlier quotation from **Halsbury's Laws of England** as applicable in this jurisdiction.

[12] In that event, there cannot be two Assessment of Damages in one action. Assessment of Damages against the 2nd Defendant cannot proceed before the trial against the 1st defendant.

[13] Concerning the question of costs, it is my view that the 2nd defendant though successful could have made the application sooner than the date of Assessment.

[14] It is therefore ordered as follows:

1. Assessment of Damages against the 2nd defendant be adjourned to be heard at the same time as the trial between the claimant and the 1st defendant.

2. No order as to costs.

3. Permission to appeal is refused.

4. Defendants' attorney to prepare, file and serve Order."

Rule 1.8(9) of the Court of Appeal Rules, 2002

[12] In this application, the applicant sought the court's permission to appeal. Rule 1.8(9) of the Court of Appeal Rules ('the CAR') indicates that the test is whether the

appeal will have a real chance of success. The appeal in this case challenged Brown J (Ag)'s exercise of her discretion to defer the assessment of damages against one respondent until the trial against the other.

The grounds of appeal

[13] There are 16 grounds of appeal set out in the application and there is some amount of overlap and repetitiveness. Counsel for the respondents has helpfully managed to group the grounds of appeal and I intend for ease of reference to adopt the grouping offered in their written submissions as follows:

a. Grounds 1 & 2 - That the judge failed to exercise her discretion judicially and/or acted on a wrong principle in allowing the respondents' application.

b. Grounds 3, 4, 8, 11, 12, 13 & 15 - That the learned judge erred in holding that the assessment of damages against the 2nd respondent and the trial of liability against the 1st respondent cannot be separated and that adjourning the assessment of damages to be heard at the same time as the trial on liability would not achieve the overriding objective of saving time and costs.

c. Grounds 9 & 10 - The question of election did not arise.

d. Grounds 5, 6 & 7 - That Brown J (Ag) was bound by, and could not depart from, the orders of Marsh J, a judge of coordinate jurisdiction.

e. Grounds 14 & 16 - That the learned Judge failed to appreciate that her orders would cause the applicant prejudice, whereas the hearing of the assessment of damages at that time would not have caused the respondents any prejudice.

The applicant's arguments

Grounds 1 and 2 – That the judge failed to exercise her discretion judicially and/or acted on a wrong principle in allowing the respondents' application

[14] Mr Reitzin submitted that the questions that the learned judge posed for herself did not arise. The first question was "would the 1st defendant have an amount awarded against him in proceedings that he could not participate in?" Counsel submitted that that question did not arise because the 1st respondent's ability to participate in the assessment of damages was never in question. Furthermore, that the assessment of damages would not have been against the 2nd respondent nor would any amount have been awarded against the 1st respondent. The assessment of damages would have been the assessment of damages *simpliciter.* Since the 2nd respondent had admitted liability prior to the case management conference, the court below would, at the

conclusion of the assessment of damages, have given final judgment against the 2nd respondent for the amount awarded. That same amount (or so much of it as then remained unpaid) would have enured for the benefit of the applicant in the event of the 1st respondent later being found liable.

[15] Counsel also sought to argue about likelihoods. He submitted that the applicant's claim was a modest one, that the 2nd respondent was driving an insured car at the relevant time and that she was also thought to be a woman of substance. The submission continued that, had the insurer paid the applicant the amount awarded (and such costs as may have been awarded), the applicant would simply have discontinued his claim against the 1st respondent. There would, counsel argued, have been no impediment to his having done so. Since both respondents were represented by the same counsel throughout, no separate costs would have been payable in respect of the 1st respondent.

[16] Counsel then made reference to the second question raised by the learned judge, which was "would the judge subsequently determining the matter be bound by the same quantum of damages upon hearing different evidence?" In relation to this matter, Mr Reitzin submitted that it was ironic that the very "once-and-for-all" rule which the learned judge adverted to in reaching her decision, would have itself precluded a second or subsequent assessment of damages. He submitted that it was precisely this anomaly which she failed to appreciate. She erred, he continued, in failing to recognize that the issues of the quantum, on the one hand, and the liability of the 1st

respondent on the other, were capable of being and, in the circumstances, ought to have been dealt with separately; that quantum could have been determined first.

[17] It was submitted that adjourning the assessment of damages was, in those circumstances, a flawed exercise of the learned judge's discretion since it was founded on an incorrect view of the law and, in the circumstances of this particular case, was quite unnecessary. It was posited that this course was inimical to the applicant's legitimate interests and expectations as well as to the administration of justice.

Grounds 3, 4, 8, 11, 12, 13 & 15 - That the learned judge erred in holding that the assessment of damages against the 2nd respondent and the trial of liability against the 1st respondent cannot be separated and that adjourning the assessment of damages to be heard at the same time as the trial on liability would not achieve the overriding objective of saving time and costs.

[18] Counsel referred to ***Coenen v Payne*** [1974] 2 All ER 1109, for the proposition that while the normal procedure should be that liability and damages should be tried together, the court should be prepared to order separate trials of the issues of liability and damages whenever it is just and convenient to do so. Reference was also made to the authorities ***Gold v Patman and Fotheringham Ltd*** [1958] 1 WLR 697 and ***Upper Namoi Water Users Association Inc & Ors v Minister for Natural Resources*** [2003] NSWLEC 175.

Grounds 9 & 10 - The question of election did not arise

[19] Counsel submitted further that the learned judge failed to appreciate that any future finding that the 1st respondent was liable was perfectly consistent with the 2nd respondent also being liable so the question of election did not arise. Further, that Marsh J's direction of entry of judgment on admissions against the 2nd respondent could not amount, and did not amount, to an unequivocal election on the part of the applicant to rely solely upon the liability of the 2nd respondent to the exclusion of that of the 1st respondent and erred, in what he described as her "apparent holding" that, because the applicant declined to abandon (discontinue) his claim against the 1st respondent, he was obliged to proceed with the assessment of damages at the same (very much later) time as the trial of liability of the 1st respondent.

Grounds 5, 6 & 7- That Brown J (Ag) was bound by, and could not depart from, the orders of Marsh J, a judge of coordinate jurisdiction.

[20] Counsel submitted that the learned judge ought not simply to have set at naught the case management orders of a judge of co-ordinate jurisdiction. Reference was made to the cases of ***Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes*** [2005] UKPC 33 and ***Hicks v Minister for Immigration & Multicultural and Indigenous Affairs*** [2003] FCA 757.

[21] It was also counsel's contention that for a court to exercise a discretion there must be some material upon which it can do so. Reference was made to the decision of

the Judicial Committee of the Privy Council in ***Ratman v Cumarasamy*** [1964] UKPC 50, where Lord Guest stated:

> "The Rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle."

[22] The submission was that the same reasoning applies in the instant case and that Marsh J's order should have been obeyed and carried to fruition. Further, that it should not have been the target of a "belated, unsupported, unjustifiable, unnecessary and unworthy attempt to, in effect, set it aside".

Grounds 14 & 16 - That the learned judge failed to appreciate that her orders would cause the applicant prejudice, whereas the hearing of the assessment of damages at that time would not have caused the respondents any prejudice.

[23] It was submitted that the delay which would automatically flow from the learned judge's decision was in itself prejudicial to the applicant. It was argued that the delay would have extended, firstly, to the date of the case management conference and, then, to the date of the trial and that there was easily the possibility of a delay in excess of 18 months to two years or even more before the applicant's case, even against the 2nd respondent who had admitted liability, could be assessed. Counsel claimed that it was grossly unfair to the applicant to allow the mere possibility of the 1st respondent being found not liable to forestall the certainty of the applicant's claim against the 2nd respondent.

Costs

[24] It was in addition argued that the respondents' application for the issues of vicarious liability and quantum to be heard together could have been made at the case management conference but was not. In the circumstances, the court was obliged to make an order for costs against the respondents: rule 11.3(1) of the Civil Procedure Rules ('the CPR'), since there were no special circumstances. Counsel submitted that the learned judge's ruling that there be no order as to costs was unjust in the circumstances.

The respondents' arguments

[25] In essence, the respondents argued that the proposed grounds of appeal have no chance of success and that in deferring the assessment of damages until trial on the

issue of liability against the 1st respondent, the learned judge correctly exercised her discretion. It was posited that there was no real chance of successfully challenging the orders made and that the application ought therefore to be refused.

Discussion and analysis

Discretion and chance of success

[26] It is common ground that the proposed appeal seeks to challenge Brown J (Ag)'s exercise of her discretion. The applicant would therefore have to demonstrate that he has a real chance of succeeding in that challenge. In that regard, the judgment of Morrison JA in ***The Attorney General of Jamaica v John Mackay*** [2012] JMCA App 2, applying the approach recommended by the House of Lords in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, provides authoritative guidance. At paragraphs [19] and [20] Morrison JA stated:

> "[19] .....It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 .....:
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where

> the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it."

Grounds 3, 4, 8, 11, 12, 13 & 15 - That the learned Judge erred in holding that the assessment of damages against the 2nd respondent and the trial of liability against the 1st respondent cannot be separated and that adjourning the assessment of damages to be heard at the same time as the trial on liability would not achieve the overriding objective of saving time and costs.

[27] It is convenient to deal with these grounds first. Section 3 of the ***Law Reform (Tort-Feasors) Act***, indicates that a defendant may recover his losses from more than one tortfeasor. However, once such loss has been assessed, he can recover no more than the sum first assessed. The learned judge accepted as a correct principle applicable in Jamaica, the principle set out in the ***Halsbury's Laws of England***, Volume 12(1) paragraph 833. I agree with her view on this matter. Paragraph 833, states as follows:

> "**Damages assessed once and for all**. The damages that result from one and the same cause of action must be assessed and recovered once and for all...."

[28] In the English Court of Appeal decision ***Coenen v Payne***, which was referred to by both counsel in their submissions, it was pointed out (at page 1112) by Lord Denning MR that the normal practice is for issues of liability and damages to be tried together. However, under Rules of Court, the courts have power and should so order

separate trials of issues of damages and liability whenever it is just and convenient so to do. I also found the judgment of Stephenson LJ helpful. At page 1114 he stated:

> "In most personal injury cases the issues of liability and damages, though clearly separate, are rightly tried together. That is so, even where the issue of damages, perhaps because of complicated medical evidence, takes longer to try than the issue of liability. The reason is, I think, that it is usually most convenient for the parties to have all the issues between them decided together and that it helps the judge to assess the credibility of the plaintiff if he can hear what the plaintiff has to say not only about his accident but also about his injuries and his financial loss. I would not disturb that general practice. But the plaintiff has, in my judgment, no right to choose the normal method of trying liability and quantum at the same time, as the judge appears to have thought, and cannot claim any such right by agreeing to pay for the extra expense of his choice. The court has inherent jurisdiction to make any use of the relevant provisions in the Rules of the Supreme Court.... If the court thinks it just and convenient to order separate trials of separate issues or to give judgment for damages to be assessed by another court, the court can and should do so without treating ancient decisions as limiting its powers. In a personal injuries case the courts will not depart from the normal practice except for good reason; but though I appreciate the plaintiff's desire to be heard on liability and damages by the same judge, I think that <u>in this special case the issue of damages is likely to take so much time and expense</u> to try that it could more conveniently, and without injustice, be tried after liability has been decided, it may be in such a way as to make a trial on the issue of damages unnecessary."
> (underlining emphasis provided)

[29] Mr Reitzin placed quite considerable reliance upon the New South Wales case of ***Upper Namoi***. Sitting in the Land and Environment Court, at paragraph 11, Bignold J

discussed the question of discretion of a similar nature to that under consideration here.

He stated:

> "11. The nature of the judicial discretion and the occasion for its exercise are well illustrated by decided cases ....., which are conveniently summarised in the following commentary from *Ritchies' Supreme Court Practice* at **paragraph 31.2.2**:
>
> > **Ordinary position - all issues should be tried together**
> >
> > Generally speaking all issues should be tried at the same time. This general rule is accompanied by much judicial caution, indeed reluctance, about making orders for separation. However, as the present rule makes clear, the court does have a discretion to order separate determination in appropriate cases, and the exercise of the discretion does not require an applicant to show special circumstances. Order for separate determination may be made whenever the court considers that it is proper to do so. The most usual instances where separate determination is appropriate are:
> >
> > > (i) where there is some preliminary question of fact or law that is critical to the disposition of the proceedings (in the sense that if it is decided in one way it will dispose of the proceedings)...; and
> > >
> > > (ii) where there are separate hearings of liability and damages issues.
> > >
> > > In either case the principal justifications for the making of the order is that the separate determination is likely to offer

> some real saving of convenience or expense...
>
> Accordingly, the proper exercise of the discretion is not limited to those situations, and can permit orders for separate determination whenever the court is satisfied that the order is appropriate, eg, where it may lead to the early resolution of the proceedings, or avoid significant additional expense or delay:..."

[30] However, in ***Upper Namoi***, Bignold J went on to refuse an application for the separate trial of certain issues, and held that the whole of the case should be heard and determined at trial. At paragraph 24, the learned judge referred to the joint judgment in ***Tepko Pty Ltd & Ors v Water Board*** [2001] HCA 19; (2001) 206 CLR 1 at 55, where Kirby and Callinan JJ observed:

> "The attractions of trials of issues rather than of cases in their totality, are often more chimerical than real. Common experience demonstrates that savings in time and expense are often illusory, particularly when the parties have, as here, had the necessity of making full preparation and the factual matters relevant to one issue are relevant to others, and they all overlap."

[31] In my judgment Brown J (Ag) in stating that "...there cannot be two Assessment of Damages in one action. Assessment of Damages against the 2nd defendant cannot proceed before the trial against the 1st defendant" simply signified that she accepted the once-and-for-all-rule and was deciding that the matter should proceed in what would be the usual way, with the trial of liability and quantum against the 1st

respondent and the trial of quantum against the 2nd respondent proceeding at the same time. Further, there was no justification advanced to the learned trial judge that could have, with good reason, persuaded her that having the trial and assessment at the same time would not be convenient or result in the saving of time and costs. It seems to me that Mr Reitzin's submission about the likelihood of the insurer paying the sum awarded against the 2nd respondent and that possibly leading to the applicant discontinuing against the 1st respondent, was far too speculative. It consisted of too many future variables for a court to have used it as a reasonable basis for concluding that assessing the damages against the 2nd respondent would have resulted in an ultimate saving of time and costs. These grounds therefore fail.

Grounds 5, 6 & 7 - That Brown J (Ag) was bound by, and could not depart from, the orders of Marsh J, a judge of coordinate jurisdiction.

[32] In relation to these grounds, it seems to me that Brown J (Ag) did not purport to override the jurisdiction of Marsh J as a judge of coordinate jurisdiction. Brown J (Ag) simply indicated that Marsh J had not made any orders in relation to the 1st respondent, who of course, was still a party to the suit. She then proceeded to make such case management orders as she deemed appropriate.

[33] As counsel for the respondents argued, at the case management conference it would have been appropriate to make an order, for example, either for separate trials of the issues of liability and quantum, with a date being fixed for the issues of liability between the applicant and the 1st respondent to be determined, discontinuance of the

claim against the 1st respondent or scheduling a further date for case management conference. The absence of any reference to the 1st respondent at all in Marsh J's order did entitle the learned judge to make orders to facilitate the further case management of the case and to make orders that would overall result in the most convenient and just disposal of the case. In all of the circumstances, I therefore find that there is nothing in Brown J (Ag)'s handling of the matter that can be considered an interference with, or trampling on, the orders made by Marsh J. It is to be recalled that case management is an ongoing process and may require review, modification or variation of orders made from time to time. Unlike the facts in ***Ratman v Cumarasamy***, cited by Mr Reitzin, it cannot be said that here there was no material upon which the learned judge could exercise her discretion. She had her view of the law as to the once-and-for-all rule and was armed with case management powers. In my view, the course which Brown J (Ag) decided to adopt was one possible and permissible way for her to manage the matter when it arose before her for assessment. Even if this court may have exercised the discretion differently that would not of and by itself be a ground for disturbing the orders made. These grounds of appeal also fail.

Grounds 9 & 10 - The question of election did not arise

[34] It is clear that the learned judge in fact accepted Mr Reitzin's submission that the question of election did not arise (see the discussion at paragraphs [1] and [6]–[8] of the reasons for judgment). This was demonstrated by the judge's discussion of the case of ***Rukhmin Balgobin v South West Regional Authority*** [2012] UKPC 11, cited by

counsel for the respondents. At paragraph [8] of her reasons for judgment, the learned trial judge correctly stated, agreeing with Mr Reitzin that:

> "...this was not an instance, it concerning vicarious liability, in which an election had to be made".

[35] I agree with Ms McGregor that if there was any election, it was when the applicant's counsel indicated that he wished to have damages assessed against the 2nd respondent. Once he did so indicate, that would amount to seeking a final judgment against the 2nd respondent. It was then plainly within the learned trial judge's discretion to decide whether to fit this case into the general category as discussed in ***Coenen v Payne*** where issues of liability and damages should be tried at the same time, or whether it was just and convenient to have separate trials on these issues. She decided that this case was one that did fit into the normal category. In my view, she cannot be faulted for that.

Grounds 14 & 16 - That the learned judge failed to appreciate that her orders would cause the applicant prejudice, whereas the hearing of the assessment of damages at that time would not have caused the respondents any prejudice.

[36] It does seem that these grounds also lack merit. One relevant issue is the issue of the credibility of the applicant being tested at the same time in relation to both the assessment of damages against the 2nd respondent and the trial against the 1st respondent. This is an aspect of the matter where the 1st respondent could potentially

have been prejudiced, or rather, it may have been more beneficial to the 1st respondent, and indeed, to the ability of the judge hearing the matter, to be able to assess the applicant's credibility by hearing what the applicant has to say about the accident and liability at the same time as he gives his evidence about his injuries, loss and damage.

[37] In my judgment, the learned judge's decision to defer the assessment of damages until trial on the issue of liability against the 1st respondent, cannot be said to have caused prejudice or undue prejudice to the applicant or any of the parties.

Costs

[38] As regards the question of costs, what the learned judge said is that the 2nd respondent's application had succeeded. She was impliedly acknowledging that costs normally follow the event. It also appears that she viewed the question of whether to defer the assessment until the trial against the 1st respondent as largely a case management issue, and it is trite that case management is a judge-driven matter. It was in those circumstances that she, firstly, stated that the 2nd respondent could have made her application sooner than on the occasion of the assessment date and, secondly, made no order as to costs. I see no reason in all of the circumstances to interfere with the exercise of her discretion in this regard. It cannot be said that the learned judge acted upon some demonstrably wrong principle. These grounds also are without merit.

Grounds 1 and 2 – That the judge failed to exercise her discretion judicially and/or acted on a wrong principle in allowing the respondents' application

[39] As discussed in paragraph [24] above, the court will only interfere with the learned trial judge's exercise of her discretion in very limited circumstances. In my judgment, Brown J (Ag)'s reasons for deferring the assessment of damages are sound in law. In ruling that the "assessment of damages against the 2nd defendant cannot proceed before the trial against the 1st defendant", she adopted and applied, as counsel for the respondents advanced, the principle stated in ***Halsbury's Laws of England***, that the damage that results from one and the same cause of action must be assessed and recovered once and for all. In my judgment, the applicant failed to demonstrate a real chance of establishing any of the special circumstances that would justify this court in interfering or overturning the exercise of the learned trial judge's discretion.

[40] It is for these reasons that we made the order referred to in paragraph [4] and refused the applicant permission to appeal against the orders made on 22 November 2013.