JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 68/97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	CARLTON CAMPBELL	1ST DEFENDANT/APPELLANT
AND	TONY CHARLEY (t/a A & S CHARLEY & SONS)	2ND DEFENDANT/APPELLANT
AND	LEVIENNE CHARLEY (t/a A & S CHARLEY & SONS)	4TH DEFENDANT/APPELLANT
AND	NATALIE WHYLIE	PLAINTIFF/RESPONDENT

David Muirhead, Q.C. with Ernest A. Smith and Marsha Smith instructed by Ernest A. Smith & Co.,for the appellants

Hugh Small, Q.C. with Katherine Francis instructed by Clinton Hart & Co., for the respondent

April 26, 27, 28, 29, 30; May 3, 4, 5 and November 3, 1999

FORTE, J.A.:

This is an appeal from the judgment of Karl Harrison, J. in an action in negligence brought by the respondent against the appellants and in which the learned judge made the following orders:

> "1A. There be Judgment for the Plaintiff against the 1st and 4th Defendants as set out hereunder:
>
> GENERAL DAMAGES
>
> 1. Pain and suffering and loss of amenities $1,500,000.00
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> 2. Handicap on the labour market 5,760,000.00
>
> 3. Interest at the rate of 3% per annum from the 7/5/94 to 20/5/97 661,157.25
>
> SPECIAL DAMAGES in the sum of $524,099.61 with interest on the sum of $370,409.61 at the rate of 3% from the 1st September 1993 to the date hereof calculated at $41,313.35
>
> Costs to Plaintiff against the 1st and 4th Defendants to be agreed or taxed.
>
> B. There shall be Judgment in favour of the 2nd Defendant against the Plaintiff with costs to be taxed if not agreed and which costs are recoverable by the 2nd Defendant from the 1st and 4th Defendants."

The plaintiff, then a medical intern, was seriously injured while a passenger in a minibus on its way to Montego Bay on the 1st September, 1993. When the minibus was travelling on the Lilliput main road having passed through Falmouth, a tractor-trailer, owned by the 4th defendant and driven by the 1st

defendant, and travelling in the opposite direction, that is, towards Falmouth, collided with it, doing extensive damage to the minibus, and causing injuries to the plaintiff, which will later be expressed in detail. The collision was not restricted to these two vehicles, including as it did a Lada motor vehicle driven by Cedric Lindo, a witness for the plaintiff/respondent. In the wake of the accident, five persons succumbed to injuries they received as a result.

The respondent's case was simple. She was travelling in the minibus, apparently enjoying the scenery, when on hearing the driver screaming, she looked to her right and saw the tractor-trailer bearing down on the minibus, which was travelling on its correct side of the road. That was all she was able to describe, as in those few seconds the collision occurred and she was rendered unconscious. She awoke while on the way to the hospital, but then again fell unconscious only to awake in the hospital.

At the time of the accident, Mr. Lindo was driving his Lada motor car, travelling behind the minibus and in the same direction. It is on his evidence that the respondent relied in proof of her case. The defence, however, challenged his evidence very strongly in an attempt to put the blame for the accident upon his (Mr. Lindo's) negligent driving. Throughout the evidence, there was no attempt to establish any negligence on the driver of the minibus, who had died in the accident. The end result was an issue as to whether Mr. Lindo, in conjunction with a policeman riding a motor cycle, were negligently overtaking the minibus at

the time, and so caused the collision, or whether it was caused by the negligent driving of Carlton Campbell, the driver of the tractor-trailer.

Mr. Lindo testified that as he proceeded behind the minibus, driving on his correct side of the road towards Montego Bay, he saw the driver of the tractor-trailer come over unto his side of the road, in an attempt to overtake two cars travelling in front of the tractor-trailer. The tractor-trailer continued on its path, colliding with the minibus. It happened so fast, and so near to him in distance, that he had no time to bring his vehicle to a stop before colliding with the tractor-trailer, which was on his side of the road.

In his defence, the 1st defendant Campbell spoke of the fast rate of speed at which the Lada and the motor cycle were being driven, and of their attempts to overtake the minibus, thereby coming unto his side of the road. As a result, he applied his brakes and swerved to his left in an effort to avoid them. In doing so, the vehicle went unto the soft shoulder, the tractor-head hitting a tree on the soft shoulder and then getting out of control. The left door flew open and he was ejected from the tractor-head and landed on the soft shoulder. The tractor-trailer then went across the road and collided with the minibus, the trailer-bed thereafter coming to rest on the tree. The Lada then ran into the tractor-trailer.

On the same day of the accident, both Inspector Edward Burke, a witness for the respondent, and Mr. Wilbert Reid, a Senior Traffic Examiner, who testified for the appellants, attended upon the scene. Both described the scene as they saw it.

Inspector Burke, who also returned to the scene on the following day with Mr. Campbell, spoke to the following:

1. The tractor-trailer was on its left side of the road (that is,. facing Falmouth) - slanting across the road. The extreme rear section (that is,. the trailer-bed) was against a tree on the soft-shoulder, on the left side of the road as one faces Falmouth.

2. The tractor-head which was on the right side of the road facing Falmouth (its incorrect side) was turned completely towards Montego Bay.

3. The mini-bus was about two feet or so ahead of the front section of the tractor-head on its left side (that is,. facing Montego Bay).

4. The Lada motorcar was at the rear section of the tractor-head.

5. All of the vehicles were extremely damaged.

On the following day when he again visited the scene, Campbell (the driver of the tractor-trailer) showed him the point where the accident occurred, on the right side of the road facing Falmouth, that is, the incorrect side for the tractor-trailer. He noticed an indentation on the tree, which corresponded in height with that of the trailer-bed, and which was at the spot where the trailer-bed was resting on the tree after the accident. There was no other mark on the tree. Importantly, as it has become the foundation of Mr. Muirhead's challenge to the factual finding of the learned judge, Inspector Burke saw two drag marks on the road running parallel to each other in a straight line one and a half feet from the left side of the road facing Falmouth, that is, the correct side of the road for the tractor-trailer. It

appeared to him that the drag marks were caused by the two rear wheels of the tractor-trailer. They began about 180 feet from the point of impact, the right wheel ran for 120 feet 6 inches and that of the left wheel for 126 feet. The road was straight for an estimated minimum of 280 feet and a maximum of 390 feet.

From the point of impact, looking in the direction of Montego Bay, one could see for 200 to 300 feet and towards Falmouth for 80 to 90 feet. The accident occurred on a gradient - the tractor-trailer would have just come down a grade, to proceed up to the brow of the hill from which direction came the minibus and the Lada motor car.

Mr. Wilbert Reid, the Inspector of Motor Vehicles, in testifying for the appellants, agreed that after the collision the minibus was on the left - facing Montego Bay but apparently placed it near to the soft-shoulder. Then he described the following:

1. The trailer was on the left side facing Falmouth, and the tractor-head partially in the middle of the road - the front of the tractor-head was to the left facing Montego Bay.

2. The Lada was in the middle of the road between the tractor-trailer, and the tractor-head.

Mr. Reid gave detailed evidence, giving his opinion that in the position he saw the tractor-trailer, with the tractor-head turned completely towards Montego Bay, and the trailer still on the left and facing Falmouth, the vehicle must have jack-knifed. In his opinion, jack-knifing was usually caused by a sudden application of brakes,

and this would cause the tractor and trailer to turn independently of each other. In 95% of cases of jack-knifing, it was caused by sudden application of the brakes. He, however, testified that if the vehicle collided with the tree, that could have caused it to jack-knife and agreed that a vehicle going at 50 miles per hour would be more likely to jack-knife than one going at 30 miles per hour.

On the above evidence, the learned judge found the following facts which he detailed in his judgment as follows:

> "1. That the plaintiff was a passenger in the minibus driven by Clifford Palmer on the 1st September, 1993 and the bus was travelling on its left, that is, its correct side of the road at the material time.
>
> 2. That Cecil Lindo was travelling also on his correct side of the road behind the said minibus as it proceeded towards Montego Bay.
>
> 3. That the tractor trailer which was approaching from the opposite end was proceeding up a grade and was some 70 ft from the brow.
>
> 4. That two vehicles were travelling ahead of the tractor trailer.
>
> 5. That the tractor trailer attempted to overtake the vehicle ahead of it at a time when the minibus and Lada car were in the vicinity of the brow.
>
> 6. That the tractor trailer driver had to apply brakes hard and suddenly to the extent where the sound coming from the wheels was quite audible.

7. That after the tractor trailer applied brakes it travelled for some distance and then it came across the road and collided front ways into the right side of the minibus which was on its correct side of the road.

8. That as a result of this collision the Lada motor car was unable to stop before it collided into the rear section of the tractor head (in the region of the petrol tank) which was turned across the road in the direction of Montego Bay.

9. That at the time of impact the two vehicles which were travelling ahead of the tractor trailer had passed, hence they were not involved in the accident.

10. That the dragmarks for the tractor trailer measured 120ft 6 ins and 126 ft respectively.

11. That the tractor trailer was travelling at a fast rate of speed before the application of brakes.

12. That the absence of dragmarks in respect of the minibus and Lada motorcar is due to the extreme suddenness of the accident.

13. That before the collision the tractor trailer went unto the left shoulder and made contact with a tree which was 4ft 6ins from the road surface.

14. That there was an impression on the tree which corresponded in height with an indentation on the tractor trailer bed.

15. That the front of the tractor trailer did not collide with the tree.

16. That neither was the driver of the Lada car nor the police motorcyclist approaching the tractor trailer on its side of the road thereby causing the driver to hold down his brakes

'permanently' in order to avoid a head-on collision.

17. That the second-named defendant, Tony Charley did tell Insp. Burke that he was the owner of the tractor trailer but on a balance of probabilities I accept the evidence that the fourthnamed defendant was the registered owner of the tractor trailer and that he was the employer of the first defendant."

Against these factual findings, the appellants filed eleven grounds of appeal which comprehensively challenged those findings as being inconsistent with the physical evidence, in particular the evidence of the drag marks found to be running parallel to each other and at a distance of one and a half feet from the edge of the tractor-trailer's correct side of the road. Mr. Muirhead, Q.C., argued that the position of the drag marks was inconsistent with the appellant having come unto his right side of the road to overtake two vehicles travelling in front of him. He contended that it was more consistent with the appellant's version that it was Mr. Cecil Lindo, in his Lada motorcar, and the policeman on his motorcycle, who were in the act of overtaking the minibus and in doing so came over on his side of the road, causing him to apply his brakes "permanently" and swerve to his left. This argument ignores the fact that the drag marks were allegedly straight and therefore did not indicate any swerving of the vehicle. What the drag marks undoubtedly indicate is the sudden application of the brakes of the tractor-trailer. The question is whether they are inconsistent with the findings of the learned judge.

Mr. Hugh Small Q.C., for the respondent, advanced the theory that, in his attempt to overtake the two vehicles in front of him, the appellant came unto his right side of the road and on seeing the approaching vehicles come over the brow of the hill, applied his brakes and attempted to pull back unto his correct side. In this scenario, it is well to remember that the tractor-head pulls the trailer, and that the drag marks were, in the opinion of Inspector Burke, caused by the rear wheels of the trailer. If that is so, it would explain why the drag marks were on the left, as in the act of overtaking, the tractor-head could have been on the right with the rear wheels of the trailer not having yet reached in that position when the brake was applied.

It is on that background that the findings of the learned judge have to be viewed, because if the drag marks are consistent with his findings, then this court cannot interfere with his conclusion. There are significant findings by the learned judge which, in my view, demonstrate that Mr. Hugh Small's Q.C., submissions are not without merit. The learned judge found that the tractor-trailer was travelling at a fast rate of speed up the grade and attempted to overtake two cars ahead of it, at a time when the minibus and the Lada motor car were in the vicinity of the brow. This, the learned judge found, necessitated the sudden application of the brakes by the driver of the tractor-trailer. The application of the brakes would no doubt have slowed the vehicle and allowed the two vehicles ahead to continue on without being involved in the subsequent collision. The learned judge found that although the tractor-trailer did go unto the soft-shoulder,

the tractor-head did not hit the tree as the appellant maintained. In fact, he found that the "impression" on the tree corresponded in height with the indentation on the tractor-trailer, indicating a conclusion that it was only the trailer-bed that came in contact with the tree. This amounts to a rejection by the learned judge that the movement or the "jack-knifing" (of the tractor-head), as described by Mr. Reid, was caused by its collision with the tree. This finding would be consistent with the expert evidence of Mr. Reid, that jack knifing is caused in 95% of the cases by the sudden application of the brakes. The learned judge also found that after the brakes were applied, the tractor-trailer travelled for some distance (hence the drag marks) and "then came across the road and collided front ways on the right side of the minibus which was on its correct side of the road." He then found that as a result of that collision the Lada motor car was unable to stop and collided with the rear section of the tractor-head. The position at which the Lada motor car came to rest was also inconsistent with the appellant's account that it (the Lada) was overtaking at the time of the collision.

In view of the above, I would conclude that the learned judge, based on the evidence before him, was justified in coming to his conclusion. In addition, an analysis of the evidence shows no inconsistency with the finding of credibility in the witness Lindo and rejection of the evidence of the appellant. For these reasons, I am of the view that the appeal in respect of the finding of liability in the appellant ought to be dismissed.

DAMAGES

I now turn to the award of damages which was challenged in two aspects by the appellants. These are clearly set out in grounds 12 to 14 of the grounds of appeal. The first complaint is contained in ground 12:

> "12. As to damages, the Learned Judge erred in law in holding that because the assessment by Dr. Blake of the plaintiff's permanent partial disability to be 25% of the whole person was never seriously challenged nor contradicted, he was constrained (compelled) to accept his evidence that there will be a 25% permanent disability of the whole person. In so doing the Learned Judge failed to adjudicate on the issue as it was the function of the Learned Judge to determine the credibility of the witness in this issue as to the alleged permanent disability of the whole person and to accept or reject in whole or in part the said assessment and the Learned Judge by acting under 'compulsion' based on unchallenged or uncontradicted evidence of the doctor erroneously abdicated/surrendered/abandoned his judicial function in blind acceptance of a medical opinion in an admitted difficult area of assessment. Further in so doing the Learned Judge failed to have regard to comparable cases in respect of like injuries and comparable awards in order to determine what was a fair percentage of the permanent disability of the plaintiff and an appropriate compensatory award."

In considering this complaint, we bear in mind the submissions of Miss Francis who argued this ground for the respondent, that an appellate court ought not to interfere with the quantum of damages awarded by a trial judge unless it is convinced that he(she) acted on some wrong principle or it can be shown that the award was so extraordinarily high or low as to make it, in the judgment of the court, an entirely erroneous estimate of the damages to which the plaintiff is

entitled. With that background, a good starting point is to examine the medical evidence as to the injuries and consequent pain and suffering endured by the respondent. The learned judge was aware that a detailed examination of that evidence was in fact necessary. He demonstrated this when he said:

> "The medical evidence of Dr. Blake is indeed extensive hence I must pay attention to detail."

The complaint made in this appeal puts a similar onus on this court and consequently without apology we borrow from the judgment of the learned judge his detailed rehearsal of the evidence of Dr. Blake. It is recorded as follows:

> "It (the evidence of Dr. Blake) reveals, inter alia:
>
> > '...I treated Natalie Whylie in relation to injuries she sustained in 1993...I first saw her on 4/9/93 at St. Joseph's Hospital...She was wearing a collar. Her mucous membrane was pale. This signified loss of blood. She had marked tenderness over the supra pubic region - lower part of the abdomen. She had tenderness also in region of the left loin. Her right thigh was markedly swollen and deformed. It was quite tender to touch. I caused X-rays to be taken. X-Rays revealed fractures of the left and right superior and inferior pubic rami. There was also a fracture of the post iliac crest with partial disruption of the right sacra-iliac joint. She also had a fracture of the mid-shaft of the right foot. X-Rays of the cervical spine revealed a fracture dislocation of the lamina of the second cervical vertebrae...
> >
> > I applied skin traction to the right lower limb and she was also given painkiller medication.
> >
> > On the 6th September 1993 she was taken to the operating theatre and she had internal fixation of the right femoral fracture and of

fracture of the right ilium. She had satisfactory progress following surgery. The fractures were fixed using a heavy duty metal plate and special bone screws.

She obtained a special cervical brace which is called a four poster brace. This was fitted on 11th September 1993...The special brace was used because of the nature of the fracture. This fracture is called "the hangman's" fracture.

...

After she was placed on brace fresh X-Rays were ordered. These revealed that the position of the cervical fracture was quite acceptable. She left hospital on the 12/9/93. She was advised to continue wearing the brace and not to interfere with it. She should also remain in bed at home.

I saw her again on the 12/10/93. I ordered new X-Rays. They showed that the cervical spine fracture was healing satisfactorily. The pelvic and femoral fractures were also healing. The fractures to the superior and inferior pubic rami were displaced...I also changed her brace. It was changed to a Philadelphia collar. I saw her again on the 5/11/93. She complained of pains in the right side...I examined thigh and noticed it was markedly swollen and tender. I did X-Rays of femur and I saw that screws in distal segment of the plate had broken and that the plate was pulled loose. She was admitted to K.P.H. where she had repeat surgery. This surgery was done on the same day. The broken screws were identified and removed and new screws were inserted. She went home the following day. I advised her not to put any weight on leg and to continue using the walking frame.

...

I next saw her on the 7/12/93. She complained of low back ache, neck ache and pains to her pelvis. I sent her for X-Rays and it revealed that the femoral fracture had united and the cervical fracture did not show any

> instability. I discontinued use of the Philadelphia collar and advised her to commence normal weight bearing on the affected limb....'."

The doctor again saw her on the 20th January, 1994, and revealed in his evidence the findings on that date as follows:

> "I saw her on 20/1/94 she complained of pains in pelvis and low backache. I x-rayed her neck, pelvis and femur. I noted that cervical vertebrae had fused together (2nd and 3rd). It would only slightly reduce her mobility. She could have pain from such a fusion. The femoral fracture was well united, there was abundant new bone formation around the fracture. In the pelvis the fractures were united but the ring of pelvis was deformed. It had like a dent. Apart from being a source of pain if she should get pregnant she would have to have her delivery by caesarean section. She would not be able to have normal delivery.
>
> I would not be surprised that pain plaintiff now suffers from long standing could be caused from distorted pelvis.
>
> The fracture of post iliac crest had entered and disrupted the sacroiliac joint. This joint is a major weight bearing joint and it transfers the forces from the trunk to the legs. In short it helps man to stand upright. She had tenderness in the region of that joint and this could cause pain. She was also tender along the scar in pelvis and fixation devise.
>
> The femur was united satisfactorily.
>
> I next saw her on 20/2/94. Her situation had remained unchanged. I wondered if she had infection around implants. She still complained of backaches and pains. She got antibiotics and anti-inflammatory medication.
>
> She was seen next on 8/3/94. She complained of back aches. I advised her to continue using anti-

> inflammatory medication. She was advised to remove implants.
>
> On 2/8/95 plaintiff visited my office. I placed her on muscle relaxers and anti-inflammatory medication. She still complained of pains. Pain had become a persistent feature.
>
> On 31/10/95 I next saw her. She again complained of lower back pain and pain to her pelvis. I continued her on anti-inflammatory medication and advised her to cope with pain as a long term feature.
>
> I was not in a position to assess her disability as I did not expect any further improvements. She was now more than 2 years post injury and she had shown no signs of improvement over the last two months. I was happy that she had reached maximum medical improvement.
>
> The removal of pelvis and femoral implants would not improve her disability rating but it would remove the risk of future infection around the implants. I had advised her to do the removals. This has not been done as yet.
>
> In October 1995 her permanent disability was assessed at 25% of the whole person."

The above disclose very serious injuries suffered by the respondent and demonstrates the pain and suffering she endured up to the time she was last examined by Dr. Blake in October 1995 when he assessed her permanent disability as 25% of the whole person.

Dr. Blake, in his evidence, then gave the method he used in coming to his conclusion that the appellant had suffered a 25% permanent partial disability. He stated:

> "In assessing disability I normally refer to American Medical Association Guidelines for permanent

> impairment. I prefer the American over British. In British you appear before a panel of doctors and each doctor gives his assessment based on his experience. The figures are then averaged. They are subjective figures and vary from doctor to doctor. Figures would be added and divided by number of doctors in the panel. That figure would represent the total disability rating. There would be about 4-5 doctors to constitute panel.
>
> The American Medical Association in order to remove subjectivity in assessments they empowered a sub committee of the Association to look at all the various types of injuries and permutations and assign different disability ratings to each and every single injury possible. It also looks at non-injury problems. The results of this is a fairly comprehensive book on impairment ratings.
>
> I arrived at 25% because based on the cervical spinal fracture which was well healed I made 2% impairment of whole person. For the fractures of the pelvis including the sacra iliac joint and which continue to give pain and fractures of symphysis pubis which was also distorted and painful. These disabilities were combined and a 22% award was made. No award was made on femoral fracture. The figures were rounded to the next 5% which the guidelines allowed you to do. If the fractures were rated individually, I could have come up with a much higher percentage."

It is agreed on both sides that the doctor's assessment of the disability was never challenged at the trial either by way of cross-examination or by calling a witness to rebut his conclusion. The appellants, however, complain that the learned judge, in stating that he was "constrained" because of these circumstances to accept the evidence of the doctor, abandoned his responsibility of assessing the credibility of the doctor's testimony. Here follows the learned judge's words:

> "Dr. Blake's evidence as to the method used in arriving at the percentage of permanent partial disability was never seriously challenged nor was it contradicted, so at the end of the day I am constrained to accept his evidence that there will be a 25% permanent disability of the whole person."

To interpret these words of the learned judge as indicating that he felt compelled to accept the doctor's evidence is, in our view, erroneous. The learned judge in circumstances where evidence was given by the doctor, an expert in the area in which he was testifying, which remains unchallenged as to the technical evidence he gave, would, in our view, be correct in acting upon that evidence in the absence of any other testimony which may throw doubt either on the accuracy of his testimony or on his credibility. It is reasonable to conclude that it is to this approach that the learned judge was committing himself as opposed to a feeling of compulsion to accept the evidence.

It is clear that in coming to his conclusion to accept the doctor's evidence as to the percentage of permanent partial disability, the learned judge was concerned, not only with the doctor's conclusion, but also with the method by which he arrived at that conclusion. Mr. Muirhead's Q.C., attempt to invite the court to look at other cases, and examine the evidence in those cases and the opinion of doctors in those cases as to the permanent partial disability and make a comparison with the evidence of injuries to the respondent in this case, in order to assess the expert's conclusion in this case, is not only untenable but would be totally wrong. Such an exercise perhaps would have been appropriate in the crucible of the trial in an attempt to challenge Dr. Blake's testimony by putting to

him, by way of cross-examination, the opinion of other experts in his field. In the result, we find no merit in this ground.

The other aspect of the challenge to damages is set out in grounds 13 and 14 and relates to handicap on the labour market. The grounds read as follows:

> "13. That the Learned Judge erred in law in that he posed the wrong question and thereby applied the wrong test to determine any entitlement of the plaintiff to damages in respect of handicap in the labour market when he inquired:
>
> > 'What then is the risk that she will at some time before the end of her working life lose her job and be thrown on the labour market?'
>
> A wholly inappropriate question in relation to a professional person now a medical doctor with well laid plans and a programme to become an Ear, Nose and Throat Specialist in the near future.
>
> 14. That the Learned Judge acted on a wrong principle of law and/or made a wholly erroneous estimate of damages in respect of handicap on the labour market. The approach of the Learned Trial Judge by employing the mathematical approach is incorrect and inappropriate in the circumstances."

Ground 13 is misconceived as the learned judge answered his own question, with reference to specific evidence as to the possibility of future handicap to the respondent in the performance and pursuance of her career, such handicap being the direct result of the injuries she received in the accident. The learned judge, in recalling Dr. Blake's evidence, referred to the following:

> "Dr. Blake finally examined the plaintiff on the 31/10/95 and was able to assess her disability. He said he did not expect any further improvements. It was now more than two years post injury and she

> had showed no signs of improvement over the last two months. He opined that she had reached maximum medical improvement and that the removal of the pelvis and femoral implants would not improve her disability rating but it would remove the risk of future infection around the implants. He had advised her to do the removals but this was not done as yet. Her permanent partial disability was assessed at 25% of the whole person. Dr. Blake also expressed the view that he would not expect anything out of the ordinary to happen to her bones over the years and he would only anticipate infections. The onset of arthritis was also another possibility since the sacra-iliac joint was affected in the injury."

The plaintiff's handicap in the future has been described by Dr. Blake thus:

> "I would not expect her to stand and work for an eight (8) hour per day period five years from now. If she spaces out standing and rests she could get a period of five (5) hours out of each day.
> ...
> The plaintiff's ability to stand would get less with the increase in the passage of time. With the disability rating and the problems she now experiences it is my opinion that she may well have to cease working before normal practitioners do. This would be a difficult assessment for me but in all probability this is what I think would be her case."

Later in his judgment, after posing the question complained of in ground 13, the learned judge answered it as follows:

> "She (the plaintiff) testified that upon the resumption of work she made several visits to Dr. Blake because of pain in her lower back and pelvis. She feels pain after standing for an hour. Her handicap in the future has been described by Dr. Blake. He was of the view that her daily hours of work would be reduced and her ability to stand would get less with the increase in the passage of time. Accordingly, she may well cease working before normal practitioners do. He admitted that it would be a difficult

> assessment for him to make but in all probability this would be her case.
>
> In view of the nature and extent of the plaintiff's injuries and her permanent disability, which I find to be 25% of the whole person, I agree with Miss Francis' submission that the plaintiff should also be awarded damages for handicap on the labour market. In her area of specialisation as a surgeon she would be expected to stand for long hours in the operating theatre. The prognosis does not look good where she is concerned. Dr. Blake was of the view that if she spaces out her standing and rests, she could get a five hours out of each day. There is evidence that a general practitioner or one who practices in the plaintiff's field of specialisation, would work for at least eight hours per day. One can therefore visualize the predicament the plaintiff will face in the operating theatre or if she has to do her rounds in the hospital attending to patients. The inability to stand for long periods would place the plaintiff at great disadvantage. It does seem to me in all probabilities that there is a substantial risk that at some time in the future before the end of her working life she will be thrown on the labour market. It is my considered view that the chances of a successful practice in the field of her choice, or even as a general practitioner would be greatly affected."

The respondent's plans to pursue her ambition to specialize in the field of ear, nose and throat, was a factor taken into account by the learned judge in determining whether she was entitled to an award for handicap on the labour market. The doctor's evidence established, as found by the learned judge, that the respondent would be restricted by her injuries in the performance of her obligations, either as a specialist or as a general practitioner, to the extent that she would be unable to stand for any long period particularly for as long as eight hours per day, and as early in time as five years from the date of his testimony. Of

greater importance, however, was the doctor's opinion that the respondent will have to cease working before normal practitioners usually do. The opinion of Dr. Blake, perhaps should be viewed against the background of the respondent's evidence as to her duties as a doctor which gives an indication of the requirements at least at the time of her testimony. This aspect of her evidence is, as set out hereunder:

> "I work on weekends. I work Mondays-Fridays from 8:00 a.m. to 4:00 p.m. and Saturday and Sundays from 8:00 a.m. to 12:00 noon.
>
> I experience significant pain during work mostly when I stand. Even on a non theatre day when we have clinic I experience pain in back. If you are on call and you perform operation you have to stand and this causes pain.
>
> I stand for 8 hours on the average on theatre days. There are two elected theatre days but there are calls when you have to go to theatre.
>
> Pain usually come after an hour of standing.
>
> The pain affects the discharge of my functions. It is difficult for me to sit at operating theatre table. If I sit I have to turn my feet to the side which causes even more pain.
>
> On my clinic days I am affected in discharging my duties. I do ward rounds preceding clinic. This involves seeing patients. You have to bend over in bed to examine patients and this causes a lot of pain. Ward rounds usually last about 3 hours. After an hour I usually have to sit. Usually I do not sit for too long because it does not really look too good to be sitting. Even if I am still having pain I would get up and rejoin ward rounds. Other doctors do not sit. The sitting and standing continue throughout the day.

> At Clinics you sit for most times but you still have to stand. Clinic is in pursuance to my specialty. My training has been progressing in my specialised area.
>
> In mornings I usually take pain killer that has long lasting effect. During the day the nurses give me tablets or injections. I take prescription pills in morning and it is prescription pills nurses give me."

The following extract from the transcript of the cross-examination of Dr. Blake is also relevant:

> "Q: In the course of her employment as a doctor would you say she would be able to perform her duties without marked discomfort whilst standing continuously for four hours.
>
> A: Pain killers are given to reduce pain. Only patient can say whether pain is relieved.
>
> In all probabilities the plaintiff will experience pain for the rest of her life.
>
> Q: Is there any treatment that the plaintiff is capable of receiving that can reduce or otherwise extinguish the pain she is subjected to?
>
> A: There is no treatment other than pain killers. People recommend various treatments but they have drawbacks. The joint could be removed but this could lead to other consequences. As an advantage it may remove the pain but there is no guarantee. It is more likely to cause problems."

Taking all that evidence into consideration, it is difficult to come to any other conclusion than that the respondent would be unable in the future to perform the functions of her chosen career to the extent and for the number of

years she would have been able, were it not for the injuries she received in this accident. The learned judge was consequently correct in directing his mind to the question as to what effect all of that evidence would have on the determination as to whether an award for handicap on the labour market should be made in those circumstances. It is true that the circumstances of this case differs from the norm where the determination called for is usually whether the plaintiff is under a risk of losing his present employment, and the chances of his securing other employment on the open market, given his acquired disabilities. In the instant case, the respondent is a medical practitioner whom though employed at (1) the time of the acquisition of the disability, [as a result of the injuries received in the accident] and (2) the time of trial, could in the future if she suffered a loss of employment, establish her own practice and continue to earn. The possibility of her losing her present employment, as the learned judge found, is predicated on the fact that she will not in the future be able to meet the requirements of the job which necessitates standing for long periods, as long as her condition continues to deteriorate, with her being able to stand for less periods and eventually being unable to continue in practice. The respondent's pursuance of post graduate qualifications, even if successful, would place her in a level of the profession which would still necessitate standing for long periods, and would not affect the doctor's opinion as to the early determination of her working life. The learned judge was consequently correct in proceeding to determine what sum, if any,

should have been awarded under this head. I now turn to that question which the appellant addresses in ground 14 of this appeal.

In coming to his decision on this aspect the learned judge applied the multiplier/multiplicand formula. In challenging this method of assessing this aspect of damages, the appellants relied, inter alia, on a passage taken from ***Moeliker v. A. Reyrolle and Co. Ltd.*** [1977] 1 All E.R. 9 which is referred to with approval by this court in the case of ***Noel Gravesandy v. Neville Moore*** (1986) 23 J.L.R. 17 at 19. Carey, J.A. in delivering the judgment of the court stated:

> "We can now refer to ***Moeliker v. A. Reyrolle & Co. Ltd.*** 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. As stated by Browne, L.J., who delivered the main judgment of the Court of Appeal, Civil Division:
>
> > '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 will suffer if the risk materializes, having regard to the degree of the risk, the time when it may materialize 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'." [Emphasis added]

Then Carey, J.A. continuing stated:

> "Although the case under reference was concerned with a plaintiff in employment, in our opinion, the principles therein stated apply equally to a plaintiff who is self-employed as was the respondent in the present case."

It may be the underlined words in the passage from the ***Moeliker*** case that encouraged Mr. Muirhead, Q.C., to mount a strong argument that the multiplier/multiplicand, which the learned judge used in the instant case, was the wrong process in assessing damages under this head. In such cases, it is always a difficult task to calculate what would be appropriate damages where there is a substantive or real risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. In the instant case, there is a real risk that the respondent will be unable to continue working in her profession until the normal retirement age. As Browne, L.J., states in the ***Moeliker*** case, the court then has to "assess and quantify the present value of the risk of the financial damage the plaintiff will suffer," given her particular circumstances.

In the instant case, the learned judge elected to use the multiplier/multiplicand method in order to assess the appropriate damages. With deference to the submission of Mr. Muirhead, Q.C., we find no error in that

decision. This court has already, in the case of ***Kiskimo Ltd. v. Deborah Salmon*** S.C.C.A. 61/89 delivered February 4, 1991 (unreported), sanctioned the use of such a test. Carey, J.A., in his judgment (page 9) had this to say:

> "The attack against the sum awarded was made on the ground that the judge erred by resorting to a multiplier/multiplicand formula and then discounting the figure arrived at. This computation, it was said, was not appropriate to the situation where the sum being assessed is intended to represent reduced eligibility for employment. Mr. Morrison was prepared to concede that different approaches to the assessment of this head of damage were perfectly feasible and that there was really no inflexible approach. He said however, that where a multiplier/multiplicand formula was invoked, the courts tended to be conservative with respect to the figure. He submitted further that in the instant case, assuming that the arithmetic approach was supportable, then the multiplicand taken by the judge was too high.
>
> It is clear from ***Joyce v. Yeomans*** [1981] 2 All E.R. 21 that there is no inflexible method of calculating loss of earning capacity. Brandon L.J. at p. 27 put the matter in this way--
>
> > 'I feel it right to express my view that, while a court is not bound to arrive at a multiplier and a multiplicand in a case of this kind in order to assess the damages, it would not be erring in law if it attempted to do so. The basis for finding a multiplicand is slender but judges are often faced with having to make findings of fact on evidence which is slender and much less convincing than would be desirable. Therefore it seems to me to be open to the court to approach the problem by putting a figure on the loss of earning capacity on a weekly or annual basis and applying a multiplier to that figure'."

Then at page 11 Carey, J.A., stated:

> "The method adopted by a judge will depend more often than not, on the adequacy of the evidence before him and in some instances on the nature of the injuries which might well create many imponderables as to the plaintiff's future. But I think, if we are to ensure some uniformity in awards under this head, the arithmetic approach should be preferred as it allows this court to maintain some equilibrium in the figure taken as the multiplier by trial judges."

Gordon, J.A. at page 26 expressed similar views when he quoted with approval the passage of Brandon, L.J., in ***Joyce v. Yeomans*** (supra) and also agreed with the submissions of counsel in the case to the effect that:

1. There is no fixed approach to the computation of such damages. In some cases, multiplier/multiplicand have been held appropriate, in others a fixed and relatively moderate sum has been awarded while in yet other cases loss of earning capacity has been subsumed in the general damages awarded, and

2. Even in the multiplier/multiplicand case it is clear that judges have been conservative in their application of the multiplier and multiplicand.

In my own view, the circumstances of this case is obviously appropriate for using the multiplier/multiplicand method of trying to assess adequate damages under this head and consequently the learned judge cannot be faulted for having done so. I now turn to the challenge made on the figures used by the learned judge in arriving at the quantum of damages under this head. Hereunder, I set out the reasoning of the learned judge in this regard:

> "I now turn to the difficult task of translating into monetary terms the loss which she will suffer. Dr. Blake did state that the plaintiff would be eligible for retirement at about 60 years of age. Bearing in mind her age at the time of the accident, I find that her working life expectancy would be approximately 38 years, that is, till she reaches age 60 yrs. Counsel had suggested that the figure of $40,000.00, her net monthly earnings after tax and other deductions are applied, should be used as the earning at trial. This figure was not challenged during the trial so I would agree that it should be used as the multiplicand. Her net earning for one year would therefore be $480,000.00. What would be a reasonable multiplier? In arriving at this figure, I take into consideration the plaintiff's age (she is now 26 years of age), her permanent whole person disability, her profession and the impact which her injuries will bear upon her. It is my considered view therefore, that a multiplier of 12 would be reasonable and ought to be used. I therefore arrive at an award of $5,760,000.00 for loss of earning capacity."

The learned judge used as the multiplicand the net earnings of the respondent at the time of the trial. Given the fact that this figure represented earnings for a young doctor just embarking on a career, and the potential for considerable increase in earnings over future years had she not suffered such serious injuries, it is understandable that this figure was not challenged by the appellants either at trial or in this appeal. It is, however, to the multiplicand that complaint was seriously made. It was argued that the inability to stand for long periods would not affect the earning capacity of the respondent as in her profession she could perform her medical practice without the need for periods of long standing. It is not clear how the learned judge arrived at the 12 years multiplier and whether or not he discounted those years as a result of all the

uncertainties that may in fact occur, and for the lump sum payment he awarded. The evidence is that the respondent would, in all probabilities, have to cease working before she would normally do and consequently would, if that occurred, lose the capacity to earn at all during those latter years. She was twenty-six at the time of trial and would have been facing 34 more years of normal earning capacity, had she not received these injuries in the accident. It is unclear how soon before age 60 that she would be forced to retire, but it is evident that even before then it is likely that her income would be reduced as she continues to lose the ability to stand for the required period of time. It is not, however, a case in which the respondent would lose entirely her ability to earn in those early years, and consequently, there must be some discounting also in terms of the multiplier. In those circumstances, I would find that the multiplier used by the learned judge was too high, and so would substitute a period of seven years purchase therefor.

Costs

The appellants also challenged the order of the learned judge that the costs of the 2nd defendant be paid by the 1st and 4th defendants. It was argued that the 4th defendant, having earlier admitted the ownership of the vehicle, the respondent ought to have discontinued the action against the 2nd defendant and consequently should now be made to pay the cost in respect of the 2nd defendant. However, it appeared that that admission did not come until during the proceedings and prior to that there being uncertainty as to who traded as A. S. Charley, the plaintiff was in her right to bring the action against both the 2nd and

4th defendants as owners of the vehicle. In the circumstances, we cannot interfere with the exercise of the discretion of the learned judge in making the order for costs as he did.

In the event, the appeal is allowed in part in that the award of damages for handicap on the labour market is reduced to $3,360,000 (being $40,000x12x7years). The remainder of the order of the learned judge is affirmed. Costs of the appeal to be paid by the appellants to be taxed, if not agreed.

BINGHAM, J.A.:

I agree.

LANGRIN, J.A.:

I also agree.