[2013] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 98/2008

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**PATRICK THOMPSON**	**1ST APPELLANT**
AND	**EVERTON EUCAL SMITH**	**2ND APPELLANT**
AND	**DEAN THOMPSON**	**1ST RESPONDENT**
AND	**LEIGHTON GORDON**	**2ND RESPONDENT**
AND	**KIMAR BROOKS**	**3RD RESPONDENT**
AND	**SHELLION STEWART**	**4TH RESPONDENT**

Mrs Tameka Jordan instructed by Mrs Jacqueline Samuels-Brown QC for the appellants

Maurice Manning and Miss Catherine Minto instructed by Nunes, Scholefield DeLeon & Co for the respondents

20, 21, 22 November 2012 and 11 November 2013

MORRISON JA

Introduction

[1] This appeal concerns an accident which took place on 17 July 2003, between two motor vehicles travelling in opposite directions along the Exton Main Road in the parish of St Elizabeth. The 1st and 2nd appellants were the owner and the driver respectively of one of the vehicles, an 'International' trailer head registration no 5988 DQ ('the trailer head'), while the 1st respondent was the driver of, and the 2nd – 4th respondents were passengers in, the other vehicle, a fire truck registration no 301736 ('the fire truck'). At the material time, the respondents were all firefighters.

[2] The 2nd appellant and the 1st respondent each contended that the accident was caused by the other's negligence, in particular by each of them driving too fast and on his incorrect side of the road. On 18 August 2008, N E McIntosh J (as she then was) gave judgment in favour of the respondents and made an award of substantial damages to each of them for the serious personal injuries and damage sustained by them as a result of the accident.

[3] On appeal from this judgment, the appellants complain about the judge's findings on liability, as well as the award of damages made to each of the respondents. I propose to deal with these issues separately.

Liability

The respondents' case at trial

[4] In July 2003, the 1st respondent was a corporal in the Jamaica Fire Brigade ('the fire brigade'). At about 12:40 pm on 17 July 2003, he was the driver of the fire truck, accompanied by the other respondents, as they made their way along the Exton Main Road en route to the Junction Fire Station. All four persons were seated in the front of the fire truck, which was some 23 feet in length and was travelling at about 25 miles per hour ('mph') on its correct side of the road. On reaching Exton District, about half a mile from Junction, the 1st respondent observed two trucks coming towards the fire truck from the opposite direction. The one in front was a red and white Leyland truck, while behind it was the trailer head. This is the 1st respondent's account of what next happened:

> "When I was alongside the Leyland, I saw when the trailer head pulled from behind the Leyland as if to overtake it and came unto my correct side of the road. As soon as he pulled out and saw us, the driver of the trailer head tried to get back in behind the Leyland, but it was too late and he collided into the fire unit.
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> After the collision, I lost control of the unit which swerved to the right hand side of the road, hit a wall, and then overturned on its side. The unit slid on its side for a while before finally coming to a stop.
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> The tractor head which hit us was a left hand drive. The driver came all the way out into the road before he could actually see us. And as soon as he came out, he tried to pull back in, but bam. It was one quick movement."

[5] When he was cross-examined, the 1st respondent described the point of impact between the two vehicles as being the "right side of the fire unit at the end of the bumper and the right front wheel and extreme rear right wheel of the trailer tractor head". He gave the distance at which he was from the trailer head when he first saw it pull out from behind the Leyland as about 15 feet and insisted that at that point he had slowed down to "May be about 20 mph" and "pulled" to his extreme left. However, he acknowledged, when shown his original statement to the police, that he had not told the police at that time about his having slowed down and pulled to his left or that the trailer head had tried to pull back in to the left before the collision". The width of the road at the point where the accident occurred was about 18 feet and the fire truck was "in the region of eight feet wide". He denied suggestions that he had been travelling at a rate of speed much faster than 25 mph and that it was the fire truck driven by him which had been travelling on the incorrect side of the road.

[6] The 2nd respondent's account of the collision with the trailer head was essentially the same, albeit in less detail, as the 1st respondent's:

> "On reaching in the vicinity of Exton District, a trailer head was traveling towards us from the opposite direction, behind another truck. When we approached the trucks, I saw when the trailer head pulled to the right of the road, over onto our side. I realized it must hit us, so I just squeezed myself up against Shelly Stewart and braced myself for the hit.
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> A collision occurred, which caused the fire truck to swerve to the right and collide into a concrete gate wall [sic]. I don't know anything more after that."

[7] Briefly cross-examined, the 2nd respondent estimated the distance of the fire truck from the Leyland when the trailer head pulled out at 8-10 feet. As regards the distance of the trailer head from the Leyland when the trailer head pulled out from behind it, the 2nd respondent put it at 8 feet. At that point, he said, the fire truck "was about 1 chain away because the Leyland truck was about 25 feet long". He accepted that he did not actually see when the vehicles collided and that he was unable to say whether the fire truck had slowed down before the collision or whether it had hit the left embankment. But, in response to suggestions that the trailer head had at no time pulled out onto the fire truck's side of the road and that it was the fire truck that had gone onto the wrong side of the road, the 2nd respondent answered emphatically, "Your suggestion is wrong."

[8] This was the 3rd respondent's account of the accident:

> "When we got to Exton Main road, I saw two trucks coming from the opposite direction. The second truck in line was a tractor head/trailer. I saw when the driver of the Tractor head pull out to overtake the first truck. When he realized he could not make it because we were coming, he tried to pulled [sic] back in behind the first truck, but he still collided with us.
>
> After the collision, our unit swerved to the right, got out of control, hit a wall and embankment and overturned on its side."

[9] Under cross-examination, the 3rd respondent agreed that, in his statement to the police after the accident, he did not say that the "tractor head tried to [pull] back in". Asked whether the fire truck had slowed down before the collision, his answer was,

"Not that I observe." He said that the right front of the fire truck collided with the trailer head and that, when the trailer head pulled out from behind the Leyland into the fire truck's path, the fire truck and the trailer head were about 25 feet away from each other.

[10] The 4th respondent gave the following account of the accident:

> "On reaching the Exton main road in St. Elizabeth, I saw when a trailer pulled out from his side of the road from behind another vehicle, and came unto our side of the road. It seemed as if the trailer driver did not have a side man, and as the trailer was a left hand drive vehicle, he had pulled out from behind the vehicle ahead of him, to see if it was safe to overtake. When the trailer driver came out and saw our unit, he tried to get back in, but at that time it was too late and the trailer hit our unit.
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> After the trailer hit the fire truck, the fire truck swung and went up on the embankment and then went across the road and hit a column. After it hit the column, the fire truck overturned."

[11] In cross-examination, the 4th respondent was asked about the embankment to which she had referred. She said that the embankment was to the left of the fire truck and less than one foot in height. The fire truck initially went up on the embankment and then across the road to the right where it hit the concrete wall. The right rear of the fire truck collided with the right rear of the trailer head, as it was "on its way going back behind truck so the back was in the road". She was unable to state the distance between the right rear of the trailer head and the embankment on the left side of the road, but insisted that there was not enough space for the fire truck to pass in between the embankment and the trailer head. That was why, she said, "the [fire truck] went

on the left embankment because he was trying to get away from the [trailer] head…[h]e was trying to avoid the collision but there wasn't enough space".

[12] When she was re-examined, the 4th respondent amended her evidence as regards which part of the fire truck had collided with the trailer head, to say that "[t]he rear of the tractor [hit] the front of the fire truck".

The appellants' case at trial

[13] The 2nd appellant led the evidence for the appellants. This is his account of how the accident happened, as contained in his witness statement:

> "3. On the 17th July 2003 I was employed to the First Defendant Patrick Thompson as a driver and on that date at about 12:40 p.m. I was driving International motor truck registration number 5988 DQ, which is owned by Patrick Thompson, along the Exton Main Road in the parish of Saint Elizabeth.
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> 4. The road, which was asphalted, was dry and the weather was fair.
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> 5. I was driving the said motor truck on the left side of the Exton main road facing and going in the direction of Top Hill in the parish of Saint Elizabeth. A motor truck was travelling ahead of me about twenty five feet away travelling in the same direction that I was travelling.
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> 6. I was travelling from the direction of Junction towards Top Hill at about 25-30 miles per hour. On reaching a section of the Exton Main road I saw a Steyr Fire Brigade motor truck registration number 30-1736 travelling in the opposite direction at a fast rate of speed on the incorrect side of the road, which was my correct side of the road, that is the left side of the road going in the direction of Top Hill.

7. Upon observing the said motor truck travelling on my left and correct side of the road I pulled further to the left side of the road closer to the banking applied my brakes and the said truck which I was driving stopped on the extreme left side of the road facing the direction of Top Hill.

8. The Steyr Fire brigade motor truck continued travelling on the incorrect side, which is the left side of the road as one faces Top Hill and collided with the right rear wheel of the International motor truck which I was driving which was then travelling on its correct left side of the road facing the direction of Top Hill.

9. After colliding with the right rear of the International motor truck I was driving the fire truck hit a perimeter wall, which is on my same left side of the road facing Top Hill on which I was travelling, and then overturned into a premises on that same side of the road.

10. At all times before and after the said collision the said International Motor truck which I was driving was on its correct side of the road, that is the left side of the road going in the direction of Top Hill.

11. At no time shortly before the said collision did I overtake other vehicles and it is not true that I drove onto the incorrect side of the road and collided with the said fire brigade motor truck."

[14] In cross-examination, the 2nd appellant testified that the right lug nut on the right front wheel of the fire truck came into contact with the right rear wheel of the trailer head in the collision. He told the court that at the time of the collision he was travelling on a straight stretch of road, which was about 300 feet in length and 20-22 feet in width. The Leyland, which was laden with a load of water, was about 25 feet ahead of him on this stretch and travelling slowly, more slowly than he was. He estimated the width and length of the trailer head to be 8 and 18-20 feet respectively, and he also

estimated the width of the Leyland to be 8 feet. He was prepared to accept the 1st respondent's estimate of 23 feet as the length of the fire truck. When he first saw the fire truck coming from the opposite direction, it was on its correct side of the road, but when it was about 30 feet ahead of him it pulled over onto the incorrect side of the road. At this point, the fire truck was beside the Leyland, not fully in his lane in front of him, but in the middle of the road, half of it on either side of an imaginary white line in the centre of the road. He was travelling on his side, close to the imaginary white line and, upon the approach of the fire truck, pulled to his left closer to the embankment and brought the trailer head to a complete stop. However, despite this maneouvre, the fire truck continued towards the trailer head and collided with its right rear wheel. The fire truck and the trailer head were the only two vehicles involved in the accident and the Leyland escaped damage altogether.

[15] At this point, the 2nd appellant was asked if he had been charged with dangerous driving as a result of the accident and, an objection to this question having been heard and overruled by the trial judge, he answered affirmatively. The 2nd appellant agreed that, after a trial at which he and the 1st and 3rd respondents had given evidence, he was convicted of the offence of careless driving and sentenced to a fine of $5,000.00 or 30 days' imprisonment.

[16] The 1st appellant gave brief evidence, in which he confirmed that he was the owner of the trailer head, which he had bought only about a week before the accident. It was not insured at the time of the accident.

What the judge found

[17] N E McIntosh J considered it to be of significance that the police investigation of the accident did not result in any charges having been brought against the 1st respondent. But, she observed, the 2nd appellant was not only charged, but was successfully prosecuted. She disbelieved the 2nd appellant's evidence that it was the fire truck which had gone over to the right side of the road and accepted the respondents as witnesses of truth in all respects. In particular, the judge accepted their evidence that the 2nd appellant had pulled out from behind the Leyland in an attempt to overtake it; however, finding himself unable to complete the "overtaking manoeuvre", he attempted to pull back to his left, "but was only able to get the front of the motor truck out of the Fire Brigade's [sic] path". In addition, the learned judge observed, "I believe that [the 2nd appellant] was travelling at a much faster rate of speed than he would have the Court believe". On the other hand, the judge found that the 1st respondent had done all that he could have done to avoid the collision and that he in no way contributed to it. She accordingly found the appellants solely liable for the accident and for the resultant injuries suffered by the respondents.

The appeal on liability

[18] By their amended grounds of appeal filed on 25 September 2008, the appellants challenge this judgment on a number of grounds, the effect of which may be summarised as follows: (i) the trial judge erred in her assessment of the evidence and

her findings are accordingly against the weight of the evidence, particularly the independent photographic evidence; and (ii) the trial judge erred in taking into account and placing reliance on inadmissible evidence, viz, the police decision not to prosecute the 1st respondent and the previous conviction of the 2nd appellant in a criminal court for careless driving.

[19] By a counter-notice of appeal filed on 14 November 2008, the respondents seek to support the judge's judgment on the additional grounds that (i) arising from the accident along the Exton main road on 17 July 2003, the 2nd appellant was on 26 May 2004 convicted of the offence of careless driving in the Resident Magistrate's Court for the parish of St Elizabeth and sentenced to a fine of $5,000.00 (from which conviction there has been no appeal); and (ii) the 2nd appellant's account of the accident was unbelievable, given the state of the traffic on the Exton main road at the material time.

[20] In her submissions on behalf of the appellants, Mrs Jordan challenged the judge's resolution of the stark conflict between the evidence of the 2nd appellant, on the one hand and the respondents, on the other. She complained, firstly, of the judge's apparent failure to give any consideration to the photographs which showed the points on the respective vehicles at which they had come into collision. Secondly, she highlighted a number of alleged inconsistencies and discrepancies in the respondents' evidence, which were, it was submitted, sufficiently material to impugn the learned trial judge's decision in favour of the respondents, despite this court's traditional reluctance to disturb a trial judge's findings of fact. And thirdly, it was submitted, the learned trial judge erred in failing to find that the 1st respondent was at least contributorily

negligent, having regard to the 2nd respondent's evidence that the fire truck was about one chain from the trailer head when the latter pulled out from behind the Leyland and the absence of any evidence that the 1st respondent took any steps to avoid the collision.

[21] With regard to the question touched on in the amended grounds of appeal and squarely raised by the counter-notice of appeal, that is, the admissibility in evidence of the 2nd appellant's conviction for careless driving, Mrs Jordan submitted that, by apparently taking it into account for the purposes of assessing his liability for negligence in this case, the judge fell into error. Further, given that none of the police officers who investigated the accident for the purposes of the criminal prosecution testified at the civil trial, the judge also erred in taking into account and relying on the decision not to prosecute the 1st respondent. Placing heavy reliance on the well-known decision of the English Court of Appeal in ***Hollington v Hewthorn and Company Ltd and Another*** [1943] 1 KB 587, Mrs Jordan submitted that a finding of guilt against a defendant in criminal proceedings is not evidence of liability against him in subsequent civil proceedings. For this submission, Mrs Jordan also referred us to ***Stupple v Royal Insurance Co. Ltd*** [1971] 1 QB 50 and the more recent decision of this court in ***Danny McNamee v Shields Enterprises Ltd*** [2010] JMCA Civ 37.

[22] Mr Manning for the respondents made a simple and direct response to these submissions. Firstly, in reliance on the decision of the Privy Council in ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (1982) 35 WIR 303 (among others), he submitted that, on general and long established principle, this court should not disturb a trial

judge's findings of fact, save in exceptional circumstances. It not having been suggested that the trial judge had failed to use, or had palpably misused, the advantage of having seen and heard the witnesses give evidence at the trial, this court should not interfere with her conclusions.

[23] Secondly, as regards ***Hollington v Hewthorn***, Mr Manning submitted that the decision was based on an application by the court of the United Kingdom ('UK') Evidence Act, 1938, which has no application to Jamaica, with the result that the decision does not represent the common law of Jamaica. Indeed, it was submitted, section 18 of the Evidence Act, which provides for the admissibility of evidence of a conviction in certain circumstances, demonstrates that the position in Jamaica is in fact different. And in any event, it was submitted, ***Hollington v Hewthorn*** has long been considered to be bad law in the UK and, on that very basis, was rejected by this court in the case of ***Michael and Richard Causwell v Dwight and Lynne Clacken*** (SCCA No 28/2008, judgment delivered 24 October 2008). The fact of the 2nd appellant's previous conviction for careless driving was therefore admissible in evidence in the civil trial and provided additional justification for the judge's decision in the instant case.

[24] This was a case in which the learned trial judge was called upon to consider and resolve two irreconcilably opposed versions of how the collision between the fire truck and the trailer head took place. As already observed, the driver of each vehicle swore that the accident occurred while he was driving on his correct side of a straight road on a clear, sunny day; and that it was the driver of the other vehicle who came over onto his incorrect side and there collided with him. There was no room for compromise or

accommodation between the two versions. Nor indeed was there any possibility that one of the drivers was mistaken in his recollection of the accident: one of them spoke the truth and one did not. In the case of the 1st respondent, while experience has shown that a collection of witnesses can all be untruthful, his evidence derives considerable support from that of his three fellow firefighters who were with him in the fire truck.

[25] In these circumstances, as Mrs Jordan realistically accepted from the very outset of her admirable submissions, this court will necessarily be constrained by the well-known limitations on the approach of an appellate court to the decision of a trial judge on disputed issues of fact. The applicable principles were restated and applied by the Privy Council in ***Industrial Chemical Co (Jamaica) Ltd v Ellis***, quoting (at page 305) the following oft-cited passage from the judgment of Lord Thankerton in ***Watt (or Thomas) v Thomas*** [1947] AC 484, 487-488:

> "(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (II) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it

> unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[26] In ***Industrial Chemical Co (Jamaica) Ltd v Ellis***, which was also a case of an acute conflict of evidence, Lord Oliver of Aylmerton accordingly went on to observe that "[t]he importance…of the advantage enjoyed by the judge who heard and saw the witnesses at first hand can…hardly be over-estimated…" In the instant case, I must therefore approach the question of liability on the basis that this court will not interfere with the learned trial judge's findings unless it can be shown that she did not make proper use of that advantage and was plainly wrong in her conclusions.

[27] Unfortunately, Mrs Jordan's first point on liability, which had to do with the judge's consideration – or lack of it - of the photographic evidence, fell away completely when, as it turned out, the photographs which were tendered in evidence at the trial could not be produced for this court's scrutiny. I describe this as an unfortunate development because I accept, as Mrs Jordan suggested in argument before us, that evidence of the physical damage to the vehicle or vehicles involved in an accident can have a decisive impact on the outcome. (As happened in ***Moore v Rahman*** (1993) 30 JLR 410, 414, to which Mrs Jordan referred us, where Patterson JA (Ag), as he then was, observed that the trial judge, "in considering the conflicting evidence, did not take into account the objective fact provided by the evidence of the loss adjuster, and consequently, his findings were falsified".)

[28] But the appellants also complain of various inconsistencies and discrepancies in the respondents' evidence. Among them are, firstly, the fact that both the 1st and 3rd respondents admitted in cross-examination that they had not mentioned in their statements to the police that the trailer head had pulled back in or tried to pull back in behind the Leyland; secondly, the 1st respondent stated in cross-examination that the trailer head had pulled out from behind the Leyland when the fire truck was alongside the Leyland, while the 2nd respondent stated, also in cross-examination, that the fire truck was 8-10 feet away from the Leyland when the trailer head pulled out from behind the Leyland; thirdly, the 1st respondent estimated the width of the road at the point of impact to be 18 feet, while the 2nd appellant estimated it to be 20-22 feet; and fourthly, the 1st, 2nd and 3rd respondents stated that the fire truck did not hit the embankment on the left of the road after the collision, while the 4th respondent stated that it did.

[29] It is clear from her judgment that N E McIntosh J was not unaware of this issue of inconsistencies and discrepancies generally. She also gave specific consideration to many of the matters of which complaint has been made on appeal. Thus, as regards the fact that neither the 1st nor the 3rd respondents had made any mention in their police statements of the fact of the trailer head having pulled out from behind the Leyland before attempting to get back behind it, the learned judge said this (at page 7 of her judgment):

> "Mr. McBean submitted that the Claimants' evidence of the 2nd Defendant pulling out from behind the Leyland truck was not to be believed because that was not mentioned in their statement to the police after the accident. In the experience of the Court statements are often found to be formulated on the basis of answers given to questions asked – statements given not only to the police but to Attorneys as well – and very often details which are later recalled at trial and considered important, are omitted. When a witness goes into the witness box and is sworn (or affirmed) then gives cogent and credible evidence which satisfies the Court that the witness is a witness of truth, it is my view that the Court is entitled to act on that evidence."

[30] And, as regards the relative positions of the vehicles when the trailer head pulled out from behind the Leyland, the judge said this (at pages 10-11):

> "Mr. McBean pointed to certain discrepancies in the evidence of the Claimants – discrepancies which were said to be material, such as the difference in their evidence as to the positioning of the Fire Brigade vis-à-vis the Leyland truck when the motor truck was observed pulling out from behind the Leyland truck and about whether or not the Fire Brigade had hit the left embankment. These are the recollections of persons who had a traumatic experience, to put it mildly and I do not believe that it would be fair to expect them to accurately recall precise positions and distances under those conditions of pressure. They recall that they were seated in the front section of the Fire Brigade. They recall that they saw the motor truck on the side of the road on which they were travelling, having come out from behind the Leyland motor truck. All but the 2nd Claimant spoke to the motor truck attempting to retake its position on its left side of the road and of its failure to do so completely, resulting in the collision."

[31] And lastly, taking all the various complaints as to the evidence given by the respondents together, the judge said this (at pages 12-13);

"I accept the driver's evidence of what he did. He was the person who was in control of the movement of the Fire Brigade and who would know well what he did. Furthermore, there is ample support from the evidence of the Claimant Shellion Stewart who told this court that the Fire Brigade had swerved before the collision. That is what the 1st Claimant must be held to mean when he said he pulled to his extreme left. She went on to say that on the impact the Fire Brigade went further left and that took it up on the embankment to the left which was estimated to be about one foot high. The 1st Claimant did not mention this but in all probability that is exactly what happened. The 2nd Defendant himself agreed that the banking on that side was about one foot high. On the impact, it would in all probability first go to the left. Then she said it went to the right, hit a concrete wall and overturned. The 1st Claimant spoke of the vehicle going out of control, hitting the wall and then overturning.

One particular discrepancy pointed out by Mr. McBean concerned the evidence of the 2nd Claimant who, in cross examination, had said that the Fire Brigade was about a chain away from the motor truck when it pulled out from behind the Leyland Truck. It seems to me that if that were so that surely would have been a sufficient distance for the 1st Claimant to correct his position if he was on the right side of the road as the 2nd Defendant says he was and an equally sufficient distance for the 2nd Defendant to fully return to his left side of the road, on the other account. The distance of a chain is, in my view, an exaggeration and I hold that the distance was at best 30 feet.

Mr. McBean also invited the Court to conclude that the Fire Brigade must have been speeding based on the fact that it got out of control, travelled across the road, hit a wall and overturned, thus making the driver contributorily negligent. However, there is no evidence of the permitted speed on that stretch of the road and the mere fact that the impact caused a vehicle of that type to get out of control, does not

> in my view, even on a balance of probability [sic], give rise to a finding that the Fire Brigade was travelling at a fast rate of speed, faster than the permitted speed. If speed was a factor here it was, in all probability, that of the overtaking vehicle.
>
> In the final analysis, I find that the 1st Claimant did all that he could do to avoid the collision and in no way contributed to it. The Defendants are therefore solely liable for the accident and injuries resulting therefrom."

[32] It seems to me that these passages from the learned trial judge's judgment amply demonstrate her awareness of the significance of the various inconsistencies and discrepancies in the evidence. It is clear that by far the larger part of what has been raised in this court on the appellants' behalf by Mrs Jordan was also raised on their behalf, with equal force, by Mr McBean in the court below. These were all matters for the judge to resolve. It has not been shown, in my view, that the manner in which the judge resolved and reconciled them was not open to her on the evidence. In these circumstances, I find it impossible to second guess the learned (and, I might add, very experienced) trial judge on what was in essence a clash of credibility, a matter entirely within her purview. On this aspect of the matter, she was emphatic in her conclusions (at pages 8-9):

> "I do not believe the 2nd Defendant that the Fire Brigade went over on the right side of the road and into the path of his vehicle. His demeanour was not that of a witness upon whose word this Court would rely. On the other hand, I accept the Claimants as witnesses of truth in all material respects and found no significant differences in the accounts they gave of the incident. I accept as true their evidence that the 2nd Defendant pulled out from behind the Leyland truck. I believe that having encountered that slow moving vehicle he was attempting to overtake it but was unable to

> complete the overtaking manoeuvre. He then attempted to pull back to his left but was only able to get the front of the motor truck out of the Fire Brigade's path. I must also add that I believe that he was travelling at a much faster rate of speed than he would have the Court believe.
>
> The 2nd Defendant's account is highly implausible. On that account the Leyland truck would in all probability have been involved in the collision and the areas of damage to the vehicles would have been entirely different. Clearly, on a balance of all the probabilities, the 2nd Defendant was at fault."

[33] In my judgment, this is plainly a case in which this court ought not to interfere with the trial judge's findings of fact and I would accordingly decline to do so.

[34] I come now to the admissibility in evidence of the 2nd appellant's conviction for careless driving. The starting point is ***Hollington v Hewthorn***, a case which arose out of a collision between two motor cars on the highway. In support of his claim in negligence against the defendant driver, the plaintiff sought to adduce evidence of the conviction of the defendant driver for careless driving as a result of the accident. The Court of Appeal, affirming the decision of Hilbery J at first instance, held that the evidence was inadmissible. Delivering the judgment of the court, Goddard LJ commented at the outset (page 593) that "the first observation we would make on this part of the case is that it has been the invariable practice of the judges for many years, certainly for so long as any member of the court has been in the profession, to reject this class of evidence, so that nowadays counsel have ceased to tender it in accident cases". That very learned judge went on to state the rationale for the exclusion of such evidence as follows (at pages 594-595):

"In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only an evidential value on the issue whether the defendant, by driving carelessly, caused damage to the plaintiff. To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

[35] This is the aspect of the decision, which was based entirely on the common law, which came to be known as the rule in ***Hollington v Hewthorn***. The rule may be stated as follows: a conviction is inadmissible in a subsequent civil action as evidence of the facts upon which it is based, if those facts are directly in issue in the civil action, as, for instance, on a claim for damages for negligence against a motorist in consequence of a collision in respect of which he has been convicted of an offence, such as dangerous or careless driving (see Cross on Evidence, 3rd edn, page 326).

[36] The decision in ***Hollington v Hewthorn*** was never a popular one. In ***Hunter v Chief Constable of West Midlands and Another*** [1981] 3 All ER 727, 734, Lord Diplock observed that the case "is generally considered to have been wrongly decided". In ***Arthur J S Hall & Co (a firm) v Simons*** [2000] 3 All ER 673, 702, Lord Hoffmann remarked, also reflecting a widely held view, that the Court of Appeal in ***Hollington v Hewthorn*** was "generally thought to have taken the technicalities of the matter much too far when it decided…that in civil proceedings a conviction was res inter alios acta and no evidence whatever that the accused had committed the offence". And, in the 15th Report of the Law Reform Committee, Cmnd. 339, the true vice of the decision is squarely put (at para. [3]):

> "Rationalise it how one will, the decision in this case offends one's sense of justice. The defendant had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness required to sustain a conviction of careless driving is, if anything, greater than that required to sustain a civil action for negligence. Yet the

> fact that the defendant driver had been convicted of careless driving at the same time and place of the accident was held not to amount to even prima facie evidence of his negligent driving at that time and place."

[37] As a result of these and other criticisms, the rule in ***Hollington v Hewthorn*** was abolished in the UK by the provisions of the Civil Evidence Act, 1968, the effect of sections 11-13 of which is that a conviction is admissible in evidence in subsequent civil proceedings.

[38] But despite the fact that no similar provision has been enacted in Jamaica, Mr Manning submits that this court should decline to follow ***Hollington v Hewthorn***, for a number of reasons, the first of which is that the decision in the case was the result of the application by the court of section 1(3) of the UK Evidence Act, 1938. This contention is, I fear, based on a misreading of the decision itself. In addition to seeking to adduce evidence of the conviction, the plaintiff in that case also sought to give evidence of a statement made to a police constable after the collision by the driver of the plaintiff's car (who had died after the action had been filed), and after he had been warned for prosecution in accordance with the provisions of the Road Traffic Act, 1930. It is in respect of the admissibility of this statement, and not of the conviction for careless driving, that the court was invited to consider the provisions of the Evidence Act, 1938. Section 1(3) of that Act rendered inadmissible "a statement by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish" (per Goddard LJ, at page 603). In the result, the court having examined the statement, it was held that in the

circumstances the deceased's statement fell within the section and was therefore not admissible.

[39] Mr Manning's second point was that ***Hollington v Hewthorn*** had no application in Jamaica, because section 18 of the Evidence Act "provides for the admissibility of evidence of a conviction, through the cross-examination of the convicted person". Section 18, which appears in the Act under the rubric, 'Impeaching Credit, Cross-examination of Witness', provides as follows:

> "18. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the Clerk of the Court or other officer having the custody of the records of the court, where the offender was convicted, or by the deputy of such Clerk or officer shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

[40] This section is in terms virtually identical to section 6 of the UK Criminal Procedure Act, 1865. It is generally treated by the textbook writers as one of the three well-recognised exceptions to the general rule that a witness' answers to questions going to credit or other collateral matters must be treated as final and cannot be contradicted by other evidence (see, for example, Keane & McKeown, The Modern Law of Evidence, 9th edn, page 214 and Cross & Tapper on Evidence, 12th edn, page 322).

The effect of the section is that, "[i]f a witness denies a conviction when it is put to him in cross-examination or refuses to answer, the conviction may be proved against him" (May, Criminal Evidence, 2nd edn, para. 14-159).

[41] Against this background, it will immediately be seen that what section 18 does is to provide a method of impugning a witness' credit, in a case in which he denies having a conviction. In my view, the section has absolutely no bearing on the point in issue in the instant case, which is whether it is open to a party in civil proceedings to adduce evidence, as part of its case, of the previous conviction of a party, with a view to asking the court to accept the conviction as evidence of the facts on which it was based. In other words, it has no bearing on the rule in ***Hollington v Hewthorn***.

[42] Mr Manning's final point on this aspect of the matter was that this court should decline to follow ***Hollington v Hewthorn***, it having been "generally considered" to be bad law in the UK and it having been "rejected" by this court in ***Causwell & Causwell v Clacken & Clacken***. ***Causwell & Causwell v Clacken & Clacken*** was concerned with the admissibility in evidence, on a motion to discharge a consent order in winding up proceedings, of the findings of the Public Accountancy Board in disciplinary proceedings against an accountant. The Board is established by section 3 of the Public Accountancy Act and, as regards disciplinary proceedings against accountants, is regulated by the Public Accountancy Regulations, 1970. The matter came before this court on appeal from the decision of Pusey J that the findings of the Board were relevant to the question which was before the court and therefore admissible. The respondents relied on, among other things, the rule in ***Hollington v Hewthorn***.

[43] It is clear from the judgment of Cooke JA, with whom F A Smith JA and G Smith JA (Ag) agreed, that he shared many of the judicial and academic misgivings generated by ***Hollington v Hewthorn*** over the years (citing in this regard the passage from Lord Diplock's speech in ***Hunter v Chief Constable of West Midlands*** referred to at para. [36] above). However, the court resolved the matter by distinguishing ***Hollington v Hewthorn***, primarily on the ground that it "did not consider findings emanating from tribunals empowered by statute to enquire and come to conclusions" (para. 8).

[44] Cooke JA took the view (at para. 17) that, in carrying out its investigation, "the [Board] was honouring and discharging the statutory duty imposed on it to promote in the public interest acceptable standards of professional conduct among registered accountants in Jamaica". In dismissing the appellants' contention that the evidence was inadmissible, the learned judge said this (at para. 18):

> "The appellants contend that it is impermissible for the learned judge trying the motion to discharge [the consent order] for frustration, to 'rely' on the findings of [the Board]. This submission is misconceived. **Firstly the trial court hearing the motion will not be concerned with whether or not [the accountant] was 'grossly negligent'. That conclusion can be tested elsewhere. Secondly the trial court will not 'rely' on the findings of [the Board] as conclusive of the truth of those findings**. It is evidence which, subject to our adversarial system, the trial judge is entitled to consider." (Emphasis supplied)

[45] Therefore, while Cooke JA obviously considered that the findings of the Board were relevant to the motion to discharge the consent order, he nevertheless felt it

necessary to disavow any thought that they provided evidence upon which the trial court would be able to act without other evidence. In other words, the findings of the Board provided context, but could not by themselves be regarded as decisive of the issue on the motion to discharge the consent order.

[46] I do not consider that, in the light of this, it can accurately be said that ***Hollington v Hewthorn*** was "rejected" by this court in ***Causwell & Causwell v Clacken & Clacken***, as Mr Manning invites us to conclude. Rather, as Mrs Jordan submitted, the approach taken by Cooke JA, while accepting the continued authority of ***Hollington v Hewthorn***, was to distinguish it as irrelevant to the particular circumstances of the case which was then before the court. The status of ***Hollington v Hewthorn*** in this jurisdiction was also considered and confirmed in ***Danny McNamee v Shields Enterprises Ltd***, in which, speaking for the court, I said this (at para. [54]):

> "In **Ivanhoe Baker v Michael Simpson** (SCCA No. 50/2000, judgment delivered 20 December 2001), Smith JA (Ag), as he then was, referred to **Hollington v Hewthorn and Co. Ltd** as an authority which 'I think we have followed in this jurisdiction' (at page 8). More recently, in **Michael and Richard Causwell v Dwight and Lynne Clacken** (SCCA No. 28/2008, judgment delivered 24 October 2008), Cooke JA subjected **Hollington v Hewthorn & Co. Ltd** to a searching examination and ultimately distinguished it on the basis that it 'did not consider findings emanating from tribunals empowered by statute to enquire and come to conclusions' (para. 8). However, it seems clear that that learned judge nevertheless considered that **Hollington v Hewthorn & Co. Ltd**, despite the judicial criticism to which it has been subjected over the years, remained good

> authority for what it decided, that is that evidence of a conviction in criminal proceedings was not admissible in subsequent civil proceedings as evidence of the facts upon which the criminal conviction was based."

[47] It follows from the foregoing discussion that, in my view, the learned judge erred in (i) allowing the respondents' attorney-at-law to cross-examine the 2nd appellant as to his conviction and sentence for careless driving; and (ii) giving any consideration to the fact of the 2nd appellant's conviction as a factor relevant to his liability for negligence in the civil proceedings.

[48] But, having said that, it seems to me to be clear that the judge, despite regarding the fact of the 2nd appellant's successful prosecution for careless driving as "significant", did not base her finding that he was liable in negligence on that fact. Rather, as I have attempted to demonstrate, she undertook a careful and balanced review of the evidence on both sides before coming to her conclusion (see paras [29]-[33] above). In my judgment therefore, based on the manner in which the learned judge approached the task of assigning liability in this case, she would inevitably have come to the same conclusion had she left the fact of the 2nd appellant's conviction entirely out of account.

[49] Therefore, despite thinking that the judge erred in placing any reliance on the 2nd appellant's conviction for careless driving as a factor relevant to the question of liability, I consider that the appellants' challenge to the judge's factual findings on liability cannot succeed.

Damages

[50] Having found the appellants liable, the learned judge then went on to assess the damages to which the respondents were entitled and to make separate awards to each of them under various heads, as follows:

1st respondent

	$
Special Damages	1,348,832.08
General Damages:	
♦ Pain & Suffering and Loss of Amenities	5,000,000.00
♦ Loss of Earning Capacity	5,227,104.96

2nd respondent

	$
Special Damages	569,520.00
General Damages:	
♦ Pain & Suffering and Loss of Amenities	6,000,000.00
♦ Handicap on the Labour Market	5,973,834.00

3rd respondent

	$
Special Damages	301,640.00
General Damages	2,000,000.00

4th respondent

	$
Special damages	106,080.00

General Damages	1,750,000.00
Future Medical Costs	12,000.00

The appeal on damages

[51] The appellants make no complaint about the various sums awarded by the judge for special damages. However, they complain (i) that the awards for general damages to all of the respondents are excessive, having regard to the usual range of awards for injuries comparable to theirs; and (ii) that, in relation to the 2nd respondent, the judge erred in making an award for handicap in the labour market; and, in any event, even if the award was justified, the amount awarded for handicap in the labour market was excessive. In order to deal with this part of the appeal, it is necessary to say something of the nature of the injuries sustained by each of the respondents, the treatment received and any residual disability suffered by them. It may also be convenient to deal with the appeal of each respondent in turn.

[52] But before doing so, I must refer to the well-established principles, contended for by the respondents and accepted by the appellants, upon which an appellate court ordinarily acts on an appeal from a trial judge's assessment of the quantum of damages. In ***Stephen Clarke v Olga James-Reid*** (SCCA No 119/2007, judgment delivered 16 May 2008), K Harrison JA said (at para. 5) that this court will "commence with the presumption that the decision on quantum made by the trial judge is the correct one". The learned judge went on to cite with approval the following well-known dictum of Greer LJ in ***Flint v Lovell*** [1935] 1 KB 354, 360:

> "…I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled." (Emphasis as in the original)

[53] I therefore approach the appeal against the trial judge's awards of damages in this case on the same basis, that is, that, unless they can be shown to have been clearly wrong in principle or egregiously high in amount, this court ought not to disturb them.

The 1st respondent

[54] At the time of the accident, the 1st respondent was 44 years of age, having been born on 15 February 1959. After the collision, the 1st respondent had to be helped from the fire truck by others. He felt himself in immediate pain, particularly in his left hand, chest and ribs. Expert evidence proffered on his behalf by Dr Grantel Dundas, a consultant orthopaedic surgeon, revealed that he had sustained a comminuted intra-articular fracture of the left radius, as well as undisplaced fractures of the right 6th, 9th and 12th ribs. On 24 July 2003, a week after the accident, he underwent surgical reduction of his left radial fracture and decompression of the carpal tunnel under

general anaesthesia. A "volar T-plate" was used for fixation of the fracture and postoperatively he progressed fairly satisfactorily in terms of the radial fracture. However, within a month of his first visit to Dr Dundas on 23 July 2003, he then developed back pain and right chest pain. An x-ray of his spine indicated that he had also sustained a fracture of the transverse process of the 2nd lumbar vertebra on the left side. A programme of physiotherapy was initiated, which he continued for several months.

[55] In due course, on 24 April 2007, the 1st respondent underwent further surgery to remove the plate from his wrist, the radial fracture having by then essentially healed. Magnetic Resonance Imaging ('MRI') investigations in May 2007 showed that he had disc bulges and spinal stenosis. Having reviewed the 1st respondent's MRI studies on 17 May 2007, Dr Dundas, by letter of that same date, recommended to the superintendent of the fire brigade that he be "seriously considered for medical redundancy, as any engagement in normal or even modified fire fighting activities are [sic] likely to aggravate a rather precarious situation, precipitating the type of condition which will make him totally unfit for any type of service". Subsequently, by letter dated 25 February 2008, the 1st respondent was notified by the fire brigade that a recommendation had been made that he be retired on medical grounds, in the light of the fact that his "ailment is of the body and is likely to be permanent". When he was examined by Dr Dundas on 9 April 2008, the 1st respondent was found to have mild restriction of range of motion of the wrist and recurrent episodes of pain in his back. His residual impairment as a result of his injuries was evaluated, using the American

Medical Association Guides for the Evaluation of Permanent Impairment ('the AMA guides'), at 3% of the right upper extremity or 2% of the whole person and, for the spine, 10% of the whole person. Accordingly, in Dr Dundas' opinion, the 1st respondent's overall whole person permanent impairment was 12%. In the doctor's view, the 1st respondent will need "ongoing palliative care in the form of analgesic medication and possible periods of physical therapy to control his symptoms…into the foreseeable future".

[56] The 1st respondent's own evidence as to his injuries and their *sequelae*, in particular his back injury, was graphic and unchallenged:

> "22. My hand started to feel better after I started physiotherapy. I did therapy for some time, and I saw Dr. Dundas throughout the period. The physiotherapist would give me letters to give Dr. Dundas reporting on my progress.
>
> 23. Then in about May or so of 2004 the pain in my back became unbearable. My back never got better after the accident, only worse. I went in to see Dr. Dundas about it and I was sent to do an MRI. Based on the results I had to start doing therapy on my back. The therapist alternated the sessions between my hand and my back.
>
> 24. As time went by, the therapy stopped helping. It made my back feel better for the first day, but after the day, the pain would come back. So I have had to rely on medication. I have been on constant medication for my back throughout the years, and I have had to see Dr. Dundas continuously throughout the period. Each time I go in to see Dr. Dundas (normally every three months), he would give me a

three months supply prescription, to hold me until I go back to see him. This medication is taken care of by my health card.

25. I have never gotten any ease off the back. It has plagued me throughout the years. In 2007 I was in so much pain, that Dr. Dundas sent me to do a second MRI. The 2nd MRI showed I had three slipped discs. Dr. Dundas then wrote a letter to the Fire Brigade recommending that I be put on medical redundancy. Up to that time, I had not returned to my duties, since the accident.

26. My whole life has mashed up since the accident. I can't function more than so. If I stand for long, I feel pain, so I have to move around with a chair, to sit down on. The only time I feel better is when I am lying down.

27. My life has made a complete turnaround. Things I could do before the accident, I cannot do now. Whenever I am supposed to do house work, I have to do it in spells, pay someone to do it, or I have to sit down and do it.

28. One of the hardest things for me, is that I cannot lift up my little girl. It is part of my biggest headache. She is very attached to me."

[57] In awarding the sum of $5,000,000.00 to the 1st respondent for general damages for pain and suffering and loss of amenities, the learned judge was content to say that she found the cases referred to by his counsel "to be much more useful". Not surprisingly, Mrs Jordan complained that this was an "insufficient explanation" by the judge of the reasons for her award.

[58] To test the reasonableness of the award, Mr Manning referred us to three previous awards reported in volume 5 of Mrs Ursula Khan's perennially helpful compilation, Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica ('Khan'). These were as follows:

i. In ***Marie Jackson v Glenroy Charlton and Another*** (Suit No CL 1999 J 113, damages assessed 4 May 2001 - Khan, page 167), the plaintiff suffered a whiplash injury as a result of a motor vehicle accident. Her persistent back pain led to a diagnosis of a lumbar disc prolapse, which required surgical intervention. In due course, she developed a phobia for travelling in motor vehicles, for which she had to be referred to a consultant psychiatrist, although there was no evidence of the outcome of that consultation. Her permanent impairment was assessed by Dr Dundas at 8% of the whole person. Dukharan J (as he then was) awarded her $1,800,000.00 for pain and suffering and loss of amenities. According to Mr Manning's calculations, from which Mrs Jordan did not demur, this award when updated to the date of trial in the instant case amounted to $4,700,000.00.

ii. In ***Salome Bailey v Virginia Dare (Ja) Ltd and Another*** (Suit No CL 1996 B 237, damages assessed 10 November 1999 - Khan, page 132), the plaintiff, a nurse, was also injured in a motor vehicle accident. She suffered fractures of the hip and two vertebrae. Dr Dundas thought that her injuries would cause her intermittent episodes of pain and discomfort and restriction of movement of the cervical spine in the short term and, in the long term, degeneration in the

cervical spine with possible disc protrusion, which would worsen her pain and restrict her range of movement. If this occurred, she would require surgical intervention. A change of occupation was indicated by the problems she might encounter in her work as a nurse, due to long hours of bending forward to give attention to patients under her care or protracted writing at a desk. Her permanent disability was assessed at 10% of the whole person. Harris J (as she then was) awarded her $1,200,000.00 for general damages for pain and suffering and loss of amenities. Mr Manning calculated that this award was worth $3,100,000.00 at the date of trial in the instant case.

iii. In ***Iris Edwards v Samuel Owen McDonnough*** (Suit No CLE 054/1997, damages assessed 3 March 1999 – Khan, page 159), the plaintiff was injured while crossing the road on a pedestrian crossing. She was diagnosed with a cerebral concussion, a fracture of the 7th rib, contusions of the lung and soft tissue injuries to her face, left shoulder and knee. She was not expected to incur any permanent disability. D O McIntosh J awarded her $1,300,000.00 for general damages for pain and suffering and loss of amenities. By Mr Manning's calculation, this award when updated was worth $3,580,000.00 at the time of trial.

[59] I should say at once that it is not particularly easy to discern a trend from these awards. I would have expected, for instance, that the plaintiff in ***Salome Bailey***, whose permanent impairment was 10% of the whole person, would have been awarded significantly more than the plaintiff in ***Iris Edwards***, who had no permanent

impairment and whose damages were assessed a matter of months before in the same year. But what seems clear is that the injuries suffered by the plaintiffs in all three of these cases were arguably less serious than those suffered by the 1st respondent, who sustained a comminuted fracture of the left forearm; undisplaced fractures of the right 6th, 9th and 12th ribs; a 12% whole person permanent impairment; and was expected to need ongoing palliative care into the foreseeable future.

[60] Of the three cases referred to in para. [58] above, the injuries sustained by the plaintiff in ***Marie Jackson*** were probably the closest, in terms of severity and permanent impairment, to the 1st respondent's injuries in the instant case. The award of $1,800,000.00 made in 2001 in ***Marie Jackson*** was worth $4,700,000.00 at the time of trial in the instant case. Therefore, on the basis that the award in that case was a correct estimate of general damages for pain and suffering and loss of amenities, it seems to me that the award of $5,000,000.00 to the 1st respondent in the instant case cannot be said to be so extremely high as to make it an entirely erroneous estimate of the damages to which he is entitled. I would therefore not disturb the judge's award.

<u>The 2nd respondent</u>

[61] This respondent was born on 27 July 1972. He was therefore just 10 days short of his 31st birthday on the date of the accident. When he regained consciousness after the collision, he was on the ground. He had difficulty breathing and felt pain under his left breast, over his right and left ribs and in his left foot. His left foot appeared to be broken. At the accident and emergency unit of the Mandeville Regional Hospital, he

was found to have sustained blunt trauma to the chest, with fractured ribs and a fractured left ankle. He underwent surgery on 28 July 2003, for the purpose of open reduction and internal fixation of his left ankle with plates and screws.

[62] In due course, the 2nd respondent also came under the care of Dr Dundas, who first saw him on 19 July 2004. His main complaint at that time was of back pain. But he also complained that his left ankle became stiff after sitting for long periods, that he had difficulty with his mobility after such periods and that he walked with a limp. When next seen by Dr Dundas on 8 September 2004, he complained of a pain in the neck and in the thoracolumbar region. He also indicated that he had a significant problem with his balance. Examination revealed increased reflexes and mild weakness in the left lower extremities, with wasting of his thigh and calf. His balance was significantly impaired and he drifted markedly when asked to stand with his eyes closed. Dr Dundas' recommendation was that he should have a full neurological evaluation in respect of the problem with his balance. On 6 September 2005, he underwent further surgery to remove the plates and screws from his ankle. Further x-rays of his left ankle in 2008 revealed that he had early osteoarthritic changes in the joint accompanied by calcification in the interosseous membrane. Based on his re-evaluation of the 2nd respondent on 2 June 2008, Dr Dundas assessed his permanent residual impairment (again using the AMA guides) at 19% of the left lower extremity or 8% of the whole person. The total overall recombined impairment, involving the cervical spine, lumbar spine and left lower extremity was assessed at 25% of the whole person.

[63] The 2nd respondent was also seen by Dr Daniel Graham and Dr Michelle Lee, both consultant neurologists. Dr Graham confirmed that the 2nd respondent had suffered a cerebral concussion as a result of his having reportedly been thrown some 25 feet from the impact into a tree and then falling to the ground. He also recommended that the 2nd respondent do an MRI of the cervical spine for the purpose of confirming or ruling out further diagnoses. In due course, an MRI of the cervical and thoracic spine was performed and, when read, was normal. Dr Lee assessed the 2nd respondent as having "myofascial pain secondary to his significant trauma", for which he would require long term pain medication and physical therapy.

[64] The 2nd respondent's evidence was that after he was discharged from hospital after the original surgery to his ankle in 2003, he was in a lot of pain and discomfort. He had to be assisted by his eight year old son and by his wife to use the toilet and to take a bath. He could not laugh without feeling pain in his chest. He was bedridden for about two months and on sick leave from work for three years and 10 months, during which time he received continuous medical treatment and physiotherapy. In his witness statement dated 2 May 2008, close to five years after the accident, the 2nd respondent said this:

> "Today I am still feeling pain. It has never stopped, especially my back, which is severe. It is a continuous and annoying pain. When I walk, sit up or stand for too long, turn in bed on one side and when I sleep on my tummy, I feel the pain. I also have problems bending which affect me when I try to kneel in church to pray.

I can't do anything around the house anymore. I can't wash dishes and I can't cut the yard. Last year I started paying someone to cut the yard…

I feel better when I am lying down, so wherever I am, whether on the verandah or the living room, I have to lie down. I spend most of the time in bed, when I am at home.

My ankle still affects me as well. When I walk for long it pains me, and gets swollen. It also feels weak when I get up in the morning.

I also have other problems. I am unable to look at my wife most of the times. I have a very weak erection. It lasts less than five minutes, and then that's it for the night. My lower back also hurts me after I am finished. Thank God my wife loves Jesus, otherwise, we would have had other problems.

I told Dr. Wilson about these problems and he referred me to Dr. Shaun Jones, an [sic] Urologist. Dr. Jones prescribed Levitra for me. It helps, but it is very expensive, and my health card doesn't cover it. One single pill costs about Seven Hundred and Twenty Dollars ($720.00) then. I was unable to fill the entire prescription, because it cost about Forty Thousand Dollars ($40,000.00). I could only buy one or three at a time. When I take one, it helps, but just for the night. I can now go more than five minutes, but not much longer. To date, I have only taken ten pills at a total cost of **$7,200.00**. I still have the rest of the prescription to fill...

My wife and I have one son. I want more children but I don't think that will happen because of my problems, and we cannot afford it.

I am also traumatized by the accident. I have a difficulty travelling in the front of vehicles, especially left hand drive vehicles. A few years ago Kimar Brooks and I were coming from Black River. Kimar was driving a left hand drive vehicle and I was sitting in the right front passenger seat. When we reached Barbary Hall, I saw a bus coming in [sic] opposite direction. When it came around the corner, it felt like the bus was coming over on us, like the trailer head. I got frightened and I pushed the steering wheel from Kimar's hand.

> I can't play sports any more either. I used to open for the Area Four (fireman) cricket in St. Elizabeth. I have not been able to play cricket since the accident. I can't really go to football or cricket matches because I can't sit or stand for too long."

[65] The 2nd respondent's evidence was that, even when he finally returned to work for the first time after the accident in April 2008, he found himself hardly able to do anything. In fact, he was only able to work, by the permission of an understanding division head, four hours out of an eight hour shift. While he was on sick leave, although he continued to receive his basic pay, he was not paid meal and taxi allowances, losing a total of $588,000.00 for the period 18 July 2003 to 21 April 2008. At the time of the accident, the 2nd respondent had been acting as a corporal, for which he received an additional sum of $3,982.16 monthly. However, he was not paid this amount during the period he was on sick leave, losing a total of $226,983.12 as a result, and he also lost the opportunity for promotion to the rank of corporal. In addition, the 2nd respondent stated, he had lost considerable income from his private work as a carpenter, from which he would have expected to have been earning $25,000.00 monthly in May 2008. For the period August 2003 to May 2008, he calculated his total lost income from his carpentry business at $1,368,000.00 (57 months at $24,000.00 per month).

[66] As regards the question of handicap on the labour market, N E McIntosh J observed (at page 20) that "[t]he writing is on the wall here…some day soon this Claimant will be thrown out on the labour market and there is no doubt that he will be seriously handicapped". She accordingly determined (without giving a reason) that this

was a case in which "an award should be made under this head on a multiplier/multiplicand basis". Therefore (using the salary of a corporal, on the assumption that "[i]n all probability he would have been promoted at some point to Corporal"), the judge applied a multiplier of eight and thereby arrived at the figure of $5,973,834.00 for handicap on the labour market.

[67] In awarding $6,000,000.00 to the 2nd respondent for pain and suffering and loss of amenities, the learned judge considered that, with a 25% whole person permanent impairment, his suffering had been greater than that of the other respondents.

[68] On 17 August 2012, pending the hearing of this appeal, the 2nd respondent was granted permission to adduce two items of fresh evidence. The first is a letter dated 11 November 2011 to the fire brigade from Dr Raefer Wilson, which reads as follows:

> "Dear Sir,
>
> re: Lance Corporal Leighton Gordon. This man who was involved in a work related accident in 2003, continues to have significant pain, weakness, and emotional stress.
>
> This has become worse since he was put on night duty. He complains that whenever he has to sleep on the bed provided, he suffers excruciating lower back pains. This is exacerbated by long hours of sitting up again whilst on night duty. He has had to be taking daily Ginsana to partially alleviate the weakness. He is also on Lyrica and Voltaren to offset his chronic pain. He has had to take a lot more sick days while on night duty as his symptoms are significantly worse due to the circumstances disclosed above.
>
> I believe that it is in the best interests of both Mr. Gordon and the Jamaica Fire Brigade that for the next six months in the first instance he be restricted to light daytime duties. At the end of this period he will be reassessed to see if any progress has been made. Any assistance rendered to him will be greatly appreciated."

[69] The second item of fresh evidence is a letter dated 11 July 2012 to the 2nd respondent from the fire brigade. This letter advised the 2nd respondent that, as a result of a Medical Board apparently faced by him on 9 November 2011, "approval has been given by the Board for you to be retired from the Brigade on Medical Grounds with effect from 01 May, 2012".

[70] Before us, Mrs Jordan complained that there was no nexus between Dr Wilson's letter dated 11 November 2011 and the Medical Board and she queried whether the Board's decision was based on "the same injuries". Therefore, it was submitted, the fresh evidence is "unhelpful and invites speculation". Mr Manning, on the other hand, said that the fact of the 2nd respondent's retirement on medical grounds confirmed the correctness of the learned judge's view that the writing was on the wall.

[71] I am inclined to agree that the fresh evidence does leave the precise reason for the 2nd respondent's retirement in a somewhat unsatisfactory state, not least because of the fact that Dr Wilson's letter, which did not seem to recommend his retirement, was in any event dated two days after the Medical Board. It would certainly have been helpful if the court had been shown a note or summary of the proceedings of the Medical Board. But what Dr Wilson's letter does demonstrate, it seems to me, is that, as late as a full eight years after the accident, the 2nd respondent continued "to have significant pain, weakness, and emotional stress", and that his condition continued to be exacerbated by the requirements of his job as a firefighter. Accordingly, I consider that the probabilities are that the 2nd respondent's retirement as a firefighter less than

three months before his 40th birthday was as a result of the serious injuries which he suffered in the accident.

[72] But while this evidence does tend to validate N E McIntosh J's view that "some day soon" the 2nd respondent would find himself on the labour market, it is only a partial answer to the two-part question posed by the appellants' challenge to her award, which is (i) whether the judge was correct to make an award for handicap on the labour market at all; and (ii) if so, whether the amount awarded was excessive in the circumstances of this case.

[73] As regards the first part of the question, Mrs Jordan submitted that, in the absence of any evidence that the 2nd respondent, who was still employed to the fire brigade at the time of trial, had suffered any handicap on the labour market, no award ought to have been made to him under this head. Mr Manning's contrary submission was that an award for handicap on the labour market is concerned to compensate for the risk of the injured person being thrown on the job market in the future, which is precisely the risk faced by the 2nd respondent in this case.

[74] As Browne LJ put it in the well-known decision of the English Court of Appeal in ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 All ER 9, 15, an award for handicap on the labour market, or loss of earning capacity, as it is perhaps more frequently called, "…generally arises where a plaintiff is, at the time of trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid

job". In my view, the position of the 2nd respondent in this case, in the light of the very serious injuries which he suffered as a result of the accident and the nature of his employment, amply satisfied these criteria. I do not therefore think that anything has been shown to suggest that the judge acted upon any wrong principle in determining that an award for handicap on the labour market was appropriate in his case.

[75] The second part of the question posed by the grounds of appeal is, in my view, more difficult to answer. The judge, it will be recalled, adopted the multiplier/multiplicand method and the question whether the total produced by that method is excessive naturally begs the wider question whether the judge was right to approach the matter on that basis. Once the court is satisfied that there is a substantial risk that the claimant will at some point in the future find himself on the labour market, "what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some *future* time, suffer financial damage because of his disadvantage in the labour market" (per Browne LJ in ***Moeliker***, at page 16).

[76] But the question of how to approach quantification of the risk, upon which I regret that we did not receive as much assistance from counsel on either side as we might have expected, can be a matter of some difficulty. In ***Moeliker***, Browne LJ observed (at page 17) that "[i]t is impossible to suggest any formula for solving the extremely difficult problems involved in the second stage of the assessment...[a] judge must look at all the factors which are relevant in a particular case and do the best he can". However, in the later case of ***Joyce v Yeomans*** [1981] 2 All ER 21, 27, Brandon

LJ considered 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".

[77] Later still, in ***Campbell and Others v Whylie*** (1999) 59 WIR 326, a decision of this court, Brandon LJ's dictum in ***Joyce v Yeomans*** was referred to with approval (at page 342) in the leading judgment of Forte JA (as he then was). In that case, the court therefore declined to disturb the trial judge's use of the multiplier/multiplicand approach to quantification of an award for loss of earning capacity. Forte JA also referred to the earlier decision of this court in ***Kiskimo v Salmon*** (SCCA No 61/1989, judgment delivered 4 February 1991). In that case, the court concluded that there was no inflexible method of calculating loss of earning capacity and the trial judge's award under this head based on the multiplier/multiplicand method was therefore upheld. As regards the further question whether the judge had also been correct to discount the figure arrived at by this method by half to allow for contingencies, Carey JA said this (at page 11):

> "I must say that I have the greatest doubt whether the method of discounting used by the learned judge in this case should be encouraged. It has nothing to recommend it and indeed I think it is wrong. The usual, and indeed the recognized method of allowing for contingencies and the fact of immediate lump sum payment is by adjusting the multiplier. Where however, a judge merely makes an overall estimate of what should be the loss of earning capacity, then I think, he would be perfectly entitled to discount that total. **The method adopted by the 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 a multiplier by trial judges**." (Emphasis supplied)

[78] The first instance decision of Sykes J in ***Iclilda Osbourne v George Barned and Others*** (Claim No 2005 HCV 294, judgment delivered 17 February 2006), to take the one example referred to by Mr Manning, is on the other side of the coin. By the time of the trial in that case, the claimant was unemployed and, after a careful review of the authorities, the learned judge concluded that that was not an obstacle to her claiming an award of damages for loss of earning capacity. As regards the choice between the multiplier/multiplicand method and the lump sum method of calculation, the judge said this (at para. 18):

> "The cases suggest that the choice of method is influenced by the information available to the court, that is to say, where the claimant has been working for some time before the accident so that the court has some reliable data concerning her income, her remaining working life and so on then the multiplier/multiplicand method may be used (***Campbell v Whylie*** (1999) 59 WIR 326)."

[79] Sykes J therefore awarded the claimant in that case a lump sum of $500,000.00 for loss of earning capacity.

[80] Therefore, once the judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a

matter for the court. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries. Although the claimant's employment status at the time of trial is not a bar to recovery, it may have an obvious effect on the kind of information that he is able to put before the court with regard to his income and employment prospects for the future. Where there is evidence to support its use, the multiplier/multiplicand method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity. This is hardly an exhaustive list and additional or different factors will obviously be of greater or lesser relevance in particular cases. Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account. As Browne LJ observed (at page 15) in ***Moeliker***, restating the oft-stated, "the facts of particular cases may vary almost infinitely".

[81] In the instant case, although it might have been helpful to know the particular considerations that led the learned trial judge to opt for the multiplier/multiplicand method, nothing has been urged before us to suggest that she acted on any wrong principle in doing so. All the information concerning the 2nd respondent's income that was needed to enable her to arrive at a multiplicand was available to her and it has not been suggested that the multiplier of eight which she chose was inappropriately high in the case of the 2nd respondent, who was 36 years old at the date of the assessment. It seems to me that there is therefore no basis upon which this court can interfere with the judge's award for handicap on the labour market.

[82] The appellants also complain that the award of $6,000,000.00 to the 2nd respondent as general damages for pain and suffering and loss of amenities was excessive. Before us, Mrs Jordan placed renewed reliance on two cases, ***Sharon Barnett v Rosemarie McLeod*** (Suit No CL 1983/B301, judgment delivered 26 January 1989 – reported in the revised edition of Casenote No 2, Harrison & Harrison's 'Assessment of Damages for Personal Injuries', page 372), and ***Albert Rowe v David McKenzie*** (Suit No CL 1990 R 096, damages assessed 18 July 2001 – reported in Khan, volume 5, at page 88).

[83] In ***Barnett v McLeod***, the plaintiff was hit down by a motor vehicle. She sustained a fracture of the neck of the right talus (a small bone that sits between the heel bone, and the tibia and the fibula) and loss of consciousness. She also received superficial abrasions, with swelling and tenderness to various parts of the body. She suffered from continuous pain, reduction in movement of her ankle and her permanent impairment was assessed at 21% of the right lower limb, or 8% of the whole person. She was awarded $45,000.00 by Marsh J as general damages for pain and suffering and loss of amenities. When updated to the date of trial in the instant case, Mrs Jordan told us, this converted to $1,242,116.63. In ***Rowe v McKenzie***, the plaintiff sustained a compound comminuted fracture of the right tibia and a fracture of the right fibula in two places. In Dr Dundas' opinion, he would experience difficulty in running or walking for distances in excess of one kilometre and in going up steep slopes, climbing ladders or playing sports like cricket or football. His permanent disability was assessed at 27% of the whole person. By Mrs Jordan's calculation, this award when updated amounted

to $3,253,011.90 and she submitted on the basis of it that N E McIntosh J's award of $6,000,000.00 to the 2nd respondent was unjustifiable and excessive.

[84] For his part, Mr Manning referred us to the cases of ***Douglas Fairweather v Joyce Eloise Campbell (executrix of the estate of Griffiths Campbell, deceased)*** (Suit No CL 1982 F 059, assessment of damages 14 May 1999 – Khan, volume 5, page 74); and ***Otis Gordon v Carlton Brown*** (SCCA No 48/1998, judgment delivered 20 December 1999 – Khan, volume 5, page 45).

[85] In ***Fairweather v Campbell***, the plaintiff was injured when his motorcycle was hit by a reversing car. In addition to a 1" laceration to the left chest wall, a chipped right upper molar and a battered and painful shoulder, the plaintiff sustained a compound fracture of the left tibula and fibula and a severe whiplash injury. His permanent impairment was assessed at 7-10% of the left lower limb. N E McIntosh J (Ag) (as she then was) awarded him $1,300,000.00 as general damages for pain and suffering and loss of amenities. Updated by Mr Manning's calculation, this award was worth $3,558,000.00 at the time of trial in the instant case. The plaintiff in ***Gordon v Brown*** was injured while alighting from a bus. Dr Dundas diagnosed him as having sustained "a very distorting fracture of the pelvis which had mal-united". His permanent impairment in relation to the pelvic injury was assessed at 14% of the whole person. The plaintiff also suffered neurological damage, resulting in a 30% loss of function of the left lower limb or a 12% whole person permanent impairment. He also complained of an inability to achieve an erection. Based on the combination of his injuries, the plaintiff's overall permanent impairment was assessed at 22% of the whole

person. This court assessed his damages for pain and suffering and loss of amenities at $1,800,000.00, which, when updated, amounted to $4,600,000.00 at the date of trial in the instant case. On the strength of these cases, Mr Manning submitted that the learned judge's award of $6,000,000.00 in the instant case was not a wholly erroneous estimate of the 2nd respondent's general damages.

[86] In the instant case, as will be recalled, the 2nd respondent sustained fractures to his ribs and left ankle. He had to undergo surgery and complained of persistent back pain, stiffness in the ankle, problems with his sexual performance, with his balance and other neurological issues. His permanent impairment was assessed at 25% of the whole person. Of the cases referred to by Mrs Jordan, I would take ***Barnett v McLeod***, in which the plaintiff incurred 8% permanent impairment of the whole person for a fracture to her foot, out of consideration altogether. Not only is the permanent impairment in that case significantly lower than the 2nd respondent's, but the injuries suffered by the plaintiff in that case differ markedly from those suffered by the 2nd respondent. ***Rowe v McKenzie***, in which the plaintiff's whole person permanent impairment was assessed at 27%, is obviously more to the point, although it does not appear from the brief report of the case that, in addition to his orthopaedic injuries, the plaintiff had any of the neurological or other problems suffered by the 2nd respondent in the instant case. But I would certainly regard the updated award of $3,253,011.90 in that case as a feasible starting point in considering the aptness of the award of $6,000,000.00 to the 2nd respondent.

[87] Of Mr Manning's cases, ***Fairweather v Campbell*** suffers in the analysis from the absence of any information on the plaintiff's whole person permanent impairment. However, the compound fracture of the left tibula and fibula and severe whiplash injury suffered by the plaintiff are sufficiently similar to some of the 2nd respondent's injuries as to make the updated award of $3,558,000.00 also worthy of consideration. But, like the award in ***Rowe v McKenzie***, I would regard that award as being somewhere closer to the bottom of the range, given, in my view, the clearly more serious injuries suffered by the 2nd respondent. ***Gordon v Brown***, in which the plaintiff sustained a bad pelvic fracture and neurological damage, resulting in sexual dysfunction and a permanent impairment of 22% of the whole person, is, I think, more obviously comparable to the instant case. I would therefore regard the updated award of $4,600,000.00 in that case as far closer to what would be reasonable compensation for the 2nd respondent's injuries.

[88] In determining the appropriate award to be made to the 2nd respondent for general damages, N E McIntosh J said this (at pages 19-20 of her judgment):

> "…the cases referred to by Mr McBean [who appeared for the appellants at trial] are way out of line with modern trends and are not really helpful to this assessment.
>
> I find the cases referred to by Miss Minto to be more on point though in need of some upgrading to adequately reflect the more serious injuries suffered by this Claimant. One must look not only at the percentage whole person disability but at the nature of the injuries resulting in that disability. Aside from the orthopaedic injuries there must needs be consideration given to the neurological and psychological effects as well. This is a young married man with one child. His relationship with his wife has been

> transformed in a very significant way – his whole life has changed for the worse. No amount of money can compensate him for his loss but the court must nevertheless seek to measure the immeasurable."

[89] In my respectful view, the learned trial judge cannot be faulted in this analysis. As she was obliged to do, the judge quite clearly took into account the cases to which she was referred, the 2nd respondent's particular circumstances, his injuries and his unchallenged evidence of the myriad ways in which his life had been affected by them. Accordingly, I am of the view that an award of $6,000,000.00 for general damages to the 2nd respondent cannot be said to be so extremely high as to make it an entirely erroneous estimate of the damages to which he was entitled.

The 3rd respondent

[90] The 3rd respondent, who was born on 2 June 1983, had just turned 20 at the date of the accident, in which he sustained injuries to his head and lower back. He was subsequently diagnosed as a case of whiplash injury to the cervical spine, acute lumbar-sacral strain and a soft tissue injury to the side of the head. When he was seen by Dr Melton Douglas, a consultant orthopaedic surgeon, on 13 April 2005, the 3rd respondent complained of frequent headaches, which would linger for days before he would get any relief. He also complained of constant pain in his lower back, aggravated by sitting and driving for long hours. He was unable to lift heavy objects and he was affected by the pain when he was on active duty. Dr Douglas found no deformities of the spine, although the 3rd respondent had a "mild hyperkyphosis of the thoracic spine".

Dr Douglas diagnosed a mild lumbosacral strain, a resolved whiplash injury of the cervical spine and a healed scalp laceration and considered it to be likely that the 3rd respondent "may have recurrences of back pain even after it appears to have fully settled". Repeated sessions of physical therapy, complemented by oral analgesics, would be required to alleviate the pain.

[91] The 3rd respondent continued to complain of intermittent, throbbing headaches and persistent back pain and on 6 May 2008 he was seen by Dr Randolph Cheeks, a consultant neurologist. Dr Cheeks considered that the 3rd respondent's headaches had a profile of "trauma triggered migraine" and that they were likely to continue to affect him intermittently. As regards his back pains, the doctor's opinion was that they indicated that the muscular injury which the 3rd respondent had suffered had healed with some scarring, "which would predispose him to experience lumbar back pains at times of physical exertion, for example during the course of his duties as a firefighter". Using the AMA guides, Dr Cheeks assessed the 3rd respondent's permanent impairment on account of the headaches and back pains at 2% and 5% respectively, resulting in a combined permanent disability of 6% of the whole person. In terms of a prognosis, the doctor's view was that the 3rd respondent was unlikely to experience any new problems arising out of these injuries.

[92] On 19 May 2008 the 3rd respondent was again examined by Dr Douglas for the purpose of a final medical report. In Dr Douglas' opinion, the 3rd respondent had improved since his last examination, but he continued to complain of "pain in the back when challenged with strenuous duties as well as light duties and chores". However,

the doctor thought that his condition was "unlikely to get worse" and that he did not require surgery, but that he would benefit from "a continuous home program of back exercises with the intermittent supervision of a physiotherapist". Analgesic drugs would also be needed for immediate relief from intense pain. Using the AMA guides, Dr Douglas assessed the 3rd respondent's permanent impairment to be 1% of the whole person.

[93] After the accident, the 3rd respondent was on sick leave for a total of 28 days. During this period, his evidence was that he was in a lot of pain, mostly in his head and back. Even when he returned to work at the end of his sick leave, he was unable to return to regular fire fighting duties and had to be assigned to light duties. Physiotherapy helped to mitigate the pain initially, but after a while the pain came back, depending on how much work, sitting or driving he did. Although he did in time return to regular fire duty at work, his supervisor and colleagues were mindful of his situation and did not ask him to lift heavy objects or to climb. As a result, he was no longer able to do "front line duties" at a fire scene but was confined to "back up work". Further, when he returned to fire duties, he found that smoke gave him headaches. In April 2008, which is when he gave his witness statement for the purposes of the trial, the 3rd respondent stated, he found that his injuries affected him in his "personal and sex life", but that he now knew "what to stay away from".

[94] In concluding that $2,000,000.00 was an appropriate award for general damages for pain and suffering and loss of amenities in the case of this respondent, the learned judge said this (at page 22):

> "This Claimant has had a good recovery and there is now a PPD of 1% from an orthopaedic standpoint and 6% from a neurological standpoint. Either way the prognosis is good, though he will continue to have intermittent back pain…This is a firefighter who is adversely affected by smoke."

[95] Mrs Jordan submitted that $2,000,000.00 was excessive for "a mild whiplash". For this submission, she based herself on the following three cases from the early 1990s (all very briefly reported in Harrison & Harrison, pages 85-86):

i. In ***Roy Campbell v Rendell Cameron*** (Suit No CL 1988/C361), the plaintiff sustained a fracture of the 6th cervical vertebra and a whiplash injury, which required him to wear a cervical collar for two months. On 6 February 1991, Wolfe J (as he then was) awarded him $16,800.00 for general damages for pain and suffering and loss of amenities. Mrs Jordan calculated the value of this award at the date of trial to be $302,400.00.

ii. In ***Desmond Poyser v Superior Party Hireage Ltd & Hylton Smith*** (Suit No CL 1991/P158), the plaintiff sustained a whiplash injury, with pain in the neck, shoulder and back. On 14 May 1992, G James J (Ag) (as he then was) awarded him $40,000.00 for pain and suffering and loss of amenities. Mrs Jordan calculated the value of this award at the date of trial to be $317,318.43.

iii. In ***Shirley Maynier-Burke v Ervine Wilson & Vincent Tennyson*** (Suit No CL 1991/B247), the plaintiff sustained a whiplash injury and suffered from an acute sacral strain and tenderness in the lumbar spine. On 2 July 1992, Reckord

J awarded her $10,000.00 for pain and suffering and loss of amenities. Mrs Jordan calculated the value of this award at the date of trial to be $76,849.06.

[96] Mr Manning for his part relied on the two later cases, in which damages were assessed in 1996 and 2000 respectively, to submit that the judge's award of $2,000,000.00 was not a wholly erroneous estimate of the 3rd respondent's loss in the instant case. The first is ***Kathleen Earle v George Graham*** (Suit No CL 1990 E 025 – Khan, volume 5, page 173), in which the plaintiff was diagnosed with a "severe whiplash", as a result of a motor vehicle accident. Six years later, she still complained of neck pains, precipitated by sudden movement of the neck, prolonged sitting, dancing, lifting children and driving, and required analgesics on alternate days to relieve her neck pains. Her neck was stiff and painful at the end of the day and she had to lie in bed for relief. Her impairment was assessed at 10% of the cervical spine and 6% of the whole person. On 11 December 1996, Courtney Orr J awarded her $800,000.00, which Mr Manning calculated to be worth $2,580,000.00 at the date of trial in the instant case, for pain and suffering and loss of amenities.

[97] ***Stacey Ann Mitchell v Carlton Davis and Others*** (Suit No CL 1998 M 315 – Khan, volume 5, page 146) is the second of Mr Manning's cases. The plaintiff's injury was assessed as a "mild whiplash". In the doctor's opinion, she would continue to have severe pain for approximately nine weeks, resulting in total disability for that period; thereafter, she would suffer pains of diminishing severity for a period of five months, resulting in partial disability, followed by intermittent pains for at least a further four months. On 10 May 2000, Beswick J (Ag) (as she then was) awarded her $550,000.00

which Mr Manning calculated to be worth $1,379,000.00 at the date of trial, for pain and suffering and loss of amenities.

[98] With the greatest of respect to Mrs Jordan's industry in unearthing them, I have not found any of the cases referred to by her (para. [95] above) of any assistance in relation to the 3rd respondent's injuries. In the first place, it does not appear that the plaintiffs in those cases had any residual disability as a result of their injuries. But, in any event, the range of $77,000.00 - $317,000.00 which these cases imply seems to me to be woefully inadequate compensation for a claimant, such as the 3rd respondent, whose whole person permanent impairment has been assessed at 1% from an orthopaedic standpoint and 6% from a neurological standpoint. It is clear from his evidence that the 3rd respondent suffered chronic pain, not entirely eased by physiotherapy, which affected him personally and in his work. In addition to the factor, mentioned by the judge, that smoke gave him headaches, there was the additional consideration, which she did not mention, that he was affected in his "personal and sex life".

[99] In my view, therefore, ***Earle v Graham***, in which the plaintiff's permanent impairment of 6% of the whole person carried with it persistent pain and personal inconvenience, is a far more apt comparator for the purposes of assessing the reasonableness of the judge's award to the 3rd respondent. Measured against that benchmark, it cannot be said, in my view, that the amount of $2,000,000.00 was a wholly erroneous estimate of the 3rd respondent's loss.

The 4th respondent

[100] This respondent was born on 27 June 1979 and had therefore just turned 24 at the time of the accident. Upon the referral of her general practitioner, she was seen in the emergency room of the Mandeville Regional Hospital on the same day of the accident. At that time, she complained of injuries to her scalp, chest and left thigh. On examination, there was tenderness over the left anterior chest wall and a haematoma over the left occipito parietal area. Her left thigh was swollen, with decreased mobility. However, x-rays of the chest, skull, pelvis, left thigh and cervical spine were normal and she was discharged from hospital the following day.

[101] On 8 April 2005, the 1st respondent was seen by Dr Melton Douglas and complained at that time of intermittent pain in the lower back, brought about by strenuous work and sitting for long periods. Dr Douglas diagnosed chronic lumbosacral strain, contusion and myofibrosis of the left thigh muscles and strain of the manubriosternal joint. The doctor considered that her injuries, which were in keeping with the accident that she had described to him, were serious but not life threatening. Although no surgical intervention was called for, Dr Douglas thought that her symptoms could be improved by an extensive course of physical therapy, although residual symptoms were likely to persist in the long term. He considered her to be partially disabled from the injuries to her lower back and left thigh and, using the AMA guides, assessed her as having an impairment rating of 7% of the whole person.

[102] Dr Douglas re-evaluated the 4th respondent for the purpose of a final medical report on 19 May 2008. At that time, he found no weakness in her lower extremities, although she continued to complain of intermittent lower back pain. He diagnosed her at this time as suffering from chronic lumbar strain and considered that, although she had reached maximum medical recovery, she would continue to experience back pain of variable severity when subjected to strenuous work. He did not expect her condition to deteriorate significantly over the years and assessed her as having an impairment rating of 2% of the whole person.

[103] After the accident, the 4th respondent was away from work until mid September 2003 and she was not able to resume fire fighting duties until sometime in 2004. For some time after that, she found that the accident and her injuries continued to affect her mentally and physically and, whenever the bell at the station went off and she had to ride a fire unit, she would start shaking. She would also talk to the driver of the fire unit if she thought that he was driving too fast.

[104] In making an award of $1,750,000.00 to the 4th respondent for general damages, the learned trial judge took into account Dr Douglas' evidence that she had reached maximum medical recovery, but that she would nevertheless be subject to recurrent episodes of pain.

[105] Mrs Jordan supported her complaint that this award was also excessive by referring to ***Percival Green V Michael Blackford & Franklyn Minott*** (Suit No CL 1987/G284 – Harrison & Harrison, page 364). In that case, the plaintiff sustained a

fracture of the right leg, lacerations of the right knee and abrasions on both arms. His permanent impairment was assessed at 10% of the whole person and, on 17 October 1991, F A Smith J (as he then was) awarded him $80,000.00 as general damages for pain and suffering and loss of amenities. This award, Mrs Jordan told us, was worth $953,000.00 at the date of trial. Mr Manning countered with ***Donald Hartley v Norman o/c Leslie Monelal o/c Dazzie*** (Suit No CL 1994 H 185 – Khan, volume 5, page 258). In that case, the plaintiff's lower limbs were run over by a truck. Although his x rays were normal, he complained of pain to the right arm and numbness of the right knee. He was diagnosed as having sustained multiple soft tissue injuries, with some neurological involvement to the right lower limb, because of cramping from the knee. He received treatment for pain with analgesics for many years after the accident, but this would bring only temporary relief. No evidence of any permanent impairment appears in the brief report. On 19 February 1997, Cooke J (as he then was) awarded him $500,000.00 (worth $1,600,000.00 at the date of trial) for general damages and loss of amenities.

[106] On the face of it, the comparison of these two cases certainly does produce something of an anomaly. For, if the plaintiff, with a 10% whole person permanent impairment, was properly compensated in 1991 by an award worth $953,000.00 in ***Green v Blackford***, then it is possible that an award worth $1,600,000.00 to the plaintiff, with no discernible permanent impairment, in ***Hartley v Norman*** in 1997 could well have been an erroneously high estimate. But, of course, the explanation of the disparity could equally be the opposite. It regrettably seems to me that, useful as

they have proved to be to the profession and the judiciary over the last many years, the sometimes quite exiguous reports of previous – particularly the older - awards upon which reliance has to be placed in these matters do not always contain the level of detailed information about each case that would enable the court to make meaningful distinctions between particular cases.

[107] That having been said, although Dr Douglas ultimately reduced his assessment of the 4th respondent's residual permanent impairment from 7% to 2% of the whole person, it seems clear that that only came after a five year recovery period, during which she experienced considerable pain, which was expected to continue indefinitely. This is the evidence which the judge heard and which it was for her to assess. In these circumstances, it not having been demonstrated that she acted on some wrong principle of law, I would not disturb the learned judge's assessment.

Conclusion

[108] For all of the above reasons, I have come to the view that this appeal cannot succeed, either in relation to liability or damages. The counter-notice of appeal, to the extent that it seeks to support the judgment of the trial judge on the additional basis of his previous conviction for careless driving, must be dismissed. However, the counter-notice, in my view, succeeds in respect of the contention that the 2nd appellant's account of the accident was unbelievable, given the state of the traffic on the Exton main road at the material time.

[109] I would accordingly propose that the court make the following orders:

1. The appeal is dismissed and the judgment of N E McIntosh J given on 18 August 2008 is affirmed.
2. The counter-notice of appeal is also dismissed in part.
3. The respondents are to have the costs of the appeal, such costs to be taxed if not sooner agreed.

DUKHARAN JA

[109] I have read in draft the judgment of my brother Morrison JA and agree with his reasoning and conclusion. There is nothing I wish to add.

BROOKS JA

[110] I too have read the draft judgment of Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

MORRISON JA

ORDER

1. The appeal is dismissed and the judgment of N E McIntosh J given on 18 August 2008 is affirmed.
2. The counter-notice of appeal is also dismissed in part.

3. The respondents are to have the costs of the appeal, such costs to be taxed if not sooner agreed.