Entered

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
Civil Appeal 12/2009
(G358/2005)

BETWEEN:

RONALD SHEALY — APPELLANT

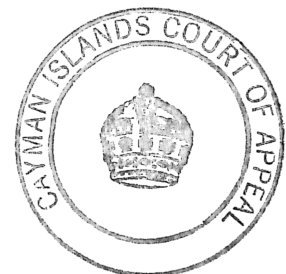
AND

RICHARD COLES — RESPONDENT

Before: The Hon. Mr. Justice Chadwick, President
The Hon. Mr. Justice Mottley, Justice of Appeal
The Hon. Mr. Justice Conteh, Justice of Appeal

Appearances: Lennox Sanguinette instructed by Marlene Smith of Murray & Westerborg for Appellant, and Hector Robinson of Mourant for Respondent.

Heard and Judgment given 19th August, 2010.
Reasons released 7th December 2010



MOTTLEY, J.A.

[1] This is an appeal by the appellant from an award of damages for personal injuries by Harrison J. following a trial in which liability was not an issue. The judge made the following award:

"47. There shall be judgment for the plaintiff as follows:

A. <u>General Damages</u>

(a) Pain and suffering and loss of amenities KYD$18,000.00

with interest thereon at the rate of 2% per annum from November 27 2002 (as agreed) to today.

B. Future Loss of Earnings

An award of USD$295,787.00

C. Special Damages

(a) Loss of earnings	US$750,118.18
(b) Travel & Medical expenses in Kingston (agreed)	USD$2,310.76
(c) Medical Expenses in Cayman and the U.K (agreed)	USD$1,856.25
(d) Medical expenses in 2006 (agreed)	KYD$74.00

with interest there on at the rate of 2.5% per annum from November 27, 2002 to today."

[2] On 16 February 2010, the appellant filed 11 Grounds of Appeal and indicated that he would seek leave to amend/clarify and/or add further Grounds of Appeal on receiving the Notes of Evidence:

1. The finding of fact by the judge that the plaintiff needs to seek ongoing medical attention was as a result of the 2002 accident (hereinafter referred to as the "relevant accident") is wrong because it was only in the year 2003 that the plaintiff attended 13 sessions of physiotherapy whereas in the subsequent years from 2004 to July 2009, there has been a

total absence of any or any significant medical attention required by the plaintiff.

2. The judge's finding of exacerbation to the plaintiff's condition by the relevant accident which had the effect of reducing his ability to work for the number of hours which he usually did was wrong and cannot be supported by the medical evidence which, if properly interpreted and understood would result in a nil and/or very little impact on the plaintiff's ability to work at his usual 4 hours per day.

3. The judge having accepted both Dr. Quartly's and Mr. Dundas' prognoses erred in coming to the conclusion that the level of impairment as projected by Mr. Dundas as permanent partial, irreversible and being likely to remain static as a result of the relevant accident for the following reasons that:

   i. prior to the relevant accident the plaintiff's constitutional degeneration was already in progress and continued to be so as at January 2006 and is expected to continue in the future;

   ii. the exacerbation found by Dr. Quartly following the relevant accident made him no worse off;

   iii. in any event as from June 2003 Dr. Quartly anticipated as almost inevitable that the plaintiff will suffer exacerbation periodically;

iv. there were no symptoms exhibited subsequent to the relevant accident.

4. The award of US1,045,905.18 was comprised of US$750,118.18 for loss of earnings and US$295,787.00 for future loss of earnings were excessive in all the circumstances and ought not to be allowed and/or ought to be substantially reduced.

5. There was no and/or credible evidence that the loss of earnings for the years 2003 to 2009 amounted to the said award of US$750,118.18.

6. There was no and/or any sufficient medical evidence to support the award of US$295,787.00 for future loss of earnings.

7. The finding of fact by the judge that the exacerbation sustained by the plaintiff as a result of the relevant accident was responsible both for the plaintiff's loss of earnings and future loss of earnings was wrong because:

   the judge failed to take into account Mr. Dundas' prognosis, with which Dr. Quartly agreed, that there is no aspect of the plaintiff's job which cannot be done successfully in his present status. The plaintiff might be limited in the freedom with which he exercises certain activities and movements of his neck, however these restrictions would not constitute an absolute prohibition from pursuing his activities.

8. That there was and/or insufficient medical evidence to support a finding that the plaintiff's working hours were reduced by 1 ½ hours per day from and around January 2003 to the date of assessment in July 2009.

9. The judge erred in law as to the required standard of proof in a claim for Special Damages and particular the plaintiff's claim for loss earnings and future loss of earnings by relying principally on the plaintiff's training and experience in the preparation of profit and loss statements instead of the accounting "QuickBooks" programme, which would have produced all relevant data and materials to verify the Bank Statements and profit and loss statements.

10. The judge's acceptance of counsel for the plaintiff's submission that it was only reasonable to expect that the plaintiff did not keep a rigid schedule of work whether before or after the relevant accident was plainly wrong since such a finding can only be inferred from the evidence in the case, of which there was none, and the circumstances of the case, which was unlike those cases where the Court at times take Judicial Notice of the fact that strict accounts are not necessarily required in all occupations, for example persons in the vending of market produce, small roadside vendors, self employed persons who carry on a trade such as plumbing and laboring.

11. The judge having found as a fact that there were disparities in the figures between the plaintiff's profit and loss statements and those arrived at by the Defence was wrong to accept the plaintiff's explanation that some of the items that were contained in the bank statements did not relate to the law practice since those items which did not relate to the law practice were left out of the calculation when comparing the income from the profit and loss statements to those admitted as income on the bank statements for the years 2002 to 2008, which revealed a higher income than those produced by the profit and loss statements."

[3] In spite of the many grounds of appeal which were filed, counsel for the appellant identified two issues which required consideration by this Court. These were stated as being:

i) did the admitted exacerbation cause any or any diminution in the respondent's earnings?

ii) did the respondent prove his loss of earnings and future loss of earnings, if any, as required by the standard of proof in accordance with the law?

History

[4] On 27 November 2002 the respondent, an attorney-at-law and a former Attorney General of the Cayman Islands, was injured in an accident at the intersection of West Bay and the entrance to the Shopping Plaza at West Shore

Centre. The appellant admitted responsibility for the accident. The sole issue at trial was the quantum of damages. Many of the heads of damages were agreed. The live issues at trial were the respondent's past and future loss of earnings and the interest payable on special damages.

[5] The day following the accident the respondent, who was born on 3 March 1947, consulted Dr. Addleson. The respondent was treated with Brisiaflam and was required to have x-rays. After returning to Dr. Addleson with the x-rays, the respondent was ordered to undergo a course of physio therapy which was administered on 2, 6 and 13 December 2002. On 6 January 2003, the respondent consulted Dr. Frank Smith who subsequently referred him to Dr. Caroline Quartly, Assistant Clinical Professor of Medicine, McMaster University. He was seen by Dr. Quartly on 19 February 2003.

[6] At the time of examination by Dr. Quartly, the respondent complained inter alia of a constant ache in his neck which varied in intensity. His most intense discomfort was experienced at the border the sub-occipital area and the cervicothoracic junction. His capacity to sit, particularly with his neck flexed, was markedly restricted so that he could not read for more than 20 minutes at any given period. He experienced increased discomfort while watching television.

[7] On examination, the doctor found that the range of movement of the neck was moderately restricted in all directions. The doctor noted that the respondent has a long neck with forward head and protracted shoulders. Range

of forward flexion was limited to 35° with decreased in intervertebral movement was noted. Extension of the neck at 25° caused increased discomfort C5-6. Side flexion of the neck to the right at 25° produced right para-cervical maximum pain at C5 and left upper cervical discomfort at C2-3. Flexion to the left side at 30° produced increased para-cervical pain on the right side. Rotation of the neck to the right at 45° caused increased discomfort on the right side at C5. Rotation to the left at 65° also caused increased discomfort at C5. The doctor found localized tenderness on palpation of the neck when the respondent was lying in a prone position. This tenderness was most pronounced at C5-6 and C6-7 zygapophyseal joints on both sides. The C1-2 and C2-3 zygapophyseal joins were extremely tender. While the joints were stiffer on left side they were more tender on right. Dr. Quartly concluded that, having regard to the angle of the impact, the respondent was lucky that he was not more symptomatic and restricted given his previous history of neck injury with known spondylitic changes and his long neck. The doctor considered that the respondent's long neck made him biomechanically disadvantaged to sustain ligamentous injuries. She indicated that the presence of pre-existing spondylitic changes in whiplash-type injuries is associated with a more protracted course of recovery.

[8] The respondent was involved in a previous motor vehicular accident in 1999. In a report dated 23 February 1999, Dr. Quartly was of the opinion that the respondent sustained a significant blow to his neck. He was expected to make slow but steady progress in recovering from his injuries but however was considered at risk of developing traumatic arthritis. In a report dated 6 March 2000, Dr. Quartly noted that the MRI performed on the respondent showed

changes within the substance of the vertebral body and disc and bony changes at C6-7 and to a lesser extent C5-6.

[9] X-rays of cervical spine done in April 2003 showed that the degenerative changes had progressed with marked narrowing and spondylitic changes most evident at C5-6 and C6-7. A further significant posterior projection of the osteophytes at C6-7 was noted with a marked reduction in cervical lordosis and definite reduction in ability to flex and extend the neck with minor retrolisthesis at 4, 5 and 6. Disc space narrowing, spondylotic changes and zygapophyseal joint degenerative changes were also seen on x-rays. Dr. Quartly found that the range of movement of the respondent's neck was unchanged in forward flexion. While extension of the neck had improved from 25 to 50° and was not symptomatic, rotation to the right had decreased from 45 to 40° and to the left from 65 to 60°. In respect of side flexion to the right it had decreased from 25° to 20°. Rotation on the left remained at 30°. Dr. Quartly recommended to the respondent that when his symptoms were exacerbated, which she expected, he should seek early physiotherapeutic intervention to stop the progression of pain, spasm and sleepless nights. In an addendum to her report dated 15 June 2003 Dr. Quartly set out the symptoms which she considered would be of concern to the respondent should they occur in the future. The doctor indicated it was possible that the respondent could develop progressive narrowing of the spinal canal and/or intervertebral foramen. If this occurred and the cord becomes compressed, the respondent would have symptoms which might include:

(i) loss of balance;

(ii) a change in urinary frequency;

(iii) stiffness in the muscles of his legs relating to a change in muscle tone; and

(iv) progressive numbness in lower extremities.

[10] The respondent was again seen by Dr. Quartly on 10 January 2006. On examination Dr. Quartly found that the range of movement of his neck remained remarkably limited. Extension of the neck had decreased from 50° and was now limited to 32° causing the respondent to experience a sense of unsteadiness and disorientation. Forward flexion had decreased from 35 to 30°. Rotation of the neck to the right remained limited to 40° while to the left it was reduced to 52°. Flexion to the right was limited to 18° and to the left to 25°. The flexion to the left however was accompanied by a significant pulling sensation in the right paracervical area. Dr. Quartly expressed the opinion that "the restriction in mobility in your cervical spine is contributing to vulnerability of the vertebral arteries, as they follow their circuitous route into the base of the skull, so that when you extend the neck, you are getting compression of the vertebral arteries at this site".

[11] In 2006, at the request of the appellant, the respondent was examined by Mr. Dundas FRCS, Consultant Orthopedic Surgeon in Jamaica. At the time of the examination, the respondent complained that he had "neck ache" which interfered with his sleep causing him become awake four to five times in the course of the night. On turning in bed, he experienced pain. Tablets did not give him any good relief. He has abandoned his activities as a scuba diver. Examination by Mr. Dundas revealed that the respondent held his neck erect.

He had tenderness at the lateral masses at C5, C6, C7 bilaterally and in the apex of the posterior triangle of the neck on the right side. The following range of motion was found:

(i) right rotation 52°,

(ii) left rotation 54°,

(iii) right lateral bending 30°,

(iv) left lateral bending 38°,

(v) extension 34°, and

(vi) flexion 26°

The consultant made a diagnosis of cervical strain and recommended that the respondent undergo a dynamic cervical spine x-ray and a MRI scan to rule out the possibility of cervical disc prostration. The MRI on the cervical spine was performed on 20 March 2006 at Medical MRI Services (Ja) Ltd. in Jamaica. As a result of the MRI, Mr. Dundas formed the impression that the respondent had a small broad-based central disc herniation at C5-C6 and C6-C7 which indented the ventral thecal sac.

[12] It appears that a series of specific questions were posed by the Branch Manager of Motor and General Insurance Company Ltd., the insurers of the appellant to Mr. Dundas. While these questions do not appear in the Record, the responses are set out in the Report from Mr. Dundas. He stated, inter alia, that he made a diagnosis of degenerative disc disease at C5/6 and C6/7 and a super imposed compression injury of C5 and C6. X-rays supported the clinical findings of the consultant which were set out in his report of dated 20 February 2006. The Orthopaedic specialist formed "the impression that pre-existing

degenerative disease had contributed to the level of impairment which is now exhibited by Mr. Coles. He went on to point out that it is very difficult in the absence of a prior record of restricted range of motion, to decide the extent of the contribution of the injury, which he suffered. He concluded that there are "many people with degenerative changes in their cervical spine who do not exhibit significant range of motion loss". Mr. Dundas was of the view that the respondent will be able to pursue his practice as an attorney-at-law successfully even in his present condition. He however recognized that his freedom might be limited in performing certain activities and movement of his neck. These restrictions were not expected to constitute an absolute prohibition from pursuing his activities. The consultant recommended that, in order to avoid sustained neck flexion and, in an effort to assist in relieving pain so that he could complete his daily routines, the respondent should make adjustments to his furniture and the general arrangements of his office. This recommendation was in keeping with what Dr. Quartly had earlier recommended in her report of March 2003. At that time, she recommended that the respondent pay "particular attention to improving the ergonomics of your home and work station". Dr Quartly also recommended that the respondent should consider working from home in order that he could punctuate periods of activity and working on the computer by resting. The doctor had urged the respondent to use a slant board and a reading stand. She specifically suggested that "a monitor on an articulated arm will allow you to protract and retract the position of the monitor to adjust in focal length". She stated that it was imperative that the respondent use a supportive chair and a speaker phone and/or headset if he was going to be on the phone for any protracted period of time.

[13] On leaving his post of Attorney General of the Cayman Islands, the respondent commenced private practice on 1 July 1999 under the name COLES, attorneys-at-law. His practice was mainly in the areas of corporate law, trust and real estate. He was a sole practitioner and shared the services of a secretary. He was required to spend several hours sitting at his desk in order to read, write and use his computer.

[14] As a result of the accident in November 2002 , the respondent developed significant limitation of movement in the neck in all directions. He suffered from constant neck pain which interferes with his sleep causing him to wake four to five times a night. As recommended by Dr. Quartly he made ergonomic changes to his work environment. He suffered persistent and significant discomfort and inconvenience. The injuries had a significant effect on his ability to work as an attorney-at-law. Pain would develop when he attempted to work for prolonged periods on the computer. This pain would in turn affect his ability to concentrate. The pain has caused him to restrict his work to an average of two or three hours per day. Prior to the accident, he had no employees and worked on his own using the computer for many hours. As a result of the accident, the hours he spent on the computer were drastically reduced. This in turn had a significant impact on his earning capacity leading to a fall in his income.

[15] The respondent stated that, following an accident in October 1998, he had difficulty working at the computer, writing and reading for sustained periods.

Between 1999 up to early in 2000 the respondent could only manage working on the computer 2 to 3 hours daily. As that injury improved, and while the respondent still experienced limitations, he was nonetheless able at least to work at the computer for some 4 hours each day. He was however required to move every 20 minutes.

[16] However, following the accident in November 2002, the hours the respondent worked daily became more restricted. It was only possible for him to work an average of 2.5 hours per day in his legal practice and this caused him a loss of 1.5 billable hours per day. He stated that his legal practice consisted of 219 working days. Generally, he took 6 weeks vacation a year. In the circumstances, the respondent concluded that he had lost a total of 328 billable hours per annum. As he billed his services at US$550.00 per hour, this translated into an annual loss of $180,140.

[17] As an alternative way of calculating his loss of earnings, the respondent produced his Profit and Loss Statements for the years prior to the accident in November 2002. He produced Profit and Loss Statements for the year 2000 to 2007 save for the year 2004 were produced. He compared the pre-accident (2002) Profit and Loss Statements with those for the years post-accident. The difference in earnings between his pre-accident (2002) Profit and Loss Statements and his post-accident Profit and Loss Statements, he indicated was his loss of earnings.

[18] The respondent explained how the Profit and Loss Statements were prepared. He used accounting software known as QuickBooks Pro. The raw

data which he used for the statements between the years 2000 to 2003 had been destroyed during Hurricane Ivan. The respondent said that he provided his attorneys-at-law with the raw data that he used for the years 2005 to 2007. In respect of the year 2004, no Profit and Loss Statement had been prepared as the raw date for that year had been destroyed by hurricane Ivan.

[19] The Profit and Loss Statement showed the respondent's net ordinary income for the year 2000 was US$145,960.70. At that time he had not fully recovered from the injury to his neck which he sustained in the previous accident in 1998. In the year 2001, the Profit and Loss Statement showed his net ordinary income was $189,879.36. In 2002, his net ordinary income was shown as US$208,983.88. In 2003, the year after the second accident in November 2002, his net ordinary income dropped to US$83,693.98. The loss of income for that year was US$125,289.90. In 2005 his ordinary net income fell even further to US$50,788.48. This was partly attributable to the fall off in activity in legal work subsequent Hurricane Ivan. His loss of income for 2005 was adjusted to US$125,289.90. The ordinary net income for 2006 was US$83,693.98. The amount of loss claimed for 2006 was $125,540.39. In 2007 the net ordinary income was US$103,560.54. The increase for that year was due to fees charged in a large Probate matter. The net loss claimed for that year was US$105,423.34. The income claimed as being lost in 2004 was US$83,526.60. The total loss of earnings claimed by the respondent in respect of the years 2003 to 2007 was US$565,070.13. This did not include loss of earnings for year 2008.

[20] Based on his past loss of earnings, the respondent claimed future loss of earnings at the rate of US$105,423.34 per annum until his normal retirement age of 65 which he will reach on 3 March 2012.

[21] In cross-examination by Mr. Sanguinette the respondent said that all payments he received were posted in the accounts together with all payments he made. It was suggested to the respondent by counsel in cross-examination that the bank statements did not show the income to match the income set out in his Profit and Loss income statements. This suggestion was however rejected by the respondent. The respondent made it clear that he was relying solely on the use of QuickBooks Pro in support of his profit and loss for his pretrial loss of earnings.

[22] The defendant called no witnesses.

Judgment

[23] In dealing with the nature and extent of the injuries sustained by the respondent, Harrison J said:

> "37. I have seen and heard the plaintiff in the witness box and it is my view that he gave his evidence in a clear and impressive manner. I found him to be both credible and reliable in his account. I accept his evidence that his need to seek ongoing medical attention was as a result of the 2002 accident. I also accept Dr. Quartly and Mr. Dundas prognoses. The level of impairment as projected by Mr.

> Dundas was "permanent, partial, irreversible" and being "likely to remain static".
>
> 38. In my judgment, I find that on a balance of probabilities, there was evidence of exacerbation of the Plaintiff's condition by the 2002 accident and this has had the effect of reducing his ability to work for the number of hours which he usually did. This has consequently affected his ability to earn in the manner which he was accustomed to. But for the 2002 accident, it is highly probable, that he would have been back to working 4 hours daily."

[24] The judge found that the respondent was credible and reliable witness. The appellant did not appeal against this finding. In addition the judge also found that the accident in November 2002 exacerbated the pre-existing condition of the respondent. He accepted that, as a result of this exacerbation, the respondent was unable the work the number of hours he had worked prior to the accident. This led to a fall in his earnings. The judge accepted that the respondent's loss of earnings was US$ 750,118.18, the amount claimed in the Amended Schedule of Damages. He assessed the respondent's future loss of earnings in the sum of $295,787.00.

The Appeal

[25] Grounds 1, 2 and 3 relate to the findings of the judge as set out in paragraphs 37 and 38 of his judgment which are set out above.

[26] In ground 1, the appellant complained about the findings by the judge that the appellant was required to seek ongoing medical attention as a result of the injury sustained in the accident in November 2002.

[27] Mr. Sanguinette took issue with this finding by the judge. He submitted that it was wrong because on the respondent's final visit to Dr. Quartly in June 2003, the doctor had advised that as Mobicox did not make any substantial difference at this point there is perhaps no need to continue taking it and recommended that he be weaned off the product slowly. In addition counsel also relied on the fact that Dr. Quartly recommended that in future topical Dicboferal Sochim and DMSO drops be used at nights as muscle relaxants to provide some symptomatic relief. Counsel however submitted that nowhere in the evidence did the respondent claim that he used that medicine.

[28] In support of this submission counsel indicated that Dr. Quartly had recommended that the respondent should continue to select healthy life style strategies to stay as fit as possible and to continue to modify his life style in order to minimize any statistic dynamic loading of the neck. Further counsel submitted that when the respondent was examined by Mr. Dundas in 2006 the respondent informed the doctor that he did not commence physiotherapy until 2003 and that course of therapy lasted over a few months and he now has physiotherapy intermittently. At the time of the examination by Mr. Dundas, as the respondent informed the doctor that he was not on medication, it was necessary therefore to ask whether the judge was right to come to the conclusion that the respondent required on going medical attention. Counsel argued that in

the circumstances it was necessary to ask whether the judge came to the right conclusion. He submitted that the answer was no.

[29] The Court does not accept this submission. Dr. Quartly indicated that she expected that from time to time the respondent's symptoms would become aggravated. She recommended that in the event of his symptoms becoming exacerbated the respondent should seek physiotherapeutic intervention sooner rather than later to obviate the progression of pain and spasm and sleepless nights.

[30] The Respondent was examined by Dr. Quartly in January 2006. At that time the doctor expressed the opinion that the restriction in mobility in his cervical spine was contributing to the vulnerability of the vertebral arteries as they followed circuitous route into the base of the skull and consequently when he extended his neck he was getting compression of the vertebral arteries in the neck. This compression the doctor had earlier indicated would cause symptoms which would include loss of balance and stiffness in the muscles of legs relating to a change in muscle tone, change in urinary frequency and progressive numbness in lower extremities.

[31] While there was no indication as to when these symptoms would manifest themselves, it was nonetheless something that the respondent was likely to suffer because of the restrictions in mobility of the cervical spine. Also in 2006, Mr. Dundas diagnosed that the respondent had degenerative disc disease at C5/6 and C6/7 with a super imposed compression injury of C5/C6.

[32] In answering specific questions posed by the insurers, Mr. Dundas expressed the view that, with the degenerative changes in the disc and the associated apophyseal joints, he did not expect a full recovery. Mr. Dundas also expressed the view that for symptomatic treatment he will be best served by periodic physiotherapy. This indicates that Mr. Dundas also expected exacerbation of the neck pain in the future. In answer to another question posed, Mr. Dundas recognized that it was possible for the respondent to develop neurological deficit which could require surgical interventions.

[33] In Ground 2, the appellant took issue with the findings that the accident in November 2002 had exacerbated the plaintiff's conditions and that this in turn led to a reduction in the hours which the respondent was capable of working. Counsel also contended that this finding was wrong and could not be supported by the medical evidence which he said, if properly interpreted and understood, would result in a nil and/or very little impact on the respondent's ability to work at his usual four hours per day.

[34] In March 2003, Dr. Quartly informed the respondent that he had to pay particular attention to improving the ergonomics of his home and work station. It was recommended that the respondent work from his home in order that he could punctuate his period of working in the computer by resting. It was also recommended that the respondent use a slant board and a reading stand. It was indicated that the respondent use a monitor on an articulated arm in order to allow him to adjust the focal length by protracting and retracting the position of

the monitor. It was also suggested that he use a supportive chair and a speaker phone and/or a headset.

[35] The need for Dr. Quartly to make these recommendations in 2003 is an acknowledgment that the accident was indeed impacting on the respondent's ability to pursue his practice as an attorney-at-law. Prolonged periods of work by the respondent would cause pain to develop in his neck. This pain affected his ability to concentrate. This restricted the respondent to working two or three hours per day. Mr. Dundas later recognized that the respondent was still able to pursue his profession as the injury did not constitute an absolute prohibition. This was a recognition that the injury, while not constituting an absolute prohibition would nonetheless impacted on his ability to work. He however did not comment on the number of hours he was able to work. This ground of appeal is consequently rejected.

[36] In Ground (iii) it is alleged that the judge having accepted the prognosis made by Dr. Quartly and Mr. Dundas came to the wrong conclusion in deciding the level of impairment as projected by Mr. Dundas as permanent partial irreversible and being likely to remain static was a result of the accident in November 2002.

[37] For this submission, counsel relied on the MRI of September 1999 which showed that the respondent had two extruded discs. Further counsel said that Dr. Quartly noted changes within the substance of the vertebral body and disc bony changes at C6-7 to a lesser extent at C5-6. Counsel said that the review of

the cervical x-rays taken on 28 November 2002 revealed a generalized loss of cervical lordosis. The lower cervical and upper thoracic vertebral are clearly visualized. He pointed out that spondylitic changes were noted. Reference was made to the respondent's previous history of neck injury with known spondylitic changes. The x-rays of the cervical spine which were taken on 8 April 2003 showed the progression of the degenerative changes which had been previously identified in the early x-rays of 28 November. In short, the appellant contended that the judge was wrong to find that the accident in November 2002 exacerbated his condition following the earlier accident in 1998.

[38] The respondent sustained injury in 1998 as a result of what the doctor described as a significant blow to his neck. At that time Dr. Quartly was of the opinion that the respondent would make a slow but steady recovery. This is supported by the evidence of the respondent who said that at the time of the accident in 2002 while he still had some limitation in respect of the hours that he was able to work, he was able nonetheless to work on the computer for 4 hours.

[39] After the accident in 1998 Dr. Quartly indicated that she expected that the respondent would develop traumatic arthritis in the neck. However, subsequent to the accident in November 2002, the doctor expressed the opinion that because of the respondent's long neck and the presence of preexisting spondylitic changes, the respondent's recovery from the whiplash injury would be protracted.

[40] In 2003 Dr. Quartly accepted that the respondent's symptoms would be exacerbated from time to time. When this occurred it was recommended that the respondent should seek physiotherapeutic intervention. In addition, it was also recognized that the respondent was at risk of developing progressive narrowing of the spinal canal or intervertebral foramen. By 2006, the range of movement in the neck "remained remarkably limited". This restriction in the mobility of the cervical spine, sometimes caused compression of the vertebral arteries in the neck when it was extended. This would contribute to the vulnerability of these arteries as they follow their circuitous route in the base of the neck. Mr. Dundas saw a super imposed compression injury of C5/C6. While he recognized that the pre-existing degenerative disease was contributing to the level of the respondent's impairment Mr. Dundas was however in the absence of prior records of the restricted range of motion, unable to say the extent of the contribution.

[41] In view of this evidence, the respondent has demonstrated that the accident of November 2008 exacerbated the cervical injury which the respondent sustained in the earlier accident.

[42] Grounds 4 through 11 all relate to the issue of Special Damages and in particular the respondent's loss of earnings up to the date of trial and to damages which he claimed in respect of future loss of earnings. It was submitted on behalf of the appellant that the respondent failed to prove his loss of earnings to the standards required by law.

[43] The evidence relating to his loss of earnings has already been set out above. Counsel for the appellant submitted that the respondent did not prove his loss as is required by law. In support of this submission, counsel relied on a number of cases.

[44] He relied heavily on **Bonham Carter v Hyde Park Hotel [1948]** 64 Law Times 177 where Lord Goddard C.J. said at p. 178:

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

[45] In that case, Lord Goddard went on to indicate that, in his view, the evidence with regard to damages was "extremely unsatisfactory". For the reasons that I will indicate below, the same thing cannot be said of the evidence of the respondent.

[46] In **Ashcroft v Curtin [1971]** 3 AllER 1208, a precision engineer who was injured in an accident was awarded £10,500 by the trial judge in respect of his financial loss. The appellant appealed against this award. Commenting on the adequacy of the proof of his loss Edmund Davies, LJ observed at p. 1210:

> "Although he was skilful at the bench, he was no man at keeping accounts. Such records as he kept were of a rudimentary kind, and much of the difficulty which has confronted not only him but also

his judges arises from the absence of proper and adequate business records. This led Donaldson J to say:

> 'The accounts are largely unreliable. That I am quite satisfied about. It is not the fault of the accountants. It is the fault of the fact that this was a one-man business'

I hope it not unkind to say that the claim for financial loss has been based on shifting sands."

[47] **Grant v Motilal Moonan Ltd. & Another [1988]** 43 WIR 372, Chief Justice Bernard in the Court of Appeal in Trinidad & Tobago, observed at p. 377:

> "I quite agree that special damages, if sought, must be pleaded and particularized (see **Ilkin v Samuels [1963]** 2 ALLER 879) and that it must be "strictly" proved. In regard to the latter requirement the question which necessarily arises, in my view, is what is the degree of this "strictness" that is required? The nearest answer to this seems to be that which Bowen L.J. gave in the leading case **Ratcliff v Evans** [1892] 2 QB where he said at pages 532, 533:
>
> > "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated *and proved*. As much certainty and particularity must be insisted on both in pleadings and *proof* of damage, *as*

> *is reasonable, having regard to the circumstances* and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry (emphasis supplied)"

[48] In **Sookoo & Another v Ramnarace Randath [2001]** 61 WIR 400 Chief Justice de la Bastide, in the Court of Appeal in Trinidad and Tobago observed at p. 404:

> "The sort of evidence which a Court should insist on having before venturing to quantify damages, will vary according to the nature of which the item in respect of which the claim is made and the difficulty or ease with which proper evidence of value might be obtained."

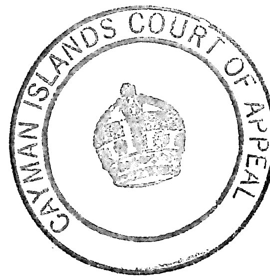
[49] The respondent in his evidence indicated that after the accident in 1998 and after the accident in 2002, he was able to work as an attorney-at-law for 4 hours each day. He was a sole legal practitioner who relied heavily on the use of computer. However after the accident in November 2002 he was only able to work for 2 hours each day. The appellant called no evidence to rebut this evidence.

[50] The respondent explained how he kept his Profit and Loss Statements. This statement had been disclosed to the appellant in the pre trial disclosure.

[51] This was not a case of throwing figures at the Court. The raw data on which the statements were based had been given to the respondent's attorney-at-law and would have been disclosed to Counsel prior to trial and available for inspection by counsel for the appellant. There was no request for inspection of that material. The respondent gave evidence as to his loss of earnings. It is accepted that the burden of proving the loss was on the respondent. He gave evidence of his loss of earnings and, while he was cross-examined on his level of those earnings, the respondent was not in any way discredited. Indeed in his judgment the judge stated that he found the respondent to be a creditable and reliable witness. This finding was not challenged by the appellant.

[52] It was for these reasons that I considered the appeal should be dismissed.

Justice Mottley JA



Sir John Chadwick P

I agree.

Justice Conteh JA

I also agree.