COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2006

BETWEEN:

EMANUEL ROCK

Appellant

and

THERESA JOLLY

Respondent

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal
The Hon. Mrs. Dancia Penn, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Michael Bruney for the Appellant
Mr. McDonald Christopher for the Respondent

2007: April 17;
May 17.

JUDGMENT

[1] RAWLINS, J.A.: The respondent, Ms. Jolly, was a part-time cook at the Roxy Mountain Lodge. She claimed damages for intentional assault and battery from the appellant, Mr. Rock who was her employer at the Lodge. She claimed that on 11th May 2002, while she was in the kitchen at the Lodge, Mr. Rock entered the kitchen and struck her a severe blow at the back of her neck with a broom stick. According to Ms. Jolly, Mr. Rock alleged that she had left a cutlass on the floor of the kitchen although he had warned her not to do so. He also cursed her using the "f" word. She left her employment at the Lodge immediately after the incident.

[2] In defence, Mr. Rock said that Ms. Jolly was accidentally hit when he went into the kitchen to fetch a broom. There were 2 cutlasses on the floor. The floor was wet.

He fell when he tried to avoid stepping on the cutlasses and the broom was knocked over hitting her in the process. He told her that he was sorry, but she uttered some indecent words, took off her apron and left the Lodge.

[3] The trial judge found Mr. Rock liable, but did not assess damages. He ordered him to pay Ms. Jolly damages to be assessed if not agreed and $3,000.00 costs. The judge also directed that for the purpose of bringing up the matter for an assessment hearing an application should be made and, in that event, Ms. Jolly should file affidavit evidence and exhibits. The judge gave Mr. Rock liberty to file affidavit evidence in reply.

[4] During the trial, the judge admitted the evidence of Police Constable Martin Walters of the C.I.D. The Constable stated that Mr. Rock was convicted in his absence in the Magistrate's Court in April 2003 for the battery of Ms. Jolly. He was fined $2,000.00.[1] In permitting this evidence to be adduced, the learned judge applied the case Hunter v Constable of West Midlands and Another.[2] The judge also admitted the evidence of Dr. Julian De Armas, the medical doctor who examined Ms. Jolly. However, the judge confined the doctor's evidence to the findings which the doctor made when he examined Ms. Jolly on 19th May 2002. This was some 8 days after the incident at the Lodge. The judge did not permit the doctor to state his opinion on that evidence because solicitors for Ms. Jolly had not complied with Part 32 of the Eastern Caribbean Supreme Court Civil Procedure Rules[3] which governs the admissibility of expert evidence.

[5] The learned judge stated his reasons for decision in the judgment as follows:[4]

> "[8] After having considered the evidence before me in its totality, I am more impressed with the Claimant's story than with the Defendant's. The Claimant and the Defendant knew each other very well and lived in the same area. The Claimant testified that she knew the Defendant from the time she was a young girl. From all appearances, the Defendant was

[1] See paragraphs 3 and 4 of the judgment.
[2] [1981] 3 All E.R 727.
[3] Hereinafter referred to as "CPR 2000".
[4] In paragraph 8 of the judgment.

> much older than the Claimant. I believe that he struck her on a previous occasion and that she did nothing about it. I also find that he threatened to lash her on another occasion subsequent to that and that on the day in question he struck her without threat. Alas, he had done it once too often and it resulted in his conviction and in this civil action being brought against him."

The grounds of appeal

[6] Mr. Rock appealed on 6 grounds. Grounds 1, 2 and 6 seek to impeach the fact finding of the trial judge. Ground 3 states that the trial judge wrongly applied the Hunter case without adequately considering the provisions of section 11(1) of the Eastern Caribbean Supreme Court (Dominica) Act[5] and section 17 of the Evidence Act.[6] Ground 4 states that the trial judge erred when he admitted the evidence of Dr. De Armas, notwithstanding that the judge had ruled that solicitors for Ms. Jolly had not complied with Part 32 of CPR 2000, which provides the procedure for presenting expert evidence. The 5th ground of appeal states that the trial judge erred in that he acted in breach of CPR 2000, in that although at the close of the trial he refused an application by Counsel for Ms. Jolly to put in exhibits to support Ms. Jolly's claim for special damages, in his judgment he nevertheless only decided liability, and then gave directions which permitted Ms. Jolly to file affidavit evidence and the same exhibits to support her claim for special damages.

[7] It would be helpful, I think, to decide, first, grounds 3 and 4. This is because a determination of the questions whether the learned trial judge erred when he admitted the evidence of Dr. De Armas, and that of Constable Martin Walters, would in turn assist in the determination whether the judge was entitled to use their evidence as he did. Additionally, if the judge's fact-finding is found to be impeached on grounds 1,2 and 6, and this court is thereby required to find the facts, a decision on grounds 3 and 4 would help this court to decide whether the

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[5] Cap. 4:02 of the revised Laws of Dominica, 1990. This Act is hereinafter referred to as "the Dominica Supreme Court Act".
[6] Cap. 64 of the Revised Laws of Dominica, 1961.

evidence of these 2 witnesses could be used in the fact finding process. Ground 5 would be considered after grounds 1, 2 and 6.

Ground 3 – The evidence of summary conviction

[8] Section 17 of the Evidence Act provides that a witness in any cause, and this would include a civil case, may be questioned as to whether he has been convicted of any criminal offence. Under section 17, if the witness either denies conviction or refuses to answer the question, the opposite party may prove the conviction by way of a copy of a summary conviction purportedly signed by the Clerk of the Court, in which that witness was convicted, or by any other officer who has custody of the records of that court.

[9] When Mr. Rock gave evidence, he was not asked whether he was convicted for committing a battery on Ms. Jolly. A witness summary was filed for Constable Walters although Section 17 of the Evidence Act does not require this to be done. It was served on 7th December 2005. There was no objection when Constable Walters was called to give evidence of Mr. Rock's conviction. Constable Walters testified that he was the investigating Officer and that he gave evidence in the summary trial in which Mr. Rock was convicted and fined for battering Ms. Jolly. He was cross-examined by Mr. Bruney, learned counsel on behalf of Mr. Rock.

[10] Since section 17 of the Evidence Act provides for the procedure in which the proof of a summary conviction may be admitted in a civil case, neither English statutes nor legal principles may be relied upon for the purpose of proving the conviction. This is because section 11(1) of the Supreme Court Act does not permit reliance on English law where a Dominica statute provides for the subject. The trial judge therefore erred when he relied upon the Hunter Case as authority for proving conviction. Further, the proof of Mr. Rock's conviction was not admitted strictly in accordance with the procedure laid down in section 17.

[11] However, in the first place, since there was no objection to the admission of the evidence of proof of the conviction at the civil trial, I do not think that the objection could now be taken. In the second place, the evidence of Constable Walters did little more than to prove the summary conviction, just as the certificate under section 17 would have done. The trial judge could not have relied on the proof of the summary conviction as proof of liability. He could only find liability on the facts presented at the trial. Although the judge sought to justify admitting the evidence of Constable Walters, he had the evidence which the parties presented in the present civil proceedings.[7] He accepted the version of the incident that Ms. Jolly gave and explained, albeit briefly, why he accepted it.[8] The judge's reference to the conviction in his reasons for decision does not show that he relied on the conviction as the basis for finding liability.[9] In the premises, I would dismiss the appeal on this ground.

Ground 4 – The doctor's evidence

[12] Mr. Bruney submitted that because of the non-compliance with Part 32 of CPR 2000, Dr. De Armas' evidence was prejudicial to Mr. Rock because it constituted hearsay in relation to the material issues between the parties. He said that it was prejudicial, in the second place, because the medical evidence does not naturally connect the battery with the injury. This, he said, was because the doctor stated no opinion that connected them, and also because there was a period of 8 days between the incident in which Ms. Jolly allegedly sustained the injury and the examination.

[13] When Dr. De Armas was called to give evidence permission was sought for him to be allowed to refresh his memory from his notes. There was no objection.[10] The doctor refreshed his memory and gave his evidence in which he stated that he

[7] This he set out at paragraphs 1, 2 and 7 of the judgment.
[8] In paragraph 8 of the judgment.
[9] See the last sentence of paragraph 8 of the judgment, which is reproduced at paragraph 5 of this judgment.
[10] See page 19 of the Record of Appeal.

examined Ms. Jolly on 19th May 2002. On examination the cervical spine was painful. Contraction of the para vertebral cervical muscle extension of the triceps and the triceptal reflex of her left arm were weak. The injury was traumatic. He treated with soft cervical collar and anti-inflammatory drugs. The doctor said that he recommended a cervical scan and referred her to Guadeloupe.

[14] When the doctor was cross-examined he said, among other things, that when he saw Ms. Jolly, she told him that she sustained a blow to the back of her head. This information usually informs a doctor of the nature of the examination which he is required to carry out and the area that should be examined. That statement does not constitute hearsay because it is made in the absence of the defendant. Neither is there hearsay because at the beginning of his written report, the doctor stated:

> "The above mentioned patient got a blow in the back of her head on 11th May, 2002. She has been complaining of pain in the cervical area since that date."

This, in my view, was simply the manner in which the doctor wrote the initial formal information in his written report, which located the place of the injury for the attention of the doctor. Additionally, the statement was not hearsay because it was not made as an assertion of its truth. There is therefore, in my view, does no basis for holding that the doctor's evidence was wrongfully admitted.

[15] On this ground of appeal, however, Mr. Bruney further submitted that since the court did not permit the doctor to state any expert opinion on the medical evidence, the doctor was unable to connect the pain complained of, any medical condition found upon his examination and the incident in which Ms. Jolly was allegedly injured. In my view, however, the judge was entitled to draw reasonable inferences from the medical evidence and it was within the bounds of reasonableness for him to have found that the injuries reported by the doctor were related to the incident in which Ms. Jolly complained that Mr. Rock injured her. In the foregoing premises, the learned judge did not err in admitting the doctor's evidence. Accordingly, I would dismiss the appeal on this ground.

Grounds 1, 2 and 6 – Impeaching the fact-finding

[16] These grounds of appeal basically assert that the trial judge fell into error with his finding of facts. Grounds 1 and 2 state that the learned trial judge erred when he failed to consider adequately, or at all, the inconsistent and conflicting evidence of Ms. Jolly, and that he also erred when he arrived at his decision on the "story" with which he was more impressed, rather than by reaching his decision by assessing the credibility and reliability of the evidence given in court as a whole. Ground 6 states that the decision was against the weight of the evidence.

[17] The legal principles which are applicable for the resolution of these complaints are well settled. In David Carol Bristol v Dr. Richardson St. Rose,[11] I stated[12] that on the authority of the judgment of the House of Lords in Benmax v Austin Motor Co., Ltd[13] and from decisions of this Court, including Francis v Boriel,[14] Grenada Electricity Services Ltd. v. Isaac Peters,[15] and Asot A. Michael v Astra Holdings Limited, Robert Cleveland and Others v Astra Holdings Limited,[16] an appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. I continued by stating that an appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appeal court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts.

[11] St. Lucia Civil Appeal No. 16 of 2005 (20th February 2006)
[12] At paragraph 13 of the judgment.
[13] [1955] 1 All E.R. 326.
[14] St. Lucia Civil Appeal No. 13 of 1995 (20th January 1997).
[15] Grenada Civil Appeal No. 10 of 2002 (28th January 2002).
[16] Antigua and Barbuda Civil Appeals Nos. 17 and 15 of 2004 (16th May 2005).

Section 32(1)(b) of the Eastern Caribbean Supreme Court (Dominica) Act empowers this Court to draw factual inferences.[17]

[18] Mr. Bruney urged this court to find that the reasons given by the trial judge for finding Mr. Rock liable on the claim are not satisfactory because he did not properly assess the evidence, overlooked inconsistencies in Ms. Jolly's evidence and drew erroneous inferences from the facts.

[19] In relation to inconsistencies, Mr. Bruney complained that in her statement of claim and in her witness statement, Ms. Jolly stated that she knew that Mr. Rock hit her intentionally and not accidentally because of his words and actions towards her before and after she was hit. He said that in cross-examination, however, she stated that Mr. Rock said nothing to her before he hit her. These statements are not inconsistent, in my view, because the statement of claim and the witness statement did not explain when Mr. Rock spoke.

[20] Learned counsel said, further, that while Ms. Jolly stated that before 11th May 2002 Mr. Rock had on occasions threatened to hit her, in cross-examination she said for the first time that he had actually hit and cuffed her on 2 previous occasions. She then changed her story in cross-examination and said that Mr. Rock hit her on the first occasion, but not on the second. Yet, said counsel, the judge concluded, in paragraph 2 of the judgment, that Mr. Rock hit Ms. Jolly on 2 occasions before 11th May 2002 and cuffed her when he first threatened her. Learned counsel submitted that the inconsistency and the sudden assertion that Mr. Rock had hit her was convenient evidence given in her attempt to disprove accident. He contended that these statements and her statement that Mr. Rock found a cutlass out of place in the kitchen; her first statement in cross-examination that there was no cutlass in the room; her subsequent admission that there were cutlasses around but not in the room where she was, followed by another statement that she

[17] Cap. 4:01 of the Revised Law of Dominica, 1990.

did not know whether any cutlasses were on the floor at the time of the incident, should have cast grave doubts on her truthfulness and reliability as a witness.

[21] In conclusion, Mr. Bruney said that the judge should have rejected Ms. Jolly's evidence with its inconsistencies instead of accepting it. The judge, he said, erred because he did not reject her evidence on this ground, and also because he did not assess the evidence, choosing to be impressed by the "story" rather than with the credibility and reliability of the evidence and the demeanour of the witness.

[22] The thrust of Mr. Bruney's challenge to the trial judge's fact-finding is that, in this case, in which the main evidence was given by the claimant, on the one hand, and by the defendant on the other, the fact-finding exercise should not have been conducted on the basis of which witness the court believed without a proper assessment of the facts. I think that the learned trial judge did a reasonable assessment of the facts. However, even if his assessment fell short of that which was reasonable, this is a case, the facts of which are simple. Mr. Rock did not deny that he caused the broom to hit Ms. Jolly. His defence was that it happened accidentally. Ms. Jolly's evidence was that he hit her deliberately. Her evidence that he hit her at the back of her head is credible because there was no suggestion that she was hit in any other area of the body. The doctor's evidence described the nature of the injury for which he treated her. Although he was not permitted to state an opinion as to whether the injury could have been sustained in the manner in which Ms. Jolly said that she sustained it, the judge was, as this court is, in assessing the facts entitled to draw reasonable inferences from them.

[23] It is noteworthy that it was not suggested to Ms. Jolly that she sustained the injury for which she was treated by the doctor in an incident other than that in which she alleged that Mr. Rock battered her on 11th May 2002. I therefore think that notwithstanding that the doctor examined her 8 days after that incident, the compelling inference is that she sustained the injury when Mr. Rock hit her in the manner in which she explained it in her evidence. Any inconsistency that arose in

her cross-examination was not serious enough to discredit her evidence so far as it indicated that Mr. Rock hit her deliberately thereby causing the injury. In relation to his defence of accident, therefore, it is unlikely that the hit on the back of Ms. Jolly's head was caused by a broom that fell in the manner in which Mr. Rock explained it. In my view his defence fails, and, therefore, Ms. Jolly proved her case that Mr. Rock deliberately struck her with the broom at the back of her head on a balance of probabilities. I would therefore dismiss the appeal on this ground.

Ground 5

[24] Rule 8.9(5) of CPR 2000 is under the rubric "special requirements applying to claims for personal injuries". It states:

> "The claimant must include in, or attach to the claim form or statement of claim a schedule of any special damages claimed."

[25] Mr. Bruney complained that solicitors for Ms. Jolly breached this sub-rule by not properly claiming special damages and presenting proof of special damages during the trial. He submitted that the judge's decision to determine liability only, directing Ms. Jolly to file further evidence and exhibits for the assessment of damages was intended to cure the non-compliance with the sub-rule.

[26] The record shows that at the end of the trial, Mr. Bruney informed the judge that he intended to rely on rule 8.9(5) in relation to the issue of special damages. The record also shows, in paragraph 17 of the statement of claim, that Ms. Jolly purported to claim special damages as follows:

> "(a) Loss of income.
> (b) Medical expenses
> (Details to be supplied when value is known)"

[27] The statement of claim is dated August 2004. The claim was instituted in that year. On 16th October 2005, Ms Jolly filed a document headed "Part 8.9(5) CLAIMANT'S SCHEDULE OF SPECIAL DAMAGES AS AT 15th October 2005". It

contains 8 items of special damages for the total sum of $10,891.75.[18] In her witness statement, Ms. Jolly claims this sum as loss of income and medical expenses. Her solicitors must have thought that this schedule complied with rule 8.9(5) of CPR 2000. However, Mr. Bruney submitted that there is no authority that permits the court to take notice of the schedule. In my view, since the statement of claim stated that the details of special damages were to be supplied when the value was known, and the schedule which supplied the value was filed and served in good time, Mr. Rock had notice of the details of the quantum of special damages and suffered no prejudice by the filing of the schedule.

[28] However, the wider question which Mr. Bruney raised under this ground of appeal, as I understand it, was whether there is authority which permitted the judge to issue the directions for a separate assessment hearing after the trial, when there was no prior bifurcating order. Mr. Bruney contended, in effect, that the trial proceeded and the evidence was given therein with the understanding that liability and damages would have been determined after the trial without a split hearing. He complained that there were already lengthy delays in the case. I think that the judgment of this court in St. Kitts Development Corporation v Golfview Development Limited and Another[19] could helpfully elucidate this issue.

St. Kitts Development v Golfview

[29] After the trial in this case, the learned trial judge awarded damages for breach of contract to Golfview on their counterclaim and scheduled the assessment to determine the quantum for a later date, expressly on the evidence already adduced at the trial. The court ordered counsel for the parties to file written submissions for the purpose of the assessment. Shortly before the assessment, solicitors for Golfview unilaterally filed witness statements to which they attached

[18] See pages 59-60 of the Record of Appeal.
[19] St. Kitts Civil Appeal No. 15 of 2004 (31st March 2005).

documents that were not previously filed in the proceedings. The trial judge refused to rely on them in the assessment. Golfview appealed.

[30] For the purpose of the appeal, counsel for Golfview contended that by scheduling a separate assessment hearing, the judge had, in effect, ordered a separate trial on the issue of quantum. They contended that the trial judge erred because he did not appreciate that an assessment of damages is a process in the nature of a trial in which witnesses must be called to give evidence. This, said counsel, required the judge to give directions under Part 16.4 of CPR 2000 for witness statements to be filed. The judge, they said, should have given directions for disclosure of documents and for the service of witness statements and expert reports for the assessment. They justified their unilateral filing of the documents on the ground that they had acted proactively to facilitate the assessment.

[31] In response, counsel for the respondent Corporation insisted that the learned judge was correct, for 4 reasons, in his decision not to rely on the documents which Golfview filed. The first reason was that the court did not make an order to bifurcate the hearing to have separate trials on the issues of liability and damages. Additionally, solicitors for Golfview did not apply for a separate trial of these issues. The second reason was that Golfview did not advance any evidence of special circumstances to justify separate trials on the issues of liability and damages.

[32] The third reason advanced by the respondent corporation was that the case had undergone significant case management before the trial. A number of case management orders were issued. The final pre-trial order directed the parties to file witness statements and documents, which were to be exchanged before the trial. Counsel for the Corporation observed that this direction was in keeping with rule 28.13(1) of CPR 2000, which provides that a party who fails to disclose documents by the date ordered, or who fails to permit inspection, may not produce those documents at the trial. Counsel for the Corporation stated that the further

documents which Golfview sought to produce for the assessment were available before disclosure closed. He insisted that Golfview could not bring in those documents that it did not disclose during the disclosure process without an order of the court.

[33] The fourth reason, which counsel for the respondent Corporation raised, was that Golfview was inviting this Court to disturb a discretionary order of the trial judge. Learned counsel contended that the questions raised by Golfview's appeal revolve around the control of evidence, which is within the purview of the trial judge. It is instructive that rule 29.1 of CPR 2000 provides that the court may control the evidence that is to be given at a trial or hearing, by giving appropriate directions as to the issues on which it required evidence and the way in which the matter was to be proved.

[34] Counsel for the respondent Corporation insisted that, in relation to the fourth reason, Golfview failed to show that the decision by the trial judge, in his discretion to control the evidence, to place no reliance upon the unilaterally filed documents, was clearly wrong or exceeded the judge's discretionary remit. He cited as authority the statement of principle by Brooke LJ in Tanfern Ltd. v Cameron-McDonald,[20] which was quoted with approval by this Court in Bank of Antigua v Williams [21] and in Peters v Superintendent of Prisons.[22]

[35] The principle, which Brooke LJ stated in Tanfern Ltd. was in fact adopted from the statement that Lord Fraser made in G v G [1985] 2 All E.R. 225, at page 229. It states:

> "… the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[20] [2000] 2 All E.R. 801, at paragraphs 31 and 32.
[21] [2003] E.C.S.C.J. No. 58, Civil Appeal No. 23 of 2001 paragraph 28.
[22] [2000] E.C.S.C.J No. 36, Civil Appeal No. 9 of 1999.

[36] I shall reproduce, fully, my reasoning and conclusion in St. Kitts Development Corporation, particularly because I referred counsel to this case during the hearing, without properly adverting to its possible effect. I stated in the case:[23]

> "[22] The view that learned Counsel for Golfview holds that the Order for assessment is, in effect, another trial on the issue of quantum reflects an opinion that he holds regarding the nature of the assessment hearing. His focus is on the trial aspect of an assessment hearing. It is not an erroneous opinion because there are instances in which an assessment of damages is conducted as a hearing to determine the amount that is to be awarded in monetary terms. However, this opinion does not go to the core of the difficulty that occasions this appeal. In my view, the question is one of procedure and discretion. [23] In this case, no application was brought or Order made for a separate trial of the issues of liability and damages. Directions were given during the case management process for disclosure, inspection, the filing of evidence in chief by way of witness statements and the filing of documents to be used at the trial. In the absence of a bifurcating Order, these directions were for the purpose of the trial of both issues. There was a trial over 9 days. Evidence was adduced on both issues. By way of a post trial suggestion that was contained in its written submissions, Golfview asked the Court to determine liability and then set a date for assessment. The Court agreed. Golfview did not ask the Court to direct the parties to file witness statements."

[37] The judgment continued:[24]

> "[24] Golfview proceeded to serve witness statements on the Corporation on the day before the re-scheduled assessment. Its Solicitors attached a number of documents to the statements that were not disclosed during the disclosure process. The Corporation had no opportunity to serve and file witness statements of its own. In effect, contrary to the purpose of the Rules, Golfview took the procedural process out of the Court's purview. It also did so in a manner that left the Corporation at a disadvantage. The overriding objective of the Rules stated in Part 1 does not contemplate this. [25] In my view, Part 16.4 of the Rules does not assist Golfview. Part 16.4(2) confers discretion upon the Court to give directions for the trial of the issue of quantum either at a case management conference, on the hearing of an application for summary judgment, or at the trial of a claim or of an issue. Part 16.4(3) makes it mandatory for the Court to exercise the powers of a case management conference if it gives directions for the trial of the issue of quantum. In particular, the Court may give directions for disclosure under Part 28 of the Rules. It may also direct the parties to

[23] In paragraphs 22 and 23 of the judgment.
[24] At paragraphs 24 to 26.

> file and serve witness statements under Part 29 or expert reports under Part 32. [26] Counsel for Golfview submits, correctly, that Part 16.4 applies where the Court makes a direction for the separate trial of the issue of quantum. The Court gave no such direction. It scheduled a date for assessment at the behest of Golfview."

[38] The judgment concluded as follows on this issue:[25]

> "[27] It was not within the purview of Golfview to file and serve witness statements with documents exhibited thereto, unilaterally. The trial Judge, within whose control the evidentiary process lies, is satisfied that the evidence that is needed for the assessment was already adduced by way of witness statements and oral evidence during the trial and the disclosure process. His view is that it is not necessary to adduce new evidence for the assessment. This is within his discretion under Part 29.1 of the Rules. [28] There is nothing that indicates that the learned trial Judge exercised his discretion wrongfully or unjustly. The case was already extensively case managed and disclosure made that should have related and in fact did relate to liability as well as damages because there was no bifurcation of these issues. There was a long trial in which evidence was taken that goes to both issues. During the assessment, the learned trial Judge will no doubt indicate to the parties what assistance they might render in that process. In these circumstances, there is no ground on which this Court will interfere with his decision."

Did the judge err?

[39] It could be deduced from the foregoing statements that it is desirable that, where no prior bifurcating order was made, liability and quantum of damages should be determined after one trial and in a single judgment or order. Notwithstanding that it lies within the discretion of a judge, a bifurcating order with directions to the parties to file additional evidence for a separate assessment hearing should very rarely be made at a stage as late in the process as was done in the present case. Such an order should not be made where a party would suffer prejudice thereby.

[40] In the light of rule 28.13(1) of CPR 2000,[26] Mr. Bruney's concern that the learned trial judge made the order which permits solicitors for Ms. Jolly to file further

[25] At paragraphs 27 and 28.
[26] See paragraph 32 of this judgment.

affidavit evidence and exhibits to prove special damages, after he (Mr. Bruney) said that he would have objected on the ground of non-compliance with rule 18.9(5) of CPR 2000, is understandable. However, as I opined earlier in this judgment,[27] Mr. Rock suffered no prejudice in relation to Ms. Jolly's claim for special damages because he had adequate notice of it. By extension, Mr. Rock suffers no prejudice by the judge's order, which, in effect, permitted Ms. Jolly to file evidence that might support her claim. He has already paid Ms. Jolly $2,000.00 towards her travel to Guadeloupe after Dr. De Armas referred her there for further medical attention. I would therefore dismiss the appeal on ground 5.

[41] In summary, the appeal fails and I would therefore dismiss it. Since the judge who tried the case is not available to conduct the assessment, a new trial to determine quantum only is hereby ordered. This case shall be brought up within 14 days of this judgment before a judge who shall schedule a speedy assessment hearing. The evidence should not go beyond that which was already given on quantum at the trial, except that Ms. Jolly shall file and serve the evidence, which the order of the trial judge permitted her to file, within 14 days of this judgment. Mr. Rock shall file and serve evidence in response within 14 days of service on him. None of the exceptional circumstances stated in rule 64.6 of CPR 2000 exists to permit a departure from the general rule that a successful party is entitled to costs. Mr. Rock is therefore ordered to pay to Ms. Jolly two-thirds of prescribed costs to be quantified after damages are assessed.

Hugh A. Rawlins
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Dancia Penn, QC
Justice of Appeal [Ag.]

[27] At paragraph 27 of this judgment.