

PELTER v. THE UNIVERSITY OF THE WEST INDIES

[COURT OF APPEAL - CIVIL APPEAL NO. 3 OF 1993

(Husbands, Smith and Moe, JJ.A.) November 15, 16, 1993;

January 6, February 14, April 27, 1994]

(1994) 30 Barb. L.R. 169

Damages - *Negligence - Breach of duty - Quantum.*

Negligence - *Duty of care - Spillage of noxious substance in laboratory - Malfunction of fume hood - Inhalation of fumes by plaintiff - Bronchial asthmatic attack - Allergic reaction to certain scents - Social activities and domestic chores curtailed - Impossible for victim to use substances with strong organic odours - Whether defendant owed plaintiff duty of care - Whether defendant's negligence in failing to maintain fume hood in proper condition caused or resulted in the injury sustained and complained of.*

Jurisdiction - *Court of Appeal - Admission of fresh evidence.*

Practice and procedure - *Pleadings - Pleadings assumed to manifest the true substantive merits of a party's case - Party fettered by pleadings unless amendment obtained.*

Facts: The plaintiff/appellant was employed by the defendant/respondent as a Chemistry lecturer in the Department of Chemistry. On November 17, 1986, the plaintiff/appellant entered the laboratory to conduct a class with about 20 students. She stated that soon thereafter, she detected the strong, pungent scent of glacial acetic acid which had spilled on the floor near to where her desk was located. The plaintiff/appellant reported that her nose itched and her eyes became watery. She activated the switch to the fume hood, which should have extracted some of the fumes from the area, but it was not working. She became ill and was granted sick leave. Some months after her return to work she suffered a bronchial, asthmatic attack and she was affected by the fumes of substances with strong organic odours and became quite ill as a result. The plaintiff/appellant was diagnosed as being at considerable risk, on the basis of the number of substances that would affect her condition. Her social life was considerably impaired, and she was forced to employ someone to help with some of her household duties. She sued for damages for negligence or breach of statutory duty of the defendant, its servants or agents.

At first instance the judge held that the defendant/respondent was negligent when it failed to maintain the fume hood in its Physical Chemistry Laboratory in a proper condition, and thereby

exposed the plaintiff/appellant to the risk of injury which reasonably ought to have been foreseen. He also held that the plaintiff/appellant's hyperactive bronchospastic disease was induced by the inhalation of the fumes of the acid and that strong odours and volatile chemicals would perpetuate attacks of great discomfort and pain. He awarded her \$57,893.48 for injury, loss and damage.

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The plaintiff/appellant appealed against the quantum. The defendant/respondent cross-appealed against the decision as to its liability for the plaintiff/appellant's injury and loss and alternatively, against the quantum awarded. The plaintiff/appellant sought leave to adduce fresh evidence on the ground that the basis on which the parties and the trial judge proceeded had been so falsified by subsequent events that it would be an affront to common sense and/or a sense of justice not to allow this evidence.

Held: (i) The injury complained of by the plaintiff/appellant resulted from her inhaling fumes which emanated from glacial acetic acid which had spilled on the floor of the defendant/respondent's laboratory. According to the evidence, a functioning fume hood could not have extracted the fumes which emanated from the acid on the floor. The failure of the defendant/respondent to clean up the spillage with dispatch after the incident did not fall within the particulars of negligence which the plaintiff/appellant placed before the judge as the case she had against the defendant/respondent. Consequently, the learned judge's conclusion that the negligence of the University of the West Indies resulted in the injury complained of could not be upheld, and issues as to the quantum of damages did not arise;

(ii) the authorities show clearly that the court is given a general discretion to admit evidence of matters which had occurred since the date of the trial or judgment, but the jurisdiction must be sparingly exercised having regard to the principle that there should be finality in judgment. In making his award the learned judge made allowance for the uncertainty of changed circumstances in the future. Therefore, in the exercise of the court's discretion it would not accede to the application;

(iii) if the court could have found in favour of the plaintiff/appellant it would have upheld the judge's award of \$10,000 for loss of earning capacity and \$7,000 for future domestic assistance. However, the appellant would not have been entitled to an award in damages for medical and other expenses incurred in the period between trial and judgment, since they were not the direct consequence of the breach complained of, and would have had to be specially pleaded;

(iv) with reference to the application by the plaintiff/appellant to adduce fresh evidence, the trial judge, in considering his award, made allowance for the uncertainty of changed circumstances in the future.

Appeal dismissed. Judgment for the defendant/respondent.

Cases referred to:

Benmax v. Austin Motor Co. Ltd. [1955] 1 All E.R. 326.

Bonnington Castings Ltd. v. Wardlaw [1956] 1 All E.R. 615.

Chan Wai Tong v. Li Ping Sum [1985] A.C. 396.

Foster v. Tyne and Wear County Council [1986] 1 All E.R. 567.

Hunt v. Severs [1993] 4 All E.R. 180.

Moeliker v. A. Reyrolle & Co. Ltd. [1977] 1 All E.R. 9. [170]

Mulholland v. Mitchell [1971] 1 All E.R. 307.

Stroms Braks Atire Bolag v. Hutchinson [1905] A.C. 515.

Statute referred to:

Supreme Court of Judicature Act, Cap. 117A, ss. 3 and 15.

Rules of the Supreme Court of England, O. 59, r. 10(2).

MOE: J.A. The appellant, a chemist and Senior Lecturer in the Department of Chemistry at the Cave Hill Campus of the University of the West Indies appeals against a judgment awarding her \$57,893.48 damages for injury, loss and damage which she claimed she sustained as a result of the negligence and/or breach of statutory duty of the University, the respondent, its servants or agents. The respondent has cross appealed against the decision as to its liability for the appellants' injury and loss; alternatively against the quantum awarded.

The appellant averred in her statement of claim that sometime on or about November 17, 1986 she was pursuing her duties as Chemistry Lecturer when on entering the respondent's chemistry lab, she suddenly and without notice encountered and inhaled dangerous and noxious fumes of glacial acetic acid which resulted in severe personal injury and damage to her bronchial tubes. The particulars of injuries given were:

- (a) acute bronchial irritation with persistent cough; intense chest pains and discomfort associated with shortness of breath.

The respondent denied any negligence or breach of statutory duty on its part and averred that the appellant's injuries were caused or contributed to by her own negligence.

Evidence given by the plaintiff/appellant is that on the material date she arrived at 1 o'clock, walked into the lab and her colleague left. She looked at the students, walked around the room and then went to her desk which was about 15 - 20 feet from the door. She then sensed a strong pungent smell of glacial acetic acid. It came from her left. She asked the students if they were doing a certain experiment and two of them answered yes. She enquired whether there was an open container. They said no but pointed to the fume cupboard. In there was a small glass container. She threw the switch to the fume cupboard. It did not work. She then asked the students to flush the contents of the container down the sink which they did. By that time she was overcome by the strong odour of the acid and she therefore went outside the room.

She also gave evidence that the scent was 100% concentrated such as she had never smelled before. She was not satisfied that the fumes came from the fume hood. She found out through a letter from the Head of the Department Dr. Meek the cause of the odour. In the relevant letter admitted in evidence Dr. Meek, Head of the Department of Chemistry wrote *inter alia*: [171]

"I am not sure what safety measures could have prevented your inhalation of fumes. According to my previous information, the source of the fumes was a quantity of liquid that had been spilled on the floor in front of the fume hood. Such accidents can happen even in the most strictly supervised laboratories, and I am confident that you (as one of the staff members responsible for that particular laboratory) made sure that the spill was immediately cleaned up, and the open beaker which may have contributed to the fumes was disposed of."

The plaintiff also said that the acid was spilt about 6 feet to the right of the door and between the door and the teacher's desk. She did not see any spillage on the floor when she came in the room. She agreed that acid in the beaker could not give off such a strong smell and that if the fume hood had been working, it could not totally extract fumes from the spillage in the room.

The plaintiff/appellant had to seek medical attention. She saw Dr. Patel who referred her to Dr. Timothy Roach in December, 1986.

Dr. Roach gave evidence that in March, 1987 he diagnosed the plaintiff/appellant to be suffering from chemically induced bronchitis. He also gave a report on her dated 30th September, 1989. In that report he stated "Ms. Pelter has the clinical features of asthma. It is not possible to say whether this state is a direct result of her accidental inhalation of chemical fumes or not but continued exposure is certain to cause further irritation." At the trial he gave his opinion that she now has chronic lung disease. His evidence is -

"There is little doubt that the bronchitis was induced by exposure to the fumes in 1986. The connecting link is the fumes caused the bronchitis and this caused the chronic lung disease."

The learned trial judge found that glacial acetic acid had been spilled in the laboratory on the floor in and around the fume hood when the appellant entered the laboratory. She attempted to activate the fume hood but it failed to function as it should. The appellant inhaled fumes emanating from the acid and she sustained injuries. He stated that he was aware that the function of the fume hood could not be extended to extracting the fumes from the acid on the floor.

He further found that the respondent was negligent when it failed to maintain the fume hood in the laboratory in a proper condition and in the result the appellant sustained injuries and suffered loss and damage. He took the view that the respondent exposed the appellant to the risk of injury which reasonably should have been foreseen. He was satisfied that the appellant suffers from hyperactive bronchospastic disease, (asthma) which was induced by the inhalation of the fumes from the acid; and that strong odours and volatile chemicals will precipitate attacks of great

discomfort and pain for the plaintiff.

The appellant was awarded damages as follows:

(a) For pain and suffering and loss of amenities \$32,000.00[172]

(b) For retooling \$10,000.00

(c) Future expenses \$15,000.00

(d) Special damages agreed \$893.48

The appellant attacked the award of damages on the following grounds:

1. The learned trial judge erred in law in that the sum awarded the appellant for loss of earning capacity was inordinately low and at variance with the medical and other evidence led at the trial. In particular, the learned trial judge gave insufficient weight to:

(a) that aspect of the evidence which confirmed that the appellant would be unable to discharge her laboratory and teaching responsibilities because of her intolerance to the many chemicals which ordinarily she had to use and because too of her chronic lung condition.

(b) the adverse impact of that evidence on her earning capacity.

2. The sum awarded the appellant for future domestic assistance, that is to say, household help and gardening, was inordinately low and wrong in law in that the multiplicand was inconsistent with the evidence.

3. The learned trial judge erred in fact and in law in that the medical and other expenses incurred in the period between trial and judgment and for which there was an evidentiary basis for calculation were not reflected in the damages awarded.

The grounds of appeal argued by the respondent were:

1. The decision of the learned trial judge is against the weight of the evidence.

2. That the learned trial judge erred in law in accepting that the letter dated the 26th day of November, 1986 from Dr. T.L. Meek to Dr. H. Pelter was evidence of the facts stated therein.

3. The learned trial judge misdirected himself on the medical evidence as to the cause of the plaintiff's injury and erred in fact and in law in holding that the plaintiff's injury was caused as a result of the incident which occurred on or about the 17th day of November, 1986 as pleaded by the plaintiff. [173]

4. Having found that the function of the fume hood could not be extended to extracting the fumes from the acid on the floor the learned trial judge erred in law in awarding damages to the plaintiff for the defendant's negligence in not maintaining the fume hood in good condition.

5. The learned trial judge erred in law in awarding the appellant \$10,000.00 damages for loss of earning capacity when the evidence did not disclose that the appellant was in danger of losing her job with the respondent and would in any other way be at a disadvantage.

6. Further and in the alternative the learned trial judge erred in awarding damages for retooling when this was neither pleaded nor proved.

Liability of the University of the West Indies

The negligence of the respondent found by the learned trial judge is its failure to maintain the fume hood in its physical chemical laboratory in a proper condition. There has been no challenge to that finding and there was ample evidence before the learned judge on which he could have so found.

The crucial question in this appeal is whether the negligence found caused or resulted in the injury sustained and complained of. It is trite law that in an action for damages for negligence the onus is on the plaintiff of proving not only the negligence or breach of duty but also that that fault caused or materially contributed to the injury complained of. See *Bonnington Castings Ltd. v. Wardlaw* [1956] 1 All E.R. 615.

In the present case the evidence is that the injury complained of resulted from the plaintiff/appellant inhaling fumes which emanated from glacial acetic acid which had spilt on the floor of the defendant/respondent's laboratory. The evidence also is and the learned judge accepted that a functioning fume hood could not have extracted the fumes which emanated from the acid on the floor. It does not appear therefore that the evidence justifies the conclusion reached by the learned judge. No question of reliability of witnesses is here involved. The question is the proper conclusion to be drawn from proved facts. *Benmax v. Austin Motor Co. Ltd.* [1955] All E.R. 326 says that this court must make up its own mind with full liberty to draw its own conclusions from the proved facts. In light of the evidence and facts found we cannot uphold the learned judge's conclusion that the negligence of the University of the West Indies as found resulted in the injury complained of.

The question then arises whether there was sufficient before the learned judge on which he could find negligence (other than that found) which resulted in the injury complained of. It is not claimed that the spillage of the acid on the floor was due to the negligence of the respondent. This court is not aware that before the trial judge it was the plaintiff/appellant's case that the negligence of the respondent was [174] in its failure to remove or have removed the acid from the floor. Before us counsel for the appellant did state that the question or the emphasis is whether the University of the West Indies, the defendant/respondent, failed to clean up the spillage with dispatch after the incident. Such failure to take care does not in our view fall within the particulars of negligence which the plaintiff/appellant put before the judge as the case she had against the defendant/respondent.

The particulars of negligence of the defendant set out in the statement of claim were:

- (a) failing to take any or any adequate precaution for the safety of the plaintiff whilst in the course of her employment;
- (b) exposing the plaintiff to the risk or damage or injury whilst carrying out her said work;
- (c) failing to provide and maintain a safe place of work for the plaintiff;
- (d) exposing the plaintiff to the risk of damage which it knew or ought to have known existed;
- (e) In the premises failing to provide a safe and efficient system of work.

The importance of pleadings is too often discounted today. The position is well set out by I.H. Jacobs (now Sir Jack Jacobs) in the following passage taken from an article on the importance of pleadings in *Current Legal Problems* (1960) at pages 176 to 177 and reiterated in *Bullen and Leake and Jacobs, Precedents and Pleadings* (12 th Ed.) at pgs 17 and 18.

"The very nature and character of pleadings demonstrate their significance and overwhelming importance; for the attention of the parties as well as the court is naturally focussed on and rivetted to the pleadings as being the nucleus around which the whole case revolves through out all its stages. The respective cases of the parties can only be considered in light of and on the basis of the pleadings which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters so as to put forward the real questions in controversy between the parties. Each party may thus be assumed to have put forward the best case he has in the best way he can in his pleading and in this sense the pleadings manifest the true substantive merits of the case."

In the circumstances we are of opinion that the appellant is not entitled to have a decision that the respondent failed to remove the spillage with dispatch.**[175]**

In view of the decision reached as to liability, issues as to the quantum of damages do not arise. However, in deference to the submissions of counsel we considered as follows -

Loss of earning capacity

In *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9 were considered the principles to be applied in making an award of damages for loss of earning capacity. The headnote to that case reads as follows:

"In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable which in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should

materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or if his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate."

The learned judge in his judgment in the present case stated:

"With respect to the loss of future earning capacity the plaintiff is trained to teach. She also did research in the laboratory as a means of improving her opportunities for promotion. However, her condition, as disclosed earlier, would not allow her to continue to work in a laboratory where she is exposed to a variety of chemicals. As a result, should the plaintiff wish to improve her opportunities for promotions within the system, the evidence shows that she would have to retool which would take about two to three years. I have no concrete evidence before me that she will pursue the course of retooling or no clear evidence as to the cost of retooling. However taking into consideration that her disability may at some time in the future cause her some financial disadvantage in the labour market unless she retools, then I think it would be just and reasonable to award her a sum of \$10,000.00. My conclusion in this regard is based on the reasoning in *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9."

The appellant says that the award under this head is and should be increased substantially. The complaint of the defendant /respondent is that the award under this head is not in accord with a finding of the learned trial judge that the employment of the appellant was not in jeopardy. Counsel for the appellant submitted that that finding is to be put in context, when the learned judge was considering an award under the head Loss of Future Earnings. In our view drawing such a rigid distinction between loss of future earnings and loss of earning capacity does not really assist in assessment of damages. It seems to us impairment or loss of earning capacity leads to the future or prospective loss of earnings. Surely the extent of the impairment of earning capacity will impact on the extent of prospective loss of earnings.

In *Foster v. Tyne and Wear County Council* [1986] 1 All E.R.567 at p. 570 Lloyd L.J. had this to say -

"In each case the trial judge has to do his best to assess the plaintiff's handicap, as an existing liability, by reference to what may happen in the future. As has been said so often, that is a matter of speculation. It is necessarily a matter of weighing up risks and chances in all the circumstances of a particular case. The very fact that the approach must necessarily be so speculative means, of course, the occasions on which this court will feel justified in interfering with a judge's assessment will be few and far between for there is no established range or standard against which to measure the judge's award."

It may be said, as argued, that \$10,000.00 is a low figure, but this court is not to interfere unless it is shown to be wholly erroneous. The above excerpt from the judgment of the trial judge shows that the learned judge applied the correct principle bearing in mind that he had to be highly speculative in this exercise. He did say that in his judgment the appellant's disability may at some time in the future cause her some financial disadvantage in the labour market unless she retools. He had also found and would have borne in mind that her job was not in jeopardy. We cannot say he adopted the wrong approach. We would not interfere with the award under this head

Future Domestic Assistance

The learned judge stated as follows:-

"The evidence shows that since the accident the plaintiff has moved into a larger property and has given birth to another child. Therefore, in those circumstances she would require additional help in and around her house. In other words, any additional help in and around her house would not be solely as a result of her condition. The circumstances there would be an award of \$7,000.00."

Counsel submitted that the judge's finding was inconsistent with the evidence; that there was a misappreciation of the evidence as to the need for increased domestic help including gardening service. As to household help, the evidence is that before the accident she was an active housekeeper and had one person one day a week for \$35.00 to do the ironing. She now engages a person 3 days a week to clean the house and to iron. She has to stay clear of cleaning liquids and polishes. She used to do all the gardening but since the accident she has had to have a gardener once a week at \$45.00 a day.

The issue is whether the increase in help was due to the injury sustained. We understand the learned judge to indicate as his finding that the increased help was not the result solely of the injury and bearing this in mind he did not allow the full amount claimed, but discounted for the circumstance that part of the sums being incurred for additional help was due to the occupancy of a larger property and the presence of another child in the family. This conclusion was not an unreasonable one on the evidence and we would not interfere.

Expenses between trial and judgment

The appellant sought to have the amount awarded for medical and other expenses increased on the ground that there was sufficient evidentiary basis on which the trial judge could have acted to determine what the appellant would have incurred in this regard between the end of trial and the date of judgment.

The appellant concedes that medical and other expenses forming the item Special Damages were agreed in the sum of \$893.48 and that sum was awarded. Any sum to be awarded in respect of such expenses between trial and judgment would also have had to have been either agreed or specifically pleaded and proved. The damages said to have been excluded in the judge's award are not such as are inferred to be the direct consequence of the breach complained about and would have to have been specially pleaded. See *Stroms Braks Atire Bolag v. Hutchinson* [1905] A.C. 515; *Chan Wai Tong v. Li Ping Sum* [1985] A.C. 396. There was no specific pleading for the damages now sought.

In the circumstances the appellant is not entitled to an award in this regard.

Application for leave to adduce further evidence

There is one other matter to be addressed before leaving this appeal. The appellant sought leave to adduce fresh

evidence on the ground that the basis on which the parties and the trial judge proceeded had been so falsified by subsequent events that it would be an affront to common sense and/or a sense of

justice were fresh evidence not allowed. Leave was refused and we now give our reasons for the refusal. [178] An issue arose as to whether this court has power to receive further evidence on the hearing of an appeal such as this.

Section 3 of the *Supreme Court of Judicature Act*, Cap. 117 A which established this court states:

"The Supreme Court of Judicature consisting of the High Court and of the Court of Appeal, as they are constituted under section 4 to 6, shall, subject to section 52 (2)(b) continue to have and exercise the jurisdiction powers and authority heretofore vested in those Courts and any other jurisdiction, powers and authority conferred respectively on those Courts by this Act or by any other Act."

Section 52(2)(b) makes provision for the exercise by the Court of Appeal of the jurisdiction previously exercised by the Divisional Court of the High Court. As to the jurisdiction of the Supreme Court previous to the establishment of this Court, Section 15 of the *Supreme Court of Judicature Act*, Cap. 117 provided:

"15. Notwithstanding the provision of any other law, the jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto every such jurisdiction shall be exercised as nearly as may be in accordance with the practice and procedure for the time being in force in the Supreme Court of Judicature in England."

There was and is no specific provision which deals with the matter. We turn then to Order 59, rule 10(2) of the Rules of Supreme Court of England as it stood at the date of repeal of Cap. 117 (1991). The Court of Appeal's powers as regards fresh evidence are there stated as follows:

"The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

The authorities show quite clearly that while under the rule, the court is given a general discretion to admit evidence of matters that have occurred since the date of the trial or judgment, that jurisdiction must be exercised sparingly having regard to the important principle that there should be finality in judgment. In *Mulholland v. Mitchell* [1971] 1 All E.R. 307 at pg. 313 Lord Wilberforce emphasised that whether in any particular case further evidence ought or ought not to be admitted is one of discretion and degree. One cannot generalise. Sir Thomas Bingham M.R. [179] re-emphasised this point in *Hunt v. Severs* [1993] 4 All E.R. 180 where he reviewed a number of cases which provide guidance as to the factors to be taken into consideration. He quoted with approval the following two important passages from the speech of Lord Wilberforce in *Mulholland* (supra) which we also adopt -

"This abbreviated and over-simplified description shows at least what limitations must inherently exist to the Court of Appeal's discretion to admit further evidence. It makes it clear that an impossible situation would arise if evidence were to be admitted of every change which may have taken place since the trial. In the nature of things medical condition will vary from year to year, or month to month; earning prospects may change, prices may rise, or even fall. If the Court of Appeal were to admit evidence of changes of this kind (and it must not be overlooked that a facility given to one side cannot be denied to the other), not only would a mass of appeals involve the hearing of evidence but the Court of Appeal would merely be faced with the same uncertainties as faced the judge, and of which the

judge has *ex hypothesi*, already taken account. In other words an appellant's contention that factors such as these have changed since the trial must, in normal cases, be met with the answer that the judge, in his estimate has already taken account of them."

Then, after a reference to the cases, he continued ([1971] 1 All E.R. 307 at 313; [1971] A.C. 666 at 679-680):

"These cases are useful as instances, but they cannot be generalised into a formula. I do not think that, in the end, much more can usefully be said than, in the words of my noble and learned friend, Lord Pearson, that the matter is one of discretion and degree (*Murphy's case* [1969] 2 All E.R. 949 at 960, [1969] 1 W.L.R. 1023 at 1036). Negatively, fresh evidence ought not to be admitted when it bears on matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted, if some basic assumptions, common to both sides, have been clearly falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice. All these are only non-exhaustive indications; the application of them, and their like, must be left to the Court of Appeal. The exceptional character of cases in which fresh evidence is allowed is fully recognised by that court."

Turning now to the evidence sought to be adduced. The appellant wished to adduce evidence to the effect that subsequent to the conclusion of the trial the plaintiff/appellant developed a sensitivity to the drug she had been using and that the alternative drug found acceptable and prescribed for her was ten times as expensive as the other drug. Further, that subsequent to the trial the appellant required a high dosage of another drug resulting in costs approximately three times [180] as much for that type of medication. Finally that the defendant/respondent had formally notified the plaintiff/appellant of its intention to terminate her contract of employment on the grounds of her inability to perform fully her duties because of her medical condition. The learned judge in his judgment stated:

"The medical evidence, as to how her disabilities will affect her in the future, shows that continued exposure to certain chemical fumes is certain to cause her further discomfort and irritation. For example, chemicals with a strong odour will induce chest pains and many of the chemical compounds which are used in day-to-day living will also have an adverse effect on her. The plaintiff is taking medication and will have to continue to take medication. The medication can affect her blood pressure, cause her diabetes, soften her bones or cause her sore throat. In addition, she will need physio-therapy about 6 times a year at a cost of \$45.00 a session; tests to measure the degree of asthma at least once every five years at \$45.00 a session; hospital lung functioning test once a year at \$50.00 a session, specialist attention four times a year at \$50.00 a session and an inhaler once a year at \$25.00. Considering that conditions will change in the future, in all the circumstances, I would use an annual sum of \$800.00, apply a multiplier of 10, and award \$8,000.00 in full for future medical and related expenses."

It seemed to us that the learned judge in considering his award did make allowance for the uncertainty of changed circumstances in the future. In the exercise of our discretion we did not accede to the application.

In the result, we dismiss the plaintiff/appellant's appeal, allow the defendant/respondent's appeal and enter judgment for the defendant with costs both here and in the court below certified fit for two counsel. Stay of execution for six weeks granted. The respondent to have its costs on the application for leave to adduce further evidence. [181]