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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 18/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN - CENTRAL SOYA OF JAMAICA LTD. - DEFENDANT/APPELLANT

AND - JUNIOR FREEMAN - PLAINTIFF/RESPONDENT

W.K. Chin See, Q.C., and Dennis Morrison for Appellant.

Norman Samuels for Respondent.

December 4 - 5, 1984 &
February 4 - 5; and
March 8, 1985

ROWE, P.:

At the age of 16 years, Junior Freeman had left school and found himself two jobs. As a labourer he worked with Mr. Pryce in his chicken coop and on his farm at Bodles in Clarendon in an irregular fashion and as a labourer he worked with the defendant/appellant on two or three days each week in their animal feed manufacturing plant, also at Bodles. When the respondent had worked with the appellant for almost 7 months, he was on October 10, 1978 assigned for work in a basement area, known as Vietnam, 40 feet by 10 feet by 5 feet high and his duties were to scrape and sweep loose animal feed from the floor, place it in bags, move backwards pulling the bags, then place them in an elevator, called a man-lift. No exact description of this contraption was given

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but it appears to be more in the nature of an escalator than an elevator as it was said by the respondent to have "a heap of steps". As the respondent stood 5'10½" tall it was impossible for him to hold an erect position and as he worked in this basement area, he was continuously in a bending or stooping position. Neville Moody, a factory inspector of the Ministry of Labour, who visited the factory in 1981 said entrance to the basement area was by a semi-circular hole about 33" in diameter through which one jumps and through which one climbs, to exit. Of the man-lift, he said, several parts were dangerous. There was a footstand 17 3/4" by 14" on which one could attempt ro ride from the basement which would be a highly dangerous exercise as one would then be climbing up on man-lift step. It appears that this was the step on which feed bags would be placed. The factory inspector said that the lower portion of the man-lift was dangerous and indeed it had been fenced after October 1981 in such a way that the body of a person working in that area could no longer come into contact with the man-lift. Mr. Moody's evidence as to the congestion caused by assorted machines in the basement as well as his description of the dangerous nature of the man-lift went unchallenged.

This is what the respondent said happened on October 10, 1978. He was scraping and bagging feed to put on man-lift. The "elevator" was running and as he moved backwards, pulling the bag towards the "elevator", something on the man-lift hitched his pants and pulled him up, hoisted him above, and in a doubled up position, he hit his back against the ceiling several times. His screams for pain seem to have attracted attention and the man-lift was deactivated. The respondent suffered injuries. He was unconscious between the Tuesday and the following Friday, some 3 days. He was hospitalized for over 1 month and the treatment he received

in hospital included being put on a saline drip. His back received several cuts, he was bruised between his legs and there was a wound to his scrotum. He complained of severe pains all over his body and especially to his back. After his discharge from hospital he sought out-patient treatment for several months and he said he had to walk with crutches for 9 months, all during which time he suffered pains.

There was medical evidence in the form of two medical certificates and the oral testimony of Dr. Lawson-Douglas. In the statement of claim, was a formidable list of some seventeen separate items under the heading "Particulars of Injuries, Treatment and Sequelae". Items 1 and 2 referred to fracture of the 4th lumbar vertebra, and fracture of the pelvis, respectively. However, each medical certificate spoke of only one fracture, and the trial as well as the appeal proceeded on that basis. Among the other enumerated injuries were: blow to the lumbar region of the back; shock and unconsciousness; laceration to the right scrotum, bruises on the pelvic area; swelling of the lower back; short leg gait; tilting of the pelvis; decreased forward flexion of the spine; and bony prominence in lower lumbar spine. As a result of the injuries the respondent pleaded that he suffered a 5% permanent disability in the lumbar spine, was susceptible to increased risk of osteo-arthritis in the lumbar spine; suffered pain in lower back for over a year which was continuing and he was unable to stand for long periods. An important complaint in the statement of claim was that the respondent became impotent as a result of the accident and this caused in him anxiety about his future sexual life.

To what extent did the evidence support the particulars of injuries? The respondent said he was feeling pains across his back up to the time of trial some 5½ years later. He said he suffered cramps in his testicles lasting for between 45 minutes to 30 minutes. No longer could he run and exercise and play games as before. He described his impotence in graphic language which was all to the effect that he sometimes had incipient erections, other times premature ejaculation and still on other occasions he could not manage an erection even in the most favourable circumstances. Dr. Lewis who treated the respondent in hospital confirmed that he had a 1½ inch laceration to the right scrotum, and bruises on the pelvic area. X-ray showed a fracture of the pelvis. The respondent was kept in bed and was discharged from hospital on November 1, 1978, making his hospitalization no more than three weeks. Then followed a series of visits to the out-patient department of the Spanish Town Hospital between November 1978 and April 5, 1979. Another x-ray was done and it showed good healing of the pelvis. Consequently, Dr. Lewis could give the opinion that the injuries, although serious initially, would not affect the respondent greatly in the future. This opinion was given on August 3, 1979, and significantly no mention was made of the respondent's sexual potency.

Dr. Chutkan, a Consultant Orthopaedic Surgeon, examined the respondent on August 3, 1979, and gave a medical certificate on January 29, 1980 as to his findings. In that certificate Dr. Chutkan gave a short account of the history of the respondent's injuries and listed his complaints to be:

(1) after sitting for long periods he had pain in his lower back when he tried to get up;

(2) his right leg felt short;

(3) swelling of his lower back;

(4) inability to stand or bend for long periods;

(5) he walked with a limp.

On examination the Doctor found that the respondent walked with a limp due to slight tilting of the pelvis. There was a bony prominence in the lower lumbar spine. There was decreased forward flexion of the spine. X-ray of the pelvis was normal but an x-ray of the lumbar spine showed a healed fracture of the 4th lumbar vertebra.

In Dr. Chutkan's opinion the respondent had about five percent disability and an increased risk of osteo-arthritis in the lumbar spine. There was no challenge to the medical findings or the opinions expressed in the medical certificates which were admitted into evidence by consent. But the evidence of Dr. Lawson-Douglas came in for comment on both sides. Respondent had complained to Dr. Chutkan that he was impotent. However, Dr. Chutkan had no expertise to report on such a condition and Dr. Lawson-Douglas, a leading urologist was consulted. To him, the respondent complained that since the accident he was experiencing difficulty to have normal sexual intercourse. There was difficulty in initiation of erection and also early ejaculation. Respondent was aware that not only was his back injured but that he had received a cut on his scrotum. During examination-in-chief Dr. Lawson-Douglas said:

> "On examination I could find very little wrong with Mr. Freeman. His scrotum was normal and there was a scar on the lower back compatible with injuries he described. In view of the back injury I investigated him from kidney point of view and all investigations were normal."

He amplified this in cross-examination when he said:

> "I found no disability on my examination. I could diagnose and treat organic impotence."

Later on he said:

> "Routine screen test of urine - negative - okay. Physically he was normal."

In giving his opinion on the respondent's complaint of impotence, Dr. Lawson-Douglas said:

> "I felt that impotence was most likely of psychogenic origin as men frequently associate strength or disease of lower back with their sexual abilities. His sexual problems could also have been exacerbated by injury to lower back could have produced pain when sexual intercourse attempted and this may have been a deterrent.
>
> "Physiogenic (sic) impotence may be due to mind or body, impotence is impotence."

Psychogenic impotence, he said, would require treatment from a psychiatrist and such treatment is available in Jamaica. Psychogenic impotence depends, he said, upon the individual and may be turned around by knowledge of that individual that he is O.K. On the assumption that the respondent's evidence as to his impotency was true, Dr. Lawson-Douglas was of opinion that at the age of 22 years, the respondent had a a better chance of overcoming his problems than would an older person.

Judgment was given for the respondent on a finding that the appellant was negligent and was in breach of the Factories Act. In three respects the learned trial judge found that the appellant was negligent for:

(a) allowing or causing the respondent to work in an area crowded with feed bags, the bottom area of an elevator and in such circumstances that the respondent had to lift damaged bags of feed and exit from the said area by going backwards;

(b) causing or allowing the respondent to work in a small or crowded area where there was an elevator of approximately five ton capacity ascending and descending at regular intervals;

(c) providing such a small place for the plaintiff to manoeuvre while engaged in his said employment and during the scope of his said duties that a portion of the elevator came into contact with the respondent's body.

For its failure to fence off the said elevator which was electrically operated with steps protruding from the sides thereof, and consequently dangerous machinery, the applicant was found to be in breach of section 3 of the Factories Act.

Damages were awarded to the respondent under various headings. Special damages amounting to $12,739 consisted of inter alia:

(a) loss of earnings for 50 weeks @ $60 per week and

(b) loss of earnings for 4½ years @ $40 per week.

An award of $4,000 was made for respondent's handicap in the labour market. General damages were awarded for pain, loss of amenities and temporary impotence in the global sum of $50,000.00. There followed an award of interest at 4% per annum on the special damages from October 10, 1978 and at 8% on the general damages as from December 21, 1979.

Notice and Grounds of Appeal filed and served on April 11, 1984, challenged the correctness of the finding of liability on the part of the appellant, alleged that the general damages were manifestly excessive, that the award in respect of loss of earnings was not supported by the evidence and finally that the learned trial judge failed to properly exercise his discretion on the award of interest.

So the matter stood when the appeal was listed to come up for hearing on December 4, 1984. Then on December 3, the Attorney for the plaintiff/respondent filed an application for extension of time to give notice of intention to contend that the decision of the Court below should be varied. The Notice filed with the application would seek a

variation in the general damages to increase the same to $129,230.00. An affidavit was filed in support of the application and the reason given for the delay in filing a respondent's notice or a cross-appeal was that it was only on November 27, 1984, that Queen's Counsel had advised that there were grounds in principle on which the respondent could challenge the award of damages.

Rule 14 of the Court of Appeal Rules enables a respondent to file a Respondent's Notice asking the Court, inter alia, to vary the decision appealed from. That notice must specify the grounds justifying the variation and must also specify the relief sought. A time frame for the filing and service of the Respondent's Notice is provided in Rule 14 (4) that is to say, "within fourteen days after the service of the Notice of Appeal on the respondent".

Because of the provisions of Rule 9 (1) of the Court of Appeal Rules, failure by more than seven months, to file and serve the Respondent's Notice, was not by itself fatal, as the Court in a proper case where the interests of justice so require, may enlarge time even after the period fixed by the Rules has expired. The procedure to seek enlargement of time is that set out in Rule 9 (2) and thereunder the application is "by Motion, notice of which shall be served on all the parties to the proceedings at least 7 clear days before the day named in the notice for hearing the Motion". This procedural requirement was not complied with and for the reason that counsel was not aware of Rule 9 (2).

A perusal of the Record shows that respondent's attorney had submitted at trial that the damages appropriate to the instant case for pain and suffering was $80,000; and for prospective loss of earnings the sum of $49,280. No new factor was introduced into the case between trial and December

3 when the application was filed. The respondent had argued at trial for $129,280. He got a little less than one-half of that amount. The appellant thought that the award was much too high and appealed. If the respondent was minded to think that the award was too low, one would expect action on his part to counter the appeal. None came until the "eleventh hour" and the reasoning was simply that senior counsel thought there was a possibility that the respondent could have a bigger award.

When a discretion vests in a court, that discretion must be exercised judicially on material sufficient to warrant the favourable exercise of that discretion. City Printery Ltd. v. Gleaner Co. Ltd. [1968-69] 13 W.I.R. 126, was concerned with the application of Rules, 9, 30 and 32 of the Appeal Court Rules, to an application to enlarge time to file the Record of Appeal. Applicant's counsel admitted neglect on his part to file the Record within time due to removal of office and changes in staff. In rejecting these excuses, Luckhoo, J.A. said:

> "It is clear that the Court has a discretion in matters of this kind. But it is a discretion to be exercised judicially. As was observed by the Judicial Committee of the Privy Council in Ratnam v. Cumarasamy [1965] 1 W.I.R. 12 ....
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> > 'The rules of Court must, prima facie, be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

It is opportune to call to attention the necessity for the Court to ensure that the Rules and Practice Directions which govern its procedure are adhered to. Ad hoc procedures may cause embarrassment to counsel and litigants and upset the smooth flow of work in the Court. It may well be disrespectful to the Court to attempt to place before it at the very last moment matters of which it ought to be apprised well in advance. In the instant case it would be unjust to call upon an appellant to answer a claim for variation of the judgment by an increase of 100% after but one day's notice. The application for extension of time to file a Respondent's Notice was dismissed.

The appeal proceeded. Mr. Chin See submitted that the respondent's account of how the accident happened was not to be believed as the injuries sustained were not consistent with that account. How, said Mr. Chin See, could the respondent suffer injury to the pubic region? It was his submission that if the respondent's back was hitting upon the moving stairs it would be well-nigh impossible for him to sustain injury to the frontal area. He returned to the suggestion made to, and denied by, the respondent at trial, that the respondent was attempting to climb on the man-lift when he received the injury, and submitted that the respondent's negligence in attempting to ride the man-lift in that unauthorised manner was the sole cause of the injury.

No evidence had been called by the appellant to support the theory advanced by them at trial. The plain fact is that the respondent got hitched up as he described and was being bounced about by the moving lift. There is no telling where he might have received injury. I find nothing inconsistent between the applicant's recall of the events of the day and the medical evidence as to his physical injuries. Mr. Chin See did say that with the passage of time, witnesses for the appellant had left the jurisdiction and were unavailable at trial but he did not overly stress his complaint as to liability. The findings

of the learned trial judge on the issue of liability are unassailable and are confirmed.

Ground 4 claimed that the award in respect of loss of earnings was not in keeping with the evidence. Respondent, a casual labourer, worked with the appellant, on his own account 2 or 3 days a week but in some weeks he did not work at all. He said that on the days when he did not work with appellant he worked with Mr. Pryce, 4 - 5 days each week. Indeed he contended that he worked 7 days a week at $10 a day. Mr. Pryce supported the respondent to the extent that respondent worked with him but as to the regularity he said:

> "I employ him $10.00 a day per week, three -four - five - two - no (3 - 4, 5, 2, 0) days per week."

The interpretation to be put upon the respondent's work pattern is that there were times when he did not get work from the appellant and at best would work only 5 days with Mr. Pryce. There were other times when respondent did not get work with Mr. Pryce and would at best get 3 days with the appellant. This pattern of work would not support a finding by the learned trial judge that the respondent worked on the average 6 days per week.

In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence. On the basis of the evidence tendered by the respondent, I am not convinced that he could show more than an average work week of 4 days.

Then he was awarded total loss of earnings for 50 weeks. Dr. Lewis who gave a medical report on June 8, 1979 said:

> "He was seen in clinic from 1st November, 1978 until 5th April, 1979. Patient was therefore ill between 10th October, 1978 - 5th April, 1979."

Dr. Chutkan saw respondent on 3rd August, 1979 and assessed his disability at 5%. These medical certificates do not indicate in any way that the respondent was unfit for work after April 5, 1979. Allowing for the fact that the respondent did consult Dr. Chutkan in August, 1979, up to then he might have considered himself unfit to work. But there seems to be no medical justification on the evidence for the respondent not to have resumed work by the beginning of August, 1979. An award for loss of earnings should, therefore, run from October, 10, 1978 to not later than August 10, 1979, i.e. 44 weeks and be calculated at the rate of $40.00 per week.

I have already referred to the medical reports of Dr. Lewis and Dr. Chutkan as they affect the respondent's ability to work. Dr. Lawson-Douglas who saw respondent in July 1981 could find very little wrong with him. Yet respondent was awarded a sum of $9,360.00 for loss of earnings for 4½ years i.e. from 1979-84 at $40.00 per week. Respondent's injuries were healed. He should have gone back to work. He cannot recover damages for loss of earnings for the period after August 10, 1979, and the award of special damages should be reduced to eliminate the $9,360.00.

An award of $4,000 for handicap in the labour market was not challenged. For pain, suffering, loss of amenities and temporary impotence, the award in general damages was $50,000.00. Mr. Morrison who argued this segment of the appeal submitted that there were two substantial injuries, viz, that to the back and impotence. As to impotence, he submitted that the medical evidence did not support the respondent's claim, as from the speciality of Dr. Douglas, there was no organic defect to account for impotence in the respondent. At its best, he submitted, the findings of the learned trial judge that the impotence was temporary, would mean that it would not attract high damages. Mr. Morrison relied upon the decision in

Smith v. Prince C.L. [1978] s. 132 decided on April 24, 1981 and reported at p. 100-101 Khan's Compilation of Personal Injury Awards. The plaintiff in that case was injured in a motor vehicle accident and he suffered a laceration of the scrotum which was swollen and a partial rupture of the urethra. He was hospitalized for 13 days and had an operation. He developed stricture of the urethra which required periodic dilation. Twenty-one months after the accident he was re-admitted to hospital and a supra pubic cycstostomy was done as all attempts to pass a urethral catheter had failed. He had frequent changes of his catheter between July 1976 and January 1977 and would require dilations of the catheter at intervals in the future. That plaintiff claimed that he was impotent as his penis stood for only short periods. Dr. Lawson-Douglas who examined this plaintiff found that he had a stricture on the bulbous urethra which could have been due to trauma. He had urethroplasty. The impotence from which the plaintiff claimed to suffer could not be confirmed by Dr. Lawson-Douglas although he admitted its possibility. If, in the doctor's opinion, the impotence was due to trauma, it would not improve. On that state of the evidence an award of $8,000 was made for partial impotence.

Mr. Samuels contended that the instant case is stronger than that of Smith v. Prince, supra. In both cases Dr. Lawson-Douglas consistently says that it is difficult, if not impossible, to determine impotence from organic factors only. The true parallel, said Mr. Samuels, was that of the case of Horan v. John Laing & Son Ltd. [1973] C.A. No. 204A reported in Kemp & Kemp 4th Edition (1975) Vol. II at 7 - 701. There a married man of 26 years suffered a crushing injury which rendered him impotent. For the first 3 weeks of hospitalization he had a catheter in his bladder. There was damage to his posterior

urethra, and he had to have dilatation under a general anaesthetic for that condition. Up to the date of trial the plaintiff had undergone dilatations on five occasions but the medical prognosis was that frequency of that treatment was decreasing rapidly.

There was in that case no doubt or question as to the plaintiff's impotence. A man, happily married for only five months, with visions of being a father and hope of a long and happy married life, because of his impotence, became extremely irritable and after 4 years of great unhappiness, he deserted his wife. His condition was such that he would be unable to father children. Although unable to have an erection the plaintiff had sexual desire and this rendered his life frustrating and, as the Court held, this frustration rendered "his condition even more intolerable than it would otherwise be". He was prepared to attempt a reconciliation but his wife would not consent and had filed a petition for divorce on the ground of his intolerable conduct. An award of ≢7,500 general damages was made for impotence. This Mr. Samuels says in the money of today would be the equivalent of J$45,000 in 1984.

The gravamen of the respondent's complaint seems to be that his virility has been affected. His evidence was that at age 13 - 14 he was sexually very active and this continued up to the time of the accident. Since then he cannot maintain an erection and has premature discharge. He says this makes him feel helpless, ashamed and "insultive of himself".

In my view the instant case is more in line with Smith v. Prince, (rather than with Horan v. John Laing & Son) but less serious. In Smith v. Prince the plaintiff had trouble with his urethra and there was the swelling of the scrotum. The instant case is wholly distinguishable on the facts from Horan v. John Laing & Son, where there was positive evidence of total impotence in circumstances in which the plaintiff had a desire for sexual intercourse which he could never fulfil

even partially. I am therefore in complete agreement with the finding of the learned trial judge that at its highest, the respondent's impotence is but partial and temporary.

Two cases taken from Khan's Collection, supra, illustrate awards for injuries related to the back. Firstly, Reid v. Brown C.L. [1976] R. 158 (reported at p. 24) decided by Carey J. on February 9, 1978 was one in which the plaintiff suffered laceration on his face and forehead, to this lower back and to the posterior aspects of his arms and legs and fracture of the left acetabulum and both right pubic rami. General damages were awarded in an amount of $8,000.00. Secondly, Donaldson v. Crossman C.L. [1979] D.004 (p. 25) a decision of McKain J. was decided on April 16, 1980. Injuries to farmer Donaldson were (i) head injury, (ii) laceration of left ear, (iii) fracture of shaft of left femur, (iv) fracture of right fibula at ankle joint, (v) wound on right thigh. That plaintiff was hospitalized in traction for 3 months and received out-patient treatment for 13 weeks. The thigh wound became infected causing additional suffering. His permanent partial disability was assessed at 5%, and the general damages were assessed at $8,750.00.

Counsel on both sides agreed that a trial judge in assessing damages for non-pecuniary loss in cases of negligence is entitled to make his assessment in the "money of the day" i.e. the money of the day at the time of trial, which would, then take account of any inflationary trends in the economy. Walker v. John McLean & Sons Ltd. [1979] 2 All E.R. 965 decided that damages for non-pecuniary loss, like damages for pecuniary loss, were to be assessed by reference to the value of money

at the date of trial, and that accordingly a victim of a tortfeasor should not have his damages reduced in order to contain inflation. This means in effect that as the real value of money falls, the quantum of damages will increase, not with a view to giving the injured person a greater benefit than someone in a similar position, say ten years earlier, but to place him in the same position, as nearly as possible, to that earlier plaintiff.

It was so submitted and it does seem to me that 1980 awards can be used as a starting point for computing awards at the present day. In the course of argument it was brought to the Court's attention that for sometime after 1980 inflation figures in Jamaica were less than 10% per annum. Using 1980 therefore as a base year for stability, to find what sum, due to inflation, would have the similar purchasing power in Jamaica in 1984, would have been a relatively simple matter if an experienced economist had been called to testify. That was not done. It was suggested that in the absence of any evidence the Court could take judicial notice of the depreciation of the Jamaican dollar between 1978 and 1984 and use that rate of depreciation as the basis for arriving at the inflation rate. In the instant case I am prepared to adopt that course and to conclude that there had been a depreciation somewhere between 75% and 100% in that period. Therefore an award in 1984 could not be said to be excessive and wholly out of line if it reflected a 100% increase over an award made in 1978 or 1980 for a similar injury.

The awards for injury to the back made between 1978 and 1980, to which we were referred, were between $8 - 9,000 while that for partial impotence was $13,000 which contained an element of $5,000 for pain and suffering. Combining these two injuries but making allowance for pain and suffering only once, it would seem that a fair award for the injuries suffered by the respondent would have been about $19 - 20,000

in 1980. Applying the formula of 100% depreciation, the award in 1984 would not exceed $40,000. I would therefore order that the general damages be reduced from $50,000.00 to $40,000.00.

I am indeed grateful to Mr. Chin See for the arguments which he addressed to us in support of Ground 5, viz, that the learned trial judge failed to properly exercise his discretion on the award of interest. It will be recalled that the Court ordered interest at 4% on special damages from 10th October, 1978 and 8% on the general from December 21, 1979. On what basis was that order made? Section 3 of the Law Reform (Miscellaneous Provisions) Act which became law in Jamaica in 1955 provides that:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment."

On the literal interpretation of this statutory provision a trial judge has an unfettered discretion to determine whether or not to grant any interest at all, and if he decides to grant interest to decide at what rate the interest should be, and on what part of the judgment, and within the parameters of the section from what time the interest should run. A parallel situation existed in England. Section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934 (U.K.) is in the identical terms of section 3 of the Law Reform (Miscellaneous Provisions) Act of Jamaica passed in 1955 and quoted above. Predictably the question as to how the trial judge ought to exercise his discretion in the matter of the award of interest reached the Court of Appeal in England before a similar question was raised in Jamaica. That was in the case of Jefford and Another v. Gee [1970] 1 All E.R. 1202; [1970]2 Q.B. 130, (C.A.).

It was a case in negligence and in assessing damages the trial judge awarded interest at 6½% on the general damages from the date of the accident but refused to order interest on the special damages. Both sides appealed. The defendants contended that no interest at all should be awarded on the general damages and certainly not on the award for loss of future earnings, and if indeed such interest were to be awarded, the rate of 6½% was too high, and further the period fixed was too long. The successful plaintiff complained that the rate of interest was too low and that he was entitled to interest on the special damages. Further, section 22 of the (U.K.) Administration of Justice Act, 1969, had amended the Law Reform Act of 1934 by making the award of interest compulsory unless there were special reasons for not awarding it.

Delivering the judgment of the Court of Appeal Lord Denning, M.R. isolated the issue before the Court in these words (at p.1204 [e]):

> "The appeal and cross-appeal raise the question: on what basis should interest be awarded in personal injury cases? The question is of especial importance because since 1st January 1970, Parliament has made it compulsory for Judges to award interest in personal injury cases. But, in making it compulsory, Parliament has, quite understandably, left it to the Courts to decide the principles on which they should act. So we have given urgent consideration to it. The question stands out: how is the statute to be applied? Up and down the country people want to know the answer. Trade unions, insurers, accountants, solicitors, barristers, all want to know. Scores of cases have already come before the Judges. Each has given a different answer. As the Latin saying has it, 'quot homines, tot sententiae', which means, put into English: Count the number of men; then the number of different opinions and you will find there are as many different opinions as there are men.' Such is the confusion that we feel it our duty to set out the guide lines, even though in some respects our observations may be obiter dicta."

Lord Denning M.R. proceeded to examine the historical reasons for the grant or withholding of interest and concluded (at p. 1208 [a]) that the applicable principle in personal injury cases should be that:

> "Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him."

What should be the rate of interest? The Court considered as a possible option, the rate of interest payable on judgment debts in England but rejected that standard on the ground that the rate had been fixed in 1838 at 4%, had not been changed since then and was therefore irrelevant in 1970. This is how Lord Denning put the matter at p. 1210 (b):

> "It was suggested to us that, in principle, the rate of interest on a debt or damages before judgment should be the same as the rate after judgment. It would be anomalous if a defendant paid less interest after judgment than before it.
>
> "This argument would be acceptable if the rate of interest on a judgment debt were a realistic rate. But it is not so. It is only 4%. It was so enacted in 1838 and has never been changed since. It should be changed. We are told that steps are being taken to increase it. But we do not think we should wait for this to be done. We ought to award a realistic rate, even if it does mean an anomaly. To go to the other extreme, it was suggested that bank rate should be awarded. That stands at 8 per cent. We cannot agree with this suggestion. Bank rate fluctuates too much."

As a guide the Court chose the rate which was payable on money in Court which was placed on short term investment account. That average rate in 1970 was 6%. In disposing of the case the Court held that:

(a) general damages awarded for pain and suffering and loss of amenities should bear interest from the date of the service of the writ to the date of trial;

(b) interest should be at the rate available for short term investment for money in Court, [then 6%];

(c) general damages awarded for loss of future earnings should bear no interest;

(d) interest on special damages should be at one half the rate awarded for general damages [3%] and should run from the date of the accident to date of trial.

Jefford v. Gee was accepted in Jamaica as good law and the Jamaican Courts began to apply the 6%, 3% formula for the award of interest in negligence cases. This 6% rate of interest accorded with the rate applicable in Jamaica for interest on judgment debts but I doubt very much if the Jamaican Courts consciously decided then to apply the rate of interest applicable to judgment debts. In this case the court was told that in recent times Judges of the Supreme Court have awarded interest on special damages of 3% or 4% and on general damages of 6% or 8%. There is, we were told, no standard rate at the present time, and that the reason advanced for awarding higher rates of interest is the inflationary state of the economy and the very high prevailing rates of interest on money deposited in banks.

The whole question of the award of interest on general damages for pain and suffering and loss of amenities has come in for full consideration in the courts of England. In Cookson v. Knowles [1977] 2 All E.R. 820, [1977] Q.B. 913, Lord Denning, delivering the judgment of the Court of Appeal, in a fatal accident case sought to change one of the guide lines established in Jefford v. Gee and said that no interest should be awarded on general damages awarded for pain and suffering and loss of amenities.

He said at p. 823 (f):

> "In Jefford v. Gee, in 1970, we said that, in personal injury cases, when a lump sum is awarded for pain and suffering and loss of amenities, interest should run 'from the date of service of the writ to the date of trial'. At that time inflation did not stare us in the face. We had not in mind continuing inflation and its effect on awards. It is obvious now that that guide line should be changed. The Courts invariably assess the lump sum on the 'scale' for figures current at the date of trial which is much higher than the figure current at the date of the injury or at the date of the writ. The plaintiff thus stands to gain by the delay in bringing the case to trial. He ought not to gain still more by having interest from the date of service of the writ. We would alter the guide line, therefore, by suggesting that no interest should be awarded on the lump sum awarded at trial for pain and suffering and loss of amenities." (Emphasis supplied).

Both Mrs. Cookson and the defendant appealed to the House of Lords which in dismissing their appeals did not directly deal with interest on non-economic loss in personal injury cases. It was left for the House in the later case of Pickett v. British Rail Engineering Ltd. [1980] A.C. 136; [1979] 1 All E.R. 774 to address that question and in doing so it over-ruled suggested alteration to the guide line proposed by Lord Denning M.R. in Cookson v. Knowles quoted above.

That guide line was contrary to section 1 (a) of the Law Reform (Miscellaneous Provisions) Act 1934 as amended by s. 22 of the Administration of Justice Act 1969. The 1969 amendment had made the award of interest on damages for personal injuries compulsory unless the Court was satisfied that there were special reasons why no interest should be given in respect of those damages. In addition the House of Lords held that the reason given by the Court of Appeal for not awarding interest on non-pecuniary damages for the period between the date of service of the writ and the date of trial was fallacious. This is how Lord Wilberforce put it in his speech on p. 151:

> "As to interest on damages, I would restore the decision of the judge. This was varied by the Court of Appeal on the theory that as damages are now normally subject to increase to take account of inflation, there is no occasion to award interest as well. I find this argument, with respect, fallacious. Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other. If the damages claimed remained, nominally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same."

Lord Edmund Davies at page 164, commenting on the passage set out earlier from Lord Denning's judgment in Cookson v. Knowles, said:

> "My Lords, I have to say with great respect that the fallacy inherent in the passage quoted is in thinking that a plaintiff who, owing to inflation, gets a bigger award than he would have secured had the case been disposed of earlier is better off in real terms. But in fact the bigger award is made simply to put the plaintiff in the same financial position as he would have been had judgment followed immediately upon service of the writ. The reality is that the plaintiff in this case has been kept out of ≠7,000 until the date of judgment, and there is no reason why he should be deprived of the ≠787 interest awarded by the trial judge for the 15-month period between writ and judgment simply because a lesser sum than ≠7,000 might or would have been awarded had the case come on earlier. Furthermore, the suggestion that the defendant is prejudiced overlooks the fact that he has meanwhile had the use of the money."

Lord Scarman at page 172 made a similar comment. He said:

> "In the instant case the Court of Appeal has followed its dictum, disallowing the interest granted by the judge on the damages for pain and suffering. My Lords, I believe the reasoning of the Court of Appeal to be unsound on this point. It is based on a fallacy; and is inconsistent with the statute.

"First, the fallacy. It is assumed that because the award of damages made at trial is greater, in monetary terms, than it would have been, had damages been assessed at date of service of writ, the award is greater in terms of real value. There is here a complete non sequitur. The cash awarded is more, because the value of cash, i.e. its purchasing power, has diminished. In theory the higher award at trial has the same purchasing power as the lower award which would have been made at the date of the service of the writ; in truth, of course, judicial awards of damages follow, but rarely keep pace with, inflation, so that in all probability the sum awarded at trial is less, in terms of real value, than would have been awarded at the earlier date. In theory, therefore, and to some extent in practice, inflation is taken care of by increasing the number of money units in the award so that the real value of the loss is met. The loss, for which interest is given, is quite distinct, and not covered by this increase. It is the loss which is suffered by being kept out of money to which one is entitled.

"Secondly, the statute. Section 22 of the Administration of Justice Act 1969, amending s.3 of the Law Reform (Miscellaneous Provisions) Act 1934, provides that the court shall (my emphasis) exercise its power to award interest on damages, or on such part of the damages as the court considers appropriate, 'unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages'. Such is the general rule laid down by the statute, which does, however, confer on the court a discretion as to the period for which interest is given and also permits differing rates. Nothing can be clearer than the duty placed on the court to give interest in the absence of special reasons for giving none. Inflation is an economic and financial condition of general application in our society. Its impact on this plaintiff has been neither more nor less than on everybody else; there is nothing special about it.

"For these reasons I think the Court of Appeal erred in refusing to allow interest on the award of damages for non-pecuniary loss. I would reinstate the judge's award."

In Pickett's case the House of Lords restored the trial judge's award of interest at 9% on the general damages awarded in respect of pain and suffering and loss of amenities as from the service of the writ. The case decided that interest was recoverable on this head of damages. Their Lordships, however, were concerned with the principle as to whether or not damages ought to have been awarded for non-pecuniary loss in personal injury cases and not with the quantum of such interest.

None of the speeches in Pickett's case having expressly dealt with the rate of such interest, Birkett v. Hayes and Another [1982] 2 All E.R. 710, provided the opportunity for the Court of Appeal to again address itself to the rate of interest to be paid on damages for non-pecuniary loss. Lord Denning noted that such damages covered both past and future pain and suffering then equated a liquidated debt with an award of damages and concluded that:

> "Suppose that this plaintiff was owed a a debt of ≠20,000 due in May 1976, but judgment was only given in 1981. The plaintiff would get interest only on ≠20,000 for those 4 2/3 years. The interest would have been about ≠8,000. She would have got ≠28,000 at trial. She would not get ≠30,000."

Compare this with the situation where the sum which would have been awarded for damages at the same time the debt was due was ≠20,000 but which, on account of inflation would now come to ≠30,000 or more, should the plantiff get the same rate of interest on the ≠30,000 as he would on the debt of ≠20,000, which figure remained static? Lord Denning's answer was "No". It having been agreed that ≠20,000 in 1976 would convert, due to inflation, to ≠30,000 in 1981, Lord Denning said:

> "I can see no possible justification for giving her interest on that inflated figure for the 4 2/3 years, when she would not be given it on an admitted debt of ≠20,000 due at the date of the service of the writ."

Lord Denning concluded that if interest is to be awarded on such damages from the date of service of the writ (following the decision of the House of Lords in Pickett's case) that interest should be at a very low rate indeed.

Eveleigh L.J., who was of the same mind, said at p. 715 (c-d):

> "If damages were assessed on the basis of the value of the pound at the date of the writ, then there would be an overwhelming case for the award of interest at rates which carry an inflationary element. Such rates would seek, albeit imperfectly to achieve two objects, namely to preserve the value of the award and to compensate for the late receipt of the money. In my opinion, however, it cannot be right to apply such interest rates to an award which already takes into account the need for preserving the value of money. We must look for some other rate of interest."

The rate of interest eventually fixed by the Court of Appeal in that case in respect to general damages was 2% and that figure was recommended as a guide line for the future. No appeal was taken therefrom.

It was however reviewed soon after in another case: His Honour Judge Bennett Q.C. sitting as a Judge of the High Court in England in the case of Wright v. British Railways Board applied the guide line established by the Court of Appeal in Birkett v. Hayes and awarded interest on general damages at 2%. The plaintiff appealed directly to the House of Lords and the decision of the House is reported as Wright v. British Railways Board [1983] 2 All E.R. 693. Lord Diplock's speech upholding the decision of the trial judge and expressly approving the decision of the Court of Appeal in Birkett v. Hayes was approved by the other four Law Lords.

Lord Diplock drew attention to the necessity to have predictable rules for the assessment of damages in personal injury cases. He said (at p. 699f):

> "My Lords, claims for damages in respect of personal injuries constitute a high proportion of civil actions that are started in the Courts in this country. If all of them proceeded to trial the administration of civil justice would break down; what prevents this is that a high proportion of them are settled before they reach the expensive and time-consuming stage of trial, and an even higher proportion of claims, particularly the less serious ones, are settled before the stage is reached of issuing and serving a writ. This is only possible if there is some reasonable degree of predictability about the sum of money

> "that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability."

In my opinion every word of that general statement is as applicable in Jamaica as it is in England.

The House went on to consider and approve the award of 2% interest by reference to expert evidence which had been tendered in Birkett v. Hayes, and by considering two suggested approaches aimed at finding the rate of interest appropriate as compensation to the plaintiff for being kept out of his money as distinct from a rate of interest that reflected compensation for the risk of inflation. The dat used by Lord Diplock as a measurement to arrive at an appropriate rate of interest in England have no parallel in Jamaica and are therefore inapplicable, but it seems to me that the reasons advanced for sanctioning a lower rate of interest are persuasive and should be adopted in Jamaica. When Cookson v. Knowles [1978] 2 W.L.R. 978 was in the House of Lords, Lord Diplock re-affirmed the power and indeed the duty of the Court of Appeal to set guide lines for trial judges to follow in fixing interest under section 3 of the Law Reform (Miscellaneous Provisions) Act. He said at p. 981:

> "The section gives no guidance as to the way in which the judge should exercise his choice between the various options open to him. This is all left to his discretion: but like all discretions vested in judges by statute or common law, it must be exercised judicially or, in the Scots phrase used by Lord Emslie in Smith v. Middleton [1972] S.C. 30, in a selective and discriminating manner, not arbitrarily or idiosyncratically - for otherwise the rights of parties to litigation would become dependent upon judicial whim.

> "It is therefore appropriate for an appellate court to lay down guide lines as to what matters it is proper for the judge to take into account in deciding how to exercise the discretion confided to him by the statute. In exercising this appellate function, the Court is not expounding a rule of law from which a judge is precluded from departing when special circumstances exist in a particular case, nor indeed, even in cases where there are no special circumstances, is an appellate court justified in giving effect to the preference of its members for exercising the discretion in a

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> "different way from that adopted by the judge if the choice between the alternative ways of exercising it is one upon which judicial opinion might reasonably differ."

With this in mind, I turn to consider what guide line this Court should suggest in the matter of the rate of interest to be awarded on general damages. Section 51 of the Judicature (Supreme Court) Act provides that:-

> "Every judgment debt shall in the Supreme Court carry interest at the rate of six per centum <u>or such other rate per annum as the Minister may by Order from time to time prescribe in lieu thereof</u>, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

The words underlined became part of the section by section 2 of Act 25/71. This amendment was made on the recommendation of the Law Reform Committee and its objective was to introduce a method into the law where the exercise for effecting a change in the interest rate would be rendered much easier by obviating the necessity of having to resort to amending legislation on every occasion for this purpose. So far, no order has ever been made by the Minister under the section.

Unlike the position which existed in England in 1970 where the rate of interest on judgment debts had been fixed over 130 years before and could be considered irrelevant, Parliament in Jamaica as late as 1971 legislated a method for fixing interest rates for judgment debts and it must be assumed that no recommendation or no sufficiently persuasive recommendation has been made to the Minister since 1971 to increase the 6% rate. I think that that rate of 6% should be our starting point. At a time when no money figure has been quantified for damages and consequently the defendant could not pay, why should he be called upon to pay interest at a higher rate than a successful plaintiff can get on a judgment debt? I am not persuaded that any justification exists for a higher rate of interest before judgment than after judgment.

In assessing the damages herein, the respondent is being awarded twice the amount of money which he would have got in 1978. So inflation has not caused his money to depreciate and in this he is in a very favourable position compared with the other members of the society. If he is given interest at the standard rate of 6% for the whole period on the inflated sum he would be reaping a windfall. The interest should be at a lower rate than 6%. Nor do I think that any logical distinction can properly be drawn between the method of awarding interest on special damages and on general damages. Special damages are not all incurred at one time in the vast majority of cases. Neither is all the pain and suffering borne by the victim at one time. It is spread over a long period probably months and even years and the award will cover both the pre-trial and post-trial periods. Yet the damages assessed will all bear interest from the date of the writ.

It is clear that in awarding general damages the trial judge must do so in the money of the day at the time of trial. As Lord Diplock said in Wright's case, supra, this is not a guide line from which a trial judge has a discretion to depart. At page 703 he said:

> (Trial Judges should) "carry out their duty of assessing damages for non-economic loss in the money of the day at the date of the trial, and this is a rule of practice that judges are required to follow, not a guide line from which they have a discretion to depart if there are special circumstances.."

Once the assessment has been made on the money of the day principle I do not think that the interest on the general damages for pain, suffering and loss of amenities should exceed one half the rate applicable to judgment debts. As the law now stands I would suggest as a guide line for the award of interest in personal injury cases that:

(a) interest be awarded on special damages at the rate of 3% from the date of the accident to the date of judgment;

(b) interest be awarded on general damages at the rate of 3% from the date of the service of the writ to the date of judgment.

Mr. Chin See argued that there were inordinate delays in bringing this case to trial and that the learned trial judge wrongly exercised his discretion to order interest in the one case from the date of the accident and in the other from the date of service of the writ. On the first trial date November 30, 1981, the respondent applied for an adjournment and was ordered to pay the costs thrown away. Again on April 14, 1982 when the case came up for trial it was again adjourned on the respondent's application and this time he was ordered to pay two days costs. January 24, 1983 was the next trial date and as the case was not reached it was again adjourned. The other abortive trial dates were May 16, and October 24, 1983. On the latter date the respondent was ordered to pay two days costs. Finally the case came on for hearing on March 12-14, 1984. Mr. Samuels submitted, however, that in the main, the adjournments were occasioned by the absence from Jamaica or the illness of the plaintiff's medical witness, and in any event the appellant was compensated by the award of costs in his favour in respect of most of the adjournments. In my view the lapse of 2½ years between when the matter first came up for trial and when it was in fact tried, is indeed a long time, but I accept that Dr. Douglas was an important witness for the plaintiff and in the circumstances there seems to be no sufficient reason in this case to depart from the exercise of the judge's discretion as to the period for which interest is to be calculated. But plaintiffs and their legal advisers, however, would do well to remember that where a plaintiff has been guilty of unreasonable delay in bringing his action to trial,

it may be appropriate for the trial judge to make a corresponding reduction in the period for which interest is given. See Birkett v. Hayes (supra) per Watkins L.J. at p. 717, and Lord Diplock in Wright's case (supra) at p. 701.

In conclusion I would allow the appeal. I would vary the award for special damages and reduce it to $2,136.00. The award of $4,000 for handicap in the labour market stands. I would reduce the general damages to $40,000. I would vary the rate of interest awarded on the general damages and on the special damages by reducing it to 3% in each case. The appellant will have his costs of the appeal to be taxed if not agreed.

CARBERRY, J.A.:

I agree.

CAMPBELL, J.A.:

I agree.