IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1984/D. 105

BETWEEN	SHEILA DARBY	PLAINTIFF
A N D	JAMAICA TELEPHONE CO. LTD.	FIRST DEFENDANT
A N D	DANIEL RUSSELL	SECOND DEFENDANT

K. Von Cork, T. Ballantyne and P. Beswick for plaintiff
D. Goffe, D. Jones and Christine Isaacs of Myers, Fletcher & Gordon, Manton & Hart for defendants.

HEARD: January 7; February 25, 26, 27; May 27, 28; July 4, 5; October 22, 23, 24, 25, 31; November 1, 1985 & July 7 & 9, 1986.

HARRISON,J.

This is an assessment of damages whereby the plaintiff claims damages for loss incurred as a result of the injuries she received, when she was involved in a motor vehicle accident on the 27th day of December, 1981, when the car in which she was a passenger collided with a mini-van owned by the first defendant and negligently driven by the second defendant.

The plaintiff, a dancer and model, and who lived at the time of the accident, and still lives at 51 Lady Musgrave Road, St. Andrew, sustained fractures of the third, fourth and fifth ribs on the left side of her chest, comminuted fracture of the left femur and injuries to her mouth, losing four teeth, as a consequence. She was treated by Dr. Geddes Dundas at the Kingston Public Hospital, where she remained a patient for a period of approximately two months and then transferred to the Medical Associates Hospital. Dr. Geddes Dundas,a Consultant Orthopaedic Surgeon, on 27th December, 1981 observed the said fractures and the patient suffering from severe pain. The leg was placed in traction and subsequently the fracture was fixed by the insertion of a intra medullary nail. She was transferred to the Medical Associates Hospital, remaining there for two weeks. The plaintiff developed

calcification around the fracture site, caused by bleeding into the tissue and so was re-hospitalized and treated by the physiotherapist. Because of the discomfort and pain in the "pin site" felt by the plaintiff, and because from the radiographic X-rays - he was of the opinion that the left leg could support her weight, Dr. Dundas removed the intra-medullary nail, or pin, on the 1st June, 1982. The fracture became over-stressed and angulated. On being told that the pin would have to be re-inserted, plaintiff went to U.S.A. for a second medical opinion in September, 1982.

On the 12th October, 1982 the plaintiff was re-admitted to the St. Joseph's Hospital, the alignment was corrected, the leg re-pinned and she was discharged on the 16th October, 1982. The pain and discomfort continued and the area of the fracture became inflamed and she was treated with antibiotics. On 1st May, 1984 the pin was finally removed in the St. Joseph's Hospital and she was discharged on 9th May, 1984.

The plaintiff suffered total disability from the time of her initial injury until 2nd March, 1982. She was functionally unable to work until her operation in October, 1982. She was first able to walk without crutches on 20th January, 1983 - could bend her knee a little more than ¾ of normal range. Up to May, 1984 she had discomfort - "intermittent pain in pine site."

The plaintiff was put on an exercise programme in 1983, because of extreme pain and further treated with infra-red physiotherapy because of further inflammation in March, 1984.

Dr. Dundas found that the plaintiff's left leg had suffered a 1.5 cm. difference in limb length and lost 5^{o} - 10^{o} of flexion at the knee amounting to 10% of the whole man, and also 17% to 20% loss of limb function. Dr. Dundas stated further, that the pain and stiffness in the joints would improve and return to normal.

As a dancer, her ability to run, jump and kick her feet is impaired - because of the pain and discomfort and thus will continue "for the rest of her life" because of the original injury. The plaintiff

received medication, oral analgesics and antibiotics for the pain and discomfort. She suffered a "reduction in hair volume", which reduction Dr. Dundas stated; "not know which medication caused it ... but it could have been doloxine."

She has two unsightly surgical scars measuring 20 cm. x 8 cm, respectively, to her left leg.

She was inhibited in her sexual activity due to "too much pain and discomfort ..." and " ... psychosomatic reaction ... caused by muscular spasm ...", at least up to June, 1983, when she conceived.

On 20th May, 1985 plaintiff developed swelling in area of fracture of left thigh. Dr. Dundas diagnosed it as bacterial infection - tender and inflamed-and stated"that residue of bacteria always there in the blood stream" and condition is "liable to recur from time to time; two years, ten years, twenty years - blood borne infection"; she was treated with antibiotics.

Dr. Horace Jackson,Consultant, Specialist in plastic and reconstructive surgery who saw the plaintiff on 6th January, 1985 described the 20 cm. x 0.75 cm. scar to the plaintiff's left thigh as "grotesque looking and hyperpigmented" and the other scars as "anti-tension", that is, at right angle to the normal crease of the skin, with an indrawing or contraction of the skin because of "gross scarring to the deep tissue of the thigh." Dr. Jackson was of the opinion that cosmetic surgery would effect a 80% to 85% improvement to the scars, but that they would still be visible "at conversational distance", the cost of such surgery he estimated at $30,000.00.

The four teeth lost by the plaintiff, were the central incisors in the upper jaw and the two adjacent teeth. Dr. Ian Jones, who examined her in December, 1982, found it consistent with the plaintiff being involved in a motor vehicle accident. She was fitted with a temporary prosthesis. A permanent bridge is advised; this would need to be changed once or twice after age 60 years, because of resorbence of the bones beneath the gums.

The exercise programme involved physiotherapy treatment to the plaintiff's leg at the St. Joseph's and Kingston Public Hospitals. She also did exercises at the Spartan gymnasium for twelve (12) weeks, attending three (3) times per week.

Domestic help was also employed by the plaintiff on the four occasions that there was an operation to her leg.

As a result of the accident, the plaintiff can no longer play netball, because of the pain to her left leg, neither can she now wear shorts nor a bikini, because she is now inhibited and self-conscious of the scar to the said leg, but cycling and swimming could improve her condition.

The plaintiff was engaged as a dancer and model of clothing, and stated, "placed different streaks in my hair", in Nassau, Bahamas, in 1980 earning approximately " ... US$100 per night ... Monday, Wednesday and Friday ..." and " ... US$200 per week ..." respectively.

During the year 1981, the plaintiff was employed as a dancer to the Career Reggae Management Company operated and managed by Mr. Copeland Forbes, the plaintiff's witness, and earned " ... about US$600 per week." The plaintiff danced with a group as a "backup" dancer to performers.

The plaintiff said:-

In examination in chief,

> "I left Bahamas early part of 1980 and come to Kingston .... I came back from a tour just before my accident. After Nassau, I returned to Jamaica to 'cool out' for a couple of months ... I worked at home with Jimmy taking telephone calls .... Between March and December, 1981 - I was working with a tour Johnny Nash, Betty Wright and a lot of people - I danced -- worked with a company - Career Reggae Management Co. .... "

In cross examination,

> "The average tour in 1981 ... from March to December - seven (7) months - I got one month off during that period .... In 1981 -- I started tour March and worked up to October and then met my accident .... In 1981 I left Jamaica March and toured all over United States ... Jimmy was on 1981 tour ... first tour I went on ... organised by Mr. Forbes."

Copeland Forbes, the plaintiff's witness said:-

In Examination in chief,

> "I know plaintiff ... employed to me as dancer .... She has been on tours with me. Her pay on tour US$600 per week and US$35 per day. When we do two shows we would give her US$600 for filming. If we have a re-run of the filming of performance - she would get another US$600. On tour - 1981 - we did four television shows and each had at least one re-run - some had two - it varied; once we had three .... We are to withhold 30% of each employee's pay and after deduction should return balance to employee. I did not withhold such 30% ...."

In cross examination,

> "Tour in 1981, went to U.S.A., Europe and Cuba. In U.S.A. toured for three (3) months and come out to Europe - two (2) months there and then back to U.S.A. - 10 weeks and then to Cuba for two (2) weeks and returned to Jamaica in November. Plaintiff with us all this time. We covered 40 - 50 States ... In Europe visited Brussels, Belgium ... eight cities - Germany - eight cities in France. In Italy, Milan ... - we returned to U.S.A. and then to Cuba ... then to Jamaica. Plaintiff with us .... Television shows filmed in New York - "Saturday Night Live" and "David Letterman" and in California we did "Soul Train" and in Germany we filmed a television show "Rock Palace" - plaintiff in all these as dancer."

He said further,

> "The 1981 tour for little more than 8 months. Jimmy Cliff was on the Cuba leg of tour. We all left from Jamaica to Cuba. Plaintiff with me from left Jamaica to Cuba and back to Jamaica. I now say that Jimmy and Peter Tosh were in Europe - separate tours .... Plaintiff with us with Peter and then did some work with Jimmy -also - Europe plaintiff did some work ... we had Jimmy Cliff until November, 1981 -- plaintiff was on that tour ... plaintiff with me from March until returned from Cuba .... We gave time off during eight months tour, but not send them home - more expensive to send them home - so we would do press and other things. Maximum time anyone got was two to three weeks." (emphasis mine)

The plaintiff did not mention touring with the group in Europe nor Cuba and probably toured U.S.A. only. The plaintiff's tour probably only lasted approximately six (6) months - because of the fact that the group, excluding the plaintiff, was in Europe for about two months and that there would have been some "time off" for two to three weeks during segments of the tour.

I found the plaintiff's witness Copeland Forbes to be a person easily moved to exaggeration and inclined to inflate the plaintiff's earnings, features that detracted from his credit, although his secondary purpose was to project an image of the magnitude and impact of his own organization.

The plaintiff said in examination in chief:-

> "While on this tour ... I would get also US$35 per week for food. The company would pay for transportation and accommodation. We stayed at hotels - Howard Johnson and Holiday Inn .... They gave me $35 per week for meals. I now say they gave me $35 U.S. per day for food. I now say it was a mistake. I do not remember how many days per week ~~+~~ I got $35.U.S."

The witness Forbes said in examination in chief, in contradistinction,

> "$35 per diem is for laundry and phone calls and such necessities ... I paid hotel bills, air transportation, buses and other miscellaneous charges .... Meals - we travel with a cook, we provide meals and pay the cook. Sometimes I would give some people money to buy his meals. Cost to me providing meals per person - average per person U.S.$40 - $50 per day ... "

and in cross examination,

> "Cost of food cook/borne by my company. I work out weekly cost and income before tour starts - food is paid from the tour gross. Each week I give cook a "float" and he buys food and accounts to me in middle of week. I provide lodging, food, transportation - it is free to musicians, dancers and singers and not charged back to them. If food finished I would buy more - it is a commitment." (Emphasis mine)

Because of this patent discrepancy between the evidence of the plaintiff and that of her witness, I am of the view that the payment of U.S.$35 per day to the plaintiff is not substantiated.

However, the provision by the company of " ... lodging, food ... it is free ... not charged back to them ... it is a commitment", is a benefit to the plaintiff, a part of her terms of employment, and so the monetary value may be claimed, vide Liffen v. Watson (1940) 2 All E.R.213.

I do not find that the plaintiff was involved in U.S.A. in appearing on television shows and the filming of such shows.

The plaintiff merely said, in examination in chief,

> "Throughout the tour I got different money - on some occasions. When I did a spot T.V. show like a video show the earning was different."

The plaintiff's witness Forbes said,

> "When we do two shows we would give her U.S.$600 for filming .... On tour in 1981 we did four T.V. shows and each had at least one re-run .... Plaintiff was in these shows - she got paid for the shows plus re-runs .... T.V. shows filmed in New York 'Saturday Night Live' and 'David Letterman' and in California we did 'Soul Train' and in Germany we filmed a T.V. show 'Rock Palace' - plaintiff in all these as dancer."

The defendants' witness John Wedderburn, Assistant Secretary and Assistant General Attorney of the N.B.C. of United States of America stated, in examination in chief,

> "David Letterman show commenced broadcast in February, 1982. There was a David Letterman show during the morning in 1980. In 1981 no David Letterman show .... In 1981 Jimmy Cliff appeared on 'Saturday Night Live' in evening of February 7th and morning of February 8, 1981." (emphasis mine)

Having found that the plaintiff did not travel to Europe as a dancer, and the plaintiff having begun her tour not before March, 1981, this Court rejects the evidence of payment of earnings to her for appearance on the said television shows.

Before the start of her dance tour in March, 1981, the plaintiff was employed doing office work for Mr. Jimmy Cliff. Since the accident, the plaintiff resumed her office work which includes the distributing of records, and is paid for such office work the sum of Three Hundred and Fifty Dollars ($350) per week as wages by Sun Power Production Limited. The plaintiff had in February, 1985, a temporary cessation of work since January, 1985, because of her migrane headaches, a pre-accident condition, but stated,

> "When I recover from this attack I will resume doing office work again .... I will not stop it and go on tour."

Mr. Forbes described the plaintiff as an excellent dancer whom he had intended to keep permanently on his show and who could have been

actively dancing until "anywhere around 40 to 45 years"; but for her accident. The plaintiff conjectured that she thought that she could have continued "to tour as a dancer up to age 45", but now "I may go back to school ... and take up dancing and teach it."

The plaintiff, in a sorely amended statement of Claim, claimed damages and several items of special damages.

Mr. Beswick for the plaintiff submitted that the special damages should be awarded as claimed, conceded that item (e) "medical costs" is properly dealt with as costs, and argued that the damages for loss of earnings should be awarded in the currency of the United States of America or the Jamaican equivalent calculated at the rate of exchange prevailing at the time of payment or alternatively, at the time of judgment, and that the breach date rule that damages should be assessed according to the amount converted from U.S. to Jamaican currency at the foreign exchange rate prevailing at the date of the breach, no longer applied. He stated further, that the Court should infer that the plaintiff was at the relevant time, living in Nassau, Bahamas. He referred to several authorities, but relied primarily on the cases, Schorsch Meier GmbH v. Hennin (1975) 1 All E.R. 152 and Miliangos v. George (Frank) (Textiles) Ltd. (1975) 3 All E.R. 801, in support of his argument, stating further, that the Jamaican Court of Appeal in the case of Sonny Gobin v. Motor and General Insurance Co. Ltd., S.C.C.A. 3/84, gave judgment in a foreign currency applying the principle in the Schorsch Meier case and that this Court should not be guided by the decision in the case of Syndic in Bankruptcy of Nasrallah Khoury v. Khayat (1943) All E.R. 406, which reiterated the "breach date" rule, but should follow instead the decision in Dodd Properties (Kent) Ltd. et al v. Canterbury City Council et al (1980) 1 All E.R. 928, where the damages were assessed as at the date of the action.

Mr. Goffe, for the defendants, challenged several items of special damages and submitted further, that there is no rule that judgment may be given in a foreign currency, because the form of judgment

remained unchanged in Jamaica - the Schorsch Meier case was not binding in Jamaica; that damages for the plaintiff's foreign currency loss should be given in the Jamaican equivalent, converted according to the rate of exchange on the date of the breach, i.e. when the plaintiff would have earned it; that the Miliangos case was a case based on a breach of contract, the parties having agreed on the currency to be applied as in the Gobin case, which principle does not apply to the instant case, such principle not having been extended to cases in tort, and that the said Miliangos case must not be taken to have overruled the cases of Celia (Steamship) (Owners) v. Owners of Steamship Volturno (1921) 2 A.C. 544, (1921) All E.R. 110, and United Railways of the Havana and Regla Warehouses Ltd., Re (1960) 2 All E.R. 332, which held that the date of conversion is thetdate of breach both in contract and in tort.

This Court holds that the general rule is that damages for breach of contract or tort are assessed as at the date of breach or tortious act. There have been several variations of this rule according to the circumstances of the particular case and because of the legal thinking that debts in foreign currency should be governed by a separate rule.

The question is - what is the fair assessment today of the plaintiff's loss since 1981? The relative postures of the plaintiff and the defendants assume a significant difference because of the mercurial sensitivity of the Jamaican dollar since 1981, as it relates to other currencies internationally.

This question of the date of conversion of foreign currency arose in the case of Owners of Steamship Celia v. Owners of Steamship Volturno, supra, on appeal to the House of Lords. This case involved the collision in the Mediterranean Sea of an English ship, the Celia and an Italian ship, the Volturno. Both ships were to blame. The damages were agreed subject to a question by the Italian owners as to the rate of exchange in respect of a claim in Italian lira for detention, while the ship was undergoing repairs. It was held that the proper date for ascertaining the rate of exchange for the purpose of converting

the amount payable in English currency was the date at which the detention occurred.

In pronouncing the final judgment, Lord Buckmaster said, at p. 548:-

> "A judgment whether for breach of contract or for tort where ... the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong."

Lord Sumner said, at p. 558:-

> "Fluctuations in foreign exchange inevitably introduce a speculative element into all transactions and affairs, and, unless the parties themselves have provided for this by some contract, the law must apply the same principles as if they had remained stable. Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays."

Finally, in the said case, Lord Wrenbury said:-

> "The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act."

The Volturno case was considered by the House of Lords in the case of Re United Railways of the Havana and Regla Warehouses Ltd., (supra), which involved payments due on the winding up of an English Company which operated a railway in Cuba and transactions concerning the stock of a subsidiary of the said Company in the United States of America. It was held that "the rate of exchange of the foreign currency in which the unfulfilled obligations of the railway company under the lease (which created debts due in foreign currency) were payable, was that prevailing as and when each sum fell due and become unpaid."

Viscount Simmonds said at page 343:-

> "We are engaged in settling the law on a question in which any rule is artificial and to some extent arbitrary. In other systems of law, different rules have been adopted, and there is no doubt that one system may benefit one creditor and another another. No rule can do perfect justice in every case. In this country, the rate is settled so as to bind all courts that where the claim is in damages for breach of contract or for a tortious act, the date of conversion is the date of that breach or that act. It would in my opinion introduce the sort of refinement into the law, against which I have striven and shall ever strive, if a different rule were adopted in the case of a foreign debt. In one case a contract for delivery of goods, in another for delivery of foreign currency, in another for payment of a foreign debt, in all alike precisely the same damage is suffered by a plaintiff who sues on the failure of the defendant to fulfill his obligation. It would be little credit to our law if a different measure was meted out in these several cases."

The Court of Appeal in England in Schorsch Meier GmbH v. Hennin, (supra), which concerned a claim for a debt due and unpaid for goods bought by the defendant who lived in England from the plaintiff who carried on business in West Germany on a contract invoiced in deutschmarks, refused to follow the Havana case and held not only that the claim filed in the English courts need not be in sterling but that the judgment may be given in a foreign currency, the currency of the contract, and that the date for conversion is the date of enforcement of the judgment at the rate of exchange prevailing on such date.

Lord Denning was a member of the bench in both the Volturno and the Havana cases.

The House of Lords again considered the question in the case of Miliangos v. George Frank (Textiles) Ltd., (supra). This was a claim to enforce a debt due on a contract for the sale of polyester yarn by the plaintiff, a national of Switzerland, to the defendant, an English company; the goods were invoiced in Swiss francs and the proper law of the contract was Swiss law. The House there held (Lord Simon of Glaisdale, dissenting), declining to follow the Havana case, thereby reversing itself, that the plaintiff having brought an action for money due under a contract he was entitled to claim and obtain judgment

for an amount of the debt expressed in the currency of a foreign country if the proper law of the contract was the law of that country and the money of account and payment was of that same country and that such judgment was in Swiss francs or the sterling equivalent converted as on the date leave was given to enforce the judgment.

Lord Wilberforce, in dealing with the argument that the "breach date rule makes for certainty whereas to chose a later date makes the claim depend on currency fluctuations", said at p. 811:-

> "The relevant certainty that the rule ought to achieve is that which gives the creditor neither more nor less than he bargained for. He bargained for ... Swiss francs ... whichever way the exchange into those currencies may go, he shall get ... Swiss francs .... That such a solution, if practicable, is just, and adherence to the 'breach date' in such a case unjust in the circumstances of today, adds greatly to the strength of the argument for revising the rule or, putting it more technically, it adds strength to the case for awarding delivery in specie rather than giving damages."

He continued at page 813:-

> "I would make it clear that, for myself, I would confine my approval at the present time of a change in the breach-date rule to claim such as those with which we are here concerned, i.e. foreign money obligations, obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country ... the principles on which damages are awarded for tort or breach of contract are both very intricate and not the same in each case, involve questions of remoteness ... and have no direct relevance to claims for specific things, in which I include specific foreign currency .... I would only say ... that the mere fact that as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach need not preclude, in particular cases, the conversion into sterling of an element in the damages, which arises and is expressed in foreign currency, as at some later date. It is for the courts ... to work out a solution in each case best adapted to to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered." (Emphasis mine)

Lord Cross of Chelsea, in concurring with the majority said, with great caution, at page 838:-

> "I say nothing one way or the other as to the date for conversion into sterling of sums ascertained in foreign currency for damages for breach of contract or tort."

Lord Fraser of Tullybelton said at page 842:-

> " ... I am not entirely satisfied that difficulty and even injustice, may not occur if the rule continues to be that damages are converted at the breach-date while foreign debts are converted at the date of payment .... As things are ... I would agree that it is not necessary or appropriate to consider cases other than foreign debts." (Emphasis mine)

The case of Dodd Properties (Kent) Ltd. et al v. Canterbury City Council et al, (supra), is a judgment of the English Court of Appeal involving a claim by the plaintiffs in tort for damages for structural damage to their building caused by the pile-driving operations by the defendants. The Court, in holding that the damages should be assessed according to the broad and general principles, that they should be compensatory and put the injured party, as far as possible in the same position as if the wrong had not been committed, said that the cost of repairs should be assessed at the earliest date, when having regard to all the circumstances, the repairs could reasonably have been undertaken, rather than when the damage occurred. Browne, L.J. agreed with the breach-date rule, but said that "damages... may be assessed at some later date." Donaldson, L.J. also agreed with the breach-date rule, and continued:-

> " ... it is only a general or basic rule and is subject to many exceptions. Thus damages for personal injury, excluding consequential loss to which other principles apply, are assessed in the light of the value of money at the date of hearing. The issue here is whether the assessment of damages based on the cost of repairs or re-instatement is another exception .... I think it is." (Emphasis mine)

The Judicial Committee of the Privy Council in the case of Syndic In Bankruptcy of Nasrallah Khoury v. Khayat, (supra), an appeal from the Supreme Court of Palestine, held that the rate of exchange to be applied in respect of promissory notes due was that at the maturity of the notes and not the date of actual payment. The Board referred to

the case of Di Ferdinando v. Simon, Smiths & Co. Ltd. (1920) 2 K.B. 409 - a case of breach of contract, and the Volturno case - both of which cases affirmed the breach-date rule.

It seems to this Court that the decision by the majority of the House of Lords in the Miliangos case effected a change in the law in respect of the breach-date rule, as far as it related to a breach of contract in foreign currency transactions. Their Lordships in their speeches carefully and pointedly referred to terms such as "bargained for", "money due under a contract", "foreign money obligations" "foreign debt" and "debt", and left untouched and unaffected the rule in relation to a tortious act as enunciated in the Volturno, Syndic and Havana cases. It is my view that the Courts visualize a more just approach in abrogating the breach-date rule in respect of foreign money obligations. Parties bargaining at arms length in the exact austere atmosphere of commercial transactions of today are bound to contemplate in their bargains the mercurial tendencies of all currencies, both local and international. They would be deemed to appreciate the attendant risks, which may involve a loss or a windfall, and respect the sanctity of the contract. The cases did not extend any such similar principle to tortious acts.

It is my view that the breach-date rule applies in this case and that the damages are to be assessed as at the date of breach as a result of the tortious act of the defendants; and conversion is to be on such date.

What is the loss to the plaintiff? The plaintiff is a Jamaican national who resides in Jamaica. She was employed doing office work in Jamaica for the periods before and after her dancing tour in 1981. After working in the Bahamas in 1980 she returned to Jamaica to "cool out", thereby maintaining a continuing contact with Jamaica. Her earnings of U.S. dollars in 1981 and successive years would have been earnings relative to a Jamaican context in each respective year, and would not be referable to any other context or subsequent period. Her earnings do not fall within the category of a foreign currency

obligation, an exception to the breach-date rule, but are more akin to an aspect of special damages, the value of which would remain fixed as at the date of breach. This court accordingly is inclined to follow the reasoning and decisions in the Volturno, Havana and Syndic cases.

The fact that the plaintiff has been kept out of her money can be adequately satisfied by the provision of interest.

On the evidence, I accept that the plaintiff received gross earnings of U.S.$600 per week on her dance tour lasting for six months. I find that she would be employed to the Company Sun Power Production probably during the months of January and February and November and December, while not on tour and earning Ja.$350 per week. Reggae Careers Incorporation, the Company of the plaintiff's witness Copeland Forbes, paid for the hotel accommodation for the plaintiff, "about U.S.$60 per day" and provided meals "average per person U.S.$40 to $50 per day." The plaintiff claimed for board and lodging as a separate item, "n", of special damage. I have treated it as a part of her gross earnings, i.e. U.S.$100 per day, and as a consequence, subject to tax - Liffen v. Watson (above).

The approximate tax rates for the relevant years on amounts of gross earnings on the Jamaican dollar is 50% where the amounts are between Ja.$12,000 and $14,000 and over Ja.$14,000 - 57½%. This Court has not sought to do a precise computation of the tax payable, but has used the second highest rate in the scale of 50% of all earnings, taking into consideration and making up for any personal allowances to which the plaintiff may have been entitled and considering also the lower rates in the scale, on each $1 of earnings below Ja.$12,000 to which the plaintiff would have been subject.

Her earnings would therefore have been as hereunder, in

1981:- i) U.S.$600 x 24 (6 months) x 1.78 = $25,632.00

The plaintiff's witness Martin Raikes gave evidence of each rate of exchange since 1981 and stated that the official rate of exchange in 1981 was, Ja.$1.78 to U.S.$1

ii) Ja.$350 x 16 (4 months) = $ 5,600.00

iii) Board and Lodging U.S.$100 x 7 x 24 (6 months) x 1.78 = $29,904.00

Less 50% tax $61,136.00 - $30,568.00

1982:- The plaintiff would probably have earned an amount similar to her earnings in 1981 $30,568.00

1983:- i) U.S.$600 x 24 (6 months) x 1.78 = $25,632.00

The plaintiff was a healthy person - her conception in June, 1983 probably would not have curtailed her dancing - her dance tour season of March to October, 1983; the official rate of exchange was unchanged at $1.78 up to October, 1983.

ii) Ja.$350 x 4 (1 month - January) = $ 1,400.00

Plaintiff could have commenced her office work in February, 1983

iii) Board and Lodging - U.S.$100 x 7 x 24 (6 months) x 1.78 = $29,904.00

$56,936.00

Less office earnings in mitigation Ja.$350 x 24 $ 8,400.00

$48,536.00

Less 50% tax - $24,268.00

1984:- i) U.S.$600 x 12 (3 months) x 4.20 = $30,240.00

Plaintiff may have been able to rejoin her dance tour 3 months after having given birth to her child in March, 1984; the rate of $4.20 is the average of the rates of $3.98 in July, 1984 and $4.43 in October, 1984 to U.S.$1

ii) U.S.$700 x 12 x 4.20 = $35,280.00

$65,520.00

Less office earnings in mitigation Ja.$350 x 12 $ 4,200.00

$61,320.00

Less 50% tax $30,660.00

1985:- i) U.S.$600 x 24 (6 months) x 5.52 = $79,488.00

ii) U.S.$700 x 24 (6 months) x 5.52 = $92,736.00

$172,224.00

Less office earnings in mitigation Ja.$350 x 24 - 2 (14 days) = $ 7,700.00

$164,524.00

Less 50% tax $82,262.00

I did not accept that the headaches that the plaintiff developed in May, 1985 were severe enough to keep her away from work in excess of "14 days" - the period stated by Dr. Dundas.

1986:- i) U.S.$600 x 17 (March, 1986 to July,7, 1986) x 5.50 = $ 56,100.00

ii) U.S.$700 x 17 x 5.50 = $ 65,450.00

$121,550.00

Less local earnings Ja.$350 x 17 $ 5,950.00

$115,600.00

Less 50% tax $57,800.00

In all the circumstances, I assess the damages as hereunder:-

(1) Special Damages

(a) Replacement of torn clothing and personal effects $ 260.00

Cost of "torn sweat suit and sneakers" allowed. Evidence in respect of watch " ... not know cost ... saw watch like that for $3,000 "without diamonds ..." and bracelet "mashed up - to be melted to be repaired - $700 ...", insufficient in proof of loss.

(b) Transportation to hospital, doctor, health club and physiotherapist. Plaintiff's evidence, "I ... paid transportation - about $30 ... about 200 times back and forth ...", is inclusive.

i) Exercise at Spartan "went about 12 weeks ... paid $10 per day - 3 times per week ...." 36.00

ii) Physiotherapy (bills agreed) 81.00

iii) Hospital - 7 trips until removal of pin 7 ..

124.00 @ $30 ea.

= $ 3,720.00

(c) Cost of exercise - Spartan Health Club $ 400.00

(d) Cost of physiotherapy sessions $ 1,620.00

(e) Medical reports - no award - item of cost ---

(f) Fees to Dr. Dundas $ 3,950.00

c/f $ 9,950.00

$ 9,950.00

(g) Medication - no award - plaintiff said, "take vitamin power to bring back my bones" - not supported by medical evidence ---

(h) Hospital charges, X-ray fees less $50 for medical report $ 2,215.00

(i) Cost of airfare $ 1,100.00

(j) Specialist's fees in U.S.A. (U.S.$350) $ 623.00

Court finds that the removal of pin because of attendant pain and discomfort to the plaintiff was, in retrospect ill advised and so the plaintiff was entitled to have some reservation and needed further medical opinion as to its re-insertion.

(k) Household helper (60 weeks @ $50 per week) $ 3,000.00

(l) Loss of earnings

1981 -	$ 30,568.00	
1982 -	$ 30,568.00	
1983 -	$ 24,268.00	
1984 -	$ 30,660.00	
1985 -	$ 82,262.00	
1986 to 7/7/86	$ 57,800.00	
	$256,126.00	$256,126.00

(m) Dental expenses $ 300.00

$273,314.00

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(2) Loss of future earnings

U.S.$1500 ($800 + $700) x 24 x 5.50 per annum

The Court makes allowance for a probable increase in the plaintiff's weekly pay of one third and not two thirds of "U.S.$1,000" as stated by the witness Forbes - $198,000.00

Less Ja. $350 x 24 $ 8,400.00

$189,600.00

Less 50% tax $ 94,800.00 per annum net

The plaintiff is now 37 years old and not having been shown to have been an exceptional or specifically gifted dancer could probably have worked as a dancer until about age 40; the witness Forbes said, "plaintiff was an

excellent dancer ... a lot of energy ... could have been actively dancing ... around 40 to 45 years. Two people ... in 40's still dancing ... Tina Turner 48 ... Madam Sugar Hips close to 50 years."

The Court takes into consideration the uncertainties of reduction in the length of the tour or injuries and illness and finds that 2 years' purchase is a reasonable assessment of such future loss - $94,800 x 2 = $189,600.00

(3) Future expenses

i)	Dental - Bridge	$6,300.00	
	Examination fee	$ 25.00	
	X-ray	$ 60.00	
		$6,385.00 x 3	$ 19,155.00

- because of resorbence of the bones -

ii)	Plastic surgery to be done	$ 30,000.00
		$ 49,155.00

The plaintiff suffered extreme pain and discomfort since the injury and as recent as the 20th day of May, 1985, Dr. Dundas observed some swelling caused by bacterial infection in the area of the fracture. A residue of bacteria will always be present in the blood stream and the infection causing headaches, fever and pain will probably continue to return. I find that a fair assessment of an amount for pain and suffering and loss of amenities suffered by the plaintiff is SEVENTY THOUSAND DOLLARS ($70,000.00).

Damages are accordingly assessed as follows:-

SPECIAL DAMAGES			$273,314.00
GENERAL DAMAGES -			
i)	Pain and suffering and loss of amenities	$ 70,000.00	
ii)	Loss of future earnings	$189,600.00	
iii)	Future expenses	$ 49,155.00	
		$308,755.00	$308,755.00

On the Special Damages, interest is allowed at 3% from 27th December, 1981 to the date hereof, and on SEVENTY THOUSAND DOLLARS ($70,000.00) of the General Damages, the interest allowed is 3% from

the date of the service of the Writ to the date hereof and costs to be agreed or taxed.

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On the basis of certain incorrect calculations in the computation of the damages, I have hereby requested the parties to return to Court to correct these amounts; the judgment has not yet been perfected and so I am therefore seeking to do so under the "slip rule."

(1) The plaintiff sustained her injuries on 27th December, 1981. The computation of her 1981 earnings was done in order to ascertain her annual earnings and so was incorrectly included in her net earnings of special damages.

(2) By the Income Tax (Amendment) Act 1986, the income tax payable on gross earnings since January, 1986 is approximately 33⅓% and not 50% as stated for the year 1986; this latter percentage was applicable to the years 1981 - 1985.

The plaintiff's net earnings in 1986 are, $115,600.00 less 33⅓% = $77,066.00.

The amendments are:-

i) Special Damages

"(1) Loss of earnings -1982 $ 30,568.00
1983 $ 24,268.00
1984 $ 30,660.00
1985 $ 82,262.00
1986 to 7/7/86 $ 77,066.00
$244,824.00 "

Total $262,012.00

ii) Loss of future earnings

Gross annual earnings = $189,600.00

Less 33⅓% tax = $126,400.00 net

Total ($126,400 x 2 years' purchase) = $252,800.00

Damages are assessed as hereunder:-

SPECIAL DAMAGES - $262,012.00 plus interest at 3% from 27th December, 1981 to date.

GENERAL DAMAGES - $371,951.00 being pain and suffering and

loss of amenities	$ 70,000.00
loss of future earnings	$252,800.00
Future expenses	$ 49,151.00

plus interest at 3% on $70,000.00 from date of service of Writ to date and costs to be agreed or taxed. Stay of execution for two weeks on THREE HUNDRED AND THIRTY THREE THOUSAND NINE HUNDRED AND SIXTY THREE DOLLARS ($333,963.00).