JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 44/1986

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN SHEILA DARBY PLAINTIFF/APPELLANT

AND THE JAMAICA TELEPHONE COMPANY LIMITED

and DEFENDANTS/RESPONDENTS

DANIEL RUSSELL

B. Macaulay Q.C. and P.A. Beswick instructed by Ballantyne, Beswick and Company for Plaintiff/Appellant

W.K. Chin See Q.C. and Dennis Goffe instructed by Myers, Fletcher and Gordon, Manton and Hart for Defendants/Respondents

1, 2, 3, 4, 7, and 8th December, 1987 and 11th April, 1988

CARBERRY, J.A.

This is an appeal from the assessment of damages made by Mr. Justice Harrison on the 9th July, 1986 in a negligence action between Sheila Darby and The Jamaica Telephone Company and Daniel Russell. Negligence was admitted and the sole issue between the parties related to the damages which the Defendants should pay to the Plaintiff for the serious injuries sustained by her in the accident which took place on the 27th December, 1981.

The Plaintiff, a model and creative dancer, was a passenger in a volks-wagon motor car being driven in a northerly direction along Washington Boulevard in the parish of St. Andrew, when the car in which she was driving was struck by a minivan owned by the first named defendant and driven by the second named defendant. The accident took place at the intersection of Washington Boulevard and

Weymouth Drive and resulted in serious and extensive injuries to the Plaintiff. These were set out in the Statement of Claim as follows:

(a) Severe shock and loss of blood;
(b) Fracture of the left third, fourth and fifth ribs;
(c) Fracture of the pneumo-thorax;
(d) Severe blows to the head and face resulting in the loss of three teeth;
(e) Comminuted fracture of the mid shaft of the left femur resulting in shortening of the left leg, and a permanent partial disability of 10% of the whole man. The Plaintiff underwent an extensive course of treatment over a period of three years, including intramedullary nailing of the fractured site twice, and a total of four operations. The Plaintiff has been treated intensively with physiotherapy over the period. The Plaintiff's left leg remains angulated at the fracture site and corrective surgery has been unable to correct same.

Amendments were made to the Statement of Claim to add the following further injuries:

(f) Loss of hair;
(g) A state of mental depression;
(h) Migraine headaches;
(i) Reduction in libido;
(j) Suicidal tendencies:

(i) loss of self-confidence;
(ii) self-consciousness and self-pity;

It was further contended that there had been damage to the plaintiff's appearance (severe scarring on the leg; having to insert a dental plate etc.); to her ability to speak, eat and of course to move.

The Plaintiff was 32 years old at the time of the accident, and the evidence showed that she had fairly recently emerged on the international entertainment scene as a dancer, singer and model. This was due in part to her own talent but also in part to her relationship with Mr. Jimmy Cliff, reggae (music) artist, film producer, actor and writer, for whom she has had two children.

The difficulties encountered in this appeal relate to two major problems in law, and secondly to points of detail relating to the claims made and those not allowed. The two major problems are (a) the incidence of income tax: the application to the Plaintiff's claim of the rule in Gourley's case; and (b) in as

much as the plaintiff lost the opportunity for furthering her career abroad where she earned foreign currency (principally American Dollars) the proper date for the conversion of the lost earnings into Jamaican currency: should it be at the date of breach? or the date of assessment? or some other date?

Dealing first with the points of law:

(a) As to income tax deductions from lost earnings, past or future:

Not until the House of Lords decision in British Transport Commission v Gourley (1956) A.C. 185; (1955) 3 ALL E.R. 796 did it emerge that in calculating damages for loss of earnings, the Plaintiff's liability for income tax and sur tax must be taken into account. Before that the courts had ignored that factor, See Billingham v Hughes (1949) 1 K.B. 643; (1949) 1 ALL E.R. 684 (C.A.) and Plaintiffs had been able simply to prove their gross loss (less expenses of earning the income if any).

Their Lordships, however, decided that Plaintiffs were only entitled to recover their actual loss, and that if there would have been income or sur tax exigible on their lost earnings it must be taken into account. It was said that the courts sat to reimburse the Plaintiff for actual loss, not to punish the defendant. The result has been two fold: though the tax is deducted from the amount the defendant is required to pay to the Plaintiff, there is no requirement that it should be paid to the revenue. The Plaintiff is deprived of the earnings, and observe - supposing he is liable on other income for income tax, he gets no credit for the income tax that has been deducted from his damages. The rule mulcts the Plaintiff and yet allows the defendant to go free. He is spared from paying for the full extent of the damage he has caused, because of the tax liability of the Plaintiff. Consequently, it seems better to injure a rich Plaintiff (with a high tax liability) than a poor one, as the richer the Plaintiff and the more extensive his loss of wages or income caused by the accident, the less will he recover

from the defendant when tax is taken into account. The rule sees no money going to the revenue, though what might have gone to it is credited to the tortfeasor whose negligence (or possibly deliberate action) has injured the Plaintiff!

In practice the rule in Gourley's case is prayed in aid largely in those cases in which the damages promise to be large and the insurers are anxious to reduce their liability as much as possible. So far as I know no attempt has been made by any legislature to address this problem, and in as much as the damages paid by insurers is cut down, the community as a whole may benefit by a lower rate of insurance premium.

The effect of applying the rule in this case was that the trial judge stated that at the rate of income involved the approximate tax rates would have been 50% and possibly 57%, and he added:

> "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 J$12,000 to which the plaintiff would have been subject."

At page 18 of his judgment, the learned judge sets out in summary the effect of this calculation in respect of loss of earnings 1981 to trial 7th July, 1986: It came to J$256,126.00. Had income tax not been deducted at 50%, this figure would have been twice as much i.e. J$512,252.00.

Counsel for the Plaintiff, Mr. Macaulay, attacked the application of the rule in Gourley's case to assessments of damage in Jamaica. Then he went on to attack the actual application on matters of detail.

He argued that the rule in Gourley's case was in breach of the Constitution of Jamaica. (The U.K. had no written constitution so that the argument would not have applied there). Section 18 of the Constitution provides that no property of any description shall be compulsorily taken possession of, except by or subject to compensation. True, there was a sub-section that provided the basic rule should not affect the making or operation of any law so far as it provided for the taking of possession of property in satisfaction of any tax, rate or due. He argued that the effect of the rule in Gourley's case was to deprive the Plaintiff of property which should come to her, and in as much as the property or sum taken away did not go to the revenue, it could not be said to be covered by the exemption dealing with "satisfaction of any tax". By way of illustrating the submission, Mr. Macaulay referred to Trinidad Island-wide Cane Farmers' Association Inc. and Attorney-General v Prakash Seereeram (1975) 27 W.I.R. 329, a case dealing with the legality of a law providing for a cess on cane to be handed over to the Cane Farmers' Association. It was held that the cess was not a tax, and was not protected by the "existing laws" provision in the constitution.

One observation that may be made is to observe that in the Trinidad Cane Farmer's case money was collected from the Plaintiff and handed over to the Association. In the instant case, however, no money has been collected from anybody: what has happened is that the Plaintiff's has been held not entitled to certain money. There has been deprivation, but has there been any "taking possession of" or "compulsory acquisition of" property that belonged to the Plaintiff? Nothing has been taken from the Plaintiff; it has simply been adjudged that the Plaintiff shall not get $x. To meet this point, Mr. Macaulay relied on Societe United Docks et al v Government of Mauritius (1985) 2 W.I.R. 114. There were actually two claims or cases involved in this hearing: in one, which failed, the Plaintiffs had been put out

of business (storing and loading sugar) by the building of a new bulk sugar terminal with which they had been unable to compete save in a very limited way, and which had been given a monopoly over the export of sugar. This was held not to amount to acquiring or taking away a right. The second case was a situation in which a labour dispute had been referred to arbitration, which was to be binding on both union and employers, and an award had been made increasing wages. The Government, however, had intervened on the basis that such an award would be bad for the economy, and had purported to direct the employers not to give the increase. Here it was held that the workers had acquired a right to increases in their pay, they had actually worked on that basis and to forbid the implementing of the compulsory award was to deprive them of rights they had acquired, to take away something that was theirs, and an order was made that they should get the difference between the new rates and the old. The Government had not had the power to direct the employers to break their contract with their workers. Though this case establishes that a "deprivation" may in some cases amount to a taking possession of or a compulsory acquisition, I do not think that the reasoning there can cover what has happened in the application of Gourley's case. Nominally, that case is aimed at securing that the Plaintiff shall recover only his actual loss and that due to the incidence of tax he would not in fact have received the sum deducted, (or if he received it he would have had it only till compelled to make a tax return/ and payment). Gourley's case does not deprive the Plaintiff of anything that he has. The right which these workers held to recover their pay at the scale awarded by the arbitration, was a right not to recover something in future, but to recover at that scale for work already done.

Interesting as these arguments based on Section 18 of the Constitution may be, the fact is that Gourley's case has been followed and applied in this jurisdiction for many years. True, it

has been raised only where the size of the damages likely to be involved or the initiative of defence counsel has made it worthwhile, but it has been applied and followed almost casually as a matter of course: See for example Sanguinetti-Steele v Irons (1965) 8 W.I.R. 112; and Jamaica Omnibus Services v Calderola (1966) 9 J.L.R. 526 at 528 10 W.I.R. 117. (In both cases the rate of tax applied was small, and in the order of 10%). I do not think that this Court would now be persuaded to refuse to follow Gourley's case, and this argument if it is to be pursued must be pursued elsewhere.

Plaintiff's counsel apart from arguing that Gourley's case should not be applied, challenged the details of the application. He argued (a) that the Plaintiff was not liable to pay income tax in Jamaica as she was not shown to be resident here; (b) that the rate of tax deducted by the Judge had taken no account of Plaintiff's personal tax allowances etcetera; (c) that if Plaintiff was resident in the U.S.A. or elsewhere, no evidence had been led to show what her tax liability would have been there. The answer to these complaints is (i) that the Statement of Claim and indeed the evidence showed that at all material time the Plaintiff was resident in Jamaica and (ii) such authority as there is suggests that in as much as it is the Plaintiff who has to prove her loss, and to establish what that loss is, the burden lies on the Plaintiff: See West Suffolk County Council v W. Rought Ltd.(1957) A.C. 403; (1956) 3 ALL E.R. 216, a case on a claim for compensation for "disturbance" in a compulsory acquisition case, in which the House of Lords applied Gourley's case and held that the loss claimed must be calculated allowing for the incidence of taxation. At p. 221 (ALL E.R.) per Lord Morton:

> "It is for the respondents to prove the loss which they have suffered. Their trading year ends on August 31. They have to prove to the satisfaction of the tribunal that they have lost £11,600 profits which they would have made during the trading year ending August 31, 1953, but it is still incumbent on them to prove their loss after taking

> "into account the incidence of taxation. This they could do by submitting to the tribunal (a) a statement of the tax liability which they actually incurred in respect of their trading during the year in question, and (b) an estimate of the tax liability which they would have incurred in respect of their trading during the same year if they had made this profit of £11,600. ..."

No suggestion was made before us that there were factors which would reduce the incidence of income tax as found by Harrison J. The only problem that remains therefore is the question of whether the calculations made as to the Plaintiff's lost income were correct or not. The Plaintiff complains on this score and the defendants respondents counter attack and argue that the findings here are too high. This is a matter of detail, and before dealing with it, it is necessary to look at the other point of law canvassed, viz the proper date for conversion of foreign currency forming part or the whole of the Plaintiff's lost earnings to a Jamaican equivalent.

This particular problem is an old one. Oddly enough, one of the earliest cases comes from Jamaica: Scott v Beavan (1831) 2 B & Ad 78 saw a Plaintiff attempting to enforce in England a judgment that he had recovered in Jamaica; it was held that the judgment must be for the sterling equivalent of the Jamaican debt at the exchange rate current in London at the date of the judgment, i.e. the English Judgment.

The problem came before the Court again in Manners v Pearson (1898) 1 Ch 581 and in an action for foreign currency due on the breach of a foreign contract which was being sued on in England. It was held that the proper date for making the conversion was the rate that obtained on the date of the judgment made in the English Court. (As the foreign currency had been steadily depreciating as against sterling, this meant that the English debtor paid less than he would otherwise have paid if he had had to convert the foreign currency to sterling at the dates originally fixed for payment, a date usually known as the breach date). By one of the odd reversals that occasionally take place in English case law, it is the

dissenting judgment of Vaughan Williams L.J. that subsequently came to be regarded as correctly stating the law, and he fixed the proper date for ascertaining the amount of sterling required to satisfy the debt in foreign currency as the rate obtaining on the appointed date for payment, that is the date on which the breach of the original contract had occurred. Both this judgment and the majority judgment, however, expressed the view that the reason for the rule was that an English Court could not give a judgment for a sum expressed in a foreign currency, it must be for a sum expressed in sterling. Vaughan Williams L.J.'s dictum at p. 592 "that the date as of which the value must be ascertained is the date of the breach and not the date of judgment" became the recognized rule in this area: See Di Ferdinando v Simon, Smits & Co.(1920) 2 K.B. 409 (C.A.) where the headnote states:

> "Held, that in arriving at the proper equivalent in British Currency for the purposes of assessing these damages for breach of a sale of goods contract, the rate of exchange prevailing between the two countries on February 10, 1919, when the breach was committed, and not that prevailing at the date of the judgment, should be adopted."

The breach-date rule was applied to claims in tort, See Owners of the S.S. Celia v Owners of S.S. Volturno, (Commonly called the Volturno) (1921) 2 A.C. 544: (1921) ALL E.R. 110. The damage here, however, was once and for all damage, not a case of continuing damage. Once again the view was expressed:

> "The necessity for transferring into English money damages ascertained in a foreign currency arises from the fact that the Courts of this country have no jurisdiction to order payment of money except in English currency."
>
> Per Lord Parmoor at page 560.

Interestingly enough there was a dissenting judgment, that of Lord Carson who at page 567 expressed the view that the foreigner should,

> "when damages as assessed or agreed upon are in foreign currency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry

"of judgment is being made for the purpose of making the judgment available."

In other words, he was of the view that the proper time at which to convert the foreign currency damages into English currency was at the date of the judgment.

In point of fact, two different things are being confused: the proper ascertainment of the damage suffered, which in most cases will relate to the situation at the date of the breach, but not necessarily so, and the expression of that damage, the translation of it into English currency for the purpose of executing the judgment. If the most natural means of ascertaining the damage suffered is to look at the situation at the date of breach, it does not follow that that date is the proper date for translating the damage into English currency. For example, in the case of assessing damages for the non-delivery of goods, the rules prescribe that the loss should be calculated by asking how much will it cost the purchaser to replace the item not delivered, by going into the market place and buying it from someone else on the date when it should have been delivered. If the delivery was to be made abroad, then the natural way to calculate the damage or loss would be to ask how much would the non-delivered article have cost the purchaser if he had gone out into the foreign market place and bought another similar article on the date of the breach. That answer will be expressed in the foreign currency of that market place. But it does not follow that justice is achieved by making the translation into English currency at that date, what is desirable is to give to the Plaintiff at the date of judgment, the sterling which will enable him to purchase the foreign currency he needed at the date of the breach to replace the non-delivered item. This will give him neither less nor more than he should get.

The "breach-date" rule, however, continued to be laid down by the courts: See Syndic in Bankruptcy Nasralla Khoury v Khayat (1943) A.C. 507: (1943) 2 ALL E.R. 406 (P.C.) where Lord Wright discussed four possible dates for the calculation of the rate of

exchange and stated that English Law had adopted the breach-date rule. This was confirmed by a House of Lords judgment, United Railways of Havana and Regla Warehouse Ltd. (1961) A.C. 1007; (1960) 2 ALL E.R. 332. The headnote in the Appeal cases report sets out in para. (4):

> "That the provable sum in dollars was to be converted into sterling at the rates of exchange prevailing at the respective dates when the several sums owing by the U. Company to the trustees fell due and were not paid."

As I read the judgment of Harrison J. in this assessment, he has in dealing with the lost earnings in U.S. Dollars on a yearly basis converted them into Jamaican dollars at the rate of exchange which he held appropriate for the year in question, starting out with a rate in 1981 J$1.78 to the U.S. $1 and ending in 1985 with a rate of J$5.52 to U.S. $1.

To continue, the devaluation of the sterling pound, however, began to provoke second thoughts culminating in 1975 in the case of Schorsch Meier G.m.b.h. v Henin (1975) 1 Q.B. 416 (1975) 1 ALL E.R. 152 in which the Court of Appeal declined to follow the Havana Warehouse case and held that the conversion into sterling should be made at the date of judgment, or to be more accurate at the date at which application was made for leave to enforce the judgment. It was pointed out that judgment could be given in the foreign currency, and that the old rule that judgment must be in sterling no longer obtained. It was said "that things had changed" and the suggested changes were dealt with at some length. They included Beswick v Beswick (1968) A.C. 58; (1967) 2 ALL E.R. 1197 (Specific performance can be ordered of a contract to pay a sum of money at regular intervals); Jugoslavenska etc. v Castle Investment Inc. (1974) Q.B. 202; (1973) 3 ALL E.R. 498 (An English arbitrator can make an award in a foreign currency, where that currency was the currency of the contract).

It is, I think clear that the major reasons dictating the alteration of the breach-date rule lay in the effect of the European Common Market upon English law, and the fluctuation in value of the pound sterling. Subsidiary reasons for change were sought in a verbal alteration made in the Supreme Court Rules and Orders which it was held now enabled the Court to give a judgment in a foreign currency. The change was cautious: it was limited to contract, and cases in which the foreign currency was the currency of the contract. As an example of a Court of Appeal declining to follow a binding House of Lords decision, the Schorsch Meier case attracted great criticism, but less than a year later it was confirmed by the House of Lords in Miliangos v George Frank Textiles (1976) A.C. 443; (1975) 3 ALL E.R. 801, Lord Simon of Glaisdale dissenting. The effect of the case can be illustrated by quotations from the two headnotes in the two reports referred to above. The Law Reports:

> "(3) That the instability which had overtaken the pound sterling and other major currencies since the decision of the House of Lords in In re United Railways of Havana and Regla Warehouse Ltd., as well as the procedures evolved in consequence by the English Courts and by arbitrators in the city of London to secure payments of foreign currency debts in foreign currency, justified departure from that decision in terms of the Practice Statement (Judicial Precedent) (1966) 1 W.L.R. 1234 since a new and more satisfactory rule could be stated to enable the courts to keep step with commercial needs and would not involve undue practical and precedural difficulties."

The All England Reports:

> "Held .... Where a plaintiff brought an action for a sum of money due under a contract he was entitled to claim and obtain judgment for the 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 that of the same country. If it was necessary to enforce the judgment that amount was to be converted into sterling at the date when leave was given to enforce the judgment...."

The change made in the Miliangos case to the breach-date rule affected claims in contract, and within the limits indicated above. The question of foreign currency in the field of Torts was specifically left open, as still being governed by The Volturno (1921) (supra) See Lord Wilberforce, at page 813 (All E. Reports).

In the instant case the researches of counsel below seemed to have reached no further than the Miliangos case, and the learned trial judge observing that the field of tort had been left open in the Miliangos case decided to follow The Volturno and to apply the breach-date rule as the date for conversion.

Though this case was heard over several days in 1985 and again in 1986, and though judgment was delivered on the 9th July, 1986, the trial judge was unfortunately not referred to The Despina (1979) A.C. 685; (1979) 1 ALL E.R. 421 (H.L.). This may have been due to the paucity of recent law reports and periodicals in the Supreme Court library; the same omission occured in our own Court of Appeal decision, Jamaica Carpet Mills Ltd. v First Valley Bank: S.Ct Civil App 79/1984, delivered on the 22nd September, 1986. It was a claim for some US$201,166.00 with interest and the trial judge ruled that the relevant date for conversion into Jamaican dollars was the date of payment rather than the date on which the debt became due. The debtor appealed arguing for the breach-date rule and relying on the Havana Warehouse case and also the Privy Council decision in Syndic in Bankruptcy of Nasralla Khoury v Khayat (supra) and arguing that the Jamaican Courts should not follow the Miliangos case. After weighing the difficult problem of whether to follow an older Privy Council decision or a modern House of Lords decision, this court elected to follow and apply the Miliangos case, recognizing that the changed circumstances of the modern economic system dictated the abandonment of the breach-date rule, and also relying on the guidance offered by Lord Scarman in the Privy Council decision in Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank (1985) 2 ALL E.R. 947

as to the relation between the decisions of the Judicial Committee of the Privy Council and the House of Lords when the latter was delivering an opinion on English common Law.

In this respect, Patterson J. was more fortunate in the case of Joyce Morgan v Jamaica Omnibus Services Ltd. and Kingston & St. Andrew Corporation: Suit C.L. 1980 M 244, judgment delivered 26th March, 1987. The Despina was cited to him and he decided to follow it, and the Milliangos case in the matter before him - an assessment of damages in a motor vehicle accident case - in which there was a claim for lost U.S. dollar earnings by the Plaintiff who had permanent U.S. residency status and apparently worked in the United States and due to the accident had been deprived of her employment there for a substantial period of time. Patterson J. first calculated the lost wages in terms of U.S. dollars, and then declining to follow The Volturno, the Khoury v Khyat case, and the Havana Warehouse case, he based his judgment on the Schorsch Meier, and the Milliangos case and finally The Despina and decided (i) that while he would not make the award for lost wages in U.S. dollars, he would (ii) make it in Jamaican dollars coverted from U.S. dollars at the date of his assessment, rather than at the date of the original accident.

The position then is that the Milliangos case has been followed by this Court, and its extension in The Despina has been followed by a trial judge in an action in Tort. This did not, of course, prevent counsel from arguing that The Despina did not apply and should not be followed, at any rate in Jamaica, and counsel relied on the express reservations that had been made in the Milliangos case.

It is true that in the Milliangos case the House of Lords had made specific reservations, and had declined at that stage to over-rule the breach-date rule in tort or contract generally: See Lord Wilberforce at page 813 (ALL England Report: (1975) Vol. 3):

> "I therefore see no need to over-rule or criticise or endorse such cases as The Volturno or Di Fernando v Simon, Smits & Co. Ltd."

However, in The Despina (and The Folias) the House of Lords heard together two cases, one involving a collision at sea and so an action in tort) and the other a claim against a carrier for breach of warranty that the air conditioning unit on his boat was working properly with the result that a cargo of onions shipped thereon had spoiled (a claim in contract). Lord Wilberforce, in dealing with the claim in tort, said this at page 696 (A.C. Reports: P 426 ALL E.R.):

> "My Lords, I do not think that there can now be any doubt that, given the ability of an English Court (and of arbitrators sitting in this country) to give a judgment or to make an award in a foreign currency, to give a judgment in the currency in which the loss was sustained produces a juster result than one which fixes the plaintiff with a sum in sterling taken at the date of the breach or of the loss. I need not expand upon this because the point has been clearly made both in Miliangos v George Frank (textiles) Ltd. and in cases which have followed it.....
>
> To fix such a plaintiff with sterling commits him to the risk of changes in the value of a currency with which he has no connection: to award him a sum in the currency of the expenditure or loss, or that in which he bears the expenditure or loss, gives him exactly what he has lost and commits him only to the risk of changes in the value of that currency, or those currencies, which are either his currency or those which he has chosen to use...."

In The Despina what was at issue was the reimbursement of sums spent in various currencies for the repair of the boat which had been injured in a collision with that of the Defendants. Dealing with the question of which currency to use, that of the expenditure currency or that of the Plaintiff's currency (The owners were a Liberian company, registered in Greece, operating out of New York and largely using U.S. Dollars), Lord Wilberforce at page 697 said:

> "My Lords, in my opinion, this question can be solved by applying the normal principles, which govern the assessment of damages in cases of tort..... These are the principles of restitutio in integrum and that of reasonable forseeability of the damage sustained....."

He went on to speak of the currency in which the Plaintiff's loss is felt, and the currency which it is reasonably foreseeable that he will have to spend, but adds eventually at page 698:

> "I wish to make it clear that I would not approve a hard and fast rule that in all cases where a plaintiff suffers loss or damage in a foreign currency the right currency to take for the purpose of his claim is 'the Plaintiff's currency' ".

During the argument it was suggested that the Jamaican dollar was the Plaintiff's currency. The object of this was to suggest that the appropriate date for conversion of lost U.S. dollar earnings into Jamaican currency was the date on which they were lost. The learned trial judge seems to have accepted this suggestion, when he accepted the breach-date rule, and in his calculations he found the loss in U.S. dollars for each given year, and then applied what seems to have been the average exchange rate for that year to produce a sum in Jamaican dollars.

It is clear that the breach-date rule is no longer acceptable. ✓ It is also clear that to give the judgment in the currency in which the loss was sustained produces a juster result. In the Joyce Morgan case before Patterson J., in which the Plaintiff had American residency, it was in a sense easier to say that American Dollars were the Plaintiff's currency, than would be the case with a Plaintiff who had a more casual connection, residence wise. But the object of the assessment must be to give the Plaintiff a restitutio in integrum. Where there has been a loss of this sort in lost earnings in U.S. dollars you do not restore the Plaintiff to the position in which he or she would have been by giving her in exchange for her lost dollars, the Jamaican equivalent of five or six years ago, when the exchange rate stood at J$1.78 to US$1, when at the date of the judgment the rate is now J$5.52 to US$1. This is to give the Plaintiff back roughly one-third of her real loss. I am of the opinion that the proper date at which to make this conversion

is at the rate existing at the date of the judgment. In England, the date chosen would be the date on which leave is sought to enforce the judgment for the foreign currency. I am not aware of any reason which would bar a Jamaican Court from giving judgment for a Plaintiff in terms of a foreign currency. Though Lord Denning relied on a small alteration made in the Supreme Court Rules in England as to the form of the judgment, in his endeavour to show that circumstances had changed since the Havana Warehouse case, Lord Cross in his judgment in the Miliangos case at page 837 ALL England Reports rejected this as a real point justifying the change and observed at 838:

> "I am quite unable to attach to this change the importance with regard to the matter in hand that Lord Denning attaches to it....."

The abolition of the breach-date rule does not rest upon the slight change made in the U.K. form of Judgment, it rests upon the need to give justice to the Plaintiff in respect of the loss of foreign currency, or loss sustained in foreign currency.

In a case such as this the question posed by Lord Russell in The Despina arises:

> "in what foreign currency (is) the respondent entitled to claim? Is it to be a mixed bag.....?"

While I can see no reason why a Jamaican Court should not give a judgment for foreign currency, yet I am inclined to agree with Patterson J. that in a case where some items will be expressed in Jamaican dollars and some otherwise, it is better to use one common currency throughout the judgment and to express it in Jamaican dollars, but using the date of assessment as the appropriate date at which to calculate the rate of exchange. I would leave open for future consideration the possible effect of appreciable change in the exchange rate for the Jamaican dollar occurring between the date of the assessment and the date of final judgment or execution of the judgment.

In the result then, I am of opinion that the assessment made for lost earnings in this assessment was wrong in using the breach-date rule for arriving at the rate of exchange from U.S. dollars into Jamaican dollars. What should have been done is to add together all the lost U.S. dollar earnings and then to convert them to Jamaican dollars at the date of the assessment of damages.

Apart from these two main issues of law, both the Plaintiff and the Defendants attacked the assessment on points of detail. There were some fourteen grounds of appeal filed by the Plaintiff-Appellant. The first is contained in ground 2 of the Plaintiff's Grounds of Appeal. It is to the effect that the judge in assessing damages did not make any award in respect of Plaintiff's claim that her employer gave her $35 per day with which to buy food while on tour. The evidence dealing with this claim is set out at page 6 of the judgment. It is there pointed out that the Plaintiff herself said at first on more than one occasion that this allowance was at the rate of $35 per week and that it was for food. The udge who saw and heard the witnesses observes that the employer, Copeland Forbes, described the allowance as $35 per day for laundry, phone calls and such necessities. He went on to say that he provided cooked meals. The judge remarked:

> "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."

After hearing the submissions made and reviewing the evidence brought to our attention, the judge appears to us to have been justified in his finding and this ground of appeal fails. We would add, en passant, that ground 2(b) dealing with the refusal to permit tendering of documents submitted by Mr. Forbes, who was absent, in support of payments he is alleged to have made to the Plaintiff in the course of her employment with his company in the United States was specifically abandoned by Plaintiff's counsel during the hearing before us.

Ground 3 of the Plaintiff's grounds of appeal was a complaint that the judge permitted the Defendants to re-open their case, after they had closed it and announced that they were not calling any witnesses, and Mr. Beswick for the Plaintiff had commenced to address on the Plaintiff's claim for special damages. See page 38 of the notes of evidence, (page 63 of the bundle), and the pages that follow.

It is not easy from a cursory reading of these notes and in the absence of agreed explanations to follow exactly what happened. It does appear that after the address on special damages commenced, that Mr. Cork, counsel for the Plaintiff, relying on the evidence of Mr. Forbes, (the impressario who employed the Plaintiff on tours in the United States) that he provided board, lodging and food to the Plaintiff (and members of his company) at a cost of US$945 per head, per week, sought and obtained permission to amend his statement of claim to add a claim of 157 weeks at US$945 per week, =US$148,365.00 or J$818,974.80 (calculated at J$5.52 to US$1). The Plaintiff relied on Liffen v Watson (1940) 1 K.B. 556; (1940) 2 ALL E.R. 213 (C.A.) for the recovery of free board and lodgings.

The defendants opposed this application to amend as they had already closed their case, and said that they had missed the opportunity of cross-examining Mr. Forbes on this item.

The judge granted the amendment, and it appears in the Amended Statement of Claim. At that stage, Mr. Cork was taken ill and Plaintiff had to seek an adjournment. On that day, or perhaps the next days sitting, it appears that the documents referred to in ground 2 as emanating from Mr. Forbes and supporting the payments he allegedly made were in Court; there was a further adjournment, and at the next sitting Defendant's counsel asked for the recall of Mr. Forbes for further cross-examination, and that the defence be allowed to call evidence. The defence complained that they had not had the opportunity of examining the documents emanating from Mr. Forbes, and wished him back for further cross-examination,

despite the fact Plaintiff had closed her case. They also intimated that they now had evidence that they wished to call.

In short, the defence, despite the fact that final addresses on behalf of the Plaintiff were being made, sought to re-open the whole trial by recalling a witness for the Plaintiff, for further cross-examination, and by re-opening their own case and calling evidence.

Plaintiff's counsel objected to both applications, and argued that his final address having begun, it was now too late for the Defendants to make these applications. It was also pointed out that some three months had elapsed since Mr. Forbes gave his evidence, that he lived out of the jurisdiction.

At page 49 of the Notes of Evidence, the judge ruled that he would exercise his discretion in favour of the Defendants by ordering the recall of Plaintiff's witness, Forbes, to produce the documents referred to in his evidence, and for cross-examination on certain specified matters, and he also gave leave for the Defendants to call evidence.

After several adjournments for the purpose, Mr. Forbes failed to attend, and the Plaintiff's attempt to put in evidence the documents emanating from him was refused by the judge. This was matched by the judges refusal to allow in evidence an affidavit from a defence witness. This witness also was out of the jurisdiction and so neither side could enforce attendance of one of their witnesses. After a further adjournment the Defendants put in a witness, Mr. John Marshall Wedderburn employed to the American network N.B.C. who purported to give evidence as to who had been employed to give television shows over the network in 1981, and to have searched the files of the network for payments to performers. The intention of the evidence was to contradict evidence given by Mr. Forbes, but in point of fact the effort seems to have been inconclusive.

In so far as the complaint in ground 3 of the Plaintiff's Grounds of Appeal is concerned, it appears that the judge entertained the Defendants' application because of the amendment that he had granted to the Plaintiff to add on the claim in respect of lost board and lodging. The case seems to have been unduly protracted by reason of these several applications, but we are not prepared to say that the judge was wrong in entertaining the applications made for the recall of Mr. Forbes or the calling of a witness by the Defence. Nor was he wrong in refusing admission to a bundle of documents, not put in by a witness nor by agreement between the parties, and as to whose contents there was no one who could verify or authenticate. In point of fact, the judge did not strike the evidence of Mr. Forbes from the record, but made such use of it as he deemed fair and reasonable in relation to the Plaintiff's evidence as to her earnings and lost earnings and her claim for lost board and lodging. He did, however, rely on the Defendants witnesses evidence and accepted it, saying at page 6 of the judgment "I do not find that the plaintiff was involved in USA in appearing on television shows and the filming of such shows." At page 7, he added after looking at the evidence "this Court rejects the evidence of payment of earnings to her for appearance on the said television shows." There has been no appeal from that finding.

Ground 4 of the Plaintiff's Grounds of Appeal complains that the judge in his assessment of 1981 lost earnings and board and lodgings, used a time period of 24 weeks and 16 weeks though the Defendant's counsel had at page 60 of the transcript of evidence item (b) apparently conceded 40 weeks, when he was computing the Plaintiff's possible damage under that head. There is no merit in the point: the Defendants were going though the exercise of attempting to compute the damages, and the judge is no more obliged to accept their computation than that of the Plaintiff.

Grounds 5 and 6 of the Plaintiff's Grounds of Appeal are on the rule in Gourley's case and have been dealt with above.

Grounds 7, 9 and 10 deal with the problem of the proper date for the conversion of Plaintiff's earnings in foreign exchange into Jamaican currency and have been dealt with above.

Ground 8 was abandoned.

Ground 11 of the Plaintiff's Grounds of Appeal raised a complaint that item (g) in the Statement of Claim: Total cost of medication to date and continuing: $2,000.00 had been rejected by the judge who apparently accepted the Defence objection that it had not been shown that these were for items prescribed by the doctors. The rejection is surprising, but it is symptomatic of the Plaintiff's case. Clearly there had been serious injuries; clearly ordinary items of every day use, pain killers like aspirin etc. must have been used, and clearly drugs, probably antibiotics must have been prescribed: yet no effort seems to have been made to collect and collate this information, or to lead any real evidence on the matter through the Plaintiff or any of her doctors, with the result that the claim failed for lack of evidence which should have been available but was not forthcoming. There is no merit in this ground.

Ground 12 of the Plaintiff's Grounds of Appeal complains of the award made in respect of future earnings; it raises two points: (a) that the judge in his calculations fixed the Plaintiffs future earnings at the rate of US$1,000 per week, which was manifestly incorrect as he had accepted the old salary at $600 per week plus $700 for perquisites etc. This complaint is followed up by the suggestion that Plaintiff's employer had given "unchallenged" evidence that her salary would have risen to US$1,500 per annum(sic). The complaint is based in part on a misunderstanding and in part on an assumption that anything that Mr. Forbes, the Plaintiff's employer said must be accepted. The misunderstanding is that the judge did not fix the future earnings on a rate of $1,000 per week; he fixed it at a

rate of $800 per week, an increase of one-third and not two-thirds. To the $800 per week, he added the amount previously awarded for perquisites etc. $700. The assumption made is that the judge was obliged to accept Mr. Forbes' evidence. The judge expressed earlier great reservations as to that evidence and accepted it only in part; he made the assumption that the salary would have increased, but not to the extent Mr. Forbes indicated; (b) the second point raised in Ground 12 relates to the multiplier used by the judge. He used a multiplier of two and at page 18 to 19 of his judgment, he explains how he arrived at that figure. The ground in 12(c) puts the Plaintiff's case much higher than does the actual evidence. The multiplier could have been fixed at a higher figure (say 4) but it is very much a matter of impression for the judge. The impression left by the Plaintiff's evidence is that she was overwhelmed by the misfortune that over-took her, and showed none of the resoluteness, adaptability or grit that would have seen her make the transition from performer to teacher.

In the result, we are not prepared to interfere in the selection of the multiplier.

Ground 13 of the Plaintiff's Grounds of Appeal, challenges the award of $70,000 made for pain, suffering and loss of amenities under the heading General Damages, but we do not think this award is out of line with comparable awards having regard to the injuries suffered.

Ground 14 challenges the award of interest made by the trial judge. The judgment was given in July 1986, and it is clear that in awarding the interest the judge followed the guidelines set out by this court in Central Soya of Jamaica Ltd. v Junior Freeman S.Ct. Civil App 18/1984, Judgment 2nd March, 1985. There is no merit in this ground of appeal.

Turning now to the points raised in the amended Respondent's notice. The first point raised relates to the amendment to the Statement of Claim allowed by the judge in respect of lost board,

lodgings and perquisites. This ground has already in part been dealt with in discussing ground 3 of the Plaintiff's grounds of appeal. The judge exercised his discretion liberally in favour of both sides: he allowed the amendment to be made on the one hand, and on the other he entertained the application to recall the witness Forbes and permitted the Defendants to re-open their case and call witnesses. In the event the witness, Forbes, did not return, but there is nothing to show that the order for his re-call was ever formalized or served on him out of the jurisdiction. He resided in America. He had given evidence and been cross-examined, and while the grant of the amendment asked for by the Plaintiff may have prompted a desire on the part of counsel for the Defendants to add to the cross-examination of this witness, we are not convinced that much more might have been gained by the further cross-examination having regard to the judge having indicated very clearly his reservations as to the acceptance of some of this witnesses evidence. He was, however, entitled to accept portions of that evidence and did so.

An additional point is made as to the value that the judge has placed on the board and lodging and perquisites enjoyed by the Plaintiff at the expense of her employer, and which form part of what she has lost. There was evidence as to the cost of these perquisites, and there seems to be no reason why those figures should not be accepted as indicating their value. The suggestion that their value ought to be measured by asking what bed and board would have cost in Jamaica seems beside the point.

The Respondents tacitly abandoned argument on grounds 2 and 3 of the amended Respondents' notice, while, as appears above, they strenuously argued the issues as to Gourley's case and the breach-date rule for the calculation of the exchange rate for a claim in respect of foreign currency.

In the event, the Plaintiff's appeal succeeds as to the date for calculating the exchange rate in respect of lost foreign currency earnings. The result will be to revise the judges calculations of lost earnings between the years 1981-84 by using an exchange rate of US$1 to J$5.52. The Plaintiff/Appellant will get costs of this appeal and below to be taxed or agreed.

ROWE, P

I agree.

DOWNER, J.A.

I agree.