JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 144 OF 2001

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN	**JUDITH GODMAR**	**PLAINTIFF/APPELLANT**
A N D	**CIBONEY GROUP LIMITED**	**DEFENDANT/RESPONDENT**

Dennis Morrison, Q.C. and Janet Morgan instructed by DunnCox for the appellant

Sandra Minott-Phillips and Helga McIntyre instructed by Myers, Fletcher & Gordon, for the respondent

October 22, 23, 24, 2002 and July 3, 2003

BINGHAM, J.A.

Having read in draft the judgment prepared in this matter by Smith, J.A. , I am in agreement with his reasoning and the conclusion he has reached that the appeal be allowed in part. Because of the importance of the issues raised in the appeal I shall venture to add a short contribution of my own in response to the submissions of counsel.

The arguments before us have raised once more the question: in what circumstances can an appellate tribunal interfere with the exercise by a judge of first instance of his discretionary powers? Although in the final analysis such circumstances may on examination appear to be exceedingly rare our task in reviewing this matter has been made that

more difficult, as the learned judge below in coming to his decision has not found it necessary to provide us with his reasons for refusing what was in effect the second application made by the attorneys for the plaintiff/appellant to amend her claim for special damages. It was this refusal that has resulted in the present appeal.

In the result this Court is, therefore, unable to determine, if in coming to his decision, the learned judge applied the correct legal principles. This leaves the matter at large for this Court to examine the issues which were raised before him, to make its own independent assessment of the matter and if necessary to differ from the conclusions reached by the learned judge: per dictum of Lord Thankerton in **Watt or (Thomas) v. Thomas** [1947] A.C. 484; [1947] 1 All E.R. 582.

The claim in negligence was the result of the appellant being seriously injured on 3rd July, 1995, while swimming in the sea off the north coast of the Island while a guest at the Shaw Park Hotel. A resident of the United States of America, she was on vacation in the Island at the time of the incident.

As a result of her injuries she has undergone a long and extended period of recuperation. As is ordinarily to be expected, during the period of her incapacity, the sums chargeable for the medical and other incidental expenses would increase with the passage of time.

In support of the amendment being made learned counsel for the appellant submitted that the circumstances facing the learned judge below in this matter called for him, in exercising his discretion, to adopt a more liberal approach in granting the amendment as the trial had not yet commenced and there was no attempt being made to alter the statement of claim. He relied in support on the dictum of Harrison, J.A. in **Gloria Moo Young and another v. Geoffery Chung et al** S.C.C.A. 177/99 (unreported), delivered 23rd March, 2000. There the learned judge of appeal in dealing with the discretionary powers of the Court to amend said (at ~~page 6~~):

> "The Court will view the exercise of the discretionary power quite liberally as long as it will not do any injustice to the opponent of the party seeking the amendment and particularly if the said opponent may be adequately compensated in costs, on such amendments."

Mr. Morrison, Q.C. submitted that, in this case the defendant/respondent would not be prejudiced, that no injustice would be done to the defendant/respondent, and that the defendant/respondent would be adequately compensated in costs.

The reasoning adopted by the learned judge of appeal in **Gloria Moo Young and another v. Geoffery Chung et al** (supra) had followed closely upon that of Dillon L.J. in **Easton v. Ford Motor Company** [1993] 4 All E.R. 257 where the learned Lord Justice said (at page 264):

> "Quite obviously there is more to be said for refusing an amendment when the action is in the course of a trial or very nearly ready for trial."

Much earlier the eminent common law Jurist Bowen, L.J., in **Cropper v. Smith** [1884] 26 Ch. D. 710-711 had remarked that:

> "It is a well established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which if not fraudulent or intended to overreach the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendments as a matter of favour or grace." (Emphasis supplied)

Learned Counsel for the respondent, Mrs. Minott-Phillips, submitted that on the state of the evidence, the learned judge properly exercised his discretion. She adverted to the history of the claim which was filed on April 1, 1997, and in respect of which was pleaded special damages in the amount of US$12,678.36. This figure was later amended in December 1999 and increased to US$35,926.69. The appellant subsequently sought leave to further amend the amended Statement of Claim by summonses dated July 3, 2001 and October, 2001 to increase the special damages claim to US$83,710.07.

In June 2001, before the filing of the two summonses seeking further amendment to the Statement of Claim, the attorneys acting for the

appellant were informed by the respondent's attorneys that they intended to make a payment into Court.

The attorneys for the appellant responded by letter dated June 21, 2001, in which they said that they would be referring the matter to their client and would get back in touch with them the following week.

Two weeks later rather than contacting the respondent's attorneys they filed a summons on July 3, 2001, seeking leave to amend the statement of claim.

Counsel submitted that the conduct of the appellant's attorneys-at-law in ~~filing a summons to further amend their Statement of~~ Claim without getting back in touch with them as promised raises the question of a lack of bona fides on their part.

In my view the conduct of the attorneys-at-law for the appellant has to be considered against the background of the nature of the injuries suffered by the appellant. It is a feature of personal injury claims such as this one, that when the Statement of Claim is filed unless the plaintiff had by that time made a complete recovery from the injuries suffered, the claim for special damages which would be in the nature of a continuing one, would only relate to such expenses as have accrued up to that stage. The claim being made in that manner would allow for the defendant to be put on notice that there is every likelihood of further amendments being made from time to time to bring the claim for special

damages in line with the existing conditions of the plaintiff as at the date of the application to amend. It is also to be expected that this course of events may continue right up to the moment in time when the action if contested, has reached the trial stage.

In this case while the incident out of which the claim arose occurred in 1995, and the Writ of Summons and Statement of Claim were filed in 1997, one is here dealing with a second application to further amend the particulars of special damages, one year and eleven months after the first amendment was made and granted by the Court, and in circumstances where such applications are not granted as of right, but on terms that the applicant bear the costs. More importantly it needs to be borne in mind that it does not relieve a successful applicant (plaintiff) of the burden placed on her of alleging and strictly proving at trial that which she has alleged and set out to establish by the amended particulars of special damages.

It is with this in mind that the Judicature (Civil Procedure Code) Law (the "CPC") at Title 27 headed "Amendment" containing provisions governing applications for amendments also contains a wide scope for a plaintiff to amend his pleadings. Section 259 provides that:

> "The Court or a Judge may at any stage of the proceedings, allow either party to alter or amend his endorsements or pleadings in such a manner and on such terms as may be just and all amendments shall be made as may be necessary for the purpose of determining the real

> question in controversy between the parties."
> (Emphasis added)

The effect of this rule when applied in practice allows for the pleadings to be amended on terms at any stage of the proceedings and up to the period before judgment is handed down at a trial of the action.

When the principles are examined governing the manner in which applications for amendments fall to be considered by a Court, in my opinion, and in the absence of anything emanating from the learned judge to the contrary, there existed no rational basis for a refusal of the application to amend the claim for special damages relating to loss of earnings and medical and other incidental expenses. I am therefore in agreement with the granting of the application as it relates to the particulars relating to loss of earnings and medical and other incidental expenses.

The amendment which sought to include a claim for "Post Traumatic Stress Disorder," however, falls to be considered on an entirely different basis. The application relating, as it does, to an entirely new subject matter and coming, as it does, outside of the limitation period, must fail. To allow the amendment would in effect result in depriving the respondent (defendant) of a defence under the Statute of Limitations.

The effect, therefore is that I would allow the appeal in part on the main question as to the application to amend the particulars of injuries as it relates to the claim in respect of Loss of Earnings and Medical Expenses.

In this regard the appellant's attorneys must proceed to file an affidavit of documents reflecting the necessary changes in the additional sums pleaded.

The appeal which relates to the amendment to include for the first time a particular of injury headed "Post Traumatic Stress Disorder", fails for the reasons indicated.

In the light of the above, I would order that both parties bear their own costs.

PANTON, J.A.

I, too, have read in draft the reasons ~~for judg~~ment written by Smith, J.A. I agree with the reasoning and decision and have nothing to add.

SMITH, J.A:

This is an appeal from an Interlocutory Order of D. McIntosh, J. made on the 6th November, 2001 dismissing an application by the appellant to further amend the Statement of Claim in Suit No. C.L.1997/G-063.

Background

On April 1, 1997, the appellant filed a Writ of Summons and Statement of Claim, claiming damages for negligence against the respondent. This action arose out of an incident which occurred on July 3, 1995. The appellant alleges that while she was lawfully swimming in the sea, a power boat managed and controlled by a servant and/or agent of the respondent violently collided with her as a consequence of which she suffered injury, loss and damages and incurred expenses.

The Statement of Claim pleaded special damages in the amounts of US$12,678.36 and J$13,736.00. On the 16th December, 1999, the Plaintiff/Appellant sought and obtained an amendment to the Statement of Claim. By that amendment the amounts claimed in respect of Special Damages were increased to US$35,722.97 and J$16,736.00. In June 2001, counsel for the respondent advised the appellant's legal representatives of their intention to make a payment into court of a certain sum. By summonses dated 3rd July 2001 and 1st October 2001, the appellant sought leave to further amend the Statement of Claim to increase the special damages to US$83,710.07. On the 28th September, 2001, the respondent made a payment into court with denial of

liability. On 6th November, 2001, D. McIntosh J dismissed the application for further amendment. On 16th November, 2001, summons for leave to appeal was filed. On the 29th November, 2001, D. McIntosh, J. granted leave to the appellant to appeal his decision made on 6th November.

ON APPEAL

On the 10th and 11th of July, 2002, this court [Bingham, Harrison JJA, and Smith J.A. (acting)] heard submissions on a preliminary objection by counsel for the respondent. Pursuant to this objection, Mrs. Sandra Minott-Phillips argued that the appeal was not properly before the court as it was filed out of time.

Mr. Morrison, Q.C. for the appellant, contended that the practice in these courts had been to grant 14 days after the leave had been granted to file notice of appeal.

The Court found that McIntosh, J. had jurisdiction to grant the application for leave. The Court also found that the notice of appeal was filed out of time. However, the Court ordered that the time to file and serve the notice and grounds of appeal be enlarged to the 4th December 2001.

GROUNDS OF APPEAL

The following grounds of appeal were argued before us:

1. The learned trial judge erred in law when he refused leave to the Plaintiff to amend the Statement of Claim in that he denied the Plaintiff an opportunity to have the real questions in controversy determined between the parties.

2. The learned trial judge erred in his finding of mala fides on the part of the Plaintiff.

3. The learned trial judge erred in law when he found that the Plaintiff had refused to submit to examinations by medical experts of the Defendant's choice in so far that there was no evidence before the court that the Plaintiff had so refused.

4. The learned judge erred in law when he found that the Plaintiff failed to produce medical evidence in support of her claim of post traumatic stress disorder in so far that there was no evidence before the court that the Plaintiff failed to produce such medical evidence.

5. That the learned judge erred in finding that the claims of additional special damages and the claim for damages for post traumatic stress disorder were statute barred.

6. There was no evidence to support the finding of the learned judge that the Defendant would be prejudiced by the amendments sought because the Defendant had paid a certain sum into court.

After referring to the well known rule in **Cropper v. Smith** (1884) 26 Ch. D 700 at pages 710 and 711, counsel for the appellant complained that the learned trial judge erred in the exercise of his discretion on the state of the evidence in the light of the following facts:

1) He found that the plaintiff/appellant had refused to submit to an examination by a medical expert of the defendant's/respondent's choice and that this was an indication of "mala fides", on the part of the plaintiff/appellant when there was no evidence of such refusal before the court; and that issue was not for the determination of the learned judge;

2) He found that the plaintiff/appellant failed to produce medical evidence to support her claim of post traumatic stress disorder when there was no evidence before the court that she had failed to produce such evidence;

3) There was no evidence before the court either from the affidavit of Helga McIntyre sworn to on November 5, 2001 or the affidavit of Sandra Minott-Phillips sworn to on October 3, 2001 that the defendant/respondent would be prejudiced by the amendments sought.

Further, Mr. Morrison, Q.C. contended that only in exceptional circumstances should an application to amend be refused and in the instant case there are no such exceptional circumstances. Accordingly, he argued, there is no basis for the learned trial judge to depart from the general rule which is that amendments will invariably be granted. For this submission he relied on the decision of this Court (Downer, Harrison Langrin JJA) in **Gloria Moo Young et al vs. Geoffrey Chong et al** SCCA No. 117/99 (unreported) delivered 23rd March, 2000.

He also submitted that amendments sought before trial are in a different position from amendments sought during trial and will be more readily granted provided there is no injustice to the defendant. He relied on **Easton v. Ford Motor Company Limited** (1993) 4 All ER 257. No injustice will be done to the defendant/respondent, he contended, and it will be adequately compensated in costs.

Mrs. Sandra Minott-Phillips for the defendant/respondent contended that the refusal to allow the further amendment was a proper exercise of the discretion of the learned trial judge on the state of the evidence.

After referring to the evidence and the pleadings she submitted that there was ample material before the trial court which allowed its discretion to be exercised in that way. She further submitted that by applying to amend her Statement of Claim to increase her claim, the plaintiff/appellant "puts pressure on the defendant/respondent to increase the amount paid into court".

She pointed out that the amendments sought, had they been granted, would have had the effect of:

a) Inflating the already existing claim for loss of earnings by replacing the figure pleaded with a higher figure;

b) Adding claims for special damage items not referred to in the affidavit of documents filed and relating to periods of time which predated the previous amendment granted; and

c) Including for the first time a claim for Post Traumatic Stress Disorder.

In the light of the above, she submitted that the application for further amendment was not made in good faith and that it would not be in the interests of justice to grant such an application. She referred to the following cases among others: **Hadmor Productions Limited v. Hamilton** (1982) 1 All ER 1042; **Jefford v. Gee** (1970) 1 All ER 1202; **Findlay v. Railway Executive** (1950) 2 All ER 969; **The Gleaner Company Limited v. Arnold Foote** (1982) 19 JLR 124 and **Philmore Ogle v. Jamaica Citizens Bank Limited** SCCA 51/94 (unreported) delivered December 5, 1995; and **Perestrello v. United Paint Company Limited** (1969) 3 All ER 479.

I am constrained to say that the absence of any reasons for the judgment of the trial judge has made it difficult for this Court to deal with the complaints of the appellant. Since there was no dispute as to the findings of the judge as indicated in the grounds of appeal, I will proceed on the basis that such findings were indeed made.

THE LAW

Section 259 of the Judicature (Civil Procedure Code) Law provides:

> "The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

Thus, the question of amendment of pleadings is a matter for the discretion of the trial judge.

In **Gloria Moo Young et al v. Geoffrey Chong et al** (supra) Harrison J.A. said (page 6):

> "The court will view the exercise of this discretionary power quite liberally, as long as it will not do any injustice to the opponent of the party seeking the amendment and particularly if the said opponent may be adequately compensated in costs, consequent on such amendment.
>
> An amendment granted before trial commences is usually viewed as permissible, than one at the end of the trial."

Downer J.A. at page 25 ibidem said:

> "The evaluation of the authorities demonstrates that the issue of amendment of pleadings is in the discretion of the trial judge and that leave to appeal ought only to be granted in exceptional cases. It follows that this court will only reverse a trial judge if he exercised his discretion on a wrong principle or if his decision was not in the interest of justice."

In **Gleaner Co. Ltd. v. Foote** (supra) at page 127, Carberry, J.A. having referred to sections 265, 266 and 267 of the CPC said:

> "The significance of these provisions relating to the machinery for making amendments is that they clearly indicate that the amendment is not made when the order granting leave to make it is passed or approved, but that the amendment is made when the consequential steps have been followed, particularly in filing the same in the Registry and getting the Registrar to note the amendments on the Court's copy of same."

The refusal of the application for amendment

One complaint is that the learned trial judge found "mala fides" on the part of the plaintiff. Was such a finding reasonable on the evidence? This question calls for a scrutiny of the original pleading, the amendment sought and the evidence. In ~~dealing with this~~ complaint I will also address the complaint in ground 6.

The Plaintiff's claim is in damages for negligence.

The Particulars of Injury pleaded in the Amended Statement of Claim dated December 16, 1999 are:

"a. 1" – 3" length and 1" – 1½" depth wound to distal thigh lateral aspect

b. 1" – 2" length and 1" – 1½" depth wound to proximal leg lateral aspect

c. Left pelvic fracture inferior/superior ramus

d. 1½" x 5" bruise to the lateral aspect left hip with deep pain and long tenderness

e. 1" x 4" superficial abrasion across the posterior axillary fold of the left armpit

f. Fat fracture left buttocks with thigh hematoma and numbness

g. Left knee laceration in lateral popiteal area."

The Particulars of Special Damages are:

	US	Jamaican
" Loss of earnings – July 1995 – November 1996 (being 16 months @ $1,000 US per month) and thereafter at $600.00 US per month to April 1999 being 17 months	$16,000.00 10,200.00	
Carib Care Medical Centre		$ 9,405.00
Dr. Warren Blake		1,300.00
Medication		831.00
Medication		2,000.00
St. Ann's Bay Hospital		200.00
Cost of Home health care provided by Marie Blanton in Florida from July 1995 to November 1995 (5 months @ US$525.00 per month	2,625.00	
Dr. Jeffrey Williams (Florida)	87.00	
Dr. John Fifer (Florida	1,286.00	
Dr. David Carlton	125.00	
Steven Chance (Chiropractor Florida	705.00	
Drugs/Vitamins/supplements	224.62	
Travelling from Montego Bay to Miami, Florida	550.95	
Kulman Chiropractice Centre	410.00	
Swimming exercises (Holiday Inn)	250.00	
Medical Report Dr. S. Minott		3,000.00
Medical Report – Dr. John Fifer	250.00	
Psychological Therapy (Dosie Davenport)	70.00	
Massage Therapy (Catie Miller)	80.00	
Massage Therapy (Jonie Bader)	650.00	
Massage Therapy Angela Grammance-Ferrera	1,110.00	
Neuromuscular Massage (Kathy Cotter)	705.00	
Massage Therapist (Lisa Wilker)	160.00	
Photographs (Linda Dayton)	53.00	
Institute for Orthopedic surgery	100.00	
Miscellaneous	81.40	
TOTAL	**US$35,722.97**	**$16,736.00"**

Pursuant to the order on Summons for Directions the plaintiff/appellant filed an affidavit of Documents on January 21, 2000.

On July 3, 2001, the plaintiff/appellant filed a summons seeking leave to further amend the above amended Statement of Claim to add "Post Traumatic Stress Disorder" as an additional injury under Particulars of Injury, and to add 2½ pages of Particulars of Special Damages. These relate primarily to expenses for physiotherapy, intramuscular treatments, various special massages, acupuncture and chiropractic management to reduce pain and to prevent atrophy to the hip joint. The amendment to the Particulars of Special Damages, if granted, would, in effect, increase the claim for special damages from US$35,722.09 to US$83,710.07. The claim for J$16,736.00 would not be affected.

In her affidavit in support of the application to amend Mrs. Janet Morgan, counsel for the appellant, stated that the attorneys-at-law for the appellant received further instructions on July 2, 2001 from their client which made it necessary to apply for leave to amend the Statement of Claim to plead post traumatic stress disorder as an additional injury arising directly as a result of the accident and to particularize loss of earnings from July 3, 1995 to date as well as to add further claims for medical and related expenses which were incurred since the filing of the Amended Statement of Claim on December 16, 1999.

A second summons to the same effect was filed on October 1, 2001. This was in effect a re-listing of the earlier summons, as was explained by Mrs. Janet Morgan in an affidavit sworn to on October 29, 2001.

Mrs. Minott-Phillips' contention that the amendment sought would have the effect of inflating the "already existing claim" for loss of earnings for period July 1995 to April, 1999 is correct. Counsel for the respondent is also correct that the proposed amendment would have the effect of adding claims for Special Damages, items not referred to in the appellant's affidavit of documents, and adding claims for periods of time which predated the previous amendment. The question is: do these by themselves indicate "mala fides"? I think not.

The plaintiff/appellant knows that she will be required to prove at trial what she claims and, that the defendant/respondent will have the opportunity to challenge her evidence. The defendant/respondent may also require a further affidavit of documents if the application for amendment to add more items of special damages is granted. I do not see any attempt to mislead in the fact that some of the items of special damages which the plaintiff/appellant seeks to add relate to periods of time which predated the previous amendment granted.

The following statement of Bowen, LJ in **Cropper v. Smith** (1884) 26 Ch.D. 700 at page 710 is instructive:

> "Now, I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down

> by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done, without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of grace."

At page 711 the learned Lord Justice continued:

> "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs."

In **Nelson v. Nelson and Slinger** (1958) 2 All ER 744 the husband filed a petition for the dissolution of marriage on the ground of the wife's constructive desertion. The wife in her answer denied the desertion and charged the husband with desertion, adultery and cruelty and cross-prayed for a divorce on those grounds. The husband, in expectation that the case would be undefended had been advised to rely on desertion only. He later asked for leave to amend his petition by charging cruelty against his wife. The Court of Appeal (England) held that the amendment would be allowed notwithstanding that the facts were within the husband's knowledge when the petition was filed because, inter alia:

> (a) to allow the amendment would not cause the wife any injustice that could not be compensated by costs; and
>
> (b) the husband has satisfactorily explained why he had not charged cruelty originally in the petition.

In his judgment Romer L.J. applied the observations of Bramwell L.J. in **Tildesley v. Harper** (1878) 10 Ch. D 393 at page 396:

> "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

He also referred to, with approval, the following observations of Brett M.R. in **Clarapede and Company v. Commercial Union Association** (1883) 32 W.R. 262 at page 263:

> "... however negligent or careless may have been the first omission, and, however late the proposed amendment, this amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

I cannot agree with counsel for the defendant/respondent that the obvious blunder by the plaintiff/appellant and/or her counsel, which on the evidence was at the most due to negligence or carelessness, is evidence of mala fides.

Counsel for the respondent further contended that the late application for leave to further amend when seen in the light of the fact that it was made shortly after the plaintiff/appellant was advised of the defendant's/respondent's intention to make a payment of a certain sum into court, calls into question the bona fides of the plaintiff/appellant. I am afraid I cannot accept this. The court may not infer from such conduct, fraud or an intention to overreach. If this were otherwise then a payment into court would preclude an amendment which would have the effect of increasing the quantum of damages. By virtue of section 219(1) of the Judicature (Civil Procedure Code) Law the "CPC" a

defendant may at any time after appearance pay into court a sum of money in satisfaction of the claim.

Each claim of the plaintiff/appellant may be tested at the trial. The plaintiff/appellant will not be allowed "to throw figures" at the court; each claim must be proved specifically. The plaintiff/appellant faces the risk of paying the defendant's/respondent's costs if she fails to satisfy the court that she is entitled to damages in excess of the sum paid into court. If she decides to take the risk and seeks "all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties," she cannot without more be said to be acting in bad faith. The granting of such amendment even though sought after the defendant/respondent had made a payment into court will cause no injustice to it since the latter can be compensated by an order as to costs.

Another complaint of the appellant is that the learned trial judge erred in finding that the appellant had refused to submit to examination by the respondent's medical experts. No arguments were advanced in support of this complaint. In this regard I will make a short comment. The affidavit evidence and correspondence between the attorneys-at-law for both parties indicate that:

1) the plaintiff/appellant resides in the U.S.A;

2) the plaintiff/appellant had expressed a willingness to submit to an examination by the respondent's doctor (see letter dated October 18, 2001);

3) there is disagreement between the attorneys-at-law for the parties as to who should pay the plaintiff's/appellant's travel costs to Jamaica for the purpose of such medical examinations – see letter dated October 19, 2001.

There is no evidence that this disagreement was resolved. I am therefore of the view that it would not be correct to hold that the plaintiff/appellant had refused to submit to examination by the respondent's medical experts.

The limitation period issue

The complaint by the appellant is that the learned trial judge erred in finding that the claims for the additional special damages and the claim for damages for post traumatic stress disorder were statute-barred. It is in my view necessary to deal with these claims separately.

Additional Special damages

Counsel for the appellant submitted that the proposed amendments to the special damages are consistent with the ongoing treatment of the appellant pleaded in April, 1997, and in December 1999 and do not constitute a new claim on the part of the appellant so as to make them statute barred. He relied on **Graff Brothers Estates Ltd. v Rimrose Brook Joint Sewerage Board and Others** (1953) 2 QB 318 and **Paragon Finance v D.B. Thakerar & Co.** (1999) 1 All ER 400 at 405 (d-f).

Counsel for the respondent on the other hand, submitted that the amendment sought on November 6, 2001 was not pleaded within the six- year period. Her further submissions are that on November 6, 2001, the respondent had an accrued defence to those new claims. Special damages must be

specifically pleaded. If not pleaded within the limitation period an amendment which allows the plaintiff/appellant to plead special damages after the expiry of the limitation period would have the effect of denying the respondent of an accrued defence. Counsel for the respondent relied on some of the cases already mentioned to support these submissions.

It is my view, having read the cases cited among others, that the limitation period does not apply to the claim for additional special damages. Such additional claims as Mr. Morrison, Q.C. submitted, are consistent with the ongoing treatment of the appellant in respect of the injuries pleaded in the amended Statement of Claim. Furthermore, these additional claims represent expenses incurred during the limitation period.

It is my view that the application for leave to further amend with a view to adding these expenses as special damages need not be made within the six-year limitation period. The defendant/respondent would have had no accrued defence to these claims for additional special damages since they are merely additional expenses in respect of injuries already pleaded in the Statement of Claim and paid within the limitation period to substantially the same doctors and therapists already listed in the particulars of special damages.

The decision of this Court in **Constable Newton Bowens and the Attorney of Jamaica v George Gordon** (1991) 28 JLR 334 is helpful. The appeal in that case raised the question of the exercise of the judge's discretion in granting an amendment to the Statement of Claim in order to rectify a fatal

omission therein, in that the respondent had failed to insert in the claim the mandatory requirement of the Constabulary Force Act of the allegation of malice or absence of reasonable or probable cause in the commission of the act complained of. The allegation was however made in the endorsement on the writ which was filed within time. It was contended on behalf of the appellants that the amendment of the Statement of Claim more than six years after the act was committed deprived the defendant of a legal defence under the Limitation Act and should not have been allowed. It was held, inter alia, that it could not be said that the amendment would have the result of affecting the existing legal rights of the appellants as the allegation had been made in the writ of summons which was filed well within time and, when read with the statement of claim, the writ was sufficient to bring home forcibly to the notice of the appellants the nature of the claim being made against them. It is therefore my view that the learned trial judge erred in finding that the claims for additional special damages were statute-barred.

It may be convenient at this point to consider whether or not the further amendment sought in respect of the additional special damages should be granted. **In Gloria Moo Young and Another v Geoffrey Chong et al,** (supra) Harrison, J.A. in addressing the question reiterated that amendments may be granted:

1) When it is necessary to decide the real issues in controversy, however late;

2) When it will not create any prejudice to the other party and is not

presenting a "new case;" and

3) When it is fair in all the circumstances of the case.

In **Rondel v Worsley** (1967) 3 All ER 993 at page 1017, Lord Pearce, said:

> "Where there appears to be good faith and a genuine case the court will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may fairly be tried. But when a party changes his story to meet difficulties, that fact is one of the matters to be taken into account."

Having considered the submissions of both counsel, the relevant law and the evidence, though sketchy, I have come to the conclusion that in the interests of justice leave to further amend the Statement of Claim to include the additional items of special damages should be granted. I have come to this conclusion, because:

1) These additional items of special damages do not constitute a "fresh claim".

2) The further amendment may be necessary for the purpose of determining the real question in controversy, that is to say, the quantum of damages.

2) The defendant/respondent will have adequate opportunity to investigate the additional items claimed.

3) The plaintiff/appellant may be ordered to make further discovery of documents.

4) The expenses claimed are capable of exact calculation thus it is possible for the defendant/respondent to come to a conclusion as to what would be a reasonable sum to pay into court to satisfy the claim and, if they are minded to increase the sum already paid into court.

5) The defendant/respondent may be adequately compensated in costs on such amendment.

The authorities seem to show that in the case of the tort of negligence the cause of action consists of two things: the wrongful act and the consequent damage -- see Earl Jowitt's "The Dictionary of English Law", page 325. Thus, the cause of action accrues when there has been a wrongdoing by the defendant from which loss or damage is suffered by the plaintiff. Thus, the loss or damage or injury must be pleaded within the limitation period. Time runs from the accrual of the cause of action. The authorities seem to indicate that this is so irrespective of the plaintiff's knowledge of such loss or damage. The case of **Carledge and Others v E. Jopling & Sons Ltd.** (1963) 2 W.L.R. 210 is perhaps instructive. In that case workmen while employed as steel dressers in a factory, contracted pneumoconiosis, a disease in which slowly accruing and progressive damage may be done to a man's lungs without his knowledge. According to the evidence a man susceptible to this disease who inhaled noxious dust over a period of years would have suffered substantial injury before it could be discovered by any means known to medical science. By writs issued on October 1, 1956, the workmen claimed from their employers damages for negligence and, or alternatively, breaches of statutory duty causing the disease. As a result of changes at the factory, the workmen could establish no breaches of duty by their employers making any material contribution to the causation of the injuries to their lungs after September, 1950.

The House of Lords held that in such cases the cause of action accrues when there has been a wrongdoing from which loss or damage is suffered,

The Post Traumatic Stress Disorder Claim

Mr. Morrison, Q.C. for the appellant, seeks an opportunity at the trial to have the court determine whether the present post traumatic stress disorder suffered by the plaintiff/appellant is a consequence of the trauma associated with the events of July 3, 1995. He contended that the proposed amendment to include this injury does not in itself constitute a new item of personal injury unconnected to the physical injuries sustained. To hold otherwise, he argued, would be a denial of the inherent trauma in the events of the accident. Further, he said, the plaintiff/appellant alleges that the mental condition arose albeit lately and slowly out of the same facts as the cause of action.

Attractive as this argument appears, in my view it is not tenable. Regrettably, the application to add this claim is not supported by any medical evidence. As Mrs. Minott-Phillips submitted, the amendment sought, if granted, would include for the first time a claim for post traumatic stress disorder. The accident took place on July 3, 1995; the six-year limitation period expired on July 2, 2001. Counsel for the defendant/respondent was first made aware of the proposed claim for post traumatic stress disorder on or about July 7, 2001, that is to say after the limitation period had expired. The application for leave to further amend was heard on November 6, 2001. I am inclined to agree with Mrs. Minott-Phillips that as at November 6, 2001, the defendant/respondent had an accrued defence to the claim for damages in respect of the post traumatic stress disorder injury.

irrespective of the plaintiff's knowledge of such loss or damage. That as such damage to the workmen had accrued before October, 1950, their claims in October 1956 were statute barred and accordingly failed. At page 212, Lord Reid, said:

> "... It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when the injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action."

Lord Morris of Borth-y-Gest in his speech said (page 216):

> "If someone knew that he had a lung injury but did not know that it had been contemporaneously caused by some breach of duty which had occurred in the past, I cannot think that such lack of knowledge would serve to defeat a plea that the breach of duty had occurred at a date more than six (or three) years previously ...
>
> A result of this, in a case where there has been a breach of duty, is that a limitation period may bar a remedy before there is or could be knowledge of a cause of action."

Lord Pearce who gave the main speech after referring to a long list of cases stated the principle applicable to actions for damages for personal injuries in this way (page 221):

> " In each case the judge assesses the damages once and for all, with the knowledge that the plaintiff can

> get no further damages for the possible traumatic consequences, such as arthritis or epilepsy, which may occur in the years to come. Lord Halsbury said in **Darley Main Colliery Co. v Mitchell** (77 App cases 127, 132, 133):
>
> > 'No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged nonetheless to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, ~~though~~ it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the damage done and consequent upon the injury originally sustained.' "

In the instant case the wrongdoing from which the plaintiff/appellant alleges that she suffered the post traumatic stress disorder occurred on July 3, 1995. Accordingly, the cause of action accrued on July 3, 1995. The limitation period expired on July 2, 2001. The further amendment sought if granted, would allow the plaintiff to plead an injury long after the expiry of the limitation period. This in my view, is not permissible in law. The court may not allow a plaintiff to amend by setting up a "fresh claim" in respect of a cause of action which since the writ would have become barred by statute – **Weldon v Neal** (1887) 19 QB 394 (C.A.).

I am therefore of the view that the learned trial judge was right in holding that the claim for post traumatic stress disorder was statute barred.

Conclusion

In the light of the foregoing I would conclude that:

1) There is no evidence to support the judge's finding of mala fides in respect of the application for further amendment;
2) A payment into court will not by itself prevent a plaintiff from obtaining leave to amend the Statement of Claim with a view to increasing the quantum of damages;
3) Such amendment, if granted, would not prejudice the defendant/respondent and will not result in injustice;
4) It is permissible on an application made outside the limitation period to grant leave to amend a statement of claim duly filed, to add claims for expenses incurred and paid for during the limitation period. Such claims are not statute-barred;
5) The claim in respect of post traumatic stress disorder is statute-barred and therefore cannot be the subject of an application to amend; and
6) The interests of justice would favour the granting of leave to amend the Statement of Claim to add the other items of special damages.

Accordingly, I would allow the appeal in part and make the following orders:

1) Leave granted to further amend the Statement of Claim to add to the Particulars of Special Damages the further claim as listed on the

"Proposed Further Amended Statement of Claim" dated the 3rd day of July, 2001;

2) Leave to add "Post Traumatic Stress Disorder to the Particulars of Injury" refused;

3) The plaintiff/appellant to file within 28 days a further affidavit of documents limited to documents and vouchers relating to the claim for additional special damages;

4) There be inspection of documents within 28 days of the filing of the further affidavit; and

5) Liberty to apply.

6) The parties are to bear their respective costs in this court.

ORDER:

BINGHAM, J.A:

Appeal allowed in part and orders made in the terms proposed by Smith J.A. and set out at 1-6 at the end of his judgment.