JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 126/96

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	**JAMAICA TELEPHONE COMPANY LTD -**	**1ST APPELLANT/ DEFENDANT**
AND	**BARRYMORE HILL**	**2ND APPELLANT/ DEFENDANT**
AND	**TISHA-ANN DALEY (An infant by her mother and next friend VERMELYN McQUICK)**	**RESPONDENT/ PLAINTIFF**

David Batts and Daniella Gentles instructed by Livingston Alexander & Levy for the Appellants

David Henry instructed by Winsome Marsh of Nunes Scholefield, Deleon and Company for the Respondent

30th, 31st March and 31st July 1998

FORTE, J.A.

This is an appeal from an order of Pitter J in which he purportedly gave judgment for the Plaintiff/Respondent as follows:-

1.	Special Damages	-	$57,368.00
	Interest on Special Damages at 5% per annum from 6/7/92 to 29/11/96 (1607 days)	-	12,628. 82
			$69,996.82

2.	General Damages	-	$1,465,000.00
	Interest on $1,200,000.00 as at 5% per annum from 31/3/93 to 29/11/96 (1340 days)	-	220,269.20
			$1,755,226.02

The subject matter of the claim concerned an allegation by the plaintiff/respondent of negligent driving by the second defendant when the vehicle owned by the 1st defendant/appellant and driven by the second defendant (Hill) ran into the plaintiff/respondent while she was standing in the roadway, causing her severe personal injuries.

The incident occurred on the 6th July, 1992 when the respondent, a 17 year old young lady having left work at Equipment Care Company Ltd. at about 4:40 p.m. proceeded to Marcus Garvey Drive with the intention of taking a bus which would transport her to downtown Kingston.

In order to do so, it necessitated crossing the highway (Marcus Garvey Drive) which meant traversing two lanes of traffic proceeding in the same direction towards Three Miles and thereafter another two lanes of traffic proceeding in the opposite direction towards Kingston. She stood on the sidewalk, waiting; when the car presumably at the head of the traffic, in the lane nearest to her stopped to allow her to proceed across. She accepted this gesture, and crossed that lane, but having reached the white line dividing those lanes, she found it unsafe to continue to the island which divided the highway, as traffic proceeding along the outer lane was "very heavy". Consequently, she

remained standing on the white line, her attention engaged with the traffic in front of her, so that she could ascertain when it would be safe for her to proceed. She had been there for about a minute and a half, when Hill driving a van, owned by the first defendant/appellant, travelling with speed, and straddling the white line came upon her, and hit her down in the roadway. By the grace of kind citizens she was removed from there and taken firstly to the Nuttall Hospital where her wounds were stitched, injections given to her, and X-rays taken, after which she was transferred to the University Hospital where she remained for a period of one week.

In his defence, Hill testified that as he proceeded along Marcus Garvey Drive in the outer lane a vehicle in the inner lane stopped behind a bus which was parked in the inner lane. He then stated:

> "I proceeded in outer lane as usual when there was a collision from nowhere. I saw a face in van. I saw plaintiff sideways or on her face looking alarmed into the screen of the vehicle I was driving. I did not observe whether she came from anywhere. I just saw a face come up suddenly..., I braked, but at that time plaintiff was already hit".

The learned judge rejected this defence, finding as can be gleaned from the "notes of oral judgment" as follows:-

> "1. Roadway wide enough to accommodate two vehicles travelling abreast of each other and leaving area safe on white line.
>
> 2. Plaintiff crossed from left lane when it was safe to do so.
>
> No evidence meandering or weaving between any traffic.

3. (Plaintiff) Stood on white line 1-1 ½ minutes
Do not find she was negligent.

4. Plaintiff exercised due care in crossing road and did not embarrass any driver.

5. Driver found her in middle of the roadway then forming a third lane. This supported by McDonald's evidence.

On balance of probabilities:

> Defendant not keeping proper look out and this caused collision. No evidence to suggest contributory negligence.

I do not find she contributed to the accident. Cases submitted are easily distinguishable".

LIABILITY

Before us Mr. Batts who presented the arguments for the appellant, did not challenge the learned judge's rejection of the account given by the appellant, but contended that on the evidence of the respondent the learned judge should have either found her solely responsible for her own injuries, or in the alternative that she contributed by her own negligence to the accident.

In ***Nance v British Colombia Electric Railway Co., Ltd*** [1951] 2 All E.R. 448, at pg. 450 Viscount Simon, expounded on the legal principles which in my view are applicable to the issues in this appeal.

He stated as follows:

> "The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due

> care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury...
> Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicle, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle".

In the instant case, the respondent, had safely crossed the inner lane and acting with due care remained on the white line, as vehicles were then travelling in the outer lane. Two things ought to be considered in this context in determining whether the act of the respondent in making it half-way across, and not waiting until both lanes were simultaneously clear, was an act of negligence which should call for a finding of shared liability.

> 1. There was no median between the two lanes upon which a pedestrian could take refuge. The traffic was admittedly heavy, and consequently it would be unlikely that both lanes would be clear at the same time. The pedestrian would therefore be compelled to traverse the road as safely as was possible in those circumstances.
>
> 2. Significantly, other cars successfully passed the plaintiff as she stood on the white line without incident.

On the finding of facts of the learned judge with which there is no reason to interfere, the 2nd defendant/appellant, was driving speedily, and not within

any of the two lanes but making a third lane for himself. The learned judge obviously accepted the respondent's testimony in which she said "vehicle travelling over the white line - white line would cut vehicle in half". In those circumstances the challenge to the learned judge's findings of negligence in the appellant must fail.

CONTRIBUTORY NEGLIGENCE:

I turn now to the question of contributory negligence. The learned judge found that the respondent crossed the road when it was safe to do so, and impliedly that she was exercising care when she waited on the line to traverse the other half of the road.

Mr. Batts however, challenged that finding and in doing so relied strongly on the case of *Snow v Gidden,* a decision of the English Court of Appeal reported in the Times Newspaper of February 28, 1969. The facts appear similar, as the plaintiff in that case was standing in the middle of the roadway where there was no refuge, and had been standing there for a few seconds when he was hit by a motor cycle driven by the defendant who had ignored the two existing lanes of traffic caused by traffic light ahead and made a third lane of traffic. Widgery , L.J. who delivered the judgment of the Court found as follows:

> "... But the plaintiff had taken on himself the unnecessary hazard of being marooned in the middle of the road at the mercy of oncoming cars. He had elected to cross the road where there was no central refuge. The plaintiff was negligent, in the circumstances of the case, in crossing the road where

> there was no central refuge and thereby he put himself in an unnecessary position of hazard, and he should bear a 25 percent proportion of responsibility for the accident".

This finding, however, has to be considered on the background of its own facts. To begin with Widgery, L.J was careful to point out that his conclusion was based on the plaintiff taking on himself an unnecessary hazard of being marooned in the middle of the road and that he had elected to cross where there was no central refuge.

In addition, in that case there was a pedestrian crossing 15 yards away from where the plaintiff chose to cross the road and there must have been some central refuge perhaps at the traffic lights, which prompted Widgery L.J. to say that "the plaintiff had elected to cross where there was no central refuge". In so far as the pedestrian crossing was concerned, no weight was placed on the plaintiff's not using it because "it could not be said that the plaintiff had been negligent in weaving through a stationary block of traffic rather than choosing to use the pedestrian crossing, which at that time was also clogged with traffic".

In the instant case, there was no pedestrian crossing nor was there any central refuge in between those two lanes, at any point in the highway at which the respondent could have crossed the roadway. There was also, no evidence of any traffic light nearby or for that matter any safeguard for pedestrians traversing the highway. In those circumstances, it could not be said that the respondent had taken on herself an unnecessary hazard of being marooned in the middle of the road. For these reasons, I am of the view that the case of

Snow v Gidden (supra) is distinguishable from the facts in this case , and that the appeal in so far as liability is concerned ought to be dismissed.

QUANTUM

I turn now to those grounds of appeal which challenge the quantum of damages awarded by the learned judge. They read as follows:-

> "5. The award for pain and suffering and loss of amenities is manifestly excessive, unreasonable and out of line with recent awards.
>
> 6. In light of the uncertainty as to whether the future surgery is required the learned judge ought not to have awarded One Hundred and Ninety Four Thousand Dollars ($194,000.00) for future surgery".

The injuries recorded in the appellant's skeleton arguments represents an accurate record of the evidence on that subject, and I therefore set them out hereunder:

1. Scarring over right cheek and lower jaw;
2. Multiple small raised hyperthropic scars over the right preauricular and lower cheek areas;
3. Four (4) multiple small hyperthropic hyper pigmented scars over the dorsum of left hand;
4. Approximately 20 small scars raised, hypertrophic and hyper pigmented over the outer aspect of the right thigh;
5. Fracture of right superior ramus;
6. Partial avulsion of the inferior ends of the collateral ligaments of the right knee.

The above injuries were related in a report by Dr. Guyan Arscott dated February 25, 1993 whose assessment and prognosis as recorded in that report reads as follows:

> "This patient is left with permanent scaring of her left cheek, left hand and right thigh following a Road Traffic Accident of July 6, 1992. The scared areas of her face and thigh are quite obvious due to the multiplicity of scars and the raised nature of most of them.
>
> She will experience intermittent itching and tenderness in the scars over approximately a two year period. During this time there should be some gradual improvement in the nature of the scars.
>
> Corrective surgery will provide partial improvement for some of her scars. The more obvious raised scars over the left cheek and right thigh can be revised using local anaesthetic and a hospital stay of one day. This would provide approximately 70% improvement in these areas".

It appears that Dr. Arscott, again saw the respondent on the 19th September, 1996 when he found that the scars were "still permanent and unsightly". Surgical improvement was then assessed at 60% as the scars over the left cheek cannot be improved significantly with surgery. The total cost for surgery is Sixty Five Thousand Dollars ($65,000) to Seventy One Thousand Dollars ($71,000.00)

Dr. Dundas, a Consultant Orthopaedic Surgeon also saw the respondent on the 18th July, 1996, and reported his diagnosis on the 5th September, 1996 as follows:

> "(1) Multiple healed lacerations to the right cheek and right thigh.

(2) Healed pubic fracture with negligible residues.
(3) Possible ligament injury to the right knee.

> X-Rays from Medical Associates Hospital indicated that she had a chipped fragment of the medial tibial condyle. This was about one centimetre in dimension. This encroaches on the articular surface".

Then his prognosis reads:

> "It appears as though the medial tibial condylar fracture would involve the medial meniscus and to an extent the medial collateral ligament because of its location. This needs to be evaluated arthroscopically to ensure that there is no underlying pathology which may create future problems for Ms. Daley. The estimation of permanent disability would probably hinge on any further pathology diagnosable on arthroscopy or further imaging techniques".

In so far as permanent disability is concerned Dr. Golding who reported on the 12th February, 1993, concluded as follows:

> "I concluded that Miss Daley would have been totally disabled for three months from the time of injury. She would have had a 30% whole person impairment for the further two months and a 10% for further month. She then reached maximum medical improvement. She now has no significant permanent impairment except for the cosmetic appearance of the scarring on the outer side of her right thigh, her left hand and the right side of her face".

On this evidence the learned judge made the following award:

Special damages (unchallenged in appeal)-$57,368.00

General Damages -
Pain and Suffering $850,000.00 interest at 5% per annum from 31/3/95 - 29/11/96

Future Medical - $265,000.00

In his judgment he detailed Future Medical as follows:

Surgical inclusive of hospital fees	-	$ 71,000.00
Arthroscopic surgery and hospital fees	-	194,000.00
		$265,000.00

There is some confusion as to the amount of general damages awarded by the learned judge, because having detailed the damages as set out above, he then records it at $1.2M and thereafter adds an additional $265,000.00 making a total of $1,465,000.00

In my view, the additional $265,000.00 is clearly an error, as it would be a duplication of the amount that the learned judge had already added to his assessment of general damages. In addition, the amount he describes as an appropriate award in this area "i.e. $850,000.00 when added to the amount awarded for 'future medical' i.e. $265,000.00 gives a total of $1, 115,000.00, yet the learned judge having done the addition, nevertheless subsequently makes an award for $1,200,000.00

In furtherance of these apparent errors the final judgment records the general damages as $1,465,000.00. Inspite of this, the only reasonable interpretation that arises from the judgment of the learned judge is that he intended to award the sums set out above i.e. $1,115,000.00 ($850,000.00 plus $265,000.00) as general damages.

WAS THE AMOUNT AWARDED INORDINATELY HIGH?

Mr. Batts referred us to several cases which in his view demonstrated that the Courts have in circumstances comparable to the circumstances of the injuries suffered in the instant case awarded much lower sums.

Ironically, however, it is one of those cases cited that in my view establishes that the award in this case is not inordinately high. In the case of ***Wendy Holness v Astley McKie*** Suit No. C.L. 1992/HO75, the plaintiff suffered scarring throughout her body as a result of burns. The scars like in the present case were hyperthrophic in nature. However, whereas in that case surgery was not advisable as the plaintiff had a tendency to form hypertrophic scars in the instant case, the respondent has the prospects of having surgery which will result in 60% improvement in relation to the scars, except for the scars over the check which cannot be significantly improved with surgery.

Although there was scarring in more areas in the cited cases, the respondent in this case, had additional injuries i.e.

(i) Fracture of right superior ramus;

(ii) Partial avulsion of the inferior ends of the collateral ligaments of the right knee

(iii) Pubic Fracture

In the ***Wendy Holness*** case, the trial judge on the 18th April, 1994 awarded $500,000.00 in general damages, an amount which using the June 1997

Consumer Price Index, would convert at the relevant time in this case, to an amount of $868,053.00

In our view, given the nature of the injuries received, and the consequent degree of pain and suffering endured by the plaintiff, no valid reason has been put forward upon which it can be concluded that the sum awarded is inordinately high. For those reasons we confirm the sum of $1,115,000.00 as the award for general damages.

FUTURE MEDICAL

The appellant also challenged the sum of $194,000.00 awarded to the respondent for Arthroscopic surgery (including hospital fees). Mr. Batts, contended that because of the uncertainty, as to whether the surgery would be necessary no such awarded sum should have been made. As I understand the evidence contained in Dr. Dundas' report, however, the Doctor recommends that the injury to the knee be evaluated arthroscopically to ensure that there is "no underlying pathology " which may create problems in the future. Consequently there is no uncertainty as to the claimed expenditure and for that reason we will not interfere with the award.

INTEREST

Mr. Batts also argued the question of the rate of interest, which was fixed at 5% per annum by the learned judge. On the basis of the judgment of this Court in ***Central Soya of Jamaica Ltd v Junior Freeman*** SCCA 18/84

(unreported) delivered on March 8, 1985 counsel submitted that the rate of interest awarded should be 3% per annum.

He relied on the following dicta of Rowe P: (pp 28 -29)

> "Once the assessment has been made on the money of the day principle I do not think that the interest on the general damages for pain, suffering and loss of amenities should exceed one half of the rate applicable to judgment debts. As the Law now stands I would suggest as a guide line for the award of interest in personal injury cases that:
>
> > (a) interest be awarded on special damages at the rate of 3% from the date of the accident to the date of judgment;
> >
> > (b) interest be awarded in general damages at the rate of 3% from date the service of the Writ to the date of judgment".

We are in agreement with counsel for the appellant that no specific circumstances are disclosed in the transcript which called for an exercise of discretion by the learned judge to award interest in excess of the 3% stated in the guidelines. As the damages were assessed on the 'money of the day principle', the order in respect of interest is varied to award 3% per annum interest on special damages as well as general damages.

In the event the appeal is allowed in part that is to say, the award as varied as follows:

Special damages - $57,368.00

General Damages	-	
Pain & suffering		$850,000.00
Future Medical	-	265,000.00
		$1,115,000.0

Interest of 3% on Special Damages for period 6/7/92 to 29/11/96 and on General Damages for period 31/3/93 to 29/11/96.

Costs of appeal to the respondent to be taxed if not agreed.