IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 64/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	DESMOND WALTERS	DEFENDANT/APPELLANT
AND	CARLENE MITCHELL	PLAINTIFF/RESPONDENT

Mrs. Ursula Khan for Appellant

R.S. Pershadsingh, Q.C. and Alvin Mundell for Respondent

April 27 & June 2, 1992

WOLFE, J.A. (AG.)

The respondent, a vendor aged 26 years, was injured on the 21st day of August 1990, when the appellant's motor vehicle collided with a motor cycle upon which she was travelling as a pillion rider. She sustained severe injuries.

On the 18th day of July, 1991 damages were assessed in favour of the respondent by Smith, J. This appeal now seeks to challenge that assessment. The grounds of appeal are set out hereunder:

"1. That the amount awarded to the plaintiff/respondent for Special Damages is excessive in that the plaintiff/respondent did not strictly prove her loss of earnings for 47 weeks as is required by law.

2. The amount assessed as General Damages was a wholly erroneous estimate of the plaintiff's loss in that:

(i) The amount awarded for loss of future earnings was not based on solid facts.

(ii) That the multiplicand chosen was based on a wrong estimate of the plaintiff's earnings.

(iii) That the said multiplicand was not adjusted to accommodate the medical evidence that the plaintiff/respondent could sit at her street side stall and sell even with the 40% disability as assessed in June 1991, and ignored the further medical evidence that with exercise and manipulation under general anaesthetic, her final residual disability would probably (sic) reduced to 20%.

(iv) The said multiplicand did not reflect the law that the plaintiff should mitigate her loss and so no notional sum was discounted from the estimate of her earnings made by the Honourable Court.

(v) That the multiplier of 5 chosen by the learned judge did not adequately provide for immediacy of payment.

(vi) That the sum awarded for extra help was too high having regard to the evidence adduced.

(vii) That the sum awarded for Pain and Suffering and Loss of Amenities was an erroneous estimate having regard to her tapering loss and the comparable cases.

(viii) That the sum awarded as general damages, in the round, was excessive having regard to the Plaintiff/Respondent's injuries, consequential disabilities and economic loss as proved by the evidence adduced."

GROUND NO. 1

SPECIAL DAMAGES

LOSS OF EARNINGS

The learned judge awarded the respondent the sum of Seventeen Thousand Six Hundred and Twenty-Five Dollars ($17,625) for loss of

earnings. The basis of this award was evidence from the plaintiff that in a partnership with her commonlaw husband they earned Nine Hundred and Fifty Dollars ($950) weekly. As her share of the partnership profit, the judge allowed her loss of earnings at Three Hundred and Seventy-Five Dollars ($375) per week for 47 weeks being the time she was unable to work following the accident.

In respect of this award Mrs. Khan contended that the respondent had failed to strictly prove that she earned Nine Hundred and Fifty Dollars ($950) on a weekly basis. She cited and relied upon paragraph 1527 of **McGregor on Damages** 12th Edition where the Learned Author states:

> "The evidence in proof of special damage must show the same particularity as is necessary for its pleading. It should therefore normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. Thus had there been a sufficient allegation of special damage in all the cases where its proof has been refused because of the plaintiff's failure to plead specific instances, the plaintiff would still have been required to give evidence of these specific instances to prove the special damage."

Mrs. Khan urged that the evidence adduced in proof of the respondent's earnings fell far short of the mark. The evidence amounted to no more than a guess.

The learned judge was not unmindful of the nature of the evidence adduced in proof of income. In dealing with the question of loss of earnings he took into consideration the following factors:

1. That the respondent was self-employed on a small basis.

2. That there was no proper accounting system employed in the business.

3. That no basis was given as to how the profit of Nine Hundred and Fifty Dollars ($950) per week was arrived at.

4. The level of intelligence of the respondent.

Having considered these factors he observed that the Court must begin to impress upon litigants the need for proper evidence to be tendered in proof of special damages. He nevertheless concluded that the respondent was a witness of truth and expressed the view that the Court could not be unmindful of how persons at the level of the society from which the respondent originates operated the type of business in which the respondent was involved. He found that the respondent was engaged in a partnership with her commonlaw husband and accepted the figure of Nine Hundred and Fifty Dollars ($950) as the weekly profit realized from the vending partnership. On the basis of a partnership he assessed her income at Three Hundred and Seventy-Five Dollars ($375) weekly and allowed her loss of earnings for forty-seven (47) weeks.

There is support for the approach which the judge adopted. At paragraph 1528 of **McGregor on Damages** 12th Edition the learned Author states:

> "However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen, L.J. laid this down in the leading case on pleading and proof of damage, Ratcliffe v. Evans [1892] 2 Q.B. 524 (C.A.). In relation to special damage he said:
> The character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry." [Emphasis added)

Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J. referred to as "the vainest pedantry".

This Court observed in S.C.C.A. 18/84 **Central Soya Jamaica Ltd v. Junior Freeman** (unreported) per Rowe, P that:

> "In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence."

This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of account. They buy, and replenish their stock from each day's transaction. They pay their domestic bills from the day's sale. They provide their children with lunch money and bus fares from the day's sale without regard to accounting.

Mrs. Khan cited and relied upon **Ashcroft v. Curtin** [1971] 3 All E.R. 1208. Such reliance is in my view misplaced, as it is readily distinguished from the instant case. In **Ashcroft's** case the plaintiff operated a one man company. Resulting from his injuries, he claimed that the remuneration paid to him by the company had been, and would, be gravely reduced, and that the value of his 40% shareholding had been reduced. In cross-examination he however admitted that he had not noticed any difference in his income. The Court below awarded the plaintiff a sum of £10,500 as financial loss.

The Court of Appeal reduced the award to £2,500 on the basis that although the evidence pointed to a decrease in the profitability of the company and to that decrease being due to the accident, it was so vague that it was quite impossible to quantify the loss.

In the instant case the plaintiff categorically stated that she earned a profit of $950 weekly from vending, in a partnership with her commonlaw spouse and as a result of the injuries received she was unable to pursue her occupation for the stated period. The trial judge accepted this evidence and awarded her loss of earnings of $375 weekly as her share of the profit. There was nothing vague about the evidence, neither can it be said that "it was quite impossible to quantify the loss."

On the basis of the evidence tendered by the plaintiff as well as the evidence elicited during cross-examination it was open to the judge to properly make the award which he made in respect of loss of earnings.

GROUND 2

GENERAL DAMAGES

Paragraphs(i), (ii), (iii), (iv), (v) were argued together. The burden of the argument in respect of these paragraphs was that the evidence relied upon in making the award was not based upon solid facts. It was further urged that the evidence disclosed no economic loss to the plaintiff which was a result of the disability and further that there must be evidence indicating that the disability will result in economic loss before the loss can be said to be quantifiable.

Fairley v. John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Report page 40 was relied on for this proposition. The principle laid down in **Fairley's** case is acknowledged as sound. However the Court of Appeal per Denning, M.R. found that the trial judge had erred in making an award for the loss of future earnings as the evidence did not disclose that a loss had been incurred. In the instant case the judge found that the respondent had incurred a loss and in our view there was evidence to support such a finding.

The medical evidence disclosed that the respondent sustained "an extensive deep laceration across the right knee, extending laterally and up to the thigh, distal end of femur protruding out of skin, peripheral pulses were palpable and sensation grossly intact.

An X-Ray examination showed a compound dislocation of right knee-joint, fracture of lateral femoral condyle."

Crutches were prescribed by the doctor and up to the hearing of this appeal the respondent was still using them to assist her in walking.

The respondent's evidence is that she stands at her cart to conduct her sales. The doctor is of the view, however, that she could sit and sell from a stall. Such is the nature of the respondent's occupation that she would be unable to move around on crutches in plying her trade. She sells at a bus stop which suggests that her patrons are largely persons travelling on the buses. This would certainly require her to move around quickly. On crutches she would be severely handicapped. Such handicap would have one of two results. Either she would be unable to pursue her occupation as a vendor or if she attempted to, her sales would be drastically reduced.

On the question of the multiplier used to arrive at the global figure, Mrs. Khan contended that a multiplier of 5 was too high. The learned trial judge in choosing the multiplier took into consideration all the imponderables viz the fact that the respondent might soon be able to resume working, the receipt of a lump sum, the immediacy of payment and the fact that she was still in the first year of the accident and was on the recovery path. Having considered all these factors he concluded that a low multiplier of 5 was appropriate in the circumstances. Having applied the correct principles and bearing in mind the age of the respondent I am of the view that the choice of the multiplier cannot be faulted.

PAIN AND SUFFERING

The nature of the respondent's injuries, to which I have referred earlier, required her to be hospitalized for forty-nine days. Subsequent examination in June 1991 revealed a 20 inch scar to her right thigh extending from the lateral aspect of the thigh downwards and across the knee to the medial aspect. The distal end of the thigh showed evidence of muscle wasting and was deformed and swollen. The range of motion at the knee level was nil. Flexion deformity was assessed at 30° and she was only able to walk with the assistance of two crutches. The doctor opined that she suffered a permanent functional impairment of 40% to her right lower limb. The likelihood of improvement is minimal and is assessed at 5%. A further operation involving manipulation of the injured limb under anaesthetics, if successful, would still leave her with at least a 20% disability of the limb. It is anticipated that eventually she would be able to walk without crutches.

On the basis of this evidence she was awarded a sum of One Hundred Thousand Dollars ($100,000) for pain and suffering. The complaint is that this award is too high and is not in keeping with awards in comparable cases. A reasonable award, contended Mrs. Khan, would have been Ninety Thousand Dollars ($90,000), using as a comparable case the award of Forty Thousand Dollars ($40,000) made in October 1984 in **Michael Thomas v. James Arscott and Earl Patterson** reported in Volume II of Recent Personal Injury Awards at page 56. Whilst it may be conceded that the consequences of the injury sustained in Thomas' case were more far reaching yet the injury sustained by the respondent in this case was far more severe.

Using the Consumers Price Index Table, an award of Forty Thousand Dollars ($40,000) in 1984 would convert to approximately One Hundred Thousand and Sixty Dollars ($100,060) in 1991.

an appellate court, notwithstanding that an appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all the questions involved in the action including the question what damages ought to be awarded, will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the judges of appeal think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

We are of the view that had the lot fallen to us to assess the damages in this case we would not have awarded a lesser sum. Further we are satisfied that the trial judge did not act upon any wrong principle of law and that the award which he made was not so extremely high as to amount to an erroneous estimate of the damage to which the respondent is entitled.

For these reasons we dismissed the appeal with costs to the respondent to be taxed if not agreed.