JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 14/05

Application No. 16/06

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (AG.)

BETWEEN:	**DALTON WILSON**	**APPELLANT**
AND	**RAYMOND REID**	**RESPONDENT**

Miss Hilary Phillips, Q.C. and Kevin Williams
instructed by Grant, Stewart, Phillips & Co. for appellant

Richard Reitzin instructed by Reitzin & Hernandez
for respondent

10th, 16th, 21st, 28th February & 7th April 2006

HARRISON, P:

This is an application for an amendment of the grounds of appeal in respect of a judgment of Mrs. Sinclair-Haynes, J. (Ag.) on 20th December 2004 awarding general and special damages for personal injuries against the appellant Wilson.

The respondent had been injured in a motor vehicle accident on 9th September 2002 whilst travelling as a passenger in a bus owned by the appellant.

The notice of appeal was filed on 2nd February, 2005. The grounds thereon unamended read:

> "(a) The Learned Trial Judge erred in law in her assessment of the quantum of damages for pain and suffering and loss of future earnings.
>
> (b) That the aforesaid quantum assessed by the Learned Trial Judge is manifestly excessive.
>
> (c) That the finding in respect of the head of damages for electrical work was not specifically proved."

The amendments sought were to include in paragraph (a) the words "past and" after the word "of" and before the word "future," and in paragraph (c) the words "security guard and for," after the word "for" and before the word "electrical". The effect of the amendments is that the "past" loss of earnings, and the damages assessed for loss of earnings as a security guard would now both be specifically challenged. An application to amend paragraph (c) of the general damages to delete the words and figures "cost of future operation $647,000.00" and substitute therefor "loss of past earnings $636,679.45" was not opposed.

Miss Phillips, Q.C., relied on the affidavit of Kevin Williams sworn to on the 3rd February 2006 which recites that the grounds of appeal un-amended "did not expressly reflect the fact that the appellant intended to raise a challenge..." to the award for past earnings and the awards as a security guard and that the amendments would "reflect the position taken by the appellant since the trial of this matter in the Supreme Court and is clearly reflected in the skeleton arguments filed and served by the appellant since 19th January 2006."

Mr. Reitzin, in opposition, argued that the amendments ought not to be granted because there had not been any challenge to the credibility of the respondent in the court below. There was a mere challenge that the bank passbook did not reveal the source of the funds. A review of the notes from the court below show that there was no attack on his credibility that he was a security guard. There was therefore no opportunity for the respondent to answer such a challenge. The notice of appeal Form A1 is deficient, in that it does not contain the findings of fact or law that are challenged. This court should not therefore exercise its discretion to grant the amendment.

Rule 1.12(2) of the Court of Appeal Rules, ("the Rules"), allows a Court to amend the notice of appeal. By rule 1.10, the notice of appeal, incorporates the grounds of appeal (rule 1.10(b)), and therefore the grounds of appeal may be amended under rule 1.12(2).

As a general rule, the amendment sought must be relevant to the issues in the appeal and must have been raised in the court below. This approach ensures that parties are not taken by surprise and maintains the element of fair play to all. In ***Browne v. Dunn*** [1894] 6 R 47 relied on by Mr. Reitzin, their Lordships in the House of Lords, laid down the proposition that a witness whom a court is being asked to disbelieve must be specifically challenged in cross-examination on material aspects of his evidence. Failure to do so may be taken as an acceptance of its truth. Lord Herschell, L.C. at page 71, inter alia said:

> "... I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the

> box, to give him an opportunity of making any explanation which is open to him; and it seems to me, that it is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

(See also ***Markem Corporation et al v Zipher Ltd*** [2005] EWCA Civ 267)

Although an appellate court may not be readily inclined to entertain an issue raised for the first time on appeal, there is no absolute prohibition against doing so. In ***Connecticut Fire Insurance Co v Kavanagh*** [1892] AC 473, Lord Watson, on behalf of their Lordships Board of the Judicial Committee of the Privy Council, at page 480 said:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below."

Their Lordships, continuing, expressed a caution:

> "But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

Fairness to all parties, the interest of justice, and the governing rules of practice are the influencing factors in the determination of the issue in an appellate court.

In the instant case, the learned trial judge did advert her mind to the credibility of the witness, the respondent Reid. In her "assessment of the evidence" at page 102 of the record, the learned trial judge said:

> "Mr. Reid spent quite sometime in the witness box. I therefore had ample opportunity to assess his credibility. I found him to be a witness of truth. I find that the deposits in the bank account were in fact his salary as a security guard. The sum of $5,000.00 per week is reasonable in light of the fluctuations in his earnings." (Emphasis added)

The learned trial judge made this finding in the context of what she accepted as the challenge to the credibility of the respondent by Mr. Williams, counsel for the appellant. Also, at page 102, she said:

> "Mr. Williams submitted that no award ought to be made under that head because the evidence adduced was insufficient to prove his exact income. He failed to prove how many hours he worked and to supply evidence as to the hourly rate. Further, the deposits in the passbook do not reflect the source of the entries, hence the court will be asked to draw inference where there is no evidential basis. The court cannot determine that the figures represent income from any particular source or whether it is income at all." (Emphasis added)

I maintain that this is a clear challenge, as perceived by the learned trial judge, to the credibility of the respondent in respect of his earnings as a security guard.

In contrast, the learned trial judge regarded the evidence of the respondent in respect of his claim "... regarding electrical work..." as, "The unchallenged evidence ..." No specific challenge to the respondent's credibility arose here.

Additionally, although the notice of appeal was filed on 2nd February 2005, the appellant's "statement of facts and issues" filed on 13th January 2006 did raise the issue of the sufficiency of evidence to grant an award for "loss of past earnings in the amount awarded by the trial judge."

I maintain that there does exist an evidential basis on which this court may entertain the application for amendment to the grounds of appeal.

More significantly, rule 1.16 of the Rules empowers this court, whilst ensuring fairness to all parties, to entertain issues that may not even have been raised in the court below. Rule 1.16 reads:

> "1.16 (1) An appeal shall be by way of re-hearing.
>
> (2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless –
>
> (a) it was relied on by the court below; or
> (b) the court gives permission
>
> (3) However -
>
> (a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but
>
> (b) May not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground."

Of course, the ground sought to be so raised must be relevant to the matters for determination in the appeal. Furthermore, a further power is given to this Court, as it concerns the facts led before the learned trial judge. Rule 1.16(4) reads:

> "1.16 (4) The court may draw any inference of fact which it considers is justified on the evidence."

This court, in the case of ***Gordon Stewart et al v Samuels*** SCCA No. 2/05 dated 18th November 2005 considered its powers under rule 1.16 to allow a point of law to be raised on appeal although it was not argued in the court below. I said at page 13 of the judgment:

> "At the hearing before us, the record did not reveal that the issue of unconscionable bargain was raised by the respondent at the trial. Consequently, not having filed a counter-notice, the respondent would need the court's permission to advance that issue. The court could consider it only if "... the other party to the appeal ... had sufficient opportunity to contest such ground.
> Counsel for the respondent did argue that the principle of undue influence applied, but he was permitted to advance also the concept of unconscionable bargain recited in his skeleton arguments filed and in his submissions before us."

We decided the point in favour of the respondent.

In the instant case, the amendment which sought to advance the issues of the credibility and earnings of the respondent, is more-so permissible, having been foreshadowed in the court below.

For the above reasons I am of the view, that a firm basis exists for the grant of the amendment sought.

In addition, I agree that the notice of appeal Form A1 is deficient, because of the omission of the recital of findings of facts and law that are being challenged. The appellant is required to regularize that deficiency by the filing of an amended notice of appeal.

I would grant leave to amend the notice and grounds of appeal as sought.

SMITH, J. A.

Having read in draft the judgments of Harrison, P., and Harris, J.A. (Ag.) I agree with their conclusions and the reasons therefor.

HARRIS, J.A. (Ag.):

This is an application by the appellant for an amendment of the grounds of appeal.

The appeal concerns a challenge by the appellant to the Judgment of Sinclair-Haynes, J. consequent on an award of damages in favour of the respondent.

The respondent was a victim of a motor vehicle accident on September 9, 2002, he being a passenger in a motorbus owned by the appellant. He sustained injuries and loss. Liability was admitted by the appellant. In evidence, the

respondent stated, among other things, that he earned income as a security guard and an electrician at the time of the accident.

On assessment, the learned trial judge ordered as follows:

"1. The claimant be awarded the sum of $2.79 million for general damages;

2. The claimant be awarded the sum of $2.548 million for loss of future earnings;

3. The claimant be awarded the sum of $647,100.00 for future medical expenses;

4. The claimant be awarded interest on general damages at the rate of 6% per annum from June 16, 2003 to December 20, 2004;

5. The claimant be awarded loss of past earnings of $636,679.45 (being $7,000.00 per week from September 17, 2002 to September 30, 2003 plus $2,750.00 per week from October 1, 2003 to July 31, 2004, and $7,000.00 per week from August 1, 2004 to December 20, 2004);

6. The claimant be awarded other special damages in the sum of $222,766.80;

7. The claimant be awarded interest on special damages at the rate of 6% per annum from September 17, 2002 to December 20, 2004; and

8. Costs to the claimant to be agreed or taxed."

The notice of appeal was outlined thus:

"**1.** The details of the Judgment appealed are:-

General Damages

(a) $2,790,000 for Pain and Suffering with interest at 6% from the date of service, being the 16th September 2003 to the 20th December 2004.

(b) Loss of Future earning at $7,000.00/ week (at a multiplier of 7 years totaling $2,548,000.00.
(c) Cost of future operations - $647,100.00.

Special damages

(a) Loss of past earnings from the 17th September 2002 to the 30th September 2003 at $7,000.00/ week.
(b) Income from electrical work for the period 1st October 2003 to 31st July 2004 at $2,750.00/ week.
(c) Income from security work for the period 1st August 2003 to 20th December 2004 at $7,000.00 / week.
(d) Hospital expenses and household helper totaling $222,766.80 with interest from the 17th September 2002 to the 20th December, 2004 at 6% per annum.
(e) Costs to be agreed or taxed.

2. The Grounds of Appeal are:

(a) The Learned Trial Judge erred in law in her assessment of the quantum of damages for pain and suffering and loss of future earnings.
(b) That the aforesaid quantum assessed by the Learned trial manifestly excessive.
(c) That the finding in respect of the head of damages for electrical work was not specifically proved.

3. The Appellant seeks and (sic) Order that the quantum assessed by the Learned trial Judge be set aside."

The following amendments were sought :-

"(a) the words "past and" may be inserted before the word "future" in the Grounds of Appeal at item 2 (a) of the said Notice of Appeal:
(b) the words "security guard and for" be inserted before the word "electrical" in the Grounds of Appeal at item 2 (c) of the said Notice of Appeal."

An oral application was made for the following amendment:

Deleting the words "cost of future operation -- $647,100.00" appearing as item (c) of the

> notice of appeal, in the details of judgment appealed, under the head of general damages, and substituting therefor, loss of past earnings $636,679.45.

Mr. Reitzen, counsel for the respondent, strenuously objected to the amendments sought.

Rule 1.12 (1) of the Court of Appeal Rules 2002 empowers an appellant to amend grounds of appeal, once without leave, within 21 days of the receipt of notice of the availability of the transcript of the notes of evidence and Judgment. Rule 1.12(2) confers on the court the right to amend notice of appeal.

Under Rule 1.10 a notice of appeal should contain the following:

> "(a) The decision or part of the decision which is being appealed identifying so far as practicable -
> (i) any finding of fact; and
> (ii) any finding of law,
> which the appellant seeks to challenge;
>
> (b) The grounds of appeal."

Rule 1.12 does not expressly provide for the grant of the court's permission to amend grounds of appeal. The grounds are however inextricably a part of the notice of appeal and the court would thereby be endowed with a right to amend them, on an application for amendment of the notice of appeal.

On the hearing of an appeal, under Rule 1.16 (3) of the Court of Appeal Rules, the court is entitled to make decisions on any ground or grounds not specified in the grounds of appeal, provided the other party to the appeal is afforded the opportunity to contest the ground. Rule 1.16 (3) states:

"However -

(a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but
(b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground."

Under Rule 1.16 (4) the court is at liberty to "draw any inference of fact which it considers is justified on the evidence."

A court, in considering whether amendments ought to be granted, must be guided by principles prescribed by the Rules of Court. The Civil Procedure Rules 2002 dictate that, in keeping with the overriding objective, the court should ensure that cases are dealt with justly and fairly. The Rules, in the pursuit of justice, confer on the court wide discretionary powers in making decisions in any given case. The grant or the refusal of an application is dependent on the particular circumstance of the case. A court will only exercise its discretion in favour of an applicant if the justice of the case so requires.

Mr. Reitzen argued that the appellant's failure to bring the application timeously and the fact that no good explanation has been advanced for the delay, would militate against him.

The appeal was filed on February 2, 2005 and the application for amendment was made on February 2, 2006. It cannot be denied that there was some delay on the part of the appellant in making the application. However, Miss

Phillips, Q.C., submitted that the reasons for judgment were not made available to the appellant until a date between February and April, 2005.

An application for an amendment can be made at any time before the hearing of an appeal. This application would normally have been made before a single judge. The appeal was fixed for hearing during the week commencing February 6 and the application was filed on February 2, 2006. It was convenient and expedient to present the application before the hearing of the substantive matter, as, indeed the appellant had done. However, the failure to have had it considered by a single judge would not by itself be detrimental.

It was further submitted by Mr. Reitzen that the court ought not to exercise its discretion in favour of the appellant as he has been in breach of several orders and directions issued by the court. He argued that the breach ought to be seen as a course of habitual conduct which raises the question of procedural or intentional default or an abuse of the process of the court. In support of his contention he cited the case of ***Khudados v Leggate and Others*** [2005] 1.C.R. 1013.

That case concerns an appeal from an Employment Appeal Tribunal based on the [English] Employers Appeal Tribunal Rules 1993, and practice directions made thereunder, which are inapplicable and would not be relevant to the circumstances of the instant case.

It is evident, however, that the appellant's adherence to the requirements of certain orders and directions within prescribed periods was lacking. However,

in paragraph 6 of the affidavit of Kevin Williams sworn on February 7, 2006, he explained that there was no intention on the part of the appellant to have disregarded the orders. In my judgment, the breaches are not ones which will cause injury to the respondent for which he cannot be compensated in costs.

The appellant also did not strictly comply with Rule 1.10 in terms of the form in which the notice of appeal ought to have been framed. His notice of appeal was deficient. Although it recited details of the decision against which the appeal was brought, neither the findings of facts nor law were specifically identified. At the time of the filing of the Notice of Appeal, the reasons for judgment were unavailable. This would have accounted for the deficiency. However, the relevant information in relation to the law can be gleaned from the contents of the grounds of appeal.

It was also Mr. Reitzen's contention that the application raises fresh points of appeal as the matter touching the respondent's veracity as to his employment was never challenged in the court below. The gravamen of his complaint is that the respondent's credibility as to his occupation and source of income as a security guard was never assailed by way of cross examination. In support of his submission he relied on a dictum of Lord Herchell LC in ***Browne v Dunn*** (1894) 6 R 67 which was applied in ***Markem Corporation et al v Zipher Ltd*** [2005] EWCA Civ. 267 (22 March 2005). In the former, the learned Lord Chancellor indicated that where it is intended to impeach a witness, he must be given an

opportunity to offer any explanation which is open to him, if, it is intended to suggest that he is not speaking the truth on a particular point.

As a general rule, an appellate court will not entertain a point which was not raised and considered in the court below. The present case is not one in which this court does not have all facts relevant to the issues raised and considered in the trial court.

The respondent testified that he was employed to a company, which he did not identify, as a security guard and also worked as an electrician in his spare time. He gave evidence of earning an income from each source. He was subject to cross-examination. Although he was not cross-examined in relation to his occupation and source of income, this does not absolve him from his obligation to furnish strict proof of these. His earnings rank as special damages and it would have been obligatory on his part to have proffered strict proof of his income in keeping with the principle laid down in ***Bonham-Carter v Hyde Park Hotel Ltd***. (1948) 64 TLR 177 and in ***Mills v Murphy*** (1976) 14 JLR 119.

The complaint of the appellant relates to the quantum of the award generally. His challenge to the judgment of the learned trial judge is predicated on the premise that the full award, inclusive of such amount as awarded by her for the respondent's past and future earnings as a security guard and an electrician is manifestly excessive.

There can be no doubt that the issues with respect to the respondent's past and future earnings and the source of his income are central to the award.

These issues were substantially the subject of dispute in the court below and were among the issues which the trial judge had to determine from the evidence before her. The award for loss of income relates to the past and future earnings of the respondent as an electrician and as a security guard. The learned trial judge considered the evidence as well as submissions by Mr. Williams, counsel for the appellant and made her findings.

In dealing with the respondent's income as a security guard, it is clear that her finding that the contents of the passbook was proof of his income had been challenged. The learned trial judge concluded that the entries in the passbook reflected his income as a security guard. Before her, the appellant contended that the figures in the passbook were not proof of the respondent's income from any particular source. In my view, it cannot be said that the credibility of the respondent had not been challenged.

So far as the amendment sought to item (c) under the head of special damages is concerned, it is patent that the recital thereunder as "cost of future operation" is a genuine error. The sum of $636,679.45 had been awarded by the learned trial judge as the respondent's cumulative loss of past earnings for the periods September 17, 2002 to September 30, 2003, October 1, 2003 to July 31, 2004, August 1, 2004 to December 29, 2004.

It is necessary, in considering this application, to determine whether the appeal has a good chance of success. For the purpose of this aspect of the application, I will restrict my deliberations to the question of special damages.

Bonham-Carter v Hyde Park Hotel Ltd (supra) and ***Mills v Murphy*** (supra) establish that a claimant bears the burden of adducing strict proof of his special damages. In the case under consideration, an onus was cast on the respondent to have provided such proof. It is arguable whether the requisite proof was before the learned trial judge. Obviously, the prospect of the success of the appeal is good.

Would the grant of an amendment be prejudicial to the respondent? The application for amendment was made on February 2, 2006. It is plain, on the face of it, that the notice of appeal would require amendment. The notice of appeal was served on February 4, 2005. The prospect of an amendment would have come to the respondent's attention from that time. Additionally, he was fully cognizant of the appellant's intention to amend and therefore had not been taken by surprise, as, his affidavit sworn on the April 28, 2005 and exhibited to an affidavit of Kevin Williams of February 7, 2006 discloses that he had knowledge of the fact that the appellant was challenging his income, not only as an electrician but also as a security guard.

Further, the sum awarded stood at $6,744,545.00 together with interest thereon. The appellant seeks to reduce the Judgment sum by approximately $2.6 million. So far, the respondent is in receipt of $1,000,000.00 from the proceeds of the appellant's policy of insurance. The appellant is pursuing a further payment of $500,000.00 to him from the insurers. On November 17, 2005 the appellant sought and obtained an order for sale of lands owned by him,

in order to satisfy the judgment. A portion of the proceeds of sale will be paid to the respondent and the balance purchase money placed on fixed deposit pending the determination of the appeal. The respondent would have at his disposal a substantial part of the judgment debt for his use and benefit.

In light of the foregoing it cannot be said that the respondent would suffer undue prejudice if the amendment is granted.

An amendment will not change the nature of the appeal. It will facilitate the fair adjudication of all issues in dispute. No injustice will be encountered by the respondent. The justice of the case warrants an amendment. It is expedient, in the interest of justice that the application should be granted. I would grant leave to amend the grounds of appeal.

HARRISON, P.

ORDER:

Application for amendment granted as prayed. The notice of appeal is amended and further amendment to include findings of facts and law which are challenged, both to be filed and served within ten (10) days of today's date. Two (2) days costs to the respondent to be agreed or taxed.

Costs thrown away as a consequence of today's amendment to the respondent to be agreed or taxed. Such costs not to be taxed until after the hearing of the substantive appeal.