JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 106/2001

SUIT NO. C.L. B021 OF 2001

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE CLARKE, J.A. (Ag.)

BETWEEN:	**OMAR YOUNG** **MICHEAL MEADE**	**APPELLANTS**
AND	**JUNE BLACK**	**RESPONDENT**

David Johnson instructed by Piper and Samuda for appellants

Anthony Williams instructed by Usim, Williams and Co. for respondent

June 3, 4, 5, 2002 and December 19, 2003

HARRISON, J.A..

This is the judgment of the Court. This appeal is against an assessment of damages for personal injuries by Hibbert, J. on July 17, 2001. The appellants were ordered to pay:

"1. Special Damages

$1,900,398.40 with interest at 3% per annum from 13th June, 1999 to 17th July, 2001

2. General Damages

Pain and Suffering and Loss of Amenities $650,000.00 with interest at 3% per annum from 24th January, 2001 to 17th July, 2001.

3. Costs to the plaintiff pursuant to Schedule A of the Rules of the Supreme Court (Attorneys-at-Law's Costs) Rules 2000."

The relevant facts are as follows. The respondent, a businesswoman, was walking along Constant Spring Road, in the parish of St Andrew at 6:30 a.m. on June 13, 1999 pushing a two-wheeled hand truck containing goods for sale. She was hit from behind by a motor car driven by the second appellant and owned by the first appellant. She was injured and taken to the Kingston Public Hospital where she was admitted, treated and discharged on August 11, 1999. Thereafter she attended a clinic at Duhaney Park, returned for physiotherapy at Kingston Public Hospital on twenty-three occasions and also went to the fracture clinic there.

She consulted Dr Emran Ali, consultant orthopedic surgeon on six occasions and Dr Collin Graham and Mr. Leighton Logan, consultant plastic reconstructive and hand surgeon, on three occasions.

At the time of the accident the respondent was wearing sneakers valued at $3,500; pants - $1,200; ganzie - $1,800; chain - $6,500 and a chaperita - $11,000. They were all destroyed.

In respect of the goods in the hand truck, she stated:

> "... valued $350,790. I kept a record of stock, I had checked the goods when I had finished selling the evening."

She related her changed circumstances, since the accident, saying:

> "I operated from Constant Spring Arcade. My profit is $18,000 per week. Since the accident I have not been able to work because of injury to my left foot. At work I have to constantly walking around to attend to customers, I took the bus to the Arcade before the accident, since the accident I have to travel by taxi. Before the accident I did cleaning and washing at home; since the accident I have to employ a helper paying $2,000 per week since I left hospital – from 13/8/99 I still employ the helper."

She stated that since the accident she cannot run, walk fast, nor stoop. She walks with a limp, her left foot is shorter than the right and it is difficult to be in a sitting position without holding on. She had a T-shaped scar below her left knee and another at the ankle. At the time of trial, she complained of pain. She cannot manage household chores. The helper cooks, washes, cleans and irons the clothes.

Dr Collin Graham's medical report certified that the respondent was admitted to the Kingston Public Hospital on June 13, 1999 having sustained a 35 cm laceration with fracture to the left ankle, with a portion of the tibia protruding, and gross contamination. She was "subjected to several episodes of wound irrigation, debridement and had orthodesis of the left ankle". A skin graft of the left ankle was done on July 20, 1999 and

she was discharged on August 11, 1999 to attend the clinic. She was allowed full weight bearing on October 4, 1999 and referred for physiotherapy. When seen on April 3, 2000, she had a keloid scar to the left ankle with minimal movement. Although her injuries were serious, by November 2000, they were healed with 21% impairment of the left leg and 8% of the whole person.

Dr Ali examined the respondent on May 9, 2000 and observed an unsightly "well healed inverted T-shaped scar 6" x 5" above the ankle", a 1" scar at the side of the left knee and a T-shaped scar over the left calf. The left foot was swollen, the ankle stiff, it is 1" shorter than the right and she walked with a limp aided by a crutch. X-rays showed orthodesis of the ankle and healed fractures of the tibia. He observed that the respondent was still to reach her maximum medical recovery, was 100% temporarily disabled since the accident, and should be reviewed in 3 months. He again examined her on September 12, 2000 and observed "zero movement at the ankle joint due to ankylosis". She still walked with the limp and needed to have her shoe "built up". In his opinion, she suffered 20% permanent partial disability of the left limb which is 5% of the whole body.

Dr Logan's examination on December 12, 2000 confirmed the scarring to the left ankle and calf. He recommended surgical scar revision to "try to minimize the constrictive effect around the left ankle". An

overall improvement of about 50%-60% could be anticipated. Complete eradication is impossible. The disfigurement was 7% to 8% of the body.

The total cost, inclusive of fees for the surgeon, anaesthetist, hospital and follow-up visits was $103,000.00. The record reveals that this item of the claim was agreed on by the parties.

Up to the date of trial, the respondent had not "tried to find any work". She kept a record of her goods and kept the record in her handbag – a daily record. She still paid rental for the stall, at the Arcade, Constant Spring Road, which she kept and where she stored her goods.

Once again, it is lamentable that the learned trial judge gave no reasons for his decision. This Court is therefore unable to ascertain the basis of his assessment and award. This Court has repeatedly stated that trial judges have a duty to do so. In its absence, this Court is itself obliged to examine the evidence to find therein what facts may have prompted his decision. The absence of reasons creates an added burden for an appellate court.

The grounds of appeal were:

> "1. The Honourable Judge failed to assess or properly assess the plaintiff's evidence regarding her claim for Special Damages and erred in law in making the awards therefor which are not substantiated by the evidence in that:
>
> a. The claim for Loss of Income was not strictly proved in accordance with the law and was not supported by the evidence;

b. The claim for damage/lost goods (in transit) was not strictly proven and is not supported by the evidence."

Respondent's notice and grounds of appeal were filed on August 3, 2001. Filing was out of time, in contravention of Rule 14(4) of the relevant Court of Appeal Rules, 1962. Dismissing the preliminary objection of the appellant, leave was granted to counsel to argue the respondent's notice filed out of time. The respondent's notice read, having abandoned ground 3:

"Ground 1

That the Honourable Judge failed to assess or properly assess the Medical Reports tendered in evidence and the evidence given by the plaintiff regarding her claim for Loss of Income and personal assistant/domestic helper and erred in law in reducing the claim having regard to the weight of the evidence.

Ground 2

That the Honourable Judge erred in law in awarding interest at the rate of 3% per annum on Special Damages and erred in law in making no award for Handicap and General Damages having regard to the weight of the evidence".

Mr. Johnson for the appellants, in support of part a of ground 1. argued that the tendered oral evidence of the respondent, a businesswoman operating her stall for twelve years and who keeps a record of daily stock in trade, was insufficient for the learned trial judge to

make an award, for loss of income, without the documentary proof. Furthermore the respondent failed to mitigate her loss in that she closed her business since the incident and locked away her goods in her stall. The medical evidence, which revealed a stiffness of the left ankle, did not support the cessation of her business, on her discharge from hospital on August 11, 1999.

Mr. Williams for the respondent, conceding that the damages must be strictly proved, argued that the oral evidence of the respondent without documentary proof should be seen as reliable. Although the respondent was incapacitated up to the date of trial, she should have mitigated her loss. The Court should reduce the period of incapacitation by only weeks. The respondent was not required to or able to return to work nor employ someone.

In a claim for personal injuries losses in proof of special damages must be strictly proved: (**Murphy v Mills** (1976) 14 J.L.R. 119). There may be instances where proof of loss may not be supportable by documentary proof, which is the best evidence. However, oral evidence by itself can be reliable and acceptable. Rowe, P. in **Central Soya of Jamaica Ltd v Freeman** (1985) 22 J.L.R. 152, intimating that the strict requirement of proof is desirable, recognized that the Court may be forced to assess damages based only on the oral evidence. He said, at page 158:

> "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."

In the instant case, the oral evidence of the respondent is that "my profit is $18,000 per week". There is no detail as to how that profit is arrived at, nor is it stated to be net of expenses or tax. Significantly, at the time of trial in July 2001, the respondent said:

> "I am not working now because of the accident ... I have not tried to work since the accident because I am sick."

The respondent is not entitled to refrain from continuing her business merely because she chooses to. She has a duty to take reasonable steps to mitigate her loss: (**British Westinghouse Electric v Underground Electric Railways Co. of London** [1912] A.C. 689). The respondent's business did not require her to be possessed of any particular personal skill nor expertise. She could have continued her trade, by employing an assistant to compensate for her lack of mobility. She was discharged from the hospital on August 11, 1999 eight weeks after the accident and in the words of Dr Graham:

> "Miss Black was allowed full weight bear on October 4, 1999,"

and referred to physiotherapy. On this evidence, the respondent had a duty by way of mitigation to resume her trade at least, as from October 4, 1999 with the aid of a shop assistant.

Dr Ali, in his medical report stated that he last saw the respondent on April 3, 2000 and observed:

> "Her injuries are serious and healed with a 21% degree of impairment of the left extremity with a (sic) overall 8% degree of impairment of the whole person."

On this evidence the respondent was obliged to adopt a full resumption of her business as from April 3, 2000 without any loss to her and without any requirement to employ additional help.

The respondent asserted that she earned $18,000 profit each week. This earning is subject to the payment of income tax of 25% of gross earnings: (**British Transport Commission v Gourley** [1955] 3 All E.R. 796). Although the respondent stated that she kept a daily record of her stock, that is her goods, she did not state that that included a record of her sales and consequently, her profits. Operating as she did from a stall in the Arcade, one cannot expect detailed accounts to be kept. This statement of her earnings was not seriously challenged in cross-examination. This Court maintains that the respondent is therefore entitled to recover $13,500 per week being the net loss of profits for the period June 13, 1999 to October 4, 1999 - a period of sixteen (16) weeks.

Subsequently, from the date when the respondent could have resumed her trade, in mitigation of her losses, she would have been obliged to employ someone to assist her until April 3, 2000 when Dr Ali

certified that her injuries were healed instead of ceasing to trade altogether. The period involved would be twenty-four weeks.

Because the respondent was unable to perform her household chores due to her incapacitation, the employment of a household help from the date of her discharge from hospital on August 13, 1999 until her injuries were healed, was reasonable. She stated:

> "Before the accident I did cleaning and washing at home; since the accident I have to employ a helper paying $2,000 per week since I left hospital – from 13/8/99 I still employ the helper."

She would be entitled to an award for the period August 13, 1999 to April 3, 2000, being thirty-two weeks at the rate of $2000 per week.

The rate of $2000 per week would be an appropriate sum to pay an unskilled person, as a shop assistant, to assist the respondent at her stall for the period of her lack of full mobility.

In support of paragraph b of ground 1 Mr. Johnson argued that there was no evidence of the value of items of goods lost. The respondent was not unconscious and so no inference should have been drawn by the Court that goods were in fact lost. Mr. Williams argued that the claim for $350,790 for goods lost was proved to the Court and it was not challenged in cross-examination.

The evidence of the respondent in relation to the item of her claim for "Damage/lost goods (in transit)" was, in examination-in-chief:

> "I had my goods in the hand truck – 3 bags, 3 trays; I had shoes, clothes, sweets, matches, cigarettes, lighters shoe polish and brushes, billfolds, slippers, sneakers and other items.
>
> At the time of the accident goods in the truck valued $350,790. I kept a record of stock, I had checked the goods when I had finished selling the evening before."

The respondent said in cross-examination:

> "I wrote down a record of my goods, I take a record every day, I kept record in my handbag."

There was no evidence of the specific numerical total of items nor any detail of unit value. However, the respondent kept a daily record of her goods "in my handbag." The respondent was then adverting to documentary proof which she could have been forced to produce. Counsel for the appellants did not pursue the point in challenge, in cross-examination. These are civil proceedings. Although strict proof is required in respect of loss sustained, the place and the circumstances in which the respondent was hit when pushing her hand truck with her goods, could well explain the damage and loss of such goods "in transit", although she was not stated to have been unconscious. As stated earlier the Court is aware that the respondent had a record of her goods. In these circumstances, a court may infer in dealing with an informal trader in goods, that she in fact incurred the losses stated, and make an award to satisfy the principle of restitutio in integrum. The award of $350,790 for the loss of goods is supportable.

The respondent's notice in ground 2 complained that the learned trial judge erred in not making an award for handicap on the labour market, in view of the evidence.

An award for handicap on the labour market or loss of earning capacity is justifiable where the injured claimant at the time of trial is still employed at a wage similar to or more than that which he was earning before he sustained his injuries. However, if on the medical evidence he faces a risk that because of his injuries he may in the future lose his job and be thrown onto the labour market, and in such circumstances he will be less able than the average person to compete for a job because of the injuries, the Court may make an award of handicap on the labour market: **(Moeliker v a Reyrolle and Co Ltd** [1971] 1 All E.R. 9). In the instant case, on the evidence, the respondent was well able to resume her trade, and there was no medical evidence of any risk to give rise to such a disadvantage to the respondent. There is no basis for such an award. This argument of the respondent therefore fails.

This award should therefore be as follows:

Special Damages:

Medical expenses	-	$21,579.20
Crutches	-	1,100.00
Orthopaedic shoe	-	34,500.00
Police report	-	1,000.00
Transportation	-	75,500.00
Clothing	-	6,500.00
Chain & chaperetta	-	17,800.00
Domestic help (32 weeks		

@ $2000.00 per week)	-	64,000.00
Shop assistant (24 weeks @ $2000.00 per week)	-	48,000.00
Goods lost (in transit)	-	350,790.00
		$620,769.20

General Damages

Pain & suffering & loss of amenities	-	$650,000.00
Plastic surgery	-	103,000.00
		$753,000.00

Accordingly, the appeal is allowed, in part. The judgment of the learned trial judge is varied. Damages are assessed as follows:

Special Damages - $620,769.20 with interest at 3% from June 13, 1999 to July 17, 2001.

General Damages - $753,000.00 with interest at 3% on $650,000.00 from January 24, 2001 to July 17, 2001 and costs below to the respondent pursuant to Appendix B of the Civil Procedure Rules 2002. Half costs of this appeal should be paid to the appellants to be agreed or taxed.