JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 111/98

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN:	**VIVIAN GAYLE**	**PLAINTIFF/ APPELLANT**
AND	**THE JAMAICA PUBLIC SERVICE CO. LTD.**	**1ST DEFENDANT/ RESPONDENT**
AND	**ANTHONY CURTIS**	**2ND DEFENDANT/ RESPONDENT**

Mrs Patricia Roberts-Brown and
Ms. Suzette Wolfe for the Plaintiff/Appellant
instructed by Crafton S. Miller and Company

Christopher Samuda for the Defendants/
Respondents instructed by Piper and Samuda

March 5, 6, and July 31, 2001

FORTE, P.

Having read in draft the judgment of Bingham, J.A., I entirely agree and have nothing further to add.

BINGHAM, J.A:

In this appeal the plaintiff/appellant (the appellant) sought to challenge an award of damages assessed by Mrs. Justice Harris, J. below, following the hearing of an action in Negligence arising out of a motor vehicle accident on 3rd November 1995. On that day a motor vehicle owned by the

first named defendant\respondent company (the respondent) and driven by the second named defendant\respondent Anthony Curtis (the second named respondent) while being driven along the main road at Goshen In Saint Elizabeth collided into the appellant while he was standing to the rear of his stationary mini-bus and then collided into the rear of the said mini-bus, injuring the appellant and damaging the vehicle.

At the conclusion of the hearing of the claim in negligence brought against both respondents, the learned trial judge in a well reasoned judgment delivered on 31st July 1998, found for the appellant on the issue of liability and made the following award of damages:

(1)	**General Damages** for Pain and Suffering	$180,000.00
(2)	**Special Damages**	
	cost of repairs, transportation, medical expenses, helper wages, agreed at	$156,770.00
	Loss of Income	$185,512.20

Interest awarded on the General Damages at 3% from the date of service of the writ to the date of judgment and on the special damages of $342,282.20 at 3% from 3rd November 1995, to the date of judgment.

The appellant not satisfied with the award for both general and special damages mounted a challenge against the judgment in an attempt to have these awards increased. This attack took the course of the filing by learned counsel for the appellant of some fourteen grounds of appeal. Not content, before us leave was sought to argue an additional ground. This latter ground of complaint related to the deduction made by the learned judge of income tax in arriving at the net award for loss of income.

The original grounds were as follows:

"**1.** That the Learned Trial Judge erred in not accepting the unchallenged evidence of the Plaintiff/Appellant that his monthly payment to his Bank was $26,500.00 and erred in drawing an inference and making her own calculation that he would have paid a higher sum when there was no evidence to support such an inference being drawn and further erred in deducting that higher sum from the Plaintiff/Appellant's weekly income as an expense to reduce such an income.

(2) That the Learned Trial Judge erred in stating that in the particular circumstances of this case a period of eight weeks would have been a reasonable time after the accident for the Plaintiff/Appellant's vehicle to have been out of service as she failed to take account of the fact that the Plaintiff/Appellant was the driver and sole operator of the vehicle and he was incapacitated for a substantial period of time in excess of eight weeks, in that sixteen (16) weeks after the accident Dr. Lawson in his report of March 7 1996, said "Mr. Gayle sustained a significant injury to his left knee joint following a direct blow on 3 November 1995 necessitating surgical fixation. At present he is significantly disabled such that he is unable to return to his job as a driver. He is unable to work in any other capacity and so is effectively unemployed and unemployable at present.

(3) That the Learned Trial Judge erred in rejecting the evidence of the Plaintiff/Appellant which was supported by medical evidence that he had to discontinue his taxi service because of the injuries he sustained in the accident and further erred in failing to appreciate that the Plaintiff/Appellant was operating the bus as a business by way of upward mobility when he started his own single small bus operator business from the early 1970's and was now mitigating his loss by operating a Taxi business which he had to abandon as a

result of pain resulting from the injuries he sustained in the accident.

(4) That the Learned Trial Judge erred in drawing the inference and stating her opinion that the Plaintiff/Appellant had started the taxi service as he had failed to repair the bus when the evidence was that he started the Taxi business as he was unable to drive and operate the bus.

(5) That the Learned Trial Judge erred in finding that there was a conflict in the medical evidence when all evidence came from the doctor who had seen the Plaintiff/Appellant for the entire period of his incapacity, and furthermore when the Doctor had made specific and descriptive and factual findings of the Plaintiff/Appellant's injuries in his report of March 7, 1996.

(6) That the Learned Trial Judge erred in law in deducting from the Plaintiff/Appellant's weekly income the payment towards his loan to his Bank and this was not an expense in the operation of his motor bus business, but a capital expenditure and ought not to be deducted from his earnings in arriving at his weekly income.

(7) That the Learned Trial Judge erred in finding that the Plaintiff/Appellant was only eligible for compensation for loss of income for a period of eight weeks as:

(a) her finding that the vehicle should have been out of service for eight weeks was unreasonable;

(b) the medical evidence proved a long period of incapacity due to the injuries of the Plaintiff/Appellant.

(c) his loss of income was related not only to his bus and its repairs but also to his incapacity to resume work.

(d) she failed to recognize that the Plaintiff/Appellant was operating his bus as a business and that he was not merely a bus driver.

(8) That the Learned Trial Judge erred in law in not awarding the Plaintiff/Appellant a sum for the depreciation in the value of his motor bus as there was sufficient evidence of depreciation in its value after the accident despite the repairs thereto.

(9) That the Learned Trial Judge was wrong in drawing the inference that the Plaintiff/Appellant sold his motor bus for $150,000.00 "because he wanted to liquidate his indebtedness to the bank" and that this did not demonstrate that this sum was a proper value as there was no or insufficient evidence on which this inference could have been based.

(10) That the Learned Trial Judge was wrong and erred in finding that the Plaintiff/Appellant's alleged neglect to repair the motor bus was the cause of its depreciation in value as there was no evidential basis for this finding.

(11) That the Learned Trial Judge's award for pain and suffering loss of amenities is manifestly low and an entirely erroneous estimate of the damage to which the Plaintiff/Appellant is entitled bearing in mind the nature of his injuries.

(12) That the Learned Trial Judge erred in not awarding the Plaintiff/Appellant any sum for prospective loss of earnings as there was ample evidence before her so to do.

(13) That the Learned Trial Judge erred in finding that in determining whether the Plaintiff/Appellant was entitled to future loss of income the availability of the bus must be taken into account as the relevant considerations must be directed to the evidence as it affects the Plaintiff/Appellant's earning capacity at the date of the trial the

moreso that the Plaintiff/Appellant would be unable to drive the bus at any future date due to his incapacity.

(14) The learned trial judge was wrong in her award of interest of 3% per annum on general damages and on special damages, and displayed a lack of consistency and bias, in that in her own judgment in the case of Morrison v Maragh et al (unreported) C.L. 1994/M - 053 Supreme Court (May 20, 1998) she exercised her discretion and awarded interest of 10% per annum both on special damages and general damages in which case the Attorney-at-Law for the Defendant was from the same firm as that of the Attorney-at-Law who appeared for the Plaintiff/Appellant in this present action, and in finding that she was constrained to adhere to the principles laid by judicial authority and in particular the case of Freeman v Central Soya Jamaica Ltd (1985) 22 JLR 152, as the Court of Appeal therein only suggested a guideline for the award of interest and clearly stated that the trial judge has an unfettered discretion to determine whether or not to grant any interest at all and if he decides to grant interest set the rate of interest."

Grounds 1 and 6

These two grounds were argued together. The evidence here was that the appellant had borrowed $500,000.00 from a commercial bank to purchase a mini-bus for use in a venture in which he obtained a road licence to carry passengers for hire or reward. This loan was to be repaid to the bank over a period of three years at a rate of interest of 45% per annum.

The appellant said that the monthly instalment to the bank on this capital sum was $26,500.00. This amount, if correct, fell to be deducted along with the other incidental expenses for maintaining the bus, from the

gross income of $54,000.00. This sum, the appellant said, was his weekly earnings from operating the bus. The learned trial judge rejected the figure stated by the appellant to be the monthly instalment which he paid to the bank. Making her own calculation she arrived at a sum of $32,638.88 as the correct sum.

Learned Counsel for the appellant submitted that as the sum advanced by the appellant as the monthly payment due to the bank was not challenged, the learned trial judge ought to have accepted it without demurrer.

Learned Counsel for the respondent on the other hand, submitted that the learned trial judge was correct in doing what she did. In making her own calculation she would have needed:

1. To do a calculation to arrive at the monthly instalment on the principal debt.

2. To calculate the interest on the principal debt over the term of the loan.

3. To arrive at the monthly instalment on the interest.

4. To add the monthly interest when calculated to the monthly instalment on the principal to arrive at the actual monthly instalment.

This submission by counsel for the respondent has merit as when the exercise is carried out using the above formula, it yields the exact sum which the learned trial judge in making her own calculation arrived at.

There is an even more compelling reason why the stance adopted by the learned trial judge ought not to be disturbed. The appellant, apart from saying that the monthly instalment due to the bank on the loan was

$26,500.00, gave no evidence as to how this sum was arrived at. This figure he seemed to have merely plucked out of the air. There was no supporting oral or documentary evidence led to justify it and in our view, therefore, it was rightly rejected.

Grounds 2 and 7

There was no claim made for loss of use in relation to the period that the bus was laid up awaiting repairs. The appellant being both the owner and driver of the mini-bus, and he being injured and the bus damaged as a result of the accident, the question arose as to what period ought to be regarded as a reasonable time for:

1. The repairs to the vehicle to be effected and so put back into service.

2. To enable the appellant to recuperate from his injuries and be able to be involved in gainful employment. The accident occurred on 3rd November, 1995, and the Loss Adjusters' report (assessors) was received shortly thereafter. Despite this, the vehicle was not repaired until October 1997. The learned trial judge made an award of eight weeks loss of income based on a gross weekly income of $54,000.00 being the evidence given by the appellant.

Learned counsel for the appellant has submitted that this award is unreasonable as given the evidence contained in the medical reports of Dr Konrad Lawson, the appellant was laid up and unable to work from November 1995, to at least August 1996.

The particulars of special damages in the Statement of Claim had sought to allege a continuing loss of income for 24 weeks at $42,000.00 weekly, a total of $1,008,000.00.

The learned judge awarded $23,189.03 per week for eight weeks. On a careful examination of the evidence the award of eight weeks' loss of income requires some degree of upward adjustment for the following reason. Given the medical reports of Dr Lawson, the appellant would have been laid up recuperating from his injury (the fracture to the left tibia) from 3rd November 1995, to at least February 1996, at which time although not yet recovered from his injury, he would have been able to get around sufficiently to attend to the repairs to the mini-bus. The award of eight weeks would have compensated him for a period only up to December 1995, at which time he would not have been able to be weight-bearing in relation to his fractured limb. Although the period of eight weeks would have been a reasonable time to allow for the repairs to the vehicle to be effected and put back into service, it would not however, have been a sufficient period to enable the appellant, given his condition, to obtain the services of a driver to operate the vehicle and mitigate the total loss of income which the appellant was experiencing while he was disabled. We would regard a period of sixteen weeks loss of income in the circumstances as reasonable to compensate the appellant while he was in the process of recuperating. In taking this course, however, we share the view expressed by the learned judge that far from taking any steps to mitigate his loss, the appellant did nothing in this regard. He chose to wait until October 1997, before taking any steps to repair the bus.

Ground 15

It is convenient at this stage to deal with this ground materially relating as it is to the grounds concerning the complaint as to the award for loss of income.

The learned trial judge in arriving at the sum of $23,189.03 as the net weekly income made a deduction of $13,229.25 for income tax. No reason has been advanced by her for taking this course. Awards made for loss of income are usually treated by Courts and regarded as being in the nature of capital payments and, as such, not subject to any deduction for income tax. A deduction in this area could only be justified if an award of interest was made, that being the item which is ordinarily subject to tax. No argument was advanced by learned counsel for the respondents both below and before us calling for such an exercise to be undertaken. We can find no sound basis for the course taken by her. Accordingly, we are of the view that no such deduction ought to have been made.

When the necessary adjustments are carried out in relation to:

(1) the period of sixteen weeks in respect of the loss of income;

(2) the award of the net weekly loss of income without any reduction for income tax;

this results in a net award for loss of income of $581,702.08.

Grounds 3 and 4

These two grounds cover the appellant's claim to be compensated for the reduction in his income when he operated a taxi service while recuperating from his injuries. The learned trial judge sought to address this

matter in making a global award for loss of income (vide grounds 2 and 7). The matter has also been re-visited by us in making a further adjustment to the period awarded by the learned judge. She was also careful to point out that the taxi service was being operated at a time when the appellant was fit enough to drive a vehicle. In the report of 28th October 1996, Dr Lawson in addressing the appellant's condition, stated that:

> "When reviewed in February 1996, he had a full range of movement of his knee and was then complaining of mild discomfort only. At that point he was able to bear full weight and therefore restriction on his activities were removed.
>
> Mr. Gayle slowly progressed until he was last seen on August 12 1996, where he complained of mild discomfort when walking only. When examined he had a full painless range of movement of his left knee and was comfortable driving a taxi which by then became his sole source of income."

In light of the above the learned judge concluded that in her opinion, the appellant started the taxi service when he failed to take the necessary steps to repair the bus. Whatever loss of income he experienced while operating the taxi service or working as a driving instructor, was due to his own negligence in repairing the bus and not as a consequence of his injury.

Given the surrounding facts and circumstances, the view formed by the learned judge cannot be faulted. The reasoning applied in relation to these two grounds is also applicable to grounds 8, 9 and 10. The pre-accident value of the bus as found by the assessors was $400,000.00. Due to the appellant's delay, the repairs were not effected to the bus until October 1997, some twenty months later. During this period the vehicle would have depreciated in value due to being in a damaged state and out of

use. When eventually sold, it fetched a price of $150,000.00. In the circumstances the claim of $250,000.00 as depreciation, in our view, was rightly rejected by the learned trial judge as the appellant "could not by his negligent conduct delay in effecting repairs to the vehicle and expect to visit whatever loss he suffered thereby upon the respondents." Per dictum of Carey, J.A. in **Stephanie Cooper-Marley and Diana Cooper-Marley v Audley Betton** [1987] 24 JLR 43 at 44(B-F).

There is an even more compelling reason given by the learned judge for rejecting this claim for depreciation. It will be recalled that the pre-accident value of the bus was stated by the Assessors' report to be $400,000.00 and the post-accident value as $300,000.00. This latter figure was the estimated value of the un-repaired vehicle. It was the duty of the appellant to tender strict proof of the value of the vehicle after the repairs were effected. No such evidence was adduced. Moreover, the appellant said that he sold the vehicle for $150,000.00, not for the reason that this was the market value of the vehicle but because he needed the money to repay the bank. As no evidence was led to support the claim in this area, the conclusion arrived at by the learned judge, therefore, was correct.

Ground 11

The Award for General Damages for Pain and Suffering.

The learned trial judge awarded a sum of $180,000.00 for Pain and Suffering. The appellant complained that this sum was unreasonable given the extent of the appellant's injuries.

For this Court to interfere with this award, the appellant would be required to demonstrate to the Court that "the trial judge acted on 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 this Court an entirely erroneous estimate of the damage to which the plaintiff is entitled" per dictum of Greer L.J. in **Flint v Lovell** [1935] 1 K.B. 360.

Learned counsel for the appellant submitted that a reasonable sum to be awarded under this head of damage was $400,000.00. In support she relied on **Douglas v Givans** (unreported) C.L. 1986/DO 30 reported at pp. 31-32 of Mrs Khan's Personal Injury Awards Volume 3. In that case the plaintiff suffered injuries including a fracture of the left tibia extending into the knee joint. At the trial the doctor gave evidence that less than two years after the accident the plaintiff had made a complete recovery, though he now had an increased risk of developing arthritis in the left knee joint.

Counsel conceded that the injury in the cited case was more serious but submitted that the recovery was similar as the doctor in his report had expressed his concern about the "likely development of debilitating osteo-arthritis in the left knee at an early age as a direct consequence of the injury." This factor, it was being contended, ought to have resulted in a higher sum being awarded to the appellant.

Learned counsel for the respondent on the other hand submitted that the learned judge's assessment was correct and ought not to be disturbed. In making the award the learned trial judge found some assistance from the following awards:

1. **Gayle v Grey and the Attorney General** C.L. 1988/G 032 (unreported) assessment in May 1990, reported at page 36 Volume 3 of Mrs Khan's Personal Injury Awards.

2. **Johnson v Thomas** C.L. 1988/J 158 (unreported) assessment on January 10 1991, reported at page 362 Assessment of Damages for Personal Injuries (Harrison and Harrison).

3. **Satahoo v Johnson et al** C.L. 1987/S 208 assessment on January 23, 1992, (reported) at page 365 Assessment of Damages for Personal Injuries. (Harrison and Harrison).

In determining the sum to be awarded for Pain and Suffering and Loss of Amenities, the learned judge said:

> "Although there is no evidence of the presence of osteoarthritis in his knee, the likelihood of its development is uncertain. However, the plaintiff is 47 years old and the fact that the lateral tibia plateau has remained depressed (Dr Lawson's Report of March 18 1996), which condition may give (sic) to the early onset of osteoarthritis is a factor which in my view I also ought to take into consideration in assessing the award.
>
> It is my view that an award ranging between $130,000.00 and $190,000.00 ought to be appropriate. I accordingly award the sum of $180,000.00 which I regard as an adequate compensating sum for his pain and suffering."

Given the manner in which the learned judge approached her task, we are of the firm view that she applied no wrong principle of law, neither did she take into consideration any irrelevant factor that could lead us to conclude that the award was either too low or inordinately high so as to warrant interference with it.

Grounds 12 and 13

The complaint as to Loss of Future Earnings

These two grounds, in order to fall within the ambit meriting any consideration, would require the appellant to establish that as a result of the injury suffered by him, his physical condition has now resulted in his being unable to perform any gainful employment. The medical evidence which was before the learned judge below was that the appellant by August 1996, was able to function normally. It was this that led the learned judge to reject the claim under this head for Loss of Future Earnings or Prospective Earnings. The doctor's report, in so far as it opined that there was the likelihood of the appellant showing early signs of developing osteoarthritis at an early age, would have made him qualify for an award for Handicap on the Labour Market. This however, would only have been possible had such a claim been made. Regrettably, this was not done hence no such award can result.

Ground 14

The complaint as to the Award of Interest

This ground is totally devoid of any merit as following the decision in **Central Soya of Jamaica Limited v Freeman** [1985] 22 JLR 152, a decision of this Court which has been consistently followed, it is now well settled that awards for General Damages for Pain and Suffering etc. being assessed on the money of the day principle, attract a nominal award of interest. Rowe, P. in giving the judgment of the Court in that case stated the principle in the following terms (p.167):

> "Once the assessment is made on the money of the day principle, I do not think that the interest on the

> General Damages for Pain and Suffering and Amenities should exceed one half the rate applicable to judgment debts. As the law now stands, I would suggest as a guideline for the award of interest in personal injury cases that:
>
> **1.** interest be awarded on Special damages at the rate of 3% from the date of the accident to the date of judgment. Interest be awarded on general damages at the rate of 3% from the date of the service of the writ to the date of judgment"

Learned counsel for the appellant attempted to distinguish awards of interest in Personal Injury cases from awards in other cases where the award of interest is a matter for the discretion of the learned trial judge in keeping with the provisions of the Law Reform (Miscellaneous Provisions) Act. Awards falling within the latter category, as in commercial cases, would naturally attract an award of interest based on the commercial rate for which oral or documentary evidence would necessarily have to be adduced to form the basis for the award. But such a computation of interest has no place in Personal Injury cases. In fixing the award of interest at 3% the learned trial judge followed the guidelines laid down in **Central Soya** (supra) and in doing so she was correct.

In the result, for the reasons which we have set out, we would allow the appeal in part and set aside the assessment of the damages awarded below in so far as the award for Loss of Income is concerned. The following award is substituted:

3.	Loss of Income	$581,702.08

In all other respects, we would affirm the judgment of the learned judge. The appellant is to have the costs of this appeal, such costs to be taxed if not agreed.

WALKER, J.A.

I have had the advantage of reading in draft the judgment of Bingham, J.A. For the reasons he gives I would dispose of this appeal in the manner proposed by him.

ORDER:

FORTE, P.

1. Appeal allowed in part.

2. Order of Harris, J in the following terms affirmed:

   (1) Judgment for the plaintiff;

   (2) Damages assessed being:

   (a) general damages (for pain and suffering) in the sum of (with interest at 3% per annum from date of service of the Writ of Summons) — $180,000.00

   (b) Costs to the plaintiff to be agreed or taxed.

3. Damages for loss of income set aside and the following award is substituted:

   special damages

   (i) Cost of repairs, transportation, medical expenses, helper wages, agreed at — $156,770.00

   (ii) loss of income — $581,702.08

   (with interest at 3% per annum from 3rd November, 1995, to date of judgment) — $738,472.08

4. Costs of the appeal to the appellant to be taxed if not agreed.