**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 61/97**

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

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| **BETWEEN** | **AUDREY WILSON** | **2ND DEFENDANT/APPELLANT** |
| **A N D** | **LLOYD ROBINSON** | **PLAINTIFF/RESPONDENT** |
| **A N D** | **DENHAM DODD** | **1ST DEFENDANT** |

**Miss Nancy Anderson and Mr. Chuckwvemeka Cameron, instructed by Crafton S. Miller & Company, for the appellant**

**Miss Tana'ania Small, instructed by Kelly McLean, for the respondent**

**February 15, 16, 1999 and July 31, 2000**

**HARRISON, J.A.:**

This is an appeal from the judgment of (Karl) Harrison, J., on April 16, 1997, on a question of damages. The award reads:

1. **General Damages**

**(a)** Pain and suffering and loss of amenities $650,000.00

**(b)** Handicap on the labour market $ 20,000.00

with interest thereon at the rate of 3% per annum from 27th July 1987 to today

2. **Special Damages**

$185.00 with interest thereon at the rate of 3% from 24th January, 1986 up to today

Costs to the plaintiff to be agreed or taxed.

The second defendant/appellant seeks to have the court reduce the award by the monetary equivalent in 1997 of one hundred thousand dollars ($100,000) paid in 1990 to the plaintiff/respondent in partial settlement and that interest be awarded for a period of six years only. The grounds of this appeal, summarised, are:

> **(1)** Because of the inordinate delay, particularly by the plaintiff/respondent interest should not have been awarded for the entire period to April, 1997.
>
> **(2)** The learned trial judge was not informed at the time of assessment of the payment of one hundred thousand dollars ($100,000) to the plaintiff/respondent in partial settlement and that the latter payment made in December 1990, should now be upgraded to its value in April 1997 using the consumer price index.
>
> **(3)** Such upgraded value should be taken into consideration to reduce the damages and an award of the balance should then be made.

Miss Anderson for the appellant argued that at the time of assessment in 1997, the learned trial judge was not informed of the partial settlement by the payment of one hundred thousand dollars ($100,000) to the respondent in 1990. She stated that payment was equivalent to six hundred and twenty-one thousand three hundred and twelve dollars forty-six cents ($621,312.46) in 1997, using the consumer price index, and the latter amount should be deducted from the sum of six hundred and seventy thousand dollars ($670,000) awarded for pain and suffering and handicap on the labour market, leaving a balance of forty-eight thousand six hundred and eighty-seven dollars fifty-four cents ($48,687.54) now due to the respondent. Alternatively, the court should apply to the said payment

of one hundred thousand dollars ($100,000) the treasury bill interest rate as used in ***Peter Williams et al v. United General Insurance Co. Ltd.*** S.C.C.A. 82/97 delivered 30th November, 1998, (unreported), which would amount to an approximate sum of two hundred thousand dollars ($200,000) which sum should be deducted from the said award.

Miss Small, conceding that there was some delay in prosecuting the claim, argued that the history of events carefully explained the delay and the plaintiff should not be penalized. On the other hand, the defendant having made the said part-payment may be paid interest. It would be conferring a benefit by use of the consumer price index conversion as argued by the appellant's attorney.

The history of this matter commenced with the plaintiff filing a writ and statement of claim on July 6, 1987, claiming damages for personal injuries sustained in a motor vehicle accident on January 24, 1986, when a minibus in which he was a passenger and which was owned by the second defendant and driven by the first defendant, collided with a motor truck. Both defendants entered appearance, but no defence was filed. Interlocutory judgment was applied for on May 16, 1989. In December 1990, a payment of one hundred thousand dollars ($100,000) was made to the respondent by the appellant's attorneys-at-law. Previously, on September 20, 1990, and again on November 29, 1990, the matter was fixed for assessment of damages but adjourned sine die. On February 14, 1991, it was the appellant's attorneys-at-law who filed, but later withdrew, a summons to remove their names from the record.

On February 20, 1991, the matter was again fixed for assessment of damages, but adjourned sine die by mutual consent. A period of one year elapsed, during which negotiations were allegedly continuing and then on March

9, 1992, the appellant's attorneys-at-law filed a notice of change of attorneys-at-law. A period of one year passed and on March 23, 1993, the assessment of damages fixed for hearing was adjourned sine die. A further period of two years and eleven months passed and on February 13, 1995, a summons filed by the appellant's attorneys-at-law to remove their names from the record was adjourned sine die, and the said attorneys-at-law not appearing. On October 12, 1995, the assessment of damages fixed for hearing was again adjourned sine die by consent of the parties and again adjourned sine die on July 1, 1996. The assessment of damages was finally heard on March 6, 1997, and the judgment delivered on April 16, 1997, resulting in this appeal.

From the above chronology, it can be readily seen that the delays were not attributable to the respondent exclusively.

The payment of the sum of one hundred thousand dollars ($100,000) by the appellant's attorneys-at-law in December 1990, in partial settlement of the respondent's claim, inadvertently was not brought to the attention of the learned trial judge at the hearing on March 6, 1997. This court is being requested to take that payment into account, at this stage in the circumstances. This request is in the nature of fresh evidence. It is credible, the payment is acknowledged, by both parties, and would have affected the final total of damages at the hearing. Although the evidence of the knowledge of payment was available, this court is obliged now to take it into account (see ***Ladd v. Marshall*** [1954] 3 All E.R. 745). However, the appellant seeks the said sum to be upgraded by the application of the consumer price index multipliers as of April 1997. The equivalent in monetary value of the said payment would be, in 1997, six hundred and thirty-one thousand three hundred and twelve dollars forty-six cents

($631,312.46). Alternatively, the appellant seeks the application of interest to the said amount of one hundred thousand dollars ($100,000) for the period since payment, at the local Treasury bill rate.

A trial judge in Jamaica in the exercise of his discretion under the provisions of section 3 of the Law Reform (Miscellaneous Provisions) Act, orders the payment of interest on damages awarded in personal injury claims, following the principles laid down in the case of ***Jefford et al v. Gee*** [1907] 1 All E.R. 1202. The said Act reads:

> "**3.** In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rates as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

This discretion must, of course, be exercised following settled judicial principles. Courts in Jamaica have consistently awarded interest on such claims on the principles laid down in the case of ***Central Soya of Jamaica v. Freeman***, S.C.C.A. No. 18/84 delivered March 8, 1985, namely 3% on general and special damages, from the date of service of the writ and from the date of the injury, respectively.

The rationale for the awarding of interest is the fact that the plaintiff has been kept out of his money by the defendant's tardiness in settling the plaintiff's claim. In ***Jefford v. Gee*** (supra), Lord Denning said at page 1208:

> "Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him."

In the ordinary case, therefore, delay in payment can be adequately dealt with by the award of interest to cover the said period. In the instant case, the appellant argued that because the partial payment was made as long ago as December 1990, and the respondent caused such delay in concluding the assessment, the appellant should not be penalized by the award of interest to the respondent for the entire period until judgment and in addition the amount should be upgraded to the 1997 value. In respect of delay, Lord Denning in ***Jefford v. Gee*** (supra) said at page 1212:

> "In exceptional cases, such as when one party or the other has been guilty of gross delay, the court may depart from the above suggestions by diminishing or increasing the award of interest, or altering the periods for which it is allowed."

On the facts of this case, as earlier referred to, there is no basis to conclude that the respondent was sufficiently liable to attribute to him the sole cause of the undue delay. In the circumstances, the apportionment of blame should be equally borne. Additionally, to upgrade the said payment by the application of the consumer price index or the Treasury bill rate, would be conferring on the appellant a benefit, the extent of which the respondent, correspondingly, did not enjoy. The payment of one hundred thousand dollars ($100,000) was in fact made to the respondent in 1990 and was enjoyed by the respondent at 1990 monetary values.

To accede to the appellant's request would be unjust and irrational and would present a windfall to the appellant who sat on his rights. He may have, at any time during the period 1990 to 1997, applied to the court to have the assessment struck out or for an order to proceed failing which it would be deemed struck out; he did neither.

I am of the view that the appellant cannot succeed on the arguments advanced. In respect of the award of twenty thousand dollars ($20,000) for handicap on the labour market, no interest should have been awarded, being an award of future payment (***Jefford v. Gee***, supra). To this extent, therefore, the appeal is allowed in part.

The award, therefore, shall read:

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| **General Damages:** | |
| Pain and suffering | $650,000. |
| Handicap on the labour market | $20,000 |
| plus interest at 3% on $650,000 from the date of service of the writ July 27, 1987 to April 16, 1997. | |
| **Special Damages:** | $185 plus interest at 3% from January 24, 1986 to April 16, 1997 |
| and costs to be agreed or taxed. | |

The costs of this appeal shall be paid by the appellant.

**DOWNER, J.A.:**

I agree.

**PANTON, J.A.:**

I agree.