BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

No. 864 of 2003

BETWEEN:

KIM HERBERT ***Plaintiff***

AND

THE ATTORNEY GENERAL ***Defendant***

Before The Honourable Madam Justice Elneth O. Kentish, Judge of the High Court.

2008: April 9 and 22

Mr. Gregory P. Nicholls, Attorney-at-law, for the Plaintiff.

Ms. Donna K. Brathwaite, Attorney-at-law, for the Defendant.

DECISION

Nature of Application

[1] By a summons filed 10 October 2007 the plaintiff inter alia sought first, leave under the relevant Rules of the Supreme Court to amend her statement of claim to include under paragraph 6 thereof particulars of (a) the injuries sustained by her in the accident, the subject matter of this action and (b) pre-trial loss of wages (earnings) in the sum of £17 033 24.

[2] Secondly, the plaintiff sought leave in that summons to give evidence of that loss of earnings by affidavit.

[3] Attached to the summons were:

(1) a draft amended statement of claim which set out the proposed amendments; and

(2) a draft affidavit by the plaintiff of the evidence proposed to be given of her loss of earnings.

[4] The summons was supported by an affidavit of the plaintiff filed on 24 October 2007. An affidavit in opposition was filed on behalf of the defendant by his counsel, Ms. Donna Brathwaite, on 11 March 2008.

The Issue

[5] The sole issue is whether the leave sought by the plaintiff should be granted.

Background

[6] In this action the plaintiff claims damages for personal injuries sustained when she fell into an open trench constructed by the defendant as she walked along Bay Street, St. Michael on 23 October 2001.

[7] This issue arose during the address of counsel for the plaintiff, Mr. Gregory Nicholls, as he sought to address the court on the plaintiff's claim for special damages, in particular, loss of earnings. Counsel for the defendant, Ms. Brathwaite, objected to the matter being raised on the ground that no evidence was given by the plaintiff of any loss of earnings and the statement of claim did not include a claim for such damages.

[8] Mr. Nicholls then sought leave of the court to recall the plaintiff to give evidence on the loss of earnings. This application also met with objection from Miss Brathwaite on the ground that the plaintiff had already closed her case.

[9] At this stage the matter was adjourned to allow Mr. Nicholls to submit legal authorities in support of his application to recall the plaintiff to give evidence of the alleged loss of earnings.

[10] On the resumed hearing of the matter on 9 April 2008 Mr. Nicholls informed the court that the plaintiff had filed the application now under consideration. And the court proceeded to hear the application.

Submissions of Counsel

[11] Referring to paragraph 6 of the statement of claim, Mr. Nicholls stated that the plaintiff pleaded loss and damage and the amendment proposed to delete the words "these will be provided on discovery" appearing under the heading "PARTICULARS OF THE INJURY LOSS AND DAMAGE" and to substitute therefor the following:

1. Injuries sustained;

   The plaintiff sustained right intra-articular condylar fracture (Gustillo-Anderson 111) of the right humerus;

2. Loss of Wages (Pre-trial).

   The plaintiff was employed as an Administrator with the ADT Fire & Security plc, at the monthly salary of £1 216 66 and by reason of her being unable to work for the 14 month period between the 23 October 2001 until the 9 December 2002, the plaintiff lost the sum of £17 033 24 in wages.

[12] Relying on the provisions of **Order 20 Rule 5(1) of the Rules of the Supreme Court (1982)** which gives the court wide powers to allow any party to amend at any stage of the proceedings, Mr. Nicholls referred the court to the general principles for the grant of leave to amend set out in the Supreme Court Practice 1993 Volume 1 at paragraph 20/5-8/6 and the authorities there mentioned, including, in particular, the well known dictum of **Bowen L.J**. in **Cooper v Smith (1883) 26 Ch.D.700, pp.710-711,** that:

> "… I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

[13] In this regard he conceded that the omission to plead the loss of earnings was an error on his part for which the plaintiff ought not to be penalized, he argued. It was his further submission that by allowing the amendment, the court would not in effect be allowing the plaintiff to change a substantive part of her claim thereby necessitating any consequential amendments in the defendant's defence.

[14] Further, he contended that the plaintiff's pre-trial loss of wages had been submitted to the defendant during the course of the proceedings and the defendant was therefore aware of the claim and was not taken by surprise.

[15] It was his submission that the effect of the proposed amendments was not to add a new claim to the plaintiff's case or a new cause of action, but rather to further particularize that claim as made in paragraph 6 of the statement of claim. To his mind, the dictum of **Griffiths L.J**. in **Ketteman And Others v Hansel Properties Ltd And Others 1987 1 A.C. 189** at p. 230 that "there is a clear difference between allowing amendments to clarify issues in dispute and those that permit a defence or claim to be raised for the first time" did not apply to the amendments sought.

[16] However, when one examines paragraph 6 there is no mention whatsoever of any claim for loss of earnings pre-trial. In my view a claim for loss and damage does not foreshadow in any way such a claim.

[17] I therefore reject the submission of Mr. Nicholls that the amendment does not raise a new claim. And I hold that the effect of the amendments sought is to add a new claim for loss of pre-trial earnings.

[18] In reply Ms. Brathwaite objected to the proposed amendments on a number of grounds.

[19] First, she submitted that the plaintiff's claim for pre-trial loss of earnings should have been pleaded as special damages in the statement of claim. She cited, in support, the dictum of **Goddard L.J**. in **British Transport Commission v Gourley [1955] 3 ALL E.R. p. 798** at p. 804 **letter I** that:

> "In an action for personal injuries, the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specifically pleaded and proved. This consists of out of pocket expenses and loss of earnings down to the date of trial and is generally capable of substantially exact calculation.
>
> Secondly, there is general damage which the law implies and which is not specifically pleaded."
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> (See also: **Odgers On High Court Practice 23rd edn. pp. 209-210; Halsbury's Laws 3rd edn. Vol 30 para. 25; Ilkiw v Samuels and Others [1963] 2 All ER 879** at p. 890 **Letter I**;)

[20] Secondly, she submitted, as was indeed the fact, that no evidence was led as to any earnings of the plaintiff during her evidence-in-chief. To allow the plaintiff to do so at this stage would be an injustice to the defendant, Counsel argued, particularly, where the defendant was first given a quantified claim for the pre-trial loss of wages in the written submissions by Mr. Nicholls, exchanged with the defendant's counsel on the 7 March 2008.

[21] This claim for $69 138.94, Ms. Brathwaite contended, was substantial when compared with the claim for general damages of $250 000.00 and changed significantly in quantitative terms the nature of the plaintiff's claim against the defendant.

[22] For this reason, she contended, the amendments should not be allowed. Counsel cited **Perestrello E. Compannia Lemitada v United Paint Co. Ltd. [1969] 1.W.L.R. 570** where it was held inter alia that a plaintiff's undoubted obligation to plead and particularize any item of damage which represented out-of-pocket expenses or loss of earnings incurred prior to trial … and which was only 'special damages' in the sense that fairness to the defendant required it to be pleaded arose because a plaintiff who could base his claim upon a precise calculation must give the defendant access to the facts which made such calculation possible. In that case the Court of Appeal dismissed the plaintiff's appeal against the decision of the trial judge refusing the plaintiff leave to amend the statement claim to include a claim for loss of profits which had not been pleaded although such a claim had been foreshadowed in a letter before the action.

[23] Thirdly, it was Ms. Brathwaite's submission relying on the Practice Note in **Loutfi v Czarnikow Ltd [1952] 2 ALL ER p. 823 para 2** that the Court should be reluctant to grant amendments of the pleadings after the close of the case, but before judgment, even though it had been indicated during the course of the hearing that some

amendment might be asked for, unless there is a very good ground and strong justification for so doing. Such an amendment, the Practice note, stated:

> "may be allowed (i) where the matter involved has been raised in the course of the trial and Counsel has addressed the court on it … and (ii) where the fact, the subject of the amendment, has been referred to by Counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence, that it is a matter in controversy and the amendment will enable the court to arrive at the view… that what is pleaded is a correct interpretation of the facts".

[24] In this case, the amendments sought do not fit within the illustrations provided by the Practice Note in so far as the amendments were not foreshadowed in any manner whatsoever. It seems to me, that the court would be hard-pressed to find good ground and strong justification for allowing the amendment. This is especially the case where the application to amend is being made some five years after the filing of the writ of summons by which date the plaintiff must have been aware of the alleged pre-trial loss of earnings. (See **James v Smith**. supra.).

[25] In answer to the argument of Counsel for the plaintiff that the defendant had knowledge of the plaintiff's claim for loss of earnings in the course of the proceedings, Ms. Brathwaite contended that any such knowledge came to the defendant under "without prejudice" correspondence. She submitted that this knowledge could not be relied on by the plaintiff in support of her application where there was no dispute that the documents were so submitted.

[26] That submission of Ms. Brathwaite I accept. Moreover, it is fortified by her further submission that the plaintiff did not disclose in her list of documents as she was obliged to do under Order 24 of the Rules of the Supreme Court, any document relating to the alleged loss of pre-trial earnings.

[27] Mr. Nicholls sought to distinguish the cases relied on by Ms. Brathwaite on the basis that in all of those cases liability was a matter in dispute whilst in this case liability was conceded at an early stage in the trial and was no longer in dispute.

[28] To my mind, that distinction is illusory. The cases cited by Ms. Brathwaite are illustrations of the particular circumstances in which the courts have refused leave to amend pleadings whether statement of claim or defence and the principles which undergird the grant or refusal of leave to amend.

[29] So the issue is whether in the circumstances of this case leave should be given to the plaintiff to amend her statement of claim to include, in particular, a claim for pre-trial loss of earnings.

[30] It is trite law that whether an amendment should be granted by a trial judge is entirely discretionary.

[31] In **Ketteman (supra.) Griffith L.J.** at p. 220 included among the diverse factors that a judge must take into account in deciding whether to grant an amendment the following:

> "the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the … conduct of litigation as was perhaps possible in a more leisured age."

[32] One of the factors that I consider I must take into account, is the fact that the draft of the affidavit evidence, the plaintiff proposes to give in support of her claim for pre-trial earnings, shows that at the time of the accident on 23 October 2001, the plaintiff was not employed. On her own admission, her contract of employment had expired at the end of September 2001 and was to be renewed after her return from holiday.

[33] It seems to me, a necessary pre-requisite for a claim for loss of pre-trial earnings must be actual employment at the time of the accident. Much speculation would be required to find, in the absence of any evidence whatsoever, that the plaintiff's contract would have been renewed were it not for the accident and the wages she would have in fact earned under that contract.

[34] When this factor is weighed together with the following factors:

(i) the absence of any intimation in the pleadings that such a claim was likely;

(ii) the total lack of evidence by the plaintiff in her evidence-in-chief of any loss of earnings;

(iii) the failure to disclose in the plaintiff's list of documents any documents relating to loss of earnings;

(iv) the first intimation of such a claim coming to the defendant some five years after the filing of the writ of summons;

(v) the fact that leave to amend as sought would have the effect of further delaying the trial either by the recalling of the plaintiff or by cross-examination of the plaintiff on the proposed affidavit evidence (if leave were given in this regard);

it seems to me that justice lies in not exercising my discretion in favour of the plaintiff.

Disposal

[35] The application to amend that statement of claim to include the claim for pre-trial loss of earnings is therefore refused.

[36] The application to amend the statement of claim to include the particulars of the injuries sustained is allowed as this falls within the claim for general damage.

[37] In light of my refusal to allow the amendment to include the claim for pre-trial loss of earnings, the application for the plaintiff to give evidence in this regard by affidavit fails and is disallowed.

[38] The defendant shall have the costs of this application to be agreed or taxed.

Elneth O. Kentish

Judge of the High Court.