INTHE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 0935

BETWEEN	**UCAL SIMPSON** **(By His Next Friend, Felix Simpson)**	**CLAIMANT**
AND	**ALLIED PROTECTION LIMITED**	**1ST DEFENDANT**
AND	**ALVA WATSON**	**2ND DEFENDANT**

Ms. Christine Hudson, instructed by K.C. Neita & Co for the claimant.

Mr. John Graham and Ms. Sharon Usim, instructed by Usim, Williams & Co. for the defendants.

Claim for Damages for Personal Injuries – Running-down Action – Brain Damage - Claim for Loss of Future Earnings- Claim for Future Help.

Heard January 26 & 27, May 4 & July 13, 2010.

Coram: F. Williams, J (ag).

Background

1. On the 1st day of March, 2005, the life of the claimant in this matter was forever changed for the worse: he sustained severe head and other injuries when he was struck by a motor vehicle, whilst walking along Mannings Hill Road in the parish of St. Andrew. That motor vehicle was owned and driven by the first and second defendants respectively. They have denied liability for the accident. The claimant, on the other hand, contends that they are solely to blame. Liability is therefore the main broad issue to be determined in this case; the other being quantum of damages, should the court decide the issue of liability in the claimant's favour.

The Claimant's Case

2. The sole witness of fact (that is, as to how the collision occurred) was one Nicar Baker. His evidence is to the effect that on that fateful day he was in a room at his mother's house at 100 Mannings Hill Road, looking out through a window into a yard across the road. From that vantage point he saw the claimant (whom he knew before as Cecil) walking along the roadway near to the embankment. He also saw the car approach the claimant from behind and strike him as he was walking. The accident occurred between 4:00 and 5:30 p.m.

   Counsel for the defendants asked the court to consider that in the original pleadings, the averment made in respect of how the collision occurred was that the car had mounted the embankment and there struck the claimant. At the time of trial, however, that contention had changed, the contention now being that he was struck whilst walking on the roadway near to the embankment.

The Defendants' Case

3. The defendants contend that the 2nd defendant was lawfully driving along Mannings Hill Road on the day in question when the claimant, who was walking on the road "while under the influence of alcohol" suddenly stepped out into the road into the left side of the 1st defendant's vehicle (see, for example, paragraph 3 of the Amended Defence).

   The car sustained damage to the left post of the windscreen and the indicator light. There was no dent on the vehicle (see, for example, paragraph 11 of the amended witness statement of Alva Watson for the defendants).

Paragraph 10 of the said witness statement is also instructive as to the contention of the defendants: -

> 10. "That the man walked into the side of the car when I was passing him, there was more than enough space between the vehicle and this man and I was in the process of passing him without any difficulty. There was no need for me to swerve or blow my horn".

He also says in paragraph 6 of his witness statement:-

> 6. "As the front of the car passed him, I heard an impact to the left side of my vehicle."

The Medical Evidence

4. The medical evidence in this case came largely from Dr. Randolph Cheeks, consultant neurosurgeon. who examined the claimant on the 15th Decernber, 2005 and the 2nd March, 2006 and provided medical reports dated the 1st March, 2006 and the 10th January, 2008. Dr. Cheeks is a registered medical practitioner with the Medical Council of Jamaica. He holds the Bachelor of Medicine and Bachelor of Surgery degree and has been engaged exclusively in the practice of neurological surgery for some 31 years. He is a Fellow of the Royal College of Surgeons and the American College of Surgeons, as well as a Fellow of the World Federation of Neurological Societies. He is also, among other things, Senior Consultant Neurosurgeon and Head of the Division of Neurosurgery of the Kingston Regional Hospitals; as well as Associate Lecturer in Neurosurgery at the University of the West Indies.

5. The claimant's records indicated to Dr. Cheeks that he had been diagnosed with severe closed head injury; injury to the left orbit and injury to the chest with evidence of vomit inhalation. The vomitus had a strong smell of alcohol. When the claimant was first seen, examined

and assessed by Dr. Cheeks, the doctor made the following observation:-

> "This man has a posttraumatic organic brain syndrome in which there is residual damage to the dominant hemisphere of the brain resulting in difficulty speaking, impairment of concentration and diminution of mental acuity. The severity of these derangements of his complex integrated cerebral functions is such that he requires supervision and assistance to cope with the usual activities of daily living."

6. On seeing the claimant for the second time in 2008 for the preparation of the final report, Dr. Cheeks' assessment was as follows:-

> "Nearly three years now have elapsed since this man sustained a severe closed head injury associated with radiological evidence of structural injury to both hemispheres of the brain. The effect of the injuries were compounded by the effects of hypoxia (reduced amount of oxygen in the body) secondary to the inhalation of vomit, and in consequence he sustained a hypoxic brain injury superimposed upon the structural brain injury resulting in significant permanent damage to the left hemisphere of his brain.
> He has reached the point of MMI and is manifesting residual disabilities especially related to the complex integrated cerebral functions. The result of this is severe impairment of memory function and executive speech as

> well as the confusion and disorientation
> which are evident clinical examination (sic).
> The psychosocial consequences prevent
> him from functioning independently outside
> of the home and he requires assistance
> with most of the activities of daily living.
> This severe brain injury has left this gentleman
> with permanent residual disabilities which
> have impacted primarily on language function
> and on the higher cognitive functions of the
> brain to an extent that renders him unlikely
> to be able to compete in his usual socio-economic
> environment. The PPD resulting from the
> impairment of his mental status
> consequent upon this brain injury is rated at a
> CDR of 2.0 which corresponds to a **PPD**
> **and (sic) of 40% of the whole person**
> according to the AMA guidelines to
> Evaluation of Permanent Impairment".

These paragraphs reflect the main findings of Dr. Cheeks in his assessment of the claimant's injuries and their sequelae.

Visit to the Locus in Quo

7. The court visited the locus in quo on the 27th January, 2010. This was done in an effort to put the court in a position better to visualize how the accident occurred. Also, it was hoped that the court could have stood in the exact spot where the witness, Mr. Nicar Baker, said that he was standing on the day in question in order for the court (with the visit and the notes of evidence) to understand more fully how the accident occurred.

8. However, it was not possible to enter the house in which the witness said he stood. The reason for this, the court was told, was that permission to do so was not given by the witness's mother, the owner of the house. The result of this was that the necessary observations had to be made from a point outside the window from which the witness said he looked on the day of the accident.

Analysis

Liability

9. A resolution of the issue of liability in this matter is ultimately dependent on the court's view of the credibility of the witness for the claimant (Mr. Nicar Baker) on the one hand, as against that of the second defendant, on the other.

In the court's assessment, Nicar Baker came across as a witness of truth, giving his evidence in a forthright manner. The court can find no significant inconsistency or other fault which would lead it to doubt his truthfulness or raise questions about the accuracy of the evidence he gave so as to render him an unreliable witness. Although tested for some time in cross-examination, he was by no means discredited.

Although the visit to the locus did not have the desired effect – in that the court was not able to stand in the exact place the witness said he stood when he said that he witnessed the accident, it was still useful in some respects. For example, the physical layout of the locus appeared to be generally consistent with the evidence given by the witness, Baker. In relation to the question of whether he could have seen what he claims to have seen from where he stood, the court's view is that, with the limitations that attended the visit, all that can be said is this: the court cannot say that it was impossible

for him to have witnessed the accident from where he said he stood. In other words, the visit to the locus cannot be used either to definitely disprove or conclusively confirm his credibility.

10. On the other hand, after hearing the testimony of the second defendant, the court was left with the impression that he really could not say how the accident occurred. This uncertainty in his evidence is really a mirror image of the uncertainty in his pleadings – specifically, paragraph 6 of his witness statement, which, it should be remembered states:

> 6. "As the front of the car passed him, I heard an impact to the left side of my vehicle."

11. It is clear from his evidence that he did not see the claimant walk into the side of the vehicle, as he contends in paragraph 10 of his witness statement. Indeed, (and without meaning to seem to be unkind to the second defendant), a summary of his testimony on the most crucial part of the evidence (that is, exactly how the collision occurred), might be stated thus: "your guess is as good as mine". He saw the claimant when he was some distance away but is unable to speak to the immediate few seconds before the collision. Isn't this consistent with a driver who fails to keep a proper look out or to continue to heed the presence of the claimant pedestrian? In the court's finding, it is.

12. Consideration has also been given to the defendants' contention which speaks to the difference between the pleadings as they now stand and the original pleadings – the latter alleging that the claimant was struck whilst on the embankment; and the former alleging that he was struck whilst on the roadway. However, it should be remembered that the claimant, because of his brain damage, could not and did not give evidence in this case. Additionally, if one accepts (as the court does) that the witness Nicar Baker was contacted only fairly recently; and that no other eye-witness to the accident appears to exist, then the

difference, though regrettable, is understandable. It seems that the original pleadings, although bearing a certificate of truth, were the subject of conjecture, and the latter is based on the information provided by Mr. Baker.

Additionally, as the reference to alcohol is limited to the vomitus having a strong smell of it, there is no medical or other evidence supporting the averment in the defendants' pleadings that the claimant was "under the influence of alcohol" or, if he was inebriated at the material time, that that was a contributory factor to the accident.

13. On a balance of probabilities, the court accepts the evidence of the witness Nicar Baker, finds for the claimant on the issue of liability and now proceeds to examine the quantum of damages.

Quantum of Damages

General Damages

14. In support of a submission that an award of some $15 million for pain and suffering and loss of amenities would be appropriate in this case, counsel for the claimant cited two cases: (i) **Vin Jackson v Punancy & Gibbs** at page 55 of the Harrisons' compilation (**Assessment of Damages for Personal Injuries**) and (ii) **Granville Bell v The Attorney-General**, page 125 of Volume 5 of Mrs. Khan's compilation (**Recent Personal Injury Awards**).

In the **Jackson case**, an award of $427,760 was made in June 1990 for injuries that included concussion, swelling of the head; basal skull fracture involving the temporal bone; injury to right facial nerve. Among the residual disabilities were: reduced hearing; twisted face, speech impairment; loss of concentration; impaired memory and back pains. Updated, that award equates to some $10.986 million in today's money.

In the **Granville Bell case**, among the injuries sustained were loss of consciousness, injury to the neck, fracture through the pedicles of the second cervical vertebrae. The claimant there was left with transient dizziness and a feeling of being unbalanced on turning his head; and had a 20% permanent partial disability of the whole person. The award of $3 million made in 1997 amounts to some $10.315 million today.

15. The defendants' submission in respect of general damages, on the other and, is that a range of between $5 million and $7 million would make for a reasonable award.

16. In support of this submission three cases were cited as a general guide. They are: (i) **Bryan v Cool-It Ltd and Glenford Coleman**, Suit No. C.L. B 125 of 1990, in which an award of $4 million was made on January 27, 2005. That award "translates" to some $7.4 million today. It was made in a case in which the PPD assessed was some 2% of the whole person. The defendants seek to rely of this award because, although the PPD in that and the instant cases differ, the sequelae of the injuries are largely the same. (ii) **Brown v English & Jones**, reported at page 54 of Harrison's **Assessment of Damages for Personal Injuries**. In that case the claimant was left with a 60% disability of the brain. It was submitted that that case is more serious than the instant case on account of the greater degree of brain damage present in the case of **Brown**. An award of $385,000 was made for pain and suffering on January 31, 1991. That award in today's money is some $8.6 million. (iii) **Hamilton v Walford** (also from page 54 of the Harrison compilation) is a case in which the claimant was left with a 50% whole-person disability. On January 31, 1991 an award of $150,000 was made for pain and suffering. Today it is worth some $3.3 million.

17. As is well known, these previous awards are by no means binding in any way on the court. The court uses them as a general guide in assisting it in arriving at its own sense and assessment of what quantum of damages would be fair and just in light of the evidence and peculiar circumstances in each particular case. With this in mind, it is important to appreciate that, at the end of the day, it really is for the court to arrive at an award that is fair and appropriate in all the circumstances.
18. A few observations of some of the cases cited are appropriate. In the **Vin Jackson** case, for example, although the injuries and the disabilities are listed, the said disabilities are not quantified in terms of a stated PPD of the whole person. In the **Hamilton** case, although the PPD is higher than the instant case and the injuries equate roughly to the instant case, my respectful comment is that that award seems somewhat low in all the circumstances.
19. It seems to me that the **Jackson** case comes closest to the instant case in terms of the injuries sustained. Using that case as a general guide (with all the limitations mentioned earlier), it seems to me that an award of twelve million dollars ($12 million) would be appropriate for pain and suffering and loss of amenities in this case.

Claim for Loss of Future Earnings

The Multiplier

20. It was submitted on behalf of the defendants that a multiplier of seven would be appropriate, if the court was of the view that sufficient evidence had been adduced for the court to arrive at a multiplicand. (It was submitted that there was no sufficient evidence of this). This multiplier is drawn from the case of **Raymond Reid** used in the table to be found at page 2 of Volume 6 of Khan.
21. On the other hand, the claimant recommended a multiplier of 9, arguing that the claimant would have some 13 years to work, based on

what is said to be his present age of 52 and the statutory age of retirement for males of 65. No case was cited in support of this.

22. The court would be minded to accept the submission made on behalf of the defendants and to use a multiplier of 7- if it decides that there is sufficient evidence for it to arrive at a multiplicand. In addition to the **Raymond Reid** case, there are two other cases reported in Volume 4 of Khan in which a multiplier of 7 was used for claimants of 48 and 49 years of age- these are (i) **Victor Campbell v Samuel Johnson & anor**. (reported at page 89- the claimant there being 48); and (ii) **Othneil Ellis v The Jamaica Public Service Co. Ltd**. (reported at page 105- the claimant there being 49).

The Multiplicand

23. The witness, Felix Simpson, at paragraph 28 of his witness statement, spoke of the claimant being a carpenter and mechanic. He also stated that the claimant would do the work of a general labourer when work as a carpenter or mechanic was not available. The claimant, he said, worked for at least nine months of the year. He further states at paragraph 30 of the said statement that he and the claimant basically earned the same salary, which was in the region of between $15,000 and $20,000 per fortnight (that is, between $7,500 and $10,000 per week). Counsel for the claimant recommends a multiplicand of between $6,000 and $10,000, citing a table at page 526 of Volume 6 of Khan which suggests that $6,848 per 40-hour work week would be the wage for a Grade 1 mason. The minimum wage can also be used as a guide, and this is $4,200 per week. It should be more than the bare minimum as the claimant is a skilled worker.

24. The defendants, on the other hand, submitted through their counsel that the evidence presented as to the claimant's earnings was not of the standard that should be accepted by the court. There is, for example, no evidence from any employer to confirm the claimant's

employment and his earnings. There is therefore no basis for the calculation of the multiplicand and so the claim for future loss of earnings must fail.

25. Support for this submission is to be found in the well-known cases of **Hepburn Harris v Carlton Walker** SCCA 40 of 1990, delivered December 10, 1990; and **Bonham-Carter v Hyde Parke Hotel Ltd.**, (1948) 64 T.L.R., 177. The essence of the oft-cited dicta there is that special damages must be specifically pleaded and proven and that claimants must not be encouraged to throw up items of alleged damage without offering sufficient proof in support of their claims. On the other hand, it is recognized that the circumstances of each particular case have to be looked at with a view to the court arriving at a view of what is permissible and acceptable in one case *vis-à-vis* another. Indeed, in the very case of **Harris v Walker**, the court, although bearing in mind the desirability for strict proof of special damages, nonetheless went on to make what it considered to be a fair award in that case, the relative paucity of evidence notwithstanding.

26. So too in this case. The court is satisfied that the claimant would have been employed from time to time either in the construction industry or as a general labourer. The court will also consider the evidence of Mr. Felix Simpson that: "the construction work come and go". Doing the best it can in the circumstances, the court will say that he worked for eight (8) months or 32 weeks of each year. In light of the paucity of the evidence the court will use the minimum wage figure of $4,070 per week. The court cannot be guided by what a Grade 1 mason earns as there is no evidence as to the claimant's level of training or expertise or in what grade of masons he might have fallen.

27. The multiplicand will therefore be $4,070 per week for 32 weeks for the year. When the multiplier of 7 is applied, that gives a total award of $911, 680.

The Claim for Future Help

28. The evidence here is to be found at paragraph 22 of the witness statement of Felix Simpson and is to the following effect:-

> "22. Nowadays, he is now able to bathe, clean and feed himself but you have to tell him when to bathe and change his clothes that is the most he can do for himself. He can't wash, cook or tidy his room, which he used to do before the accident."
>
> This is a far cry from the claimant's condition shortly after the accident, as reflected in paragraphs 11and 12 of the said witness statement:-
>
> "11. When Ucal was discharged from the Hospital he was able to stand up, but he could not walk much. He appeared weak and had to be assisted by myself. He was still breathing heavily.
> 12. At home he was unable to feed himself and had to be fed, clean and tidy (sic) by myself and other family members for about two to three months. He was like a baby, the food had to cut up for him to eat. His movements, even in eating were slow".

29. It will be readily apparent that the degree of care required by the claimant shortly after the accident has been reduced considerably by reason of his improvement over time. The rate of compensation that might have been used in respect of his past care cannot, therefore, be still applied; but must be discounted considerably to take into account this fact. There being no evidential basis to support the claim of $3,500 or $4,000 per week, the court has to, in its discretion and best judgment, arrive at a figure that it considers to be reasonable in the circumstances. That figure, in the court's view, is $1,500 per week.

That is the multiplicand. The multiplier will be 10, having regard to his present age (submitted by the claimant's attorney-at-law to be 52) and the life expectancy of 71. The award under this head will therefore be $780,000.

Special Damages

30. There are some seven items of claim under this head. The ones in respect of which the defendants offered no objection (as being reasonable and supported by the evidence) are: (i) the admission cost to the Kingston Public Hospital of $84, 700; (ii) the cost of obtaining Dr. Cheeks' medical report of $43,000; (iii) the cost of transportation (a) to and from the K.P.H, amounting to $2,400; and (b) the visit to Dr. Cheeks costing $600, which together total $3,000.
31. The defendants, however, opposed the allowing of the claim of $1,000 for the police report on the basis that it was never used by the claimant in any way at the trial. The court agrees with this submission and disallows this sum.
32. As regards the claim for extra help, the sum of $396,000 was claimed, being the sum in respect of 132 weeks (from June 2005 to December, 2007) at the rate of $3,500 per week. Additionally, the sum of $356,000 was claimed, being the sum in respect of 89 weeks (from January, 2008 to September 2008) at the rate of $4,000 per week. No evidence was put forward to explain the increase from $3,500 to $4,000. Neither was any evidence adduced to explain the basis on which the figure of $3,500 was arrived at. However, acknowledging (on the basis of the medical evidence) that extra help would have been needed; and, again doing the best it can in the circumstances, the court will allow a figure of $3,000 for the 221 weeks. This gives a total of $663,000.
33. In respect of the claim for loss of earnings, the rate claimed is that of $10,000 per week. However, the court reminds itself of its earlier finding as to the unsatisfactory nature of the evidence in respect of the

claimant's earnings; and of its use of the minimum-wage figure of $4,070 per week. The court also reminds itself of its earlier finding that the claimant would have worked for some eight months (or 32 weeks) of the calendar year. The claim is also for a period from March 2005 "up to the date of judgment".

34. The period March 1, 2005 to March 1, 2010 would represent five years. The claimant would have worked some eight months of each of those years – that is, some 40 months or 160 weeks. If the court's calculations are correct, the period March 2, 2010 to July 13, 2010 represents 19 weeks. In keeping with the court's earlier finding, the claimant might not have worked all of these weeks. To reflect this uncertainty, this figure will be discounted by half – giving a period of eight weeks. To this total of 168 weeks the figure of $4,070 is applied, giving a total of $683,760.
35. The total award for special damages will therefore be $1, 477, 460.
36. The Acknowledgement of Service of Claim Form speaks to service being effected on March 13, 2007.
37. The order of the court is as follows:-

It is hereby ordered that there be Judgment for the claimant:-

(i) In the sum of $1, 477, 460, representing special damages, with interest thereon at the rate of 3% per annum from March 13, 2007 to July 13, 2010.

(ii) And in the sums of (a) $12,000,000 representing general damages for pain and suffering and loss of amenities, with interest thereon at the rate of 3% per annum from March 1, 2005 to July 13, 2010. (b) $780,000 for future help; (c) $911,680 for loss of future earnings.

(iii) Costs to the claimant to be taxed if not sooner agreed.