JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 116/04

BEFORE: **THE HONOURABLE MR. JUSTICE PANTON, J.A.**
THE HONOURABLE MRS. JUSTICE McCALLA, J.A.
THE HONOURABLE MRS. JUSTICE HARRIS, J.A.,

BETWEEN:	**THE ATTORNEY GENERAL**	**3rd DEFENDANT/APPELLANT**
AND	**EVELYN SIMPSON (Substituted for Harold Simpson by order dated February 16, 2004**	**RESPONDENT/CLAIMANT**
AND	**JOSEPH THORPE**	**1ST DEFENDANT**
AND	**DERRICK RUSSELL**	**2ND DEFENDANT**
AND	**ESTATE: ERNEST CLARKE (Represented by the Administrator General, by Order of the Court Dated 24th September, 2002)**	**4TH DEFENDANT**

Mr. Curtis Cochrane instructed by Director of State Proceedings for the appellant

Miss Carol Davis for the respondent

May 21 & June 1 & 22, 2007

PANTON, J.A.

I agree with the reasoning and conclusion of Harris, J.A. and I have nothing further to add.

McCALLA, J.A.

I too agree with the reasoning and conclusion of Harris, J.A., and have nothing to add.

HARRIS, J.A.

In this appeal the appellant challenges a judgment of the Honourable Mrs. Justice Norma McIntosh which she delivered in favour of the respondent, ordering among other things, that the appellant pay 60% of one half of the assessed damages.

The appeal has its genesis in an action arising out of a claim in negligence by the respondent against four defendants. Only the appellant who was named as the 3rd defendant has appealed. For ease of reference, the names of the parties will be utilized in this judgment.

On March 25, 1997 Mr. Harold Simpson, a 73 year old architect, was the victim of two motor vehicle accidents. The first occurred on the Spring Garden main road between a motor car driven by Mr. Simpson and a motor bus owned by Mr. Joseph Thorpe and driven by Mr. Derrick Russell.

The second accident took place at the intersection of Bogue main road and Alice Eldemire Drive while Mr. Simpson was being transported to the hospital in an ambulance as a result of injuries received in the first accident. The ambulance driven by Mr. Daniel Reid collided with a motor car driven by Mr. Ernest Clarke.

On January 1, 1999 Mr. Simpson commenced action. Messrs. Thorpe Russell, Clarke and the Attorney General were named defendants. Defences were filed by all defendants.

Both Mr. Simpson and Mr. Clarke died before the trial of the action. Mrs. Evelyn Simpson, Mr. Simpson's widow was substituted as claimant by order of the court dated February 16, 2004. The Administrator General was substituted as defendant in place of Mr. Clarke by order dated September 24, 2002. The evidence for Mr. Simpson as to what transpired that day came from two eye witnesses, Mr. Clarence Daley, a passing motorist and Mr. George McGhie, Mr. Simpson's gardener who accompanied him in the ambulance to the hospital.

Mr. Daley testified that at about 9:30 on the morning of the accident, he was driving in the left lane along the Spring Garden main road when he observed Mr. Simpson's car emerging from a minor road. He, Mr. Daley, slowed to allow Mr. Simpson access in the left lane ahead of him. When Mr. Simpson had almost completed his maneuver into the left lane, the bus, driven by Mr. Russell at a rate of speed between 60-70 miles per hour, collided with Mr. Simpson's car.

He placed Mr. Simpson in his car and, accompanied by Mr. McGhie, he proceeded to the hospital. En route to the hospital, an ambulance arrived. Mr. Simpson was transferred to the ambulance.

Mr. McGhie stated that he assisted Mr. Daley in lifting and placing Mr. Simpson in Mr. Daley's car. Mr. Simpson's leg was injured but he was conscious.

He remained conscious up to the time he was placed in the ambulance. In the ambulance, he, Mr. McGhie, was seated in the front with the driver while Mr. Simpson and the porter were in the back. The ambulance proceeded quickly with sirens blaring. On approaching a set of traffic lights at the intersection of Bogue main road and Alice Eldermire Drive, the collision occurred. The ambulance overturned and rolled over three or four times.

Mr. McGhie heard the porter crying out for help and went to investigate. He saw that a stretcher on which Mr. Simpson was placed had become dislodged from its position and was resting on the porter's leg. Mr. Simpson appeared to be unconscious. He, Mr. McGhie, was unhurt.

Evidence on behalf of the Attorney General was proffered by Mr. Lloyd Thompson a porter employed to the Cornwall Regional Hospital and Mr. Daniel Reid, the driver of the ambulance. Mr. Reid related that he responded to a call and en route to the Spring Garden main road the driver of a vehicle in which Mr. Simpson was being transported stopped him. Mr. Simpson was placed in the ambulance. He put on the warning lights and siren and proceeded to the hospital.

On approaching the dual carriageway at Bogue and Freeport crossing, he changed the tones of the siren to warn everyone of the presence of the emergency vehicle. The traffic lights were showing green. He proceeded

through the intersection using the left lane while doing so. A vehicle driven by Mr. Clarke collided with the ambulance causing it to overturn.

After the accident, he, Mr. Reid, found that Mr. Simpson was strapped in a locked position in the ambulance and appeared not to have suffered any injuries from the accident. However, when he first saw him, he had lacerations to his head and face. He also had a swollen hip and appeared to be unconscious.

It was Mr. Thompson's evidence that on the arrival of the ambulance, on the Reading main road, he observed Mr. Simpson lying in the back seat of the car groaning. He noticed that he had lacerations to his head and blood in his nostrils which appeared to be dried. He said Mr. Simpson told him he was experiencing pain in his head and hip.

Mr. Simpson was securely anchored in the ambulance, and remained in that position after the accident. Following the accident, he was conscious and appeared not to have sustained any further injury.

On November 22, 2004 Judgment was handed down against all defendants. The award was made in the following terms:

> "1. Judgment for the Claimant on his Claim against all the Defendants in relation to both accidents.
>
> 2. General Damages for pain and suffering and loss of amenities awarded in the sum of $8,000,000.00 with interest at 6% from 13th January, 1999 to 22nd November, 2004.

3. Special Damages in the sum of $2,150,356.00 awarded with interest at the rate of 6% from 25th March, 1997 to 22nd November, 2004.

4. Damages for loss of earnings awarded in the sum of $2,150,356.00.

5. The awards of General Damages + interest for the pain and suffering and loss of amenities as also the award of $2,646,198.00 + interest for Special Damages and for Loss of Earnings of $2,150,356.00 is apportioned between the 2 accidents on a fifty-fifty basis, such that the 1st and 2nd Defendants are 50% responsible and the 3rd & 4th Defendants are 50% responsible.

6. As between the 3rd & 4th Defendants, the 3rd Defendant portion of the damages is assessed at 60%.

7. The Claimant is to have 50% of his costs to be agreed or taxed."

Both grounds (a) and (b) were argued together and are stated hereunder.

Grounds (a) and (b):

"a) The Judge erred in arriving at an assessment of the 4th Defendant's liability of 60% of the portion of damages payable in relation to the second collision by disregarding her finding that this second collision was caused by the sole negligence of the 4th Defendant.

b) The Judge erred in finding the 3rd Defendant contributorily liable to the Claimant in relation to the second collision by disregarding her finding that it was the 4th Defendant's sole negligence that caused the second collision, thereby causing the Claimant to suffer further injuries."

It was submitted by Mr. Cochrane that it was unreasonable for the learned trial judge to have placed any liability on the Attorney General, as Mr. Clarke had admitted liability and Judgment was accordingly entered against him.

At page 493 of the record, the learned trial judge in her judgment said:

> "The record shows that on the 10th December, 2002 a consent judgment was entered against the Fourth Defendant [Mr. Clarke] so that the liability of that Defendant has already been established."

Unfortunately, the records do not disclose that a consent Judgment had been entered. A judgment dated December 10, 2002 was pronounced in favour of Mr. Simpson against Mr. Clarke as follows:

> "This action having come on for trial between the Plaintiff and the Defendant before the Honourable Mr. Justice Rattray, and upon hearing Ms. Carol Davis, Attorney-at-Law on the record for the Plaintiff and Mr. Andrew Gyles, instructed by the Administrator General, Attorneys-at-Law on the record for the 4th Defendant, **IT IS THIS DAY ADJUDGED THAT THERE BE JUDGMENT FOR THE PLAINTIFF AGAINST THE 4TH DEFENDANT AS FOLLOWS:**
>
> 1. Judgment for the Plaintiff against the 4th Defendant in the sum of $750,000 with interest thereon at the rate of 6% per annum from the 30th March, 1999 to the 10th December, 2002.
>
> 2. Costs to the Plaintiff in the sum of $76,000.00 pursuant to Schedule A (9) & (15) of the Rules of the Supreme Court (Attorneys-at-Law Cost Rules) 1998."

The foregoing is clearly not a consent judgment. If there was an admission of liability by Mr. Clarke subsequent to the filing of his defence, then

there ought to have been an application for Judgment to be entered in favour of Mr. Simpson and for damages to be assessed as prescribed by Rule 16.3(2) of the Civil Procedure Rules 2002. The circumstances of this case would necessitate directions for the trial of the issue of quantum at a Case Management Conference. Indeed, the directions would have to stipulate that the trial of the issue of quantum takes place at the time of the trial of the issue of liability of the other co-defendants.

The learned trial judge had fallen into error by stating that a consent judgment had been entered. The procedure as required by the relevant rules had not been followed. Consequently, the failure to do so, renders the Judgment of December 10, 2002 invalid. That judgment, having been improperly pronounced, must be set aside.

Notwithstanding the learned trial judge's error in ascribing liability to Mr. Clarke by reason of the entry of "a consent judgment" she nonetheless gave some consideration to the question of Mr. Clarke's liability. At page 493 of the record she said:

> "It clearly must have been accepted that the Fourth defendant was liable to the Claimant as the ambulance was an emergency vehicle properly observing all the Road Traffic Regulations relating to sirens and flashing lights, so that the Fourth Defendant was obliged to give way and ought not to have proceeded into the intersection but instead should have pulled over as other vehicles had done. The point of impact on the ambulance was to the right rear which suggests that the ambulance was

> almost out of the intersection when the Fourth Defendant's vehicle collided with it. At that time the ambulance would have been well within the range of his vision had he been exercising due care and attention and he quite correctly admitted liability for the accident.
>
> What remains to be determined therefore is whether, on a balance of probabilities, the Third Defendant is also liable to the Claimant for any injuries sustained as a result of the second accident."

Further, no witness statements were filed with respect to Mr. Clarke's case. Consequently, no evidence was advanced on his behalf. The learned trial judge was thereby entitled to proceed on the evidence presented before her and could have found and attached some liability to Mr. Clarke, as she had done.

On the issue of liability, with reference to the first accident, the learned trial judge placed reliance on Mr. Daley's evidence and found that Mr. Russell was the sole cause of that accident by driving at a fast rate of speed, drifting into Mr. Simpson's path and colliding with his vehicle.

So far as the issue of liability as it affects Mr. Simpson, the Attorney General and Mr. Clarke is concerned, the learned trial judge relied on the evidence of Mr. McGhie. He travelled in the front of the ambulance while Mr. Simpson and Mr. Thompson were in the back. On the approach of the ambulance at the traffic lights, Mr. Clarke, who was travelling in the opposite direction, failed to give the right of passage to Mr. Reid, as he, Mr. Clarke, was obliged to do by virtue of the Road Traffic (Emergency Vehicles) Regulations.

Sections 3 and 4 of the Road Traffic (Emergency Vehicles) Regulations state:

> "3. Emergency vehicles giving audible signal by siren horn shall have the prior right of passage along all roads.
>
> 4. Upon the approach of any emergency vehicle giving audible signal by siren horn -
>
> (a) the driver or operator of every other vehicle being used on a road shall immediately drive the vehicle as near as possible and parallel to the left edge or kerb of the road clear of any intersection and shall stop and remain stationary until the emergency vehicle has passed; and
>
> (b) every pedestrian on the road shall immediately proceed as near as possible to the extreme edge of the road and shall remain there until the emergency vehicle has passed."

On observing the advancing ambulance with siren blaring and lights flashing, Mr. Clarke was under a duty to have halted and remained in a stationary position until the ambulance passed. He, nonetheless, continued driving and caused the ambulance to collide with his vehicle. Not only was he in breach of a duty of care to Mr. Simpson but he was also in breach of an absolute duty imposed on him by the Road Traffic (Emergency Vehicle) Regulations. It is clear that some liability in negligence ought to be imposed on him.

I will now turn to the Attorney General's case. Were there any acts on his part which could be said to be the effective cause of Mr. Simpson's injuries?

Determining causation, at times gives rise to some difficulty especially in cases where there are multiple defendants. In determining whether a defendant can be said to be part and parcel of a claimant's injuries, the question is whether he can be drawn into the net of liability. Causation is a net not a chain. I would adopt the words of Lord Shaw of Dunfermline in ***Leyland Shipping Co. Ltd. v Norwich Union Fire Insurance Society Ltd.*** (1918) AC 350, at page 369 in this regard when he said:

> "Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but - if this metaphysical topic has to be referred to - it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause."

The further question in this case is how wide should the net be cast?

The learned trial judge found that the stretcher on which Mr. Simpson was placed in the ambulance became dislodged from its position after the ambulance overturned. The stretcher rested on Mr. Thompson's leg causing him to summon help. The learned trial judge rejected the evidence of Messrs. Thompson and Reid that the stretcher remained intact after the impact and overturning of the ambulance and found that the stretcher had not been properly secured. It was also her finding that the failure to secure the stretcher resulted in further injuries

to Mr. Simpson. She also found that in light of Mr. Simpson's age, the number of times the vehicle overturned with him strapped to a stretcher pointed to the fact that he sustained further injuries from the second collision. The learned trial judge had the advantage of seeing and assessing the witnesses. She accepted the evidence of Messrs. Daley and McGhie. I see no reason why these findings should be disturbed, she, having made her findings of facts based on the credibility of the witnesses.

It was also the learned trial judge's finding that the Attorney General's negligence contributed to the injuries sustained by Mr. Simpson.

The question of contributory negligence must be considered broadly,in this case, taking into account common sense principles. In ***Commissioners For Executing Office of Lord High Admiral of United Kingdom v Owners of S.S. Volute*** (2) (1922) 1 A.C. 129 at page 144 Viscount (Birkenhead), L.C. said:

> "... I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

In ***Fitzgerald v Lane and Another*** (1988) 3 W.L.R. 356, a plaintiff entered a crossing on a roadway without paying attention. He sustained injuries when he was hit by two motor cars in quick succession. The Court of Appeal found both defendants liable as both sets of negligence increased the risk of the plaintiff's injury. An appeal to the House of Lords was only in respect of the apportionment of the award to the plaintiff.

In that case, a dictum of Lord Ackner, at page 361 affords guidance as to the proper approach in determining whether the negligence of one or more of several defendants substantially contributed to a claimant's injuries. He said:

> "It is axiomatic that whether the plaintiff is suing one or more defendants, for damages for personal injuries, the first question which the judge has to determine is whether the plaintiff has established liability against one or other or all the defendants, i.e. that they, or one or more of them, were negligent (or breach of statutory duty) caused or materially contributed to his injuries. The next step, of course, once liability has been established, is to assess what is the total of the damage that the plaintiff has sustained as a result of the established negligence. It is only after these two decisions have been made that the next question arises, namely, whether the defendant or defendants have established (for the onus is upon them) that the plaintiff, by his own negligence, contributed to the damage which he suffered."

The learned trial judge having found that the cause of Mr. Simpson's injuries was brought about not only by Mr. Clarke's failure to have given way to the oncoming ambulance but also by Messrs. Reid and Thompson neglecting to

ensure that the stretcher had been safely anchored, went on to find that both were negligent and had materially contributed to Mr. Simpson's injuries. It is of great significance that Mr. Reid stated that if the stretcher had been properly positioned the impact would not have caused its displacement and the learned trial judge was cognizant of this fact. No issue could have arisen as to whether Mr. Simpson could have been contributorily negligent while he was being transported in the ambulance.

This court will not interfere with the exercise of a trial judge's judgment except in circumstances where the judge is plainly wrong on the facts or has misinterpreted the law. See ***Watt v. Thomas*** [1947] A.C. 484. The learned trial judge, having found the evidence of the witnesses Mr. Daley and Mr. McGhie to be credible and reliable, accepted their evidence. I can see no evidence that she failed to use or that she palpably misused this advantage. She was correct in finding that all four defendants were liable to Mr. Simpson and that they were negligent as there is ample evidence to justify her conclusions.

Ground (c):

> "The award for general damages is an excessive and erroneous estimate of the damages to which the Respondent/Claimant is entitled and in arriving at this award the trial judge disregarded the authorities cited that were distinguishable and had far more aggravating circumstances."

Mr. Cochrane argued that the award of general damages is excessive and that the imposition of a 60% contribution of 50% of the assessed damages on

the Attorney General is also excessive. He contended that contribution on the part of the Attorney General if any, should not exceed 25%.

In dealing with the question of apportionment, the learned trial judge was guided by the dictum of Lord Ackner in ***Fitzgerald v Lane and Another*** (supra), where at pages 361 and 362: he stated:

> "Apportionment of liability in a case of contributory negligence between plaintiff and defendants must be kept separate from apportionment of *contribution between the defendants inter se.* Although the defendants are each liable to the plaintiff for the whole amount for which he has obtained judgment, the proportions in which, as between themselves, the defendants must meet the plaintiff's claim, do not have any direct relationship to the extent to which the total damages have been reduced by the contributory negligence, although the facts of any given case may justify the proportions being the same."

The learned trial judge reviewed and analyzed the medical evidence from medical reports tendered in evidence and the oral evidence of Dr. Henry Brown, one of several physicians who attended to Mr. Simpson. She found that Mr. Simpson sustained multiple fractures and head injuries resulting in a 60% whole person permanent disability but as it was impossible to establish the percentage attributable to his injuries by each defendant, held that all defendants were liable for the injuries.

The learned trial judge also held that of the 50% apportionment of liability imposed on Mr. Clarke and the Attorney General, a contribution of 60% of that 50% should be paid by the Attorney General. It appears to me that the learned

trial judge erred in this regard as the imposition of a 60% of 50% contribution is disproportionate. This clearly will have to be regularized and I will deal with this later.

In assessing the quantum of damages to be awarded, she sought guidance from the cases of ***Deborah Salmon (b.n.f. Clinton Salmon) v Kiskimo Ltd. and Ors***. CLS 119 of 1982 and ***Algie Moore v Mervis Rahman,*** (Harrison on Damages in the Supreme Court page 164.)

The plaintiff in ***Salmon v Kiskimo Ltd and Ors***. (supra) sustained injuries to her head and right leg, severe brain damage, large haematoma, severe displaced comminuted fracture, fractured pelvis and vaginal damage. The resultant disability was an impaired right arm and hand, spacity in the right leg, intellectual impairment, depression and epileptic seizures. General damages were assessed in 1989 at $500,000.00 which would currently amount to $7,800,000.

In ***Algie Moore v Rahman*** (supra) the plaintiff sustained fractures of the tibia and fibula, a wound to the right leg, fractured ribs causing bleeding in the lungs as well as brain damage. The resultant disabilities were deformity and bowing of both shins, memory deficits, retrograde and post traumatic amnesia. General damages were assessed in October 1993 at $1,200,000.00 which would today translate to $4,300,000.00.

In the case under review, the injuries suffered by Mr. Simpson were fracture of the glenoid labrum, comminuted fracture of the mid shaft of the right femur, multiple rib fractures and cerebral concussion. His permanent disabilities were:

a 4 inch shortening of the right leg;

a 15 degree flexion deformity of the right knee,

osteoarthritis of the right hip,

and osteoarthritis of the right shoulder.

The learned trial judge took into account the age of Mr. Simpson, his occupation, his injuries, pain and suffering and made an award of $8,000,000.00. This award is fair and reasonable. She held that the Attorney General is liable for 60% of one half of the assessed damages. As I pointed out earlier, the extent of the apportionment to which the Attorney General should contribute as stated by the learned trial judge is incorrect. The Attorney General and Mr. Clarke had materially contributed to Mr. Simpson's injuries and resultant disabilities. It is not possible to definitively establish what injuries emanated from their negligence. So far as the apportionment of contribution on the part of the Attorney General is concerned, it would be just and equitable that 50% of the general damages be shared equally between the Attorney General and Mr. Clarke's estate.

Ground (d):

> "The award for special damages and loss of earnings were excessive and an erroneous estimate of these

damages to which the Respondent/Claimant is entitled as:

i) The trial Judge failed to take into consideration that these heads of damages must be strictly proven.

ii) The trial Judge erred in these heads of damages on the basis of viva voce evidence that was not substantiated by any documentary evidence or such evidence that was formally tendered into evidence during the course of the trial.

iii) The trial Judge erred in allowing witnesses for the Claimant to speculate and "throw" figures at the Court for its consideration and thereby awarding these heads of damages."

Mr. Cochrane contended that a number of items claimed for medical expenses had not been specifically proved. He further argued that although the learned trial judge awarded $3,225,553.40 for loss of earnings, there is no tangible evidence of proof of such loss.

It was submitted by Miss Davis that the learned trial judge carefully assessed the evidence, admitted such items of special damages as found proved and rejected or reduced those for which no documentation was provided.

As a general rule, a claimant who claims special damages of loss must proffer strict proof of such loss. See ***Bonham-Carter v. Hyde Park Hotel Ltd*** 3 (1948) 64 T.L.R. 177 and ***Murphy v Mills*** (1976) 14 J.L.R. 119. There are however, exceptional circumstances which may impel a departure from this rule. Although certitude and particularity are distinguishing characteristics in proof of

special damages, there are occasions which may well dictate that the requirement for such proof be relaxed. In ***Ratcliffe v Evans*** (1892) 2 Q.B. 524 at 532 Bowen L.J. declared:

> "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax the old and intelligible principles. To insist upon more would be the vainest pedantry."

The claim for medical expenses amounted to $2,826,198.00. These have been itemized as follows:

"PARTICULARS OF SPECIAL DAMAGES

1. Dr. R.C. Rose (Surgery)	$264,000
2. Dr. Milton Arthurs (Consultant Physician)	$202,000
3. Dr. Ivor W. Crandon (Consultant)	27,150
4. Dr. I.G. Mitchell (Consultant)	6,000
5. Dr. Hector Robinson (Consultant)	110,500
6. Dr. Howard Spencer (Surgeon)	29,527
7. Dr. Maria Nelson (Anaesthetist)	15,000
8. Dr. D. Fray (Consultant)	50,000
9. Dr. Whitelock (Anaesthetist)	5,000
10. Physiotheraphy	230,650
11. Anaesthetist Department (UHWI)	57,000
12. U.H.W.I. (Intensive Care)	150,000

13. Dr. Howard Spencer (Mini Tracheotomy tube)	3,527
14. U.H.W.I. (Room and board)	79,500
15. Doctors Hospital (Room and Board)	172,700
16. Doctors Hospital (Bed rental)	63,200
17. Drugs and medications & continuing	281,390
18. Ambulance Service	40,900
19. Laboratory & x-rays	114,095
20. Nursing care & continuing	1,659,496
21. Operating recovery room and oxygen	20,450
22. Disposables & continuing	88,047
23. Medical Report (Dr. R.C. Rose)	5,000
24. Medical Report (Dr. Hector Robinson)	2,500
25. Medical Report (Dr. Delroy Fray)	2,500
26. Dr. K.L. Wedderburn	11,560
Transportation and Loss of Earnings	
27. Taxi fare (Gemini Tours)	129,900
28. Airfares	25,371
29. Traveling for family members	13,800
30. Special Diet and miscellaneous expenses	5,118
31. Custom clearance and medications	4,025
32. Courier services (Airpack Express)	8,404

33. Telephone	8,402
34. Accident investigation report	34,086
35. Loss of earnings	
(From projects lost and continuing)	
1997	490,590
1998	637,767
1999	829,097
2000	1,077, 826
2001	1,401,174
2002	1,821,174."

Mr. Cochrane contended that only loss amounting to $461,490.00 has been specifically proved with respect to medical expenses and only this sum should be allowed.

The evidence relating to the cost of medical treatment and nursing care received by Mr. Simpson was given by his daughter Mrs. Jacqueline Perinchief. A great volume of bills, invoices, receipts and cancelled cheques were attached to her witness statement. Some of these documents were originals, others were photocopies. The originals were admitted in evidence while the photocopies were marked for identity.

The learned trial judge, with due diligence, meticulously examined the evidence. She found, in relation to some medical expenses, that if original

documents were available they would have been produced. She accepted Mrs. Perinchief's evidence that bills for which no receipts were tendered, had been paid. It was also her finding that, on the balance of probabilities, the medical treatment was extensive and that the photocopies represented genuine copies of bills and receipts.

The photocopies of the documents were regarded by the learned trial judge as being utilized by the witness to refresh her memory. She disallowed the claim for $50,000.00 for Dr. Fray as there was no document showing that such sum was paid. Based on documentation before her, the claim for room and board at doctor's hospital for $172,700.00 was reduced to $58,800.00. There was also a reduction of the claim for ambulance services to $25,000.00. This claim was admitted, for the reason that the evidence supported a claim for such services.

The learned trial judge concluded that in the interest of justice Mr. Simpson's claim ought to be pursued on the available material and accordingly awarded the sum of $2,646,198.00 as the costs of medical expenses. In all the circumstances, I see no reason why her findings and the conclusions should be disturbed.

I will now address the question of loss of earnings. The sum of $6,277,628.00 was claimed as loss of earnings. Evidence in this regard was given by Mr. Neville Coleman an accountant in the employ of Harold Simpson

and Associates, a company of which Mr. Simpson was Managing Director. Mr. Coleman provided an audited statement for the year ending June, 1996, which showed that in that year Mr. Simpson earned $314,714.00 as salary. This sum the learned trial judge accepted as Mr. Simpson's salary for 1996. She also accepted that the company was a viable concern in 1997 and that the business would have developed progressively and found that an estimated 25% growth was reasonable.

She then went on to say:

> "The Claimant was clearly a successful architect and at the age of 73 would have well established himself in the field. Furthermore, since his work was not manual-labour intensive, he would in all probability have been able to continue for at least another five years, notwithstanding his age so that the claim for five years loss of earnings is reasonable and the award is accordingly made in the sum of $3,225,534.00, reduced by one-third to cover 'imponderables'. The final figure under this head is therefore $2,150,356.00."

I am in agreement with the learned trial judge's reasoning. However, the reduction of the award of $3,225,534.00, by one third to include 'imponderables' appears to be excessive. I am of the view that, in the circumstances of this case, the award should be reduced by the sum of $425,534.00 to cover 'imponderables'. The learned trial judge failed to take into account the fact that the award is liable for taxation. The amount would therefore have to be further reduced by 25% per cent to cover liability for income tax. Accordingly, the sum of $2,100,000.00 is awarded for loss of earnings.

I would allow the appeal in part as to liability as it relates to the proportionate liability of the Attorney General as he should only be liable for 25% of the assessed damages, and judgment dated December 10, 2002 is set aside. I would allow the appeal in part as to special damages as it relates to loss of income. The award for loss of income is reduced to $2,100,000.00. The judgment of the court below is affirmed in all other respects.

PANTON, J.A.

ORDER:

It is hereby ordered as follows:

1. Appeal allowed in part as to liability. The liability of the appellant is reduced to 25% of the total assessed damages.

2. The judgment dated December 10, 2002 is set aside.

3. Appeal allowed in part in respect of the award of special damages – award for loss of income is reduced to $2,100,000.00.

4. The judgment of the Court below is affirmed in all other respects.

5. No order as to costs.