

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 3278 of 1999

Between

**OCTON BERNARD
(an infant by his next friend Sylvia Hamlett)
SYLVIA HAMLETT**

Plaintiff

AND

**NIGEL ORR
TRINIDAD AND TOBAGO INSURANCE LIMITED**

Defendants

Before the Honourable Justice Gregory Smith

Appearances:

Mr. Carlton George for the Plaintiff

Mr. Neal Bisnath for the Defendants

REASONS

1. On the 16th October, 1997 the Plaintiff, aged 11 years, was a pedestrian, and was involved in a collision with motor vehicle registration number PBB 8781 owned and driven by the First Defendant. The Second Defendants are the insurers of the Plaintiff.

The cases of the Plaintiff and of the First Defendant are diametrically opposed. The Plaintiff's case is that he was standing on the shoulder of the road, waiting for a taxi, when the First Defendant ran off the road and hit him, causing serious personal injuries. The First Defendant's case is that the Plaintiff attempted to run across the road while he was passing in his vehicle and in so doing the Plaintiff ran into the First Defendant's vehicle.

At the trial, the issue of liability was dealt with before quantum and I will deal with these issues in that order.

A. LIABILITY

The Evidence Summarised:-

2. The Plaintiff testified in chief, that he lived at Morvant and attended Rosary Boys' R.C. School, Port-of-Spain. He would usually travel to school by taxi and he would wait on the Northern side of the Lady Young Road, Morvant, for such a taxi. On the 16th October 1997, he was standing on the Northern side of the Lady Young Road, Morvant at about 7.00 a.m. waiting for a taxi. He was about 1 metre away from the edge of the road when a car suddenly swung off the road and hit him. He was thrown into the air and he remembered nothing else after this. In cross-examination, his testimony was unshaken; it also emerged that he had been standing at the spot for about 10 to 15 minutes before the accident and that he was alone and no one was close by him.

3. One, Paul Marryshow, next testified on behalf of the Plaintiff. He stated in chief that he was on the Northern side of the Lady Young Road, Morvant, at the time of the collision. He was going to get ice. He saw the Plaintiff dressed in a white shirt and black pants standing about 4 to 5 feet away from the roadway. Suddenly, a green vehicle swerved into the Plaintiff and bounced him. He then ran up to the Plaintiff and rendered assistance. The Plaintiff was eventually placed in another vehicle and taken to hospital. In cross-examination he insisted that at the time of the collision he was on the same side of the road as the Plaintiff and not on the opposite side of the road. He was then shown his own affidavit, filed in earlier interlocutory proceedings in this matter on the 7th February, 2001, where at paragraph 2, he stated that at the time, the Plaintiff was on the opposite side of the road. Mr. Marryshow then stated that what was stated in the affidavit was incorrect and that his present testimony was correct and that he did witness the accident.

4. The next witness on liability was one Shawn Hobson. He stated in examination in chief that on the day in question, at some time between 7.00 – 7.30 a.m. he was on the Southern side of the Lady Young Road, Morvant, facing in a Northerly direction when he saw a green Toyota Tercel approaching him. This vehicle swerved to the left and the wing mirror of that vehicle hit the Plaintiff, pulled him on to the windscreen, and then threw him down on the side of the road. Mr. Hobson crossed the road and went to the scene where he met a gentleman who he knew only as “Strongie”, trying to render assistance. The

driver of the vehicle which had hit the Plaintiff was on his cell phone and Mr. Hobson asked him to take the Plaintiff to the hospital, but the driver was reluctant to do so; Mr. Hobson therefore, ran back across the road, got his vehicle and with help from "Strongie" and another person, put the Plaintiff in his vehicle and took him to the Port-of-Spain General Hospital. Mr. Hobson also stated that at no time was the Plaintiff trying to cross the road. In cross-examination, Mr. Hobson's testimony was unshaken. He also went on to explain that he was contacted to give evidence about one week before by "Strongie" whom he knew as a casual acquaintance and he reiterated to the court that the Plaintiff was standing on the shoulder of the road before the accident.

This was the last witness to testify on behalf of the Plaintiff.

5. The First Defendant testified that on the 16th October 1997 at about 7.15 a.m. he was driving his green Toyota Tercel in a Southerly direction along the Lady Young Road, Morvant, at about 40 miles per hour, when he saw a child who was by himself and who was also facing in a Southerly direction; while the First Defendant was driving past this child, from the corner of his eyesight, he saw the child run from East to West to cross the road. The First Defendant tried to pull to the center of the road and the front of his car had already passed the Plaintiff, but the Plaintiff still struck the left side of the First Defendant's vehicle. An area between the left front door and left fender of the First Defendant's vehicle was damaged and the left wing mirror was broken; the left corner of his car's windscreen was also damaged. When the Plaintiff hit the car, he fell

backward. After the collision the First Defendant brought his vehicle to a stop and reversed on to the shoulder of the road near to where the Plaintiff had fallen. He came out of his vehicle and with the assistance of an unknown man, put the Plaintiff in his vehicle; he then got back into his vehicle and was about to drive off when a white Hyundai Accent rental vehicle blocked his path. By this time a crowd had gathered and an unknown man approached the First Defendant and attempted to take his keys out of the ignition. The crowd was (according to the First Defendant) "behaving drastic". While the First Defendant was wrestling with the unknown gentleman for control of the car keys, persons unknown in the crowd opened his left rear door and "pulled the child out by his feet", put him into the white Hyundai Accent, and took him to the hospital. The First Defendant then got on his cellular phone and made a call to the Emergency Rapid Response arm of the Police. He later managed to go to the Port-of-Spain General Hospital and then to the Morvant Police Station, to make a report.

In cross-examination the First Defendant revealed that at the time of the collision he had been driving for about 14 to 15 years. At the material time he was on his way to pick up a friend near to where the collision occurred and the road was clear. He stated that the front of his car had already passed the Plaintiff when the latter started to cross the road. The Plaintiff was looking in a Southerly direction at the time. Although he could not say exactly where in the road his vehicle was at the time of the collision he knew it was "closer to the white line". According to him, some 15 to 20 minutes had elapsed between the collision and when the Plaintiff was taken to hospital. In response to the Court,

the First Defendant stated that the whole of his front fender had passed the Plaintiff before the latter ran off and that he did not actually see the Plaintiff attempt to cross the road. According to the First Defendant he “glimpsed” the Plaintiff after about 2 to 3 feet of his front fender had passed the Plaintiff, and later, he said that this “glimpse” came after the entire front fender had passed the Plaintiff.

6. In deciding on liability I paid particular regard to the testimony of the independent witnesses. While the testimony of Mr. Marrayshow supported the Plaintiff’s version of events, his previous inconsistent statement as to where he was, prior to the accident, put his credibility in doubt. On the other hand, Mr. Hobson’s testimony was both credible and unshaken, and I had no hesitation in accepting his evidence as being an independent account of the circumstances of the collision.

I also noted that even though the Plaintiff appeared simple, and sub normal in intelligence, his testimony was presented with candour, and even when he had the opportunity to exaggerate his claim, he stayed true. So, for instance, he candidly admitted that he still played football and drew a little and, that he could not remember if he suffered pain after the accident. His evidence was, in my estimation, compelling and true.

As for the testimony of the First Defendant; while he presented his evidence in a forceful and confident manner, there were serious inconsistencies in his testimony which put his credibility in doubt. This was manifested

particularly when he stated clearly in examination in chief that he saw the Plaintiff out of the corner of his eye, trying to run across the road before the collision and that his vehicle was damaged between the left front door and the left fender. He attempted to bolster this evidence in cross-examination by stating that the front of his car had already passed the Plaintiff when the Plaintiff started to cross, and at that time the Plaintiff was looking to the South. However, in response to the Court, the First Defendant admitted that the whole of his front fender had already passed the Plaintiff and that he did not actually see the Plaintiff attempting to cross the road. Even if the First Defendant's story were true, it would be strange indeed if, while driving at 40 miles per hour, passing someone at the side of the road, when the entire front fender of his car had passed that person, the First Defendant would even have been able to see this person run off, let alone run off facing in a particular direction and also hit the vehicle at a point where the First Defendant's vehicle would have already passed.

Also, I found it strange that the First Defendant, hounded by an angry crowd, one of whom was wrestling him for his car keys, actually would find time to make a phone call. Also, it seemed odd that such a crowd, insensed by the collision, would vent its rage on the injured child by dragging him out of the First Defendant's vehicle.

7. In the circumstances, based on the strength of the Plaintiff's testimony and that of the independent witness, Mr. Hobson, as opposed to the inconsistencies and curious version of events propounded by the First Defendant, I preferred, the

Plaintiff's version of events on a balance of probabilities, and I found as a fact that the collision occurred when the Plaintiff was standing on the shoulder at the side of the Lady Young Road, Morvant and the First Defendant's vehicle ran off the road and collided with the Plaintiff pulling him on to the wing mirror and windscreen of his vehicle then catapulting him into the air and the Plaintiff then fell on the shoulder of the road.

Given this scenario, there was, in my opinion, no room for the inference of contributory negligence on the part of the Plaintiff.

B. QUANTUM

In this matter there were claims for Special and General Damages.

Special Damages:

8. On the last day of hearings, the Plaintiff's attorney agreed to forego the claim for Special Damages as a result of the fact that the Plaintiff had previously received compensation by way of interim payments before the trial and the compensation so received roughly equalled the claim the Plaintiff would have made for Special Damages.

General Damages:

9. In assessing the general damages which are to be awarded to a party in a personal injury matter, the general guidelines which a court considers have been laid down in Cornillac v St. Louis (1965) 7 W.I.R. 491; these are:-

- (i) The nature and extent of the injuries sustained
- (ii) The nature and gravity of the resulting disability
- (iii) The pain and suffering which the injured party endured and is likely to continue to endure
- (iv) The loss of amenity
- (v) The extent to which the pecuniary prospects of the injured party have been affected.

In addition, even though there is no doctrine of precedent in fixing the quantum of damages for such loss, other similar cases are regarded as guidelines for the possible range of an award of damages (see Aziz Ahamad v Raghubar 12 W.I.R. 352). In this judgment, I will deal with categories (i) to (iv) as mentioned above in Cornillac v St. Louis (which have sometimes been classified as the non-pecuniary losses) separately from item (v) above, which has often been called the pecuniary losses.

In this matter there was also the factor of the cost of future nursing care at home to be considered and this was dealt with separately from the non-pecuniary losses and the pecuniary losses.

Non Pecuniary Losses:-

10. (i) The Nature and Extent of the Injuries Sustained:-

The Plaintiff was admitted to the Accident and Emergency Department of the Port-of-Spain General Hospital on the 16th October, 1997. He was in a coma and evinced no spontaneous respiratory effort. He was stabilized and taken immediately to theater where he had exploratory burr holes and an exploratory laparotomy. Surgery revealed diffuse cerebral injury. He was admitted to the Intensive Care Unit for hyperventilation and observation. On the 19th October 1997 he was returned to theater to K-wire a fracture of the left Tibia. He spent 26 days in the Intensive Care Unit during which time he was treated for respiratory tract infections and was intubated for a prolonged period of time due to his depressed level of consciousness. He was discharged to the Neurosurgical ward on the 10th November 1997.

He was also referred to the Ear, Nose and Throat Specialist for vocal cord granuloma and to the Paediatric Surgeon for a retractile left testicle. An MRI Scan of the brain showed a 3 cm post traumatic ghotic area in the right parietal lobe.

He was eventually discharged from Hospital on the 5th December 1997 with problems of severe residual speech difficulty needing extensive

rehabilitation. Further, according to the unchallenged testimony of the Plaintiff's mother, he was, at the time "more or less a vegetable".

On the 12th May 1998 the Plaintiff had an operation to remove the granuloma in his vocal cord. On the 9th May 2000, he had surgery to remove the pins in his ankle. On the 22nd August 2001 he had a surgical procedure to deal with the retractile testicle. He has been attended to by two neurosurgeons and also has had to be treated and assessed by a speech therapist, two child psychologists, and a physical rehabilitation instructor.

11. (ii) The Nature and Gravity of the Resulting Disability:

The Plaintiff has interacted with numerous professional personnel who have tried to assist him. There are extensive medical reports which were admitted into evidence with the consent of the parties without the need for oral testimony. Additionally, the Plaintiff's mother gave unchallenged evidence of the Plaintiff's prolonged recovery and his past and present disabilities. I also made observations of the Plaintiff in the witness box on this issue. I will now try to summarise this aspect of the evidence in various categories.

(a) Brain injury and resulting personality change.

The interim report of Mr. Ramcharran (the Hospital Registrar of the Neurosurgery Department) dated 13th July 2000 indicated that an MRI scan of the Plaintiff's brain showed a 3 cm post traumatic ghotic area in the right parietal lobe. Examination of the Plaintiff revealed a slow purposeful gait and a resting tremor of the left (dominant) hand. He exhibited poor abstract thinking,

calculation and concentration with a marked decrease in attention span. He had severe dysgraphia and poor spatial orientation. His behaviour had reportedly changed with inappropriate laughing, temper tantrums, aggression and some bed wetting. Mr. Ramcharran gave an assessment of frontal lobe injury with temporal dysfunction and a 70% disability.

On the 25th April 2002, Mr. Rasheed Adam, a Specialist Neurosurgeon gave a more long term evaluation with respect to the brain injury which indicated that the Plaintiff manifested bilateral cerebral dysfunction and irritability, with post traumatic gliosis in the right parietal lobe. The Plaintiff experienced tremors on usage of his left hand and had limited speech and forgetfulness. Examination showed him to be smiling only to questions but he was oriented in time, place and person with good attention. His permanent partial disability was assessed at 70%.

Dr. Steve Rollocks, a clinical child psychologist in his evaluation report of the Plaintiff dated 8th August 2000 indicated that the Plaintiff exhibited mild mental retardation and was to be considered as mentally deficient. At age 14 his reading and understanding skills were at the level of a 9 year old. The Plaintiff also experienced problems with motor co-ordination.

Ms. Donna Watkins Phd., a clinical psychological, did a more extensive report of the Plaintiff's condition based on evaluation between July to September 2001. She also examined his academic records prior to and after the accident. In many of the tests administered to the Plaintiff, she found that he performed at the level of a child between 7 – 9 years old when he was 15 years old. Ms.

Watkins described the Plaintiff as smiling continuously and inappropriately, with apparent psychomotor retardation and impaired gross and fine motor skills. He walked slowly and with a slight limp. He was unable to use his dominant (left) hand for functional tasks such as writing or buttoning his shirt because of a significant tremor and although he had learned to use his right hand, manual dexterity was compromised. The Plaintiff's speech was dysarthric and difficult to understand. Cognitive dysfunction and slowing exacerbated his receptive and expressive language difficulties, as a result of which, a speaker would have to speak in simple terms or repeat statements to the Plaintiff and there would follow a noticeable response lag. Sustained concentration was limited. Intelligence testing revealed that the Plaintiff was functioning significantly below age level in all areas and that his cognitive abilities were in the intellectually deficient range. Given the time that had elapsed since the accident Ms. Watkins opined that it was unlikely that the Plaintiff would make any further significant cognitive gains. He would continue to display persistent motor and neuropsychological deficits and personality changes, with compromised problem solving abilities, poor higher order processing, problems with initiative and memory, poor social judgment, disinhibition, lack of insight and poor planning and organizational skills. He would require daily supervision and would not be able, for example, to drive a car, though he may be able to work in a sheltered/supervised environment. Among the recommendations made for the Plaintiff's future care and management were, constant care and re-training for semi-independent living,

enrollment at a special school, occupational therapy and, since the Plaintiff would develop physically, sterilization.

In her testimony at court (upon which there was no cross-examination) the Plaintiff's mother gave details of the manifestations of his brain injury and personality change. She described him as a vegetable upon his discharge from hospital. He couldn't do anything whatsoever for himself, he just lay down straight; she had to guess when he could be fed and then feed him with a spoon by squeezing his mouth open, holding his head back and rubbing his throat. The Plaintiff was in diapers too. This continued till about March 1998 when she had to retrain the Plaintiff, as she would a baby, to do every task even, for example, walking; she even had to potty train the Plaintiff. She took him to every one of his numerous appointments with doctors and other professionals. She described the Plaintiff's frustration at not being able to do tasks like button his shirt and going to buy simple household items in the nearby shop. She explained how he had developed a temper and frequently fought in school.

The Plaintiff too, while testifying, displayed his lack of cognitive skills since it was very often a task for his Counsel to lead simple evidence from him and cross-examination was frustrating and painstaking; the Plaintiff also smiled continuously and his speech was slow and slurred, and it was difficult at times to understand the words that he was saying. I had little hesitation in agreeing with the professional evaluations of mental retardation..

(b) The fracture of the ankle:-

According to the report of Mr. David Toby, consultant Orthopaedic Surgeon, dated 25th July 2000, the Plaintiff had complained of severe medial ankle pain and surgery was performed to remove surgical pins which had been previously inserted. The review indicated that the skin had healed but the Plaintiff still had residual pain and the estimated permanent partial disability from this injury was 15%.

(c) The Retractable Testicle:

In his report dated 17th September 2001, Dr. Sawh, an Urologist, indicated that as a result of the left orchidopexy (testicle fixation) performed on the 22nd August 2001 the Plaintiff was well healed from this injury. No indication was given of any continuing disability. The Plaintiff's mother indicated that immediately after the operation, the Plaintiff slept a lot and was also on painkillers, and only complained of slight pain.

(d) The left Vocal Cord Granuloma and Speech:

The medical report of Dr. S. Juman (specialist in Ear, Nose and Throat diseases) indicated that as a result of an operation performed on the Plaintiff on the 12th May 1998, the quality of his voice had improved significantly.

The report of Wendy Senior Gomez (a speech therapist) dated 28th July 2000 indicated that the Plaintiff displayed language skills appropriate to a 9 year old (at age 14) and that it was difficult to understand his speech due to his low intensity level and slow rate of speech. His lower lip pressure/closure was also weak and inappropriate.

The Plaintiff's mother supported these findings in so far as she indicated that the Plaintiff couldn't speak after the accident and that at present it was sometimes difficult to understand what the Plaintiff was saying. From my observations of the plaintiff in the witness box, it was evident that he still suffered significantly with a speech defect.

12. (iii) Pain and Suffering:

Not much evidence was led on this aspect of the claim, and Counsel for the Defendants submitted that the Plaintiff's claim should somehow be lessened because it was not proved that the Plaintiff suffered any degree of pain. The basis for this submission flowed from the Plaintiff's simplistic statement that he could not remember if he suffered pain as a result of the accident; he however recalled that he had an operation to his foot and that his foot hurt him after the operation but it no longer hurt him. These statements however, must be read in context. The Plaintiff had suffered severe brain trauma and his memory and cognitive functions had been seriously undermined. Indeed, in relation to the foot operation, Dr. Toby's report indicated that the Plaintiff complained of "severe medial ankle pain" before surgery and that he continued to experience residual pain. It was also clear that the Plaintiff was much less communicative after the accident and from the statement that he did not remember if he suffered pain, it ought not to be extrapolated that the issue of pain and suffering in this case was minimal. Additionally, one had to remember that the Plaintiff has had five operations after two of which he remained in a coma for some considerable time.

Further, when one examined the evidence of the Plaintiff's mother about his condition after discharge from hospital, it was evident that the Plaintiff was in a state of withdrawal from the world (he was more or less a vegetable..) and it took him a lot of time before he could even begin to attempt to re-learn basic living skills.

In the circumstances, even though the Plaintiff could not remember his pain and suffering nor did his mother give any detailed testimony about it, I could not agree that because he could not testify as to the degree of such pain and suffering experienced, it ought to be regarded as minimal, but rather, I concluded that his unfortunate circumstances have prevented the leading of such evidence in any great detail.

13. (iv) Loss of Amenities:

The evidence led by the Plaintiff and his mother on this issue was not challenged by cross-examination. The Plaintiff stated that prior to the accident he did well at school, in fact, he came first in his class. Now, he can't even pass his exams. He indicated that before, he used to help his mother around the house, by washing, cooking and cleaning but he can't do that now because his left hand trembles. Before the accident he liked art and craft and doing macramé, but he no longer can do this since his hand trembles, although he can draw a little. He used to be good at football but he does not play as well now as before. He was an active member of the Police Youth Club but now he no longer is a member of that club. He used to be a cadet too but now he can't stand for long periods to

do drills and march so he is no longer a cadet. He used to do karate, but no longer does this since he is afraid of being hit in his head.

The Plaintiff's mother supported this testimony of his loss of amenities. Also, she testified how she had to re-train the Plaintiff in basic life skills as one would do with an infant. She indicated that she has tried to re-introduce him to the household chores that he could do before the accident but this has proved to be an exercise in frustration since he did not have good control, his left hand trembled and he would make a mess of such chores. She even tried to send him to the grocery to obtain a small list of items but he would only return with one item. She noted that he could not use his left (dominant) hand and he had a problem using the right hand. She has to supervise his every routine such as brushing his teeth, bathing etc. and she noticed that she has been contacted by his school because of his aggression.

Case Law:

14. Both Counsel referred me to a plethora of cases which, it was submitted, would be of guidance in assessing the quantum of damages to be awarded. However, many of these cases were decided more than 25 years ago and were only barely similar to the present matter and as such were not of great assistance in arriving at a current range for an award. In addition, the suggested upgrades of the cases based on certain mathematical formulae as provided in the most recent version of "The Lawyer" (Vol. 7 No. 1) proved to be flawed in the sense that some older and less serious cases often were upgraded at higher levels than

more current and more serious cases. The Court of Appeal has placed a caveat on this mathematical formula for upgrading cases (See Thadeus Bernard & Anor v Nixie Quashie Civil Appeal 159 of 1992 at pages 7 and 8), and suggested that it is only to be used prima facie, as a guide to updating an award.

In that event I will only refer to some of the cases cited.

In Matadeen v Coosal's Quarry Ltd H.C.A. 4229B of 1982 the Plaintiff aged (40 at the date of the accident in 1982) had suffered brain damage which resulted in a marked change in his personality; his physical condition had worsened as well, to the extent that he became progressively disabled. He suffered severe pain and continued to do so. He had an abnormal gait, lacked balance and exhibited a neural disease. He was unable to digest solid foods and the judge assessed his disability at 100%. In February 1988, he was awarded \$150,000.00 as general damages, for non-economic loss. (The suggested upgrade as at October 2000 as per "The Lawyer" Vol. 7 No.1 is \$356,726.00).

In Battoo Bros. Ltd v Leavitt Civil Appeal 93 of 1978, The Respondent aged 32 at the date of accident suffered injuries to the skull, left arm, left hip, right knee and right foot. A problem with a dislocated shoulder had also been exacerbated. He experienced double vision. He had partial paralysis of the right leg, and suffered from sexual incapacity, tended to be clumsy, slow in speech, forgetful and his intellect was impaired. He also experienced several epileptic fits and might continue to experience more. While he was not a "total wreck" his awareness of his condition added to his misery and he was generally frustrated, aggressive and intolerant. On the 8th May 1980 the Court of Appeal reduced the

claim for general damages for non-economic loss from \$80,000.00 to \$60,000.00. (Suggested upgrade as at October 2000 \$308,446.00).

In Boodram v Lucas H.C.A. 422 of 1978 The Plaintiff aged 43 suffered damage to the right parieto-occipital area of the brain, grand mal epilepsy, blackouts, giddiness, impotence and personality deterioration. It was opined that his mental condition would not improve and his permanent partial disability was assessed at 60% for his physical injury and 90% for his mental impairment. In December 1981, he was awarded general damages for non economic loss in the sum of \$50,000.00 (suggested upgrade as at October 2000, \$135,577).

In Blackwell v Auto Rentals H.C.A. 730 of 1970, The Plaintiff aged 29 at the date of the accident suffered brain injury as a result of a closed head injury. He was unconscious upon admission to hospital and stayed in a semi-comatose state for ten days. He displayed obvious mental slowness and had to be admitted to a mental hospital where he stayed for 5 months. He would always be mentally retarded and was described as psychotic. He also had an epileptic condition. The Plaintiff was diagnosed as getting worse with time and may have to be permanently institutionalized. Before the accident he had been a very active man with a variety of pursuits like playing the guitar, fishing, and swimming; after the accident, he was like a child, requiring to be cleaned, and bathed and dressed. He was no longer able to have sexual relations with his wife and his life expectancy had been diminished. In July 1980, the Plaintiff was awarded \$30,000.00 for his non-economic losses (suggested upgrade as at October 2000 \$148,122.00).

Another case which I considered, not for the similarity of the injury, but to show how a court recently approached a 100% disability was the case of Christopher v Rampersad H.C.A. S1063 of 1996, where the Plaintiff was a tetraplegic, permanently confined to a wheelchair, but possessed of his full mental faculties. He was two months shy of his 16th birthday at the date of the accident. He was awarded \$890,000.00 for his non-economic losses in July 2001.

15. An examination of the cases above shows that even with similar type injuries, there is a marked fluctuation in the awards given for this type of injury (compare Boodram v Lucas and Blackwell's case to Matadeen's case and the Battoo case). Even where there is 100% disability, there seems to be a marked difference between brain injuries and other physical injuries. I also considered that the cases cited (except Christopher v Rampersad) related to adults who would have already experienced some of life's pleasures at the time of their injury, whereas this Plaintiff was at the threshold of a life that held a lot of promise and he has now been denied such a bright future; he is also aware that all is not right with him, for instance, he knows he was a good student before the accident but he cannot even pass an examination now. He was frustrated by being unable to do simple daily routines and would be a mis-fit in any regular academic or social peer group. While his permanent partial disability was assessed at 70% this represents a 70% disability to function mentally as a normal person; one can only surmise that 100% disability in this area may mean

that a person is a vegetable. This 70% disability is a very serious incapacity, which, while it is just short of having the Plaintiff institutionalized, has put him in the twilight zone of mental capacity, a situation for which money is a very inferior form of compensation. This 70% disability is also indicative of the situation that the Plaintiff, is effectively rendered unproductive in the job market except perhaps for the simplest of tasks, and even then, he would have to be supervised. In such a case, I agreed with the dicta quoted by the judge in the Christopher v Rampersad case, citing with approval Kilner-Brown J. at first instance in the case Housecroft v Burnett (1986) 1 All E.R. 322 at pg 339F:

“...it is right that I should say something further about the appropriate figure for general damages to be awarded for pain and suffering and loss of amenities. Were it not for the fact that I am very conscious that the Court of Appeal over and over again and the House of Lords on several occasions have said that some sort of conformity is essential, some sort of certainty is vital in the economy of the insurance world that in the professional world of solicitor and counsel called on to advise, I would, left to my own, have awarded a considerably higher figure than that which I am about to award. In my opinion, and it is one which I put forward with humble respect, a 16 year old intelligent girl, attractive, with the whole world at her

feet, ranks right at the top of injuries of so severe a nature as this.There is this girl on the threshold of life denied everything.... The only way that I can approach this is to say that I take by way of comparison the top awards so far and edge up just a little, though were it left to me alone without the guidance I would increase the award....by a very large amount indeed."

Therefore, even though it may be argued that this Plaintiff did not experience as much pain and suffering as in some of the cases cited, it must be remembered that the award for non pecuniary losses comprises three other elements pursuant to Cornillac v St. Louis (cited above) namely, the nature of the injuries, the resulting disability and the loss of amenities. In each of these three other matters, this case is even more serious than the others cited; so, for instance with respect to the injuries suffered, they were so serious that the Defendant was in a coma or at least in intensive care for twenty-six days and thereafter was a "vegetable" for at least four months and only slowly, over a period of years, has "recovered" to 70% disability. Further, this Plaintiff has had five surgical procedures performed to date and has had to be attended to by many specialists over the five year period after the accident, and it is mainly because of this specialist intervention that he has been brought to some degree of stability. The other resulting disabilities and the loss of amenities suffered have already been detailed above and I need not repeat these save to re-

emphasise that this is a case where a normal, healthy and reasonably intelligent boy has now been rendered mentally sub-normal and unable to enjoy the fruits of a life that held so much promise. In these circumstances, I felt that this case ranked right at the top of injuries of so severe a nature as this and that it was right to edge beyond the awards in the reported cases which were somewhat similar; yet this had to be balanced by considering that from the trend of the awards, there were more serious cases (such as quadriplegia or tetraplegia sufferers).

Therefore while this was not a case of 100% disability, I considered it as one of the most serious in its category especially with respect to the injuries sustained, the resulting disabilities and the loss of amenities of a young person with great promise who has now been rendered mentally sub normal with little or no prospect of improvement in his current mental status, and while a figure of \$890,000.00 as in Christopher v Rampersad would have been too great an award, a figure of \$148,000.00 (as suggested by Blackwell's case) would have been inordinately too low.

In the circumstances I considered an award of \$500,000.00 as appropriate for damages for non-economic loss.

(iv) Loss of Pecuniary Prospects:

16. In calculating this loss, a Court is making a guess as to what the Plaintiff's loss of future remuneration would be, taking into account the "imponderables"

and vicissitudes of life. In arriving at a figure for this loss the courts use two approaches:

- (i) a lump sum award based on similar cases (see Joyce v Yeomans (1981) 2 All E.R. 21)
- (ii) A multiplier/multiplicand approach where the multiplicand represents the Plaintiff's net earnings (or average estimated earning capacity) less the amount he can/or will now be able to earn, and the multiplier represents the number of years the diminution in earning capacity is likely to continue, but discounted to reflect certain factors.

In the present matter, Counsel for the Defendant asked the court to use the lump sum method since the Plaintiff at the time of the accident was only 11 years old and to estimate his future earnings or earning capacity was too much guesswork here. Counsel referred to Christopher v Rampersad (cited above) where it was stated at page 8 that: "To decide what is the age at which this (lump sum) approach becomes suitable could always be accused of being arbitrary but at the risk of so doing, it is the Court's view that children 14 years and younger would fall into the category of the approach in Joyce v Yeomans." Counsel went on to submit that based on the trends in recent cases, a sum in the range of \$150,000.00 would be adequate compensation for this category of loss.

17. I agreed with the submissions of Counsel for the Defendants especially since this Plaintiff was only 11 years old at the time of the accident, and while he was performing well at school at the time, he had been kept back for 1 year. He had not even written his 11 plus exams to be placed in a Secondary School and to guess what trade, profession or vocation he would have pursued seemed to me to be too speculative. In the circumstances, there was no reason to depart from the position stated in the Christopher v Rampersad decision (above) with respect to this 11 year old Plaintiff and I accepted the figure of \$150,000.00 as suggested by Counsel for the Defendant as representing adequate compensation for the loss of pecuniary prospects.

The Cost of Future Nursing Care:

18. Counsel for the Defendant submitted that when assessing compensation under this head one looks to the commercial rate applicable to decide on a fair and reasonable award. In support of this proposition, Counsel quoted from Mc Gregor on Damages 16th ed pg 1093 which quoted from the Housecroft case (cited above) that “the ceiling is the commercial rate i.e. the commercial rate for supplying the Plaintiff’s needs by employing someone to do what the relative does.” Counsel submitted that based on the evidence of the Plaintiff’s mother when she had to hire help, that the helper was paid \$150.00 per week, this sum should be the basis for calculating the commercial rate for these services. If put at a monthly figure the sum should be \$600.00 per month. While Counsel also submitted that based on the report of Dr. Watkins, a full time helper would not be

needed, he made no discount of the monthly sum to reflect this. Counsel also went on to suggest a total multiplier of 18 years purchase, split in two, so as to reflect possible inflation and using a monthly sum of \$1,000.00 in the second 9 years as recompense. In that event the suggested award was to be calculated as follows:-

\$600 x 12 x 9	=	\$64,800.00
plus		
\$1000.00 x 12 x 9	=	\$108,000.00
(plus 56 months of such care provided to date)		
\$600 x 56	=	<u>\$33,600.00</u>
Suggested award		<u>\$206,400.00</u>

19. Counsel for the Plaintiff suggested that a figure of \$1,500.00 per month was a reasonable sum for such services. Though it was not in the written submissions, Counsel indicated that this figure was arrived at by a comparison with the Christopher v Rampersad case where the sum of \$2,500.00 per month was treated as adequate for nursing care; Counsel then allowed for a “generous” reduction of \$1,000.00 since the Plaintiff in the Christopher v Rampersad case, being a tetraplegic, would require more constant and specialist supervision. Counsel also suggested a multiplier of 25 years purchase. Counsel’s suggested award was to be calculated as follows:

\$1,500.00 x 12 x 25	=	\$450,000.00
For care to date	=	<u>30,000.00</u>
Total		<u>\$480,000.00</u>

20. With respect to the sum to be used as the monthly figure, I noted that the Plaintiff's mother admittedly worked for \$900.00 per month. To pay \$600.00 per month for a helper must have been a tremendous sacrifice and furthermore, the person used was a relative. This suggested to me that the sum of \$150.00 per week quite probably did not represent a true commercial rate. Further, the sum used should really represent a fair remuneration for the services, the ceiling for which is the commercial rate. On the other hand, to use the sum of \$1500.00 per month for the reasons suggested by Counsel for the Plaintiff was little more than "plucking a figure out of the air." Doing the best I could on the evidence, I was of the opinion that the current minimum wage of \$7.00 per hour would be a fair starting point for the figure.

With respect to the number of hours per day that would be reasonable, I noted that while Dr. Watkins did suggest that the Plaintiff should be prepared to live a semi-independent life, one of her main conclusions was that the Plaintiff would need care and supervision throughout his adolescence and probably adulthood too and suggested that a family member be identified for this purpose. Another consideration was that the Plaintiff's mother was not a young person and I had to consider the position if the Plaintiff's mother should herself no longer be able to provide the care needed. Another factor I considered was that it may be

the case that the Plaintiff's mother herself would, in any event, eventually have to provide the care needed on a full time basis to the Plaintiff if he is to live as meaningful a life as possible. In the circumstances, I considered an 8 hour daily period (being equivalent to an average work day) as reasonable.

With respect to the multiplier, I used the maximum that has been applied locally because of the age of the Plaintiff. In the Christopher v Rampersad case the Plaintiff aged 21 at the date of assessment, was given a multiplier of 20 years purchase and I proposed to use this figure as well.

I also decided not to split the award over two periods as suggested by Counsel for the Plaintiff since the Plaintiff was receiving a capital sum which itself would bear interest and compensate for inflation.

In the circumstances the award for future care and supervision was calculated as follows:-

$\$7.00$ (hourly minimum wage) \times 8 (daily estimate of time needed) \times 5
(average working days per week) \times 4 (weeks per month) = $\$1,120$ \times 12 (yearly
figure) \times 20 (multiplier) = $\$268,800.00$ rounded off to $\$250,000.00$.

Since both Counsel agreed that there would be no award for special damages (see paragraph above) there was no need to award a pre-trial sum for this claim.

CONCLUSIONS:

21. In all the circumstances I made the following orders:

Judgment for the Plaintiff against the Defendants in the following sums:-

(i)	Non pecuniary loss	\$500,000.00
(ii)	Loss of future earnings	\$150,000.00
(iii)	Cost of Nursing care	\$250,000.00

By consent (a) interest on the sum of \$500,000.00 was awarded at 6% per annum from the 22nd October 1999 to the 23rd July, 2002.

(b) Interest on the sum of \$21,600.00 (being a portion of the nursing care) was to be awarded at 6% per annum from the 16th October 1997 to the 16th October 2000.

(c) The Plaintiff to forego claims for special damages.

(d) Stay of Execution for 25 days.

Because of the Plaintiff's age and mental condition both parties suggested that I should not order a full payment out to him and I should make any payments out subject to an application to Court. After discussing the matter with both Counsel, it was agreed that the following conditions be applied:

(a) It is further ordered that the sum of \$150,000.00 be paid out to Sylvia Hamlett (the Plaintiff's mother and next friend) after the stay of execution.

(b) The balance of the judgment debt is to be deposited into court and invested by the Registrar in a high interest bearing Fixed Deposit Account at a local Commercial Bank.

(c) Payment out of all or any part of the sum so deposited into court is to be made only upon application to a Judge in Chambers or to a Master.

(d) Liberty to apply.

Dated this 22nd day of November, 2002

Justice Gregory Smith
JUDGE