



[2015] JMSC Civ. 191

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. 2008HCV06051

BETWEEN	ANDREAN WHYLIE	CLAIMANT
AND	MICHAEL DUNCAN	1 <sup>st</sup> DEFENDANT
AND	JAMAICA URBAN TRANSIT COMPANY LIMITED	2 <sup>nd</sup> DEFENDANT
AND	LEAFORD MILLER	3 <sup>rd</sup> DEFENDANT

AND

BETWEEN	JAMAICA URBAN TRANSIT COMPANY LIMITED	1 <sup>st</sup> ANCILLARY CLAIMANT
AND	LEAFORD MILLER	2 <sup>nd</sup> ANCILLARY CLAIMANT
AND	MICHAEL DUNCAN	ANCILLARY DEFENDANT

AND

AND	MICHAEL DUNCAN	ANCILLARY CLAIMANT
AND	JAMAICA URBAN TRANSIT COMPANY LIMITED	1 <sup>st</sup> ANCILLARY DEFENDANT
AND	LEAFORD MILLER	2 <sup>nd</sup> ANCILLARY DEFENDANT

Ms. C. Hudson and Ms. I. Robinson instructed by K. Churchill Neita & Co. for the Claimant

Mr. L. Campbell instructed by Campbell & Campbell for the 1<sup>st</sup> Defendant

Mr. Manley Nicholson instructed by Nicholson Phillips for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Heard: July 30<sup>th</sup> & 31<sup>st</sup>, 2014, September 24, 2014, September 30, 2015

Road Traffic Accident – Road Traffic Act – Island Traffic Authority Road Code - negligence – personal injuries – whether defendants liable – contributory negligence - vicarious liability - assessment of Damages

## THOMPSON-JAMES J.

### BACKGROUND

[1] November 12, 2007, on the Cavaliers Main Road, St. Andrew, in the vicinity of Woman Hole, there was a collision between a Toyota Hiace minibus driven by the 1<sup>st</sup> Defendant Michael Duncan, and a Jamaica Urban Transit Company Limited (JUTC) bus, driven by the 3<sup>rd</sup> Defendant Leaford Miller. That Leaford Miller was an agent of JUTC and was driving the company's vehicle in the course of his employment at the time of the accident is not in dispute. The Claim was filed December 29, 2008 by Claimant Andean Whyllie, who, on the date of the accident, was a passenger in the Hiace minibus. Ms. Whyllie alleges that, as a result of the negligence of either the 1<sup>st</sup> Defendant or the 3<sup>rd</sup> Defendant. She suffered injuries and loss, and incurred expenses.

Both the Claimant and the 1<sup>st</sup> Defendant sustained injuries in the collision.

February 18, 2009, the JUTC and Leaford Miller filed an Ancillary Claim against Michael Duncan (Ancillary Defendant), claiming contribution and/or indemnity together with costs against the Claimant's claim pursuant to the **Law Reform (Tortfeasors) Act**, on the grounds that the Ancillary Defendant was the negligent party.

May 5, 2009, the 1<sup>st</sup> Defendant Michael Duncan filed an Ancillary Claim against the JUTC (1<sup>st</sup> Ancillary Defendant) and Leaford Miller (2<sup>nd</sup> Ancillary Defendant) counterclaiming for damages for negligence and/or a contribution or indemnity in relation to any damage he may be found liable to pay the Claimant.

### *The Claim*

[2] The Claimant in her Amended Particulars alleges negligence against the 1<sup>st</sup> Defendant or the 3<sup>rd</sup> Defendant and itemizes particulars of negligence for both.

[3] Importantly, it is pleaded by the Claimant, inter-alia, that the 1<sup>st</sup> Defendant was driving at a speed which was too fast in the circumstances and in a reckless and careless manner. In respect of the 3<sup>rd</sup> Defendant it was also pleaded that he drove in a reckless and careless manner.

[4] In his defence, the 1<sup>st</sup> Defendant denies the allegations of negligence, and alleges that the collision was caused by the negligence of the 3<sup>rd</sup> Defendant. He alleges, inter-alia- that the 3<sup>rd</sup>

Defendant at the relevant time was speeding and encroached on his side of the roadway, the left lane.

[5] The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the other hand, allege that it is the 1<sup>st</sup> Defendant who was negligent, in that, he drove at an excessive speed, on the wrong side of the roadway, and into the path of the JUTC bus.

### ***The Claimant's Account***

[6] The Claimant, **Ms. Andrean Whylie**, testifies that November 12, 2007 she was a passenger in a Hiace minibus travelling along the Cavalier Main Road, heading in the direction of Constant Spring. Cavalier Main Road is flat, narrow and asphalted with single lane traffic travelling in opposite direction. A portion of this road is referred to as Woman Hole. There is a deep bend that she calls the blind spot, as one cannot see oncoming vehicles until one starts going around the corner.

[7] The driver of the Hiace proceeded to go around the bend when she saw a JUTC bus coming from the opposite direction. It came around the corner on the side of the Hiace bus and 'lick' into the right side of the Hiace. She immediately 'blacked' out and woke up at the Stony Hill Police Station and was later taken to the University Hospital of the West Indies.

[8] In answer to learned defence Counsel Mr. Nicholson in **cross-examination** Ms. Whylie testifies that she was seated behind the driver and it would be safe to say that the driver would be blocking her view and to see the road she would have to get up from where she was and look. She was on the right hand side of the driver. She did not get up when the bus was travelling along the Cavalier Main Road. This road is a winding narrow road and from where she was travelling the road slopes downward towards Constant Spring. The accident occurred on a downward slope. The roadway was not wet but she is not quite sure that it was drizzling.

[9] The corner is dangerous and one has to be careful when coming around the corner. By this she means blowing the horn and slowing down. Even though the road is narrow two vehicles can pass relatively easily, but one would have to slow down.

[10] There were about ten persons in the Hiace. This number includes her and the driver. She could not see the speedometer and could not say how fast the bus was going. To the left of her vehicle is a precipice and the road is asphalted. There are trees and shrubs between the road and the precipice.

***The Defendants' Account***

[11] The 1<sup>st</sup> Defendant, **Michael Duncan**, testifies that he operates the Hiace, a public passenger vehicle, on the route from Constant Spring to Bog Walk. He is the usual driver of the bus.

In cross-examination he states that he has been driving the bus for the past 5 years. He has been operating on the route for about 10 years.

[12] At about 10:30 that morning he was travelling from Above Rocks to Constant Spring along the Cavaliers Road with a bus load of people. In cross-examination he states that he does not know the width of the road. The road was not marked but there were 2 lanes going in opposite directions. The road surface was good, asphalted going up there is a rock to the edge of the road and on his side, a precipice at the edge of the asphalt. The road is winding with several corners and turns. Two vehicles were in front of him. He does not remember any vehicle behind him. He could not see the roadway clearly.

[13] Driving at about 20-30 mph and approaching a corner along the roadway he was not able to see anything around the corner. He saw a JUTC bus approaching at a fast rate of speed. When he first saw the bus most of it was on the Hiace's side of the road. He stopped in his lane but the bus continued going towards him. He did not do anything. If he swerved to the left he would go over the precipice. The right front section of the JUTC bus came and crashed in the right front section of the Hiace.

[14] After the collision he was pinned in his bus. The JUTC bus was slanted across the road, its front to the right of the Hiace but the middle and back to the left hand. The dashboard was smashed and resting on his knees and stomach. The driver of the JUTC bus used the bus to pull the Hiace's dashboard releasing his leg.

[15] In answer to learned Defence Counsel Mr. Nicholson in **cross examination** he testifies that some of the road is narrow and some winding. There is a flat piece of road measuring about 2 chains before the bend where the accident took place. When he saw the JUTC bus for the First

time it was coming around the corner approaching his vehicle, he immediately swerved left and came to a stop. At this time he saw the JUTC bus driver fighting himself with the steering. The accident happened fast.

[16] He denied that he drove into and under the JUTC bus. Referring to the image, Exh "22" he testifies that the impact to the Hiace occurred whilst it was stationary and the JUTC bus pushed it back. This happened whilst the JUTC bus was moving from the Hiace's lane back to its lane. The damages to his vehicle occurred whilst it was stationary. It was the right front of the JUTC bus that came in contact with the Hiace.

[17] The 3<sup>rd</sup> defendant **Leaford Miller** testifies that he was formerly employed to the JUTC. At the time of the accident, he was assigned duties on the Half-Way Tree to Above Rocks route. On his way to Above Rocks driving along the Cavalier's Main Road rain was drizzling and the road was wet. He was driving uphill on the left hand side of the road. There is a hillside on the left of the road and a precipice to the right. The road is winding with an uphill incline, and wide enough to easily accommodate vehicular traffic in opposite directions without encroachment.

[18] At a speed of 25 MPH approaching a left hand corner, he slowed down to negotiate the corner, when he saw the Hiace coming in the opposite direction around the corner at a fast speed and overloaded. He tried to lock his bus from the Hiace leaving very little space between the bus and the hillside. The Hiace came across to his side of the road and ran under the JUTC bus. The JUTC bus remained on the left hand side in the corner. To the left, of the Hiace were low lying shrubs and bushes that is where the asphalt ended and a precipice beyond the bushes.

[19] He reversed the JUTC bus to help release the driver. He reversed for about 4 feet. He did not pull the Hiace after the impact. Both vehicles remained in the road for about 30 minutes and during this time vehicles coming from the Above Rocks direction were able to pass freely to the left of the Hiace and on the arrival of the police based on their directions vehicles travelling from the Stony Hill end were also able to pass freely to the right of the Hiace. Prior to the accident the bus did not come to a stop on the left hand side of the road, neither did it swerve to the left. Further, if the Hiace had gone to the left it would have gone over the precipice as there is no space over there.

[20] In answer to learned defence counsel Ms. Robinson in **cross-examination**, he agrees that his bus is wider than the Hiace and would therefore take up more road space. Around the corner

where the accident took place the JUTC bus took up one lane and the Hiace three-quarter's of a lane. The corner is a sharp left hand corner. When he approached this corner he was about 8 inches from the hillside. Two vehicles could pass at the same time. The distance between the road surface and the end of the bushes and shrubs is about 5 feet. The damage to the JUTC bus was to the front right side and that to the Hiace was to the front right side, not to the right.

[21] In answer to learned defense counsel Mr. L. Campbell, he testifies that he has been driving the JUTC bus on that route for 1 ½ years, 2 times or more per week. After the collision, a portion of the Hiace was in the left lane and a portion in the right lane, half in the JUTC bus lane and the other half in the Hiace's left lane. The JUTC bus was not blocking the right lane coming from Above Rocks. It was blocking the left lane going to Above Rocks.

[22] Again, he reiterated that although the corner is a sharp one, he did not open up, that is, to go to his right to go around the corner. He did not attach a rope to his bumper and tied it to the Hiace's door jamb and pulled it forward. He reversed no further than 4 feet.

[23] He is being truthful when he testified that with the JUTC bus in the road, the police directed vehicles to drive on the right of the minibus where the dangerous precipice, that could have caused injury or even death, is.

## ISSUES

[24] The issues to be decided in resolving the claims are as follows:

- i. Who was the proximate cause of the collision?
  - a. Did the 1<sup>st</sup> Defendant drive the Hiace bus in such a way as to cause the collision?
  - b. Did the 3<sup>rd</sup> Defendant drive the JUTC bus in such a way as to cause the collision?
- ii. Did the defendants owe a duty of care to the Claimant and was that duty breached?
- iii. Was there contributory negligence, and if so should liability be apportioned between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants?

In respect of Michael Duncan's Ancillary Claim, the additional issue as to whether he was contributorily negligent to his own loss and injuries falls to be determined as well.

## LAW & ANALYSIS

[25] Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something

which a prudent and reasonable man would not do. [**Blythe v Birmingham Waterworks Co. (1856) 11 EX 78**].

**Charlesworth and Percy on Negligence**, 9<sup>th</sup> Ed. Para 1-01.

In current forensic speech, negligence has three meanings. They are: (1) a state of mind in which it is opposed to intention; (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either Common Law or Statute Law.

All three meanings are applicable to different circumstances, but any one of them does not necessarily exclude the other meanings.

[26] The driver of a motor vehicle has a duty to take reasonable care not to cause injury or damage to other road users. **Section 32 (1)** of the **Road Traffic Act (RTA)** of Jamaica provides that if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence. **Section 51 (2)** of the **RTA** provides that it is the ...'*duty of a driver to take such action as may be necessary to avoid an accident*'. **Further, section 27 of the RTA provides:**

*"If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable..."*

[27] **Reasonable** care means the care which an ordinarily skillful driver would have exercised under all the circumstances, and connotes an "avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals" and so on. What is reasonable depends on the circumstances of each case and is a question of degree (**Bourhill v Young [1943] A.C. 92**).

[28] In **Esso Standard Oil S.A. Ltd & Anor v Ivan Tulloch [1991] 28 J.L.R 553**, it was held that 'all users of a road have a duty of care to other road users'.

[29] Further, the driver of a vehicle in which there are passengers, has a duty to those passengers, to operate said vehicle in such manner as would be expected from an ordinary, reasonable and careful driver in similar circumstances, so as to not cause them harm. This duty must be balanced, with the driver also having regard to the other users of the road (**Parkinson v Liverpool Corporation [1950] 1 ALL ER 367**).

**[30]** From the foregoing, it is clear that both the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant owed a duty of care to the Claimant to operate their vehicles in a manner so as not to cause her harm. They also owed the same duty of care to each other.

**[31]** There is no police report in evidence, and the only witnesses to give evidence are the parties who were themselves involved in the accident on the relevant day. However, the evidence suggests that at the point when the police came on the scene, the JUTC bus had already reversed, hence the scene was different.

**[32]** The preponderance of evidence shows that the locus of the accident on Cavalier's Main Road was in the vicinity of a bend, and this road is in the main, a narrow winding road, able to accommodate 2 lanes of traffic going in opposite directions. It has also been established that the JUTC bus was going around the bend, on the side of the road with a hill to its immediate left, whilst the Hiace bus was going in the opposite direction, on the side of the road with a precipice to its immediate left. It is disputed that the road was on an incline, with the JUTC bus going uphill and the Hiace downhill.

**[33]** Both the 1<sup>st</sup> and 3<sup>rd</sup> Defendants gave evidence that the road is in good condition and is wide enough to accommodate two vehicles going in opposite directions, at the same time, without encroaching on the other side. Both also state there are no markings in the road. The Claimant gave evidence that 'vehicles have to slow down to allow vehicles to pass'. All witnesses stated that the roadway is asphalted.

**[34]** The Claimant also spoke of a 'blind spot' in the deep bend of the roadway, and stated along with the 1<sup>st</sup> Defendant, that one cannot see oncoming vehicles until they have started going around the corner. The 3<sup>rd</sup> Defendant described the road as winding with an ascent/uphill incline and sharp left hand corner, whilst the 1<sup>st</sup> Defendant described the 'majority of the road' as winding and having several corners. The 3<sup>rd</sup> Defendant further said of the conditions that rain was drizzling and the road was wet.

**[35]** The 1<sup>st</sup> Defendant in his evidence stated that, on approaching the corner, he was driving at a speed of about 25-30 miles per hour, when he saw the JUTC bus come around the corner from the opposite direction at a fast speed with most of the bus on his side of the road. He testified that he stopped in his lane and could not do anything, because if he swerved left he would have

gone over the precipice. However, in cross-examination, as the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants submit, the 1<sup>st</sup> Defendant stated that he had "swerved further to the left then came to a stop". He even went as far to say that he had swerved roughly one foot to the left, and later on said he 'applied his brakes and swerved'. The 1<sup>st</sup> Defendant maintained that, at the material time, he was not speeding nor was he on the incorrect side of the roadway. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants in their submissions note that it is only under cross examination that the 1<sup>st</sup> Defendant stated that he had braked twice before approaching the corner, and that the reasonable inference to be drawn is that the 1<sup>st</sup> Defendant was speeding.

**[36]** The 3<sup>rd</sup> Defendant on the other hand, in his evidence-in-chief, states that, as he approached the left hand corner he was driving less than 25 mph. He asserts that he 'blew his horn and slowed down to negotiate the corner when he saw the Hiace minibus coming in the opposite direction at a great speed and overloaded'. He stated that he tried to lock the bus from the Hiace by hugging the hillside to his left but the Hiace still came across on to his side of the road and ran under the right front side of his bus. His assertion that immediately before the accident both vehicles were in motion, disputes that the Hiace had stopped as claimed by the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant further alleged that the collision took place on his side of the roadway.

**[37]** It seems to me that if the 1<sup>st</sup> Defendant's assertions that the JUTC bus was speeding and mostly on his side of road, were in fact true, the Hiace quite possibly would have gone over the precipice, or at the very least, have ended up in the shrubs on the edge of the roadway. If he had swerved from the evidence, this was not the case.

Additionally, there would have been more damage to the middle of the Hiace. The evidence as to the damage to the vehicles, by way of witness testimony, picture exhibits 24A and B and 25, and the assessor's report, is that the Hiace was extensively damaged with the point of impact being the front right section of the Hiace, whilst the JUTC bus received damage to the right front of the bus and bottom right of the windscreen. This evidence remains undisputed.

A report tendered into evidence in respect of the Hiace by the 1<sup>st</sup> Defendant from Collision/Appraisal Consultants Mendez Livingstone Incorporated Ltd., prepared by Assessor Lloyd Chin, noted that due to the extent of the damage it would not have been economical to fix it. It noted the following:

*"...The front structure was collapsed and significantly swayed. The front panel, roof panel, and right front door were crushed, crumpled and mangled. The right front hinge pillar was severely buckled and displaced. The door was forced against the side body panel with such force that it bucked the panel badly. The body of the vehicle was torn from the frame rail at the front. The dashboard/instrument panel was deformed and broken. The windshield was shattered. The front floor panel was crumpled, damaging the pedals in the process. The steering column was damaged. Other casualties are the front lights, grille and bumper and the driver's and passengers seats."*

The extent of the damage to the Hiace, in my estimation, seems to suggest that it was travelling at some speed upon impact.

[38] The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have submitted that the fact that the JUTC bus, the larger vehicle, was going uphill, and the Hiace, the smaller vehicle, downhill, makes it more probable than not that the JUTC bus was driving more slowly than the Hiace. The 1<sup>st</sup> Defendant submits that the picture of the locus, exhibit 25, indicates that the roadway where the accident occurred is practically flat. There appears to be an incline going upwards in the direction of above rocks. It is also noteworthy that the Claimant, on cross examination, stated that "*coming from Above Rocks along Cavalier Main Road it is downhill*". This incline quite possibly would cause a vehicle to go more slowly than if the vehicle was coming down on the other side towards Constant Spring. Thus, I tend to agree with the contention that the fact that the JUTC Bus was going up the incline makes it probable that it was travelling at a slower speed than the Hiace.

[39] Contrary to her pleadings, wherein the Claimant averred that the 1<sup>st</sup> Defendant had been speeding and driving recklessly, the Claimant gave evidence to the effect that the 3<sup>rd</sup> Defendant and not the 1<sup>st</sup> Defendant was the cause of the accident. She asserted that it was the 3<sup>rd</sup> Defendant that was speeding when he came around the bend, and that the 1<sup>st</sup> Defendant had stopped to try and avoid the accident. As the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have pointed out in their submissions, the Claimant under cross-examination fully admitted that from her position in the Hiace, seated directly behind the driver, she could not see what was taking place unless she stood up, and at the time of the collision she was not standing. She also admitted that she could not state how fast the bus was going, but that she remembered that it slowed down to go around the bend. Accordingly, I cannot place any weight on the Claimant's testimony that the JUTC bus was speeding and that the Hiace was not. It has been pointed out to the Court that this evidence of the

Hiace slowing down to go around the bend was not in the Claimant's witness statement. Furthermore, the contradiction between the Claimant's pleadings and her evidence, as well as her submission that she places blame for the collision solely on the 3<sup>rd</sup> Defendant, whilst not ruling out liability against the 1<sup>st</sup> Defendant, is quite interesting.

[40] As it relates to the position of the vehicles after the accident, the 3<sup>rd</sup> Defendant asserted that the JUTC bus remained on the left hand side in the corner, and the Hiace bus was underneath the front section of the JUTC bus, with the driver pinned inside. In cross-examination he stated that at this time "part of the minibus was in the left lane and part in the right. The 1<sup>st</sup> Defendant, in his submissions, describes as outrageous, the assertion that the Hiace bus ran under the JUTC bus.

The 1<sup>st</sup> Defendant gave evidence that after the collision he was pinned down in his bus. The JUTC bus was positioned slanted across the road with its front to the right of the Hiace, but the middle and back was in his left lane. The dashboard at the front of his bus had been smashed and was resting on his knee and stomach. The 1<sup>st</sup> Defendant himself gave evidence that the 3<sup>rd</sup> Defendant used his bus to pull the dashboard of his bus releasing his leg'. This tends to corroborate the 3<sup>rd</sup> Defendant's testimony, at the very least, even if the 3<sup>rd</sup> Defendant's assertion was an exaggeration, that the Hiace and JUTC bus had intertwined or lodged together in some way upon impact. The fact that the dashboard was pressing down on the 1<sup>st</sup> defendant's stomach and knees tends to show that something was pressing on the dashboard pushing it down. This may well suggest that, even a part of the Hiace had gone under the JUTC bus and the said bus was resting on the dashboard of the Hiace. The 3<sup>rd</sup> Defendant denied using a rope, and stated he reversed the JUTC bus to release the 1<sup>st</sup> Defendant. Though it was suggested to the 3<sup>rd</sup> Defendant that he had used a wire rope to release the 1<sup>st</sup> Defendant from his trapped position, there was no evidence from the 1<sup>st</sup> Defendant or the Claimant to say that he indeed used a wire rope. As such, the 3<sup>rd</sup> Defendant's evidence on this point is more plausible.

[41] Moreover, after impact, the 1<sup>st</sup> Defendant was trapped in the bus underneath the dashboard, injured and as he stated, in excruciating pain. He was removed from the vehicle by the police and transported away from the scene after he was released from the dashboard. He would not have been in a position to properly assess, if at all, the positions of the vehicles after the collision. Similarly, it was established by the Claimant's evidence and remains undisputed that she was rendered unconscious upon impact of the collision, and so is also unable to speak to the position of the vehicles after the accident. On the other hand, the 3<sup>rd</sup> Defendant who had not been injured gave evidence that that he came out of the JUTC bus to examine the damage to his bus

and remained on the scene with the vehicles up to 30 minutes following the accident. This evidence remains unchallenged.

[42] I find that the Claimant's evidence is of little help in accurately and fairly determining who caused the accident, particularly in light of her evidence in cross-examination that she was seated behind the driver and it would be safe to say that the driver would be blocking the view in front of her and she would have to get up from where she was and look. She did not get up while the bus was going along the Cavalier Main Road. The roadway was not wet but she was not sure that it was drizzling. The position remains the same despite her assertions in re-examination that the driver was not blocking her entire view.

[43] The 3<sup>rd</sup> Defendant also gave evidence that for the 30 minutes that the vehicles remained in the road following the accident "...vehicles coming from the Above Rocks direction were able to pass freely to the left of the minibus; and later when the police came on the scene they directed vehicular traffic from Stony Hill end to drive over to the right of the minibus which was still in the road. Those vehicles were also able to freely pass."

It is unfortunate that the police report was not made available to the Court, as it may well have assisted in coming to a conclusion in respect of this aspect of the evidence.

[44] The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, in their submissions, propose that the specificity with which the 3<sup>rd</sup> Defendant gave his evidence should be taken to indicate that he is a witness of truth. In that regard, they note that the 3<sup>rd</sup> Defendant gave evidence that the road was wet and rain was drizzling, that when he approached the corner he slowed down and blew his horn, that he was about 8 inches from the hillside, and that he had reversed his bus about 4 feet to release the Hiace. Further, it was submitted that the 3<sup>rd</sup> Defendant had no vested interest in the outcome and so had no motive to lie, since he no longer worked at the JUTC and he was not claiming for any damages. I have difficulty in accepting the "no vested interest" aspect of the submission.

### ***Contributory Negligence***

Contributory negligence does not mean breach of a duty to take care but simply means careless conduct on the part of the person, usually the plaintiff, in failing to prevent or avoid the carelessness of the other person's breach of duty to take care. (**Charlesworth and Percy on Negligence, 9<sup>th</sup> Edition, para.1-10**).

In **Froom & Others v Butcher (1975) 3 AER** , pg. 520 at pg 524, it is propounded:

“Negligence depends on a breach of duty whereas contributory negligence does not. Negligence is a man’s carelessness in breach of duty to others. Contributory negligence is a man’s carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might be hurt himself. [See **Jones v Livox Quarries Ltd (1952) 2 Q. B. 68**]

**[45]** The Claimant’s testimony is that in approaching the scene of the accident the bend being a dangerous one, in entering that bend care would be exercised and by this she means slowing down and blowing the horn. She cannot recall the driver of the Hiace blowing the horn. In one instance, she testifies that the Hiace did not slow down. She then changed this to “it slowed down”. The 1<sup>st</sup> Defendant’s testimony is that when he started the corner he slowed down and applied his brakes. He came to a stop. The Claimant’s testimony is that he only slowed down. I prefer the Claimant’s testimony in this respect and find that the 1<sup>st</sup> Defendant did not stop. Perhaps if he had stopped the accident would have been avoided, or at least the impact less. Consequently the damages would be less.

**[46]** The 1<sup>st</sup> Defendant’s testimony is that the corner is a dangerous one and one is required to drive with care going around the corner. The required care being: to concentrate and blow the horn in case there is another vehicle. His testimony in cross-examination in answer to Mr. Nicolson is that he blew his horn that day. The Claimant’s testimony is that she cannot recall him blowing the horn.

I find it quite interesting that it was in cross-examination that the blowing of the horn was first mentioned, and when further pressed, the 1<sup>st</sup> Defendant’s testimony was that he could not remember blowing the horn. It may well be that he did not blow his horn as he was expected to do.

**[47]** The 1<sup>st</sup> Defendant’s testimony is that on approaching the corner, he applied his brakes. He had earlier testified that when he first saw the bus he swerved about one (1) foot to the left. He again applied his brakes about ½ chain before seeing the bus. It was upon seeing the bus that he swerved and applied his brakes. When he swerved to the left he saw the 3<sup>rd</sup> Defendant fighting to come back on his left hand side of the road, fighting the steering to come back on the road. “The accident happened quick, in about 2 seconds or more”. In this time the 1<sup>st</sup> Defendant swerved to the left, came to a stop, the JUTC driver fighting to get back to its side of the road. In cross-examination, he agreed that his evidence is that the JUTC bus swerved from the Hiace’s right

going to the left and still collided into the right hand front side of the Hiace. I have difficulty in appreciating how the collision could have occurred thus.

**[48]** It is also interesting to note that according to the 1<sup>st</sup> Defendant, after the collision, the Hiace was pushed back further up the road. The 1<sup>st</sup> Defendant has not explained how, from being on the trees and shrubs (bush) and the vehicle being pushed back up, is it that the Hiace did not end up over or nearer to the precipice. Further, as submitted by Mr. Nicholson, this too was not mentioned in his evidence-in-chief.

Further, in cross-examination, the 1<sup>st</sup> Defendant testified that if he had swerved left he would have gone over the precipice. This begs the question: "why then was the Hiace not pushed over the precipice rather than backwards?"

The 1<sup>st</sup> defendant states that he was in pain and pre-occupied. In answer to Mr. Nicholson, he testified, "the impact to my vehicle was when it was stationary and it pushed my vehicle back. This also happened when the JUTC bus was moving from my lane heading back to his lane". In answer to Mr. Nicholson's question if he would be surprised to know it was the right side of the JUTC bus that collided with his bus, the 1<sup>st</sup> Defendant responded: "I would be really surprised. The right side never passed by (his) as yet.

**[49]** The 3<sup>rd</sup> Defendant testified that when he saw the Hiace approaching he locked his bus hugging the hillside to his left, leaving little space between the bus and the hillside. The Hiace came across the road and ran under the right side of the JUTC bus. At the point of impact the Hiace bus was over on the JUTC bus' lane going around the corner. He did not go on the other side of the road. It is not true that he could not make that sharp left hand corner without going on the other side. He blew his horn going around the corner.

**[50]** The 3<sup>rd</sup> Defendant's testimony is that when he 1<sup>st</sup> saw the Hiace put in the left and then right. He did not stop. He slowed down. He applied the brakes. He said "I did not stop. I slowed down." Learned Defence Counsel Mr. L. Campbell posed the question: "Could you stop?", to which he responded "yes I could stop".

It was suggested to him that he failed to stop when he saw the minibus speeding coming towards him and he responded that he stopped on the impact. He could not do any better.

I find that the 3<sup>rd</sup> defendants' evidence as to how the accident occurred is more credible and more reliable than of the 1<sup>st</sup> Defendant.

I find that the 1<sup>st</sup> Defendant failed to come to a stop. He failed to blow his horn when he knew he should have. He was going at some speed. Of course speed by itself does not amount to careless driving.

I find that the accident occurred on the JUTC's bus' side of the road.

The 3<sup>rd</sup> Defendant failed to stop when he could have done so and had he stopped the accident may well have been avoided or at least the damages suffered would not have been so great.

I find that the absence of markings on the road and the fact that the rain may have been drizzling have not impacted on the collision.

[51] The 1<sup>st</sup> Defendant in operating the Hiace in the manner that he did that day did not exercise the standard of care expected of him as a reasonable man would have. Hence he breached the duty of care that he owed his passengers and other road users. Hence he is liable.

The 3<sup>rd</sup> Defendant in not stopping when he could have was careless, and as such, he contributed to the accident. I find that the 3<sup>rd</sup> Defendant was contributorily negligent and would apportion liability as 80% to the 1<sup>st</sup> Defendant and 20 % to the 3<sup>rd</sup> Defendant.

### ***Vicarious Liability***

[52] Vicarious liability is described as a legal liability imposed on one person for torts or crime committed by another. It is settled law that an employer is vicariously liable for torts committed by his employees where he has authorized or ratified them or where the tort was committed in the course of the employee's work. Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer (**Clinton Bernard v. Attorney General of Jamaica (2004) UKPC 47**, 07 October, 2004, para. 21).

[53] The 3<sup>rd</sup> Defendant testifies that November 12, 2007 he was assigned duties on the 2<sup>nd</sup> Defendant's bus plying the Half-Way Tree to Above Rocks route. The 2<sup>nd</sup> Defendant does not dispute this. In the result, I find that the 2<sup>nd</sup> Defendant is vicariously liable for the acts of their servant and or agent the 3<sup>rd</sup> Defendant on that day.

### ***Conclusion***

[54] The preponderance of the evidence leads, on a balance of probabilities, to the following conclusion:

That the accident occurred in a corner with the JUTC bus ascending and the Hiace bus descending. The Hiace was travelling at a speed that may well have been too fast given the circumstances. The JUTC bus did not encroach on the Hiace's side of road. The

Hiace bus encroached on the JUTC bus' side of road. The 2<sup>nd</sup> Defendant is vicariously liable for the actions of its servant or agent the 3<sup>rd</sup> Defendant. Both the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are liable The 1<sup>st</sup> Defendant is 80% liable and the 3<sup>rd</sup> Defendant is 20% liable.

## **ASSESSMENT OF DAMAGES**

***The Claimant: Ms. Andrean Whyllie***

### **Special Damages**

**[55]** I find the following special damages proved:

i.	Cost for Medical Report from University Hospital of the West Indies	\$2,000.00
ii.	Cost for Consultation & Report from Dr. Randolph Cheeks	36,000.00
iii.	Cost of Police Report	1,000.00

**Total** **\$ 39,000.00**

For loss of earnings the Claimant claims the sum of \$178, 200.00 at \$3,300.00 per week from November 12, 2007 to November 23, 2008. The Court was urged to accept this figure as proven on the basis that the figure is reasonable and the Defendants did not object.

In any action where a Claimant seeks to recover special damages the onus is on him to strictly prove his loss. (**Lawford Murphy v Luther Mills (1976) 14 JLR p.119**). The Court, however, must insist on certainty of proof of damage as is reasonable, having regard to the circumstances of the case, [**Ratcliffe v Evans [1892] 2 QB 524 (C.A)**], and, 'in cases having to do with casual workers, the Court has to use its own experience to arrive at what is proved on the evidence' [**Central Soya of Jamaica Ltd. v Junior Freeman SCCA 18/84**].

In her witness statement, the Claimant gave evidence that she was not admitted to the hospital on the day of the accident. She was treated and sent home still feeling a lot of pain and was unable to do household chores as she was still shaken up and experiencing dizzy spells. She had persistent headaches and short term memory loss, and was unable to continue in her job as a caregiver to an elderly lady as her body did not feel strong enough. The sutures were removed after 10 day. Dr. Rhonda Hutson's medical report shows that Ms. Whyllie was not hospitalized. I find that an entire year's claim in this respect is excessive and not reasonable given the injuries she sustained. Her testimony is that she started looking for work in 2009 that is in answer to Mr. Nicholson. Further, an injured party has a duty to mitigate her losses. It seems to me that she failed to adequately mitigate her losses in not finding work for an entire year. I am of the view that in the circumstances 4

months is a fair time within which to recuperate and to find employment. I accept her evidence that she would have earned \$3,300.00 per week, and therefore award her \$52, 800.00 for loss of earnings.

Special Damages in the sum of \$91, 800.00. I fully appreciate that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant take no issue with respect to the sum claimed.

### **General Damages**

**[56]** The Claimant testified that at the hospital she felt pain and blood was coming from her head and face. She had cuts to the right side of her face, her eye and her chin. When she went home, she was still feeling a lot of pain.

**[57]** The Medical Report from Dr. Rhonda Hutson shows that on November 12, 2007 Ms. Whyllie reported that she lost consciousness for an estimated 10 minutes. She complained of a headache, pain to her right shoulder and slight pain to her neck. On examination she was found to have:

- i. A 2 x 4 cm soft, non - tender swelling to her chin;
- ii. A 1.5 cm linear laceration of the pre-auricular region;
- iii. A 3 cm laceration on the right temporal area of the scalp.

**[58]** The Medical Report generated by Consultant Neurosurgeon Dr. Randolph Cheeks dated December 21, 2010, shows that on the said day he examined the Claimant, he diagnosed her as suffering from:

- i. Minor concussion with mild residual impairment of recent memory function;
- ii. Facial scar measuring half an inch in length which constitutes a cosmetic defect;
- iii. Stress headaches

Her Partial Permanent Disability (PPD) is rated as 3%.

**[59]** He opines that the impairment of recent memory function is permanent but he does not anticipate that it will worsen with time. Surgery and physiotherapy are not required. Overall the impact of this disability on her ability to continue functioning at her usual employment and to be competitive in her usual socioeconomic environment is mild given that she is in fact continuing to function at her pre-accident level in her pre-accident employment without assistance.

**[60]** In **Melvin Smith and Ors v Deneice Brooks** SCCA No 91 & 92/98, Harrison's Assessment of Damages 2<sup>nd</sup> Edition, Pg. 14:

The Plaintiff an infant was injured in a motor vehicle accident. She spent 3 days in hospital. Her face was very swollen and she suffered minor cuts and bruises and loss of consciousness. In May 1999 she was awarded the sum of \$200,000. Revalued this amounts to \$924,505.45.

The Court of Appeal held that the award was fully supported by the evidence.

[61] In **Florence Samuels v Michael Davis**, Suit No. CL 1990 S 268, Khan Vol 4 at pg. 151: A 33 years old housewife was involved in a motor vehicle accident. She suffered from unconsciousness, pain in the head, chest and back, cuts on the right knee and multiple lacerations to face. When she was examined on April 4, 1988, there were numerous superficial and deep healing lacerations varying from 1 – 1 ¼ to 2" long to forehead and nose (approximately 40) and 2 lacerations, each 4" long stretching from the forehead to the left eye and left side of nose. By January 28, 1989, the wounds had healed with much scarring and keloid formation. Plastic surgery was necessary. In March of 1996, she was awarded the sum of \$380,000, revalued this amounts to \$ 2,233,572.895.

[62] The Claimant suggested the case of **Bernice Clarke v. Clive Lewis and Lyniere Ashman**, Suit CL 2001/C234, unreported, delivered April 11, 2003, as a useful guide. The Claimant suffered a mild cerebral concussion with loss of consciousness and soft tissue injuries, and healed without any impairment. The Claimant was awarded the sum of \$550,000.00, revalued this amounts to \$1,916,755.44.

[63] I have not been able to locate comparable cases to the instant case as it relates to 'the mild residual impairment of recent memory function'. The Court is guided by general knowledge and experience coupled with the general rule of placing the injured in the same position as she would have been had she not sustained the wrong for which she is now getting compensated.

[64] It seems to me that the injuries suffered by Ms. Whyllie are more serious than those suffered by the infant in **Smith and Ors v Brooks** and that of **Berniece Clarke**, but not as serious as those suffered by the Claimant in **Samuels v Davis**. I appreciate that Ms. Whyllie was assessed at 3% PPD and No PPD was indicated in the **Samuels'** case. Taking into consideration the injuries sustained by Ms. Whyllie including the mild memory loss as well as the facial scarring, I find that the sum of \$ 2,000,000.00 is an appropriate award in the circumstances.

**1<sup>st</sup> Defendant Mr. Michael Duncan**

***Special Damages***

[65] I find the following special damages proved or not challenged:

Total Loss of motor bus	\$130,000.00
Assessor's fee	\$ 7,000.00
Wrecker fee	\$ 10,000.00
<b><i>Medical Expenses</i></b>	
Hospital fee – UHWI	\$ 5,310.00
Medication, X-ray/Lab fee	\$ 94,104.27
Manuchant Limited	\$ 415.21
Costs of Surgery – Dr. Neil	\$183,327.20
Consultation – Dr. Neil	\$ 44,000.00
St. Joseph's Hospital	\$103,361.93
Medical Report	\$ 12,000.00
Physiotherapy	\$ 29,100.00
<b>Total</b>	<b>\$618,618.61</b>

[66] In relation to Loss of use and Loss of earnings, Mr. Duncan testified that on average his weekly earnings from operating the bus was \$130,000.00. He has no formal record of his earnings. He further testified that sometimes the bus would not work as it would require parts that he could not get. He is therefore claiming the sum of \$45,000.00 per week. He did not work for 74 weeks.

[67] The Medical Report of Dr. Ian Neil, Consultant Orthopaedic and Spinal Surgeon, shows that July 1<sup>st</sup>, 2008 Mr. Duncan was again treated for a severe wound infection that he had developed earlier. November 21, 2007 open reduction and internal fixation of the fracture was done.

Mr. Duncan was diagnosed with:

1. displaced comminuted fracture of the tibial plateau with involvement of both medial and lateral tibial plateau and a depressed segment near the medial side;
2. a tear to the right shoulder joint capsule and a severe left tibial plateau fracture.

He was assessed at 10% whole person impairment. He was last seen on November 3, 2008, at which time there was no evidence of infection. He had full range of pain free movement, fully ambulant and able to carry out most of his activities.

[68] The accident occurred November 12, 2007. Between November 12, 2007 and November 3, 2008, there seems to be a week or so shy of 52 weeks. I cannot therefore see how a claim for 74 weeks loss in this respect is arrived at. Further, I cannot see how the reduction of a weekly sum of \$130,000.00 becomes \$45,000.00.

In **Lawford Murphy v. Luther Mills** [1976] 14 JLR at page 119, it is propounded that:

“In any action in which the plaintiff seeks to recover special damages the onus is on him to prove his loss strictly. It is not enough for a plaintiff 'to write down particulars and so to speak throw them at the head of the Court saying this is what I have loss, I ask you to give me these damages. They have to prove it.”

[69] The evidence is that Mr. Duncan is the operator of a public passenger vehicle and at the time of the accident he was so engaged. Although he has supplied no proof of earnings, I find that he is entitled to a sum under this head. However, I am left in an “unsatisfactory position”. (per Hercules J.A., **Murphy v. Mills**).

In arriving at a reasonable sum I take into consideration that he was a self-employed man who submitted no proof of income. No clear basis was shown as to how he arrived at an average weekly sum of \$45,000.00. Further, in less than 52 weeks he “was able to carry out most of his usual activities” but nevertheless he is entitled to be awarded a sum. At the expense of being accused of “plucking a figure out of the air” (*Ashcroft v. Curtin* (1971) 3 A.E.R. 1208 at pg. 1214). I would award him the sum of \$ 1,200,000.00: Special Damages is therefore awarded in the sum of \$ 1, 818,618.51.

### ***General Damages***

[70] Mr. Duncan testified that after the accident he was unable to stand on his right foot. He was feeling severe pain to the right foot and had pain to the right shoulder. He was admitted to the University Hospital for 8 days. There was a delay in the performance of the surgery so he sought the assistance of Dr. Ian Neil who performed the surgery on March 21, 2007. He was admitted to the St. Joseph's Hospital for 2 days and was discharged. He had to use crutches to get around. He made subsequent visits to Dr. Neil, the last being November 2008. He has not fully recovered from the injuries. At times he has a burning sensation in his right knee, as well as pain to the right shoulder if it is kept in one position for long, or if he uses his right hand long during the day.

[71] The injuries as observed by Dr. Neil were outlined earlier. Dr. Neil also observed that the fracture healed in good time. However, there were gross palpable crepitations in the knee. The thigh was raised and measured 3 cm less than the right. There was a 10% impairment of the whole person and Mr. Duncan will need removal of the implants from the left knee. (Mr. Duncan is indicating injuries to the right knee).

I do not believe that it is challenged that Mr. Duncan suffered injury to his knee.

[72] Counsel for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants suggested **Feliz Beecher v. St. Mary Banana Estates Ltd & Ors**, Suit No. CL 1988/1313 (Harrison's Assessment of Damages for Personal Injuries, page 210) as a useful guide and recommended the sum of \$2,664,000.00. The plaintiff was 46 years old. She sustained the following injuries:

- i. 4 cm laceration over right eyebrow
- ii. 2 cm open wound over anterior aspect of right leg between knee and ankle
- iii. Comminuted and compound fracture of the tibia and tibular bones of right leg
- iv. Swelling and tenderness in right leg

There was an increased risk of osteoarthritis in the ankle joint. She was assessed at 15% whole person disability and awarded the sum of \$150,000.00 in December of 1991. Revalued this amounts to \$2,756,821.829.

[73] Counsel for Mr. Duncan suggested **Ruddard Myers v. Electoral Office of Jamaica and Canute Miller**, Claim No. 2001 C.L.M 152, and claimed the sum of \$6,900,000.00.

The Plaintiff suffered the following injuries:

- i. Transient loss of consciousness
- ii. Upper gastro-intestinal haemorrhage
- iii. Closed anterior dislocation of the right shoulder
- iv. Closed left femoral fracture
- v. Total permanent disability of 8% of the whole person

In May 2007 he was awarded \$3,250,000.00. Revalued this amounts to \$7,135,666.347.

[74] In **Louise Brown v. Thomas Chen and Anor**, Suit No. Cl. 1995 B120 (Khan Vol 5 pg 5), the Claimant suffered:

- i. 3 cm laceration to mid-forehead

- ii. 1 ½ cm laceration to supra orbital area of eye
- iii. Tender left shoulder
- iv. Pain in chest
- v. Transverse fracture of mid thigh of right femur
- vi. Displaced transverse fracture of mid shaft of left leg.

Permanent partial disability was assessed at 10% of the whole person.

In July 1998 she was awarded the sum of \$800,000.00. Revalued this amounts to \$3,785,906.178.

**[75]** I take into consideration the awards mentioned above and it seems to me that an award of \$5 million is appropriate in the circumstances.

### **Order**

Judgment for the Claimant against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Special damages in the sum of \$91,800.00 at 3% interest from March 12, 2007 to September 30, 2015.

General Damages for pain and suffering and loss of amenities in the sum of \$2 million at 3% interest, from \_\_\_\_\_ to September 30, 2015.

The 1<sup>st</sup> Defendant is liable to pay to the Claimant 80% of the sums awarded. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant 20%.

Costs to Claimant against 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant to be agreed or taxed.

Judgment for the 1<sup>st</sup> Defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Special damages in the sum of \$1,818,618.51 at 3% interest from March 12, 2007 to September 30, 2015.

General Damages for pain and suffering and loss of amenities in the sum of \$5 million at 3% interest from \_\_\_\_\_ to September 30, 2015.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are liable to pay to the 1<sup>st</sup> Defendant 20% only of the sums awarded.

Costs to the 1<sup>st</sup> Defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to be agreed or taxed.