Judgment Book



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1994/W103

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| BETWEEN | NATALIE WHYLIE | PLAINTIFF |
| AND | CARLTON CAMPBELL | 1ST DEFENDANT |
| AND | TONY CHARLEY | |
| | T/a A&S CHARLEY & SONS | 2ND DEFENDANT |
| AND | (ADMINISTRATOR OF THE | |
| | ESTATE CLIFFORD PALMER | 3RD DEFENDANT |
| AND | LEVIENNE CHARLEY | 4TH DEFENDANT |
| | T/A A & S CHARLEY & SONS | |
| | (Added by consent) | |

Mr. C. Honeywell and Miss C. Francis instructed by Clinton Hart & Co for Plaintiff.
Mr. E. Smith and Miss C. McFarlane instructed by Ernest Smith & Co for first, second and fourth Defendants.

Heard January 20, 21, 23, 24, 28, 30, 31; February 5, 6, 7; May 20, 1997

KARL HARRISON J

This trial lasted for at least ten (10) days and at the end thereof on the 7th February , I reserved judgment and promised to deliver it as early as possible. Due to my engagements in the criminal jurisdiction I was unable to do so before now. I do apologise for the delay and I now seek to fulfil this promise.

Cause of Action

Tragedy struck on September 1, 1993 when a tractor trailer, a minibus and a Lada motor car collided on the main road leading to Lilliput in the Parish of St. James. Lives were lost and several persons injured. The plaintiff in this action is one of the survivors. She is a medical doctor by profession, but at the time of this accident she had just completed her final examinations in medicine. She was a passenger on the minibus which was en route to Montego Bay and she brings this action in negligence against the owners and drivers of the tractor trailer and minibus respectively.

At the commencement of trial the plaintiff discontinued her action against the third defendant, the driver of the minibus, due to the fact that no administrator was appointed in his estate hence the writ of summons was not served.

An ex-parte motion for Third Party Proceedings which was filed by the first and second defendants was not pursued.The object of this Motion was to join third parties in the trial as it was being contended that they were the persons who caused or contributed to the accident. Albeit that the third parties were not joined, the amended defences nevertheless alleged particulars of negligence against them.

A fourth defendant was added with the consent of the parties, so amended pleadings (statement of claim

and defence) were filed and re-delivered.

The Pleadings

The Further Amended Statement of Claim alleges inter alia, that the collision between the mini bus and trailer driven by the first defendant was caused and/or contributed to by the negligence of the first defendant and or the third defendant. The particulars of negligence alleged against the first defendant are as follows:

1. Attempting to overtake at a time when it was manifestly unsafe so to do.
2. Driving into the path of the minibus...and colliding therewith.
3. Driving at a speed which was manifestly unsafe in the circumstances.
4. Failing to keep any or any proper lookout.
5. Failing to stop, slow down, swerve or in any way to stop to avoid the said collision.
6. Driving without due regard for other users of the road.

In answer to the foregoing the further amended defence of the First, Second and Fourth Defendants has denied negligence and has averred that the accident was caused and or contributed to by the negligence of the minibus driver Clifford Palmer and/or Cedric Lindo and/or Constable Gordon.

The Facts

The plaintiff testified that on the 1st day of September, 1993 she was a passenger in a minibus driven by Clifford Palmer and was on her way to Montego Bay. She was seated in the third row of seats and in close proximity to the passenger door. In her estimation the bus was travelling between 50 -55 m.p.h. During the course of the journey she heard the driver screamed out and when she looked in his direction she saw a trailer coming directly at the bus. There was no way for the driver of the minibus to go further to his left as there was an embankment. The trailer then hit the bus and she lost consciousness. When she regained consciousness she found herself trapped in the bus and was among several injured persons. She sustained serious injuries, was admitted to Cornwall Regional Hospital and was subsequently transferred to St. Joseph's Memorial Hospital.

Cedric Lindo an eye-witness to this accident was called by the plaintiff. He testified that he was travelling behind the minibus going towards Montego Bay. In the vicinity of Lilliput he saw a tractor trailer approaching from the opposite direction. When he first saw the trailer it was some ten (10) chains away. He said that two vehicles were travelling ahead of the trailer. The trailer attempted to overtake the vehicles ahead of it and in doing so it collided with the minibus and his vehicle on the left side of the road as they proceeded towards Montego Bay.

This was his evidence describing the sequence of events preceding the accident:

Q. - "At the time you first saw this car what distance was trailer from your vehicle"?

A - Two (2) chains and coming.

Q - On which side of the road was the trailer now?

A - Approaching the right. I mean coming into my lane.

Q - When the trailer is on your side and coming where was other car you speak of"?

A - Being overtaken by the trailer.

Q - From the time the trailer started to overtake first car did it go back on its side of the road or it just come and slam into the bus?

A - It came and slam into the bus but not head on."

It was a matter of seconds he said from the time he first saw the trailer up to the time the accident occurred. Nothing prevented him seeing the trailer before it was two chains from him. He said:

" It (the trailer) was coming across the road towards the bus and my car."

He could do nothing as the trailer came so "fast and so quick". He estimated that the trailer was then travelling between 70 - 75 m.p.h and the bus was travelling at 50 m.p.h. His car was about three yards directly behind the bus just before the accident occurred and when the trailer attempted to overtake.He did not collide in the rear of bus however. He collided into the area where the body of the trailer adjoins the tractor head.The distance of three yards when pointed out was agreed at 25 - 30 feet. According to him, when the trailer attempted to overtake, the trailer was about seven (7) yards from his vehicle. He pointed out this distance but it was agreed at 2⅔ - 2½ chains.

Inspector Edward Burke, who was the investigating officer, visited the scene of the accident. He observed that the accident had occurred on a slight grade about 70 ft from the brow rising from Montego Bay direction. The tractor head was in a slant position pointing towards Montego Bay with the extreme rear section resting against a tree on the left side of the road going towards Falmouth. The minibus was positioned some two (2) ft ahead of the tractor head on its correct side of the road leading towards Montego Bay. The Lada motor car was seen at the rear section of the tractor head.

Inspector Burke also observed that there were two parallel dragmarks. They were made by the two rear wheels of the trailer.The inner dragmark was 1ft. 6 ins from the edge of the road surface as one proceeded towards Falmouth. It was approximately 180 ft from the point of impact to the beginning of the drag marks. The right drag mark measured 120ft. 6 ins whereas the left measured 126 ft. No dragmarks were seen in respect of the minibus and Lada motor car.

The road surface was dry at the point of impact. It's width was 24 ft. 6 ins and one could see for a distance of 200 - 300 ft looking in the direction of Montego Bay. There was a tree in close vicinity to the accident, on the left embankment going towards Falmouth. This tree which features in the evidence was about 4ft 6 ins from the road surface and about twenty (20) ft from the end of the dragmarks. It had an indentation from which sap flowed and which corresponded with an impression seen by Insp. Burke on the metal trailer bed.Under cross-examination Inspector Burke did admit that there was overhanging shrubbery at the side of the road where the dragmarks commenced which caused some obstruction for motorists proceeding towards Falmouth.

Carlton Campbell, the first defendant, testified that he was the driver of the tractor trailer and he was travelling at 30 m.p.h towards Falmouth just before the accident took place. He was going up what he describes as a rising and travelling about 2ft from the left embankment. When he reached the top of the rising he saw a police motorcyclist approaching him on his side of the road going towards Montego Bay. There was also a Lada car travelling behind the motorcyclist on his side of road also going towards MoBay. He saw the minibus going

towards Montego Bay on its left and correct side of the road.

According to Campbell, the trailer was about 3 chains from the motorcyclist and 3½ chains from the Lada car when he first saw them. Both vehicles were travelling fast - the motorcyclist travelling at 70 m.p.h and the Lada car at 55 m.p.h. He said that the minibus was travelling between 60 - 65 m.p.h. and there was no other vehicle.

He applied brakes and held it down, in his words, "permanently" in order to avoid a head-on collision with the Lada and motor cycle He heard the sound of tyres when he applied brakes. Under cross-examination he said that from the moment he saw the vehicles he hit brakes. After he hit brakes his vehicle continued to go forward towards Falmouth. As he continued, the Lada car and motorcyclist were still facing him. When he got near to a tree on his left, the approaching vehicles were completely on his side.He pulled further left and the left front section of his cab hit the tree. The Lada was actually beside the minibus before he collided with the tree.

After he hit the tree his left door flew open, the tractor head turned to the right and he fell from the vehicle unto the left soft shoulder going towards Falmouth. When he regained consciousness he saw the body of the trailer resting on the tree. The part where the head connected with the trailer was in the middle of the road. The tractor head was turned towards Montego Bay and the Lada car was in the middle of the road at the point where the head connects with the trailer.

Campbell has denied under cross-examination that he was in the act of overtaking two cars when the collision took place.

The Law

Three things must be proved before a defendant can be held liable to pay damages for the tort of negligence. It must be established:

1. That the defendant failed to exercise due care; and
2. That the defendant owed to the injured person a duty to exercise due care; and
3. That the defendant's failure was the cause of the injury.

There are times however, where the doctrine of res ipsa loquitor may be invoked by a plaintiff. All this means is that the accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case the mere fact of the accident is prima facie evidence of such negligence. In these circumstances, although the legal burden rests upon the plaintiff to prove negligence, the defendant must explain and show however, that the accident occurred without fault on his part.

In *Barkway v South Wales Transport Co. Ltd* [1950] 1 All E.R 392, Lord Normand said at page 399:

> "The maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."

But what is the position where a plaintiff fails to prove the cause of an accident from facts pleaded and thereafter seeks to rely upon the doctrine of res ipsa loquitor. Is it permissible, and is it supported by authority? The authorities seem to suggest that if a plaintiff builds his case entirely upon allegations in the pleadings of particular acts or omissions on the part of the defendant, he may be confined to the issues he has chosen unless at the trial he be allowed to amend. On the other hand,there are cases which seem to suggest that if he has made a general allegation of negligence, his alleging particular faults does not necessarily prevent his relying upon an inference to be drawn from the fact that the accident happened. The Court of Appeal in Jamaica has held in *Courage Construction Ltd. v Royal Bank Trust Co.* SCCA 12/90 (un-reported) delivered on the 9th April 1992 that if there is evidence as to the cause of the accident the doctrine of res ipsa loquitor has no application. In Australia however, it has been held in the case of *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 that a plaintiff who tenders evidence directed to proving the defendant guilty of a particular act of negligence is not thereby precluded from relying upon the principle of res ipsa loquitor. The Ontario Court of Appeal held in the case of *Neal v T. Eaton Co. Ltd.* (1933) 3 DLR 306 that a plaintiff does not waive the application of the maxim res ipsa loquitor by alleging in his pleadings and attempting to prove at the trial specific acts or omissions constituting negligence. Albeit, that the decisions from Australia and Canada are persuasive, I would not hesitate in saying that I am bound by the decision in Courage Construction (supra).

Issues in the case regarding liability

Mr. Honeywell submitted that the plaintiff had proved the particulars of negligence alleged in the statement of claim. He further submitted that if the Court were to find that these particulars were not proved, since there was undisputed evidence that the tractor trailer had come over to the side of the road that the bus was properly proceeding and the collision had taken place there, a res had been raised and it would be for the defendants to answer this prima facie case.

Mr Smith on the other hand would have none of this. He submitted that res ipsa loquitor was not pleaded and even though the first defendant had admitted that the head of the trailer did end up on its incorrect side of the road, the plaintiff would be obliged to establish her case based upon the testimony of the eyewitness, Mr. Lindo. Mr. Honeywell had applied during closing addresses to amend the statement of claim to include the allegation of res ipsa loquitor but this was vigorously opposed by Mr. Smith. He argued that the defendants had sought to defend the action entirely upon the acts of negligence pleaded so the amendment ought not to be granted. The Court did not grant the amendment but it was Mr. Honeywell's contention however, that there need not be any pleading in order to rely upon the principle.

What are the issues which arise for consideration in this case? Let me deal firstly with the question of agency and ownership of the tractor trailer. Mr. Smith submitted that there was an abundance of evidence which showed that the first defendant was not the servant or agent of the second defendant and that the tractor trailer was owned by the fourth named defendant. The fourth defendant had admitted that he was the owner of the tractor trailer; that he was trading as A & S Charley & Son and that he was the employer of the first defendant. There was also evidence coming from the second defendant that he never traded as A & S Charley & Son and that he had not employed the first defendant although he would run errands for him occasionally. This defendant testified also that he was the owner of the business "Channos Block and Marl Quarry Ltd." There was also evidence from a Miss Carolene Beckford, Claims Manager for West Indies Alliance Insurance Company, that the tractor trailer was insured in the name A & S Charley & Son in September, 1993.

The second issue for determination was whether or not the tractor trailer had attempted to overtake other vehicles immediately preceding the accident. Mr. Smith submitted that at the time of the collision the first defendant was not and could not have been overtaking any vehicle having regard to the evidence of Cecil Lindo and the physical description of the scene given by Inspector Burke and Wilbert Reid.( The latter witness was called by the defence.) He argued that since the dragmarks were for a distance between 120 ft to 126 ft on the left side of the road going towards Falmouth and that they were about 18 inches from the road surface, when Lindo said that the tractor trailer was on its right hand side of the road and coming just before the collision, this could not be true. Furthermore, Mr. Smith argued that if Lindo was in fact travelling some 3 yards behind the minibus at a speed of 50 - 55 m.p.h and having regard to his evidence that everything happened quickly, he could not have avoided colliding into the rear of the bus. This was not the case, so the court ought to believe the first defendant when he said that Lindo was not travelling behind the bus on the left going towards Montego Bay at the material time.

It was Mr. Smith's view therefore, that the physical evidence given by Insp. Burke demonstrated that at all material times the trailer was on its correct side of the road with the exception when it jack-knifed and turned across the road into the path of the minibus. He submitted that at the time the trailer went across the road, the evidence of Campbell shows that he was no longer in control of the vehicle as he had fallen out of it unto the soft shoulder.

Mr. Honeywell submitted on the other hand, that there can be no doubt having regard to the physical evidence, that it was approximately 55 ft from the end of the dragmark to the point of impact. He submitted that Lindo's evidence is to be explained within the context of the physical evidence and what he perceived as overtaking on a totality of the evidence, was probably the tractor head veering and jack-knifing at the end of the drag mark.

Other issues for consideration are whether or not a police motorcyclist and the Lada motor car were travelling on the tractor trailer's side of the road preceding the accident; whether the tractor trailer had hit a tree on its left side of the road thereby causing his left door to be opened; whether the tractor head then turned to the right and the driver fell from the vehicle unto the left soft shoulder.

Review of the evidence

The plaintiff herself was not able to give a description of the sequence of events leading up to the time she saw the trailer heading towards the minibus. Her case therefore depends to a great extent on the evidence of Cecil Lindo. One of the questions to be asked is, if he in fact saw the tractor trailer coming on his side of the road for approximately two chains, then how does one explain dragmarks extending between 120ft - 126 ft on the left going towards Falmouth and at a distance of 18 inches from the edge of the road surface?

The first defendant gave evidence on the steps taken by him when he applied brakes. They are as follows: He held down his brakes "permanently" in order to avoid a head -on collision with the Lada car and motorcyclist. He also said that having applied brakes his vehicle continued to go forward towards Falmouth direction and then the left front section of his cab hit the tree which was on his left soft shoulder.

There is evidence coming from Insp. Burke that the tree was some 20ft from the end of the dragmarks.

Based also upon the physical evidence, it would mean that the tractor trailer had travelled a further distance of 30 - 35 ft before the collision with the bus took place. Overall then, the evidence points to the tractor trailer travelling between 50 -55 ft before the collision. Furthermore, there is evidence from the first defendant that it was after the trailer hit the tree that it turned to the right. What this evidence shows is that even with drastic application of brakes the trailer travelled for a further distance of 50 - 55 ft. The learned authors of "Bingham's Motor Claims Cases" 9th Edn at page 121 show that the overall stopping distance in perfect conditions, that is, broad daylight and dry road, for a motor vehicle with four wheel brakes travelling at 50 m.p.h is 175 ft .

A further issue which calls for consideration is this: If there were two motor cars travelling ahead of the tractor trailer and which the tractor trailer driver attempted to overtake, where were they at the time of collision? Mr. Smith submitted that it was Lindo who had invented the presence of these two cars. According to Lindo however, these two vehicles had passed the minibus and his car before the accident. He said that they were travelling about one chain apart and at one stage the first car was about 6ft from the right side of his vehicle travelling "right alongside him". He was unable to say what distance the bus was from his car at this stage.

There is every reason to believe that based on the evidence presented, the series of events leading up to the time of collision, did take place quickly. Mr. Lindo told this court that he was travelling at 40 m.p.h at the time when the tractor trailer attempted to overtake the vehicles. Under cross-examination he admitted that he told the Magistrate at the Preliminary Inquiry that he was then travelling at 55 m.p.h. He has maintained at this trial however that he was travelling at 40 m.p.h. In a statement to the police, Lindo stated that the motorcyclist had overtaken his motor vehicle about one mile from the scene of the accident. In evidence here he said it was about 4 chains before the accident occurred. He said he was travelling at about 55 m.p.h at the time the motorcyclist overtook him and the bus was about two car lengths ahead of him. He did not see the two vehicles which were ahead of the tractor trailer at the time when the police motorcyclist had overtaken him and the bus. He disagreed that after the motorcyclist had overtaken him he then followed him and proceeded to overtake the bus. He did not see the tractor trailer going further and further to the left and neither did he see the cab of the trailer colliding with a tree.

I should say at the very outset that Mr. Lindo's estimation of distances was not the best. He had said that when the trailer attempted to overtake, it was about seven (7) yards from his vehicle. In pointing out this distance it was agreed that it would be between 2⅔ - 2½ chains. When he pointed out the distance of 3 yds which he said he was travelling behind the bus just before the collision, this was agreed at 25 -30 ft. One must therefore examine Mr. Lindo's evidence in light of his difficulty in properly estimating distances. According to him, everything happened "so fast and so quick" and it was just a matter of seconds between the time he saw the trailer and when it collided. The physical evidence and the evidence given by Lindo reveal that the bus is 8-10 ft long, Lindo is 25 - 30 ft behind the bus and the trailer has travelled some 55ft from the end of the dragmarks.The maximum overall distance that Lindo would be from the end of the dragmarks would be approximately 95 ft. Could it be as Mr. Honeywell asks, that at the time Lindo perceived an overtaking that on a balance of probabilities, the trailer was really veering and jack-knifing to its right at the end of the dragmarks?

Mr. Wilbert Reid who was a Senior Certifying Officer at the time of the accident was called by the defence. He had visited the scene and it was his opinion that the trailer had jack-knifed. He was of the opinion that 95% of the times, a jack-knife is caused by the sudden application of brakes. He also said that a collision with

a tree could also have caused the vehicle to jack-knife and once a jack-knife occurs the driver of the vehicle has no control over it. It was also his opinion that if a vehicle were travelling at 50 m.p.h or more on the road surface at the scene of the accident, it was more likely to jack-knife upon the application of brakes, than for one travelling at 30 m.p.h. He was of the view that if the tractor head had travelled into the right lane and collided with the bus, then it would have drawn the trailer with it. He agreed however that the damages seen to the front of the trailer would suggest that they resulted from a frontal impact. The damage on the minibus started at the right front and continued down the right hand side. The right side was torn off completely. The right chassis was bent, the right front wheel cut off, the steering column cut off, the clutch cut off and the brake pedal was also cut off. The tractor trailer had the following damages: broken windscreen, damaged front bumper, front fenders grill , and petrol tank. The right front tyre was cut and punctured. The engine was cut off from the gear box housing. The Lada motor car had a broken windscreen, damaged bonnet, grill, headlamps and front fenders.

The first defendant admitted that he had given a written statement about the accident to Insp. Burke. He said it was given whilst he was still in pain. According to him, he spoke, Burke wrote, he signed at its completion but he did not read it before he signed. His testimony at a previous trial and statement to the police were introduced by the plaintiff's Attorney in order to establish previous inconsistencies. The following are a number of questions asked and answers given by this defendant:

1. He was asked if at a previous trial he said that he told the police:

> "When I saw the bus coming to the truck I steered to the left on to the soft shoulder, but could go no further because of a tree which was by the side of the road. The cab of the truck collided with the tree causing it to get out of control"

He responded that he did tell the police those words. (Ex. 2) He now says at this trial that he cannot recall if he had used those words to the police.

2. At a previous trial it was recorded where he agreed that he was travelling between 35 and 40 m.p.h just before something happened. At this trial he claims that he was travelling at 30 m.p.h. He also had said at the previous trial that he was well over 30 m.p.h on the 1st September, 1993. (Exhibits 2B and 2C)

3. He did tell this court that when he first saw the motorcycle coming on his side of the road it was about 3 chains away. He cannot recall however if he said on a previous occasion that the minibus and motor cycle were 3½ chains away and Lada 4 chains away. Exhibit 2D (transcript of a previous trial) reveals where he did tell the court on that occasion that the minibus was 4 chains away and the motorcyclist 3½ chains away.

4. He was unable to say at this trial the distance he had travelled from the soft shoulder before he collided with the tree. He cannot recall saying at a previous trial that he had said 2ft. When confronted with the transcript of those proceedings he says he cannot recall saying this.(Ex. 2E)

5. He denied at this trial that he told Insp. Burke :

> " I saw two vehicles coming from Falmouth direction towards MoBay; they were coming at

> good speed, I don't remember type of vehicle in front but the minibus which was behind started to overtake the vehicle ahead."

His statement which he gave to the police was shown to him. He agreed that he had signed a statement but the above were not the correct words which he told Insp. Burke. This portion of his statement was admitted in evidence Ex. 3.

6. When he was further asked if he told Insp. Burke in the statement:

> " At this time I was about 1½ chains from the approaching vehicles. As the minibus was about ½ way passing the vehicle I notice the bus coming towards the truck. I applied my brakes and the mini bus collided with the left front section of the truck."

He denied telling Inspector Burke this in the statement. This portion of his statement was admitted in evidence as Ex. 3.

7. When he was asked if he told Insp. Burke that the door flew open and he fell out unto the asphalt....., (Ex. 3) he denied telling the Insp this and say that he fell on the soft shoulder.

8. He denied that he told Insp. Burke that:

> " When I saw the bus coming towards the truck I steered to the left on the soft shoulder but could go no further because of a tree which was by the side of the road."

This portion of his statement was also read to him but he denied telling Insp. Burke anything about the bus. This portion of his statement was also admitted in evidence as Ex. 3.

A suggestion was put to him that he had given two different versions of the accident - one to the police and another to the court. He responded that he gave the right one to the court and also to the police but the police put it wrong.

Findings

I ask the question: can it be said that the facts are sufficiently known in this case? In order to determine these facts one must consider amongst other things the demeanour of witnesses; their credibility is extremely critical. My answer is that indeed they are known.

Let me first of all say that the witness Lindo has impressed me as an honest and truthful witness. Of course, he has admitted under cross-examination that he gave previous testimony that he was travelling at 55 m.p.h when the trailer attempted to overtake, whereas he has said here that he was travelling at 40 m.p.h. There is also an inconsistency on his part as to the distance from the collision that the motorcyclist had overtaken him. To my mind, these inconsistencies have not affected his credibility . He gave his evidence in all other respects, in a straight-forward manner and although thoroughly cross-examined, his credibility has not been damaged.

Unfortunately, I cannot say the same for the first defendant. He has far from impressed me as a truthful and reliable witness. In my view his credit worthiness has been seriously affected and I therefore do not believe his version of the accident .

What then are the facts that I find? I set them out as follows:

1. That the plaintiff was a passenger in the minibus driven by Clifford Palmer on the 1st September, 1993 and the bus was travelling on its left, that is, its correct side of the road at the material time.
2. That Cecil Lindo was travelling also on his correct side of the road behind the said minibus as it proceeded towards Montego Bay.
3. That the tractor trailer which was approaching from the opposite end was proceeding up a grade and was some 70 ft from the brow.
4. That two vehicles were travelling ahead of the tractor trailer.
5. That the tractor trailer attempted to overtake the vehicle ahead of it at a time when the minibus and Lada car were in the vicinity of the brow.
6. That the tractor trailer driver had to apply brakes hard and suddenly to the extent where the sound coming from the wheels was quite audible.
7. That after the tractor trailer applied brakes it travelled for some distance and then it came across the road and collided front ways into the right side of the minibus which was on its correct side of the road.
8. That as result of this collision the Lada motor car was unable to stop before it collided into the rear section of the tractor head (in the region of the petrol tank )which was turned across the road in the direction of Montego Bay.
9. That at the time of impact the two vehicles which were travelling ahead of the tractor trailer had passed, hence they were not involved in the accident.
10. That the dragmarks for the tractor trailer measured 120ft 6ins and 126ft respectively.
11. That the tractor trailer was travelling at a fast rate of speed before the application of brakes
12. That the absence of dragmarks in respect of the minibus and Lada motorcar is due to the extreme suddenness of the accident.
13. That before the collision the tractor trailer went unto the left shoulder and made contact with a tree which was 4ft 6 ins from the road surface.
14. That there was an impression on the tree which corresponded in height with an indentation on the tractor trailer bed.
15. That the front of the tractor trailer did not collide with the tree.
16. That neither was the driver of the Lada car nor the police motorcyclist approaching the tractor trailer on its side of the road thereby causing the driver to hold down his brakes "permanently" in order to avoid a head-on collision.
17. That the second-named defendant, Tony Charley did tell Insp. Burke that he was the owner of the tractor trailer but on a balance of probabilities I accept the evidence that the fourth named defendant was the registered owner of the tractor trailer and that he was the employer of the first defendant.

It is unarguable, I think that the foregoing provide sufficient facts to conclude that the cause of the accident was due to the action on the part of the first defendant when he attempted to overtake on the grade at a time when it was manifestly unsafe so to do and equally that he had failed to keep any or any proper look out. Were he travelling at a much slower rate of speed, the probabilities are that he could have come to a stop within a safe distance or at least slowed down behind the vehicle he was attempting to overtake when the oncoming vehicles approached from the brow of the grade. In these circumstances I find the principle of res ipsa loquitor clearly inapplicable. The first and fourth named defendants are therefore liable in damages to the plaintiff.

Damages

I must now turn to the question of damages. Let me deal firstly with the head general damages.

General Damages

There is evidence that the plaintiff was born on the 4th day of October, 1970. This means that at the time of trial she would have been 26 years of age.

On the day of the accident she was pinned in the bus in the region of the chest. She had lost consciousness but it would seem that it was not for a long period of time as she regained consciousness on her way to the Falmouth Hospital. She was removed from Falmouth Hospital and taken to Cornwall Regional where she remained for a few days. She was finally transferred to the St. Joseph's Memorial Hospital and was a patient there for one week. Whilst in hospital she received antibiotics and pain killers. She was attended to by Dr. Warren Blake, Orthopaedic Surgeon whilst at the latter institution.The medical evidence of Dr. Blake is indeed extensive hence, I must pay attention to details. It reveals, inter alia:

> "...I treated Natalie Whylie in relation to injuries she sustained in 1993.....I first saw her on 4/9/93 at St. Joseph's Hospital....She was wearing a collar. Her mucous membrane was pale. This signified loss of blood. She had marked tenderness over the supra pubic region - lower part of the abdomen. She had tenderness also in region of the left loin. Her right thigh was markedly swollen and deformed. It was quite tender to touch. I caused X-rays to be taken. X-Rays revealed fractures of the left and right superior and inferior pubic rami. There was also a fracture of the post iliac crest with partial disruption of the right sacra-iliac joint. She also had a fracture of the mid-shaft of the right foot. X-Rays of the cervical spine revealed a fracture dislocation of the lamina of the second cervical vertebrae...
>
> I applied skin traction to the right lower limb and she was also given painkiller medication.
>
> On the 6th September 1993 she was taken to the operating theatre and she had internal fixation of the right femoral fracture and of fracture of the right ilium. She had satisfactory progress following surgery. The fractures were fixed using a heavy duty metal plate and special bone screws.
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> She obtained a special cervical brace which is called a four poster brace. This was fitted on 11th September 1993.....The special brace was used because of the nature of the fracture. This