Judgment Book

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

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.
>
> 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

fracture is called "the hangman's" fracture.

.....

After she was placed on brace fresh X-Rays were ordered. These revealed that the position of the cervical fracture was quite acceptable. She left hospital on the 12/9/93. She was advised to continue wearing the brace and not to interfere with it. She should also remain in bed at home.

I saw her again on the 12/10/93. I ordered new X-Rays. They showed that the cervical spine fracture was healing satisfactorily. The pelvic and femoral fractures were also healing. The fractures to the superior and inferior pubic rami were displaced.....I also changed her brace. It was changed to a Philadelphia collar. I saw her again on the 5/11/93. She complained of pains in the right side....I examined thigh and noticed it was markedly swollen and tender. I did X-Rays of femur and I saw that screws in distal segment of the plate had broken and that the plate was pulled loose. She was admitted to K.P.H where she had repeat surgery. This surgery was done on the same day. The broken screws were identified and removed and new screws were inserted. She went home the following day. I advised her not to put any weight on leg and to continue using the walking frame.

.....

I next saw her on the 7/12/93. She complained of low back ache, neck ache and pains to her pelvis. I sent her for X-Rays and it revealed that the femoral fracture had united and the cervical fracture did not show any instability. I discontinued use of the Philadelphia collar and advised her to commence normal weight bearing on the affected limb....."

The plaintiff gave evidence that after her discharge from hospital she was unable to anything for herself. She had to have 24 hour nursing care. She was initially bed-ridden for two months. After the second operation she was further confined to bed for another one month. She was unable to turn without assistance whilst in bed. Turning was extremely difficult and extremely painful. Sitting up as well as using crutches caused pain. Walking caused pain and she further testified that the pain was still felt up to the time of trial. She is now able to stand for about one hour before she feels pain. She resumed working at the Kingston Public Hospital on the 1st January, 1994 but experienced difficulties on ward rounds. After about ten (10) minutes she felt pain in the back. Being an Intern at that time she had to do continuous standing and had to attend to 60 - 100 patients per day. She finally became a registered medical practitioner in April 1995. She is now pursuing her specialty in surgery and is doing post graduate work in ear, nose and throat. She has another three years to complete her studies and will be going to Glasgow, Scotland to complete her training.

Miss Whylie testified that she has lost some of the amenities of life. She was a regular jogger around the Mona dam but is unable to do so now due to pain in her back and pelvis. Her ability to run has also been hampered. She is unable to lie flat and this affects her ability to have sexual intercourse. She has to resort to the taking of painkillers in the form of tablets and injections on a daily basis.

Since her resumption of work, the plaintiff has made several visits to Dr. Blake due to complaints regarding pain in her lower back and pelvis. He had to prescribe antibiotics, muscle relaxers and anti - inflammatory medication for her. Under cross-examination he said that in all probabilities she would experience pain for the rest of her life. He opined that the continued use of painkillers could cause stomach disorders.

When he saw her on the 20/1/94 he had observed that the cervical vertebra had fused together and was of the opinion that this injury would only slightly reduce her mobility. He opined that she would experience pain from such a fusion. The femoral fracture was well united and there was abundant new bone formation around the fracture. The pelvic fractures were united but the ring of the pelvis was deformed. The Doctor further testified that apart from being a source of pain, should she get pregnant she would have difficulty having normal delivery so birth would have to be by Caesarian section. The plaintiff herself had said that she would be getting married in December of this year and embraces the hope of having children. The doctor further opined that the pain she was experiencing from long standing could have been caused from the distorted pelvis.

Dr. Blake finally examined the plaintiff on the 31/10/95 and was able to assess her disability. He said he did not expect any further improvements. It was now more than two years post injury and she had showed no signs of improvement over the last two months. He opined that she had reached maximum medical improvement and that the removal of the pelvis and femoral implants would not improve her disability rating but it would remove the risk of future infection around the implants. He had advised her to do the removals but this was not done as yet. Her permanent partial disability was assessed at 25% of the whole person. Dr. Blake also expressed the view that he would not expect anything out of the ordinary to happen to her bones over the years and he would only anticipate infections. The onset of arthritis was also another possibility since the sacra-iliac joint was affected in the injury.

The plaintiff's handicap in the future has been described by Dr. Blake thus:

> "I would not expect her to stand and work for an eight (8) hour per day period five years from now. If she spaces out standing and rests she could get a period of five (5) hours out of each day.
>
> .....
>
> The plaintiff's ability to stand would get less with the increase in the passage of time. With the disability rating and the problems she now experiences it is my opinion that she may well have to cease working before normal practitioners do. This would be a difficult assessment for me but in all probability this is what I think would be her case."

Dr. Blake's evidence as to the method used in arriving at the percentage of permanent partial disability was never seriously challenged nor was it contradicted, so at the end of the day I am constrained to accept his evidence that there will be a 25% permanent disability of the whole person. In response to a question if there was any treatment that the plaintiff was capable of receiving that could reduce or otherwise extinguish pain, his response was:

> " There is no treatment other than painkillers. People recommend various treatments but they

> have drawbacks. The joint could be removed but this could lead to other consequences. As an advantage it may remove the pain but there is no guarantee. It is more likely to cause problems. The method of removing the joint is not done locally. It is not recommended here based on the medical experience."

It has always been expressed that assessing damages for pain and suffering and the loss of amenities of life is not an easy task. I do recall that the plaintiff gave evidence that those who came to their rescue seem to have thought that she not one of those alive. Her survival is indeed miraculous but I have every reason to believe that her pain and suffering will remain with her for the rest of her life.The words used by Lord Reid in *H. West & Son Ltd v Shepherd* (1964) A.C 326 are quite apt and are worthwhile repeating here:

> "The man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated so far as money can do it, for that and for the mental strain and anxiety which results. There are two view about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition - for the multitude of deprivations and even petty annoyances which he must tolerate. Unless I am prevented by authority, I would think that the ordinary man is, at least after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."

What then would be a reasonable award for general damages in this case? Although no two cases are precisely the same, justice requires that there be consistency between awards. Campbell J. A did say in the case of *Beverley Dryden v Winston Layne* (un-reported) SCCA 44/87 delivered on the 12th June, 1989 that:

> "....personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."

It was submitted on behalf of the plaintiff that the court should consider an award under general damages in respect of pain and suffering and loss of amenities, handicap on the labour market and loss of future earnings.

Pain and suffering and loss of amenities

Of the cases cited by the Attorneys, I find the following to be most useful in giving some guidance on what would be a reasonable award under this head.

In *Williams v Cope* SCCA 60/91 (un-reported) delivered October 5, 1992, the plaintiff had sustained the following injuries:

1. Lower back was swollen and tender over the right lumbar region
2. The pelvis was painful on touch, over the symphis pubic was swollen.
3. On X-ray the pelvis was seen to be fractured at the roof of the acetabulum. There was separation of the pubic symphis and displacement of the right sacra-iliac joint.

4. Compound comminuted fracture of the left leg.
5. Several wounds and abrasions.

He was admitted in hospital and upon being discharged he was followed up as an out-patient. He continued bed rest at home. The injuries to the left tibia and fibula were considered serious and they caused a lot of pain. The fracture to the acetabulum was likely to affect his walking and it was said that it would last forever. It would affect him in his work as a labourer when he had to walk or move things. The leg healed with a "bow leg" deformity and a one inch shortening. He walks with a limp which affected his balance. As he gets older he is likely to develop osteo-arthritis in the right hip joint and this was likely to develop in five to seven years from the date of injury. He complained of pain when he walks too long or stands too long. His permanent partial disability was assessed at 15% of the whole man. At trial he was awarded a sum of $110,000.00 in October 1990 in respect of pain and suffering and loss of amenities which was upgraded to $130,000.00 on appeal.The learned trial judge had apportioned liability 80/20. This award would value in the region of $850,064 when the consumer price index of 1007 for March 1997 is applied. It would be reasonable to say that the latter sum would now value closer to $1,000,000.00.

The case of *Sheila Campbell v Sharon Kiem & Ors.* C.L 1987/C263 tried on the 8th February 1991 before Wolfe J , and reported at page 40 of Casenote No. 2 is of assistance. The plaintiff in that case had sustained facial injuries which necessitated corrective surgery. Dr. Geoffrey Williams had expressed the view that even with plastic surgery this would not completely rid of her of the scars. In addition to the facial injuries the plaintiff had sustained a fracture of the superior pubic ramus, widening of the right sacra-iliac joint, fracture of the right molar bone and loss of consciousness. Dr. Warren Blake who had attended to her had opined that the widening of the sacra-iliac would cause the plaintiff to continue experiencing pain. He had also testified that if she became pregnant there was the possibility she would develop problems because of the deformity of the pubic inlet which was out of shape. This problem he said would likely to result in obstructed labour, necessitating Caesarian sections during pregnancy. Her permanent partial disability was assessed at 10% of the whole person. She was awarded $200,000.00 in respect of pain and suffering and loss of amenities. That award would value $1,184,705 in March 1997 by using the latest consumer price index of 1007.

The injuries sustained by the plaintiff in this case were quite serious. She was rendered unconscious at the time of the collision. The cervical fracture has been described by Dr. Blake as "the hangman's fracture". He stated that because of the nature of the broken neck, they were not able to use the usual techniques of anaesthesia at surgery. Instead she was given a spinal anesthetic which caused the lower limb to go to sleep but she was awake during the operation. Although she would not have felt sharp pains for the internal fixations, deeper sensations would be felt.

There is no doubt that she suffered excruciating pains and will continue experiencing pain for the rest of her life. She has a 25% permanent partial disability of the whole person. Future surgery is a real possibility due to the likelihood of infections. Her job as a doctor involves standing for long hours during the course of a day and Dr. Blake did opine that her ability to stand would get less with the increase in the passage of time. With her disability rating and the problems which she now experiences, it was his opinion that she may well have to cease working before normal practitioners do.

There is also the possibility of her developing arthritis since the sacra-iliac joint was affected. Of course there is also the problem of her having normal delivery where children are concerned.

Although there is no need for plastic surgery she has a surgical scar on the right foot which is seven (7) inches in length. She is an attractive young lady and is now 26 years of age. It does not seem that this scar will affect her chances of marriage, but no doubt it will be unsightly.

She can no longer pursue the amenities of life that she was once accustomed to. There is also the possibility that continuous use of painkillers will cause stomach disorders. Miss Whylie will from all appearances have to make serious adjustments in her life. I am of the considered view that her pain and misery will exceed those plaintiffs in the two cases referred to above. In all the circumstances therefore, I award the plaintiff a sum of $1,500,000.00 in respect of pain and suffering and loss of amenities.

Handicap on the labour market

Miss McFarlane had submitted that the court should not make an award under this head of damages but if the Court disagreed with her, a nominal figure of $75,000.00 should be awarded. Miss Francis on the other hand argued quite strongly that the plaintiff was entitled to an award under this head. She submitted that there was a substantial or real risk that the plaintiff will not be able to work full time for her estimated work life. It was her view that a multiplier method should be used in order to arrive at a reasonable sum. She suggested a multiplier of a high of 16 or a low of 12 and a multiplicand of $40,000.00 monthly, a sum representing her net monthly earnings. If the higher multiplier were used then the figure of $7,680,000 would be arrived at. At the lower multiplier the figure would be $5,760,000.00.

In arriving at an award under this head I am guided by the remarks made by Gordon J.A in the case of *Edwards & Anor v Pommells & Anor.* SCCA 38/90 (un-reported) delivered on the 22nd March 1991, when he said , "there must be some amount of speculation but there must also be some basic fact or facts upon which a court can make a forecast."

The principles which will guide a court of trial in an assessment of this loss of earning capacity are clearly stated in the case of *Moeliker v Reyrolle & Co. Ltd.* (1977) 1 All E.R at page 176 where Browne L.J said:

> "...The consideration of this head of damages should be made in two stages.....Is there a substantial or real risk that a plaintiff will loose his present job at some time before the estimated end of his working life? If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materializes, having regard to the degree of the risk, the time when it may materialize, and the factors, both favourable and unfavourable, which in a particular case will or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

The evidence in this case shows that the plaintiff was in employment at the date of trial and it also shows that her salary as a General Practitioner had increased since the accident. What then is the risk that she will, at some time before the end of her working life lose her job and be thrown on the labour market?

She testified that upon the resumption of work she made several visits to Dr. Blake because of pain in her lower back and pelvis. She feels pain after standing for an hour. Her handicap in the future has been described by Dr. Blake. He was of the view that her daily hours of work would be reduced and her ability to stand would get less with the increase in the passage of time. Accordingly, she may well cease working before normal practitioners do. He admitted that it would be a difficult assessment for him to make but in all probability this would be her case.

In view of the nature and extent of the plaintiff's injuries and her permanent disability, which I find to be 25% of the whole person, I agree with Miss Francis' submission that the plaintiff should also be awarded damages for handicap on the labour market. In her area of specialisation as a surgeon she would be expected to stand for long hours in the operating theatre. The prognosis does not look good where she is concerned. Dr. Blake was of the view that if she spaces out her standing and rests, she could get a five hours out of each day. There is evidence that a general practitioner or one who practices in the plaintiff's field of specialisation, would work for at least eight hours per day. One can therefore visualize the predicament the plaintiff will face in the operating theatre or if she has to do her rounds in the hospital attending to patients. The inability to stand for long periods would place the plaintiff at great disadvantage. It does seem to me in all probabilities that there is a substantial risk that at some time in the future before the end of her working life she will be thrown on the labour market. It is my considered view that her chances of a successful practice in the field of her choice, or even as a general practitioner would be greatly affected.

I now turn to the difficult task of translating into monetary terms the loss which she will suffer. Dr. Blake did state that the plaintiff would be eligible for retirement at about 60 years of age. Bearing in mind her age at the time of the accident, I find that her working life expectancy would be for approximately 38 years, that is, till she reaches age 60 yrs. Counsel had suggested that the figure of $40,000.00, her net monthly earnings after tax and other deductions are applied , should be used as the earning at trial.This figure was not challenged during the trial so I would agree that it should be used as the multiplicand. Her net earning for one year would therefore be $480,000.00. What would be a reasonable multiplier? In arriving at this figure, I take into consideration the plaintiff's age (she is now 26 years of age), her permanent whole person disability, her profession and the impact which her injuries will bear upon her. It is my considered view therefore, that a multiplier of 12 would be reasonable and ought to be used. I therefore arrive at an award of $5,760,000.00 for loss of earning capacity.

Loss of future earnings

This head was included by virtue of an amendment to the statement of claim. It was not pursued by Counsel in her address on damages so I will not make any award in respect of this head.

Special Damages

By consent, the parties agreed to the following items of special damages:

b.	Cost of helper @ $400 per week	$5,200.00
c.	Practical nurse	6,600.00
c.	Medical report	1,500.00
g.	Loss of jewelry,hair dryer and camera	14,000.00
h.	Transportation	4,000.00

j.	Cost of medical equipment	10,000.00
k.	Hospital Bill:	
	Cornwall Regional	45.00
	St. Josephs	28,244.61
l.	Sheet set	2,500.00
m.	Ambulance services	2,320.00
	Total	$74,409.61

The other items left to be considered are loss of earnings, Doctor's fees for surgery, and cost of medication which is said to be continuing.

The plaintiff testified that she resumed working on the 1st January 1994. This was not challenged. Neither was there any challenge to the earning which she lost during the period of her recuperation. She said she had just started to work as an Intern so she would not be eligible for any substantial period of leave. I would allow her claim in respect of loss of earnings for the period claimed. I therefore award her $140,000.00 as loss of earnings. This sum represents 3 months at $40,000 per month (net) and two weeks amounting to $20,000.00.

In my view the claim for medical expenses for surgery has been proved. Dr. Blake did testify that he presented his bill in respect of the various fees attendant to surgery. I award the sum of $156,000.00 in respect of this expense. I also make an award of $81,600 in respect of the cost of future surgery. Dr. Blake had made his recommendations regarding future surgery to the plaintiff so I have every reason to believe that the plaintiff will comply.

The plaintiff has testified that she is currently on prescribed medication and Dr. Blake supports her case that she will have to be on painkillers constantly as she will experience pain for the rest of her life. Not only will she need painkillers but anti-inflammatory medication will also be needed. I would use the multiplier of 12 and apply it to the percentage that she is obliged to pay under her Blue Cross Health Scheme. She usually paid 20% of $10,000 which is the sum expended normally on one health card. She has admitted that with the new treatment that she is receiving she has not been taking as many tablets as before so it now works out cheaper. I would make an allowance for three cards annually. The sum $6,000 annually will be used as the multiplicand. I therefore make an award of $72,000.00 in respect of future medical expenses.

Conclusion

A. In fine there shall be judgment for the plaintiff against the first and fourth defendants as set out hereunder:

General damages

1.	Pain and suffering and loss of amenities	$1,500,000.00
2.	Handicap on the labour market	$5, 760,000.00

With interest thereon at the rate of 3% p.a from the date of service of the writ up to today.

Special damages

An award in the sum of $524,009.61 with interest on the sum of $452,009.61 at the rate of 3% from the 1st day of September, 1993 up to today.

There shall be costs against the first and fourth defendants to the plaintiff to be taxed if not agreed.

B. There shall be judgment in favour of the second defendant against the plaintiff with costs to be taxed if not agreed and which costs are recoverable by the second defendant from the first and fourth defendants.

Interest

I was requested to award interest at the rate of 6%respectively on both general and special damages but I have not acceded as I am constrained to follow the decision of *Central Soya of Jamaica Ltd v Junior Freeman* SCCA 16/84 (un-reported) delivered on the 8th March 1985. That case held that once an assessment has been made according to the money of the day principle, interest on general damages for pain and suffering and loss of amenities should not exceed one half the rate applicable to judgment debts. The same rate is applicable to special damages hence, this is the reason for the rate of 3% ordered.