IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1992/I 032

BETWEEN	ISLAND BUILDERS CONTRACTORS AND REAL ESTATE LIMITED	PLAINTIFF
A N D	TRANSPORT AUTHORITY	DEFENDANT

Mr. A. Irving instructed by Vacianna & Whittingham for the plaintiff

Mr. Carlton Melbourne for the defendants

Heard: 24th, 25th, 26th May, 14th June, 2000 and 16th January 2001

GLORIA SMITH, J.

The plaintiff Island Builders Contractors and Real Estate Limited amended statement of Claim is against the defendants Transport Authority for negligence. It is alleged that on or about the 3rd day of May 1991, a servant and/or agent of the defendant being the driver of a motor truck "jeep" registered 7394 AS so negligently managed or controlled the said motor truck that he caused same to collide with the plaintiff's motor truck which was in a stationary position along the Pamphret main Road in the

parish of St. Thomas, in consequence of which the plaintiff suffered loss and damage and incurred expenses.

In the particulars of negligence the plaintiff alleged that the servant and/or agent of the defendants:

1. Failed to keep any or any proper look out, or to have any or sufficient regard for other road users particularly the plaintiff.
2. Driving at a rate of speed which was excessive in the circumstances.
3. Failed to see and/or heed the plaintiff's said motor vehicle.
4. Failed to have any or any sufficient regard for vehicles along the said road.
5. Driving on the incorrect side of the road and into the path of the plaintiff's said motor vehicle.
6. Failing to stop, slow down, swerve or in any manner to so manage and/or control the said motor vehicle so as to avoid the collision.

The defendants in their defence and Counter-claim, alleged that the driver of the motor vehicle in question (i.e. the jeep) one Audley West was

not acting as the servant and/or agent of the defendant, or in the course of his employment with the defendant, but that Mr. West was on a frolic of his own.

The defendants in their Particulars of negligence states that the servant or agent of the plaintiffs:

(1) Failed to keep any or any proper lookout or to have any or sufficient regard for other road users particularly the defendants and driving at a speed that was excessive in the circumstances.

(2) Failed to see or heed the defendants vehicle or have any or sufficient regard for vehicles on the said road.

(3) Over taking or passing another vehicle without ascertaining whether it was safe to do so and when it was dangerous to do so and without giving any signal of his intention to over-take and pass another vehicle.

(4) Driving on the incorrect side of the road and into the path of and colliding with the defendants' vehicle.

(5) Failed to stop, slow down, swerve or in any manner to so manage and/or control the said vehicle so as to avoid the collision.

The plaintiffs called two witnesses in support of their Claim. The first

Lurest Freebon an eye witness to the collisions and Mr. Henry Tulloch the driver of the plaintiffs motor truck at the time of the incident.

Miss Freebon gave evidence that on the 3rd of May 1991 at about 11:00 a.m. she was standing on the left hand side of the Pamphret main road going towards Kingston. She was talking to a friend, when a red Lada motor car stopped on the left side of the road going towards Morant Bay. This car stopped in the "bend" of the road – as a result Miss Freebon said she signalled some trailer drivers who were approaching to slow down. She also observed a grey truck travelling towards Morant Bay approaching and she signalled him to slow down as well, she can't say if this truck driver saw her.

The grey truck passed the red Lada motor car and stopped about 2 car lengths in front of the Lada. Witness then said she saw a red pick-up coming from the Morant Bay direction, it hit the right back wheel of the grey truck, then hit into the red Lada, spun around and turned across the road. The Transport Authority van (i.e. the defendants vehicle) which was travelling in the same direction as the red pick-up then collided head on into the grey truck. The grey truck was still stationary at the time of these collisions.

After the collisions occurred Miss Freebon ran towards the defendant's van and saw 2 persons in the front of the van and 3 in the back. Shortly after this van collided with the grey truck it burst into flames and the grey truck also caught fire. Attempts were made to put out the fire.

Where the collisions occurred, Miss Freebon stated that the road was asphalted. The truck which was travelling towards Morant Bay was stationary and on its left while the Transport Authority van which had been travelling in the opposite direction was on its right coming from Morant Bay and heading towards Kingston.

In cross examination Miss Freebon said that there were other persons on the Pamphret main road on the day of the accident, but they were not there throughout the time of the collisions. After the collisions a number of persons came on the scene. She further stated that the Lada motor car was parked on the left side of the road going towards Morant Bay and that there was a white line in the middle of the road. The Lada she indicated was parked just a little above the bend and was not obstructing traffic. She denied that the grey truck was travelling fast – she said after she signalled it, the driver then stopped about 2 car lengths in front of the Lada. She admitted that she had been looking in the direction of Yallahs from which direction both the Lada and the grey truck had come, but denied that it was

the collision which caused her to look, in the opposite direction, and that she did not actually see what happened. She however agreed that these collisions happened very fast. She said that the Transport Authority vehicle had no where to go as the road was blocked. The five persons who were in the Transport Authority vehicle all died.

Mr. Henry Tulloch gave evidence that he was employed to the plaintiffs as a truck driver in May 1991. They owned a 1985 Seddon Atkinson truck registered CC 2180 and that was the truck that was assigned to him.

On the 3rd of May 1991 at about 11:a.m. he was driving the plaintiff's Seddon Atkinson truck CC 2180 on the Pamphret main road going towards Morant Bay. Upon reaching mile post 23 he saw a Lada motor car parked on the left side of the road going towards Morant Bay. As he passed the Lada, he saw two vehicles coming from the opposite direction and he observed that one vehicle was about to overtake the other. He then pulled over to his left and stopped. He noticed that the approaching vehicles were travelling very fast , one was a red Chevrolet pick-up, the other was a Diahatsu. The Diahatsu tried to overtake the red Chevrolet pick-up but did not actually do so. The pick-up swerved and then went on the embankment on the left side of the road, dropped back in the road and hit into the right

rear wheel of the plaintiff truck – after which Mr. Tulloch said he felt another impact. He then saw the windscreen of his truck fall out and when he looked in front of him, he saw the Daihatsu motor vehicle right in front of his truck. When he came out of his truck he observed that it was the same Diahatsu that had earlier tried to overtake the Chevrolet pick-up. The Diahatsu then caught fire – he got dirt and was trying to put out the fire because his truck had also caught fire.

As a result the truck was completely burnt out. An asssessment of the damage done to the truck was subsequently carried out. The truck was towed away from the scene of the accident to the Yallahs Police Station and then to the plaintiffs' business place in Kingston.

The sand that Mr. Tulloch was going to collect was to be delivered to Jamaica Pre-Mix Limited on Molynes Road, Kingston. This was something he had been doing on a regular basis, Mondays to Fridays. This was pursuant to a contract between Island Contractors Limited and Jamaica Pre-Mix Limited. This contract had another five months to run before it expired. Jamaica Pre-Mix Limited paid $60,000 per month to Island Contractors Limited and Mr. Tulloch indicated that he knew of this because he was paid on the basis of a percentage of that sum.

At the time of the collision Mr. Tulloch stated that when the Diahatsu vehicle belonging to the Transport Authority collided with his truck, he was on his left side going towards Morant Bay and the Diahatsu was travelling in the opposite direction. His vehicle was stationary.

In cross-examination he reiterated that there were in fact two collisions – one where the red Chevrolet collided with the right rear wheel of his truck and the head on collision where the Diahatsu crashed into his truck. He said he saw the collision with the red Chevrolet and he heard and felt the collision with the Daihatsu - These collisions happened within split seconds of each other. His attention had been focused on both vehicles. Before he heard the second collision his attention was focussed on the red pick-up, which hit the banking, then dropped back in the road, then hit his right rear wheel then hit the Lada. Mr. Tulloch could not say if the red pick-up spun around in the road, he however said it did not block the road. He explained that he did not see the red pick-up come to a stand still, as his attention was then drawn to the second collision. He denied that on the day of the accident he saw a lady signalling him to stop. He stopped and pulled over because he saw the two vehicles trying to over-take coming towards him.

Mr. Tulloch admitted that when he saw the red pick-up and the Diahatsu trying to overtake , the red pick-up was always in front – He said

you could conclude therefore that the Diahatsu was trying to overtake the pick-up – and the pick-up prevented it. Mr. Tulloch denied that where he stopped the truck was on a corner – he said it was on the straight and he had a clear view of what was happening. Both vehicles were trying to overtake, hence he pulled over.

He again said he travelled the road often, about 5 times per week and he did not see any white lines in the road where the collision took place. He said his vehicle was parked very close to the side of the embankment and denies that he was in fact parked near the line in the road.

Mr. Melbourne on behalf of the defendants, attempted to discredit the witnesses evidence by pointing out discrepancies which in my view were rather superficial, for example that Miss Freebon had stated that she signalled Mr. Tulloch to stop whereas Mr. Tulloch said he had not seen anyone signalling him to stop that day. That in my opinion does not affect the undisputed fact that the plaintiff's vehicle was stationary at the time of the collision.

The real issue is whether or not the defendants are liable for the damage done to the plaintiffs vehicle.

The defendants have as was already mentioned, put up the defence that the actual driver of their vehicle was either on a frolic of his own or was not acting in the capacity of actual employment to them.

The evidence of the witnesses called by the defendants raised a lot of irreconciable discrepancies and suggests that they are merely seeking to avoid liability.

The first witness for the defence was Miss Millicent Hinds, Supervisor for administration at the Transport Authority, a position which she occupied in May 1991.

She told us that a part of her function was to make up duty rosters for the inspectorate division, which at that time was at 4 ½ Camp Road (The Head office was located at 68 Slipe Road). The roster would then be posted at the Camp Road office. The roster would be made up for a week i.e. from Sunday to Saturday. The inspector's assignments would be placed on the duty roster.

Apart from the roster an Inspector could be given an assignment by a senior Supervisor. The roster was therefore subject to changes, which could be made by instructions from the manager or the person in charge of the Inspectorate division.

Miss Hinds evidence is that in May 1991 a Mr. Arthur McFarlane (now deceased) was the person in charge of the Inspection division – Mr. Bowes was the Acting Managing Director – and these two gentlemen were the persons who could make changes to the duty rosters. For these assignments, the use of motor vehicles might be involved and the person who had responsibility for assigning these vehicles was Mr. McFarlane.

Miss Hinds recalls the week of the accident and that the four (4) persons who died were rostered to work that week starting the Sunday in the following areas:

1. Mr. Menzie was assigned to the Eastern area namely Papine along Mountain View Avenue to Parade – Parade to Harbour View, Airport, Port Royal and Eleven Miles, Bull Bay, St. Andrew.
2. Miss Thompson and Miss Hylton were rostered for assignment in Port Morant, St. Thomas.
3. Mr. West, the driver of the Defendant's vehicle was rostered for special assignment.

Her evidence is that when someone is on special assignment, he got his instructions from the manager – these were issued periodically, for example, for 2 days or an entire week. When the roster was made up details of the special assignments would not be placed on the duty roster. The

person responsible to supervise an inspector on Special assignment would be put on the duty roster.

Mr. West was on special assignment the week of the accident and Miss Stackpole was his supervisor – The details of his assignment would be given to Miss Stackpole by the manager of the division. As Supervisor of Administration she would not be aware of the instructions given to persons on Special assignment. However when persons were going out on duty in Transport Authority vehicles there is a supervisor in charge of those persons in those vehicles.

During the week of the 3rd of May Miss Thompson and Miss Hylton were on special assignment – There was a system in place for them to report to the Morant Bay Police Station on a daily basis and on Fridays they were to report to Mr. Bowes in Kingston.

In cross-examination Miss Hines stated at one point that she could not say where Mr. West was rostered to work the week of the 3rd May 1991, yet later she said he was rostered to work in the eastern area. She admitted that she was unable to recall the names of persons rostered to work in January 1995 yet she remembered clearly those rostered to work the week of the incident.

Miss Delphine Stackpole in her evidence seemed unsure of exactly how many persons had died in the accident – She named 4 persons and ended her list with the words "and some others I don't recall". She states that Major Risden Crooks was the managing director at the time.

According to the duty roster prepared by Miss Hines for the relevant period, she was on Special Assignment to rural Jamaica and Audley West was one of the Inspectors she would be supervising . She states that on the Thursday and Friday of that week she was supposed to be in St. Elizabeth with her team. Her team consisted of Ainsley Dixon, Audley West, M. Francis, T. Lonie and D. Davis.

She further stated that Audley West was authorised to drive Transport Authority vehicles and that he lived in St. Thomas.

Miss Stackpole could not recall Mr. McFarlane working at the Transport Authority at the material time – She states that she never witnessed a situation where the Managing Director made changes to special assignments without consulting the General Manager in charge of operations.

She stated that Audley West was not with her on the Thursday of the week of the accident and that she made no checks to see if he had been assigned elsewhere.

Mr. Wilbert Bowes the final witness for the Transport Authority gave evidence that in 1991 he was the manager for route monitoring and inspections. He was in charge of Inspectors and other persons working for the defendant at the time.

He stated that in May 1991, Miss Delphine Stackpole was employed as a Supervisor – Miss Aldith Thompson, Selbourne Menzie, Devon Hylton, Audley West and Pamella Duffus were all employed to the defendant.

He outlined that his job entailed monitoring and inspecting the routes and supervising the Inspectors. He would move inspectors from area to area assigning them various duties – Supervisors would supervise the Inspectors and report to him periodically.

Inspectors were required to patrol areas to check on buses and to see that the bus crews were complying with the Transport Authority Act. From time to time, the duties of Inspectors and Supervisors would be detailed and authorized by him. Books were provided to record these duties, these were called the Inspectors' Duty Roster – This book would tell the Inspectors what types of duty they were assigned, whether Patrol or Inspection. Communication of the above information would either be by the Inspectors going and checking the roster or the supervisors informing them – Although

a Supervisor could change the duty of an Inspector, Mr. Bowes authority was necessary before that could be done.

Mr. Bowes said that in May 1991 Major Crooks was the Managing Director – Although the Managing Director could make changes to the roster, he would nevertheless expect to be notified of such changes.

In May 1991 Miss Thompson and Miss Hylton were given special instructions by him to do duties in St. Thomas. They were to report to the Police Station in Morant Bay daily and on Fridays they were to report directly to him in Kingston. The focal point of their operations was the town of Morant Bay. Pamela Duffus on the 3rd of May 1991 was part of a patrol which was scheduled to go as far as Eleven Miles Bull Bay and return to base in Kingston. Mr. Selbourne Menzie and Audley West were a part of that same Patrol – West was detailed as the reserved driver – he was not scheduled to drive. There were 2 drivers i.e. the regular driver and the reserved driver. The Transport Authority had special drivers for special assignments.

On the 3rd May 1991, the vehicle that was involved in the accident had West as the reserved driver, however, Mr. Bowes could not remember who was the regular driver assigned for that shift.

He said if changes were to be made in respect of drivers the supervisor would have to inform him. As it related specifically to any changes in respect of Audley West driving that day, he received no notification.

On cross-examination Mr. Bowes stated he knew Arthur McFarlane and that he worked at the Transport Authority - He cannot recall if Mr. McFarlane was working there in May 1991. He admitted that when Mr. McFarlane worked there he was at one stage in charge of the assigning of motor vehicles. He took over from Mr. McFarlane but he cannot recall when that was, whether prior or subsequent to the accident. He said it is possible that Mr. McFarlane could have been responsible for the assigning of motor vehicles on 3rd May 1991.

In response to a suggestion that Audley West was assigned to St. Elizabeth on 3rd May 1991 he said that Mr. West could not be properly assigned there without he being so informed. He said he knew Miss Stackpole. However on 3rd May 1991, he had not given her any instructions to carry out any special operations in St. Elizabeth. He was very emphatic that he knew of no such instructions. He further stated that as far as he was concerned Audley West was not the reserved driver for the early shift from 6:00 a.m. – 3:00 p.m. on the 3rd May 1991 on the patrol to Eleven Miles and

if he said so earlier it was an error. To a suggestion that he did not remember where Audley West was authorized to be on the 3rd May 1991, he responded that he did not remember – He said that West could have been authorized by someone but he did not know who. The defence then closed its case.

The defendant counsel in his closing arguments put forward the submissions that:-

1. If liability in the matter was sought to be established vicariously then the plaintiff would be required to establish negligence by either an agent and/or servant of the defendant.
2. It was for the plaintiff to establish and indicate why the defendant should be held responsible for the negligence.

Here the plaintiffs are contending that Audley West, the actual driver of the Transport Authority vehicle involved in the accident was the servant and/or agent of the defendants. The Court upon considering the evidence presented before it has to decide whether the defendant Transport Authority should be held responsible for the negligence of Audley West.

In this regard, we are guided by such decisions as the House of Lords in **Hilton v Thomas Burton (Rhodes) Limited [1961] 1 ALL England Law Reports 74** where Lord Diplock J., at page 76 said that the true test of

vicarious liability is (at page 76), "was ... the defendant (i.e. employee) doing something he was employed to do? if however the servant was not doing what he was employed to do, the master does not become liable merely because the act of the servant is done with the masters knowledge, acquiescence or permission."

This case may be distinguished from the case at hand, as Audley West was employed to drive his employers (Transport Authority) vehicles and according to the evidence of Mr. Bowes, was actually the reserved driver for that particular day. Based on the submissions and the evidence of the witnesses for the defendant, there is a strong suggestion that West was actually acting in relation of his employment and was not on a frolic of his own as had been suggested. In **A and W Hemphill Limited v Williams [1966] 2 Lloyds Law Reports 101**, where Lord Pearce cited the dicta of Lord Clyde LP in the Scottish decision of **Kirby v National Coal Board [1958] Sess. Cas. 514 at page 532** of that judgment where he had said:-

> "vicarious responsibility for the act of a servant would only attach to the master if the act of the servant is done within the scope of the employment. It is probably not possible and it is certainly inadvisable to endeavor to lay down an exhaustive definition of what falls within the scope of employment. Each case must depend to a considerable extent on Its particular facts. But, in the decisions four different types of situations have been envisaged as guides

> to the solution of the problem. In the first place if the master actually authorized the particular act he is clearly liable for it. Secondly, where the workman does some work which he is appointed to do but does it in a way which his master has not authorized and would not have authorized had he known of it, the master is nevertheless still responsible for the servants act which is still within the scope of his employment. On the other hand in the third place if the servant is employed to do a particular work or a particular type of work and he does something outside of that work the master is responsible ...."

Further on page 103 Lord Pearce said:-

> "It is a question of fact and degree in each case whether the deviation is sufficiently detached from the masters business to constitute a frolic of the servant unconnected with the enterprise for which he was employed."

Based on the evidence presented to the Court, it would seem that the second situation identified in the dicta is more than applicable to the situation at hand. That second situation for ease of exposition could be reduced to three parts and will be dealt with as such.

Firstly, ... "Where the workman does some work which he is appointed to do ..."

What was Audley West appointed to do? According to the evidence of defendant witnesses, he was employed/appointed to be an inspector of the defendant. As an inspector, he was expected to go on assignments, be

they special or ordinary, wherever the defendant sent him and at whatever time they sent him. His duties would be first indicated on a roster and then, if necessary, further expounded on by a supervisor.

Mr. Bowes in his evidence said that West was a reserved driver. Miss Stackpole said that a vehicle was assigned to her for the carrying out of special assignments, who was the assigned driver, we were not told. West, however, it would seem was appointed to drive the defendant motor vehicles where necessary.

Mr. Bowes, the General Manager at the time in issue, May 1991, indicated that he was involved in the instructing and training of the Transport Authority personnel in terms of their duties. He said that inspectors were moved from area to area as required. Audley West was appointed to work in any area where he was sent. There were two shifts, a morning shift and an afternoon shift. West was appointed to work either shift as instructed by the roster, the supervisor, Managing Director or General Manager.

Secondly, ... "where the workman does the work [i.e. which he is appointed to do] in a way which his master has not authorized ..." The defendant submits in their defence and counterclaim that West was not authorized to drive that particular vehicle and neither was he to be in St.

Thomas on that particular day. The evidence of the defendant witnesses is irreconcilable as to exactly what Mr. West was authorized to do that day. Miss Stackpole said that he was to be on special operations with her in St. Elizabeth; Mr. Bowes said that he was the reserved driver for Eastern Region, but he was to work the afternoon shift; and Miss Hinds who at first could not recall, later on said that he was to be in the Eastern area which ended right at the border of the parishes of St. Andrew and St. Thomas. It is the opinion of the court that there are these irreconcilable differences between the various witnesses because they would like the court to believe that Mr. West was on a frolic of his own and was not doing what he was authorized to do by his master – at the time of the collision.

Thirdly, "... and would not have authorized had he known of it, the master is nevertheless responsible, for the servant act is still within the scope of his employment." It is highly debatable and yet a moot point whether or not West's actions that fateful day in May of 1991 would not have been authorized by the defendant, if they had known of it. It is debatable because the witnesses for the defendant have all given evidence contradicting each other and so it would not be an easy task to ascertain the true or even probable situation at the time.

It seems inconceivable that an ordinary inspector who according to Mr. Bowes "would be out of order if he made changes to the roster without getting authorization from him or a supervisor," could take away one of the defendants vehicles and go on a frolic of his own when no one gave him permission and without anyone asking him where he was going. Then again, no records were presented to the Court, not the roster of that week of May 1991 of which Miss Stackpole and Miss Hinds were so knowledgeable; not any special instructions given to Miss Stackpole as the supervisor of Mr. West at that time. In any event based on the abovementioned reasons, Audley West was still acting within the scope of his employment and therefore his master, the Transport Authority would nevertheless still be responsible for his actions.

The fact remains that everyone in the defendant's vehicle were employees of the defendant on duty that particular day, based on the evidence of all the defendants' witnesses. In **Omrod v Crossville Motor Services Limited [1953] 2 QBD 753**, per Singleton LJ, who in considering the purpose of the plaintiff driving in that case, stated at page 754:-

> "It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner of the use of a chattel is not proof of agency, but the purpose for which

> this car was being taken down the road on the morning of the accident was either that it should be used for the joint purpose of the male plaintiff and the third party when it reached Monte Carlo."

And further at page 755:

> "The law puts an especial responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly on the owners business or for the owners purposes the owner is liable for any negligence on the part of the driver. The owner escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

This dictum introduces two concepts advanced as a possible solution to situations like the present one. That of interest and the purpose in the use of the vehicle by the owner. The defendants had an interest in the use of the vehicle involved in the accident. It was to facilitate their purposes of transporting their employees to their special assignment (i.e. seizing unauthorized vehicles or those not conforming to the Transport Authority Act). The law so far has been to the effect that for there to be a frolic of 'his' own in respect of the employee, consideration has to be given to possession of the concepts introduced, that is, was there was any interest of the Transport Authority in the use of the vehicle. In **A and W Hamphill Limited v Williams [1966]** the Courts applied the dominant purpose test.

The view was that the more dominant are the current obligations on the master's business in connection with the vehicle, the less weight is to be attached to disobedient navigational extravagances of the servant. The defence has failed to account for West's assignment on that particular day of the accident. Where was he supposed to be? We are given speculative information [as outlined in the evidence of the defendant's witnesses] as to his actual duties on that day, but nothing concrete as to where he should have been or what he was supposed to be doing in respect of his employment. It is reasonable to assume and to adopt the Courts position at page 104 of the judgment and find that, in weighing up the question of degree whether there is substantial or any deviation at all, from Mr. West's course of employment, to constitute a frolic of the servant unconnected or in substitution of the defendant's business, that that was not so. The presence of only the defendant's employees in the vehicle is a decisive factor against the situation as a mere frolic of a servant. Therefore that defence fails.

The defence also attempted to rely on the defence of inevitable accident citing the definition of **Charlesworth and Percy on Negligence 8th Ed. (1990)** page 241, "Inevitable accident is where a person does an act, which he lawfully may do but causes damages, despite there neither have been negligence or tension on his part." None of the defendants witnesses

gave any evidence in respect of how the accident actually occurred, and based on the evidence of those who actually did see the accident, and the actual consequence of the accident which makes the eye witness evidence even more plausible, there is no doubt that Audley West was negligent. The point of impact of the defendants' vehicle with the plaintiff's vehicle clearly indicates that the defendant was driving on the wrong side of the road. Further, if the defendant was driving at a reasonable speed, it is reasonable to assume that the consequence of any collision would not necessarily have been so dire. Mr. Melbourne in his submissions to the Court suggested that the evidence of Miss Freebon, was to the effect that it was only the Chevrolet vehicle which was speeding, and may be if the Chevrolet vehicle had allowed the defendant vehicle to overtake it there would have been no accident. What a preposterous suggestion. If it was only the Chevrolet vehicle that was speeding, then how should it allow the defendants' vehicle to overtake it? Is it not a natural inference that for any two vehicles driving in the same direction to attempt any overtaking, they would have to be going at the same speed and further for the one doing the overtaking to be successful, that would necessarily be the one to speed up. Based on the evidence presented to the Court, the defendant vehicle was prevented from overtaking the Chevrolet vehicle and neither would relent, so one can

visualize the race to overtake and not be overtaken. There must necessarily have been some speeding by both the defendant and the Chevrolet vehicle. Therefore, Mr. Melbourne's submissions as to the lack of negligence on the part of the defendant fails.

Paragraph 3 – 115 **of Charlesworth and Percy on Negligence 8th ed.** (1990) at page 241 says, "... the true view is that loss must lie where it falls, unless it can be shown that it was caused by a breach on the part of some other person of a duty to take care, or some duty making it wrongful for him to have inflicted the loss upon the person who has suffered it."

On the heels of that at paragraph 3 – 116 at page 242, it is said there that, "there can be no inevitable accident, unless the defendant can prove that something happened, over which he had no control and the effect of which could not have been avoided by exercise of care and skill."

Although the defendant's made a noble effort to support this defence, the facts of the case and the evidence led, strongly suggests that the defendants' driver could have prevented that fatal accident, if he had exercised even a modicum of care and skill. The accident was more avoidable than inevitable. This defence fails.

To cement the Courts position in this regard, the decision of Widgery J. in, **Scott v Warren (1973} 117 Collectors Journal, 916** lends strong

support as there it was said that, "....The civil standard was that a following driver was bound so far as reasonably possible to take such a position and to drive in such a fashion as would enable him to deal successfully with all traffic exigencies reasonably to be anticipated; but whether he had fulfilled the duty was in every case a question of fact whether on any emergency, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances".

Despite all the defence's efforts to convince the Court otherwise, the evidence clearly revealed that there were no "traffic exigencies" in the particular circumstances of the case "reasonably to be anticipated". On the facts of this case it cannot be said that the defendant who was the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances. This accident was not inevitable and was not the result of any reasonably anticipated traffic exigencies.

The Court therefore finds in the favour of the Plaintiff.

1. Judgment for the Plaintiff on the claim for the sum of $628,880 with costs to be taxed or agreed.

   Interest at the rate of 4% from the 3rd of May 1991 to the date hereof.

2. Counterclaim dismissed.