IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1997/W018

BETWEEN	DWIGHT WALKER	PLAINTIFF
A N D	WINSTON SMITH	1st DEFEN DANT
A N D	PERCIVAL FRANCIS	2nd DEFENDANT
A N D	NEWPORT MILLS LIMITED	3rd DEFENDANT
A N D	RUDOLPH HALSTEAD	4th DEFENDANT

Mr. Ransford Braham and Mr. Michael Hogarth instructed by Livingston Alexander and Levy, Attorneys-at-Law for the Plaintiff.

Mr. Alexander Williams instructed by Williams, Palomino, Gordon-Palomino, Attorneys-at-Law for the 3rd and 4th Defendants.

The 1st and 2nd Defendants not appearing and not represented.

Heard: January 7-10, 13-15 and 24, 2003

N.E. McIntosh, J.

On the 4th of October, 1996, at about 1:00 p.m., twenty-six (26) year old Dwight Walker boarded a Hiace minivan in Mandeville, Manchester, on his way to Spanish Town in the parish of St. Catherine. That journey was cut short in the vicinity of Innswood Estate, on the Old Harbour Main Road in St. Catherine, when a collision occurred between the Hiace minivan and a Ford motor truck which was also heading in the Spanish Town direction.

It is Mr. Walker's evidence that the Hiace minivan was driven by the 2nd Defendant Percival Francis while the truck was driven by the 4th Defendant Rudolph Halstead. The pleadings disclose that the 1st Defendant Winston Smith is the owner of the minivan and that the 3rd Defendant Newport Mills Limited owns the Ford motor truck.

As a result of the collision Mr. Walker sustained some very serious injuries which have left him unable to walk and unable to do anything to help himself. His injuries have, in effect, robbed him of his dignity as a human being as he is now entirely dependent upon others even for the performance of the most basic bodily functions.

Two (2) medical reports were admitted into evidence one from the Kingston Public Hospital, dated May 2, 1997 and one from the Mona Rehabilitation Centre dated August 18, 1997 both attesting to the severity of Mr. Walker's injuries.

The Kingston Public Hospital report from Dr. J. Buschmann, disclosed that Mr. Walker was transferred from the Spanish Town Hospital on October 5, 1996 with full conscious level, no power in all limbs, loss of sensation below dermatom C5 and with a urinal catheter, in situ.

On X-ray he was found to have an anterior dislocation of the cervical spine (C4/C5). A crutchfield traction was applied and he was given

antibiotics, analgesics and blood was transfused. He was treated with physiotheraphy and when traction was discontinued the cervical spine was rested in a Philadelphia collar.

In sum, according to Dr. Buschmann, Mr. Walker sustained a luxation C4/C5 (cervical spine) with a spinal cord injury, which left him tetraplegic at that point, unable to move his limbs. He spent four months at this hospital during which time the luxation showed signs of bony consolidation but his neurological status did not improve and his condition had a poor prognosis.

On December 10, 1996, Mr. Walker was transferred to the Mona Rehabilitation Centre (now the Sir John Golding Rehabilitation Centre), where he spent eleven (11) months. There he received continuous physiotherapy, occupational therapy and nursing care. He was also given medications for muscle spasm. He regained some degree of muscle power in his upper limbs but no improvement in the lower extremities and he was assessed as likely to have a permanent impairment of about 80% of the whole person.

According to Dr. Htay Myint, he had now become a quadraplegic, secondary to cervical spine injury.

Mr. Walker was brought into the Court room in a wheelchair which had to be reclined while he gave his evidence and as he gave his evidence,

he, from time to time, had to receive attention from his accompanying care-givers who had to shift his position or use a pillow to separate his legs to prevent them from resting against the sides of the wheelchair for any extended periods, as he now has pressure sores.

In his words, since the accident "I am completely dependent on others. I lose my independence physically and financially. Physically I am unable to bathe myself, feed myself. There is nothing I can do for myself.

Financially – because I am unable to work.."

Further, he said "I am regularly depressed. I was on depression tablets..... I feel as if I am a child again in my mother's arms and lose my erection. My bladder and my bowels, I have no control over, causing regular muscle spasm." Indeed while he gave his evidence there were episodes of intense shaking of his legs.

He said "I was employed, able bodied, sexually active, involved in social activities, able to play football, do a little running and swimming. These are things that I enjoyed."

"Financially - I don't have no idea whatsoever what would be my progress in life financially.

Mentally, it is very down pressing. A lot of people look down on my condition. It is difficult sometimes to associate myself in society."

He has a home care giver who attends to him in the day. There is a need for care giving in the night but he is financially unable to meet that need and depends upon relatives to assist at nights.

That Mr. Walker is entitled to be compensated for this drastic change in the quality of his life and the consequential expenses to which he has been put is beyond question. He has claimed special damages for the period from October 1996 to November 2002. During that time he received private nursing care while in the hospital and home nursing care when he was eventually discharged from the Mona Rehabilitation Centre. His expenses for medical supplies and medication, as well as home nursing care, continue and will continue for the duration of his life.

With the evidence of his sister Angella Marie Walker, Mr. Walker has proved expenses amounting to $541,002.98, aided by various documents and receipts. He also claimed the cost of a second hand wheelchair which he bought for the sum of $31,000. That wheelchair had to be supported against a column in the Court room and is clearly in need of replacement.

Up to the time of the accident Mr. Walker was an industrious young man. He worked as a mason while at the same time augmenting his earnings by planting cash crops.

His evidence is that he did not work as a mason continuously because there were times when there was no work so he estimated that he worked at his mason trade for about eight months each year. He planted between three and four cash crops each year. He would tend his crops himself for the most part, sometimes even when he had work as a mason but from time to time he would employ persons to do some weeding or mulching and he would sell his crops over a six week period, after each harvest, earning approximately $3,000 per week.

He would earn about $10,000 per week as a mason but he was unable to offer any documentary support for this income as also for his earnings from farming. He was similarly unable to support his claim for certain items of his special damages for the period April 1998 to November, 2002 – namely, his claims for home nursing care, transportation and medication.

However, Mr. Braham correctly submitted that although it is trite law that special damages must be specially proved the Courts have accommodated claims which were not supported by documentary proof taking the view that where the Plaintiff has proved that the claim is a true claim but is unable to present exact figures, documents or receipts, the Court has to use its own experience to arrive at an award which is just and reasonable.

He relies on the case of Desmond Walters v. Carlene Mitchell (1992) 29 JLR 173 which is in line with the unreported case of SCCA 18/84 Central Soya Jamaica Limited v. Junior Freeman where Rowe P. said:-

> "In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence."

Wolfe, J.A. (Ag.) as he then was had said in the Walters case that persons such as sidewalk vendors do not engage themselves in the keeping of books of account and they operate on a day-to-day basis without any regard to accounting.

As Mr. Walters would fall into that category of persons, Mr. Braham submits that the sums sought in those instances for which he has no supporting documents are neither unreasonable nor outrageous and asks the Court to accept these claims as proved.

In making a determination in this regard the Court is greatly assisted by the evidence relating to earlier periods, as there was documentary proof of the cost of medication and of nursing care as also transportation costs. Using these as a guide, the claims for transportation at a rate of $1000 per week is reasonable. This is less than the Plaintiff's evidence disclosed but in line with the figure in the receipt forming Exhibit 15.

The Plaintiff gave evidence that he had purchased a motor car to assist with transportation at one point but had to park this vehicle when he was unable to meet the cost of licencing and insuring it. No claim is made for the vehicle and I agree with Mr. Braham that the claim for transportation costs should include that period when the Plaintiff's vehicle was in operation and should be assessed as taxi fares through-out. This claim would then cover the period of four (4) years and eight (8) months from April 1998 to November 2002 and would amount to $243,000.

Similarly, using the rate of home nursing care which was applicable to the period 1996 to 1998 – the claim would be for $1000 per week for the first year, April 1998 to March 1999 amounting to $52,000 and $2000 per week for the years April 1999 to March 2002, in addition to the thirty five weeks from April 2002 to November 2002, making a total of 191 weeks at $2000 per week. This amounts to $382,000. However, the sum claimed in the pleadings is $348,000 and the Plaintiff must therefore be content which that sum.

Mr. Walker's claim for the cost of medication during the period April 1998 to November 2002 should be assessed using the cost of $4,500 per month as disclosed in receipts relating to the period 1996 to 1998. This claim would therefore be for 56 months at $4,500 amounting to $47,492.51.

Here again the Plaintiff is limited to the sum of $42,992.51, as claimed in his pleadings.

Under the heading 'Loss of Earnings' the Plaintiff claims $10,000 per week as a mason for the period October 1, 1996 to November 22, 2002, which is roughly six years. If in 1996 he earned $10,000, chances are that he would increase his earnings by 2002. Therefore $10,000 is accepted as reasonable for the six years claimed. Using $10,000 per week for 32 weeks of each year, the Plaintiff would therefore have lost $1,920,000 in earnings as a mason.

Mr. Walker said he earned $3,000 per week for periods of six weeks after he had reaped his three or four crops each year. Taking the lower figure of three that would amount to eighteen weeks per year over the same six-year period. The sum under this heading of special damages would therefore be $324,000.

The Plaintiff also claimed the sum of US$245.00 for cervical collars and tendered in evidence as Exhibit 11 (eleven) documents, which spoke to the prescription for the collars, the measurement and the postage costs indicating its importation but the cost of US$245 is not actually supported by a receipt. Clearly there was need for the collar and the evidence of his

witness is that he had to have three while in hospital. The medical report also refers to the use of the collars.

I am therefore of the view that an award should be made to meet this claim as it was clearly a true claim and I believe the Plaintiff's witness that this incurred a cost of US$245.00 - an amount which seems quite reasonable.

Turning now to General Damages, the words of Byrne J, in Rushton v National Coal Board, spring readily to mind.

> "This is a case in which money cannot really compensate at all ... yet compensation must be assessed in money even if it appears to be measuring the immeasurable."

To assist the Court in measuring the immeasurable Mr. Braham brought the following cases to the attention of the Court.

(1) C.L.1996/Y003 Jeffrey Young v. Book Traders Caribbean Limited Derrick Harvey and West Indies Publishing Limited, where the award under this head in July 1997, was $10,000,000 which when updated using the October, 2002 CPI of 1539.2, would amount to $14,589,573.45.

(2) C.L.1997/W184 Anthony Wright v. Lucient Brown where the award of $8,000,000 in March 2000 when upgraded would today be $9,607,240.

(3) C.L.1991/J283 Imogene Amanda Jackson v. High View Estate and Nathaniel Byfield where in July 1997 the award was $2.600.000 and would today amount to $3.8 million.

(4) C.L.1976/H039 Sylvester Hylton v. Leonard Davis:-

In April 1980 the award was $234,000 which when updated would today be $3,245,301.01.

It is Mr. Braham's submission that in recent times the trend in the Court is to award damages at the higher rate as in the Jeffrey Young v Book Traders case and it is his view that in these circumstances an award of $14 million would be appropriate.

The Plaintiff also seeks damages for loss of future earnings. To my mind there is no question about the Plaintiff's entitlement to damages under this head and I am in agreement with Mr. Braham that a multiplier of 11 is appropriate with the multiplicand being annual earnings of $374,000 ($320,000 per annum from mason work and $54,000 per annum from farming). Bearing in mind the age of the Plaintiff (now 32 years old) and his life expectancy, which according to the Life Table in Khan's Recent Personal Injury Awards in the Supreme Court, Volume 4 would be 38.5 years, I hold that a multiplier of 11 is quite reasonable.

The Plaintiff also seeks awards for the cost of future nursing care, medication and transportation and of two wheelchairs, which will hopefully serve for the reminder of his life.

Multipliers of 15, 11, and 11 using multiplicands of $104,000, $54,000 and $52,000 have been suggested for nursing care, medication and transportation costs, respectively, and in all the circumstances I accept these as reasonable, especially as it relates to nursing care because no claim is really being made for the provision of night care, for which there is a need.

A price list was tendered in evidence as Exhibit 21, to show the cost of wheelchairs, in an effort to assist the Court on this aspect of the claim. Having regard to the nature of the Plaintiff's injuries it seems to me that wheelchairs in the price range of US$3500 would be best suited to his needs and would agree that provisions should be made for two chairs.

Mr. Williams for the 3rd and 4th Defendants submitted that that upward trend in recent award of damages is not consistent and referred to the case of C.L.2001/T075 Janice Thompson v. Gloria Williams and Michael Charlton in which damages were assessed on May 17, 2002. That Plaintiff had sustained 70% permanent partial whole person disability and was awarded $3,400,000 for pain and suffering. He concedes that in the instant case Mr.

Walker's injuries are more severe with an 80% permanent partial disability and that an upward adjustment would be necessary in his case.

He suggests that an award in the region of J$5,000,000 would be appropriate here. He was prepared to leave the assessment of special damages to the Court although he had reservations about certain items such as the need for private nursing care when the Plaintiff was in hospital and ought to have received nursing care from the hospital staff.

This reservation must be considered in the light of the unchallenged evidence from the Plaintiff's witness that the Plaintiff required 24 hour nursing care. He could not remove saliva from his mouth by himself, could not feed himself, could not remove the roaches that were in his bed and were over cupboards, and everywhere. In addition, there were other patients on the ward and only two nurses.

Clearly, if the two nurses were to divide their attention between Mr. Walker and the other patients on the award – (4 rows of beds with patients)- Mr. Walker with patients would not get the care he needed. She was asked if she complained when she observed that the care he was receiving was insufficient and she said "bitterly." In the end, she had to resort to private nursing care and the Plaintiff should not be denied his expenses in this regard.

Mr. Williams also pointed out that the Plaintiff's earnings from his mason trade were not consistent as it was his evidence that he did not work all the time. This was already taken into account by the deduction of four months in each year. He also mentioned the absence of receipts relating to Mr. Walker's earnings though he concedes that it is open to the Court to make a determination as to what is reasonable and just and he referred to the indication from the authorities that income tax should be deducted from the award for loss of future earnings.

I am of the view that awards for personal injuries of the severity of those sustained by Mr. Walker should be geared towards the provision of as comfortable a life as possible for a Plaintiff who has lost almost everything. One of the things he has not lost is his ability to think, so his unhappy condition is further compounded by his thoughts of what was and is now and also what lies ahead.

It has truly been said that the mind is its own place and in itself can make a hell of heaven or a heaven of hell. At this point in his life, Mr. Walker's mind is not making a heaven of hell and he ought to be given the means to provide himself with as much assistance as possible to deal with the difficulties of his daily life.

An award in the range of that made in the case of Jeffrey Young v Book Traders Caribbean Ltd. and Ors. (supra) is to my mind what is appropriate in these circumstances. The injuries sustained by Mr. Young are similar to Mr. Walker's injuries. They were of similar age at the time of the accident. Additionally both suffered pressure sores, had spasms, bladder infections, suffered from bouts of depression and had an assessed whole person impairment of 80%.

Accordingly, I award to Mr. Walker the sum of J$14,600,000 as General Damages for pain and suffering and loss of amenities which accords with the award made to Mr. Young in July of 1997, when updated.

I award the sum of J$4,114,000 for loss of future earnings using the multiplier of 11 and the multiplicand of $374,000 as previously outlined. From this figure income tax of 25% is deducted leaving a total of $3,085,500.

For future home nursing care, I award the sum of $1,560,000 using a multiplier of 15 with the annual cost of $104,000 and for future transportation expenses I award the sum of $572,000.00 using a multiplier of 11 and the annual cost of $52,000.

A sum of J$594,000.00 is awarded for future medication expenses being the annual cost of $54,000 times the multiplier of 11.

In addition I award the sum of US$7000 to cover the cost of two wheelchairs, as previously indicated.

The total award to the Plaintiff under the heading of General Damages for Pain and Suffering and Loss of Amenities, Loss of Future earnings, Future Nursing Care, Medication and Transportation is therefore:

$14,600,000.00
3,085,500.00
1,560,000.00
572,000.00
594,000.00
$20,411,500.00

plus US$7000 for two wheelchairs. Interest is awarded on the sum of $14,600,000 at the rate of 6% from the 17th of May, 2000 to the date of this judgment.

Special Damages is awarded in the sum of J$3,418,995.49 and US$245.00 with interest at the rate of 6% from October 4, 1996 to the date of this judgment.

Having thus assessed the damages to which the Plaintiff is entitled the Court must now determine from whom the Plaintiff should recover these damages.

The Plaintiff has filed suit against four defendants, two of whom have not seen fit to defend this action. Consequently the Plaintiff has secured a default judgment against the 1st named Defendant, Winston Smith and the

2nd named Defendant, Percival Francis. They are therefore liable to pay damages to the Plaintiff, as assessed. But what of the 3rd and 4th Defendants, Newport Mills Limited, owners of the Ford Motor Truck and Rudolph Halstead, the driver of the truck? Are they also liable to the Plaintiff for the injuries he received?

The Plaintiff contends that the 3rd and 4th Defendants are liable because Mr. Halstead owed a duty of care to the driver of the minivan in accordance with the underlying principle of the law of the highway that all those lawfully using the highway.... must show mutual respect and forbearance and must use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. Reasonable care means the care which an ordinarily skilful driver or rider would have exercised, under all the circumstances and connotes an avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on. (See Charlesworth and Percy on Negligence, Ninth Edition, page 721 paragraph 9 – 187.)

Mr. Braham sought to show, with the aid of the Road Traffic Act and the 1987 Road Code as well as the case of McLeary v Eldridge (1953) 1 D.L.R. 547 that Mr. Halstead was at least partly responsible for the collision.

He at one point submitted that it was open to the Court to find Mr. Halstead solely responsible but in light of the Judgment obtained against the First and Second Defendants the Plaintiff must be taken to be seeking to establish contributory liability in the 3rd and 4th Defendants.

The Plaintiff and the 4th Defendant gave two very different accounts as to how the collision occurred. It is the Plaintiff's evidence that Mr. Francis overtook Mr. Halstead's truck and was in the act of overtaking another truck, reaching about two-thirds of the length of the truck, when an oncoming vehicle prevented Mr. Francis from completing the overtaking manoeuvre and caused him to attempt to reoccupy the space he had left in front of Mr. Halstead's truck. However, the size of that space had been reduced as it was partially occupied by the truck so that only a part of the minivan was able to go into the space with the result that the truck collided with the minivan which then overturned several times.

He said:

> "Mr. Percival brake up and was about to come back in the space and there was a loud explosion from the back of the van and after that I feel metal come in on me – the metal come in on my neck and my ribs in my side and glass break...."

He was unable to say exactly where the minivan ended up after the collision and when first asked about the oncoming vehicle he said:

> "I can't recall exactly. I think it was a Coaster cause it was some distance."

Then later he was sure that it was a Coaster and not a Leyland Truck as was suggested to him in cross-examination.

He was unable to come out of the van by himself and had to be assisted after which he was placed in a vehicle and taken to the Spanish Town hospital.

Though he did not drive a vehicle he was able to do so and it was his opinion that the minivan was travelling at a fast rate of speed – over 55 to 60 miles per hour. He was not able to say how fast the oncoming vehicle was travelling but he didn't think it was more than 50 or 60 miles per hour. Mr. Halstead's truck might have been travelling below that speed. He said the minivan had speeded up to overtake.

In cross-examination he said part of the front of the minivan was behind the truck when it tried to regain its position before the collision. After braking up the minivan did not swerve to the left, but, somehow had moved from the right side of the road to the position on the left, behind the truck. He was not able to say if there was a ditch to the left side of the road facing Spanish Town and was unable to say where the van came to rest after it stopped overturning.

He said he was focusing straight ahead of him on the on-coming vehicle and he altered his position on where the minivan had reached when it was obliged to pull back – it became a question of whether it was two-thirds of the length of the truck or half way or little less than half-way. He said eventually that if the truck were to be divided into three the van was in the second third. It was his view that the road was wide enough for three vehicles such as three small motor cars to pass but there was not enough space for the minivan, the truck and a Leyland truck to pass side by side.

Mr. Halstead's account of the accident is that as he drove along looking in his rearview and side mirrors from time to time he saw an oncoming vehicle flashing its lights and he suddenly became aware of a minivan overtaking his truck as he felt something hit the right front fender and bumper of the truck. He then saw the van spin around in front of the truck, hitting the left hand fender after which it went over into a ditch and ended up on its side, on the left side of the road.

He stopped his truck with the front on the soft shoulder and the back on the road surface. Then he got out of the truck and went to the assistance of the occupants of the minivan.

Mr. Halstead said he observed that the front of the minivan was turned in the Old Harbour direction. It had a tear on the left side from the point

where the conductor would sit, all the way to the back. He also made observations of the truck – the front bumper was bent and pointing straight ahead in front of the truck and the left front fender was crushed. Two photographs were admitted into evidence showing the damaged areas of the bumper, seemingly consistent with his evidence.

He remained on the scene until the police arrived. Mr. Francis was subsequently taken away by the police while he was instructed to take his truck to the Examination Depot. He said he drove the truck up against a pole and pressed the bumper back on the front of the truck then drove it to the Examination Depot.

It is his evidence that he had been travelling at about 30 to 35 miles per hour and indeed it would appear on both accounts that he was not travelling at a fast rate of speed as the minivan on impact would not, in all probability, have ended up on the left side of the road.

He was never charged with any criminal offence arising from this accident.

In cross-examination he said he had neither seen nor heard the minivan before the impact. There were vehicles travelling in front of him. The road was about 24 feet wide and his truck about 8 feet wide. In his opinion the minivan was about 6 feet wide. It was the side of the van in the

region where the conductor sits that hit the truck. That area of the van is about three seats from the front. He agreed that a portion of the van had passed the truck when the vehicles collided. He had been using his side mirrors as he drove along but he did not see the minivan before the collision. Neither did he see it driving alongside the truck and he did not hear the sound of its engine.

According to Mr. Halstead the oncoming vehicle was a Leyland truck and not a Coaster. He had been focusing on the road in front of him and had observed the Coaster's flashing lights and he did not hear or see the van before the collision because everything happened so fast. It is to be noted that the Plaintiff also agrees that the incident took place very quickly.

I find that the probabilities favour the 4th Defendant's account. He was after-all the driver of one of the vehicles involved and can speak in more definite terms about what was taking place on the road that afternoon than the plaintiff who was seated towards the back of the minivan.

The Plaintiff was admittedly frightened and was severely injured. His evidence was that when he was at the hospital he felt as if he was in water drowning. I am not satisfied that much reliance ought to be placed on his recollection of the events leading up to the collision. He really wasn't sure what type of vehicle was approaching from the opposite direction and cannot

explain how, on his account the van got back partially behind the truck it was overtaking. He was not even able to say where the minivan ended up after the collision. He said he heard an explosion at the back and that may well be how it sounded to him but that does not preclude the scenario described by Mr. Halstead.

It would seem that all the Plaintiff can say with any degree of certainty is that the van was overtaking a truck, that there was an impact and that the van overturned.

On the other hand the 4th Defendant has produced physical evidence which is unchallenged and which suggests that the van was moving forward when it hitched the truck's bumper and this seems to be consistent with it coming from behind the truck. There is no other evidence but Mr. Halstead's about the damage to the van and indeed to the truck. The account given by Mr. Halstead is entirely probable and indicates that the 2nd Defendant far from braking up was seeking to complete the manoeuvre and cut too sharply in front of the truck, colliding with it.

The issue, which must therefore now be determined, is whether on that account there was any negligence in Mr. Halstead – whether he failed in his duty to the other driver involved in this incident by failing to take steps to assist him in his over-taking difficulties.

In bringing the 3rd and 4th Defendants into the picture the Plaintiff is taking a somewhat unusual course inasmuch as the evidence clearly shows that it was the 2nd named Defendant who was negligent in his manner of driving – overtaking when it was not safe to do so and would therefore be liable to the plaintiff in damages. However, the view that the Plaintiff is seeking to persuade the Court to take is that Mr. Halstead had a duty to assist Mr. Francis when he was in the act of reckless overtaking, that he failed in that duty and must therefore bear some of the responsibility for the accident and the resulting injuries to the Plaintiff.

The suggestion to Mr. Halstead in cross-examination was that the reason the van could not come back in front of the truck was because he had driven down into the space and had taken up that space but Mr. Halstead maintained his position that the minivan was overtaking his truck and was not attempting to re-occupy any space before his vehicle.

In the case of McLeary v Eldridge cited by Mr. Braham it was held that while generally a driver is entitled to assume that others will observe the rules of the road, the existence of a statutory right in his favour does not entitle him to disregard an apparent danger that confronts him. However, there is a clear requirement that the Defendant must be aware of the apparent danger.

As Viscount Dunedin said in the House of Lords in Fardon v Harcourt – Rivington (1932) 48 T.L.R. 215 at p 216, quoted in the McLeary case.

> "The root of this liability is negligence and what is negligence ... depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man then there is no negligence in not having taken extraordinary precautions".

Again in Carter v. Wilson (1937) 3 D.L.R. 374 at page 94 Middleton J.A. said:-

> "The statutory right of way is a matter of prime importance, but it is a right that is to be used with due regard to the rights of others and, if a motor driver knows or ought to have known, that some other, by his fault or misfortune is in a position of danger, this statutory right-of-way cannot be exercised with impunity."

Section 51(2) of the Road Traffic Act puts it this way:

> "Nothwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

In this case there is no evidence that Mr. Halstead saw or was aware of any apparent danger. He did not see the van until the moment of impact at which point there was nothing he could do to assist Mr. Francis.

He admitted in cross-examination that if he had seen Mr. Francis in difficulty he would have pulled over as he had done several times in similar situations.

Ought he to have seen and heard the minivan?

On this evidence I find no adverse inference to be drawn from Mr. Halstead's admission that he did not see or hear the van prior to the impact as it seems clear that the van was travelling at an excessive speed and even with the proper look out which Mr. Halstead said he observed and which I believe that he did observe, it is highly probable that he would not have seen or heard the van until the impact. Both the Plaintiff and the 4th Defendant agree that the incident took place quickly.

Mr. Braham placed much reliance on the provisions of Rule 11 of the 1987 Revised Road Code which states as follows:-

> "When you are about to be overtaken by another vehicle move closer to the left and do not increase your speed. Remember that a vehicle may need to temporarily join the line to afford the right of way to oncoming traffic so make provision for same."

Time was when the pre-revised Road Code had a requirement for the driver of the overtaking vehicle to sound the horn giving full warning to the driver of the vehicle being overtaken. Unhappily, the Revised Road Code seem no longer to have that requirement.

There is no evidence of any horn being sounded and Mr. Halstead did not know that he was being overtaken until it was too late.

There is no evidence that he increased his speed and indeed the indications are that his speed was moderate. If any assistance could have been given to Mr. Francis that afternoon it would have had to come from the driver of the oncoming vehicle who had a clear view of the road ahead and apart from flashing his lights could have slowed down and pull to his left allowing Mr. Francis to complete the manoeuvre. It may be however, that that driver did seek to accommodate Mr. Francis but Mr. Francis nevertheless cut too sharply in front of Mr. Halstead's truck and collided with it.

According to Mr. Halstead, to his left was 4 feet of soft shoulder and a ditch where the van ended up. He would therefore have been faced with the possibility of also ending up in the ditch if at the last minute he had taken any sudden evasive action which would perhaps amount to the "extraordinary precautions" referred to by Viscount Dunedin in Fardon v

Harcourt -Rivington (supra), and, which, in my view, he would not be obliged to take.

It is not without significance that he was not charged with any offence arising from this incident. The police were involved and it may reasonably be inferred that they were of the view that there was no negligence on his part.

Mr. Braham also relied on Section 95 (3) of the Road Traffic Act which states that:-

> "The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

This is of no assistance to the Plaintiff as no such failure has been established.

On the totality of the evidence I find no liability in the 3rd and 4th Defendants and judgment is to be entered in their favour.

In conclusion then judgment is to the Plaintiff against the 1st and 2nd Defendants with damages assessed as follows:-

Special Damages	J$ 3,418,995.49
	US$ 245.00
with interest at the rate of 6% from October 4, 1996 to January 24, 2003	
General Damages for pain and suffering and Loss of amenities	J$14,600,000.00
with interest at the rate of 6% and from May 17, 2000 to January 24, 2003	
Loss of Future earnings	J$ 4,114,000.00
Less as income tax calculated at the rate of 25%	$ 1,028,500.00
	$ 3,085,500.00
Future nursing care	1, 560,000.00
Future medication	594,000.00
Future transportation	572,000.00
2 wheelchairs at US$3,500 each = $7,000	

Cost to the Plaintiff as against the 1st and 2nd Defendants to be agreed or taxed.

Judgment to the 3rd and 4th Defendants with costs to be agreed or taxed as against the 1st and 2nd Defendants.