IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. D207/95

BETWEEN	ROGER IAN DAYES	PLAINTIFF
AND	A. CHONG	1ST DEFENDANT
AND	ACHONG LIMITED	2ND DEFENDANT
AND	BASIL JAMES	3RD DEFENDANT
AND	B.J. CONSTRUCTION AND	4TH DEFENDANT
AND	BASIL JAMES CONSTRUCTION AND PLUMBING SERVICES LIMITED	5TH DEFENDANT
AND	NATIONAL WATER COMMISSION	6TH DEFENDANT

The fourth defendant is struck from the records.

Dr. R. B. Manderson-Jones for the plaintiff.

Dennis Goffe Q.C. and Minette-Palmer instructed by Myers Fletcher & Gordon for the first and second defendants.

Garth Lyttle instructed by Garth Lyttle & Co. for the third, fourth & fifth defendants.

Andre Earle and Jeffery Daley instructed by Rattray Patterson for the sixth defendants.

Heard: 25th & 26th November 1998, 11th, 12th, 13th, 14th, 21st, 22nd January 1999 and 8th October, 1999

PITTER J.

On the early morning of the 14th January, 1995, at approximately 1:00 o'clock, Roger Ian Dayes the plaintiff was driving his Suzuki Vitara motor vehicle along Musgrave Avenue in the parish of St. Andrew when he was involved in an accident which resulted in serious bodily injury to him and extensive damage to the vehicle. It is the plaintiff's case that at the intersection of Musgrave Avenue and Comlin Bank Road there was a large hole which

had been dug in the roadway with a high mound of earth alongside it and a trench cut across the road. That the said hole and mound of earth constituted a major obstruction of passage along the roadway, occupying most of the surface of the road and blocking all of the plaintiff's path on the left hand side of the road, causing the plaintiff to swerve and avoid entering the hole or hitting the mound of earth and forcing the plaintiff's car to hit the trench running across the road and from there to collide into a telephone pole on the bank of the right hand side of the road. In swerving to avoid the mound of earth and hitting the open trench, he was thrown from his seat and he lost control of the vehicle. He says that there were no lights in the area except those of his car and at the time he was travelling at approximately 30 miles per hour.

The plaintiff's claim is that the first defendant at all material times was an officer and servant or agent of the second defendant which was at the time a company of consulting engineers. The third defendant at all material times was the servant or agent of the first and or second defendant and or the fifth defendant and or the sixth defendant.

Alternatively, at all material times the fifth defendant was the servant and agent of the first and or second defendant and or the third defendant, and or the sixth defendant.

The sixth defendant is a Statutory Company.

It is the further claim of the plaintiff that the said hole, mound of earth and trench were part of pipe-laying and road works activity being carried out by and under the supervision of the first, second, third, fifth and sixth defendants and or their servants or agents the first, third, and fifth defendants (as the case may be) who they had employed to assist in providing manual labour for carrying out the works and laying the pipes or who did so under their supervision.

The first and second defendants deny the claim and deny that the third and fifth defendants were their servants and/or agents. They also deny that the pipe-laying and road works were being carried out by them or under their supervision and deny that they were responsible for the digging of the hole, the mound of earth and the trench. It is the case of the first and second defendants that at all material times the second defendant had been engaged as a consultant for the design and implementation of the sewerage system in a housing development at Musgrave Avenue and Comlin Road and that the second defendant applied to the sixth defendant for a sewer connection to the sixth defendant's sewer main for the said housing development and which was approved by the sixth defendant who agreed to undertake the responsibility of designing and constructing the sewer trench in question.
They deny the claim for negligence and say that at all material times the work was being carried out by the third and or fifth

defendants who were themselves independent contractors subject to and under the supervisor of the sixth defendant. They also filed notice of indemnity against the other defendants.

The third, & fifth defendants also deny the plaintiff's claim. They deny that there was any mound or hole or trench left in the road or at all; that earlier in the day a trench was dug but it was later backfilled and levelled off leaving no obstruction in the road. They say that excavation work was done under the supervision of the first, and second defendants. It is their case that the injuries occasioned by the accident, loss and damage suffered by the plaintiff were solely caused or contributed to by the plaintiff's own negligence.

The sixth defendant denies that any of the third, or fifth defendants were its servants or agent. It also denies that the pipe - laying works and roads and works activities were carried out under their supervision; or done by any of its servants or agents but that this was carried out by the first, second and fifth defendants. The sixth defendant in its defence, claims that the first defendant, acting as the servant and/or agent of the second defendant, contracted the third defendant to connect a sewer main to the said location and that its actual role as regards the said connection was limited to the examination of the laying of the sewer mains and the building of the manholes to ensure that such works were undertaken to its specifications.

It is the further defence of the 6th defendant that the loss and damage suffered by the plaintiff was caused or contributed to by the negligence of the plaintiff, the fist, second and third defendants or any one or more of them. The sixth defendant has also filed notice to the co-defendants claiming indemnity.

The Evidence

The plaintiff's evidence is that he owns two businesses in auto parts. One is located in Florida U.S.A. and the other, Daytona Sales Limited at 7D Marescaux Road, Kingston and that he is the majority shareholder to both businesses. He testified that on the 14th January, 1995 at about 1:00 a.m. he was driving his Suzuki Vitara motor vehicle along Musgrave Avenue in the parish of St. Andrew when he suddenly saw a mound of earth in the middle of the road, that he braked and swerved left, hit an open trench, was thrown out of his seat, he lost control of the car which went to the other side of the road and ended up in a lightpole some 100 feet from the mound. As a result he suffered serious bodily injury requiring hospitalisation, both here and in the U.S.A. The car was a total write off. He said he was travelling at 30 miles per hour, that there was no lighting on the roadway except for the lights coming from his motor car. There were no warning signs. The open trench which ran into the mound area is an unpaved area below the level of the road.

He was taken to the University of the West Indies Hospital where he spent a month in the Tony Thwaites Wing of the hospital. As a result of the accident, he suffered abrasions, to the right foot, cuts to the face and scalp and a broken hip. The femur was driven through the socket of the hip. He also suffered fractured ribs and the injuries were associated with severe pains. He underwent surgery to reinforce the broken socket, which was pinned and his right leg placed in traction. He left the hospital and went by air ambulance to St. Petersburg, Florida where he had further treatment. He again underwent surgery and received an artifical replacement hip - there he spent a further nine days in hospital and rehabs centres. He stayed at home recuperating approximately three - four months. In all he spent about six months between hospitals and home.

He incurred medical expenses. Most of it was met in the U.S.A. by Cigma Insurance Company amounting to U.S$23974. Cost of psychotheraphy in Jamaica $21,000 and in the US.A. over $500. The plaintiff's medical prognosis is that he will require another hip replacement soon and he anticipates another three replacements during his lifetime costing an average of U.S.$30,000 each. One replacement lasts ten - fifteen years. Medical expenses were supported by documentary evidence including bills and receipts. The cost of air ambulance service amounted to U.S.$5,500 which was paid by the insurers. Cigma Health Insurance paid out a total of U.S.$23,400.

The Vitara motor vehicle was damaged and had to be written off in the sum of $475,000.00, its pre-accident value being $700,000.00. A car was rented in its place costing $23,114.36 which was used by his wife to visit him. Taxi service amounted to $10,000.

It is his evidence that his future earnings would be seriously affected. He is unable to attend auto trade shows for any length of time because of the pains experienced. These shows allow him to be kept abreast of current events in the motor trade. He is also prevented from galvanishing customer relationship with social relationship as his working day is usually terminated because of pain. He currently does a full days work in his business but with much discomfort because it is difficult to sit for prolonged hours as his business is a warehouse and it is necessary to walk the premises. He thinks he has a substantial working life ahead of him be being 53 years of age. He estimates his loss of future earnings to be $1.2M at a rate of $100,000 per annum over a period of twelve years.

He further testified that the injuries caused pains which preoccupy his existence. Not a day goes by, and recently, an hour, that he does not feel pains. Such is the pain that it saps his energy and interest in life. He feels pains mostly in his hip, leg, calf and bottom. When he moves the pains are excruciating, and intermittent when he sits on hard surfaces, it is painful due to lack of muscle fat on his bottom because of atrophy associated with the accident. It is difficult and

uncomfortable to sit in cars with bucket seats and also in air plane seats. He walks with a limp as one leg is now a little shorter than the other, and has trouble walking as he does a lot of this particularly at trade shows.

The artifical hip has its restrictions, he should not cross his legs, should not bend at an angle of more than 90 degrees and as a result he has developed a phobia because of the care he has to exercise. He also has a fear of infections.

His injuries have prevented him from enjoying the recreation he is accustomed to including horseback riding, golf, boating, swimming, playing of cards, travelling and visiting museums. At best of times he is slow, cannot walk fast and this impinges on his enjoyment. He is unable to sit in his bed with his feet in the bed - they have to be off when sitting. He is restricted in having sexual intercourse because of the range of motion it is difficult in rotating his hips as he encounters pain in so doing. He also has difficulty in getting on the toilet as the point at which his legs touch the seat causes pain. His mental attitude is also affected as the injuries preoccupy his very existence, something he thinks about daily.

After his first illness, he had to use two crutches for about fifteen months. Thereafter he has had to use a walking stick up to the present. He currently wears support stockings to contain the swelling in the leg. He has a problem standing as one leg is

shorter and weaker than the other which makes standing on the good one leg tiresome.

Cross-examined by Mr. Goffe, he said that the accident took place at a T junction. The road is straight from Trafalgar Road to that junction and it is neither wide nor very narrow, though narrower than Trafalgar Road.

The trench was right in the junction. The mound of earth and dirt were blocking both lanes. There were no warning lights and the area was not illuminated. The site of the road repairs was dark and he does not remember whether street lights were on. Prior to the accident his lights were on dim, the range then being about 40 feet. He saw the mound when he was 20 feet away from it. He did not see the mound earlier as it was of the same colour as the road.

He denied travelling at a speed of more than 30 miles per hour. At 30 miles per hour his car could not stop within 20 feet - that it would take 70 feet to stop if he was driving at that speed. If he had seen the mound earlier he could not have stopped on time. He admitted being tired at the time of the accident but not to the point of falling asleep behind the wheel. He also admitted that his vehicle was equipped with seat-belts but he was not wearing one at the time. He said that at the time of the impact, he was thrown out of his seat albeit he knew that the purpose of the seat-belts was to reduce the chance of that

happening. The car travelled at least 100 feet from the mound to the electric pole - he was unable to press the brakes as he was thrown out of his seat.

He did not see the trench at the same time he saw the mound. The trench was below the level of the road so it was not obvious to him until he ran into it. The rest of the road was asphalted - black - and in good condition. The mound was about 2 feet high, the open trench about 8 inches deep. It did not take up the road completely. He did not know if he could have passed on either side of it - he had to make a decision instantly. He denied that he was not keeping a proper look-at and also that he was driving too fast in the circumstances. Prior to the accident he had no problems to his left leg or hip. He has had no hip injuries before.

Cross-examined by Mr. Lyttle, he said he was driving along Musgrave Avenue, a straight road which took him beyond the mound. He could have turned left up Comlin Bank Road where there would have been no obstruction. He was driving along Musgrave Avenue at 30 miles per hour and applied his brakes 20 feet from the mound and pulled left as he did not want to serve into the mound. It was after he applied his brakes that his vehicle went into the open trench. It was when the vehicle went into the open trench that he was thrown from his seat. He denied travelling at more than 30 miles per hour, from the trench to the light pole

where he collided is 100 feet. His vehicle travelled a distance of 100 feet from the left side of the road on Musgrave Avenue and collided with the pole on the right side of the road. He denied telling Dr. Vaughn that he had "washed" into a light pole. It was the open trench that caused him to lose control of his vehicle. He denied the suggestion that there were four cones placed in the middle of the road just before one gets to the trench. He said his vehicle did not mount the curb wall - he cannot say if there is a 9 inch curb wall just before the light post. He denied that after he went into the trench, he travelled over 100 feet and then the vehicle crashed and went across the road. Dr. Vaughn was his medical doctor in Jamaica and prescribed the crutches for him and instructed him about its use. He was able to amble along on the crutches before he did the hip surgery in Florida. During that time he went to work at Daytona. He denied suffering any injury to his hip, pelvic area or the affected leg prior to the accident.

Cross-examined by Mr. Daley, he said the trench was 30 inches wide by 8 inches deep. That when he hit the trench he was travelling at a speed less than 30 miles per hour. He applied his brakes immediately on seeing the mound. He was not in control of the vehicle after it hit the trench. He denied he was travelling at a speed far in excess of 30 miles per hour why he had no proper control over the vehicle and thereby causing the accident. Re-examined he said there were no signs inviting him to take detour into Comlin Bank Road. It was one transaction from the hitting of

the trench to his ending up in the light pole. He got into the open trench because he was avoiding the mound which was in front of him and there was no other way.

Winston Gassop, a corporal of police said that about 1:45 a.m. January 14, 1995, as a result of a radio message he received, he went to Musgrave Avenue where he saw a Vitara motor vehicle which was extensively damaged. He noticed the driver of the vehicle, the plaintiff was bleeding severely all over his body and unable to walk. He also observed that there was a huge heap of dirt with little road space. There were no signs or reflecting lights to indicate that construction was in progress. He did not see any cones. There were no lights in the area - it was dark. This dangerous area he said could not be seen from a far distance. He had to use spot lights on the left of his service vehicle to assist him. The plaintiff was conscious and did not appear to be under the influence of alcohol.

Cross-examined by Mr. Goffe, he said he did not see any lights on Musgrave Avenue nor did he see any lights in the area.

Cross-examined by Mr. Lyttle, he denied that Musgrave Avenue is a dead straight road from the top of Trafalgar Road. He saw obstruction in the road i.e. a mound of earth and a hole in the middle of the road. That vehicles could not turn left into Camden Road. Vehicles going north had very little space to go

through. Going south a very small vehicle could pass.

Cross-examined by Mr. Earle, he said he saw the obstruction in the road when he was ½ chain from it. It was not possible for him to have seen it before. He did not see any cones surrounding the area - he did not see any cones at all. He disagreed that the damage to the Vitara was consistent with excessive speed. The light pole the vehicle ran into was standing straight.

At this stage Mr. Goffe applied for amendment to his defence to include contributory negligence and secondly to visit the locus in quo. Both applications were refused.

Dr. Kenneth Vaughn an orthopaedic surgeon treated the plaintiff for fracture of the hip joints. He said the plaintiff subsequently developed osteo-arthritis of the hip joint which necessitated him having a total hip replacement which was done in the U.S.A. in May 1996. Bone graft may have to be done and there is a likelihood of further hip revision. Remissions do not last as long as primary hips which last for approximately 10 years whilst revisions last approximately 5 years.

Cross-examined Mr. Goffe, he said the natural consequences of osteo-arthritis is a vascular neurosis.

Cross-examined by Mr. Lyttle, he said that the injuries to the plaintiff's head are consistent with someone sitting in front of a vehicle and crashing with a light pole. He said the plaintiff did tell him that he ran off the road and ran into a light pole.

Cross-examined by Mr. Earle, he said that (the) hip replacement is done in Jamaica at a cost of approximately $300,000. That when he examined the plaintiff, there was no evidence of a previous leg or hip injury.

The third defendant Basil James, gave evidence saying he is the managing director of the fifth defendant, Basil James Construction and Plumbing Services Limited and has been involved in building construction for 23 years, 18 of which he was a superintendent in the waste-water division of the National Water Commission and that he is an employee of the fifth defendant.

He said that in January 1995, he was employed by the second defendant A. Chong Limited in the construction of a sewerage system in the area of Musgrave Avenue taking in Comlin Bank Road. The work involved the laying of 18 inches mains from Braemer Avenue into Musgrave Avenue to facilitate premises at an open lot. His company dug a trench across the road about 1 week prior to the accident. It was approximately 7 feet deep and 2 feet six inches wide and pipes were laid in it. Having dug the drain across the road, a 4 feet diameter man-hole was put in - this at the center of the intersection. He left workmen working in the man-hole about 9:00 p.m. that night. Two cones were placed to the northern side and two to the southern. It was a busy Friday and traffic passed on both sides.

When he left at 9:00 p.m. the trench was backfilled with marl to the level of the road. He denied the trench was 18 inches deep. He did not leave a mound of earth or filling from the trench in the road. Apart from the cones there was nothing left in the road to form a barrier or obstruction.

There was also light coming from a lightpole 104 feet from the intersection.

On the morning of the 14th he discovered one of the cones missing.

He denied that he or his company failed to provide adequate warning regarding the mound or the manhole. He said that there was no need to provide other protection as there were four self-illuminated cones around the manhole cover. There was no need to provide a warning for the open trench as there was none. Nor was there a need to re-route traffic that night as men were working in the area of the manhole inside it. Trafalgar Road to the top of Musgrave Road is straight no bend in it.

Cross-examined by Mr. Goffe, he said it was the second defendant who prepared the plans. The sixth defendant, The National Water Commission would be responsible for approving the design and sewer trunk. In this case the (N.W.C.) sixth defendant accepted responsibility of designing and constructing the sewer trunk. When the work was completed, the sixth defendant inspected it. This was on the 23rd January 1995 - he was present along with Garfield Haughton, manager of the Waste Water Department of the N.W.C. It was the

sixth defendant that accepted the responsibility of designing and constructing the sewer trunk.

Cross-examined by Mr. Earle, he said that no time did he leave the trench on Comlin Bank Road open - it was backfilled. He never saw a representative of the second defendant come there during construction. The first defendant came there before the work started on omore than one occasion. The first defendant showed him where the pipes were going and he would observe the work that he was doing. In carrying out the work laying the pipes, he was not representing the sixth defendant, he was doing the work for the first defendant; contact with the second defendant only for the payment. When he wrote exhibit 15 he was not representing the sixth defendant. He said he laid pipes along Comlin Bank Road connecting it on Braemer Avenue, he also installed 2'x3" diameter manholes - one in the center of Comlin Bank Road and the other at the intersection of Musgrave and Comlin Bank Roads. He also installed an 8" lateral to number 4 Musgrave Avenue, putting it back in its original condition. The total excavated area was completely reinstated. His company did the job for $433,682.60 this after reducing the original figure by $10,000 which the first defendant said was high.

The 6th defendant approved the design of the system - they do not do the design themselves.

At 2:00 p.m. on the 13/1/95 all the trenches were already backfilled the only work left to be done were inside the manhole on Musgrave Avenue. He left the site at 9:00 p.m., manhole

cover was in place - with wet cement around it and that is why he left self-illuminating cones around it. He returned to the site at 9:00 a.m. the following day when three of the four cones where still in place. He did not see any imprint in the cement as if vehicles had driven over it.

Cross-examined Mr. Manderson-Jones, he said the supervision charge he referred to in the estimate were for persons who supervised. All the labourers who worked on that site were employed by his company the fifth defendant. He did the supervision. He said that the road surface at Musgrave Avenue was reinstated when the job was completed.

The trench to the right of the manhole was dug on the 13th and was backfilled the same day. When he left it was not asphalted. There was no space left in the trench for asphalting after backfilling. He said he was given specifications that would allow for the layer of asphalt to be reinstated - which is one inch - he did not comply. He did not have any of the following signs left on the premises when he finished working on the 13th eg. "detour", "road works ahead", "slow", "caution", "pass this side". He did not provide a light for the spot. He did not have plans to work on the road up to 9:00 p.m., but the work took them to that time. There were lights overhead directly over the manhole - that is the light used to work in the manhole. From the manhole he took out about 15 cm. yards of earth and from the trench a little less. The earth was stored in adjoining premises. He never had a drop of earth on Musgrave Avenue to fill the trench. He denied that

the earth removed from the manhole and the trench were left near the manhole on Musgrave Avenue.

He did not consider it necessary to install any warning in respect of the backfilled trench as there was no need for caution.

One could drive at 30 miles per hour on Musgrave Avenue when he left there on the 13th - above that would be unlawful.

The first defendant ALton Chong, testified that he is the Managing Director fo the second defendant Company which provides designs in water supply, plumbing and drainage etc. In March 1994, he said that at the request of Architects, McMorris, Sibbly Robinson, he prepared plans which were drawings that depict the internal sewer layout mainly including pipes and location of manholes within the proposed development by Mutual Life on Comlin Bank Rd and Musgrave Avenue. Construction was done by fifth defendant and was paid for by Surrey Construction Limited. Whilst work was being done by the fifth defendant company he visited the site to ensure that the project had started. He had gone there between the 1st to the 13th January 1995 to see if the lateral to the development had been done, i.e. the manhole at the junction of Musgrave Avenue to his client's, Jamaica Mutual Life's property.

Cross-examined by Mr. Lyttle, he said he had gone to the site as he had expected a monument to be installed before the project was completed. He could not say whether or not the manhole was in place when he visited the site. He said that the sixth defendant must approve plans and the cutting of roads before they

can be implemented. Backfilling after pipes are laid must be done to the specifications of the sixth defendant.

Cross-examined by Mr. Earle, he denied he had gone to the site on more than one occasion supervising the work done by the fifth defendant. He also denied that he selected the fifth defendant to do the work as the sixth defendant did not approve of Ancar Development Company.

All payments for work done and the design of the system were made either by Surrey Construction Company directly of through the second defendant as courier. He regards the third defendant as an excellent contractor for his speed, price, knowledge of the work, creativeness and personal conduct. He has never supervised his work.

The third defendant has on many occasions done work on projects for which he was consultant, and on each occasion he has left the site in good condition. He denied that in December 1994 two options were put to him by National Water Commission (1) National Water Commission to undertake full responsibility for the sewage scheme construction at cost of $400,000 or (2) To simply undertake supervision of the work at a cost of $26,000.

He denied responding to option number 2.

Garfield Haughton gave evidence on behalf of the sixth defendant. He is a civil engineer employed to the National Water Commission the sixth defendant as manager of waste water operations for the Corporate Area. He is responsible for the operations of all the National Water

Commission sewage works and vetting off plans submitted for approval of housing developments. On the 5th July 1994 he received an application signed by the first defendant for sewerage services on a property located on Musgrave Avenue.
A number of phone call subsequently passed between them because there was disagreement as to who should be responsible for the design of the proposed mains. Mr. Chong wanted the National Water Commission to do the designs, but he said that the National Water Commission does not do designs for private contractors.
As a result of Mr. Chong's insistence, he relented and wrote him to the effect that initially the National Water Commission would take responsibility for the designs and construction of the sewer mains provided they were remunerated. He said he was bending over backwards to accommodate Mr. Chong as the National Water Commission does not do design work.

Reproduced hereunder is the letter written to Mr. Chong the first defendant and which is admitted in evidence as Exhibit 26.

"National Water Commission
July 29, 1994
Anchong Limited
45 Mannings Hill Road
Kingston 8

Attention: Mr. Allen D. Chong

Dear Sir,

SUBJECT: Sewer connection for Housing Development By Mutual Life - Musgrave Road & Comlin Bank Avenue

In response to your letter of July 22, 1994, the National Water Commission (N.W.C.) will undertake the responsibility of designing and construcking the sewer truck in question.

The cost of designing the sewers is Twenty Thousand Dollars ($20,000.00), and the projected completion date is seven (7) working days upon receipt of this sum. The cost of construction can only be arrived at upon receipt of the design drawings and this would be indicated to you along with the completion time.

The speed of conpletion of this job is therefore dependent on how quickly the design cost is paid.

Yours truly

National Water Commission

Garfield Haughton
Engineer Wastewater

GW

He admitted that the National Water Commission did receive the $20,000 for the design however the design was done by S.P.K. Designs Limited which he approved and that sum was paid over to them. He also admitted that the National Water Commission prepared the estimate (Exhibit 33 (a) for Comlin Bank Road which was sent to Mr. Chong the 1st defendant who communicated to him that the estimate was high and that he disputed the cost.

In response to a letter written to the National Water Commission by Mr. Chong, Mr. Haughton said he had communicated to him that Ancar Development and Construction Co. Ltd. was not on the list of National Water Commission approved contractors. With reference to exhibit 26, he said that that position subsequently changed during the last quarter of 1994 normally the National Water Commission would have total responsibility of the sewer mains, so long as payment was made, the National Water Commission would be responsible for the work from the beginning, i.e. the construction, opening of the road laying of pipes, building manholes, compacting, road reinstatement and site clearance. Since then the National Water Commission started giving their clients the option of chosing a contractor from their approved list and contracts would be made between the client and the contractor. The National Water Commission would only be paid to supervise to its standard and specifications. The specifications and standards would take into consideration the

the following:

(1) the trench - its depth, width and gradient

(2) class A & B protection regarding correct pipe size and sand pillow below it

(3) back-filling and compacting

(4) integrity of the manhole and

(5) lateral connections from the pipe manhole to the property.

He testified further that a letter dated December 23, 1994 (Exhibit 39) was written to Mr. Chong outlining the options open to him. Mr. Chong denies receiving this letter which reads.

"National Water Commission
December 23, 1994

Mr. A. Chong
Managing Director
A. Chong Ltd.
45 Mannings Hill Rd.
Kingston 8

Dear Sir,

Re: Sewer Lateral Connection on Comlin Bank Road

See attached National Water Commission estimate for the above.

There are two courses of action open to you.

(a) Pay National Water Commission Four Hundred and Forty-Three Thousand Six Hundred and Eighty-two Dollars and Sixty Cents ($443,628.60) and National Water Commission will have total responsibility for completion of the job.

(b) Pay National Water Commission a supervision fee of Twenty-Six Thousand Dollars ($26,000.00), employ a contractor acceptable to the National Water Commission (a list can be provided) and National Water Commission will supervise

the job so as to ensure it meets the National Water Commission standards.

Could you please communicate the variant, which is most acceptable to you, at the earliest possible date.

Garfield Haughton
Engineer - Wastewater"

He said that at the time of writing this letter the work had already commenced. The letter was written to formalize the work process and the National Water Commission's involvement. He had communicated to Mr. Chong over the telephone the list of contractors who said he knew Mr. James who had already worked with him and he would go the route of finding a contractor and paying the National Water Commission the suggested sum for supervison.

Mr. Haughton testified further that he never employed any contractor to do any construction work on Musgrave Avenue between December 1994 and January, 1995; neither did he pay any contractor to do any construction work at that time. He said that no request was made of him to pay any contractor to do construction work, that he held no retention money for work on that contract, that he never wrote any of the related agencies before construction commenced in relation to the opening up of roads on Comlin Bank Road or Musgrave Avenue, and that the National Water Commission did not put up detour or re-routing signs in relation to the works. He denied giving Mr. James permission or authorisation to write on behalf of the National Water Commission a letter dated 9th December 1994 and said he was not aware of it.

He had gone to the site approximately 6 times between the 6th and 25th January 1995, the first time being the 6th. He had been there Friday the 13th January 1995 at about 2:00 p.m. where he saw workmen putting on the manhole cover at the intersection of Musgrave Avenue and Comlin Bank road, the state of the work was completed apart from re-asphalting, and men were clearly around the edges of the manhole and compacting the road surfaces. There was no excavated trench along Comlin Bank Road but there was marl and stabilizing material, marl mixed with cement where the road was cut. Later that same day he went back on the site at about 5:30 p.m. where he found the manhole and its levels to be correct. Workers were working on the inverts in the manhole and four cones were placed around the manhole at the time. He said he returned to the site on the 23rd January, 1995 as Mr. Chong the first defendant had asked him to sign off the job so that he could pay off the contractor. He did the final inspection that day and wrote to Mr. Chong the following day communicating to him that everything was done to specification. See letter dated January 24, 1995 which is reproduced below.

"National Water Commission
January 24, 1995

Mr. A. Chong
Anchong Limited
Mannings Hill Road
Kingston

Dear Sir,

Construction of Seven Main
on Comlin Bank Road

The above-mentioned construction was inspected on January 23, 1995 at 10:00 a.m. by a team from the National Water Commission and was found to be completed and done to the standards of the National Water Commission.

Yours truly,

Garfield Haughton
Engineer Wastewater"

He said that a letter addressed to him from Mr. Chong dated January 17, 1995 was ignored by him as the only money the National Water Commission received was $20,000 for design and $26,000 for supervision; there was no money from which a retainer could have been made.

Cross-examined by Mr. Goffe he maintained that Mr. James was not a representative of the National Water Commission and nobody in his department gave him permission to say so. He denied the letter exhibit 39 to be a sham. He said that when the lateral was built, at the end of construction it was the National Water Commission's property and it services other areas apart from the lot for which it was built and charges are made for such services by the National Water Commission Cross-examined by Mr. Lyttle he said marl and cement were used as stabilizers to the surface which was compacted from 9" below the surface. It is not inappropriate to bring the stabilizer to 1" above the road surface.

Cross-examined by Dr. Manderson-Jones, he said he did not see any earth on the surface of the road and there was no trench leading from the manhole to the premises. He did not see

any earth piled up nor did he see a monument. He was not sure who paid National Water Commission the supervision fee or when it was paid. The supervision was done for Mr. Chong.

Earth taken from the manhole by excavation would be in the region of 8 - 12 cubic yards and a little more in respect of the trench which would carry the pipes across Musgrave Avenue.

Findings:

I am satisfied on the evidence that the plaintiff suffered severe injuries as a result of the accident which occurred in the vicinity of a work site along Musgrave Avenue in the parish of St. Andrew in the early morning of January 14, 1995.

I find as a fact that pipes were being laid by workmen from Basil James Construction and Plumbing Limited the fifth defendant, and that they had dug a trench across Musgrave Avenue to facilitate this exercise. I accept the evidence of the plaintiff and his witness Corporal Gassop that there was a mound of earth left in the roadway. Although in his evidence, Basil James the third defendant denied that there was any mound of earth left in the roadway, his affidavit of the 11th November 1996, in answer to an order for further and better particulars, supports the plaintiff's contention when he said in evidence,

> "The red cones were placed before the mound of earth on the left of the road by the third named defendant."

I also find as a fact that as a result of excavation done by the fifth defendant a hole and an open trench were left in the said roadway and that there were no adequate warning of the presence of the mound of earth, hole or trench and that as a result an obstruction of the highway was created. I further find that the area was unlit and that the passage left in the roadway for vehicles to pass was narrowed.

I find that Mr. Jame's evidence is not truthful when he said that four illuminated cones were palced around the manhole to warn motorists of its presence. The evidence of Garfield Haughton in this regard lacks credibility.

I conclude therefore that these factors were the main cause of the accident. I accept the plaintiff's case that negligence has been established against one or more or all of the defendants.

The first and second defendants in their defence have not contradicted the version given by the plaintiff as to how the accident occurred save suggestions regarding excessive speed and not keeping a proper look-out which were never pleaded by them.

The third and fifth defendants in their defence say that the accident and resultant injuries to the plaintiff were solely caused or contributed to by the plaintiff's own negligence, particularised as follows:-

" (a) Driving at a speed that was excessive in all the circumstances.

(b) Colliding in the Jamaica Public Service Co Ltd. lightpole exactly 104 feet away from the site complained of.

(c) Driving at a speed so great that the impact pushed the said Jamaica Public Service Co. Ltd. lightpole some 6 inches back from its original position and chipping off a piece of it.

(d) Permitting your said vehicle registered 8999AX to mount a 9" curb wall and therefore colliding with the said Jamaica Public Service Co. Ltd. lightpole some 104 feet away.

(e) Failing to have any proper look-out while travelling on the said road.

(f) Allowing your said vehicle to run off the road some 104 feet from the site complained of them mounted the sidewalk and there at violently to collided with the Jamaica Public Service Co. Ltd. lightpole on the sidewalk.

(g) Failing to heed the warning of four red illuminated cones posted in the said road near the wet concrete to alert motorists to keep to the right so as to avoid an accident.

(h) Failing to have any or any proper control over your said vehicle thereby cause the accident.

(i) Driving without due care and attention on the said road there by caused the accident."

On the question of negligence, the 6th defendant denies the particulars of negligence as set out in the amended statement of claim and states that if the said accident occurred, which is not admitted, the alleged injuries, loss and damage suffered by

the plaintiff was caused or contributed to by the negligence of the plaintiff, 1st 2nd and 3rd defendants or any one or more of them. The particulars of negligence of the plaintiff is as follows:-

"(a) Driving at a speed that was excessive in all the circumstances;

(b) Colliding into the utility pole;

(c) Failing to have any or any proper look out while travelling on the said road;

(d) Failing to have any or any proper control over his said vehicle thereby causing the alleged accident;

(e) Driving without due care and attention on the said road;

(f) Failing to heed warning indicators placed on the said road by the 1st, 2nd or 3rd defendants to alert motorists to avoid that section of the roadway;

(g) Failing to stop, to slow down, to swerve or so to manage or control his said motor vehicle as to avoid colliding into the said utility pole as alleged or at all;"

A common thread that runs throughout the defence is that the plaintiff contributed to this accident by his own negligence. Excessive speed and failing to keep a proper look-out are the foundation of the allegations.

Having found that there was a mound of earth and an open trench in the roadway without any warning signs, I now take a closer

look at the manner in which the plaintiff was driving. Was he driving at an excessive speed in all the circumstances? The plaintiff's evidence is that he was travelling at a speed of 30 miles per hour when he saw the mound of earth. He applied his brakes when he was 20 feet away from the mound which in effect slowed the vehicle to a speed of less than 30 miles per hour. The road was straight. He swerved from the mound and went into the open trench 8" deep. It is at this point that he said he was thrown from his seat, thereby losing control of the vehicle. He admitted that the vehcile was equipped with seat belts but at the time he was not wearing any. He also admitted that the purpose of the seat belt is to reduce the chance of being thrown from his seat in the circumstances he described. He said further that after entering the trench the vehicle went across the road hit a curb wall and travelled 100 feet before ending up in the light post. The vehicle was not under acceleration after going into the trench as he was then out of the seat. The result is that the vehicle was extensively damaged and he suffered serious injuries.

He admitted that the vehicle is a 4 wheel drive sports utility type which has a ground clearance of 9", which is higher than a regular sedan motor car.

He denied that he was driving at speed far in excess of 30 miles per hour and that he had no proper control over his vehicle. He also denied that after travelling 100 feet from the trench his vehicle "washed" and went across the road ending up in the light pole. Dr. Vaughn who gave evidence on the plaintiff's

behalf said that Mr. Dayes, the plaintiff gave him a history of how the accident happened. He said he told him that his vehicle ran off the road and "washed" into a light post. Dr. Vaughn's reports dated February 1995 and November 17, 1998, exhibits 1 and 13 respectively, referred to the report made by the plaintiff that "..... he was the driver of the vehicle which "washed" into a lightpost." I accept Dr. Vaughn's account and find that the plaintiff was not speaking the truth when he denied having said so.

Dr. Vauhgn also agreed to the suggestion that the injuries he saw to the head of the plaintiff were consistent with someone sitting in front of the vehicle and crashing into the lightpole. I accept Dr. Vaughn's opinion and reject the evidence of the plaintiff that he was thrown from his seat. I find that when he entered the trench he was still seated around the steering wheel and should have had control of his vehicle.

To determine the speed at which the plaintiff was travelling there being no evidence other than that coming from the plaintiff, regard must be taken of the extent of the damage to the vehicle. It was a total write-off, is a clear indication that there was a severe impact. The question to be answered is this. Could a vehicle travelling at a speed of less than 30 miles per hour over a distance of 100 feet without acceleration on a level stretch of road and ending up in a light pole have caused the sort of damage to which the motor vehicle assessor speaks?

The damage to the vehicle includes items such as severe damage to the chasis, damaged dash/instrument panel console, steering wheel, bumper, radiator, engine mount to name a few (see exhibit 11). The answer to the question posed is an uniquivocal "no." It is inconveivable that travelling at a speed of less than 30 miles per hour such extensive damage could have resulted when it ended in the lightpost. I conclude on a balance of probabilities that the washing Dr. Vaughn referred to, was caused by the plaintiff driving at an excessive speed and resulting in his failure to have any or any proper control over his vehicle. It is of note that the plaintiff was unable to stop his vehicle within a distance of 100 feet driving at 30 miles per hour.

In the 9th edition of Bingham's Motor Claims Cases, the tables give the overall stopping distance of a motor vehicle travelling at 30 miles per hour in perfect conditions is 75 feet. What then accounts for the extra 25 feet in which he should have stopped bearing in mind that the vehicle was in a slowing-down process? Here again the plaintiff was less than truthful when he said he was travelling at less than 30 miles per hour - I reject his evidence on this.

Another factor that must be considered is his evidence that the area was dark and not illuminated, yet he was driving on his dim lights which has a range of 40 feet and he only saw the mound when he was 20 feet away from it. I would have thought that for his own safety he would have been driving on

his bright lights given the lighting condition at the time.

> "In order to establish the defence of contributory negligence the defendant must prove, first, that the plaintiff failed to take 'ordinary care of himself' or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident."

This expression is to be found in the case of **Lewis v Denye (1939) 1KB540, per Parcq L.J.** I find that the plaintiff failed to take care and this was a contributory cause of the accident, and therefore is contributorily negligent. The defence has succeeded in establishing contributory negligence.

Liability

It is now left to be decided which of the defendant and or defendants are liable. The actual or physical work on the site was carried out by the fifth defendant and liability is therefore attached to them as principals. The third defendant Basil James has admitted that the excavation work was done by Basil James Construction and Plumbing Services Ltd., the fifth defendant,of which he is the managing director. The workmen were employed by his company. The fifth defendants are therefore vicariously liable for the negligence of their servants, the workers. I also find that Basil James as managing director was acting on behalf of the fifth defendant, and he would not be personally liable in negligence.

As regards the first defendant, he has admitted being a consultant and the managing director of the second defendant A. Chong Ltd. which is provides designs of water pollution, water supply, plumbing, drainage and mechanical services for building. I find that his negotiations with the 6th defendant was in a representative capacity of the 2nd defendant. Any negligence arising out of these transactions, would not make him personally liable. The 2nd defendant would be vicariously liable in this regard. What was the role of the second defendant? The first defendant testified that the second defendant at all material times was acting in a representative capacity pursuant to an application to the sixth defendant for services. He denied engaging the services of the fifth defendant to carry out the work. He contends that the role of the seond defendant was no more than that of a consultant to the developer and as its agent for the sewer main. The uncontroverted evidence of Basil James is that his company the fifth defendant was employed by the second defendant in the construction of a sewerage system on Musgrave Avenue. His evidence was never challenged in cross-examination. However payments for this were made directly by Surrey Construction Ltd. as also payments for designing and supervison fees. Although the second defendants routinely copied correspondence with the sixth defendant and Surrey Construction Ltd. I find as a fact that the second defendant employed the fifth defendant to carry out the laying of the sewerage mains exercising part two of

option contained in letter dated 23rd December 1994 (Exhibit 39). There is no evidence that the sixth defendant employed or contracted with the fifth defendant to carry out these works, and accordingly, I find that no contract existed between the fifth and sixth defendants in this regard.

What then is the role of the sixth defendant? By letter of the 29th July 1994. (Exhibit 26) the National Water Commission /the sixth defendant, undertook the responsibility of designing and constructing the sewer trunk, the cost of the design being $20,000 which was subsequently paid. The sixth defendant thereafter submitted an estimate for $443,682 from the fifth defendant.
By letter dated 23rd December, 1994, (supra) the sixth defendant wrote to the first and second defendants giving them the option of (a) paying the National Water Commission for the completion of the job, or (b), pay the National Water Commission $26,000 for supervision fee and employ a contractor acceptable to the National Water Commission.

The sixth defendant was never paid the sum asked for doing the job, in fact it was the fifth defendant that did it. The second defendant having exercised option two of the letter exhibit 9, already referred to, and the sixth defendant having admitted being paid the $26,000 by Surrey Construction Ltd. for whom the second defendants are consultants, then the sixth defendant is obliged to carry out their promise, that is, to "supervise the job so as to ensure it meets the National Water

Commission standards." Mr. Haughton in his evidence said that he visited the site approximately six times between the 6th to the 28th January 1995; he first visit being on the 6th. He visisted twice on the 13th and when he was leaving at 5:30 p.m. that day his supervisory role he should have seen that the site was left in a safe condition and that no obstruction would be left in the roadway so as to create a danger to persons using it.

The Law

It is well established as a general rule of law that an employer is not liable for the acts of his independent contractor in the same way as he is liable for the acts of his servants or agents even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the doer, the latter is an independent contractor.

It was said by Lord Blackburn in **Dalton v Angus (1881) 6AC740**

> "Even since **Quarman v Burnett** it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant exist between them. So that a person employing

> a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby releive himself from liability of those injured by failure to perform it."

In the case of George Martin Hughes and John Percival (1883) 8AC443 the appellant and respondents were owners of adjoining houses between which was a party-wall, the property of both. The appellants' house also adjoins B's house and between them was a party-wall. The appellant employed a builder to pull down his house and rebuild it on a plan which involved, the trying together of the new house and the party-wall between it and the respondent's house, so that if one fell the other would be damaged. In the course of the rebuilding, the builder's workmen in fixing a staircase, negligently and without the knowledge of the appellant, cut into the party-wall between the appelants' house and B's house, in consequence of which the appellants' house fell, and the wall dragged over the party-wall between it and the respondent's house and injured the respondent's house. The cutting into the party-wall was not authorised by the contract between the appellant and the builder. It was held by the Privy Council that:

> "The law casts a duty upon the appellant to see that reasonable care and skill were exercised in the operations which involved a use of the party-wall belonging to himself and the respondent exposing it to the risk above-mentioned, and that the appellant could not get rid of responsibility be delegating the performance to a third person, and was liable to the respondent for the injury to his house" (emphasis mine)

In the case of **Holliday v National Telephone Co. (1899) 2QB392,** where a passerby on the highway was injured through the negligence of a plumber engaged by the defendant company under an independent contract, it was held that the defendant company were liable Smith J in his judgment said:-

> "The plaintiff sued the defendants for damages and the defendants set up the defence that they had employed an independent contractor to do the work and therefore were not liable. I am of the opinion that according to the principles established in **Hughes v Pervival** and **Black v Christdurch Finance Co. (2)**, where a person is executing work upon a public highway, he cannot escape liability by employing an independent contractor because there is a duty cast upon him to see that the work upon the highway is so carried out as not to injure persons who are using the highway."

These principles of law were further endorsed in the case of **Penny v Winibeldon Urban District Council & Anor. (1899)** QBD and which is strongly relied on as being pari aateria with

negligence. Sessler LJ in the Court of Appeal said:-

> "The decision in this case, in our judgment, does not depend merely on the fact that the defendants were doing work on the highway, but primarily on its dangerous character, which imposes on the ultimate employers an obligation to take special precautions, and they cannot delegate this obligation by having the work carried out by an independent contractor. This is equally true when the work being done by the independent contractor for the ultimate employer is being done on another person's premises."

It is abundantly clear from the above authorities, that a person doing work on a public highway cannot escape liablility by employing an independent contractor. If an employer who has to perform a duty imposed on him by statute or common law, makes a contract with an independent contractor for the performance of that duty, instead of doing it himself, he is liable for the negligence of the independent contractor in carrying it out.

The first and second defendants cannot therefore in these circumstances rely on the defence that they are not liable on the basis that the fifth defendants were independent contractors.

Where a staturory authority has power to do something to a road which involves stopping it, or to do something to it which will make it dangerous while it is being done, there is a duty cast upon them to take care that person are not injured by any carelessness in the doing of that which has to be done

(See **Penny v Wimbledon supra**).

The sixth defendant admitted that they gave permission to the first and second defendants to execute the works. In their defence, they pleaded that their actual role as regards the connection of the sewer main was limited to the examination of the laying of the sewer mains and building materials to ensure that such works were undertaken to their specifications and further, that they were not involved in nor responsible for the resurfacing and or stabilization of the roadway or any road works at all.
Mr. Haughton in his evidence stated that.

> "At the end of the construction, the works became the property of the National Water Commission. It services other areas apart from the lot for which it was built. The National Water Commission charges for that service."

Clearly the work which was on the public highway was done for the sixth defendant and the particular premises at No. 4 Musgrave Avenue to which a connection was made would be merely one of any number of private lots to obtain similar services from the National Water Commission from the same main. It was the sixth defendant that approved the laying of the sewer mains.

The provisions of the National Water Commission Act empowers the commission to carry out certain works on the highway which would otherwise be unlawful. Section 4 (2) (g) reads:-

> For the purposes of subsection 1 the Commissioner may .... subject to such notice to the appropriate

> reduction ..... involves a consideration not only of the causative potency of a particular factor but also of it blameworthiness."

In the case of **Stamley v Gypsum Mines Ltd. (1953) AC663** Lord Reid said.

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but the claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

In the instant case, having considered all the circumstances I am of the view that negligence on part of the plaintiff was one of the causes of the accident. Had he been keeping a proper look-out and driving at a speed in keeping with the lighting conditions which existed at the time, the accident might have been averted, or if not, the extent of the damage to his vehicle and his personal injuries would have been considerably lessened. However, the blameworthiness attached to the plaintiff in all the circumstances does not exceed that of the defendant and/or defendants. Applying the above tests. I would apportion blameworthiness in the plaintiff as being 25% and that of the defendants to be 75%.

ASSESSMENT OF DAMAGES

GENERAL DAMAGES

The plaintiff was admitted to the University of The West Indies Hospital on the 14th January 1995. He was treated by Dr. Kenneth Vaughn an orthopaedic consultant who found him to be suffering from the following injuries:-

1. Fracture of the 3rd & 4th ribs posteriorily.
2. Comminuted fracture of the posterior acetabulum with a fracture of the head of the left femur.
3. Posterior dislocation of the left hip joint.
4. Multiple abrasions to the left side of the face and a 6' cm laceration to the left fronto-parietal region of the scalp.
5. There was an abrasion to the right knee an a laceration to the front of the left upper leg.
6. Tenderness in the left chest posteriorily.
7. Considerable pain in the left hip.

He was placed on skeletal traction pending surgery. He was mobolised on crutches, non-weight bearing and not allowed to sit. He was subsequently transferred to the Orthopaedic

Associates Hospital in the U.S.A. under the care of Gary Moskovitz an Orthopaedic Surgeon. He arrived there on the 10th February 1995 in a precarious and debilitated condition. In May 1996 a total hip replacement was done. The recovery is slow and tedious due to damage to the left hip and surrounding tissues. He has suffered permanent impairment, disability and paid. He will require future surgerys on his left hip and the hip arthroplasty will cost from 10 to 15 years at which time he will require a revision of the total hip arthroplasty. As a result of the wasting, limb length discrepancy, pain, limitation of movement and loosening of the prosthesis, he has an impairment of the lower extremity amounting to 75% which equates to 30% of the whole person.

I accept the plaintiff's evidence which documents the continuing and excruciating pains suffered by him which are considerable and cannot be ameliorated. I am satisfied from his evidence and the medical reports tendered that his loss of ameneties are extensive and his suffering will continue almost unabated.

For pain and suffering and loss of ameneties, Dr. Manderson-Jones relied on the unreported case of **Jancie Forrest v Ottman Todd S.C. CLF103/96** as a guide to assessment. In this case the plaintiff suffered broadly similar injuries and was awarded $2M in December 1997, which when converted to today's value amounts to $3M.

Neither Messrs Goffe nor Lyttle addressed the question of general damages in so far as it relates to pain and suffering and loss of ameneties. Mr. Earle in his submission referred to the case of **Wade McKoy v Hilda Beckford** - Suit CL.1984/M-396 where the injuries are dissimilar to those of the plaintiffs. Of note that the permanent disability was only 14% of the whole person. An award of $60,000 was made on the 4th October 1990, when converted to today amounts to $455,611.65. Also submitted is the case of **Terrence Lawrence v Ernest Young and Donald Young** - Suit No C.L.1984/Y-181 where again the injuries were dissimilar to those of the plaintiffs. His permanent partial disability was put at 15% to 20% and an award of $70,000 was made, converted to today's value amounts to $676,917.69. Another case cited was that of **Eric Buchanan v Elias Blake** Suit No SCCA 2 of 1993 where the injury concerned the fracture of the right sacro-iliac joint with dislocation where the permanent partial disability was 12% and needing a total hip replacement an award of $400,000 was made in October 1992 and when converted to today's value amounts to $1,138,476.4.

This last case cited is the nearest comparison with the plaintiff's. However the permanent partial disability is far less than that of the plaintiff.

Given the extent of the plaintiff's injuries and the accompanying suffering and wide loss of ameneties, I regard the

sum of $2.5M as reasonable in all the circumstances. An award of $2.5M is accordingly made for pain and suffering and loss of ameneties.

Loss of future earning

Here the plaintiff is asking for an award of $1.2M under this head. This is based on the fact that he is 53 years old and thinks he has several working years ahead of him. He calculates his loss at $100,000 per year for a period of twelve years. There is no evidence as to how he arrived at this figure also no evidence of his earnings.

This area of claim is vigorously challenged by Messrs Lyttle and Earle. The plaintiff's evidence is that he owns companies in the auto-parts business, one in Jamaica and the other in Florida, U.S.A. of which he is the managing director. He has not given any evidence to the effect that both businesses or either of them had to be closed or scaled down in any way whilst he was hospitalized or at any time whilst recuperating after the accident. No evidence is given of his income here or in the U.S.A. It would therefore be speculative to use the figure submitted without proof. There is also no evidence that the plaintiffs' earning capacity has been affected because of the accident. The claim under this head is unsupported, and is disallowed.

Special damages

Medical expenses

I have found the following claims to be proven, and not

resisted by the defence and which amounts to $181,750.00.

1. Hospital bill - $110,450; Dr. Vaughn's fees $36,500; anaesthetics fees $12000; crutches $1,800; physiotheraphy $21,000. Cost of treatment in the U.S.A. is opposed. The evidence however, is that the plaintiff lives with his wife and family in Florida U.S.A. albeit he has interest in Jamaica - He could have received treatment here in Jamaica with the cost somewhat less, but I find it reasonable to have his treatment done in the area where access to his home and family is readily available and would be more amenable to his healing process. I do not find it unreasonable for the plaintiff to have travelled to Florida from Jamaica by means of air-ambulance. In the circumstances an award is made for medical-related expenses in the U.S.A. as follows:-

Air ambulance US$5,500; hospital bill for hip replacement $US#,844.32; surgeons fees US$8,695.70; Health South Rehabilitation US$5,867.46; Cigma miscellaneous payments US$1,941.51 amounting to US$25,498.63

Future Medical expenses

Dr. Vaughn's evidence is that primary hip replacements last for approximately 10 years. Revisions however, have a shorter life span of about 5 years. Given the plaintiff's age, I would allow for two revisions and not three as suggested by Dr. Manderson-Jones and one by Mr. Lyttle. Messrs Lyttle and

Daley submit that furture prosthesis should be done in Jamaica which would be less costly thereby mitigating the damages. However, I am cognizant of the fact that the plaintiff's family home is in Florida and which makes it less burdensome and less inconvenient for him to have this done in Florida. In the circumstances I will make an award for the costs of 2 hip revisions to be done in Florida the cost of which is US$30,000 of each revision making a total of $60,000.

Motor vehicle

The palintiff has claimed the sum of $475,000 representing the written-off value fo the damaged vehicle. The assessor's report exhibit 11 makes this amount $450,000. Messrs Lyttle & Earle both submit that this claim and that for loss of use by the plaintiff should be disallowed on the grounds that:-

(a) the motor vehicle is owned by Daytona Sales Co. Ltd.

(b) that the plaintiff, a third party, cannot sue on behalf of Daytona Sales Ltd, nor,

(c) can he do so in his own right.

The answer is to be found in the case of **The Winkfield (1902) C.A. 85LT668** where Collins MR. in his judgment said.

> " ..... the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed."

In the instant case the evidence is that the plaintiff is a director of Daytona Sales Ltd. and as such was the bailee of the motor vehicle at the time of the accident.

In his capacity as such he can properly make this claim as he has so done. An award of $450,000 is accordingly made.

Loss of use of motor vehicle

It is reasonable that the plaintiff would need to replace his damaged vehicle and in this regard to have one during the interim period. The claim for $23114.36 is supported by documents from Island Car Rentals Ltd. (Exhibit 12) and which sum I allow.

The plaintiff is also entitled to recover the sum of US$23,974.98 representing Cigma Health Insurance payout and US$150 co-payments for hospitalization in Jamaica amounting to US$150 totalling US$24,124.98.

Judgment is assessed as follows:

Special damages: In the sum of J$654,864.36, US$44,192.61

General damages:

For pain & suffering & loss of amenities $2.5M.

Future medication & hip surgery J$450,000, US$60,000.

The plaintiff having found to be contributorily negligent to the extent of 25% he is therefore entitled to a final judgment of 75% of the above.

Claims of Indemnity

The first and second defendants have claimed indemnity against the third and fifth defendants on the one part and against the sixth defendant on the other part, as follows:-

1. An indemnity against the plaintiff's claim or to contribution to such extent as the Court shall think fit in respect of such claim.

2. Judgment for any amoun that may be found due from the first and second defendants to the plaintiff.

3. Judgment for any amount of any costs that the first and second defendants may be adjudged to pay the plaintiff and for the amount of the first and second defendants' own costs of defending this action and of the proceedings against the first and second defendants herein.

The sixth defendant has claimed indemnity against the first and second defendants on the one part and the third and fifth defendants on the other part interms identical to those made by the first and second defendants.

Having already found that the first and third defendants were not personally liable, the claims of indemnity will be considered in respect of the second, fifth and sixth defendants.

I find the fifth defendant to be the principal tortfeasor in this action. The second defendant's role is in

employing an independent contractor, the fifth defendant's proved to be negligent in carrying out their work. The sixth defendant's role is in negligently supervising the job for which they were paid to do.

It was held in the Miraflores and the Abadesa (1967) 1 AER 672, that in assessing degrees of fault, blameworthiness as well as causation must be considered as necessary to weigh the fault of each negligent party against each of the others separately and not conjunctively. The proportions of fault I assess to be 10% in respect of the second defendant and 10% in respect of the sixth defendant. The second and sixth defendants are each entitled to be indemnified by the fifth defendant to the extent of 80% of the judgment. The fifth defendant's liability as between all three defendants amounts, to 80% of the judgment.

In fine damages are assessed as follows:-

Special damages: In the sum of J$491,114.25, US$33,144.46 with interest at the rate of 3% per annum from the 14.1.95 to the 8.10.99;

General damages: In the sum of J$2,212,500.00 US$45,000 with interest on $1,875,000.00 at the rate of 3% per annum from the 22.5.95 to the 8th October, 1999.

Costs to the plaintiff to be agreed or taxed.

the instant case, the district council acting under the Public Health Act, 1875, employed a contractor to make up a highway, which was used by the public but had not become repariable by the inhabitant at large. In carrying out the work the contractor negligently left on the road a heap of soil, unlighted and unprotected. A person walking along the road after dark fell over the heap and was injuried. In an action against the district council and the contractor to recover damages for the injuries sustained, it was held that as from the nature of the work, danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not causal or collateral to his employement and the district council is liable.

In the Court of Appeal, Smith LJ agreed with the trial judge Bruce J when he says.

> "The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in a habit of passing, which work will, unless precautions are taken, and that if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor."

There principles were further reiterated in the case of **Honeywill & Stein Ltd. v Lachin Bros Ltd. (1933) AER 77** where the action was against the contractor to recover sums paid to a third party in respect of property damage caused by the contractors

> road authority and to such conditions as may be prescribed, open or break up any road, street or have for the purpose of laying down, extending, inspecting, altering, removing or repairing any water works or sewerage system."

The Act places the Commission under a duty to conduct its operations properly without endangering the public and cannot escape this duty by delegation to an independent contractor.

I find that the sixth defendant is also liable in negligence and conclude that the second, fifth, and sixth defendants are all liable in negligence. The plaintiff succeeds in establishing negligence against them.

Apportionment of damages

When both parties are at fault, the plaintiff's damages are to be reduced having regard to the claimant's share in the responsibility for the damage. Share in the responsibility for the damage therefore means share of the blame causing the damage and the damages are to be apportioned on the basis of blameworthiness. In **Davies v Swan Motor Co. Ltd. (1949) 2KB291, Denning LJ** said:-

> "Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of the causation. The amount of the