In the Supreme Court.

In Common Law

Before: The Chief Justice

Suit No. C.L. 1976/D093

Between	Milton Douglas	Plaintiff
And	The Kingston & St. Andrew Corporation	Defendant

Suit No. C.L. 1978/D195

Between	Luletta Flo Douglas (by Lucille Douglas her next friend)	Plaintiff
And	The Kingston & St. Andrew Corporation	
	David Emanuel and Robert Gordon	Defendants.

Clinton Hines and Elizabeth Hines for Plaintiffs.

W.K. Chin See and Margaret Moodie for Defendant Corporation.

Heard: March 23, 24 & 25 & June 4, 1981.

Judgment: September 25, 1981

SMITH, C.J. :

These actions were tried together by consent. The infant plaintiff is the daughter of the plaintiff Milton Douglas and his wife, Lucille. In September, 1975 Mr. & Mrs. Douglas lived with their family at No. 17, Balmagie Avenue, off the Bay Farm Road, in Saint Andrew in a house owned by Mr. Douglas.

On 14 September a garbage truck owned by the defendant corporation ran off Balmagie Avenue, where it was being driven by the defendant Robert Gordon, and into the Douglas' house causing damage to the house, Mr. Douglas' motor car and his furniture. The damages claimed by Mr. Douglas in his action, as a result, have been agreed at $4,000.00.

At the time of the accident, Mr. Douglas and his three children, of whom the infant plaintiff Luletta was the youngest, were in the house. Mr. Douglas said that he received a blow to his head when the truck struck the house. Luletta was beside him at the time. He was, apparently, stunned by the blow but left the house after the impact.

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It was afterwards discovered that although the two older children had also left the house Luletta was still inside it. On being taken from the house she was found to be bleeding from a wound on her head. She was taken by her mother to the Children's hospital, where she was treated for the wound. She was admitted overnight. Next morning she was discharged. Her mother took her home and after ten days the stitches were removed from the wound at the hospital.

Luletta was two years of age at the time of the accident She was born on 22 July 1973. Mrs. Douglas said that before the accident her daughter could speak and could put together simple sentences - e.g. "Mummy, want water." She did not speak at all after the accident; she communicated by making signs or touching her mother. Mrs. Douglas became concerned and took the child back to the Children's hospital in April, 1976. The doctor who saw her referred her for speech therapy. She was taken for therapy from April to October, 1976 but there was no improvement. On Friday 11 March, 1977, Mrs. Douglas said, Luletta went to lie in her lap and "started to stiffen". She shook her and she turned, looked up at her and smiled. She was taken to the Children's hospital on the following day and was examined by a doctor, who carried out tests. On the following Tuesday (March 15) she was examined again at the hospital by doctors, who advised that she be seen by a brain specialist. Mrs. Douglas said that on returning home that day Luletta fell on the verandah "and start to stiff out." She was taken two days later to the University hospital, where she has been seen frequently since by doctors. Mrs. Douglas said that "the falling and stiffening out" continued every day since and is still continuing. There has been improvement in her speech only to the extent that she can now call the names of persons and objects but cannot make sentences. She does not respond to instructions, cannot bathe herself, put on her clothes or manage toilet habits; she, however, feeds herself. Her mother does not think she is making any progress in her schooling - she was sent to a school run by the Early Childhood Stimulation Project at Spanish Town for seven months but was not learning anything, her mother said; she now attends an infant school but her mother does not see that she is learning anything - she cannot identify

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letters of the alphabet and though she uses pencil and paper she does not write any letters or draw any object.

Dr. Robert Gray is a consultant paediatrician associated with the University hospital. He has a special interest, he said, in paediatric neurology. He has examined and treated Luletta. He first saw her on 21 April, 1977 when she was referred to the special clinic which he runs at the University. She was then aged 3 years 9 months. She had a history, he said, which was typical of a form of epilepsy that children may have. Investigations were done; x-ray of her skull was normal but an E.E.G. showed an abnormality in keeping with the historical description of the epileptic attacks she had been having. Dr. Gray concluded that she was suffering from a particular form of epilepsy and that her general brain development was below par for her age in view of the history of speech digression. He said that the two were connected insofar that the two could have been caused by brain damage earlier in life; that there was nothing in the birth history or early infancy which could have damaged the brain and the one thing that was a likely relevant factor was a head injury she received when she was 2 years and 2 months old i.e. when the garbage truck ran into the house. Luletta was next seen by Dr. Gray on 10 November, 1977. There was no change for the better; in spite of being given medication to control the seizures, she continued to have frequent spells, she was not communicating to the doctor as a child of her age should. Dr. Gray said that this was consistent with delayed development which, in turn, was consistent with earlier brain damage; she was then 4 years and 3 months old and her development was obviously below normal. The type of epilepsy from which she suffered, he said, was known to be difficult to control and was likely to continue indefinitely. She was given different medication in November, 1977 but this really made little difference over the ensuing fifteen months. A newer type of drug was then introduced and there was slightly better control, but she continued to have daily spells. In March 1980, the supply in Jamaica of the new drug ran out and she had to be put back on a drug she had previously had; as expected the control was not quite as good. Since November, 1980 the new drug, epilim, is again available. In spite of being back on it she still has brief spells everyday when

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she would lose consciousness and shake her head - she may or may not fall; the doctor would himself see her having these spells while she was at the clinic. He last saw her on 12 February, 1981. There was no remarkable change in the overall development or her seizure control. She was still saying very little.

Dr. Gray's opinion is that there is no doubt that Luletta is intelectually retarded and has a form of epilepsy which is likely to continue for a long time and be difficult to control even with the most modern drug. He said that on 31 July 1980 a developmental screening test was done by a "play therapist" in the child neurology clinic and it was concluded that at 7 years of age, as Luletta was then, she was functioning at the level of a 2 year old. The doctor is of the opinion that she will never catch-up with her chronological age - in her intellectual development. He feels that she is not going to be able to learn in the normal school setting; that she will require special education; how much she will be behind as she develops physically will depend on the stimulation and special education she receives; he did not think she will reach an adult age in her development. Her life expectancy will not necessarily be affected.

It was admitted by Dr. Gray that epilepsy is attributable in many cases to congenital factors and that the majority fall into this category. In many cases, he said, there is a familial tendency and one child in a family can have congenital epilepsy while another does not. Mrs. Douglas said that her other children are normal. It was also possible, the doctor said, that Luletta could have had a latent tendency to have seizures from birth and there was an earlier manifestation of it by reason of the accident. Based on the evidence of Dr. Gray and on that of the child's mother, I find that it is more probable than not that Luletta developed epilepsy as a result of the blow she received to her head, causing damage to her brain, when the defendant corporation's truck ran into her father's house on 14 September, 1975.

I will now endeavour to assess the damages to which the child is entitled in the event that she succeeds in her action on the question of liability. The special damages on her claim was agreed

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at $1,000.00. It is agreed that she may recover general damages under three heads, viz: (a) loss of amenities of life, (b) loss of future earnings and (c) cost of future nursing and attendance. I now deal with them in turn.

(a) Loss of amenities of life -

It is not unreasonable to find, on the medical evidence, that it is more probable than not that Luletta will have almost daily epileptic attacks, when she will lose consciousness briefly, for the rest of her life. The severity of the attacks will depend on the availability of modern drugs. It is not suggested that she suffered any physical impairment as a result of the accident. She was present in court during the trial and appeared to be a physically normal child. The injury which she received to the head was apparently not physically severe and it is not suggested that it occasioned much pain. Indeed, no medical evidence was called in respect of this injury and it was not treated as being of any significance except that it was caused by the same blow which it was alleged caused the damage to her brain. She is now 6 years old. There was no direct evidence given of the extent to which during her childhood her ability to participate in normal childhood activities will be impaired. It is assumed that, apart from her epileptic attacks, she will behave as a child of her retarded age would. So that the compensation to which she is entitled under this head up to adolescence is for the loss of enjoyment of life of a person of her chronological age, including the restrictions to which she will be subjected because of the epileptic attacks. Thereafter, she will lose the enjoyment of life of a normal woman - a worthwhile occupation and earning from it, the pleasures of adult romance and motherhood and the numerous other things to which a young woman aspires. There will likely be also, both before and after adolescence, feelings of frustration because of inability to do what other persons of her chronological age do. I do not agree with Mr. Hines that Luletta is in a worse position than the infant plaintiff in Taylor v Bristol Omnibus Co. Ltd., (1975) 2 All E.R. 1107; the brain damage in that case was severe with greater impairing effects. In my judgment $60,000 is a fair and reasonable award to make under this head. Mr. Hines' $75,000 is much too high.

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(b) Loss of future earnings -

Luletta's father is a tailor and her mother a dressmaker. In Taylor v Bristol Omnibus Co. Ltd. (supra) the use by the trial judge of the yardstick of the father's position to arrive at an average annual earning was approved by the Court of Appeal. In this case it may be more appropriate to use the mother's than the father's. However, no evidence was given of what either the father or the mother earns. Mr. Hines suggested that the award should be made on the basis that the child would eventually have become a typist earning a minimum of $75 a week. There is, however, apart from Mr. Hines' say so; no evidence of what a typist earns. He might just as well have suggested a figure as that which the mother is capable of earning as a dressmaker, which is a more appropriate basis for assessment. The best I am able to do, in a situation where it is really impossible to say what Luletta's earning capacity would be in a normal adult life and where there is no evidential basis adduced, is to assume that she would have been able to earn at least the national minimum wage of $30.00 a week. This gives an annual sum of $1,560.00. Her normal working life would be from age 16 to 65. Applying a multiplier of 16 and discounting it by half because of immediate payment the resulting figure to be awarded is $12,500.00, in round figures.

(c) Cost of future nursing and attendance -

Mr. Douglas, Luletta's father, said that his wife had not worked since the child's illness because she had to remain at home with her. Mrs. Douglas formerly did her dressmaking at her husband's tailor's shop. Mr. Douglas said that Luletta cannot safely be left alone because "she cannot manage herself" - "she would probably go in the refrigerator or throw water on herself or turn on the pipe or go outside and get knock down." There has been no express evidence given to establish whether or not she will require constant adult supervision and attendance for the rest of her life. This, presumably, is left to inference from the fact that the doctor did not think that she will reach an adult age in her development. The inference is, however, made difficult to draw by the fact that it is uncertain how far she will be behind in her intellectual development when she reaches adult age chronologically. Will she reach the

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age of, say, a 16 year old and thus be better able to look after herself? Mr. Chin See for the defendant did not contest this issue. What he said was that no evidence was given of the amount the mother would have earned if she did not have to stay at home to look after the child, so an award cannot properly be made under this head.

There is indeed no such evidence, but the authorities suggest that courts take a liberal view of the evidence which is regarded as a sufficient basis for an award under this head. In Taylor v Bristol Omnibus Co. Ltd. (supra), Lord Denning, M.R. used the cost of a home help as a basis. Counsel for the plaintiff relied on this for the submission that the national minimum wage should be used in this case. In the absence of evidence of what the mother actually loses financially by having to stay at home, I shall make an award on the basis that she would have to employ a domestic helper to take care of Luletta in the days while she is away at work. Indeed, it seems that this would be a more reasonable basis even if evidence had been given as I get the impression from the evidence that a reliable domestic helper is all that Luletta would really require to look after her; so that the mother could not justifiably be expected to be reimbursed her actual weekly earnings, even if this were legally permissible (see Griffiths v. Merkemeyer, (1977) 139 C.L.R. 161). As Luletta's life expectancy has not been impaired, I think it is fair to use a multiplier of 18, as in the Taylor v Bristol Omnibus Co. Ltd. case (supra) (per Lord Denning, M.R.). At $30 a week, the total is $28,080.00. I, would, however, discount this figure to $21,000.00 as it seems to me that there is a chance that Luletta may not need constant supervision all her life (see Jones v Griffiths (1969) 1 W.L.R. 798, per Widgery, L.J. at 801).

If the defendant corporation is liable to pay damages in the two actions, the amounts I would award are : $4,000.00 agreed damages in the first action and $97,500 in the second, being $1,000.00 agreed special damages and $93,500 general damages. Liability in both actions is denied on the ground that the driver of the truck on the occasion was not acting within the scope of his employment. Additionally, by amendment of the defence at the trial, liability is denied in the action

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by the infant plaintiff on the ground that the action is barred by the provisions of the Public Authorities Protection Act. In this latter action, judgments in default of appearance were entered against the second and third defendants.

On the day of the accident, a Sunday, the truck which caused the damage was driven from the Bumper Hall headquarters by its driver, David Emanuel, to collect garbage along the Waltham Park Road, between Spanish Town Road and Hagley Park Road. It carried four loaders or sidemen, of whom Robert Gordon was one. The truck left Hagley Park Road with its load of garbage, at about 11.30 a.m. according to the driver, for the garbage dump at Riverton City via the Spanish Town Road. Robert Gordon was the only sideman who went with the driver to the dump. On the return journey to Bumper Hall the driver, Emanuel, turned off the Spanish Town Road at Penwood Road because, he said, the side of Spanish Town Road on which he was then driving was blocked because of road work, then in progress. He said that he intended driving on Penwood Road to Bay Farm Road to Olympic Way and thence back to Spanish Town Road and Bumper Hall. He said that he stopped the truck on Bay Farm Road near to Dillistone Avenue because he saw a friend with whom he wanted to speak. He parked the truck and went 30 to 40 yards away to Dillistone Avenue to speak to the friend, leaving Robert Gordon seated in the cab of the truck. Mr. Emanuel said that after about half-an-hour he looked around and did not see the truck.

Mr. Gordon's account was that on the way back from the dump he did not know the driver intended turning off on Penwood Road; that he was not aware that the Spanish Town Road was blocked between Riverton City and Bumper Hall. He said that after the truck was parked the driver left it and went into a building where dominoes were being played and "like a fish feed thing" there were other people there. Mr. Gordon said that after waiting by the truck for nearly an hour he went into the premises and spoke to the driver, who said that he "would soon come". He went back and waited another half-hour or so but "did not try to contact (the driver) again as he took a seat now." He then drove off the truck. Mr. Gordon, who was called as a witness for the plaintiffs,

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gave the following reasons, during his evidence, for driving off the truck .

> " Through I really know that I had a licence and can drive it and I waiting over two hours - in the fields of the department if anything like the driver take sick and a loader can help out - so I intend to take the truck in to Bumper Hall. I decided to do that. "

Mr. Gordon said that he had driven that truck several times before that day and that the driver, Emanuel, has been present when he has driven it and has given him permission to do so. Indeed, he said, on the very day of the accident he drove the truck while they were working on Waltham Park Road when the truck needed to be moved from one heap of garbage to another and the driver was not present. Mr. Emanual knew that Mr. Gordon could drive trucks. He said that he has seen him drive all types of garbage trucks in the "depot" at Bumper Hall. He, however, denied that Mr. Gordon had ever driven any truck with his permission. It is, of course, not suggested that the driver gave permission for him to drive off the truck from Bay Farm Road on September 14 but Mr. Gordon said that he did not expect the driver, Emanuel, to be upset about it when he did so.

The driver had left the engine of the truck running when he parked it on Bay Farm Road. The key had been left in the ignition but the ignition system had been "bridged" on the Waltham Park Road earlier that day when the engine could not be started with the use of the key. Mr. Gordon said that the accelerator of the truck was in the habit of sticking and stuck that day when they were working on the Waltham Park Road. Mr. Emanuel said that the truck was in good mechanical condition when he drove it off that morning; there was nothing wrong with the accelerator and the only thing that went wrong with the truck on Waltham Park Road was when the engine could not be started by the ignition key. He denied that the accelerator stuck on Waltham Park Road. I believe the accelerator was in the habit of sticking, as Mr. Gordon said, but there is no allegation of negligence against the defendant corporation in respect of this defect.

Mr. Gordon said that he drove the truck from Bay Farm Road to Balmagie Avenue on his way to Bumper Hall. Driving on Balmagie Avenue,

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he said, was "almost the same way out as if (he) drove on Bay Farm Road - it would be the same journey." Mr. Emanuel said that Balmagie Avenue was out of the way if one is driving from Bay Farm Road to Bumper Hall, but it was not suggested to Mr. Gordon that he drove off the truck for any other purpose than to take it to its headquarters at Bumper Hall. I got the impression that Mr. Gordon did not know the area very well - he was confused in naming the streets. He gave the following account of the accident. While driving on Balmagie Avenue he "was not going at no speed" when, about 40 chains from where the truck was driven off, the accelerator stuck. He could not use his foot to "pull it up back" so he was trying to use one hand to do so with the other hand on the steering wheel. While doing this "the front wheel bump on the kerb wall", he lost control and the truck crashed into the house. In cross-examination, he said that it was after the accelerator stuck and he was trying to pull it up that the vehicle got out of control, he said he was trying to stall it to make it stop.

I find that the accident was caused by Mr. Gordon's negligence in employing an awkward manoeuvre to release the accelerator instead of using a safer means whereby to stop the truck e.g. by neutralising the gears and using the brakes. His negligence was the effective cause of the accident and not the defective accelerator. I believe that he was a licensed driver, as he said that he had driven the defendant corporation's trucks from time to time and had done so with the permission of Mr. Emanuel. It is clear, however, and I so find, that the truck was driven off from Bay Farm Road on September 14 without Mr. Emanuel's permission. I believe that this is what happened - that Mr. Emanuel did not stop at Bay Farm Road to see a friend, as he said, but in the circumstances described by Mr. Gordon: that Mr. Gordon was kept waiting for what he felt was an unreasonable time while Mr. Emanuel enjoyed himself; that, being a Sunday, Mr. Gordon was anxious to go off duty but could not do so until the truck with the tools were returned to Bumper Hall; and that being a licensed driver he decided to leave Mr. Emanuel to his fun and take in the truck and tools. Mr. Emanuel was a hopeless witness insofar as veracity was concerned and I unhesitatingly accept Mr. Gordon's evidence in preference to his where they are in

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conflict.

It was clearly outside the scope of his employment as sideman or loader for Mr. Gordon to drive the truck and he was not otherwise expressly authorised to do so. So the defendant corporation is not liable on this basis for his negligence. Insofar as it is material for a decision in the case whether Mr. Emanuel was on a frolic of his own or not, I find that he was not. I do not believe him that he drove on Penwood Road, instead of continuing directly along the Spanish Town Road back to Burger Hall, because the latter road was blocked. I hold, however, that a deviation from the direct route, such as this was, was not sufficient to take him outside the course of his employment, albeit he went by that route for his own purposes (see Joel v Morison, (1834) 6 Car. & P. 501; Storey v Ashton, (1869) L.R. 4 Q.B. 476).

The plaintiffs seek to make the defendant corporation liable, firstly, by imputing negligence to the corporation's driver, Emanuel. It was submitted that it was an act of negligence on Emanuel's part to leave the engine of the truck running and that knowing Mr. Gordon was a driver he should have exercised more care and not abandon the truck leaving him in charge. Even if this submission is right, it is not a ground for making the defendant corporation liable as, ex hypothesi, the negligence of the driver was not the effective cause of the accident. The sideman Gordon, as I have found, was a competent driver and it was his negligence, as I have also found, which was the effective cause of the accident. I am not, however, convinced that the driver Emanuel was negligent in leaving the truck as he did, with the engine running; nor can it reasonably be said that he abandoned the vehicle. It was not left unattended nor was it left in circumstances where it can reasonably be said that it was dangerous to do so. Even if it should have been in Mr. Emanuel's contemplation that Mr. Gordon may have driven off the truck, he knew him to be a competent driver.

Secondly, it was submitted that the defendant corporation is liable because at the time of the accident Mr. Gordon, the sideman, though not employed to drive, was agent of the corporation and was acting within the scope of his agency. Alternatively, that he was at the

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time dealing with an emergency and so had implied authority to endeavour to protect his employer's property. These submissions are based on the premise that there were the tools used by the sidemen on the truck and liable to be stolen, along with the battery, if Mr. Gordon had gone off and left the truck.

Evidence was given by Mr. Sydney McKain, the Superintendent of the Public Cleansing department, that the sidemen are responsible for the safety of the tools and to see that they are returned to the storekeeper by whom they were issued; that it would be a breach of duty if sidemen left the tools on the truck and went about their business. Mr. Gordon said that his work was not finished until the truck was parked back at Bumper Hall and the tools taken off. It was submitted that Mr. Gordon was entitled to drive off the truck and take it to Bumper Hall, and would do so as agent, if he saw the truck and his employer's other property in danger or had reasonable grounds for believing that he saw them in danger. There was an emergency, it was said, because Mr. Gordon was left with the truck and was there waiting for long and there were the tools which were his responsibility; he had to find a way to safeguard his employers' goods and his job. It was his duty in those circumstances, it was said, to take the truck back to Bumper Hall.

The principle of law cited in support of these submissions is stated in Poland v John Parr & Sons (1927) 1 K.B. 236: that a servant has implied authority to make reasonable efforts to protect and preserve his master's property in cases of emergency endangering it. Bankes, L.J. in that case (at p. 240) cited the following passage from the opinion of the Privy Council in Bank of New South Wales v Owston, (1879) 4 App. Cas. 270, 290:

> " An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of fact must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one. "

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Though this second ground for making the defendant corporation liable is put in the alternative, there is no authority, independent of an emergency arising, to support the submission that an employer can be made liable for the negligence of an employee on the basis of pure agency where the negligent act of the employee was not done in the normal course of his employment. The question which, therefore, arises for decision is whether factually an emergency arose which authorised the sideman Gordon to drive the truck back to Bumper Hall in protection of his employers' property.

It is quite clear, in my judgment, that no emergency can be said to have arisen on the facts which are relevant for a decision on this issue. The driver of the truck, Emanuel, said that he had left the truck for only about half-an-hour when it was driven off. I accept the evidence of Mr. Gordon that it was for a longer period. He said that he waited "over two hours" before he drove off, though when it was suggested in cross-examination that he did not wait for as long as two hours he replied: "Well, it was a long time." Taking two hours as the period, and using 12.30 p.m., the time given by Mr. Emanuel, as the time when the truck left the dump on the return journey, it must have been sometime just before 3 o'clock p.m. when Mr. Gordon drove off the truck. He himself said it was "12 mid-day or after 12" when he drove off. On these facts, where is the emergency? Where is the anxiety to protect his employers' property? Where is the exigency of the occasion except insofar as Mr. Gordon was personally concerned? Clearly, as I have said above, Mr. Gordon drove off the truck in his own interest because he felt that he was kept waiting by Mr. Emanuel for an inordinately long time and he wanted to discharge his responsibility for the tools so that he could go off duty. There is no question here of any emergency arising which would give the stamp of authority to his unauthorised act so as to make his employers liable.

The defendant corporation pleaded the Public Authorities Protection Act in defence of the claim by the infant plaintiff. The writ in this action was not filed until December 5, 1979, more than three years after the accident. It is conceded that the defendant corporation is

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charged by the Public Health Act with the public duty of collecting and disposing of garbage within the corporate area of Kingston and St. Andrew. It is, therefore, not in dispute that on the day of the accident the truck was driven to the garbage dump in pursuance of that public duty. It follows, and is also conceded, that a normal return journey would also be within the statute. Learned counsel for the plaintiff submitted, however, that at the time of the accident the truck was not being used in the execution by the defendant corporation of its public duty or authority; that the sideman Gordon cannot be said to have been acting in pursuance of a public duty or authority after he took control of the truck. On the facts found by me, this submission is clearly right. If the defendant corporation had been found to be liable for the negligent act of Mr. Gordon on the ground that he had authority to drive the truck in protection of his employers' property, the statute would have been of no avail to the defendant.

I regret that the facts of the case and the principles of law applicable have compelled me to find for the defendant corporation on the question of liability. The Douglas family, particularly Lulubta, have suffered grievous damage and loss by the intrusion of the corporation's truck into their home on what must have been a quiet Sunday afternoon. It will be a tragedy if they have to go entirely without compensation. If further steps which will, no doubt, be taken on their behalf in these actions are equally unsuccessful, I hope that those responsible for recommending and taking a decision on behalf of this public corporation will consider this a proper case for the making of an ex-gratia payment by way of even partial compensation to this family.

There will be judgment for the defendant corporation in each action with costs to be agreed or taxed. If I could justify withholding the order for costs I would have done so.