

20 OF 1982

43/82



APPEAL

TO

HER MAJESTY IN COUNCIL

(PRIVY COUNCIL)

APPEAL FROM

THE COURT OF APPEAL OF JAMAICA

NO: C.A. 18 OF 1979

BETWEEN

CLIVE MALCOLM

PLAINTIFF/APPELLANT

A N D

REX KNIGHT

FIRST DEFENDANT/RESPONDENT

A N D

EZEKIEL WILLIAMS

SECOND DEFENDANT/RESPONDENT

Record prepared by AINSWORTH W. CAMPBELL of 53 Church Street, Kingston
Attorney-at-Law for the Plaintiff/Appellant.

TO THE PRIVY COUNCIL

NO. C.A. 18/79

ON APPEAL

FROM THE COURT OF APPEAL, JAMAICA

BETWEEN CLIVE MALCOLM PLAINTIFF/APPELLANT
AND REX KNIGHT DEFENDANT/
AND EZEKIEL WILLIAMS RESPONDENTS

SETTLING OF THE RECORD
OF PROCEEDINGS

BEFORE: The Deputy Registrar

On the 27th May, 1981

| NO: | DESCRIPTION OF DOCUMENTS | DATE |
|---------------------------------|--|---------|
| <u>DOCUMENTS TO BE INCLUDED</u> | | |
| <u>IN THE COURT OF APPEAL</u> | | |
| 1. | Notice & Grounds of Appeal | |
| 2. | Judgment of Court of Appeal | 12/2/81 |
| 3. | Notice of Motion and Affidavit of Ainsworth Campbell supporting it | /3/80 |
| 4. | Order granting Conditional leave to Appeal to Privy Council | |
| 5. | Final Order granting leave to Appeal to Privy Council (when given) | |
| ***** | | |
| <u>DOCUMENTS TO BE EXCLUDED</u> | | |
| 1. | Notice of intention to rely on Affidavit of Ainsworth Campbell | |
| 2. | Bill of Costs | |
| 3. | Notice of taxation | |
| 4. | Amended Notice of Motion and Affidavit of Ainsworth Campbell supporting it | |

| NO: | DESCRIPTION OF DOCUMENTS | DATE |
|---------------------------------|--|------|
| <u>DOCUMENTS TO BE INCLUDED</u> | | |
| <u>IN THE COURT BELOW</u> | | |
| 1. | Endorsement on Writ of Summons | |
| 2. | Statement of Claim | |
| 3. | Defence | |
| 4. | Notes of Evidence (with Exhibits) | |
| 5. | Written Judgment of Mrs. Justice Allen | |
| 6. | Formal Judgment | |
| ***** | | |
| <u>DOCUMENTS TO BE EXCLUDED</u> | | |
| 1. | Writ of Summons (except endorsement) | |
| 2. | Appearance | |
| 3. | Interlocutory Judgment | |
| 4. | Affidavit of Search | |
| 5. | Summons to Proceed to Assessment of Damages | |
| 6. | Order on Summons to Proceed to Assessment of Damages | |
| 7. | Notice of Change of Attorney | |
| 8. | Notice of Assessment of Damages | |
| 9. | Summons to set aside Interlocutory Judgment | |
| 10. | Affidavit of Rex Knight in support of Summons | |
| 11. | Affidavit of E. Williams in support of Summons | |
| 12. | Notice of Change of Attorney | |
| 13. | Notice of Hearing of Summons | |
| 14. | Notice to cross-examine Applicants for Summons | |

PRESENT : Mr. Ainsworth Campbell for Plaintiff/Appellant.
Mrs. Elizabeth Hines instructed by Messrs. Hines,
Hines & Co. for Defendant/Respondents.

Settled :-

Dep. Registrar (Ag.)
Court of Appeal

TO: - Mr. A. Campbell,
Attorney-at-Law
53 Church Street
Kingston

Messrs. Hines, Hines & Co.,
Attorneys-at-Law
11 Duke Street
Kingston.

NOTICE OF APPEAL

SUIT NO. C.L. M.107 OF 1976

SUPREME COURT CIVIL APPEAL NO. 18 OF 1979

COURT OF APPEAL

| | | |
|---------|------------------|--------------------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF/APPELLANT |
| A N D | REX KNIGHT | 1ST-DEFENDANT/RESPONDENT |
| A N D | EZEKIEL WILLIAMS | 2ND-DEFENDANT/RESPONDENT |

TAKE NOTICE that the Court of Appeal will be moved as soon as Attorney-at-Law can be heard for the Plaintiff/Appellant on appeal from the whole of the Judgment herein of the Honourable Mrs. Justice Allen given at the trial of this action on the 16th, 17th and 18th days of January 1978, the 29th, 30th and 31st days of May, 1978, the 9th, 10th and 11th days of October 1978 and on the 31st day of January 1979 whereby it was ordered that there should be Judgment for the Defendants/Respondents against the Plaintiff/Appellant with costs to be taxed or agreed for orders that:

1. Judgment be entered for the Plaintiff/Appellant with costs to be taxed or agreed and paid by the Defendants/Respondents.
2. The action be sent to a Judge at first instance for the damages to be assessed.
3. That the Defendants/Respondents do pay the costs of and incident to this Appeal.

AND TAKE FURTHER NOTICE that the following are the grounds upon which the Plaintiff/Appellant will reply at the hearing of the Appeal:

1. The Judgment is wholly against the weight of the evidence and cannot be maintained in Law or on the facts.
2. The learned trial Judge erred in assessing the evidence of the 2nd Defendant/Respondent's evidence which was highly improbable.
3. The learned trial Judge erred when she failed to properly assess the evidence of the second-Defendant/Respondent. This evidence is to the effect that the collision occurred at various points on the road at Thompson Pen. See evidence (a) You cannot see around the

corner I was driving (b) As I reached the corner I saw him coming down the grade (c) Manhole before reach apex about 15-20 feet coming on the Sligoville Road (d) saw a bicycle rider came down grade. Yes said grade about $\frac{1}{2}$ chain from the corner. Yes from the Sligoville direction you have to apex of corner before you can see up grade. For me to see upgrade I have to finish the corner. Well, you have to pass manhole near apex of corner before can see upgrade.

Yes I had passed the manhole about two (2) feet or so before I saw the Plaintiff for first time. I would say collision took place in dead centre of the apex. From dead centre of the apex unable to see up the grade (towards McNeil Park).

Yes said truck passed manhole two (2) feet when truck and cycle collided. Yes at the time manhole behind truck.

4. The learned trial Judge erred when she rejected the evidence of the witness Noel McLennon for the Plaintiff/Appellant after having assessed him as a witness of sincerity who was present at the scene of the collision and did see the collision. Reason given i.e. that he could not see all he said he saw, has no foundation in any fact stated in the evidence or that could be drawn inferentially. On the contrary the evidence as to the physical outlay of the locus in quo suggests that he had all the opportunity to see what he said he saw.

5. The learned trial Judge erred in not accepting the Plaintiff/Appellant's evidence as reliable when he was neither assessed as untruthful by reason of any contradiction in his evidence or because of the manner in which he gave evidence.

6. The learned trial Judge erred when she visited or stopped at the locus in quo during the trial of the case without the presence and or assistance of the Plaintiff/Appellant or his Attorney-at-Law or without notice of the fact that she was making the visit.

7. The learned trial Judge erred when she made use of the exhibits 1-12 although these could not be found at the time that Attorneys-at-Law in the case were addressing the court on the evidence in the case.

8. The learned trial Judge erred in admitting the prints i.e. Exhibits 1-12 in evidence although no prior notice of the existence of the exhibits had been given to the Plaintiff by the defence of its intention to use them until the very morning they were to be used.

9. The Plaintiff/Appellant craves leave to file supplementary grounds of Appeal when the notes of evidence are available if necessary.

AINSWORTH W. CAMPBELL
Plaintiff/Appellant's Attorney-at-Law.

Filed by AINSWORTH W. CAMPBELL of 53 Church Street, Kingston,
Attorney-at-Law for and on behalf of the Plaintiff/Appellant whose
address for service is that of his said Attorney-at-Law.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 18/79

BEFORE: The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

BETWEEN CLIVE MALCOLM PLAINTIFF/APPELLANT
A N D REX KNIGHT FIRST DEFENDANT/RESPONDENT
A N D EZEKIEL WILLIAMS SECOND DEFENDANT/RESPONDENT

Mr. Ainsworth Campbell for the Plaintiff/Appellant

Clinton & Elizabeth Hines for Defendants/Respondents

January 30, 31 February 1, 13,14, March 14, 1980

HENRY J.A.

On June 28, 1973 a collision occurred between a truck owned by the First Defendant/Respondent and driven by the second Defendant/Respondent and a bicycle ridden by the Plaintiff/Appellant. The Plaintiff sustained serious injuries. He brought an action for negligence and at the conclusion of the trial of that action judgment was given for the Defendants. This is an appeal against that Judgment.

At the trial three witnesses gave evidence on the Plaintiff's behalf in respect of the actual collision - the plaintiff himself, George McFarlane and Noel McLennon. The Plaintiff had suffered brain damage in the collision, there was evidence that his memory was not always reliable and his mother also gave evidence to suggest that subsequent to the accident he was not always truthful.

The learned trial judge concluded that "it would be extremely unsafe to accept Plaintiff's evidence as to how the accident happened" and rejected his evidence. In so far as Mr. McFarlane was concerned she said "The impression I formed of this witness was not favourable. I doubted that he saw how the accident happened and that he spoke to the driver of the truck as he alleged. I formed the opinion that he was untruthful and unreliable and rejected his evidence of how the accident happened on those grounds." She was therefore left with the evidence of Mr. McLennon for the Plaintiff and of the Second Defendant Mr. Williams the only eye witness called for the Defendants. The gist of Mr. McLennon's evidence was that the collision occurred in circumstances where the two vehicles were travelling in the same direction and the truck ran into the rear of the bicycle. On the other hand Mr. Williams gave evidence to the effect that the vehicles were travelling in opposite directions with the Plaintiff riding on his incorrect side of the road. I was not in dispute that the Plaintiff fell near a culvert on the side of the road on which the truck was travelling. Evidence from Mr. Williams as to the damage to the bicycle indicated that the front fork and front wheel were damaged. Mr. Williams saw no damage to the handle. Corporal Britton who investigated the accident found the front wheel of the bicycle damaged, the handle bent, the front fork slightly damaged and the frame bent. Neither witness saw any damage to the rear of the bicycle.

Professor James Cross a Neuro-Surgeon who treated the Plaintiff for injuries received in the accident stated that those injuries were consistent with the plaintiff riding a bicycle and colliding with a truck going in the opposite direction. He also however agreed that those injuries were consistent with a fall. Dr. Chutkan an orthopaedic surgeon who also treated the Plaintiff stated that the

injury which he found to the brachial plexus and shoulder could be caused by a fall on a hard surface but was more likely to be caused by a moving object. He considered the fracture to the metacarpals consistent with the Defendant's version of the accident but he later conceded that any of the injuries could be caused by the cyclist being hit from behind going up in the air and falling in an open culvert. Finally he said that if the Plaintiff fell on his outstretched palms the fracture of the metacarpals was less likely but possible although he would then expect a fracture to the lower forearm. A fair appraisal of this medical evidence would seem to be that the injuries which the Plaintiff received were consistent either with his version or the Defendant's version of the accident although Dr. Chutkan's evidence would suggest a balance of probabilities slightly in favour of the Defendant's version.

There was no expert evidence as to the significance of the damage to the bicycle. On the face of it it is obviously consistent with the defendant's version of a head-on collision. It does not however negate the Plaintiff's version since the relatively slight impact between the two vehicles moving in the same direction could have occurred without damage to the rear of the bicycle if it was struck on the tyre, the other damage occurring when the bicycle was propelled forward and struck some other object. It was therefore crucial to a resolution of the issue between the parties that there be a proper appraisal of the credibility of the respective witnesses. This is essentially a matter for a trial judge.

The learned trial judge clearly was favourably impressed by the witness McLennon. She said 'McLennon.....impressed me with his apparent sincerity...This witness impressed me with the shock he felt as he made the bend and saw the accident happen right before his eyes, and I believe and accept that he did see the collision.' In this respect she accepted his evidence in preference to that of Mr. Williams who stated that apart from an 18 year old youngster he did not see

anybody else on the scene. She however found that Mr. McLennon lied when he said that he saw the Plaintiff coming down the road towards him, the truck behind Plaintiff because in her opinion he could not from his position in the road see the movement of vehicles approaching him and travelling on their correct hand. Having rejected this aspect of Mr. McLennon's evidence the learned trial judge then proceeded "there being no credible evidence offered by Plaintiff of the direction in which Plaintiff/cyclist was travelling before the collision "to consider" the inanimate evidence presented to see how it fits in with the two versions of the parties." She then concluded.

"On the balance of probabilities I find that the plaintiff has failed to prove that the defendant Williams drove negligently as alleged, or that his negligence caused this accident. I find that the accident was due to plaintiff's own negligence."

Nowhere in her judgment does the learned trial judge say that she accepted the second Defendant Mr. Williams as a witness of truth. Nevertheless implicit in her ultimate judgment is an acceptance of his evidence as to the circumstances of the collision. At the same time she has specifically accepted Mr. McLennon's evidence that he saw the collision. It would be reasonable to conclude that if he saw the collision he must at least have seen the direction in which the respective vehicles were facing at the moment of impact. However she rejected his evidence as to the direction in which the vehicles were travelling prior to the collision for the specific reason that in her opinion he was unable to see. An examination of the photographs tendered in evidence however makes it clear that the witness would have been able to see what he said he saw. Yuill v. Yuill (1945) 1 All E.R. 183 is authority for the proposition that in these circumstances it would be open to this court to substitute its own view of the evidence for that of the learned trial judge. The matter does not however end there. Neither the Plaintiff nor his witnesses (and in particular McLennon) gave evidence to account for the specific damage to his bicycle. Accordingly to reinstate

Mr. McLennon's evidence and consequently enter judgment for the plaintiff would involve not merely the drawing of inferences but the finding of such primary facts as ought properly to be left to the trial judge. At the same time we do not consider that a judgment in favour of the defendants ought to stand in circumstances where the learned trial judge having accepted that Mr. McLennon witnessed the accident, went on to reject the vital part of his evidence for a reason which is wholly untenable. Counsel for the Respondents contended that the factors set out by the learned trial judge towards the end of her judgment indicate the ultimate rejection of the evidence of Mr. McLennon. These are as follows :

- "1. That damage to the bicycle was to the front wheel and front fork and handles.
2. That there was no damage to the rear wheel and rear fork.
33. That there was fracture of the metacarpals of both the left and right hands of plaintiff, and that this evidence points with telling effect in support of Defendant Williams' version.
4. That Mr. Aubrey Robinson, the employer of plaintiff and a person having an interest in plaintiff, made efforts to find, but never found a witness who said he saw the accident.
5. That Mr. Aubrey Robinson is well acquainted with witness McLennon and that both men had spoken with each other."

Therefore he submitted that following the well known principle enunciated in Watt v. Thomas (1947) 1 All E.R. 58 2 and Denmax v. Austin Motor Company (1955) 1 All E.R. 326, this court ought not to interfere with findings of primary facts made by a trial judge in consequence of an evaluation of the credibility of a witness having regard to the particular advantage which a trial judge enjoys of observing the witness. We recognized and accept this principle. The difficulty in this case however arises from the fact that, as we have pointed out, the learned trial judge has expressly accepted at least part of

Mr. McLennon's testimony (and in preference to that of Mr. Williams) and rejected the other part on grounds which were not dependent on seeing and hearing the witness; these grounds being manifestly untenable. As regards factors (4) and (5) above it is enough to say that they are inconsistent with her positive finding that McLennon saw the collision, as McLennon's not telling Robinson that he was an eyewitness could only be relevant to the question of whether or not he was present on the scene at the material time.

We consider that in all the circumstances the credibility of these witnesses ought to be properly assessed by the tribunal with competence to do so and therefore the interest of justice requires that the appeal be allowed, the judgment of the court below be set aside and a new trial take place. For these reasons on February 14, 1980 we so ordered.

NOTICE OF MOTION

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 18 of 1979

| | | |
|---------|------------------|-----------------------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF/APPELLANT |
| AND | REX KNIGHT | FIRST DEFENDANT/RESPONDENT |
| AND | EZEKIEL WILLIAMS | SECOND DEFENDANT/RESPONDENT |

TAKE NOTICE that the Court of Appeal will be moved at 9:30 o'clock in the forenoon on the 8th day of ~~March~~ ^{APRIL} 1980 or as soon thereafter as Counsel can be heard on behalf of Clive Malcolm the abovenamed Plaintiff/Appellant on the hearing of an application for the following order:

1. That the Plaintiff/Appellant may be granted leave to appeal to Her Majesty in Council from the decision of this Court allowing the appeal only to the extent of directing a new trial and with costs to abide the result of the new trial.

Dated the 5th day of March 1980

Settled: A.W. Campbell
.....
Ainsworth W. Campbell

To: The Defendants
c/o Their Attorneys-at-Law
Hines Hines & Co.,
17A Duke Street
Kingston

TO: The Registrar
Supreme Court.

Filed by Ainsworth W. Campbell of 53 Church Street, Kingston, Attorney-at-Law for the Plaintiff whose address for service is that of his said Attorney-at-Law.

Insert

"Paragraphs 5 - 6, A"

5. That this motion had originally been set down for hearing in this Honourable Court on the 2nd day of May 1980, but it was adjourned on that day without a hearing.
6. That due to the great demand upon attorney's time between the 2nd May 1980 and the present time he has been now only able to renew the application contained in the motion herein.
Wherefore I humbly pray
That the court may exercise its descretion in favour of the Plaintiff/ Appellant and
- A. Grant leave to relist the motion herein.

AFFIDAVIT

IN THE COURT OF APPEAL

SUPREME COURT OF JUDICATURE OF JAMAICA

SUPREME COURT CIVIL APPEAL NO.: 18 of 1979

BETWEEN CLIVE MALCOLM PLAINTIFF/APPELLANT
AND REX KNIGHT FIRST DEFENDANT/RESPONDENT
AND EZEKIEL WILLIAMS SECOND DEFENDANT/RESPONDENT

I, Ainsworth W. Campbell make oath and say as follows :

1. That I live and reside at 45 West Kirkland Heights in the Parish of Saint Andrew and my postal address is 53 Church Street, Kingston.
2. That I am an Attorney-at-Law and Attorney on the records for the Plaintiff/Appellant.
3. That I was advocate appearing for the Plaintiff/Appellant at the hearing of the appeal herein when the appeal was allowed to the extent of a new trial being ordered. A part of the order asked for then was that judgment should have been entered for the Plaintiff/Appellant on the evidence.
4. The case herein is one in Negligence and the damages to be assessed on the personal injuries if the Plaintiff/Appellant is successful is in my opinion in excess of One Hundred and Fifty Thousand Dollars.
5. Grant leave to the Plaintiff/Appellant to appeal to Her Majesty in Council from the decision of this Court allowing the appeal only to the extent of directing a new trial and with costs of the original trial to abide the result of the new trial.

Sworn to at Kingston

in the Parish of Kingston

this 23rd day of March 1981.

Before me :

Joseph D. Casey
Justice of the Peace St. Andrew

A. W. Campbell

Filed by Ainsworth W. Campbell of 53 Church Street, Kingston, Attorney-at-Law for the Plaintiff whose address for service is that of his said Attorney-at-Law.

ORDER GRANTING CONDITIONAL
LEAVE TO APPEAL

| | | |
|------------------------|------------------|-----------------------------|
| IN THE COURT OF APPEAL | | CIVIL APPEAL NO. 18 of 1979 |
| BETWEEN | CLIVE MALCOLM | PLAINTIFF/APPELLANT |
| AND | REX KNIGHT | FIRST DEFENDANT/RESPONDENT |
| AND | HEEKIEL WILLIAMS | SECOND DEFENDANT/RESPONDENT |

APPLICATION OF CLIVE MALCOLM TO
APPEAL TO HER MAJESTY IN COUNCIL

The 30th of April 1981.

Upon reading the motion on behalf of Clive Malcolm the Plaintiff/Appellant .
dated the 14th day of April 1980 and filed herein
And upon reading the Affidavit of Mr. Ainsworth W. Campbell Counsel for
Clive Malcolm and Mr. Clinton Hines Counsel for the Defendant/Respondent
IT IS HEREBY ORDERED that formal leave to appeal to Her Majesty in Council
be and is hereby granted upon condition that Clive Malcolm do within 90
days of the date hereof enter into good and sufficient surety to the
satisfaction of this Honourable Court in the sum of £500 sterling or its
equivalent in Jamaican Currency for the due prosecution of the Appeal and
the payment of all costs as may become payable by Clive Malcolm in the event
of his obtaining an order granting him final leave to appeal or of the
appeal being dismissed for non-prosecution or of the Judicial Committee
ordering Clive Malcolm to pay the costs of the Appeal (as the case may be)
and also upon condition that Clive Malcolm shall within 90 days of the date
hereof take the necessary steps for the purposes of procuring the preparation
of the record and dispatch thereof to England
AND IT IS FURTHER ORDERED that the costs of and incidental to the motion
be costs in the cause
And it is further ordered that a formal order be drawn up.

K. P. Nosworthy
Dep. Registrar (Ag.)

Entered by Ainsworth W. Campbell of 53 Church Street, Kingston
Attorney-at-Law for Clive Malcolm the Plaintiff/Appellant.

J U D G M E N T

SUIT NO. C.L. M. 107 of 1976

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

| | | |
|---------|------------------|------------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF |
| A N D | REX KNIGHT | FIRST-DEFENDANT |
| A N D | EZEKIEL WILLIAMS | SECOND-DEFENDANT |

This action coming on for hearing before the Honourable Mrs. Justice Allen the 16th, 17th and 18th days of January 1976, the 29th, 30th and 31st days of May 1978, the 9th, 10th and 11th days of October 1978 and on the 31st day of January 1979 and upon hearing Mr. Ainsworth W. Campbell with Mr. Crafton Miller and Mrs. Monica Earl-Brown, Attorneys-at-Law for the Plaintiff and Mr. Clinton Hines and Mrs. Elizabeth Hines, Attorneys-at-Law instructed by Hines, Hines & Co., Attorneys-at-Law for the Defendants,

IT IS ADJUDGED:--

1. That Judgment to be entered for the first and second defendants against the Plaintiff.
2. Costs to be taxed or agreed.

AINSWORTH W. CAMPBELL
Attorney-at-Law for the Plaintiff

ENTERED by AINSWORTH W. CAMPBELL of 53 Church Street, Kingston Attorney-at-Law for and on behalf of the Plaintiff whose address for service is that of his said Attorney-at-Law

E N D O R S E M E N T

The Plaintiff claims to recover from the Defendants damages for negligence for that on the 28th day of June, 1973, the second-named Defendant, the servant or agent of the first-named Defendant, so negligently drove motor truck licensed FB 818 belonging to the first-named Defendant along the Thompson Pen main road, in the parish of Saint Catherine, that it collided with the Plaintiff causing him bodily injuries, pain and suffering and loss.

Dated the 14th day of May, 1976.

Settled..... W. B. BROWN
W. B. BROWN

Signed.....
AINSWORTH W. CAMPBELL
Plaintiff's Attorney-at-Law

This Writ is issued by AINSWORTH W. CAMPBELL of 53 Church Street, Kingston, Attorney-at-Law for the Plaintiff, Clive Malcolm, who resides at Long Road, in the parish of Portland, and whose address for service is that of his said Attorney-at-Law.

STATEMENT OF CLAIM

SUIT NO. C. L. M. 107 OF 1976

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

| | | |
|---------|------------------|---------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF |
| A N D | REX KNIGHT | 1ST DEFENDANT |
| A N D | EZEKIEL WILLIAMS | 2ND DEFENDANT |

1. The Plaintiff was at all material times an apprentice mechanic.
2. The Plaintiff was at the material time of the collision a pedal cyclist.
3. The first-named Defendant was at all material times the owner of motor truck, licensed and registered FB 818.
4. The second-named Defendant was at all material times the servant or agent of the first-named Defendant, and driver of the truck licensed FB 818.
5. On or about the 28th day of June, 1973, the Plaintiff was lawfully riding along the Thompson Pen main Road, in the parish of Saint Catherine, when the second-named Defendant so negligently drove, managed, and/or controlled the said truck, licensed FB 818, that it collided with the Plaintiff, thereby causing bodily injuries, loss, and damages to the Plaintiff.
6. The collision was caused solely by the negligence of the second Defendant.

PARTICULARS OF NEGLIGENCE

1. Hitting the Plaintiff from behind.
2. Failing to see the Plaintiff and to take evasive action to avoid hitting the Plaintiff.
3. Speeding around a curve.
4. Failing to have regard for other users of the road including the Plaintiff.

Page 2.

PARTICULARS OF INJURIES.

1. Restless moving of all limbs vigorously except for the left upper limb.
2. Wound about 2½ inches in the left frontal area of the head within the hairline.
3. Incoherent mumbling with the opening of the eyes as response to stimulation.
4. The right pupil was larger than the left but both reacted to light and there was resistance to attempts to open eyes further for retinal examinations.
5. Mild facial asymmetry in that the left side of the face moved less than the right during grimacing.
6. Swelling in the left supraclavicular and shoulder areas without bruising of the skin, and the trachea was displaced a little to the right of the midline.
7. The right upper limb was moved purposefully and vigorously; both legs showed variable movement, sometime flexing and alternately extending. Movement of left arm took place at the elbow only and was sluggish through a small range. The abdomen was flat and the superficial tendon reflexes could not be elicited. Both hands were swollen.
8. Reduced tendon reflexes in the left upper limb when compared to the right. There was extensor plantar reflex in the left foot, that on the right being equivocal.
9. Compound depressed fracture of the skull.
10. Fracture of the left fourth rib and of the left scapula.
11. Small left haemothorax.
12. Fractures of the metacarpal bones of both hands.
13. Laceration of the brain itself with small blood clot in the brain tissue beneath fracture.
14. Absence of memory for the events preceding admission to hospital.
15. Diminished memory with pains persisting in the back of neck, in chest and cramping of the left hand.
16. Paralyzed left arm resulting in depression because of inability to work.
17. Blunting of mental function in the areas of local general knowledge - number and name of his siblings and inability to carry out simple mental calculations.
18. Post traumatic amnesia which included his entire stay in hospital.
19. Wasting of the left upper limb with no movement in the fingers or thumb, and with minimal useful movement of the elbow and wrist.

Particulars of Injuries

Page 3.

- 20. Diminished skin sensation in the left upper limb.
- 21. Diminished tendon jerks in the left upper limb in relation to the right, but the jerks in both lower limbs were exaggerated, the left planter response being extensor and the right equivocal.
- 22. Damage to the brachial plexus.
- 23. Damage to the spinal cord probably as a secondary effect of injury to the brachial plexus.
- 24. Inferior intellectual function to that of normal youth of his age.
- 25. Damage to left upper limb is permanent.
- 26. Area of damage to the brain forms potential focus for post traumatic epileptic seizures.
- 27. Fractures of the left 1st, 2nd, 3rd and 4th metacarpals.
- 28. Permanent disability of 75% of the left upper limb.
- 29. Marked mental degeneration with tendency to become boisterous and violent without provocation.
- 30. Developed tendency to take money and things that do not belong to him.
- 31. Make demands on neighbours for money when none is owed to him.

By reason of the above injuries, the Plaintiff has suffered a changed and negative personality.

PARTICULARS OF SPECIAL DAMAGES

| | |
|--|----------------|
| Loss of earnings for 130 weeks and continuing at \$50 per week | \$6,500 |
| Loss of shoes | 12 |
| Loss of clother | 24 |
| Travelling | 60 |
| T O T A L | <u>\$6,596</u> |

AND THE PLAINTIFF CLAIMS DAMAGES

Dated the 14th day of May, 1976

Settled.....W. B. BROWN.....
W. B. BROWN

FILED by AINSWORTH W. CAMPBELL of 53 Church Street, Kingston, Attorney-at-Law for the Plaintiff whose address for service is that of his said Attorney-at-Law.

D E F E N C E
SUIT NO. C. L. N. 107 OF 1976

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

| | | |
|---------|------------------|---------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF |
| A N D | REX KNIGHT | 1ST-DEFENDANT |
| A N D | EZEKIEL WILLIAMS | 2ND-DEFENDANT |

1. The Defendants make no admission to paragraph 1 of the Statement of Claim.
2. The Defendants admit paragraphs 2, 3 and 4 of the Statement of Claim.
3. Save that it is admitted that on the 28th day of June, 1973 the Plaintiff was riding a pedal cycle along the Thompson Pen main Road in the parish of Saint Catherine and that a collision occurred between the Plaintiff and Motor Truck license No. FB-818 driven by the second named Defendant, the Defendants deny the allegations contained in paragraph 5 of the Statement of Claim.
4. The allegations of negligence and particulars of negligence contained in paragraph 6 of the Statement of Claim are hereby specifically denied.
5. The allegations of injuries loss and damage contained in paragraph 6 of the Statement of Claim are not admitted.
6. The Defendants say that the collision aforesaid was caused or alternatively contributed by the negligence of the Plaintiff.

PARTICULARS OF PLAINTIFF'S NEGLIGENCE

- (1) Failing to keep to the left hand side of the road.
- (2) Failing to heed the approach of other vehicles on the road.
- (3) Negotiating a gradient down hill at an excessive speed or at a speed which was excessive in the circumstances.
- (4) Failing to brake, slow down or stop or in any other way so to manouvre his said pedal cycle as to avoid a collision.

- (5) Failing to have any or any effective brakes on his pedal bicycle.
- (6) Failing to keep any or any proper lookout.
- (7) Further and/or in the alternative the Defendants say that the Plaintiff's cause of the action was released by Deed dated the 8th day of April, 1974 between the Plaintiff then an infant 18 years old and his mother Violet Moore of the first part and the First Defendant of the second part whereby the Plaintiff released the First Defendant from (inter alia) all claims, costs and expenses and demands whatsoever which the Plaintiff claimed to have against the First Defendant in respect of the accident afore-said as at the date of the said Deed.
- (8) Save as hereinbefore specifically admitted the Defendants deny each and every allegation contained in the Statement of Claim as if the same are herein set forth and traversed seriatim.

CLINTON U. HINES
Defendants Attorney-at-Law.

TO: The Plaintiff,
OR
TO: Mr. Ainsworth W. Campbell
Attorney-at-Law
53 Church Street,
Kingston.

Filed and delivered this day of 1976
by CLINTON U. HINES of No. 11 Duke Street, Kingston, Attorney-
at-Law for and on behalf of the Defendants.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1976/M107

| | | |
|---------|------------------|------------------|
| BETWEEN | OLIVE MALCOLM | PLAINTIFF |
| AND | REX KNIGHT | FIRST DEFENDANT |
| AND | BEZKIEL WILLIAMS | SECOND DEFENDANT |

16th January, 1978

COR: THE HONOURABLE MRS. JUSTICE ALLEN

Mr. A. W. Campbell, Attorney-at-Law for plaintiff with Mr. Crafton Miller and Mrs. Carl Brown appear for plaintiff.

Mr. C. U. Hines and Mrs. D. Hines instructed by Hines, Hines and Company for defendants.

Mr. A. W. Campbell:

Action one in negligence arising out of a motor vehicle and a bicycle collision on 28th June, 1973, on Thompson Pen Road known now as Sligoville Road also Beacon Hill - parish of Saint Catherine.

It happened that this road ends at McNeil Park on main road leading from Saint Catherine from Kingston.

Would describe road coming from Sligoville when one reaches a few chains from McNeil Park the main road - one reaches a deep left hand curve - not only deep but when reach apex start going up hill at angle 35 degrees then when have gone a little get on a plateau.

Before:

The driving surface in apex of curve fourteen to fifteen feet wide - asphalted - there is a soft shoulder in crescent form at the elbow - the widest part of soft shoulder seven to eight feet but narrows as go to end of crescent.

Coming from Thompson Pen, Sligoville going to McNeil Park, the road at end going to curve is slightly higher.

From Sligoville direction, road is slightly higher on right than on left. Would perhaps take a filling on extreme left of three feet.

As come from Sligoville direction before get to big left hand curve road practically straight for about seven to eight chains.

As come down Sligoville Road approaching the curve there is a road for about one chain on your right.

Immediately behind the wall, deep precipice or gutter, six to ten feet - ten to twelve feet. Wall continue then slope, then crescent begins.

Soft shoulder on right. Soft shoulder does not continue into a wall but goes into a descent - an escarpment - gets shallow. Another road cuts on the right of Sligoville Road and goes to Spanish Town.

Accident we say happened where a slight down slope - just before take corner. At end slope now a culvert then a concrete structure there - stones - some called ditch - some culvert.

Plaintiff riding from Sligoville direction some distance and then when reached somewhere in area fifteen to twenty feet of culvert on left - culvert on left. Plaintiff riding a bicycle - he was pitched from behind. He fell in the ditch/culvert. He was taken up shortly after and taken to Spanish Town Hospital where treated for head injuries.

When reached University Hospital had report he was shaven on head.

Plaintiff will call witnesses as to fact to support case.

Court will have read pleadings. Great conflict of fact. Alleging plaintiff hit by dump truck FB 818. Defendant admits collision but deny hit from behind.

P. 13 Bundle:

Defence paragraph 7

Release by mother

Plaintiff's witness, Mr. McFarlane, will be called to give evidence how collision took place. Plaintiff's mother to say how

plaintiff..... Mr. McLennon to give evidence as to facts. One Mr. Robinson employer of plaintiff just before accident. Witness as to his learning ability at school.

Professor Cross called from University makes apology for dress.

Mother will tell court plaintiff not been employed as his left hand paralysed.

Mr. Robinson will tell you he had employed plaintiff at business when set up, business as manufacturer and mechanic like father, to him, will tell of trip he had and his Welding work at factory. Had established team. Men in welding would \$70 - \$80 per week and confident Clive would have been one of these.

With agreement of parties asking to call Professor Cross to give evidence. Learned friend (Mr. Hines) ask.

JAMES NATHANIEL CROSS (AFFIRMS):

Professor of Neuro-surgery at University of West Indies and Senior Consultant Neuro-surgeon, University Hospital.

Was stationed at University Hospital, 28th June, 1973. Whilst there Clive Malcolm came under my care as a patient. I treated him.

I made notes in respect of observation made on Clive Malcolm. I would like to refresh memory from notes.

[Granted]

28th June, 1973, I saw him first at 6:30 p.m.

I wrote a report on Clive Malcolm in April, 1975. The report contained all the salient findings in respect of Clive Malcolm. I have a copy of this report.

When he came in on 28th June, 1973 - I saw him 6:30 p.m. He was restless, moving both of his legs and moving his right upper limbs vigorously. The left upper limb was moved poorly.

There was an area of scalp to left of midline shaved and a sutured wound approximately two and a half inches long in the shaved area. His conscious level was depressed - his state of awareness/

alertness. He was mumbling incoherently and he would open his eyes when spoken to or stimulated in any other fashion. That period of incoherence lasted for several days.

At time I saw him his right pupil was dilated and larger than the left one and he showed mild of the left side of the face. At time of examination possibly damage to nerve controlling the pupil or that he was bleeding inside the skull and putting pressure on one nerve. He also showed some swelling in area of left collar-bone and the area of left shoulder.

The trachea - main airway was displaced to the right side.

The face moved less on left than on right, if one stimulated it, indicate some degree of weakness of facial muscles on left side.

He moved his right arm purposefully. Movement of left leg variable- would sometime flex the same time straighten them out. Left arm showed only slight movement of the elbow and what movement took place was very slow.

Movement of left arm abnormal at the time attributed either to damage to part of brain controlling the arm or to the nerve actually supplying muscles to the arm.

Abdomen was quite flat - but the superficial reflexes absent. At time I thought likely to be due to damage to spinal cord at level above the abdomen. I also observed both his hands were swollen.

Injuries were consistent with a fall on the head and hands.

The reflexes in the tendons in the limbs were reduced in the left upper limb in comparison with the right arm. He also had an abnormal reflex in the left foot. Normally, stroke sole of foot, the big toe turned down. His went up. It suggest damage to nervous system at a level where supplies nerves to foot.

On basis of the examination, I found he had a compound fracture of the skull that he had damage to the plexus of nerves supply to the left arm and fractures of the bones of the hands - bones - metacarpal bones (in line with thumb).

X-Ray of the hands showed fractures involved both hands.

Early the following morning, he was taken to the operating

room and the area of the wound to scalp explored.

My findings then were that there was a tear of the lining of the skull - there was also a depressed fracture comminuted - compound fracture break not only there but extend to arm. Cominuted - that there were multiple fragments. At this spot compound comminuted fracture and the dura mater torn and the brain itself also lacerated. There was a small blood clot in damaged area of the brain.

Likely result of the injuries:

- (1) Area of brain damaged no longer function.
- (2) Pressure of scar on surface of brain pre-dispose to epileptic seizures later on.

Treatment:

I removed the loose piece of brain separated in laceration - removed the small blood clot. Cleaned the area of dirt and hair embedded in the injury - sutured the tear of the dura mater and after cleaning the bone fragments - replaced them, finally closed the wound in the scalp.

He was put on antibiotic to forestall infection at site - put on anti-convulsant drugs, to try to prevent epileptic seizure.

Laceration saw on brain - on that side - not likely to affect memory. Saw injury likely to affect memory. His general neurological state when seen indicated he had suffered brain damage likely to affect his memory.

He had X-Ray of chest and hands. X-Rays of hands showed fracture of metacarpal bones one to four inclusive of left hand and of the first metacarpal of the right hand.

X-Ray of chest showed fracture of fourth rib on the left side and possibility of a blood clot in the chest on that side.

Fourth rib (indicate high three inches from spine, neck to sternum collar-bone) more to front than back. There was also fracture of the left shoulder blade (shown). It overlies several ribs including the fractured rib. These were the injuries apparent on his admission.

Yes, said plexus nerve damaged. The result would be to produce a loss of power and sensation in the left arm. Yes, partly

paralysed.

(Court: Plexus nerve starts in spinal cord alongside neck to armpit where it breaks up).

Abnormal reflex of foot indicate damage to nerve above at time attribute to nerve in level of plexus or damage to brain. Those were findings.

He was rather slow to recover consciousness. Case record showed fully recover consciousness 16th July, 18 days after admission to University Hospital. It is a long period of unconsciousness. On a system of ratio I would consider it moderately severe brain injury.

The risk of life at time he was brought to hospital arose from two possibilities - bleeding continue inside the head (2) would develop infection inside brain from contamination.

Recovery of mental intellectual function was very slow and up to discharge from hospital incomplete.

Still after fully awake was very confused with a poor memory.

Evidence of poor memory:

At time I saw him last he had no memory of his stay in hospital. Saw him 27th March, 1975. His stay in hospital 26th March - 27th July, 1973.

Yes, approximately two years after.

In March 1975, I thought at time he had achieved most of the recovery he was likely to attain.

In March 1975:

He was rather slow - slow in response - mentally slow.

His memory defective in respect of name of his brother and sister - how they are numbered. He showed defect in mental arithmetic - simple calculations, and he had some defect I thought in reading ability.

He complained of cramping of left hand - that it was useless and could not move it. Complained of pain at back of neck - pain of chest and some headaches.

Headaches consistent with previous head injury. Pain of neck - no positive diagnosis - pain of chest consistent with injury

He also report his memory was poor and that he just sat around at home. He seemed to me at that time to be somewhat depressed. Formed impression he was depressed at his inability to work - not read - got impression not working and unhappy about it.

From point of view of performance on job, his left hand was useless at that time. I thought at time he was not functioning at level he could carry out a job properly and at same time physically incapable of carrying out a job he

Examination of pupil shows still inequality of pupils, right being slightly larger than left.

On this my impression inequality more likely to be defect in left eye - the sort of abnormality consistent with damage to spinal cord

Examined him for facial condition.

He showed facial assymetry. Left side of face being weaker than right. We attribute this to damage to right side of brain at time of initial injury.

Check for sensation of skin in left arm was depressed from shoulder to fingertips.

Tendon jerks in left upper limbs, were depressed and at one site absent, the lower left increased jerks in knee and right left increased jerks at elbow and wrist and at knee. Jerks were exaggerated. At ankle he had exaggerated jerks resulting in continue beating.

Yes, this suggest injury to the spinal cord.

This sort of injury exaggerated reflex action produce stiffness of the limbs. The dragging of the legs consistent with this injury.

Yes, I regard his injury (on 28th June, 1973) as serious.
Multiple? Yes.

Yes, one of incidents of injury to brain is the development of fits. These fits would tend to persist.

XXD Mr. Hines:

At time of discharge from hospital if patient literate I would think he would be able to carry out the physical action of signing his name.

Objection - Mr. Miller - If mentally capable?

Witness:

Yes, he would know that he is signing his name.

Yes, last saw him March 1975. Then I thought there was some chance of further slight improvement both physically and mentally. I formed opinion on basis of pattern of recovery from damage to the nervous system.

Yes, would import be related to his recalling ability - memory? Yes, scar on brain might lead to epileptic seizures. Yes, with the passage of time those seizures would become less.

Anti-convulsant drugs, used to stay on coming of epileptic fit. Yes, if take the drug, chances of fit reduced.

Yes, would say in case of plaintiff, medical fact would apply - chances of epilepsy reduced.

Function of left hand:

Yes, I believe plaintiff is right handed. Physical improvement of left hand. Yes, would expect some improvement in function of left hand.

No, not had opportunity of seeing him today. Correct unable to assess improvement to date.

Two and a half inches laceration.

Back was parallel to midline with his hair. Just to left (about indicating left parting). Laceration started at the hairline.

He had numerous superficial bruises. I did not record them. Two and a half inches laceration was laceration from injury (not surgical laceration).

Ques: Assuming facts in which plaintiff riding bicycle and collided with truck...

Mr. C. Miller:

Would depend on other facts - speed of truck.

Mr. Hines:

Ques:: Assuming fact in which plaintiff riding a bicycle and colliding with truck going in opposite direction - both moving. Injuries consistent with circumstances?

Ans: Yes, injury to scalp consistent with those circumstances.

Test - simple arithmetic, defective reading ability. When tested 27th March, 1975, he told me had left school in Form I at age 14. Test was merely to subtract seven from 100 and to keep subtracting seven from answer,

Do not think could give valid opinion as to his pre-injury level of intelligence.

At time of interview mother kept prompting him with the names of family.

[Court suggests and parties agree. Doctor examines patient]

On Resumption:

PROFESSOR CROSS (Still on oath):

On examination I formed opinion his mental function still inferior to one of his age. Memory poor. He still does not know the name of the family. His general knowledge still less than would expect in identifying major general public persons. His calculating ability still poor.

He is quick to reply and more conversant with welding than with general events of the country.

As far as the arm is concerned, he has recovered movement at the shoulder and elbow and to limited extent at wrist - the power still weaker than on the right.

He has no useful movement in the hand or fingers.

The tendon reflexes are still brisk - exaggerated - in the legs and in the right arm - but less so than before.

He now has a brisk tendon jerk at the left biceps. He still has very mild facial weakness on the left.

He cannot be engaged in any occupation which require the use of both hands. He could be employed in occupation which involve use of one hand only and mobility which he has.

No sir, left hand not functioning, power in forearm and upper arm.

Possible to utilize tendon of left arm to utilize the hand.

May require a series operation - orthopaedic case. Not likely after this time to get spontaneous improvement.

Yes, he walks satisfactory.

"Brachial plexus" damage it has produce weakening of the arm and (non-use) of hand. The best course of action would be to transfer whatever working muscles he has to the tendons of the fingers. Next best, amputation and an artificial hand.

As far as aware no way of increasing brain function other than by training.

Could probably acquire skill in carrying out sequential action - set in patterns.

Re-xn:

Yes, consider him totally incapable as far as left hand is concerned. Yes, the hand is totally paralysed.

His mental condition:

All can say he is slower and in my opinion somewhat inefficient compared to someone of his age.

Problem of epilepsy. Dangers. Two grounds:

- (1) Risk of injury during fits.
- (2) Further brain damage if goes into continuous (fits).

From interview gather he has had three episodes - I would say epileptic.

At this time, risk of recurrent epileptic fits five per cent, that is, seven to ten times as high as the normal population.

Fall consistent with head injury and hands and shoulder.

Ques: If Clive Malcolm came down grade, collided

Injuries to head and shoulders and I would expect no injury to hand. Not unless he saw it and put out hands.

Laceration to face? Depend on whether saw where head down - they get hit and somersault. All injuries I have seen consistent with fall.

To Court:

Laceration to brain not in area associated with loss of memory.

Had and that induce defused brain damage. That would be from impact and from force with the brain as it stops moving.

Trachea - displacement - could be blood clot from brachial plexus. Injury to brachial plexus seen in connection with head injuries - head goes one way and plexus pulled from cord shoulder - get paralysis of arm and also affects the legs.

The stretching of the plexus from the cord nerve in plexus may be rehabilitated and evidence he has improved.

Where damage to spine likely to be permanent legs not likely to improve.

Likelihood of osteo arthritis to fracture of bone in metatarsal.

The scapula form part of shoulder joint itself not likely to become arthritic.

2:05 p.m.

Adjourned to 10:00 a.m.

17th January, 1978:

CLIVE MALCOLM (STORN):

Live Long Road, Portland.

Nearly five years ago I was in Spanish Town working in Spanish Town. Four and a half to five years ago I was in an accident. I was riding a bicycle from Sligoville direction going towards McNeil Park.

Know deep left hand curve, you turn before reach McNeil Park. Something happened.

Truckman hit me from behind. Just feel the bicycle go up in air and know nothing more.

I am father of two children born before the accident.

When in hospital I feel pain across my shoulder and across waist so sometime I couldn't lie. Could find no way to lie.

Pain around shoulder (left indicated) and shoulder blade, forehead, left hand cramp. Sometime left hand cramp three to four times per week. (Left hand muscles two-thirds way from wrist to elbow appear wasted. Fingers curved).

Left hand was not like that before accident. Can't use left hand to do any work now. Have to use right hand to put left hand in any position I want it.

I remember I was in hospital but not remember the time.

When left hospital I went home at mother's house in Portland. Not living there for a long time.

When I got home I was unable to look after self. Parents and sister looked after me. They bathe me. Couldn't bathe self.

I can never. I need help still but I try. Areas I can't reach with right hand left hand no help.

Before accident I was learning a trade.

I am now 23 years. Born 2nd May, 1955.

I used to learn welding with Mr. Basil Martin workshop at Harrison Town, Ocho Rios, Saint Ann.

When in Spanish Town I was working with Mr. Aubrey Robinson. He paid me.

I used to do almost everything. I'd sweep, wash dish, pack up goods, help carry parts, wash out engine, grease tools. I was living at his mother's house and there met him and he employed me in building his workshop with intention to learn welding when the shop finish.

Mr. Robinson paid me - standard price \$30.00 a week and when work in night - overtime - sometime it work to \$40.00, \$42.00, \$38.00. Apart from salary I used to be living in the office. Never finish. He buy a bed and two of us sleep in there.

I used to be a good cricketer. Can't play cricket now. Don't think I could ever be able to do it.

I used to be a good swimmer. Used to play velley-ball and generally push ball in the basket.

All dancing - I used to be a good dancer - where I go people admire me. Can't do it again.

I used to be bright in school. I used to read good. I went to school up to 14 plus. Now when read one word becomes several words, it becomes doubles.

The left hand - the whole arm do cramp. I try to practice it and when do, I see bump with water raise up and take more and burst it and it become sore.

I have had fits after the accident.

Mother looks after me now.

I can't wash. Can only cook like rice - and open tin of sardines. Can't do anything that needs two hands.

Know I got a cut at time of accident - started from here (hairline at forehead). It just scratch.

Pain is in the forehead and cramp. Pain at left side neck.

I and mother went to an insurance office. They gave my mother something to help her out with the expense of caring for me since the accident.

Mr. Hines:

Areas in which plaintiff setting up admission as part of his case and ought to be pleaded.

Submit no evidence to be solicited/admitted that has to do with any admission as totally outside pleadings.

Mr. Miller:

Yesterday at opening learned colleague drew attention to pp 12-13 of judge's bundle and draft defence in support for application to set aside. Submit that that document form a part of the record before court and can be looked at at any time of proceedings to examine the behaviour of the parties and so far as the case is concerned.

Having set up document, defendant must be estopped from denying such a situation exists and court can use it as being relevant to their case - the propose defence exhibited. Submit this can be used.

Bronx Transport v. Stewart; Rupert Stewart v. Bronx Transport.

Judges looked at the affidavit.

Court:

Upheld the objection.

XXD Mr. Hines:

Don't remember day of the week accident took place.

Yes, day accident took place I was working. Accident happened

in the afternoon.

I was working with a man named "Tony". He was constructing pit at Greendale where we were packing. It was a housing scheme and he got the contract for the pits. Someone dug out - truck carrying stones and we (shape and put them in).

We started to work with Tony three to four weeks before the accident.

Mr. Robinson in Jones Pen paid us but "Tony" is the man supervising us. He was not the boss. Got paid by Jones Pen at Mr. Robinson. We were working at the garage before and assign with Tony to pit job.

Mr. Robinson live down Circle Drive. At that time he lived at his mother's house in Ocho Rios. Never buy his house at that time.

Pit job in Greendale in Spanish Town.

Greendale just about Carreñas when coming from Kingston to Spanish Town.

Got pay every Friday evening. At that time I used to get pay in envelope.

Yes, paid N.I.S. He used to take out a percent out of pay. Don't remember how much. Remember how much I got week before accident. Yes, Friday the week before I got pay - \$35.00. That pertaining to work I did at Greendale with Tony.

Met Mr. Robinson in Ocho Rios and he carry me to Spanish Town.

I used to learn welding with Mr. Basil Robinson. As apprentice we used to paint the bars and knock out the hole to put in bars in cement.

Know accident 28th June, 1973. Couldn't remember the day. Agree Friday before 22nd June, 1973.

Couldn't remember how many employees Mr. Robinson had - I would say about eight.

Yes, after I left hospital I went to live with mother at Long Road in Portland. Long Road is near the sea.

Remember Emanuel Malcolm - my father. Valrene Malcolm is my sister. Newton Rutland - never hear that name before.

Know a place called "Newton" in Portland. Yes, I have lived there.

In August 1973, Yes, I gave a statement of account of the accident in presence of father and sister. I gave a statement. I don't know what they write.

Yes, remember the occasion when I told someone what happened.

Yes, father and sister were there (present).

Yes, I remember signing a paper that day. They signed as he can't read. I told them I never like to sign paper like this and yes, father and mother was there.

I remember telling him I was riding from Sligoville going up Mr. McBean's place and the man was trying to contradict me that it was the other way.

Yes, I suppose to know my name I sign.

(Two pages paper shown witness).

That is my name. It looks like my writing. Yes, it looks like my writing. Yes, remember signing it.

Don't remember if sister Valrena Malcolm wrote her name on the same paper. I don't know her handwriting. She write in different ways - in script and join.

Mr. Miller:

Objects to paper put to witness. Says not know her handwriting.

Court:

Upheld.

Witness:

Yes, know script from join-up. Yes, I have watched her teaching the smaller ones.

I can't spell Valrena. I can spell Malcolm "MALCOLM".

Mr. Miller:

Object, not yet established foundation.

Witness:

I saw her teaching the smaller ones. Whenever teaching you must write.

Have seen her - like where you are(10 feet) or out at the gate. Not stand over her. Don't remember reading anything that she writes.

I don't remember seeing sister sign the paper. My father never sign. The same man hold the pen/pencil. He take my father hand in his hand. Is he write.

Yes, I know Cox's Woodworks at Great Pond. This is in Great Pond, Ocho Rios - right in front of my friend's house. They used to do cabinet work in carport - make things like bureau, table and chair and buffet and things like those. Yes, I have worked there - was there sanding. Mr. Joe Cox then employed me.

Don't remember if I told gentleman I gave statement to that I was working for Mr. Joe Cox.

I never used to work weekly basis get paid by job. Can't remember how much I used to draw. Not agree it could be \$7.00 per week. It used to be more but I can't remember.

Know Aubrey Rob. His mother has a house at Harrison Town. Not living there at that time.

Just can't remember if I told investigator I was living at Mr. Rob's house in Harrison Town.

Yes, I believe I tell him that. That I was living at Mr. Aubrey Rob's house and he opened a garage in Jones Pen and I went to Spanish Town with him.

Yes, garage at Jones Pen was called "Spanish Town Motor Auto Engineers Specialise in Electronic Tune up".

Don't remember telling investigator that Mr. Rob's garage was called "Spanish Town Motors".

When worked with Mr. Rob at Jones Pen, I used to sleep said place. Told court I slept in the office - he gave us a room and buy us a bed. Don't remember if I told investigator this.

While working ofr Mr. Rob did small errands for him. Don't remember if told investigator so.

Remember how much he used to pay me at garage \$30.00 per week and overtime make it to \$40.00 - \$42.00 and more. Don't remember telling investigator Mr. Rob paid me \$22.00 and I slept in the garage.

I don't remember leaving Mr. Rob no time.

Working with Tony - pit at Greendale that is true. Can't remember telling investigator.

Yes, I still sleep at Jones Pen when working at Greendale. Yes, Mr. Rob knew. Don't remember telling investigator nothing at all about that time.

You already ask me things that I remember. Not all things I remember.

On day of accident I never owned a bicycle. Don't remember telling investigator that.

Garage "Spanish Town Motor" not on Sligoville Road. It is on the Spanish Town Road in front - opposite Carreras. It is in Spanish Town on the Kingston/Spanish Town Road.

Yes, know McNeil Park.

Yes, know Sligoville Road starts at McNeil Park - when meets Kingston/Spanish Town Highway. Garage Kingston/Spanish Town Highway. Garage just a few chains from McNeil Park nearer to Spanish Town.

Coming from Kingston got to pass Carreras then my garage, then McNeil Park, then straight into Spanish Town.

Bicycle always at garage - one of my co-worker bicycle. Yes, when took bicycle I took it from garage that day.

Don't remember those things that happened in that time. Don't remember telling him on a Friday in June I went to garage and rode away one of bicycles in garage.

Day of accident when took bicycle I know to whom bicycle belonged - my friend Byia - can't remember if asked Byia for bicycle. Can't remember seeing him.

Never remember telling investigator that I did not know the owner of the bicycle as I did ask anyone to lend same to me.

Yes, bicycle I was riding on day of accident had brakes.

Yes, know down handle bicycle - racing bicycle. This is not a racing bicycle. It wasn't a curve up bicycle - just an ordinary handle.

Know difference between fixed and free-wheel bicycle.

The bicycle is a gear bicycle. You can change from speed to speed. Can change from fixed to free-wheel.

Don't remember if bicycle had a lamp. Not ride it at night.

All that I can't remember - how long after took bicycle I got in accident.

When I took bicycle that morning, can't remember how much o'clock.

I used to go to work at 8:00 o'clock. I remember I ride to Greendale from garage to where working on the pit at Greendale. Yes, rode the bicycle to work.

Bicycle was there leaning up.

Leaving Greendale I just don't know hours.

To Court:

It was on a trip from where working going to garage that accident happened.

To Mr. Hines:

Leaving Greendale I couldn't ride same way I went. They block the route with pipes, back hoe so I took the Sligoville Road to McNeil Park.

Boss sent me and Tony and three fellows - a war break out on the scene. I know police must come so I grab the bicycle and going to tell Mr. Rob, and never reached him.

The fight happen sometime way after 11:-- going up to 12:00.

After I leave riding, truck came on and hit me from behind. Was riding to McNeil Park when truck following me, only feel truck hit me from behind and I and bicycle go up in air and they told me
12:40 p.m.

Adjourned to 2:00 p.m.

[Mr. Hines a witness in Sutton Street Court]

CLIVE MALCOLM (STILL ON OATH):

At U.W. Hospital couldn't remember if I do - give my name to any of nurses.

I don't remember telling investigator I did not give my name but my mother gave my name.

I didn't see the truck before I was hit - couldn't tell the colour.

I didn't give statement to police. Don't remember telling

investigator I didn't give a statement to police.

I don't remember telling investigator my right hand is now feeling good and that left hand is longer than right and is now swollen.

Yes, I was travelling alone at time of accident.

No, don't remember telling investigator. I remember I was travelling alone at time of accident.

I know Villa School in Manchioneal. I attend manual training there. Don't remember telling investigator I attended a Villa School and learned to do woodwork and can make human heads out of wood.

I can't remember time (year) I left Long Road. Left Hector's River to Long Road - year I couldn't remember.

Don't remember telling investigator re bicycle "I don't remember if it had brakes".

No sir, don't remember telling investigator: "I remember that I was riding on the main road at Thompson Pen. I ran into the front of a truck that was travelling towards me in the opposite direction".

Don't remember telling investigator: "I don't remember if I were riding around a curve down or up a hill or on the level".

I did not find out how I got to University Hospital. Nobody told me. Am speaking the truth.

I don't remember telling investigator: "I heard other patients saying that I was brought from Spanish Town Hospital by ambulance."

Immediately before the crash I saw nobody around.

I don't remember telling investigator that I had no witness to the accident.

I can't recall how that go (investigator taking statement). Yes, father and sister there. I was telling him things. After I tell him things he ask me question in a different way that he would like to hear me say.

Mr. Hines:

Tendering the document in evidence.

Mr. Miller:

Witness not asked if he knew the contents of document if read out to him. Can be for identity but not as exhibit.

Mr. Hines:

Defendant asking to put in a document formerly in evidence - 1 - witness has said this is my signature. I signed it. Inexcapably identifying document which he signed. Contents not yet.

He identify signature and admit gave evidence. Admissible in evidence.

My learned friend confusing admissibility and weight. Submit court can properly admit.

Mr. Miller in reply:

Telling court he has an option. Can use it as exhibit or identity. Who is the maker of the document? No evidence has been led that he knows contents.

Court:

Two sheets of paper marked "1" for identity.

Witness:

I only know was hit from behind and like a plane moving off (arms upraised). Couldn't say what happened to the bicycle if it coming with me.

At home I told mother what happened. She had it that is beat them beat me.

Correct, from McNeil Park, Spanish Town Highway going west then curve going north. Yes, curve sharp.

If approach bend from McNeil Park coming down a grade. After finish the bend you have a little piece of level road.

Yes, recall in 1973, You have a zinc fence on left coming from Sligoville to McNeil Park.

Yes, a culvert was there in 1973. I remember by seeing it the other day.

Know what call a fire hydrant. Don't recall in 1973 a fire hydrant on left side road as coming from McNeil Park (towards Sligoville).

Yes, surface of road asphalted in 1973.

Don't recall a wide soft shoulder on left side as leave McNeil Park towards Sligoville.

Said was told after I dropped head stuck down culvert. I went there but I couldn't say spot I really drop.

Day of accident I was riding on the asphalt. Was just about two feet from the left hedge of asphalt. I was just going medium. Not too fast or slow. Didn't touch brakes. I was going on comfortable.

Yes, I heard the sound of the truck behind me. I first heard sound from it made the corner higher up. I did not look back. Know it was a truck by the sound. Used to be in a shop they come daily so know different sound of bus and truck.

Not in rush to tell Mr. Rob because I know someone went before me. I believe someone would reach quicker than me (through shorter road).

Can't remember a Mr. McMillian or Mr. Chambers.

People who give evidence in case for me don't know all of them. Know people from Long Road not from Spanish Town.

Well, yes, when told mother what happened told her what direction I was riding.

True, I was riding from Sligoville direction towards McNeil Park. Not correct I was riding from McNeil Park on incorrect side of road. Not true I made the blind corner and came face to face with the truck.

No sir, not a down-handled bicycle with no brakes.

Yes, know a man named McBean out at Thompson Pen.

Yes, that is what they talk - that he took me up to hospital. I went and told him thanks.

Since the accident I have not seen the bicycle.

Yes, told court not worked since the accident. Not live in Long Road in Portland in mother's house.

Mother is fish vendor. Father does cultivating - has land. I try to help.

I can see but when reading words jump around. I can write. Can write a letter to mother but it would take a long time. I have to spell and pronounce. What used to write now a long while get headaches (forehead, across touched).

I attended basic school then Manchioneal - then to Ocho Rios. Was in Grade 1 when left Manchioneal.

I never try it since leave school except in making change of money.

In grade I used to have reading book. First Aid in English Reader C or Reader B.

When left Manchioneal School I was ^{just} going up in 15 (years). Was in Grade 1 when left was 14 plus.

Yes, I was able to read a chapter in the Bible when at Manchioneal. Would try to read a chapter.

"Genesis. And it came to pass after his thinking that after the battle of the king - Egypt"

Up to yesterday I look up. Daily News where they "X" out the bad man that they kill. The two came to me as the same (Daily News shown).

Yes, was captain of the team. Vice captain. I used to be wicket-keeper. I would have man in first slip, second slip, cover long arm boundary. Top score I used to make 97. After left Manchioneal and went to Spanish Town not played.

GEORGE MCFARLANE (SWORN):

Live Beacon Hill, Spanish Town. Farmer and work at factory.

Know Thompson Pen area. Know road leading from Sligoville to Spanish Town. Know McNeil Park. It is near to where I live.

Remember a accident taking place along Sligoville Road in June 1973. Know Sligoville Road coming up towards McNeil Park very well. There is a very deep curve.

Remember date 28th June, 1973.

I saw the accident.

I saw a truck and a bicycle in the accident. Truck travelling from Sligoville direction. Cyclist travelling from Sligoville. Cyclist was before the truck when I saw it. I was on a culvert bridge. From where I was could see from Sligoville end clearly. I was about half chain across the road from the accident. From Sligoville end towards McNeil Park I would be on the right hand. From McNeil Park towards Sligoville I would be on the left.

Road in area asphalted - about fourteen feet wide.

Yes, soft shoulder on side of road where I was - around six feet wide.

Where the dump truck came down and the fellow on the cycle was from 20 - 23 feet in front - before the accident. The curve was a little way when him going drop.

When him lick him.....

It is a curve piece of road. I saw the driver of the truck went down on the cyclist and hit him backways. The bumper of the truck - left hand bumper - hit the cyclist and he go up like that and he fell - dropped into a little culvert on his face - on his head. Yes, I saw all that. He fell like from here to table (15 feet). He fell in culvert of the road on left hand side.

Yes, I manage to see who driving the truck. See driver of truck there (in court).

I did not know either driver or cyclist before. First time I saw them.

The truck run off and stop. Run pass and stop and driver came out.

I went across the road. Spoke to driver. I said, "You are a murderer. You could save the man for no vehicle coming from McNeil Park and no vehicle behind." He said, "Go away." I went and looked at the man. Two ladies lifted his head like this and ease him. Man had a cut in his head. See him in blood. I was there until Mr. McBean at the supermarket take up the cyclist. I was not there - no police came up to when I left.

Accident happened around from 12 - 12:30.

[4:05 - Adjourned to 10:00 a.m.]

18th January, 1978:

GEORGE McFARLANE (SWORN):

XXD Mr. Hines:

Don't remember day of week. Remember date of month. Twenty-eight day of the month. 28 of the 6, 1973. The sixth month of the year. June.

I didn't make a note of the date this accident took place.

Some time after I gave a statement to someone. About two years after - 1975. Around that time to that gentleman (Mr. Campbell). At the spot where the accident took place. Yes, before this date I had told gentleman that I had seen it. The gentleman was living in same district - Thompson Town - told him around a month or two weeks after. No special reason why I told him. Just talking and said I saw an accident at the corner. Was having an argument. Not of that said argument.

Yes, said spoken to this gentleman (second defendant Williams). Yes, called him "murderer". Of course, as far as concerned he could have avoided hitting man.

Didn't tell police. Someone to tell police - not I. I did not make effort to tell police.

Mr. Miller:

Object. Difficult for witness to know. Not relevant.

Court:

Uphold.

Witness:

Know what I am in court for action in '73. Don't know action filed. Don't know it is insurance or what. Now know. I am in court to give evidence in the case.

Before accident did not know plaintiff cyclist nor driver of truck.

I am 60 and 7 - call it 70. Born 1902, 22nd January.

Yes, I have seen an accident before. Yes, I have given evidence in court before about an accident.

Now working at factory - the 'aluminium factory'. Yes, now working at factory. Got few days work - 'aluminium factory where they make pipe. Not working there in 1973. Yes, at that time I did my farming with my cows - at my home in Beacon Hill otherwise called Thompson Pen. (Day accident took place) I leave my house around 6 o'clock ride my cycle - to take out milk.

Yes, that correct, remember that. Returned about 7:30. (What else did before accident) I carried my cows out to the bush - around 8 o'clock. Six cows. Take them just a mile to pasture. Yes, to grass to feed. I let them feed until my dinner time. Yes, stayed with them until dinner time.

Yes, exactly what I did 28th June, 1973.

Yes, married - twice.

Either wife or her daughter looks about dinner - Sometimes two or sometimes three. What I call dinner - anytime I ready to go in with my cows and the dinner ready I have it.

Yes, ordinarily knew it is 4 o'clock. When at home and not at bush. I generally have it 4 o'clock. When at bush five or six o'clock. Sometimes the cow lost - stray. Yes, when going home for dinner take cows with me.

28th June, 1873, 7:30 went and sold milk. 8 o'clock took out cows one mile away and then left and return to go for dinner.

On return for dinner I walk on Sligoville Road. I walk and when reach McNeil Park go on Sligoville Road to my yard.

Feed the cows up at the factory. Yes, Carreras and so land at the outskirts.

On 28th June, 1973, I took cows up at the factory at the outskirts - yes, near to Carreras where cigarette factory is.

Yes, stayed with cows until dinner time but you may call it dinner.

I call dinner what eat from 4, 5 - what eat 10, 11, 12 is breakfast.

I came back down with the cows in the evening around 5 o'clock. No, I leave cows 12 o'clock from 12 - 11:30 and come and eat my breakfast.

Mr. Miller:

Objection to suggestion witness switch from dinner to breakfast.

Court:

Not Upheld.

Witness:

Of course, appreciate dinner different from breakfast. I said what you call dinner I call breakfast.

On 28th June, 1973, I can remember what I done that day.

Time I eat my dinner done - that's when the accident.

Time I eat my breakfast done - that's when the accident.

I eat my dinner in the evening. Three times I eat that day. Second time for the day I eat my breakfast. Had tied some and let go some. Around 11 o'clock left. Never walked. I ride. Took about quarter hour that day. Yes, I stopped at home and had my breakfast. Yes, my intention to go back (to cows). A good time I spend at my yard - about three quarters hour. My house just right at the deep bend after leaving McNeil Park. My house on left hand of Sligoville Road (from McNeil Park. House just one and a half chains from the road.

Don't know the name of the man but I know the man (man with whom had conversation). After had breakfast. Man's nickname is "Dan". At that time I was going back to the bush. My bicycle leaning on the culvert wall. I leaning on the wall and bicycle. Going to McNeil Park that culvert on the right. Coming from McNeil Park culvert on left. Fully a chain from my gate (From my gate can see in). From where standing I could see up Sligoville Road and see McNeil Park. Yes, both ends.

Didn't see any vehicle approaching from McNeil Park - not at that time. Did not see any vehicle approaching from Sligoville Road - except the truck. I never notice that truck before that day. When I see the truck it was about eight chains from the curve/bend. There was nobody in back of the truck. The chauffeur in truck.

Yes, observed truck driving on its left hand side. When saw it eight chains away, it was travelling fast.

When I saw the truck eight chains away, the cyclist was before it - saw the cyclist coming down - yes, before the truck. The cyclist was about five chains in front of the truck. Couldn't tell you how many chains the cyclist from the bend. Only know he was about five

chains from truck. He was riding left hand side of road. He riding ordinary. Yes, not slow not fast.

Wasn't looking at McNeil Park, was looking on the road.

That time Dan leave and gone. Of course, is when Dan gone I see the truck and cyclist. Dan go out to district to shop - on same left hand where I am. He never cross the road. He keep on the old road to the bridge. Not say out of sight but far away (at time of crash).

Only my little daughter at home when go for breakfast. A young four year old child going to school.

Yes, loud noise when crash. Anybody nearby in the district could hear. If I was in my home could have heard. I could come out and look. When the crash I was at culvert not inside the yard.

When the crash I didn't see anybody else except driver or truck and cyclist in the vicinity. Of course, after crash I saw many people came out on scene. Mrs. Flowers and many more - after crash. After the crash I had no talking about the crash with anyone except the driver. Afterwards someone came to me to find out if I know anything about the crash. Few weeks ago - about week before last.

Yes, first time I was telling someone about it. Person was that gentleman there (counsel). That was the first time I know this accident going to court. Yes I said so this morning that I gave him a statement two years after the accident.

Yes, also said week before last someone asked if I know about accident.

Saw that gentleman twice. Two years ago gave statement but few weeks aback he came and said going to court. When he came back three weeks ago I gave him back the said statement that I saw.

Mr. Miller:

Object.

To Mr. Hines:

I went and look at the injured man first and then spoke to driver. I said (yesterday) I went and look at injured man and saw he

had a cut in head and two ladies ease him up and driver came out and I said, "You are a murderer" etc.

I knew the two ladies, of course. They were out on the road. No, I didn't see them before the crash. They run down. Mrs. Flowers came to gate but they were the first come and try to help. I never made to help take up.

Saw the bicycle in road after crash. I never took up bicycle. When I left the scene the bicycle was at the road at the said spot. No, I didn't look at the bicycle. Couldn't tell what happen to it. I believe the front part of it did bend.

I was there when injured man taken away, about three of them take him up and put him in vehicle. Don't know if the driver was there. Never take no notice of those who put him in vehicle.

Not a very long time after that Mr. McBean drive up. About fifteen minutes. Just a little (delay) before McBean drove off with injured man.

I went away to the bush.

I never gave police - never gave any indication any government person.

I didn't see anybody else on the road nearby when accident happened.

I know I could help (police) but my cows is before all those things.

A few minutes after collision - around half hour after the action I leave the scene to look after cows - 'fraid them stray and go on the road.

I never notice if anything break off in the road from bicycle/truck.

When Mr. McBean drove off with injured man about something to one.

Talking to Dan before he left just a couple minutes - around quarter hour.

My house - windows not to road. Can stay at doorway and look

out the road. If sat at table and eating and looked could see out in road. Would be looking through the door. I can look straight to McNeil Park. I can see Sligoville Road but not on the straight. Can see Sligoville Road - the corner.

I said to driver, "You are a murderer because you could do without knock that man because there is no vehicle coming behind you and no vehicle coming from McNeil Park so you could slow down and save him," and he get ignorant same time.

Yes, at that time, driver was outside the truck. Then we were not quite where the boy lay down about there (indicate 10 - 12 feet).

Driver said, "You is not me". I said, "How you mean, you is not me", He got ignorant and siad I must go away. A lady said leave the man you no see him not in his senses. That mean he is frightened. When he come out like a person frightened.

I was present. I was there. Yes, swore to tell truth on Bible.

Correct 76 years of age coming up. I can't read so ----- I can tell you my worship I was at present.

No sir (Possible came on scene after accident took place?).

No one told me how accident took place. I ask no one to send for police. Accident don't belong to me. Belong to government. I never been see no police place. I said you could save the man. I could not business with it (go and tell police). Business with it now as question come and ask me.

If me would like somebody take some interest in it.

Not telling untruth about what I saw. It is true I saw the accident.

Not agree fellow injured was riding bicycle from McNeil Park towards Sligoville.

Never notice bicycle if down handle.

Not true he was riding on his right hand side. He was on his left hand side. The man riding I didn't take no notice whether down handle bicycle. I saw him coming down the road.

Rexn: None.

To Court:

No reason why not go to police. They must come to me. I not going to them. Take no interest in it.

NOEL MCLENNON (SWORN):

Live Beacon Hill, Saint Catherine. Trade - Shoemaker. I work Carreras Jamaica Limited.

I do not know Clive Malcolm. I just see him for about a week before the accident. Seen him at Mr. Rob's place. I don't know the direct date of accident - sometime in 1973.

Know about accident. I saw it. Accident took place at the corner they call it Mother Flowers corner of Sligoville Road. Accident time 12:00 o'clock going down somewhere about mid-day.

Saw who involved in accident. That gentlemen there (plaintiff) and a dumper truck.

I was riding my bicycle going towards Sligoville going towards the Postal Agency and I saw Clive coming down on a bicycle coming down towards me, face to me, and a dumper truck was behind him. Just as I bend the corner dumper truck come and hit him from behind and he fell to my right at a culvert and the bicycle was almost in the middle of the road more to my left hand side. I jump off my bicycle same time and run across the road and I recognize that it was a man that working with Mr. Robinson.

Saw crowd gathered and people gather and I left the scene about five minutes and went to Mr. Robinson and tell somebody there.

He was bleeding from his head and whole heap of people come and said he was dead and I feel frightened and touched my head - didn't want to - through they said he was dead. I get frightened and go to Mr. Robinson.

XXD Mr. Hines:

I was riding a fixed-wheel bicycle.

Really don't know what kind of bicycle Clive riding - didn't look at. Not a down handle. Didn't see the handle as a down handle.

Didn't take notice of the bicycle itself.

I didn't look at the bicycle to see damage. Just dropped my bicycle and run across to him.

Nearest person?

There were some other people there. Not in road. Bystanders at Mother Flowers fence. Couldn't tell how many people if one, two, four. More than two. Yes, it was at Mother Flowers fence.

Never take notice if two women among them. Men were there. Yes, more than one. Yes, saw more than one man. There was a mixed multitude. Couldn't take notice. They were just standing and talking. Yes, from where people standing could see if they were looking. I didn't know any of the people at Mother Flowers fence that day.

When I made the bend and saw the truck for the first time, it was fifteen to twenty yards from me. Truck was just going at an ordinary speed.

Didn't take notice how many people in the truck.

Didn't notice the driver. Didn't look on the driver. Was so frightened only drop bicycle and (hand on head). Not first person to approach injured man. About six of us met by injured man.

I don't remember seeing anybody standing on left hand side at a culvert wall with a bicycle.

Yes, I remember about five men.

Yes, truck stopped, passed where man fell a little. Couldn't say where on road truck stopped. Didn't notice if anybody come from truck. Only paying attention to injured man. Didn't hear anyone say he is a murderer.

Coming from shop along McNeil Park. It was after 12:00 but don't know the direct time.

Was going Postal Agency on Sligoville Road. Beacon Hill Postal Agency.

I was not there when police came on scene.

Someone was trying to get out injured man - the crowd of people. I left to tell Mr. Rob. I ride my bicycle. Don't remember who I tell.

I tell someone there. Did not go back to scene. Don't know accident investigated by police. Didn't make attempt to report to police. Nobody ask me to report to police. Only last week that gentleman (Mr. Campbell) spoke to me.

Only the time I went up to Mr. Rob. told someone I had seen accident. Not told anyone saw accident. Couldn't tell Mr. Rob "Clive" - one of his workers knocked down by a truck and they said he is dead. Described him as stout, fat one, I didn't know his name.

I didn't go back that way from that day.

No sir - when made Mother Flowers corner accident already taken place. Just as I come down the grade and made the corner the accident happened before my eyes.

Don't remember if anyone passed me - whether car or cycle just before accident.

Yes, the collision made a noise.

I was on my left hand.

There is some ruts in the road and saw the truck swerve from some of the ruts - before the crash. About from here to there (about thirty-five feet) between swerve and actual crash. After swerve it look to me as if it check its speed. When truck swerve/check from pot hole, distance between bicycle and truck about half distance (17½ feet).

Adjourned 2:00 p.m.

2:17 p.m.

XXD Mr. Hines (cont'd):

One fellow came on thereafter the accident that I know.

I didn't take notice seeing him (second defendant Williams).

When I leave I didn't see that man either (George McFarlane).

Don't remember seeing him.

Yes, two women were there trying to lift injured man's head. Didn't know them. Is when the accident took place I saw them rush down. If was standing by I don't know.

Yes, I knew Mr. Rob before day of accident. Don't know how long before. I was living on a piece of land Mr. Rob bought. That's how come to know him.

After accident and I gave news about one of his workmen, I did not again speak to Mr. Rob about accident. No, neither to police.

Yes, am churchman - Mount Hope Church of Christ. I was a churchman from I was 12 years old. Yes, have some amount of christian charity.

You see, I don't know him and believe should tell his employer. After they said he was dead - left the scene. Don't know where plaintiff lived.

Mr. Rob's business-place about two doors from me on the main and I see him (plaintiff) passing to go to the shop.

Yes, collision took place in front of me. Yes, had good view of man as was hit. Couldn't say how he fall. He go up in the air about four feet and drop to his left on the culvert and the bicycle coming more to my left hand. The bicycle (plaintiff's) went more to soft shoulder - side walk. I got off my bicycle back way. I was about (15 feet indicated) from bicycle when I backed off. Then the truck was before me - not reached to me yet.

Don't remember distance of truck when it stopped.

When I backed off, truck didn't come to a full stop. It almost stop. Yes, it came to a stop. I don't remember direct spot whether in middle or side of road. Can't remember how far from the fallen bicycle. It was a frightening time. I couldn't recall.

I know truck swerved from the pot holes. After that I don't remember if truck swerved.

After the accident, a cream Austin van passed over on my left hand side going towards Sligoville (from McNeil Park). Suppose so - (on right of truck).

As you come down the grade (from McNeil Park) you can see straight up Thompson Pen.

To Court:

The way I was travelling can see around bend before reach the middle of bend. Before I actually made the bend I saw the truck and bicycle.

To Mr. Hines:

Not agree can't see anything until you actually make the middle of the bend. Some stones at middle of bend. Can see it before make bend. Stones they take to widen road - from riverside.

No bicycle couldn't pass me as approach the bend and I don't see it.

When I ride completely on left hand and no vehicle didn't pass me on that bend.

Well, when said I don't remember anyone passing me - seeing anyone passing me travelling on a bicycle or car. Quite frankly, no vehicle or bicycle didn't pass me at that spot.

Not agree collision had taken place before I got to scene. Not agree I didn't see cyclist before collision. I saw the cyclist before the truck knock him.

Said this morning didn't see a man leaning against a wall on bicycle. Didn't see bicycle leaning up against a culvert.

Rexn:

Coming from McNeil Park little valley on left.

Know old road leading to old bridge. Road leads off Sligoville Road leaving a piece of land. Don't know what they call it if culvert wall. Yes, if standing down there - leave to him far down - can see where the accident happened.

(Witnesses McFarlane and McLennon released until needed again).

AUBREY ROBINSON (SWORN):

Live 31 Circle Drive, Spanish Town, Saint Catherine. Manufacturer of several items. Dish drainers space sawers record racks - all from wire plastic coated. It is a skilled job. It is all jig work. It include a tremendous amount of welding.

Yes, had travelled to England, America. Spent years there. Five to six years ago returned to Jamaica and built factory and go into manufacturing. Purchased lands at Jones Pen, Spanish Town.

Know Clive Malcolm - very well. First met him in Ocho Rios, Saint Ann. Own premises there. He was a tenant there. Met and talked

to Clive.

Ques: Did you form an assessment?

Mr. Hines:

Object - leading.

Court:

Question allowed. Not with Mr. Hines.

Witness:

Yes, form an assessment.

His intelligence I found fairly good. He was a good worker. He was a willing worker. He was competent at his job. He got along with his co-workers good.

Know what kind of work he was doing in Ocho Rios - welding.

Clive came to Spanish Town to work with me. I took him to Spanish Town.

I built the factory in 1973. My business was auto repairs, manufacture ironing boards and mops.

In Spanish Town, plaintiff employed to me - he helped in welding the steel roof of factory. Yes, then a boy about 18. Paid him per week \$30.00 for five days. There was overtime and fringe benefits. It amounts to \$50.00. I supplied almost all of his food. He stayed at my premises. Not charged him. Part of perquisites.

In Spanish Town, plaintiff was an apprentice welder. Showed promise as welder - fairly good.

Relationship between us as worker was very close - I was more or less stranger to Spanish Town. I figure I could teach him the trade and think he would^{have} done well - very well.

Yes, had a number of young men with me at time. I had a team of workers. He had good potential.

Still carrying on welding. Ages of young men from 18 to 27. They do welding. Average pay of those young men \$70.00 per week. Have one there considered my foreman. He earns \$95.00 per week. This man was not working with me at time plaintiff worked with me. Shortly after. If plaintiff had remained with me from 1973, possibly he would have

reached this position. Yes, likely.

He was reliable, trustworthy. He used to make lodgements from time to time and cash cheques.

I have travelled with plaintiff to Portland. He wanted to see his parents. I saw his parents.

Know he was in an accident. Visited in hospital when he was ill and seen him since. He visited the workshop in Spanish Town.

Have seen difference in him from before accident. He is a different person altogether.

Difference:

His ability to work. His approach to people. Laughter since been ill - senseless laughter. Questions he asks - silly questions. I would say his I.Q. has dropped - intelligence gone down.

As far as hygiene is concerned, before accident I found him fairly clean person. Since the accident he walks about very dirty.

He came back to the factory, visited for a week or two. I have three toilets and he just wouldn't use them would do his elsewhere outsidedefecation - would do it any old place outside. Never saw this kind of behaviour before.

He used to buy nice clothes - in leisure time. Normally clean on the job. After accident a definite change - cleanliness going down.

XXD Mr. Hines:

I first visited Clive in hospital - not same day - two days after accident at U.C. Hospital. I was trying to talk to him but he couldn't understand. Not only time I visited. Went back three times after. I couldn't communicate on the three occasions after. Period covering a week - very early stage.

Yes, at time of accident he was employed to me. Was paying him. At that time he would have to be assessed as a labourer - at that time. He was a handyman. He was a general worker - would go to hardware - only errand he would do.

On day of accident working over in Grendale - they were digging a spetic pit. Yes, he was engaged in digging pit - in my presence. No, don't live there.

No, I never visited scene of accident. Yes, spoke to someone who had seen the accident - shortly after the accident. Person I spoke with visited the scene of accident. Never spoke to anyone who was present when the accident occurred.

Yes, I was a person very interested in Clive from beginning.

I made inquiries - several - in and around where accident took place. No, never found anyone who said saw the accident.

Got news of accident - someone came and told me - was at workshop - same day. Yes, I know the name of the person who told me - an employee.

I know gentleman Mr. McLennon. I have known him from ending 1972. He was living on my premises in 1973 - a part of 1973 - factory premises. Can't recall seeing him day of accident. Don't remember. Have seen him several times since the accident. Yes, we have talked about the accident - how sorry everybody was about what happened. Don't remember - shortly after accident. Could possibly be same day.

Know Mr. McFarlane - about 75 years - since yesterday. Saw him right outside here.

Not many houses around there - where accident happened.

Yes, very interested in Clive - good worker, willing.

Yes, effort to find out about the accident - doing it quite seriously.

I have spoken to plaintiff's parents - after the accident - once. No - twice - on two occasions. One period of two months after accident.

After the two months I did not continue inquiries as inquiries without success.

Rexn: None.

To Court:

When he visited week or two and I found his habits changed was about July, '74. Not had opportunity of observing his behaviour since.

Yes, found him a promising employee - trainable. He was a good man. Yes, work attitude, industry, intelligence. Reading and

comprehension. He could follow a job sheet. His job did not involve calculation. Didn't get to that stage where he would be given a specification to work on. As far as job sheet could read, comprehend and follow instructions.

By Leave Mr. A. W. Campbell:

Yes, he was kind of person - material could reach stage of working on specification. Could read a tape measure.

By Leave to Mr. Hines:

None.

Adjourned for date to be fixed by Registrar (estimated length two days).

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1976/M107

DATE OF HEARING 29TH, 30TH & 31ST MAY, 1978.

BEFORE THE HONOURABLE MRS. JUSTICE ALLEN

| | | |
|---------|------------------|---------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF |
| A N D | REX KNIGHT | 1ST DEFENDANT |
| A N D | EZEKIEL WILLIAMS | 2ND DEFENDANT |

Mr. A. W. Campbell with Mr. Crafton Miller and Mrs. Earl Brown for Plaintiff

Mr. C.U. Hines and Mrs. E. Hines for Defendants.

(Mr. Hines ask to release witness taking Examination at C.A.S.T. at 2 p.m. today)

VIOLET MOORE (SWORN)

(TO A. W. C.)

Live at Long Road, Portland, Fish Vendor. Clive Malcolm is my son. He grew with me as a child. He attended school until about fifteen (15) years. Know he could read and write very well. Yes he left my home to work. Yes just at about fifteen (15) years.

Yes Clive used to come back home to visit me. Yes after a time I understand he was in an accident. I went to visit him in University College Hospital many, many times. Yes I took him home to Long Road to live with me. He is still with me. Before the accident Clive was a bright boy, mannerly and he used to go tidy and nice. Since the accident he doesn't tidy. He would want to sleep in the same clothes that he is into. If he put on a clean clothes anytime he would want sleep same way if I am not there. To get him into night clothes I have coax him and talk to him.

He used the toilet before the accident. Since the accident he go

to the window corner and all about in the yard. It affects his clothes - dirty - because he doesn't wipe his back.

When he does his stools out into the yard - me or the sister clean it up. He has attempted to do this took down his pants and bend in neighbours kitchen.

Another lady demanded money, he took set in her house said the lady owe him money. I know it to be not true. He speaks things not true - said he married nine wives.

He was mannersable before. Now he is rude to me and he'll push me down. There are brothers and sisters in the house - He treats them bad - beat them up. Was not like this before. Mannersable boy - everybody love him. He would just sit down and laugh and laugh to himself. If he see anyone talking he would quarrel say is him them talking. Sometimes when he want money he would say if he did have his two good hands he would work.

Sometimes he has fits, rolls over and turn up his eyes. He has had fits three times before the case try - and last time I saw him have fits about three to four weeks. Two weeks about a month now.

When he has fits he stiff out and froth up the mouth and (shaking indicated). If I could prevent it would not allow Clive to go from me. He can't manage himself. I sometimes earn per week \$40.00 sometimes \$50.00, according to the circumstances up to \$100.

As compared with before accident he was a mannersable boy, but since accident sometimes he make me disgust.

XXD MR. HINES:

Sometimes work seven (7) days per week, sometimes three (3) days, sometimes one (1), according to how the fish run.

Yes remember in January this year this case heard. Up to January this year never see him, only the little girl, say him have it (fits). I see him three (3) times suffering attack of fits. The little girl say he has it one time but I never saw it that time.

Clive leave my house at Long Road when he was about fifteen (15). I sent him to Joyce Beckford in Ocho Rios.

Yes, same lady who sent a telegram informing me Clive in Hospital.

I have eight (8) children, not all living with me now. Four lives with me including Clive.

Yes Clive born 2nd May, 1956 - 55. '55 he born 2nd May. Yes his father Emanuel Malcolm and I Violet Moore and he was born at Happy Grove. Born '55 sure. Can't remember if Clive left in 1971.

Suffer with my nerve. Don't remember what year he came back to me. Don't remember when I went to look for him at University. I can't count.

No, Clive has not lived with his father. Lived with me up to time he left Long Road. Since Clive met the accident I have not given a statement in writing to anyone about him.

No I can't read and write. Yes I can write my name. No Sir, nobody came to me at Long Road and speak to me about Clive and the accident in 1974.

Yes know a man name Kenneth Thompson. Yes he lives in same area where I live. (witness hesitates to recall incident).

Everybody know I can't write. Don't remember Clive father gave a statement. He don't responsible for the little boy.

No Sir, I never wrote anybody in connection with Clive and Clive's accident. Yes, if I see my name, my signature I would be able to identify it. Don't know whether Clive has signed a statement in connection with his accident. Please Sir, is not him sign it.

I never write letter to Insurance Company of Jamaica. I never ask anyone to write a letter for me to them. No Sir, never write or ask anyone to write letter to them in connection with this accident.

Yes I have been into the Insurance Company of Jamaica Office. Yes spoke to Officers there. No never write to them.

Never make complaint that Clive and his father sign a paper and

I would like to know what it was about. Never made complaint. From Clive met accident is I also carry his expense and still have to carry him back to University Hospital same day.

No did not complain that Clive can't read, his father can't read and I don't know what they signed. Clive can read nice, nice.

Yes I did see Clive Birth Certificate, but moving up and down something cut it - don't have it - have seen it. Yes got his Birth Certificate from Spanish Town. (Birth Certificate put to witness).

Miller:

Something more would have to be done, witness can't read.

Not necessary if intended to tender certified copy. Yes Clive told me how accident took place but don't remember now. Yes I went to the scene of accident - long time now. Went to Police and went to scene.

Mr. A. W. Campbell:

When say went to scene - must be hearsay. No evidence she was at accident (abandoned).

Yes I know a gentleman by name of Mr. Robinson. Yes have seen him since Clive's accident. Yes first time I saw Mr. Robinson after accident. Not the first time I knew Mr. Robinson. First time I knew Mr. Robinson was when Clive work with him at Spanish Town - and then came up the yard - doing welding. Yes first time after accident I saw him at Court - and at U.C. we buck up.

Since them come now - you have to say is me and him Clive tek the case to a lawyer. Because me have the response of him, because he mash up.

I have a toothache.

Yes, said I had spoken to the police, went to police station after the accident.

Yes I made enquiries of the accident. I ask "Coolie" one lady them call so from Ocho Rios but she go over Spanish Town. I ask

her to seek and tell me. Yes I got the name of some one who saw the accident. Them come here and talk already. Yes me got the name but can't remember now. Can't contain it in my brain. I did not get no names. "Coolie" told me.

Yes son's habits changed since the accident. Just wha day yah - notice his habit changed - him never out a de yard and when me ask why him start to laugh. Have toilet outside not in house. Yes pit latrine.

Re XN: Mr. A. W. Campbell:

None.

To Court:

Sometimes he does it in toilet, sometimes out in the yard. No don't think he can help it. Sometimes he is not in senses. Doctor told me something (bear with him).

Case for Plaintiff

Mr. Hines : Opens

Burden of Defendants case mostly revealed in cross examination of those who claim to be eye witnesses of this accident.

In fact pleadings of Defendants in particulars discloses Defendant's contention.

What defendant said a general denial of negligence and that neither of them hit plaintiff from behind.

Central issues of fact - only issues of fact an issues of liability is whether or not Plaintiff hit from behind as alleged or whether as he claims plaintiff riding his bicycle ran head long into the left front of defendant's truck.

Plaintiff making this deep corner travelling from direction of the McNeil Park towards Sligoville.

Paragraphs 4 and 5 particulars of Plaintiff's negligence set out briefly particulars of negligence.

Defence:

1. Court will observe allegations. Failing to keep to left side of road.
- 2.
- 3.
- 4.
- 5.
- 6.

It is position of Defendant - Defendant was driving the truck from Sligoville towards McNeil Park, driving on left side of road and as he approached this deep left hand bend Plaintiff turned around bend on him, and collided with the left hand front of truck when the Plaintiff and his bicycle fell to ground.

In support of defendant's contention driver of truck 2nd defendant will give evidence.

Officer who investigated accident, a Corporal Britton will be called to give evidence and Mr. Samuel Oliver who took a written statement from Plaintiff already marked for identity - in this case.

Would add two (2) other matters:

1. Scene of accident itself has one or two features that Counsel for defendant thought it would be useful to get pictures of scene. Picture taken by me 27th December, 1977, on colour negatives and negatives developed Stanley Motto Photograph Studio and resulting prints 5 x 7 are in possession of defendant, some of which purpose to prove the usually way and it admitted to be used to acquaint court more intimately with views of scene itself. In order to do so will have to go in witness box and subject self to searching in cross examination.

Other matter - having heard evidence given by Dr. Cross - decision of defendant to have plaintiff examined by Dr. Chutkan. Co-operation of Attorneys for plaintiff sought but declined.

Dr. Chutkan has already seen and examined plaintiff and a portion of Dr. Cross evidence on which seeking to have orthopaedic evidence.....?.....

to have Dr. Chutkan give evidence in this case. This might be tomorrow.

Mr. Miller:

Opportunity to state plaintiff's Attorneys position.

Hines:

Order for Directions - provided if Medical Report, not agreed, each party entitled to two (2) witnesses.

Normal circumstances defendant would first give evidence but in these circumstances asking leave of court to have evidence of photographs dealt with and admitted if possible and have defendant give evidence. Defendant's evidence connected to photograph.

Court:

Leave granted to defendant.

CLINTON U. HINES (SWORN)

Attorney-at-Law, Office at 11 Duke Street, Kingston, Partner in firm of Hines, Hines & Company, Attorney for Defendant in this case.

22nd December, 1977, go to a point along the Sligoville Road accompanied by 2nd defendant Ezekiel Williams.

The 2nd defendant pointed out to me a point in the road. I took a number of colour photographs of the location. Yes of the point. This particular point is at a deep right hand bend as one going from McNeil Park towards Sligoville in St. Catherine.

There were twelve exposures and the negatives from the twelve exposures are with me. The roll of film containing the twelve negative were taken by me to Stanley Motto's Photographic Laboratory. These negatives were subsequently developed and returned to me.

A. W. Campbell stands: Will not pursue.

Returned to me on a date in beginning of January '78. There was one photo-print from each of the negative. These are the twelve prints and these are the negatives. Two of the negatives are of shots that have no connection with the location. (Tendered negatives and prints as Exhibit 1).

A. W. Campbell:

Not yet reached stage where photographs could be admitted in evidence as Exhibit.

Court: Agreed.

All twelve prints were examined by me and reflect the character of the scene in the location as seen by me at the location.

LUNCHEON ADJOURNMENT

Resumed 2.25 p.m.

CLINTON HINES STILL ON OATH:

These prints I have numbered 1 - 12. Numbers 1 - 8 are those prints, are shots of the scene of the bend to which I referred - taken from the direction of Sligoville and looking towards McNeil Park.

Prints numbers 9 - 12 are shots viewing the same bend from the other direction i.e. McNeil Park looking towards direction of Sligoville.

The print No. 1 shows:-

Prints shows bend pointed out to me by defendant Williams. Prints 1 - 8 are shots which were taken with camera 15 ft. Callibrated on the camera focussed in the apex of the bend.

Prints 1 - 8 are taken from different angles, but not necessary different distance - approximately the same 15 ft.

Print No. 1 was taken with a shorter focus then 15 ft., and it bring up in focus a manhole on the left hand side of the road as face McNeil Park. In relation to the bend the manhole is right in the apex of the bend.

Prints 9 - 12 were taken from about the same distances 15 ft., and these give a view of the left hand side of the bend as one views from McNeil Park towards Sligoville.

All 12 prints marked "A" for identity. Negatives are in my possession.

XXD A. W. Campbell:

Correct, I am an Attorney-at-Law have been such since July, 1963. Have since 1962 been doing photography as a hobby. Have had professional guidance in England. Have a general idea of development of black and white film - not colour. Pictures I took were colour negatives.

Not done any check to relied on capabilities as photographer. Rely on camera. Not electrically operated camera. Shutter release to manually operated. This particular camera I have had since Christmas 1974. Not

done any check to assess its accuracy. The camera is always accurate. The picture I have taken of family flower tree have always been accurate in picture I have taken.

When I went to place where I took pictures, I went there purposefully. Yes intention to take picture of area where accident under consideration took place. Purpose in taking 2nd defendant unless able to establish place. I was not on scene of accident.

It did not occur to me to ask plaintiff or representative of plaintiff to go with me to scene. The negatives are not marked. This morning the prints were marked. Some been brighted in crayon.

Took the shot and took the roll of film. Not put any mark on it. Took them to Stanley Motto Laboratory at Geffard Place. Because these films have to be processed under special circumstances. Only four Laboratory in Corporate area. Stanley Motto is one of them.

Not know person I gave films to, know employee of Stanley Motto. Did not photograph the scene in 1973. Do not know whether physical characteristics of scene have changed since 1973.

Rexn: None

EZEKIEL HEZEKIAH WILLIAMS (SWORN)

Live Braeton, St. Catherine, Driver. Live in St. Catherine thirty (30) years. I am forty-two (42) plus (Years). Yes familiar with the area of Spanish Town. Knew area of Greendale like the back of my hand. Know the road leading from Sligoville to McNeil Park. I have been a driver for fifteen (15) years. I know the roads in and around Spanish Town fairly well.

Correct, Greendale border on Kingston/Spanish Town Highway in the McNeil Park area.

There are several streets coming out on Spanish Town/Kingston Highway from Greendale. This was so from 1973 up to now. Those roads there before 1973.

During 1973 I was employed to somebody. Accident took place? when I was driving a truck in June, 1973.

Working with Mr. Rex Knight - live Greendale up to now. Yes,

I used the roads several times leading into Greendale.

Remember hearing Mr. Clive Malcolm giving evidence in January this year. Yes, remember him saying leaving a site in Greendale to go to Robinson's place on Kingston/Spanish Town Highway, on said street barred with rubbish and couldn't come out so went around. Day of accident several roads from Greendale to Spanish Town Highway - nothing blocked the road coming too or from. Even if one blocked other roads ~~available~~ - even a trailer to come to Spanish Town Highway.

27th December, 1977, I accompanied you to the Sligoville Road. When got to Sligoville road some distances from McNeil Park I showed you where accident took place and also a manhole where the man dropped.

Yes, I saw you take photographs of the area. From date of accident to when photographs taken there were no physical changes to the location itself. As stand there recall what the scene looked like. If saw photographs would be able to say if reflect what the scene looked like.

Miller:

At ~~this~~ stage Counsel ought not to put photographs to witness without foundation.

Court:

Agreed could elicit more - manhole cover.

Witness:

Where I pointed out to you had a manhole where Mr. Malcolm dropped. The manhole is on the left hand side of the road coming from Sligoville. A fence is there - a zinc fence from the left hand side.

Yes, have a road there, a corner. Coming from Sligoville on left hand corner a deep bend asphalted surface. Yes, had a light post at the edge of the road on the right side of road going to McNeil Park and top of the road leading back to old bridge is another light pole. Coming from McNeil Park you go down a grade about a ¼ chain from the bend on the Sligoville side. Houses are along the road on both sides.

(Prints identity 'A' numbered 1 - 8).

Miller:

Not done enough.

Court:

Evidence connects 1 - 8 - although (witness asked to look at 8 prints).

All these photograph are the same, I know the scene they represented. It is Thompson Pen Road. Yes, it is where the accident took place. I see print No. 1. This picture shows the left hand side coming from Sligoville. The corner showed in photograph is what called Mother Flowers' corner. I see a zinc fence in photograph and the manhole. I can see the bend - left hand bend.

Prints 1 - 8 tendered in evidence A2.

Miller:

Object all reason been given.

Court:

Over-ruled.

Witness:

Remember 28th June, 1973. On that day working as a driver. On that day I was driving from Sligoville towards Spanish Town, McNeil Park - and driving through the district of Thompson Pen. Yes, I approached that bend in road, I described as Mother Flowers' corner. As approach the corner I was in extreme left hand corner - a right hand driven dumper truck Licence FB 818 a ten ton truck. As approach Mother Flowers' corner travelling at about 25 m.p.h., you cannot see around the corner as I was driving. As approach the corner I blow my horn. I even cut down on my speed. Immediately I saw a cyclist coming from the direction of McNeil Park in the opposite direction. As I reached the corner I see him coming down the grade. He was on my left hand side of the road. He was coming on a down handle bicycle. His head was down (indicating waist bend) He just suddenly come around the bend.

When I saw him I swerved to my right and he hit on the left hand side of my truck. When I swerved to right he hit the truck already. Reason I swerved to right because if I stop same place I sure he would die same place on spot, so I pull up on the right hand

side of road. I came out immediately.

When I came out one man around - little boy about 18 years of age. He was standing on the old road that lead to the old bridge. Apart from that 18 year old youngster, I did not see anybody else on the scene. I go towards the man - the same cyclist fell in the manhole. (witness indicate on Ex. A1 open culvert). Yes, what - called manhole. Cyclist was on asphalt near to edge of manhole and his head in manhole lying on his back. He was bleeding. Not saying anything. After a minute and a half Mr. McBean drive up.

No one gathered on scene at the said time accident happened - after a little while. That Mr. McBean moved man from scene. Yes, a couple people was there but not much crowd when Mr. McBean come. Yes, women on scene four yards around. Yes, I assisted to get body from where it was - some people from McBean van about four men from McBean van and McBean himself. I couldn't leave the scene. No never left the scene.

Remember Mr. McFarlane gave evidence in January this year. McFarlane did not speak to me. Day of accident he did not tell me you murderer and I said go away. Not used those words to McFarlane.

Yes, police eventually came on scene, about ½ hour after accident took place. Yes, Acting Corporal Britton - Spanish Town Police. Yes, when police came, there were still some people around. Yes Corporal commence investigation same place on scene.

I did not see Mr. McFarlane who gave evidence on the scene of accident. Mr. Noel McLennon I remember seeing him gave evidence in Court. I had not see him before day he gave evidence in Court. Day of accident I did not see McLennon on scene of accident.

Bicycle - when Mr. McBean took injured man from scene his bicycle left in road until police came. Bicycle taken from scene in my truck to police station. Truck, bicycle to police station. The front fork and front wheel of bicycle were damaged. Handle of bicycle Didn't notice any damage to handle of bicycle. No damage done to my

truck. Cycle collided with left hand side where have the light. Light on front truck low down. No damage to light - just edge of light get a slight dent - metal part around the glass.

Yes gave a statement to Investigating Officer that same day at station. Yes, told him how accident took place. Not correct I hit Mr. Malcolm on bicycle from behind. After accident I saw women looking through the zinc fence. A pipe side they were standing. Saw them after the accident. When I saw them, they were over the fence. Apart from the bicycle didn't see any other bicycle on the scene. There were no bicycle there on the left hand side near culvert (going towards Sligoville). Didn't see anything like that happen. McLennon riding bicycle and and back off, and put hand on head after accident. Boy leaning on bicycle - last saw him about four years now on scene. Know he lived in Thompson Pen but not know house - Them don't know his name - can't find him.

When cyclist came around the bend he was riding very fast. Why said, as far as I am concerned he had no control - because a man that have control wouldn't be riding left hand side of the road coming down a grade.

4:12 p.m.

Adjourned sine die

HEZEKIAH WILLIAMS (SWORN):

In Chief (continued)

By consent (4 prints) tendered in evidence as Exhibit A2. (witness shown prints marked 9, 10, 11 & 12). I identified the view in photograph. It is of the same corner where accident happened, viewed from McNeil Park direction.

A. W. Campbell:

Application to amend Statement of Claim to include claim for nursing care. Particulars of Special Damage to insert after traveling. Nursing care from 15th July, 1973, to present 30th May, 1978 at \$25. per week.

Hines:

Object.

Evidence in case so far suggest Clive care. Since left hospital has been carried out by his mother. Statement of Claim would not have omitted item if it is not an after thought. Item so large could not be omitted.

2. Defendant missed opportunity to cross examined this expert and need for nursing care now claiming not proper at this stage to game. Item of Special Damage that required proof included evidence subject to rigid cross examination.

Hines:

Submission out of time.

Miller in reply:

With jurisdiction of court to do this to alter amendment. In so far as necessary, whether it is to justify evidence of Doctor, man has epilepsy. Fact it is substantial amount should not affect.

Court:

Too late. Would mean re-opening case to prove X Dollar cost of case. Application refused.

HEZEKIAH WILLIAMS:

XXD A. W. Campbell:

Yes, driver for fifteen (15) years. Yes, on 28th June, 1973, drive on Thompson Pen Road. Not had gone in Greendale area 28th June, 1973. No, do not know condition of road in Greendale area on 28th June, 1973. Yes saw cut on his head. No woman lift him out. No woman there when he was lifted out. Yes at time of collision saw women standing by fence inside the yard. None of the women came out from the yard with the zinc fence. Yes, between time of accident and man taken away. Yes a large number of people gathered. Yes, among those there were women. Not so much of a great number when collision took place. Know the Post Office - Yes, quite near to scene of collision. Didn't take notice if anybody over Post Office at time of collision.

Time of day accident took place - about 11:30 a.m. not yet reach 12 o'clock. Don't know if anybody from Post Office or house around. Yes a number of houses in area on that road and on old road to bridge. Yes, as come down Sligoville Road over to right is wide soft shoulder. On right there is a little valley and over there a culvert wall. Yes, if one stand at culvert wall one can look straight up Sligoville Road. If one riding from McNeil Park direction coming towards Sligoville before he go in bend - can't see up Sligoville Road.

(Prints No. 9 of Exhibit A2 shown witness).

Understand "broad area" to mean soft shoulder. The bicycle in picture not reached apex of corner.

This bicycle is on his left hand side of road coming from McNeil Park.

Where he is he cannot see up Sligoville Road until he go up more. Yes is straight road from apex, top. Sligoville Road - I would call it far more then 10 chains. If one is at apex, if face turn Sligoville, that person can't see straight up. I would call apex the dead bend of the corner. Apex - still coming at that point - why, can't see up Sligoville Road - same Thompson Pen Road.

If riding towards Sligoville coming from McNeil Park keeping on the left hand side - would be riding on soft shoulder. Can't say how wide road is there, as road on soft shoulder is into one. Not agree, if there, can see vehicles coming. Can hear, but can't see.

Manhole before reach apex - about 15 - 20 feet coming on Sligoville side.

Yes, if stand in line with manhole with face towards Sligoville one can see straight up the road, when one comes from McNeil Park going up Thompson Pen Road. Yes, it is first level road and at a certain point going down hill and about one chain from corner? Would say less than $\frac{3}{4}$ chain - would say about 15 yards.

No, I did not see the rider when he began coming down the grade. Yes said as approach corner blew horn, cut down speed, saw a bicycle rider came down grade. Yes, said grade about $\frac{1}{4}$ chain from the corner. Yes from Sligoville direction you have to come to apex of

corner before you can see up grade - because I am driving a right hand vehicle.

Not agree coming from Sligoville would have to pass the manhole, travelling another 15 feet or so pass the corner before could see up the grade. Yes travelling to my close left, yes driving a right hand drive. For me to see up the grade I have to finish the corner - but I didn't finish the corner.

Well yes, have to pass manhole near the apex of corner before can see up grade. Yes I had passed the manhole about 2 feet or so before saw plaintiff for first time.

From Sligoville on right there is a wall and deep ditch (on other side wall from road). Yes I have ridden a bicycle. Yes know the corner quite well. I would say collision took place in the dead centre of the apex. From dead centre of apex unable to see up the grade (towards McNeil Park).

The left front truck collided with cyclist. Not correct I collided with cyclist before reached manhole. Not correct I hit this man from behind, Not correct I shift from a rut and hit plaintiff from behind. Heard McLennon gave evidence in court. Not correct what McLennon said that I shifted from a rut. No rut in road. I know man didn't die. Well, from blow he got though he could die.

The little boy eighteen (18) years old was standing on other side of road. Light post shown in print No. 4 is the post by which he was standing. That post is old road leading to old bridge. That light post is on higher ground to where accident happened. Yes, that person on higher ground than culvert wall. I have seen him but not spoken to him. He walked away from scene.

When police came, police ask and nobody decide to give a statement. They were not prepared to give a statement. When police came didn't see him around. Yes I did indicate to police there was the boy. When the truck hit the bicycle and the rider he did not go up in the air.

Mr. McBean stopped about 3 chains from where collision took

place. I am speaking the truth. Not correct I hit plaintiff from behind. Not correct hit him before reached manhole - hit him about 2 feet pass manhole. Never seen McFarlane. Nobody told me I was murderer and didn't have to hit him. Not agreed McFarlane said so. Said out there ½ hour before police came.

Yes after Malcolm gone to hospital I was there. Not very frightened, spoke to no one - Nobody asked how it happen.

Rexn:

Yes said truck passed manhole 2 feet, when truck and cycle collided. Yes he fell in manhole. Yes at that time manhole behind truck.

Nobody did not go up in air. Yes able to notice the movement that placed it in manhole. I swerved to right immediately so he get a clearance to chip between truck and the manhole.

SAMUEL GEORGE OLIVER (SWORN):

Live 11 Unity Lane, Whitfield Town, Kingston 13. Investigator to Insurance Company of Jamaica. So employed in 1973 - 74. I collect statements in accident and do general investigation. When taking statement submit them to the Claim Manager of the Insurance Company.

I have seen plaintiff Clive Malcolm. See him in court now. 22nd August, 1973, I took a statement from him. Taken at his home in Long Road. A man who said he is his father and a girl who said she is his sister, older sister were present. I took the statement indoor sitting down in one of rooms of a two (2) room house.

While taking statement he told me how accident took place. Statement taken in presence and hearing of father and sister. After I took the statement I write the statement - I read it over aloud to all three and then the man - the father read it over - he took it and he read it. After he did this, plaintiff signed it. The man signed it - the father. The sister signed too.

This is the statement contained a 3 page foolscap. Tendered in evidence as Exhibit 1.

Miller:

Objection to admission. Sufficient foundation not laid.

2. Documents shown to us contain information substantially different from what witness Oliver said to court.

All matter not before court.

Saying more people signed it. Even if a Clive Malcolm signed it.

TO COURT:

The Clive Malcolm I see in court signed statement. He signed it in my presence. He signed at the bottom of the 3rd page. I signed as a witness at the bottom of the 3rd page.

Court:

Over-ruled.

Clive Malcolm signed here (indicated). I signed here (indicated).

Admitted in evidence as Exhibit 1.

Witness reads statement.

While taking statement from plaintiff I did not make any suggestion to him whatsoever. Not I telling how the accident happened. I was of opinion he was understanding what he was saying.

8th April, 1974, I went back to Long Road. I took another statement from the mother, Violet Moore - she signed the statement in my presence.

XXD Mr. C. Miller:

I did not hold the hand of the father Emanuel Malcolm to signed his name. No not joined up, script. Emanuel Malcolm signed in script. I did not assist him to write his daughter helped him to spell.

Emanuel Malcolm write: "THIS STATEMENT WAS TAKEN IN WRITING IN MY PRESENCE".

Read over to him.

Agreed it correct.

He signed SIG.

When I saw him write like this did not occur to me he could not read and write properly. It did not take him much time. Well yes, it took a much longer time to write that than would expect from a person who can read and write properly.

Investigator for twenty-two (22) years.

He did not read statement loudly. I couldn't say if he read the contents of whichI did not see the daughter hold his hand to write. She spelled some of the words. It didn't occur to me funny that he write in script what I can't read now.

EESAME signed same.

I have not seen E. A. Malcolm signed in joined up letters. Can't make out signature above. Yes there is a name before reach to Clive's own. Didn't tell court other person there other than Clive's family.

Not wrote story in manner I want, then assisted Emanuel Malcolm to signed. No I was not suggesting what happened to Clive.

In 1973 living same Unity Lane. I saw defendant Williams several times after accident. Yes, saw Mr. Rex Knight also. Did not have discussion with Mr. Williams or Mr. Rex Knight before went for statement. When I went for statement I understand so - that Clive had brain injury. Yes understood he was under Medical treatment generally excluding brain injury. I did not make suggestion to Clive. True I read over statement to Clive and others. No didn't know whether Clive father could read or write. That sister appeared to be about eighteen (18) years at the time. She did not appeared to be thirteen (13) years old at time. Much advanced.

I didn't tell him, taking statement so he could get money from the Insurance Company. Didn't tell him he could not get money unless he signed. Yes I told him the purpose of statement. I told Clive father and sister the purpose of the statement to enquire the nature of his injury so that if the Insurance Company decided to compensate, then the details of his injury would be in the statement. No I did not tell Clive the Insurance Company wanted his signature so they could know I had visited him. Yes, I would say details of his injury in the statement.

At the bottom of page 2 "I was suffering from a cut in my forehead, both arms broken - left arm broken in 3 places. I received nineteen stitches and both arms placed in cast".

Lunch adjourned

Resumed 2:15 p.m.

Rexn: None.

HUNTLEY BRITTON (SWORN)

Corporal of Police attached to the Telecom Headquarters, Elletson Road. During June 1973, I was stationed Spanish Town, St. Catherine. Mobile Traffic. Part of duty to investigated scene accidents.

Recall 28th June, 1973, about mid-day called to scene of accident in district called Thompson Pen. Got to scene about 11:50 a.m. There I saw a bicycle on the left side of the road by a culvert (left towards McNeil Park) right to the apex of a corner. A truck was parked a little distance away on the right side of the road going towards Spanish Town Road/McNeil Park. I saw defendant Williams who said was driver. I saw a small crowd of people, men, women, small children. I made enquiry as to owner bicycle.

Mr. Williams told me how accident took place. During course of day I took another statement from him at Spanish Town Police Station. I enquired of crowd for witnesses, no one answered.

I saw damage to the truck. The left front blinker was damaged and the left side of the front fender was also slightly damaged. It was a Fargo truck. Glass of blinker was broken - yellow colour. Left side of front fender sinking - having a dent.

The bicycle front wheel was damaged. The handle was bent. The front fork was slightly damaged. Frame was slightly bent. No damage to back wheel. No damage to back fork. Bicycle was - part of road. It is left hand bend.- deep bend - from Sligoville towards McNeil Park - slightly rough surface asphalted. There is a slight grade down from Sligoville down to the bend. Asphalted surface about 18 - 20 feet (where saw bicycle).

(Print No. 1 Exhibit A1 shown witness).

I recognize scene in picture. I recognize it as a photograph

of the road - of spot where I saw the bicycle. Here right by the culvert. (indicated).

Yes, that's where I saw the bicycle.

XND Miller:

I did not see the accident. Yes said where scene bicycle in apex corner. I know the place - know it well. Culvert is not far from the apex. From Sligoville towards McNeil Park one would reach the culvert before reaching apex. From McNeil Park going down grade towards the corner one reaches the apex before reached the culvert.

Yes, know the grade would take it from McNeil Park. Grade about 15 yards from apex (not 1 chain). Not agree manhole about 15 - 20 feet from the

Bicycle was not on the hole itself - on the left side by rough side there. Did not see the injured man when went on the scene. Wasn't given the name and address of any witness on the scene. Yes driver told me what happened. Didn't take a statement on scene. I made notes, Didn't take measurements.

Rexn: None.

TO COURT:

I remember damage to truck and bicycle by refreshing memory from Accident Report Book. I wrote up that book on the scene. There was no drag mark. Bicycle and truck taken to Spanish Town Police Station and examined the following day and were given back. Don't know who to. Don't know where they are.

Mr. Hines:

Doctor Chutkan not available today, will be available tomorrow after 11:30.

Adjourned to 12 noon - 31/5/78.

WINSTON BARRINGTON CHUTKAN (SWORN):

Registered Medical Practitioner and Consultant Orthopaedic Surgeon, University Hospital. I also lecture Orthopaedics at University. Also holder of degree of F.R.C.S. I have fifteen years experience in Orthopaedic, as Medical Practitioner - 18 years.

In course of Consultant Orthopaedic Surgeon during June '73 had occasion to attend patient Clive Malcolm and in August, '73 prepared report on injury and of said Clive Malcolm.

I treated Malcolm at the University Hospital of the West Indies. At the time of treatment I made notes of findings. Notes on docket of University Hospital. Recall making report of August '73 and I recall the case itself.

Would like to refresh memory.

Court:

May.

A. W. Campbell:

If refresh memory from report would like to object.

Witness:

I do not send report to anyone in particular. I have photocopy of that report.

A. W. Campbell:

Objecting to attorney for Defence handling what he calls in respect to Dr. when Dr. says himself he has a report.

Court:

Mr. Hines please continue.

(paper shown to witness).

Witness:

Yes, this is my signature. Yes, now recall the case itself. Report I made myself, it is a summary of my examination and treatment as recorded in the patient docket. These could be notes from the general surgery and notes made by me at the time when the patient visited. Yes from my own personal notes I made this report in 1974.

Court:

Witness allowed to refresh memory from report.

Witness:

When I examined Clive Malcolm his orthopaedic findings - for myself I was aware he had a compound depressed fracture of the skull which was being treated by the Neuro-surgeon. His orthopaedic injuries

consisted of fractures of the 1st, 2nd and 3rd metacarpals of the left hand and fractures of the first metacarpals of the right hand.

There was also injury to the left brachial plexus - i.e. the nerve at the root of the neck which run down to the left upper limb.

Metacarpals are bones which runs from the wrist joint to the base of the fingers. The first metacarpals is below the thumb.

The injury of the brachial plexus on the left side resulted in weakness of the muscles of the left arm and forearm and complete paralysis of the fingers of the left hand. There was also lost of sensation i.e. ability to appreciate touch or pin-prick hot or cold over the left hand. Injuries described were treated by me. Would expect - Fracture of the metacarpals on both hands to heal quite well. Last saw Clive Malcolm at time of medical report on 19th August, 1974.

He had fracture of the skull and injury to chest. These would not be treated by me. Brachial plexus injury would be treated by me. The treatment really boils down to see if there is a recession - nothing very active one can do about it. Very often with passing to time injury to brachial plexus would improve with time. Fracture to metacarpals - left. Yes would expect application of force. On right - yes, the same - would expect moderate to severe force to cause fracture to metacarpals.

Ques: If assumed Malcolm riding down handle bicycle in collision with truck?

Miller:

Object would have to know speed of truck and cyclist.

Court:

Question for court to decide. Upheld.

Hines:

Allowed notes bottom page 9.

Court:

Different question.

Ques: If cyclist had a?.....come in collision with truck - face - and fracture to metacarpals consistent with version?

Ans: Yes.

Ques: Fall in these circumstances likely to cause fracture to skull and injury to brachial plexus?

Ans: Yes.

Court why:

Witness:

Fracture of skull on left side (above the eye).

Plus injury to brachial plexus and shoulder would indicate a stretch - more likely caused by more force from moving objects.

Can be caused by fall on hard surface but more likely by moving object. Brachial plexus is a nerve situated towards the front of the root of the neck - from the spine - starts from the spinal cord through neck, shoulder, arm forearm to tip of fingers. Damage to brachial plexus which would result to the injury to Malcolm is the stretching of the nerves. Severe degree of force would produce the stretching (to cause injury).

XXD Miller:

Yes, well acquainted with Professor Cross. Yes, in my estimation he is very eminent Neuro-surgeon and a Practitioner of Neuro-surgery.

The Neuro-surgeon would have treated the depressed fracture. The Thoracic Surgeon would have treated the chest. I did know Malcolm had fracture of rib or ribs and Thoracic Surgeon asked for his opinion.

Yes he had compound depressed fracture to skull. Yes in 1974 the fractures of his metacarpals heals well. Yes fingers of left hand paralysed. In 1974 when I saw him the muscles of his left hand were paralysed - that's all I am prepared to go.

Ques: Supposing truck 20-25 m.p.h. coming contact with man riding a bicycle so that that man went up in air and landed in concrete manhole?

Yes injuries consisted with patient falling on a hard surface (after being hit). Not related to hit from behind. One would have to postulate that hit to head on manhole and shoulder pushed in other direction and metacarpals injured at that time.

Ques: Cyclist hit from behind going up in air and falling in open culvert body out and head in area of the culvert?

Ans: Any injuries could be caused in those circumstances.

If fall on palm outstretched fracture of the metacarpals less likely but possible would expect fracture of the lower forearm. If head comes in contact with truck coming in opposite direction not necessary expected some facial injuries.

Ques: If would expect that patient would go up in air?

Ans: Depends on too many factors.

When saw patient in 1974 his mother with him, she make observations which I recorded "His mother thought there had been marked mental changes since the accident".

Rexn: None.

2:15 p.m.

CASE FOR DEFENDANT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
 IN COMMON LAW
 SUIT NO. C. L. 1976/11107

| | | |
|---------|-------------------|------------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF |
| AND | REX KNIGHT | FIRST DEFENDANT |
| AND | HEZEKIAH WILLIAMS | SECOND DEFENDANT |

HEARD: January 16, 17, 18, 1976
 May 29, 30, 31, 1978
 October 9, 10, 11, 1978
January 31, 1979

CCR: THE HONOURABLE MRS. JUSTICE ALLEN

Mr. A. W. Campbell together with Mr. Crafton Miller and Mrs. Earle-Brown appearing for the Plaintiff.

Mr. C. U. Hines and Mrs. E. Hines, instructed by Hines, Hines and Company, appearing for the Defendants.

Allen, J. :

Judgment was awarded for the Defendants in this case on the 31st day of January, 1979, when the court intimated orally the findings relevant to such award, and promised to give the reasons in writing shortly, and this I now do.

The Plaintiff suffered injuries in collision with First Defendant's truck driven by the Second Defendant, Hezekiah Williams, on the 28th June, 1973, along the Thompson Pen Road which runs from Sligoville to Mc Neil Park in the parish of Saint Catherine. These injuries resulted in serious brain damage and physical disability. The Plaintiff contends that the collision was caused by the negligence of the Defendant driver in hitting the Plaintiff from behind. Plaintiff had been riding a pedal bicycle travelling in the same direction ~~towards~~ McNeil Park, ahead of the truck. As a result of the collision he was propelled up in the air and fell on a concrete culvert which was on their left side of the road.

There is a great conflict of facts: The Defendants allege that the collision was caused by the negligence of the Plaintiff,

whom they say was riding a bicycle in the opposite direction, travelling on his incorrect hand, and collided with the left side of the front of the truck, ending up on the culvert.

Facts which either admitted, conceded or not contested were:

- (a) That there was a collision between the bicycle ridden by the Plaintiff and Fargo dumper truck driven by Defendant Hezekiah Williams, on 28th June, 1973.
- (b) The place where Plaintiff's body fell was a concrete culvert.
- (c) Location of Culvert - on Sligoville side of a corner described as "Mother Flowers' corner".
- (d) Direction truck travelling: In direction from Sligoville towards McNeil Park.
- (e) Daytime: The hour was not material to the issues, and has been given by different witnesses as 11:30 a.m., 12 noon, 12:30 p.m.
- (f) No evidence of other than fair weather conditions.
- (g) No other traffic in vicinity of collision.

Also not contested were the injuries suffered by the Plaintiff:

- (1) Cominuted compound depressed fracture of skull to left of midline, the dura mater torn, the brain itself lacerated, blood clot in damaged area of the brain.
- (2) Fracture of the first, second and third metacarpals of the left hand.
- (3) Fracture of the first metacarpal of the right hand.
- (4) Fracture of the fourth rib on the left side.
- (5) Fracture of the left scapula.
- (6) Injury to the brachial plexus on the left side resulting in weakness of muscles of the left arm and forearm and complete paralysis of left hand. (The left hand presented a claw-like appearance.)

- (7) Trachea displaced to right side.
- (8) Plaintiff was unconscious for 18 days.
- (9) Epileptic fits developed, following on brain damage.
- (10) There was evidence of personality change.
- (11) In the opinion of Professor Cross, Plaintiff's mental function (at trial) was inferior to one of his age, his memory and calculating ability poor. Plaintiff was also treated by Dr. Chutkan.

Nor was any challenge made to the evidence of damage to the truck and pedal bicycle given by Corporal Britton:

Damage to the truck:

- (a) Left front blinker damaged, glass broken.
- (b) Left side front fender slightly damaged.
- (c) Left side front fender sink-dented.

Defendant Williams made less of this damage. He stated that there "was no damage to the light - just the edge of the light get damaged."

Of the pedal cycle, Corporal Britton found slight damage to:

- (a) Front wheel.
- (b) Front fork.
- (c) Handle bent.
- (d) Frame slightly bent.
- (e) No damage to back wheel.
- (f) No damage to back fork.

Defendant Williams' evidence was that there was damage to the front fork and front wheel.

The only other evidence of the condition of the bicycle came from Plaintiff's witness, Mr. George McFarlane, who said, "I believe the front part of it did bend."

Witness Mr. Aubrey Robinson, the former employee of Plaintiff, was called in support of the allegation of a change in personality, following Plaintiff's injuries, and his preaccident skills. Mr. Robinson's business was auto repairs, manufacturer of ironing boards and nops, dish drainers, space savers, record racks, jig work, requiring

a lot of welding. Mr. Robinson first knew Plaintiff as a tenant of premises owned by him. Plaintiff was then about eighteen years old. Mr. Robinson employed Plaintiff as apprentice welder; found him a promising, trainable, industrious, intelligent, reliable and trustworthy. He was a good worker, and had good potential. Plaintiff was paid \$30.00 per week for five days, but with fringe benefits and overtime the job was worth \$50.00 per week. In his estimation, if Plaintiff had remained with him he might have earned what others now employed in the category were earning, an average of \$70.00 per week, possibly what the man he considers his foreman earns, \$95.00 per week. He could read a job sheet and follow instructions from it. Since the accident, Mr. Robinson found Plaintiff a different person altogether. His ability to work - his approach to people. He indulges in senseless laughter, asks silly questions - his intelligence had gone down. His personal hygiene, previously fairly clean - now he defecates anywhere.

Plaintiff, Clive Malcolm, gave evidence on his own behalf. His story is that while riding a bicycle from Sligoville direction towards McNeil Park, at a deep left hand curve before one reaches McNeil Park, he was hit from behind and know nothing more.

Plaintiff impressed the Court as being shrewd and intelligent, although having no more than basic academic education. Although there were apparent gaps in his recollection, he showed a coherent grasp of his situation, displayed his understanding of shades of meaning and was alert to where his own interest lies and where it does not. Were it not for the evidence of eminent neurosurgeon, Professor Cross of brain damage, and of his mother, Miss Violet Moore, as to his post-accident change of habits and of personality, it would be difficult to believe that anything was wrong with his brain, or that his intellect was affected by the damage to his brain. From the evidence of Miss Violet Moore - as incident to his personality change, Plaintiff demanded money not owed to him in truth, and speaks things not true. The Court did not believe him when he said that witness investigator to the Insurance Company of Jamaica, Mr. Samuel Oliver,

held his father's hand to sign statement (Exhibit 1). In the opinion of the Court, it would be extremely unsafe to accept Plaintiff's evidence as to how the accident happened, and accordingly this evidence is rejected.

In support of his case as to how the accident happened, the Plaintiff called witnesses George McFarlane and Noel McLennon.

Mr. McFarlane's story is that he saw the driver of the truck

"went down on the cyclist and hit him backwards. The dumper of the truck - left hand dumper - hit the cyclist and he go up like that and he fell - dropped into a little culvert on his face - on his head. Yes, I saw all that. He fell like from here to table (15 feet). He fell in culvert of the road on left hand side."

The impression I formed of this witness was not favourable. I doubted that he saw how the accident happened, and that he spoke to the driver of the truck as he alleged. I form the opinion that he was untruthful and unreliable and rejected his evidence of how the accident happened on those grounds.

Mr. McLennon, on the other hand, impressed me with his apparent sincerity. His story is that he was riding a bicycle on the road, travelling in the direction McNeil Park towards Sligoville. He saw the accident which took place at the corner called "Mother Flowers' corner". He saw the Plaintiff

"... coming down on a bicycle coming down towards me, face to me, and a dumper truck was behind him. Just as I bend the corner the dumper truck come and hit him from behind and he fell to my right at a culvert and the bicycle was almost in the middle of the road more to my left hand side."

In cross-examination he said:

" When I made the bend and saw the truck for the first time, it was fifteen to twenty yards from me. Truck was just going at an ordinary speed. Yes, truck stopped, passed where man fell a little. No Sir - When made Nather Flowers' corner accident already taken place. Just as I come down the grade and made the corner the accident happened before my eyes. There is some ruts in the road and saw the truck swerve from some of the ruts - before the crash. About from here to there (about thirty-five feet) between swerve and actual crash. After swerve it look to me as if it check its speed. When truck swerve/check from pot hole, distance between bicycle and truck about half distance (17½ feet)."

" Yes, collision took place in front of me. Yes, had good view of man as was hit. Couldn't say how he fall. He go up in the air about four feet and drop to his left on the culvert and the bicycle coming more to my left hand."

This witness impressed me with the shock he felt as he made the bend and saw the accident happen right before his eyes, and I believe and accept that he did see the collision. However, in view of the position in the road where he must have been when he 'bent' the corner, the statement which he made as to the pre-accident movement and direction of the truck and of the Plaintiff is inconsistent with the immediacy of the earlier statement.

The Defendants' denial of liability arises out of the facts as alleged by Defendant/driver, Mr. Hezekiah Williams.

Mr. Williams' evidence is that he was driving dumper truck, licensed FB 848, a 10 ton truck, right hand drive, from Sligoville towards McNeil Park, Spanish Town, through the district of Thompson Pen. As he approached the corner known as Mother Flowers' corner, he was in the extreme left hand corner travelling at about twenty-five miles per hour - that he blew his horn and even cut down his speed - that immediately he saw a cyclist coming from the opposite direction and on his (Williams') side of the road. That he swerved to his right to avoid killing the cyclist but when he swerved, the cyclist had hit the truck already. He pulled to the right side of the road and came out immediately and saw the cyclist lying on his back on the asphalt near to the edge of a manhole, his head in the manhole. The cyclist was bleeding, and not saying anything. A Mr. McBean, driving a van, came up shortly (1½ minutes) after, and with the assistance of Mr. McBean and men from the van, the cyclist was taken from where he was on the culvert and placed in van. He denied seeing witnesses Mr. McFarlane and Mr. McLennon on the scene. When he came out the truck, he saw only "one man around - a little boy about eighteen years of age". That no one gathered on the scene at the time the accident happened - not until after a little while.

The Defence called witness Mr. Samuel George Oliver, who said that on the 22nd August, 1973, when employed as investigator to

the Insurance Company of Jamaica, he took a statement from the Plaintiff (Exhibit 1). This document was signed by the Plaintiff, and Plaintiff's father and sister as witnesses. Among other things, this document purports to be a written admission by the Plaintiff that "I remember that as I was riding on the main road at Thompson Pen, I ran into the front of a truck that was travelling towards me from the opposite direction".

The Court regards the circumstances under which the statement was taken from the Plaintiff to be unfair: the Plaintiff was apparently suffering disorientation from the effects of the accident, and as it turned out brain damage. Further, this statement was taken in the presence of witnesses, themselves illiterate. The Court accordingly rejects the evidence of a previous inconsistent statement contained in Exhibit 1, as being unreliable and having no weight, even if accepted as said by Plaintiff.

What remains for the Court to consider, therefore, after eliminating rejected evidence, is the evidence of Mr. McLennon, for the Plaintiff, against the evidence of Mr. Williams, for the defence. Whose version of the way the accident happened is more probable? The Court looks to the evidence of Professor Cross and Dr. Chutkan to see how Plaintiff's injuries fit in with the two versions.

Professor Cross agrees in general terms that the injuries of Plaintiff were consistent with a fall on the head and hands. The injury to the brachial plexus, he stated, was seen in connection with head injuries - the head goes one way and the plexus is pulled from the spinal cord (the path of the plexus traced from vicinity of neck along shoulder to arm, indicated) and you get paralysis of the arm and also affects the legs.

Dr. Chutkan, in turn speaking of injury to the brachial plexus that a severe degree of force would produce the stretching to cause injury.

Doctor Chutkan's attention was directed by the defence

to the fracture of the metacarpals. His opinion was that he would expect moderate to severe degree of force to cause fracture to the metacarpals, and agreed that the fracture to the metacarpals is consistent with a cyclist with (both) hands on handle-bars coming into collision with a truck face to face. He also agreed that a fall in these circumstances was likely to cause fracture to the skull and injury to the brachial plexus. He elaborated that a fracture of the skull on the left side (indicating above the eye at hairline) in addition to injury to the brachial plexus would indicate a stretch which was more likely caused by more (greater) force from moving objects. This, he said, can be caused by a fall on a hard surface, but more likely by a moving object.

To Mr. Crafton Miller, Counsel for the Plaintiff, postulating a truck travelling at twenty to twenty-five miles per hour, coming into contact with a man riding a bicycle (from behind) so that that man went up in the air and landed in a concrete manhole, Dr. Chutkan agreed that the injuries were consistent with patient falling on a hard surface - that this was not related to being hit from behind and one would have to postulate that the patient got hit to the head on the manhole, and the shoulder pushed in the other direction and the metacarpals injured at that time. Dr. Chutkan agreed that if the body fell in a manner - head in open culvert and body out - that any injuries could be caused in those circumstances. As to the metacarpals, Dr. Chutkan gave his opinion that on a fall on palms outstretched, fracture of the metacarpals was less likely but possible. He would expect a fracture of the lower forearm in such a case.

The upshot of all this medical evidence on the issue of causation is that the injuries suffered by Plaintiff could be caused on both versions, whether Plaintiff rode into the truck and fell, or whether he was hit from behind and fell.

Speed:

Speed has not been an issue in the case. Mr. McLennon stated that the truck was going at an ordinary speed and stopped a

little past where Plaintiff fell.

Point of Collision:

What is very material is the point of collision or impact.

Was the cyclist hit from behind at some point before the truck reached the culvert, and thrown forward of the truck to fall on the culvert? Or, was the cyclist hit from behind and propelled behind the truck? If Mr. McLennon saw both cyclist and truck travelling - one ahead of the other - the distance between himself and the truck at that point was in excess of thirty-five feet - approximately twenty-five feet on the Sligoville side of the culvert.

The whole purpose in fixing the point of collision and in consequently ascertaining how far Plaintiff's body was carried/flung, is to test whether it was possible for witness McLennon to see the direction the Plaintiff was travelling before the actual collision, in view of the evidence given by him that as he 'bend' the corner, the accident happened before his eyes.

Defendant Williams' evidence is that Plaintiff hit the truck after the truck had passed the manhole. In re-examination he said "I swerved to right immediately so he got a clearance to 'chip' between truck and the manhole." Defendant Williams puts the point of collision to be "in the dead centre of the apex", and the manhole/culvert to be about fifteen to twenty feet from the apex of curve on the Sligoville side of the curve. On Defendants' version, the Plaintiff collided with the truck and continued on his path for fifteen to twenty feet to the culvert. There is no evidence as to how he reached there, whether in one fling, somersault or carried on the bicycle.

Eight photographic prints (marked 1 to 8) of the area, and in particular the side of the culvert in relation to Mother Flowers' corner were admitted in evidence as Exhibit A2.

Defendant Williams' evidence is that he saw Counsel, Mr. Hines, take photographs of the area and the culvert where the

accident occurred, and that from the date of the accident to the date when the photographs were taken on 22nd December, 1977, there were no physical changes in the location itself. Witness identified the photographic prints marked 1 to 8 as photographs of the area and of the culvert, and showing the corner which is called Mother Flower's corner.

Exhibit A1 was put to witness Corporal Britton who identified the photograph to be of the area where he saw the bicycle.

The Court is not unfamiliar with the location, having travelled by the road and passed that corner many times before, and twice during the hearing of the case. These photoprints (Exhibit A2) bring to instant vision the evidence of the location of the accident given by the witnesses McLennon, Williams and Britton.

Defendant Williams' evidence is that "You cannot see around the corner as I was driving". The witnesses speak of a fence - Mother Flowers' fence - and a zinc fence is shown (in Exhibit A1) around premises in the corner which effectively blocks the view around the corner. If the accident happened "right before my eyes" as witness McLennon bent the corner, then this witness could not see the movement of vehicles approaching him and travelling on their correct hand. He could only see approaching traffic as they broke his line of vision diagonally at a tangent to the corner.

I therefore find that witness McLennon lied when he said that he saw plaintiff coming down the road towards him, the truck behind plaintiff, and when he said he saw the truck swerve, apparently to avoid ruts.

There being no credible evidence offered by plaintiff of the direction in which plaintiff/cyclist was travelling before the collision, the Court considered the inanimate evidence presented to see how it fits in with the two versions of the parties. With respect to the evidence presented the Court finds:

- (1) That damage to the bicycle was to the front wheel and front fork and handles.

- (2) That there was no damage to the rear wheel and rear fork.
- (3) That there was fracture of the metacarpals of both the left and right hands of plaintiff, and that this evidence points with telling effect in support of Defendant Williams' version.
- (4) That Mr. Aubrey Robinson, the employer of plaintiff and a person whaving an interest in plaintiff, made efforts to find, but never found a witness who said he saw the accident.
- (5) That Mr. Aubrey Robinson is well acquainted with witness McLennon and that both men had spoken with each other and discussed the accident.

On the balance of probabilities I find that the plaintiff has failed to prove that the defendant Williams drove negligently as alleged, or that his negligence caused this accident. I find that the accident was due to plaintiff's own negligence, and that it is most unfortunate that he sustained such serious injuries.

FINAL ORDER ON MOTION GRANTING LEAVE

TO APPEAL TO HER MAJESTY IN PRIVY COUNCIL

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 18 of 1979

| | | |
|---------|------------------|-----------------------------|
| BETWEEN | CLIVE MALCOLM | PLAINTIFF/APPELLANT |
| AND | REX KNIGHT | FIRST-DEFENDANT/RESPONDENT |
| AND | EZEKIEL WILLIAMS | SECOND-DEFENDANT/RESPONDENT |

IN OPEN COURT

The 12th day of October, 1981.

Upon this motion coming on for hearing before the Honourable Zacca J. A. President, the Honourable Ross J.A. and the Honourable White J. A. and upon hearing Mr. Ainsworth W. Campbell Attorney-at-Law for and on behalf of the Plaintiff/Appellant and Mc. C. H. Hines Attorney-at-Law of the firm of Hines, Hines & Company for the Defendants/Respondents

IT IS HEREBY ORDERED


That the Plaintiff/Appellant Clive Malcolm be granted Final Leave to appeal to Her MAJESTY IN COUNCIL from an order of the Court of Appeal made the 14th day of February 1980 and that the costs of an incidental to the motion abide the result of the Appeal.

/s/ S. Alcott

REGISTRAR (Ag.)

This Order is entered by Ainsworth W. Campbell of 53 Church Street, Kingston, Attorney-at-Law for the Plaintiff/Appellant Clive Malcolm whose address for service is that of his said Attorney-at-Law.

I, NORMA ELAINE MCINTOSH, Registrar of the Court of Appeal, Jamaica DO HEREBY CERTIFY that this is a true copy of the Order of the Court in the case - Clive Malcolm v. Rex Knight & Ezekiel Williams.


N. E. McIntosh (Mrs.)
Registrar.