1985

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. CHIEF JUSTICE, SIR JOHN SUMMERFIELD C.B.E., Q.C.

CAUSE NO. 112 of 1984

AG.	
LD	RWCL
SCC	
CC 1	
CC 2	LD
CC 3	
CC 4	DAB.
LL	JG
PS	
For Action To	AG
NFA Put Away	

BETWEEN ARTHUR WOODS in his capacity as Administrator of the estate of N. EDGAR WOODS, deceased — PLAINTIFF

AND JOHN FRANCIS — DEFENDANT

29 and 30 April, 1, 2 and 3 May, 8 Nov. and 13 Dec. 1985

Mr. P. LaMontagne Q.C. and Mr. T. Shea for plaintiff
Mr. N. Hill Q.C. and Miss Irving & Mr. Roger for defendant.

JUDGMENT

At about 10.15 p.m. on 18 June 1983 a Honda motor car driven by Edgar Woods (the deceased) was in collision with a Chevrolet station wagon taxi driven by the defendant. As a result of the accident the deceased died, either immediately or very shortly thereafter. The defendant was knocked unconscious and received bruises to his chest and ribs.

On the 5th day of December 1983 the defendant was convicted on indictment in the Grand Court following trial by jury of the offence of causing the death of the deceased by dangerous driving. The count in the indictment was, of course, based on the incident just narrated. An appeal against

the conviction was dismissed by the Court of Appeal. That conviction was admitted by the defendnat.

The deceased's brother, as the administrator of the deceased's estate, brings this action for the benefit of the estate under the Estates Proceedings Law 1974 and for the benefit of the deceased's mother, his only dependant, under Part 11 of the Law of Torts Reform Law.

In addition to the claim for loss of dependency for the benefit of the mother the claim includes a claim for special damages which have been agreed at $10,340, a claim for the "lost years" as well as the conventional claim for loss of expectation of life which is normally fixed at $2,000. It is conceded that, in the circumstances of this case, the claim for loss of support for the mother is subsumed in the claim for the "lost years". If, therefore, liability is established, whether with or without contributory negligence, it becomes a question of assessing damages for the lost years or the appropriate proportion thereof.

The defendnat counterclaims for special damages which are agreed at $6,025 together with general damages for pain and injury, loss of amenity and consequential financial losses. And so if his claim succeeds, whether with or without contributory negligence, the exercise resolves itself into one of assessing those general damages or the appropriate proportion thereof.

It is of some significance that the original defence, dated 17 May 1984, did not include a counterclaim. An amended statement of claim was filed on 28 March 1985 in which, for the first time, a claim for the "lost years" was put forward and the provisions of section 37 of the Evidence Law, founded on the conviction, were pleaded. An amended defence was filed on 11 April 1985 and that included the counterclaim. Nowhere in the pleadings is there a reference to failure to use a seat belt in relation to either party.

The manner chosen for the proof of liability was, for me, a novel one. I am not aware of any precedent in these Islands for the course

adopted. In saying this, I am not in any way being critical. The law invoked was clearly designed for the method of presentation chosen as a means of achieving the swifter disposition of cases. The fact is that the law invoked appears to have been invoked for the first time in these Islands. When a new trail is thus blazed the Court is left, if not bereft of, at best only sparsely furnished with, guiding precedents and feels obliged to tread cautiously and to examine and analyse carefully all the consequences and implications of the new approach.

To prove liability the plaintiff has relied first of all on section 37 of the Evidence Law subsection (1) of which provides for the admissibility of relevant convictions in civil proceedings and subsection (2) of which provides:

> "(2) In civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by any court in the Islands -
>
> (a) he shall be taken to have committed that offence unless the contrary is proved;
>
> ....."

The onus is, therefore, on the defendant to establish that he was not driving dangerously at the material time, i.e. that he did not commit the offence, and this he has sought to do. In this connection it is convenient to quote Davies L. J. in Taylor v Taylor 1970 2 All E. R. 609 at p 612:

> "That section obviously, in contradistinction to s 13 of the 1968 Act, which deals with the effect of convictions when they fall to be considered in an action of defamation, means that the onus of proof of, as it were, upsetting the previous conviction is on the person who seeks to upset it. It is probable, though I do not want to make any particular pronunciamento about it at the moment, that that is an onus of proof on balance of probabilities. But, having said that, it nevertheless is obvious that, when a man has been convicted by 12 of his fellow countrymen and countrywomen at a criminal trial, the verdict of the jury is a matter which is entitled to very great weight when the convicted person is seeking, in the words of the statute, to prove the contrary.".

In Wauchope v Mordecai 1970 1 All E.R. 417 at p 419 Lord Denning M.R. put it this way:

> "So in this case, in view of the conviction, it was to be taken that the defendant had opened the door of the car so as to cause injury, unless the contrary was proved. The burden of proof in in this civil case was altered. Instead of the burden being on the plaintiff to prove that the defendant was negligent, it was

"for the defendant to prove that he had not opened the door so as to cause injury.".

The local provisions in this regard, of course, correspond with the English ones.

As to the facts relating to how the accident occurred the plaintiff has relied on certified copies of the evidence of witnesses (with two exceptions omitted by agreement) called on behalf of the Crown at the trial of the defendant before the Grand Court. No witnesses were called by the plaintiff on this aspect. This evidence was introduced under section 32 of the Evidence Law (section 30 was also invoked as an alternative).

Although my initial reaction was sceptical I was persuaded by the English authorities dealing with similar provisions that this was an acceptable course to adopt. As the corresponding English provisions (in Part I of the Civil Evidence Act 1968) appear in a passage about to be quoted. I need not set out the local provisions.

In Wauchope v Mordecai Lord Denning M.R. said at p 419:

> "I may say that, since the trial, Part I of the Civil Evidence Act 1968 has been brought into operation. It came into force on 1st October 1969. That makes first-hand hearsay admissible. So the statements given by the witnesses to the police would now be admissible. If need be, we would be ready to admit them on the hearing of the appeal. Theyall support the plaintiff's case. But it is unnecessary.".

And in Taylor v Taylor Davies L. J. said at p 613:

> "However, the law is now different in view of the coming into force of Part I of the Civil Evidence Act 1968, to which I have already referred. Sections 2 (1) and 4 (1) of that Act are relevant and apply to the hearing of this appeal, as is conceded by counsel for the husband, they being procedural sections. Section 2 (1) provides:
>
> > 'In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.'

"Section 4 (1) provides:

> 'Without prejudice to section 5 of this Act, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which which was supplied by a person (whether acting under a duty ornot) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.'

I will come to the rules of court in a moment. In my view, the transcript would be admissible under either of those sections. It may be, though I express no direct opinion on this, that the summing-up of the judge might not be covered by s 2 (1), because that is dealing with a statement in evidence, and, of course, the judge cannot give evidence. But I think that the summing-up would probably be admissible under s 4 (1), since that is a record compiled by the shorthandwriter in his capacity as such.".

Of course, we do not have the transcript of a court shorthand writer's note. We have the Judge's note of what a witness says written in narrative form. And the Judge may well omit what he considers irrelevant to the case before him. However, there is no difference in principle.

At the instance of the defence the depositions of the Crown witnesses taken at the preliminary enquiry and the Judge's summing-up were also admitted by agreement as were other documents.

Several points can conveniently be made at this stage.

One is that I did not have these Crown witnesses "live" before me to assess their credibility on issues of fact. The jury did. It is impossible for me to resolve discrepancies as between one witness and another or discrepancies between what a witness said at the trial and what he said at the preliminary enquiry. One knows from experience that a jury can have confidence in part of what a witness says but may have doubts about another part and, therefore, reject the latter. A Judge's summing-up recognises the existence of discrepancies and conflicts in the evidence of witnesses and gives advice on a jury's approach to them. That was done in this case.

Another important point is this: the jury would have approached the case against the defendant with following (very proper) direction given by the learned Judge:

> "To establish this charge the prosecution does not have to establish, as you have been told, that the accused's dangerous driving was the sole cause of the accident resulting in the death. They have to show that it was a cause. And I am going to say that they have to show that it was a substantial cause but not the sole cause. Even though there might have been other causes which contributed to that accident. It doesn't matter that the deceased was also negligent or even did something wrong. I hope you appreciate that, members of the jury. Their main duty is to show that it was a cause of the accident - his method of driving was a substantial cause of the accident. Not important whether the other party did something wrong. But if you feel that the accused's driving was the substantial cause then he would be guilty of dangerous driving.".

And so the jury was concerned with whether the defendant's dangerous driving was a substantial cause of the accident. The verdict did not negative the possibility of contributory negligence on the part of the deceased. Contributory negligence on the part of the deceased would not have led to a different verdict. For example, if the jury felt, as the defendant claimed, that the defendant may not have had his headlights on at the relevant time, or if they had any reasonable doubt on that issue, they could have treated that fact as a contributory cause of the accident and decided that, nevertheless, the dangerous driving of the defendant, as related by the principal witnesses for the Crown, was a substantial cause and returned a verdict of guilty accordingly.

The next point is that the jury must have rejected the defendant's version of the primary cause of the accident. In brief, the prosecution version was that the defendant was driving his station wagon towards West Bay while the deceased was driving his Honda in the opposite direction towards George Town when, in the vicinity of Dyke Road, the defendant pulled out to overtake in the face of oncoming traffic and ploughed into the deceased's car. The defendant's version of the primary cause was that, as he was driving along towards West Bay, the deceased swung out widely from Dyke Road and went straight into the defendant's station wagon while he was still on his proper side of the road; that he was unable to avoid the collision. On his version - and leaving aside for the moment his allegation that the

deceased's headlights were not on, which will be considered presently - he was not at fault at all. And so, if the jury had accepted his version or had any reasonable doubt that it might be true they would necessarily have found him not guilty. It follows that, having rejected the defendant's version of events, to have found him guilty they must have accepted the prosecution's version of events leading up to the accident - again leaving aside the question of whether the deceased's headlights were on or off because that alone would not have affected their verdict.

When one examines the defendant's version of events it is not difficult to see why any sensible jury would have rejected it outright. West Bay Road is one of the major arterial roads in these Islands with, probably, the densest traffic (outside towncentre) at any time of the day or night. Although well lit in most parts, including the area in the vicinity of Dyke Road, the beam of the headlights of traffic on the main road, even on low beam, would have been clearly visible to anyone on Dyke Road about to emerge on to the main road. There were several cars on the main road in that vicinity at the time as one would expect. One can take judicial notice of the fact that traffic, in both directions, is fairly continuous on that main road until well after midnight. Dyke Road was a minor road, unlit and serving no premises. (It is no longer a road.) As one drove down it towards the main road, apart from one's own knowledge of the traffic one would expect to meet on it, one would see the lit traffic going in both directions on the main road. These are matters of notoriety of which one can take judicial notice. It would be imperative to stop before emerging from Dyke Road to assess the traffic situation on the main road. If one were foolhardy enough merely to try taking the corner slowly, keeping well to the left, one would be taking a serious risk. But to swing out of Dyke Raod at even 15 m.p.h. onto part of the other side of the road would be crass folly. The possibility of anyone in his right mind doing so is so slender that one can discount it. The probabilities are heavily against this happening. Further, as Dyke Road was a narrow unlit road, the probability of any rational being driving along it at night with no lights would be negligible.

Of course, the jury were not concerned only with probabilities. They had to reach a conclusion on the facts beyond all reasonable doubt if the verdict was to be adverse to the defendant. In reaching a decision as to which version to believe the jury had the evidence of Judy Wood (although she did not see the oncoming car (the deceased's) until the collision occurred. Judy Wood was driving in the same direction as the defendant, was overtaken by him and saw him overtaking another car just ahead of her when the accident took place. The jury had the evidence of Roland Schwery. He was a front seat passenger in the deceased's car and said that they were driving from the Holiday Inn to the Royal Palms at the time - i.e. along the West Bay Road towards George Town. There was also the evidence of P. C. Martin Bodden. He was travelling towards West Bay on the West Bay Road. Shortly before the accident he was in the vicinity of the Periwinkle, waiting to make a right hand turn, when he saw the deceased's car travelling in the opposite direction. Then there was the sketch plan of P. C. Ebanks who arrived at the scene and took measurements. That sketch plan indicates that the defendant's car was well over the centre line when the collision took place.

In short, there was an abundance of evidence to justify the rejection of the defendant's version and the finding that it was the defendant's dangerous driving that was a substantial cause of the accident. That dangerous driving was obviously the overtaking of a car in the face of oncoming traffic when it was unsafe to do so.

The question to be faced now, therefore, is: does the evidence for the defence rebut the statutory presumption, supported as it is by the record of the evidence of the Crown witnesses? The onus on the defence is to show, on the balance of probabilities, that it was not the defendant's negligent driving that caused the accident. Alternatively, the defence can show that there was contributory negligence.

At this trial the defendant gave evidence and maintained that, as he approached Dyke Road from George Town, he was on his correct side of the [illegible] car came out of Dyke Road and right into his right

fender. He also maintained that the deceased's car had no lights on at all. He claimed that, when the collision took place, the steering wheel hit him in the chest and that he lost control. He added that he became unconscious and that his car went straight. That last observation must have been surmise because the sketch plans show otherwise. He went on to say that he could take no avoiding action because the deceased's car came out so suddenly.

I have dealt with the probabilities of the defendant's version earlier. His evidence did nothing to give it credibility. He was an unsatisfactory witness and I was left far from satisfied on the balance of probabilities that he was giving a truthful version of how the accident happened. I think that is all I need say about his evidence on the issue of rebutting the presumption adverse to him.

On behalf of the defence Mr. Harris Meyersohn was called. His field of expertise is in vehicle collision analysis which includes the interpretation of physical evidence (including damage and injury), skid mark identification and interpretation, determination of speed, collision angles, reaction time and distance calculations, photo interpretation and driver behaviour factors. He brought with him an impressive resumé which displayed a great deal of experience and achievement in this and related and other fields. He admitted that he had no college or university degree or academic experience in accident reconstruction, which was what most of his evidence was all about, but stated that he had practical experience in that field.

Mr. Meyersohn produced a mind boggling array of photographs, charts, plans, graphs, overlays, equations and paraphernalia. As to the equations I can say this at this stage: (although much was readily identifiable e.g. Sin, Cos etc.), they were not accompanied by a key to the symbols employed with relevant quantification to give them relevance to the conclusions they were intended to demonstrate. Further, the source of the formulae was not revealed or explained. I do not say that he was trying to blind the court with science, but certainly one was left blind without any key to underlying

intended proofs.

My flagging faith in his conclusions and analysis snapped when he explained his approach to vector analysis and the over simplistic formula used to reach conclusions on relative speeds. The law of the conservation of energy was stated correctly enough. The sum total of momentum after impact is equal to the sum total of the momentum before impact. But this is so only in ideal conditions. Ideal conditions do not exist in the real world. Momentum is the product of the mass into the velocity. While the mass will not change in normal circumstances, the velocity will. That will alter the momentum. Momentum will be lost by friction, by the operation of gravitional forces and by decelaration occasioned by the braking effect of e.g. metal crumpling up in resistance to the momentum of the object striking it. One should not expect that the sum of the momentum of two cars bouncing off each other after impact would be equal, or even nearly equal, to the sum of the momentum of the vehicles immediately before crashing into each other. There are a host of factors to take into account such as the resilience and elasticity of the various parts meeting on impact. No account appears to have been taken of these factors which would be virtually impossible to quantify in a case such as the one under consideration.

Further, the momentum of one body after impact with another would not necessarily be the same, or proportionately so after allowance for the factors just mentioned, and would rarely be so if the bodies are of unequal mass. The combination of mass and velocity of each object before impact would have a profound effect on the relative momentum of each after impact.

Again, in reaching conclusions, Mr. Meyersohn has assumed a figure of 0.2 for the coefficient of friction for both vehicles - presumably the tyres against the asphalt surface of the road. No reason was given for this arbitrary figure. The resistance which a body meets with in moving over or against another body is dependent on a number of factors e.g. the nature, shape, area of the material comprising each body, the direction and force with which, and the extent to which, they are impacted together etc. As a

number of these factors may well have been different in relation to each vehicle it is difficult to see why the same figure was used. There is a further complication in that each vehicle had a deflated tyre after impact. There was no explanation of whether that factor was taken into account in determining the coefficient of friction.

But apart from the foregoing, before one can begin to abstract lines of force generated by two vehicles coming into collision as these two did one needs an enormous amount of information about the structures coming into contact with each other. This is not like one billiard ball striking another. The different parts of each coming together are composed of different materials, metal mostly but also rubber tyres with metal rims. One would have to know the configuration of each part coming into contact with another, the configuration of the part it came in contact with, the elasticity of the material of each part and its resistance to stress before collapse, the varying angles at which parts with different configurations struck each other (the angle at which parts with different configurations strike each other can be different from the general angle at which the parts as a whole collide), remembering always that many parts struck each other at different times, however fractionally different. One would need to know this and much more, such as the reaction of the respective drivers on the controls in response to danger, braking and swerving etc. affecting direction and speed, before one could begin to plot a general line of force (for either vehicle) generated by a myriad interacting forces.

There was no suggestion that there was any attempt to garner all that data even if it were possible to do so. That is reason enough to be hesitant about accepting positive conclusions put forward.

Much of what I have just said is based on what I apprehend to be matters of general knowledge of which judicial notice can be taken. It is knowledge fed to us in school when we are taught physics and mathematics.

But if I have strayed too far from what a judge may take judicial notice of let me advert to one or two matters which undermine my confidence

in this expert evidence and which are plain from the record.

Ex. I was a sketch plan produced by P. C. Ebanks from measurements he took at the scene of the accident. It is not to scale. (Although not to scale, it is my experience that these sketch plans usually place objects etc. in a fairly accurate position relative to each other e.g. the commencement of fluid marks and the tyre marks, in relation to the entrance to Dyke Road.) Ex. BB was produced by Mr. Meyersohn. To produce it he used the measurements taken by P.C. Ebanks. In preparing plans Mr. Meyersohn also took account of his own observations of the scene and the photographs such as those contained in Ex. N.

Ex. BB is said to be drawn to scale using P. C. Ebanks' measurements. The scale is 1" to 10".

One minor point, the back of the Honda on P. C. Ebanks sketch plan is marked as being 5 feet from the power pole immediately to the South of Dyke Road. On Ex. BB the nearest point to the back is 3 feet. Perhaps not important, but it is inaccurate in that particular. I have not checked all the figures.

More important, on Ex. I the "alleged point of impact" is placed 48 feet south of the right rear of the station wagon and 2 feet 8 inches from (and to the west of) the radiator of the Honda. Although it is an "alleged" point of impact it remains a real point or spot on the surface of the road which P. C. Ebanks clearly pinpointed. On Ex. BB that alleged point of impact is again fixed at 48 feet south of the right rear of the station wagon but it is not 2 feet 8 inches from the radiator of the Honda. It is too far south for that to be possible - in fact about 9 feet too far south. P. C. Ebanks' placing puts that spot in the mouth, albeit to the south, of the entrance to Dyke Road and it is also clear from photographs 4 and 9 of Ex. N that that spot would be in the mouth of that road. Ex BB puts it slightly to the south of the entrance to Dyke Road. It follows that the relative positioning of key factors on Ex. BB must be wrong. But the importance of it is that, on Ex. I the commencement of the fluid trail and

the commencement of the tyre marks are some distance to the north of that point or spot marked as "alleged point of impact" and are, therefore, well within the mouth of the entrance of Dyke Road, albeit still in the southern position.

Another point: the liquid trail is marked on Ex.I as being two inches from the centre line. That must be a slip of the pen and intended to be two feet. That is obvious for two reasons. The first is that the commencement of the liquid trail a little to the south, commencing in a small pool, is marked as 1 foot 9 inches from the centre line which would be consistent with the point marked being two feet from the centre line. The second reason is a matter of simple addition. The tyre mark on Ex.I is marked as being two feet to the East of the liquid trail; the balance of the asphalt to the east of the tyre mark is marked as seven feet eight inches wide. In fact the distance from the centre line to the edge ofthe asphalt on the eastern side is about eleven feet eight or nine inches. And so if we add the seven feet eight inches from the eastern edge to the tyre mark to the further two feet to the liquid trail we have nine feet eight inches. That leaves a balance of two feet to the centre line.

One would have expected an expert to have picked up a clerical error of this nature, but that does not appear to have happened. Those marks, liquid trail and tyre marks, are reproduced on Ex. BB without the measurements being marked in, but obviously using the measurements marked on Ex.I , and consequently giving a false picture. Much was made at the trial of the liquid trail being only two inches from the centre line as the error had not been noticed.

Mr. Meyersohn's conclusions, of course, fitted snugly in with the defendant's version of how the accident occurred, supporting his evidence that the deceased's car emerged from Dyke Road very much in the manner discribed by the defendant.

Mr. Meyersohn may well have been sincere in his conclusions and may have convinced himself that those conclusions were right on the data

he examined. He was certainly very nimble minded in the witness box and defended his conclusions with dexterity. I am certainly not going to employ some of the language used to describe some expert witnesses in some of the cases cited to me. I believe that an expert can be sincere although mistaken. Mr. Meyersohn may have rightly refuted the accusation that accident reconstruction was like Monday morning quarter-back, but I am satisfied that it is not as precise a science as he would have the court believe.

I do not propose to go into details, such as the presence of marl on some parts of the deceased's tyres etc. If Mr. Meyersoln's analysis was valid and sufficiently scientifically based to command confidence there would be no need for minor indicia of this nature which could well have more than one explanation.

In the end, and leaving aside all the foregoing observations, Mr. Meyersoln's conclusions conflict directly with the evidence of eye witnesses who saw what happened. On the evidence of two eye witnesses, the deceased's car did not come out from Dyke Road. It was driving steadily on its proper side of the road towards George Town at about 30 - 35 m.p.h. On the evidence of two eye witnesses the defendant's car did come out and over the centre line. It did overtake another vehicle. And in doing so the accident occurred. That evidence is clearly consistent with the sketch map, Ex. I , Prepared by P. C. Ebanks and the photographs in Ex. N.

That evidence was believed by the jury. The jury could not have convicted the defendant of the offence charged had they not believed that evidence. On the authority of Taylor v Taylor the verdict of the jury is entitled to very great weight.

I find that the defendant has not discharged the onus on him in rebutting the presumption which arises from his conviction.

Accordingly, I find liability established by the plaintiff.

I can turn now to the question of whether there was contributory

negligence on the part of the deceased. There are two aspects to this question: (a) was the deceased driving his car with no headlights or other lights and (b) was he wearing a seat-belt at the time and, if not, does that have any bearing on the assessment of damages?

As to headlights, there was no lighting on the deceased's car immediately after the collision. That can be seen from the photographs in Ex. N. However, that would not be surprising having regard to the extensive damage to the car. The defendant himself said in evidence that the headlights were not on. One has no idea what the jury held in that regard if they made any finding at all. Ordinarily one would prefer live evidence to "paper" evidence contained in a record of a trial, where one has had no opportunity to see the witnesses giving that evidence. However, as will appear from what has been said earlier, the defendant has given a completely false version of how the accident occurred. That makes anything he has said extremely suspect. As observed earlier, it is inconceivable that a car would be travelling on the unlit Dyke Road at night without lights, which makes his statement all the more suspect. As it is the finding is that the deceased was travelling on the well lit West Bay Road (one can take judicial notice of the fact that it is well lit in the relevant area).

It is extremely improbable that any car would travel along the West Bay Road at that time of night (10.15 p.m.) without the headlights being turned on. They would probabely be on low beam - or ought to be having regard to the amount of traffic on that road. In my view the chances must be less than one in ten thousand that a car would be driven along that road at that time of night without its headlights being switched on - although it must be admitted that on very rare occasions one has seen this happen. In civil cases we are dealing with probabilities - the balance of probabilities. Looked at objectively the strong probability is that the headlights of the deceased's car were on. Added to this is the record of evidence of Mr. Schwery and P. C. Bodden. Both said that, at the relevant time, the headlights on the deceased's car were on. Weighing that evidence- probability supported by the record of evidence of two eye witnesses - against the suspect evidence

of the defendant, I accept that the headlights on the deceased's car were on. Ms. Wood was unable to say one way or the other, but one would be surprised if they were off and she failed to notice that fact. The deceased had not had so much to drink that it would confuse his driving skills. He had had three Barcadi and Coke at the Holiday Inn.

As to the seatbelt, although following a recent intensive campaign to encourage the wearing of seat belts one does see the odd driver or front seat passenger wearing his - perhaps one in a hundred or less - at the time of the accident the wearing of seatbelts was about as rare as palm fringed beaches in the Antarctic. Here the probability operates the other way. Almost certainly the deceased was not wearing his seat belt. Had he been doing so somebody in the rescue team or engaged in the investigation would have noticed it and remarked on it. None of those in that category who gave evidence mentioned it.

The next question is: had the deceased been wearing a seat belt would that have saved his life and diminished the injury to him? It is impossible to answer that question with any certainty. That aspect was not adverted to at the trial and there is no evidence directed to the point which could assist me.

The deceased's Honda had right hand steering. The defendant's station wagon had left hand steering. That may well account for why the defendant, who was almost certainly not wearing a seat belt either, escaped with his life. The two vehicles were converging at a combined speed of 60 m.p.h. or more. The impact occurred directly in front of the deceased, crushing the front of the car inwards and spinning the Honda through about 60 degrees. Looking at the damage to the Honda as a layman, and examining the nature of the injuries, it would appear to me to be more likely than not that the accident would have killed the deceased even if he had been wearing a seat belt. He suffered massive personal injuries. It could, of course be argued that had he been wearing a seat belt the injuries would have been less extensive. Even so, the likelihood is that those injuries

would have been such as to attract even higher damages than those about to be assessed based on the premise that death would, in any event, have ensued.

I recognise, of course, that the wearing of seat belts is not compulsory in these Islands. Nevertheless, in my view, there is a duty on drivers and front seat passengers to exercise prudence and to take all available precautions to minimise injury and diminish the chances of death in the event that there is an accident. Failure to do so should be grounds for reducing the award of damages.

I now come to the controversial part.

The doctrine of damages for the "lost years" had a short history in England before it was abolished by legislation. I should imagine that this is the first claim under this head ever to come before the courts in these Islands. As it is, I feel that I have to treat that doctrine as being part of the Common Law of these Islands, brought here with them by the early settlers. And this is so notwithstanding the fact that the doctrine blossomed in England long after these Islands were settled. That is the case with many other Common Law doctrines.

The doctrine of the "lost years" has its full share of anomalies as the decided cases show and it may be that the Government will introduce legislation similar to that considered appropriate in England.

The doctrine, while it lasted in England, was much criticised as capable of causing real injustice as was illustrated in McCann v Sheppard 1973 1 W. L. R. 540.

It is significant that the application of the doctrine diverged in at least two "Common Law" countries as is illustrated by the English, main theme, cases Pickett v Bristol Rail Engineering Ltd. 1979 1 All.E.R. 774 and Gammell v Wilson and Ors. 1981 1 All E.R. 578 and the High Court of Australia case Skelton v Collins 115 C.L.R. 94, to mention but some.

Perhaps I should state here that I am not bound by the decisions of any court save those of the Court of Appeal for these Islands and the Judicial Committee of the Privy Council. Naturally the English cases and those of other Dominions will be treated as persuasive and valuable guides. But in the application of the doctrine to these Islands I must try to ensure that the application is fair and reasonable, and try, where possible, to avoid anomalies, bearing in mind that cases differ and that the approach to different sets of circumstances may require modifications of principles to be applied in order to avoid an unjust outcome.

I start with the obvious principle and that is that the objective is to compensate the estate. That compensation must be fair. This was recognised in Gammell v Wilson (per Lord Edmund-Davies at p 587). That is, after all, the whole purpose of the Estates Proceedings Law - to preserve actions for the benefit of the estate so that it will not be denied the fruits thereof by reason of the earlier Common Law rule.

Secondly, I adopt the observation of Lord Salmon in Pickett v Bristol Rail Engineering Ltd. at P 784 that "damages for the loss of earnings during the "lost years" should be assessed justly and with moderation.".

Thereafter I depart from any rigid formula, treating each case on its merits and bearing in mind features which I consider best suited to these Islands.

What are the important considerations?

The deceased was forty-five at the time of his untimely death. His mother was eighty-six and she was the sole beneficiary to his estate. The deceased was in good health, unmarried, with the prospect of a reasonable number of working years ahead of him - although people do tend to retire earlier inthese Islands when they are comfortably off and, consequently, have no need to continue working. His employment with a law firm earned

him a handsome salary of around $75,000 a year. I am not going to take account of the modest sum he received as Director of Cayman Airways as that position is dependant on political tides and the recent tide led to all the appointments on the Board being changed.

The salary the deceased earned had risen dramatically year by year from a little over $27,000 in 1978. That was in tandem with the general economic good fortune of these Islands and the spread of affluence with it. While one wants to remain optimistic one must recognise that the dramatic improvement to the economy has been a recent phenomenon. It emerged from a fairly spartan one before the trend started. There is no guarantee against possible lean years. And so one must retain a sense of proportion.

His savings to date can be placed at around $190,000. One must disregard securities and property (and the income from them) as they continue as revenue earning assets whether or not he lost his life. His total expenditure over the last year of his life was in the region of $35,000. Of that, approximately $15,000 was spent in support of his mother and the payment of her medical and other related expenses. It is urged that this $15,000 should be deducted from his total expenditure in the process of arriving at a multiplicand in accordance with the principles adopted in Harris v Empress Motors Ltd. 1983 3 All E. R. 561.

Here I am going to depart from the English authorities. In my view, in arriving at the appropriate multiplicand (if one approaches the assessment on that basis at all) all expenditure (other than that which goes into some form of saving) must be deducted. We are, after all, concerned with what would have been left in his estate had he not died. We are comparing the estate he actually leaves with the one he would have accumulated had he lived on and added to his assets from income surplus to actual expenditure. As I see it, the administrator is suing for the loss to the ultimate estate by reason of the deceased's earlier death. To obtain that figure, we must get at the balance of income after all expenditure which is not in the form of a saving that would ultimately form part of the estate. That includes expenditure on dependants, donations

to charities etc. The money spent on dependants is a net outflow. It could never accrue so as to form part of the ultimate estate. And it is the loss to the estate that we are concerned with.

Although a bachelor one cannot rule out the possibility that he may have married had he lived on. At forty-five or even fifty-five, or older, it is not too late to lose one's heart to a member of the opposite sex. Experience suggests that marriage, and an ensuing family, might well result in a rapid diminution in the rate of savings which could accrue to form part of the deceased's ultimate estate.

Another factor to take into account is this: when one thinks in terms of a capital sum being built up to a figure of, say, half a million dollars in 20 - 25 years time, a much smaller sum placed on deposit and left, with interest accruing at a compound rate, will end up at that figure, or thereabouts, at the end of that period of time. The ultimate figure would naturally depend on the interest rates available from time to time. At today's rate of interest (U.K. and excluding tax), unchanged over the period, a sum of $100,000 left on deposit with interest accruing at a compound rate would build up to around $800,000 in about 21 years. And that is what this exercise is all about. We are saying that, on past performance he was saving $X a year. We go on to say that, leaving aside the vicissitudes of life and aberrations, that should build up to $26X, plus interest accrued meanwhile, at the end of his normal expectation of life (which would be about 26 years at age 45, arbitrarily taking the figures for Scotland from Whittaker's Almanack, as we do not have figure for these Islands). That would assume that he would have worked until the end of his life. What amount should be awarded today which could reasonably be expected to grow to that amount at the end of the 26 years life expectancy? In real life, however, it is unlikely that he would have gone on working until the end. And when he retired he would be likely to enjoy at least the interest on any capital saved and might well eat into capital as well - particularly if he had no dependants. Further, he could purchase an annuity with part of the capital thereby depleting the estate he ultimately leaves.

In making these general observations I am not overlooking the fact that sums regularly saved over the years can also earn interest or dividends, depending on how it is invested. There can also be capital growth or shrinkage depending on the movements of financial indices and the cycles of boom or recession. My purpose is to advert to some of the many imponderables to which some weight must be given in arriving at a just figure of compensation. I do not see it simply as reaching a figure which roughly represents the annual savings, treating that as the multiplicand, and then applying a multiplier which one judges will take account of his age, known factors likely to affect his life expectancy and the unforeseeable vicissitudes of life. In my view that will normally greatly over compensate and result in injustice. I recognise that in not adopting this approach I am again departing from precedent.

To take one further example of the complicating factors, one can confidently say that any sum of money today will have a purchasing power equivalent to a very much higher sum in 20 - 25 years time because of the ravages of inflation. Past experience confirms this.

I think I have said enough to demonstrate that, in my view, the assessment of appropriate compensation for the "lost years" is not a matter of simple arithmetic. In departing from precedent not binding on me, I have tried to approach the matter in a way that I believe to be logical and in keeping with local circumstances, in the hope that this approach will help to iron out anomalies and meet the justice of the case. If my approach is wrong, then the aggrieved party has his remedy. In ploughing my own furrow I have kept in mind the fact that the one person who reaps no reward from this doctrine is the injured party, the deceased - except, perhaps, an occasional prayer of thanks for the bounty his early demise has provided.

And so, bearing in mind the foregoing, taking account of the facts outlined, giving weight to all the imponderabilia I have been able to summon to mind (realising that there may be some I have been unable to) and doing my best to arrive at an award which is just but tempered with

moderation I award damages under this head for the "lost years" in the sum of $90,000.

I am conscious that this sum is very much less than what will have been expected. But on any view it is a fair whack, a windfall to be enjoyed by persons who would in all likelihood have outlived the deceased and who would, therefore, have received none of it.

I can now turn to the claim in respect of the mother under Part II of the Law of Torts Reform Law which, fortunately, presents me with no difficulty. In doing so I disregard the award just assessed which will go to the estate.

The mother was 86 years old at the time of the tragic incident. Her life expectancy at the time would have been little more than four years (again taking the Scotland figures). She is also in very poor health. And so, at most, the award to her could not have exceeded $60,000; and that figure takes no account of any reduction which should be made because it is payable as a lump sum.

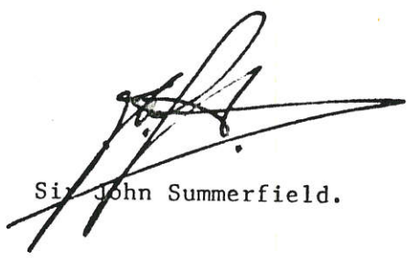
As the sole beneficiary to her son's estate she became entitled to money and other assets the value of which is far in excess of that figure. She has, therefore, suffered no loss. She is very much better off even without any award under this suit. Her son would ordinarily have been expected to have outlived her and so she would have had no real expectation of inheriting very much more than he would have given her as a dependant. The money and other assets in the deceased's estate would by now have been in her hands if this suit had not delayed the administration of the estate. However, bearing in mind section 5 of the Succession Law the proceeds of the estate should soon be in her hands and will more than compensate for the loss of dependency.

There will be no award under this head.

I might add that had there been no other assets in the estate I would still have made no award under this head because, as sole beneficiary,

she would have become entitled to an amount in excess of the award she would have got for loss of dependency (even on the modified basis on which I have arrived at the award for the "lost years") and would, therefore, have suffered no loss.

There will, therefore, be judgment for the plaintiff in the sum of $102,340 with costs to be agreed or taxed.



Sir John Summerfield.