IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1986 A200

BETWEEN	THE ADMINISTRATOR GENERAL FOR JAMAICA (Administration Estate)		PLAINTIFF
	CLINTON MALCOLM (deceased)		
AND	JOHN McDOWELL	FIRST	DEFENDANT
AND	EVANGELINE McDOWELL	SECOND	DEFENDANT

Clinton Hines instructed by Hines, Hines & Company for the Plaintiff

Miss Hilary Phillips instructed by Perkins, Tomlinson, Grant, Stewart, Phillips and Company for the Defendants.

HEARD: FEBRUARY 20, 21, 22, MARCH 1 & 8, 1991

CORAM: LANGRIN, J.

In this action, the plaintiff claims on behalf of the estate of Clinton Malcolm deceased, under the provisions of the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, damages for negligence whereby the said Clinton Malcolm, deceased (hereafter referred to as deceased) was killed on 27th October, 1983.

The claim is brought for the benefit of the widow, Mayable Malcolm and four children of the deceased who at the time of death were ages 17, 15, 12, and 7 years respectively.

The first defendant was on the 27th October 1983 and at all material times the registered owner of a 1972 Peugeot 504 motor car licensed number F.M. 4232 and the second defendant was on the said day at all material times the driver or the person in control of the said motor car as agent of the first defendant.

It is common ground that on the 27th October, 1983 about 4:00 p.m. the Peugeot motor car driven by the second defendant on the Linstead highway towards Ewarton collided with the deceased who was crossing the highway. As a result of that collision the deceased suffered serious injuries from which he died. The road in question was straight for about 24 chains, surface smooth and asphalted and the visibility was excellent.

The case for the plaintiff can be shortly stated as follows:

While deceased was crossing the highway and on reaching approximately 3 to 4 feet from the centre line over on the left hand side he was hit by a car driven by the second defendant. When deceased was hit he was walking fast across the road and had just paused for a moment before crossing the centre line and looked in the direction of Bog Walk. The driver was travelling about 50 m.p.h., did not blow any horn and after the impact travelled for about 1½ chains before deceased dropped off the bonnet of the car. There were drag marks of approximately 117 feet in length.

It was contended that the defendants were negligent in that the second defendant was: (i) driving without any or any proper look out (ii) at a speed too fast or too fast in the circumstances (iii) failing to see the deceased in time to avoid colliding with him (iv) failing to stop, to swerve, to slow down or in any other manner so as to avoid colliding with the deceased.

The case for the defendants stated shortly was as follows:-

The motor car was being driven along the highway at a speed of 40 m.p.h. on a 50 m.p.h. speed limit highway. Car was travelling on left hand side of road. Deceased was first seen about 1½ chains away when he was walking on the right hand shoulder of the road and about to cross over on the highway. The driver blew her horn but deceased continued walking so she braked and swerved further to her left where there was an impact on right front fender of car. The deceased's body flashed across the windscreen which was shattered. The car came to a stop a few feet after impact on the left shoulder of the road. The point of impact was about 3' to 4' on the road-way from the left hand side.

The first point that arises for consideration is whether the impact took place three to four feet from the centre of the road as deposed by Eustace Bennett, the only eye witness. His evidence must be taken with a grain of salt. In the first place his presence at the scene appears doubtful. Ivy Griffiths a witness who deposed on behalf of the defence said Bennett was at the material time in her shop when the accident happened and could not have been at the spot where Bennett said he was standing. Bennett told this Court that he took measurements at the scene immediately after the accident yet he never gave a statement to the police because no one had requested

it from him. He did not give any evidence at the Coroner's Inquest. The conflicting evidence he gave as to how he measured the length of drag marks confirmed my suspicion as to his presence at the accident. In his examination in chief he said he measured the distance by 'walking it out' and under Cross examination he said he used a tape. I hold that the impact occurred 3 to 4 feet from the left side of road.

Ruel Thompson, a retired police sergeant visited the scene of the accident shortly after the impact and took measurements. Unfortunately there was no record available of the measurements he had taken. Due to the passage of time he was unable to remember some of the critical measurements in the case but was able to recall that the dragmarks covered a distance of 2 chains. Apart from this bit of evidence the account he gave was not very helpful.

It is important to observe at the outset that the issues involved in this case turn upon questions of fact. The driver must show that she drove with skill, circumspection, proper lookout and did not relax her observation in relation to other users of the road generally and in particular the deceased. Indeed, the critical question to be determined by the Court is whether the driver discharged the duty of care placed on her to take the necessary action to avoid the collision.

I was impressed with the manner in which the second defendant gave her evidence. She was obviously a truthful witness and demonstrated the anxiety she experienced in avoiding the impact. She was not under any duty to be a perfectionist. It was going too far to say that she should have observed the irresponsible action of the deceased earlier than she did.

Under cross-examination she said inter alia:-

"All I was thinking to do was to avoid the accident. The moment I tooted my horn deceased was crossing the road. I applied my brakes and swerved to the left. This happened in seconds."

A number of cases were cited but the one which deals with the principle most akin to the instant case is included in Jamaica Omnibus Services Limited vs. Osmond Gordon 1971 12 JLR p.487. Within his judgment Luckoo J.A. at p.497 referred to the Scottish case of McLean v. Bell 1932 AER. 424 an appeal to the House of Lords. In the latter case the Plaintiff said she had alighted from a tramcar on the northside of the road and then proceeded to cross to

the south side of the road. Before doing so she looked to see if the road was clear of traffic and observed none from which danger might be apprehended. When she reached the middle of the southern most tramway rails she was suddenly run into and knocked down by a motor car driven by the defendant in a westerly direction at excessive speed and without keeping a proper lookout.

Lord Wright in delivering the judgment of the House of Lords said at p. 424:

> "But I shall assume that they did think she was negligent in the sense of being careless of her own safety in crossing the street when she did. On that assumption, however, there was a further question still for the jury, namely, whether assuming her to be negligent in that sense, the defender could yet by the exercise of reasonable care and skill have avoided striking her. That issue was raised on the pleadings and was fully dealt with on the evidence and there was, in my judgment, abundant evidence to entitle the jury to find against the defender, on that issue. I can see no reason to think that they did not so find, and if they did, that finding justifies or rather requires a verdict for the prisoner. With all respect to the Learned Judge he seems to ignore this aspect of the case in his judg- and I think that vititiates his conclusion. The only test which he applied is whether the pursuer materially contributed to the accident. No doubt in a sense she did, because if she had not come out in what may be called the danger zone, and had not proceeded to cross the street, she would not have been struck by the car. She may have been negligent in so doing but that does not bar her claim if the defender by the exercise of reasonable care and skill (which does not mean anything superhuman or exceptional, with all allowance for what is called the agony of the moment) could have avoided the pursuer, even though the effect of the pursuer's negligence, if she was negligent, continued right up to the moment of impact."

In that case the view was taken that notwithstanding the pursuer's negligence in crossing the road there was opportunity for the defender subsequent to the negligence of the pursuer to have avoided the collision by the exercise of reasonable care and that there was abundant evidence to justify that finding.

In the instant case <u>if the driver</u> could have avoided the collision by the exercise of reasonable care then it is her failure to take that reasonable care which caused the resulting damage and the defendant would

be solely responsible.

The failure of the deceased to heed the warning by Myers as stated by Miss Ivy whose evidence I accept as well as the failure of the deceased to heed the approach of the defendant's car unexplained and uncontradicted established that the deceased's negligence continued up to the moment of the collision.

It was submitted by Mr. Hines that the defendant's failure to turn the vehicle right instead of left in the taking of the evasive action was a substantial cause of the accident. I reject such a contention, as I am of the view that the defendant in the agony of the moment instinctively did that which she perceived to have been reasonable in all the circumstances.

Although there was no evidence that other vehicles were on the road at the material time, turning to the right could result in a collision with other vehicles reasonably expected to be on the highway.

I find as a fact that the length of the drag marks was consistent with the speed of 40 m.p.h. at which the defendant was driving.

Against this background, has the plaintiff discharged on a balance of probabilities the onus placed on him in proving that the collision was wholly or partly caused by the fault of the defendant?

In my judgment, I find the deceased solely at fault. The defendant was placed (in the agony of the moment) and so reacted promptly and reasonably and taking all other circumstances into consideration could not be said, to have driven without keeping a proper look-out or at an excessive rate of speed.

The deceased was the author of his death and cannot call upon the defendant to compensate him. For these reasons I dismiss the action and give judgment to the defendants both on the Claim and the Counterclaim, with costs to be agreed or taxed.

The award on the Counterclaim is assessed at $2,769.30.