IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F048/1993

BETWEEN	PAULINE FACEY (Administratrix of the Estate of Thomas Alfred Plummer)	PLAINTIFF
A N D	JAMES WHITE	DEFENDANT

Mr. Carlton Williams instructed by Williams, McKoy & Palmer for the Plaintiff.

Mr. R. Braham & Mrs. D. Gentles Instructed by Livingston, Alexander & Levy for the Defendant.

Heard: 12th - 14th January, 1998
and 8th October, 1998

THEOBALDS, J.

JUDGMENT

During the early morning of the 9th October 1990 the defendant James White left his home in Forest Hills, St. Andrew for Westmoreland. His wife Merle White accompanied him. She occupied the front passenger seat of the defendant's Lada motor car. On the May Pen bypass otherwise known as the Bustamante Highway in the parish of Clarendon a most unfortunate collision took place with a Colt motor vehicle, driven by the deceased Thomas Alfred Plummer. This Colt motor car was being driven in the opposite direction towards Kingston. Plummer lost his life in the collision and the defendant was severely injured. It is the duly qualified administratrix of Plummer's estate who has brought action under the Fatal Accidents Act on behalf of the beneficiaries under the Will of deceased and under the Law Reform (Miscellaneous Provisions Act) for the benefit of the deceased estate. The defendant White has counter-claimed for damages for the severe personal injuries suffered and for the loss of his motor vehicle which had to be written off as a total loss. At the trial issue was not joined on the preliminary but none the less important basics that need to be established

by the plaintiff. Indeed a certified copy of the Probate and Will of the plaintiff along with Birth Certificates for three children and two Medical Reports on the defendant James White by the late professor John Golding were tendered and admitted in evidence by consent. The attorneys on both sides are to be commended for this approach.

Unfortunately the same approach does not apply with regard to the authorities cited. Modern technology by way of computer surfing the internet has been able to produce a veritable plethora of cases on the subject of negligence by drivers of motor vehicles and the duty owed by a driver who is dazzled or blinded by the headlights of an approaching vehicle. Indeed some of the authorities submitted are in conflict with themselves and I do not propose to delay this judgment any longer by dealing with and commenting upon each of the authorities submitted.

Civil negligence in so far as drivers of motor vehicles on the public roads are concerned can be succinctly described as "doing of an act (something) which a prudent and reasonable driver would not do or the omission to do something which a prudent and reasonable driver would have done." In other words a lack of care in the circumstances. Bearing in mind that there have been no witnesses called by the plaintiff to testify as to the facts or circumstances; one has to pay close attention to the demeanour of the defendant and his witness(es) in order to ascertain the true facts. One has to use one's common sense and knowledge of people and experience as a driver and assess each witnesses' credibility. The task has been simplified somewhat by the candid admissions made in his final address by learned counsel who represented the plaintiff. Still I find that in fairness to the plaintiff one has had to draw on one's reserves in order to determine whether the defendant is being truthful or simply capitalizing on the lack of factual evidence for the plaintiff. I now find the following facts:

1. The road at the point where the collision took place was straight, flat and 24 ft. wide. It was also dark and there were no street lights on.

2. A dead cow was in the middle of the driving surface.

3. The impact between the moving vehicles took place on the plaintiff's half of the driving surface.

4. The sole reason for the defendant's vehicle being on the plaintiff's half of the driving surface was that the defendant's vehicle came into contact with a dead cow that was in the middle of the road, the Defendant lost control of his vehicle, veered on to the incorrect hand and into the path of the plaintiff's car and was hit and subsequently thereafter overturned.

5. Three other vehicles ahead of the plaintiff's vehicle and travelling in the same direction towards Kingston passed on their dim lights without causing any embarrassment to the defendant.

6. The plaintiff's vehicle (No. 4) approached with its bright lights on, failed to respond to the defendant's frequent dipping, was clearly driving without reasonable consideration for other users of the road. Additionally the plaintiff was guilty of a breach of a statutory duty under Regulation 5 of the Regulations made pursuant to Section 95 of the Road Traffic Act. More on this anon.

The above findings of fact demonstrate that the plaintiff certainly was at fault and contributed to the accident through his failure to dip his lights. As a prudent and reasonable

man what does the defendant confronted by a situation in which he cannot see do in order that he should escape liability? The case of Legga V Shatford (1927) 2 DRL was cited by the plaintiff's attorney. The headnote reads:

> "When a driver of a motor car is blinded by the headlights of an approaching car his duty is to stop and if he continues moving and causes an accident he is guilty of negligence."

Strong support is given to this view by the dicta of Chief Justice Adamson in Voth v. Fuerson (1955) 15 WWR 625. In that case a pedestrian was hit from behind by a car travelling in the same direction. The driver of the car was travelling at 47 to 48 miles per hour and was temporarily blinded by the glaring headlights of an uncoming car. He did not see the pedestrian until he was almost upon him. The Court of Appeal held that the speed of the driver was excessive in the blinding situation with which he was confronted !..... Adamson C. J. M had this to say at p. 629.

> If a driver does not dim his lights in plenty of time, an approaching driver's duty is to slow right down or stop."

The plaintiff's attorney extracted these words from the report and urged on this Court that this defendant Mr. White had failed to stop and was therefore in breach of this duty and liable in negligence for damages to the plaintiff.

Mr. Braham for the defendant would have none of this. He urged that there was no such duty in law and there existed no rule in law saying that you must stop. It is interesting to note that in the same report it is doubted whether the learned Chief Justice intended the statement above to be of universal application. Negligence being a question of fact not of law and while the basic facts of one case may justify such a broad statement it must be borne in mind always that each case is different and must stand by itself based on its own circumstances. Indeed the dicta of Macnaghten J are particular relevant to this case and here I quote:

> "At night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts, such as the colour of the obstruction, the background against which it stands and the light coming from other sources. ..... It cannot I think be said that where there is an unlighted obstruction in the roadway a careful driver of a motor vehicle is bound to see it in time and must therefore be guilty of negligence if he runs in to it."

The evidence from the plaintiff's witness, one police corporal Eric Williams is that when he got to the scene it was dark, the road surface was normal black asphalted road and the dead cow was also black and in the middle of the road. It was a large animal about 6 feet long and 15-18 inches high. The witness also confirmed that on the scene he received a report from the defendant that he "was dazzled by bright lights, and felt his motor vehicle hit an object, which he later discovered was a cow. His motor vehicle got out of control and hit a car travelling in the opposite direction." It is my view that on these basic facts alone this defendant would not be liable in negligence. But the defendant in his evidence made some startling admissions. He claims that travelling at a speed of 45 miles per hour all he did was lift his foot off the accelerator. He estimates that by so doing his speed fell to 35 miles per hour but he cannot remember if he pressed his brake at all. Under cross examination he went further to say that he never applied his brakes. He estimated the car approaching was doing 45 to 50 miles per hour. Clearly the defendant was at fault in not applying his brakes during the estimated 20 seconds which elapsed between taking his foot off the gas and colliding with the object. Had he done so the probability of losing control and veering into the path of the plaintiff's car would have been unlikely. In addition on a road with a driving surface of 24 feet why was the defendant so far

from his left bank where he ought to have been, that he should have come in contact with an unlighted obstruction 6 feet long in the middle of the road. It is the defendants failure to apply his brakes and not travelling sufficiently close to his left that contribute to his colliding with the dead cow at all. It is not being suggested that travelling along a highway a driver is obliged to stop each time his vision is impaired by approaching headlights. That would in itself create an impossible situation for traffic on our main highways would become congested and at times come to a standstill, but a driver who merely takes his foot off the accelerator and continues at a speed conservatively estimated at about 35 miles per hour when blinded by glaring headlights cannot be said to be taking care in the circumstances. Visibility is a most important factor, if not the major factor in determining whether speed is excessive and whether reasonable care is being taken. Had the defendant applied his brakes and temporarily cut his speed to 15 - 20 miles per hour whilst the collision with the cow might not have been averted, loss of control certainly would not have been so serious. On the other hand the driver of the approaching car who had failed to dim his lights would have, as so frequently happens, gone along his way perhaps without even stopping to see the result of his lack of consideration. In a society where lack of consideration for others is the rule rather than the exception it becomes, in my view the duty of the Court to show its disapproval of such conduct by drivers on our public roads. To assert that this was at least poetic justice might appear harsh for the driver did lose his life, but he had himself partially to blame. On these findings I apportion liability on a fifty % basic on each driver , on the plaintiff driver for his failure to dip lights in circumstances in which 3 other drivers immediately ahead of him dipped without running into any obstruction or causing any embarrassment to the defendant; and on the defendant for failing

to bring his vehicle to a speed at which he could control it and failing to keep to his left or near side of the road where there would have been ample space for him to have passed safely without colliding with the dead cow.

I turn now to the question of damages. The evidence is that at the time of his death the deceased was earning $290,000 per annum. Of this amount $120,000 was spent in the maintenance of his four (4) children. In percentage terms this would represent a little under 41.4% of his annual income. On the authority of Godfrey Dyer v. Gloria Stone S.C.C.A. No 7/86 the multiplicand for the pre trial loss, that is between the year of the fatal accident (1990) and the date of trial (1998) a period of just over seven years would be the average of the earnings of the deceased over that period.

After arriving at the average earnings over that period which amounts to $345,000 you take 41.4% thereof which would amount to $142,830.00. When $142,830.00 is multiplied by seven the pre trial loss would be $999,810.00. This figure is rounded off at $1,000.000. To this figure of $1,000.000 is added a post trial loss of $331,200 that is approximately 41.4% of his estimated earnings at time of trial ($400,000). The total award under the Fatal Accidents Act is therefore $1,331,200.

Under the Law Reform (Miscellaneous Provisions) Act one must first ascertain the amount that would have been available for the beneficiaries during the seven lost or pre-trial years 1990-1998. That amount is arrived at by subtracting the personal expenses of the deceased (estimated at $140,000) from his income at the time of his death ($290,000). This figure of $150,000 put in percentage terms would amount to 51.72%, so you now ascertain 51.72% of the average net income during the seven pre-trial years that is 51.72% of the $345,000 already arrived at. This comes to $178,434 per annum for a seven years pre-trial period $1,249.038. In respect of two years post-trial period one takes 51.72% of $400,000 that is his estimated income at time of

trial and multiply same by two leaving a figure of $413,760. The total claim under the Law Reform Act is therefore $1,249.038 plus $413,760 equal $1,662,798. Since there are a total of six beneficiaries under the will of the deceased (namely his four children, his sister Pauline and his common law wife) you now divide the $1,662,798 by six leaving an entitlement of $277,133 to each child. The total award is therefore $1,331,200 under the Fatal Accidents Act plus $222,708 under the Law Reform (Miscellaneous Provision) Act making a total of $1,553.908. The deceased having been found 50% contributorily negligent the plaintiff gets judgment for $776,954 on his claim with costs to be taxed, if not agreed.

In respect of the Counter Claim the defendant has not been able to prove with some exceptions the quantum of his special damages. Those proven include crutches $100.00; payment to Dr. Lee $900.00; physiotheraphy sessions $500.00 being twice weekly up to March to APril 1991. In addition the value of his Lada Station Waggon is awarded on the basis of the sum insured as set out in the further amended Statement of Claim being $92,000.00. This makes a total award for special damages of $93,500,00. General damages to cover pain, suffering and loss of amenities is assessed at $1,000,000. Bearing in mind my earlier apportionment of 50% liability on the defendant the amount of $1,093.500 is divided by two with judgment to the defendant on the Counter Claim for $546,750 with costs on Counter Claim to be agreed or taxed.