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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S-113 OF 1977

BETWEEN	NORMAN SAMUELS (Administrator under power of Attorney of the Est. JOHN LEWIS WALKER, Deceased)	PLAINTIFF
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A N D	EARL FRAY	DEFENDANT
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D. Muirhead Q.C. and D. Scharsdsmidt instructed by B. E. Frankson for Plaintiff.

Crafton Miller and Miss Monica Earle Brown for Defendant.

Heard on: March 30, 31, 1981, April 1, 2, 3, 12, 13, 1981 and July 29, 1982.

JUDGMENT

ORR J.

The plaintiff's claim against the defendant is as Administrator under power of Attorney of the Estate of John Lewis Walker deceased under the provisions of the Fatal Accidents Act, and the Law Reform (Miscellaneous Provisions) Act for damages in respect of injuries to the said John L. Walker resulting in his death caused by the negligent driving of a motor vehicle by the defendant on the main road at Ocho Rios in the parish of St. Ann on the 12th day of May, 1976.

In his Statement of Claim, as amended, the plaintiff set out the particulars of negligence of the defendant.

In his defence the defendant denied the allegations of negligence and stated that the accident was caused solely by the negligence of the deceased or alternatively that he contributed thereto by his negligence.

The accident occurred on the main road leading from Ocho Rios to St. Ann's Bay in the parish of St. Ann in the vicinity of the Reynolds Pier. The Pier is situated on the right of the main road in the direction of St. Ann's Bay. There are two gates to the Pier - One the main entrance, and the other some 77 yards away towards Ocho Rios.

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On the opposite side of the road facing the main entrance was an establishment known as the Blue Berry Inn. The side of the road beside which the Pier is situated was referred to as the seaside and the opposite side as the land side. There is a soft shoulder on either side of the road and the road is straight for a distance of almost ¼ mile. The road was dry at the time of the accident.

The deceased was then employed on a ship, the S.S. Louise which had docked at the Reynolds Pier. The Blue Berry Inn was a popular resort for sailors and other employees on the ship.

The deceased had left the Pier and was on his way to the Blue Berry Inn when he met his death.

The first witness for the plaintiff was Miss. Nancy Earle. She testified that at about 8:30 p.m. she was sitting on a piece of iron outside the Blue Berry Inn. The deceased walked through the gate of the Pier, crossed the road and walked on the sidewalk which she called the dirt, in the direction of the Inn. She stretched out her hand to greet him - he was then some 6 ft. away and she describes the accident thus:

" I only see a car come and lick him, I did not see a light, I did not see anything, I made a shout".

She stated that when the car hit the deceased he was on the sidewalk, it hit him off the sidewalk and he fell on the sidewalk but more in the bush.

She saw no other vehicle on the road at the time.

She explained that she was then engaged in Hustling and stretched her hand towards him to greet him.

She placed the accident some 10 ft. from the Inn and was adamant that the deceased was on the soft shoulder of the road when he was hit. She was the only eye witness.

Another witness Mr. Barber Khan was then second officer on the S.S. Louise. He had gone to the Blue Berry Inn with another officer Mr. Brancic and both were awaiting the arrival of the deceased.

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Mr. Khan and Mr. Brancic sat drinking - He, Khan sat at the main entrance which faces the sea, about 1 ft. from the entrance. Mr. Brancic spoke to him. and he got up, leaned over inside, looked outside and saw the deceased to his left about 70 - 80 ft. away, walking towards the Inn on the soft shoulder on the same side of the road as the Inn.

Mr. Khan resumed his seat and heard a car passing at a very fast speed and then heard "a tremendous noise". He went outside and saw the deceased lying on his back on the same soft shoulder about 50 - 60 ft. from the Inn close to the car.

He accompanied the deceased to the St. Ann's Bay hospital where he died later that night.

Mr. Derrick Jeffries another officer on the ship, left the ship at about 8 p.m. and was on his way to the Ocho Rios Post Office - when he reached approximately 230 yards from the Blue Berry Inn a Volkswagon car "whizzed past" him without lights going in the direction of St. Ann's bay. It appeared to him that the car was without a driver. He went to the Post Office and returned, saw a crowd and went to investigate. He observed a damaged Volkswagon car about 22 yards from the Blue Berry Inn.

Corporal Derron Lettman received a report and went to the scene at about 8:55 p.m. He observed the defendant's car on the left side of the road facing St. Ann's Bay. It was almost in the middle of the road and had no lights. He marked the position of the wheels on the asphalted portion of the road and had the car removed to the soft shoulder of the road. He went to the hospital where he saw the defendant and both returned to the scene.

Defendant pointed out what he considered the point of impact and the spot where the deceased fell after the impact.

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Lettman took the following measurements from the marks he had made on the asphalt in the defendant's presence:

- Right front wheel to right bank - 15 ft.
- Right rear wheel to right bank - 16 ft.
- Left rear wheel to left bank - 4 ft.
- Left front wheel to left bank - 5 ft.
- Width of road asphalted surface - at point of impact shown by defendant - 25 ft.
- Length of car - 12 ft.
- Width of car - 5 ft.
- Drag mark from point of impact to right rear wheel - 35 ft.
- Overall length of drag mark - 105 ft. 7 ins.

Drag mark to right rear wheel commenced about 3 ft. from the left edge of the asphalt facing towards St. Ann's Bay.

The first part of the drag mark was straight for about 70 ft. and then turned almost to the middle of the road pointing in that direction.

Drag mark commenced on the St. Ann's ^{Bay} side of Blue Berry Inn about 10 ft. from the Inn.

Broken glass was scattered over the whole road and also in the area pointed out by the defendant as the point of impact.

His recollection of the damage to the car was:

" Windscreen completely broken out, left front section of bonnet slightly damaged.

No damage to right frontfender nor right front section of bonnet".

He formed a conclusion that the true point of impact was almost between the left edge of the road facing St. Ann's Bay to a small portion of the soft shoulder. This conclusion was arrived at because there was more broken glass there than at the spot indicated by the defendant. The drag mark was straight to this point.

Dr. Noel Black a registered medical practitioner conducted the post mortem examination on the body of the deceased on the 14th May, 1976. He estimated the time of death at about 10:20 p.m. on 12th May, 1976.

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On external examination he found:

Lacerated wound on the right side of the forehead about 3" in length;

Haematoma of the forehead;

Haematoma of the upper and lower lids of the right eye;

Lacerated wound of the left elbow 1" long;

Abrasion of the right hip;

Abrasion of the left side of chest;

Haematoma left ankle, left thigh and left leg;

Bleeding from left ear.

On dissection of the skull cerebral haemorrhage was noticed. There was a fracture of the base of the skull on the left side.

Fracture on the 4th, 5th, 6th and 7th ribs on the right side;

Fracture of the 5th, 6th, 7th, 8th and 9th ribs on the left side;

Blood in both pleural cavities;

Laceration of the spleen left side;

Fracture of the left humerus.

Death was due to shock and haemorrhage from the above injuries. The injuries were consistent with the deceased having been involved in a collision with a motor vehicle.

He agreed that the injuries to the left side were greater than those on the right.

He stated that the injuries could have been received while the deceased was walking on the soft shoulder towards Ocho Rios and was struck by a car coming in the opposite direction.

He also stated that the injuries could have been received while the deceased was crossing from the seaside, the Pier side, to the opposite side of the road and the car was coming in the opposite direction. If, however, the right side of the deceased was exposed while so crossing, he would not expect to find the injuries he saw.

The defendant testified that he was driving his Volkswagon motor car from Kingston to Montego Bay. When he reached Ocho Rios his headlights were on. At the spot where the accident occurred it was not well lighted, the road was dark. As he reached towards the Reynolds Pier, he saw a figure move across the road from his right - the Pier side towards him. He applied his brakes and swerved to his left but by then the figure had landed on the windscreen of the car and then went on the cab and fell forward of the car, on the soft shoulder about 3 ft. from the asphalted portion of the road.

The car continued for some distance after he applied his brakes and finally came to a stop on the asphalted portion of the road. Just before the accident his speed was 35 - 40 m.p.h.

He left the car where it stopped and discovered the figure was the deceased whom he assisted to take to the hospital. He returned to the scene with Corporal Lettman and saw him take measurements. The deceased who was wearing dark clothing was about 20 ft. from the Blue Berry Inn when the collision occurred.

He maintained that the collision occurred on the asphalted portion of the road and he never left the asphalt even when he swerved. When he first saw the deceased he was about 35 - 40 ft. away on the seaside of the white ^{centre} line of the road. He was unable to say how far from the white line.

The windshield, left portion of the cab, right front fender and left portion of the bonnet of the car were damaged. There was no damage to the headlamps. He explained that the damage to the right front fender was caused by the deceased's feet hitting the fender when he came in contact with the windshield and the cab. He agreed that the only damage to the roof of the cab was on the left side.

It is of note that the defendant gave a statement to the police on the same night in which he stated that he heard a thud on the left side of the car. At the trial he did not recollect having heard this. The statement was tendered in evidence as Exhibit 8.

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Mr. Raymond Bryan a Certifying Officer and Motor Vehicle Examiner of 18 years experience was the only other witness for the defence. He examined the defendant's motor car at the request of the police at the Ocho Rios Police Station on the 13th May, 1976. He found no mechanical defects. He found damage to the left front fender, the cab and the windshield glass was broken. He then said:

" I think it was the left section of the bonnet not the left front fender".

He stated that the right front fender was damaged as also the left section of the roof.

He made a note of the damage in a log book when he examined the car but for some unexplained reason did not take the log book to Court. He denied that the left front fender was damaged. He admitted having given a statement to the police in which he said he recorded the damage. This statement which was tendered in evidence Exhibit 7, makes no reference to any damage to the fenders.

Having observed the demeanour of the witnesses Miss Earle, Mr. Khan and Mr. Jeffries, I accept them as witnesses of truth. Miss Earle obviously exaggerated the position but I accept her evidence that the deceased was hit on the soft shoulder of the road.

I accept Mr. Khan's evidence that he saw the deceased walking on the soft shoulder shortly before he heard "a tremendous noise" which was the impact of the car with the deceased. I also accept Mr. Jeffries evidence that a car passed him without lights at a fast rate of speed. His language was vivid but he is a precise gentleman who actually measured a distance.

Corporal Lettman's evidence was of great assistance. From the length and direction of the drag mark, I draw the inference that the car struck the deceased on the soft shoulder on the land side of the road and the defendant then swerved to his right and came to a stop. I do not believe that the witnesses for plaintiff correctly recollected the position of the car after the accident.

I find that the defendant was driving at too fast a speed at that hour of night, that at the time he had no lights on the car and was not keeping a proper look out.

I reject the evidence of the defendant that he was driving at 35 - 40 m.p.h. and that the deceased was crossing the road at the time of the impact. I do not accept Mr. Evans as a witness of truth. Mr. Muirhead referred to his evidence that he saw damage to the left front fender of the car, as a Freudian lapse: this is an apt description, in other words despite his attempt to suppress it, the truth emerged from his unconscious.

I find that there was damage to the left front fender of the car and that this damage was caused by this fender coming in contact with the deceased.

I reject Mr. Evan's evidence of damage to the right front fender of the car. An expert of 18 years experience, he conveniently forgot to bring his log book to Court knowing that, according to him, it contained his findings at the time of the examination.

I also reject the ingenious attempt of the defendant to convince the Court that there was damage to the right front fender of the car. He asserted that the feet of the deceased came in contact with the front fender during the impact thus causing damage. This version excited my curiosity but failed to make an impact on my credulity.

In the circumstances I find that the negligence of the defendant was the sole cause of the accident which caused the death of the deceased John Lewis Walker.

I will now deal with the rather difficult question of damages. My first task is to find the datum figure.

At the time of his death the deceased was employed as a Superintendent to Kerrison Kontrollers, Inc. of Corpus Christi, Texas in the United States of America. His net salary was U.S.\$20,275.00 per annum.

However there was evidence which I accept, that the deceased had been offered and had accepted employment in a higher post. This post would have been available in 1977 and carried increased emoluments and benefits. The salary was U.S.\$40,000 per annum and the benefits included a furnished apartment, the use of a truck and a subsidy for food at the rate of approximately \$15.00 per day. There was an annual increase in salaries of approximately 6% since 1977.

I take into account the state of health of the deceased, his excellent record of employment with the company and am of the opinion that in all likelihood he would have been employed in this higher post had he not met his untimely death.

There is evidence from Mr. Pickering an Attorney-at-Law who is familiar with the Tax Laws of the U.S.A. that the net income of the deceased at a salary of U.S.\$40,000 in 1981 would be \$33,348.60.

In addition I take into account the value of another benefit, the work done by the deceased on the home which the widow valued at about \$2,000.00 per annum. The total income would therefore be \$35,348.60.

The next amount to be ascertained is that which was expended for the deceased's own personal and living expenses.

Various amounts spent for household and other expenses were given and scrutinised in the course of the evidence. However I will adopt a shorter and in my opinion a more practical approach by deducting the amount expended by the deceased personally from his net income.

He was a man of sober habits and thrifty. His widow estimated that he spent about \$2,000.00 per annum on himself. I take into account that he lived at home for three months of the year and make a further deduction from the expenses. I adopt Mr. Muirhead's figure of 1/5 of his income.

1/5 of \$35,000 = \$ 7,000.00
 35,000 less \$7,000 = \$28,000.00 which is the datum figure.

I now go on to ascertain the value of the dependency. At the time of his death the deceased was 42 years of age. The retirement age in the United States of America is 70 with optional retirement at 62 or 65 but there are penalties for early retirement such as loss of social security benefits - the maximum benefits being payable at age 70. It is expected that he would have worked to age 70. He had had two surgical operations which were not major.

His widow was 38 years at the time of his death. She is now 43 and has no intention nor prospects of re-marriage. I do not attach any importance to the possibility of her re-marriage. The only child John Jnr. was 13 years at the time of the deceased's death. The parents had made plans for him to pursue a Degree in Law which he should complete by age 24.

Having regard to the above factors and the submissions by both attorneys. I consider a multiplier of 13 most appropriate in the circumstances. The result of multiplying the datum figure \$28,000 x 13 is \$364,000.00.

I now consider the question of benefits accruing to the widow and son as a result of the death. There is a sum of \$30,000.00 which the widow received as beneficiary under an insurance policy. This amount is deductible as this suit was commenced before the Amending Act of 1979 was passed.

This is an accelerated benefit but in accordance ^{with the} ~~with~~ the established practice will not be deducted in full from the ~~damage~~ awarded under the Fatal Accidents Act.

I adopt the approach of Graham-Perkins J. in Rattray v. Muir and others (1966) 15 West Indian Reports 87 at 92 and Ross J. as he then was, in Administrator General for Jamaica. (Administrator Estate Llewelyn O'Reggio vs. Arthur Thomas and others Supreme Court Judgment C.L. 1382/71 (unreported)).

Having regard to the imponderable factors involved a fair result would be achieved in this case by deducting a half of the benefit.

Accordingly I deduct one half of \$30,000.00 equal \$15,000.00 from the sum of \$364,000.00 leaving a balance of \$349,000.00 converted into Jamaican dollars at the rate of J\$1.75 to the U.S. dollar gives J\$610,000.75.

On the claim under the Law Reform Act, I award \$500.00 which will be dealt with in the usual way. The Special Damages have been agreed at U.S.\$2,211.00 similarly converted into Jamaican dollars gives \$3,869.25.

Accordingly I award Judgment to the plaintiff in the sum of \$610,000.75 on the claim under the Fatal Accidents Act and in the sum of \$3,869.25 on the claim under the Law Reform Act with costs to be agreed or taxed.

The damages are apportioned as follows:

The widow	-	\$600,870
Son John Jnr.	-	<u>13,000</u>
		\$613,870

Orr J.