IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S. 365 OF 1985

BETWEEN	CARL GEORGE SMITH (Administrator of the Estate of Donovan Glen Smith o/c Donovan Smith, deceased)	PLAINTIFF
AND	JOHNNY HINDS	FIRST DEFENDANT
AND	UTON HINDS	SECOND DEFENDANT
AND	WILTON ELLIS	THIRD DEFENDANT
AND	LEONARD ELLIS	FOURTH DEFENDANT

MR. K. PERSHADSINGH Q.C. and MR. ALVIN MUNDELL for plaintiff;

MR. P. DENNIS instructed by MYERS FLETCHER & GORDON MANTON & HART for first and second defendants;

MISS HELEN MCLEAN instructed by D.O. KELLY & ASSOCIATES for third and fourth defendants.

16, 17, 18, 19, 26 July and 7 December 1990.

COOKE J.

On July 27, 1984 at about 7:30 p.m., a minibus which plies for hire collided into the right rear of a stationary truck along the main road between Ocho Rios and Oracabessa. It is the left front of the minibus which made contact with the truck. As a result of this collision Donovan Smith who was a passenger seated in the front of the minibus died. The administrator of his estate has brought this action for damages consequent upon his death. My first task is to address the issue of liability as between the defendants. The 1st and 2nd defendants contended that the truck was parked in such a way that the body of the truck covered the entire left hand lane and thus blocked the progress of the van which was proceeding to Oracabessa. It was said that this truck was unlit and had no reflectors and it was parked in a dark area almost on a curve. The road was wet and although the driver of the minibus, Uton Hinds, the 2nd defendant, tried to brake, the wet conditions adversely affected the braking manouevre — resulting in the collision. As counsel for the 1st and 2nd defendants, Mr. Paul Dennis submitted, "The 3rd and 4th defendants were the direct

cause of the accident, or in the alternative a degree of blameworthiness is attributable to th 1st and 2nd defendants' negligence." The 2nd and 3rd defendants agued that the truck was not parked across th road and the cause of the accident was the attempt to overtake a properly parked, well lit truck at a time when it was unsafe to to do. Their contention was that in an effort to avoid a head-on collision with an approaching vehicle, the minibus swerved into the parked truck. Accordingly, the 1st and 2nd defendatns must be held wholly responsible.

I will now deal with the common ground. The asphalt was wet. There had been showers that evening in that area and at the relevant time there was some drizzling. Although there were street lights along the road, there was darkness in the immediate vicinity of the point of impact. Just before the impact the minibus had gone around a pronounced curve. This curve was such that vision ahead was not impaired nor in any way affected because of it. The roadway approaching the point of impact from the Oracabessa end was undulating. This was a fairly extended straight stretch of road. At about the time of the collision a motor vehicle was approaching from the Oracabessa end.

I will now examine the central areas of dispute. The first question is how was the truck parked?

The driver of the minibus, Uton Hinds, swore that the truck was parked in a slanted position across his left hand lane in such a position that, the entire lane was blocked by its presence. Winston Cox, who was called by the plaintiff, and who was a passenger seated beside the deceased at the relevant time, supported Hinds. He said that the truck was parked in a slanted position "party to the middle of the road. Truck parked with back to white line at angle of 45 degrees from edge of the road on left hand side" Leonard Ellis, the 4th defendant and driver of the truck asserted that "truck positioned straight on grass on bank. Left hand side of truck on bank. Front and left rear wheel on bank." Then there is the evidence of Sgt. Albert bryan of the Oracabessa Police Station who visited the scene in his official capacity shortly after the collision. It is agreed that when he arrived both vehicles were still in the same position as they were immediately after the impact. This is what Sgt. Bryan, who I

regard as an independent witness said. "I saw both vehicles. The truck was parked on left hand. There was a bank to the left. Left hand front wheel and back wheel both on bank." If the account of Hinds and Cox is to be accepted, it would mean that it is the impact that positioned the truck where it was seen by Sgt. Bryan. But in the words of Hinds pertaining to the truck after the impact, "I think the truck moved a little" which is quite understandable. I have absolutely no difficulty in rejecting the evidence of Hinds and Cox as to the position of the truck at the time of the collision. I accept the evidence of Ellis as to where the truck was parked.

In his evidence Hinds said that after the collision he asked Ellis, "What sort a man like this park truck in corner without reflectors or light?" Implicit in that question is the kernel of the case for the 1st and 2nd defendants.

Where was the truck parked in relation to the curve?

According to Ellis the truck was parked approximately four chains on the straight road after the end of the curve. It is the evidence of Sgt. Bryan that the point of impact was "just as the straight begins." I prefer the evidence of Sgt. Bryan on this aspect of the case but it is my view that in the circumstances, where the truck was parked is not necessarily relevant. It will be only relevant if it can be shown that the parked truck was a causitive factor in bringing about the collision. The evidence of Sgt. Bryan, which I accept, is that at the point of impact the width of the road was 21 ft. The width of the back of the truck was 8ft. of which 7ft. was on the roadway. The width of the front of the minibus was 5ft. It is obvious therefore that the minibus could have passed the truck with about some 9 ft. spare room. But the court is being asked to say that such a seemingly ordinary manouevre was precluded because of the sudden awareness of the presence of the truck, the darkness which prevailed at the point of impact and the wet road. Hind's evidence in this area is this. "Coming around a circle - a wide circle like a corner but not steep corner - I was still on dim - coming in opposite direction there was another car coming with bright light. I was still on dim. The car light in opposite direction bright - as about to finish that circle - corner I glimpse that there was an object in the road. I lower my speed. I could see a figure like a truck in the road."

Again, he said "when first had glimpse of object I was 3/4 chain away. When I figure is truck I was ½ chain away." He was travelling between 30 to 35 m.p.h and he was travelling on the left hand side of the road. Under cross examination he said, "I saw tyres of truck. I figure object was a truck. I saw human feet step across from behind truck." Now bearing in mind the evidence of Hinds referred to above, it is more than a little curious as to why he did not go around the parked truck. The answer to this may lie in other evidence in this case.

Ellis recounted that he was on his way home to Port Antonio from Montego Bay where he had gone to make a delivery. Along the way the water hose of his truck became defective. He had stopped to have water put in the radiator. While the water was being put in the radiator he had gone to the back of the truck "to spring a leak". He told the court that while he was at the back of the truck he observed motor vehicle lights coming from both the Ocho Rios and Oracabessa ends. He said, "I was standing at the right hand side of truck back. I remain there waiting on Boscabel vehicle (minibus) to pass to get back into truck. Truck right hand drive. After standing there I notice vehicle from Oracabessa coming on nearer to the truck, and one from Boscabel also coming. Vehicle from Boscabel just as finish circle it was over white line on right hand side. I see other vehicle coming. I start to use hand to flag him down. Boscabel vehicle seem like it never out to stop. I had to jump away to left and to bank to save my life for I thought must be accident between Oracabessa vehicle and the Boscabel vehicle."

There is agreement that just about the time of the collision a motor vehicle was approaching from the Oracabessa end. However, according to Hinds, this approaching vehicle was merely part of the scenery and had nothing to do with the collision. To him the only relevance of the presence of the approaching vehicle was that because he saw the oncoming light he had his light dim. I have to resolve this conflict in the evidence as to the import of this approaching vehicle. Hinds stated that after he became aware of the presence of a figure like a truck on the road — "I then applied my brakes. I picked up a slide on wet road. When pick up slide move swiftly on wet road. I applied my brake another time; I then realized not

able to stop before getting to object. When vehicle slid ease off brake and apply it another time at slower pressure. When apply brake second time, slow down. I swerve to avoid hitting object. There was a sudden impact-- left side of van hit right tail of truck." Cox had this to say, "after saw truck vehicle feel like going faster than before. I would say brakes applied by driver. I felt a sway. I now say I do not know if brakes applied." So Cox, who has been sympathetic to Hinds, does not exactly support him in this area. I find it quite significant that Cox said, "after saw truck vehicle felt like going faster." I will advert to this subsequently. I cannot but have regard to the impression I have formed of the chief witnesses, Hinds and Ellis. Hinds has been untruthful about the position of the parked truck and I ask myself why? Here is a deliberate lie on a material particular. His credibility is destroyed. I find that when he lied it was because he knew that his manner of driving was bad and he did so in an attempt to escape liability. On the other hand, Ellis, although I have not accepted everything he said, I found was essentially a truthful witness. I accept what he has said pertaining to the circumstances immediately before the collision.

Miss Helen Mclean through cross-examination, put forward the view that Hinds saw the truck in good time; that Hinds was aware of the approaching motor vehicle; that he misjudged the distance between himself and that motor vehicle and when he set out to pass the truck he suddenly realized the motor vehicle was much closer than he assumed and thus to avoid a head-on collision swerved into the back of the parked truck. I find this a very reasonable explanation. This inference is drawn not only from the account given by Ellis but by the evidence of Cox. "After saw truck vehicle felt like going faster than before." Hinds had speeded up to pass the truck before the arrival of the oncoming motor vehicle. It may well be that the undulating roadway affected the judgment of Hinds in that he may not have seen a continuous stream of light from the approaching vehicle and thus did not properly guage the distance between the oncoming vehicle and himself.

My conclusion is that the 1st and 2nd defendants are wholly to blame and no liability attaches to the 3rd and 4th defendants. The parked truck was in no way a causitive factor in this collision.

As a result of this finding it is unnecessary for me to consider whether the truck was lit or there were reflectors on it. Perhaps Ellis may be blameworthy in continuing to drive a truck with a defective water hose at night, especially as he had a long way to go. Perhaps he may be at fault in not stopping in a lighted area - he had the opportunity so to do. However, as already said, any negligence on his part contributed nothing to the collision. I find support for my approach from the speech of Lord Pearce in Miraflores (owners) and George Livanos (owners) & Others [1967] 1 AC, 826 at p. 847.

> It is axiomatic that a person who embarks on a deliberate act of negligence should, in general, bear a greater degree of fault than one who fails to cope adequately with the resulting crisis which is thus thrust upon him. This generality is subject, of course, to the particular facts. And it may be that the initial act was so slight or easily avoidable and the subsequent failure to take avoiding action so gross that the blame for the accident falls more largely or even (if the interval and opportunity for avoidance are sufficiently great) wholly upon the person who failed to avoid the consequences of another's negligence. Between the extremes in which a man is either wholly excused for a foolish act done in the agony of the moment as the result of another's negligence or is wholly to blame because he had plenty of opportunity to avoid it, lies a wide area where his proportion of fault in failing to react properly to a crisis thrust upon him by another must be assesed as a question of degree. But the driver who deliberately goes round a corner on the wrong side should, as a rule, find himself more harshly judged than the negligent driver who fails to react promptly enough to the unexpected problem thereby created. For all humans can refrain

> from deliberately breaking well-known safety rules; but 'tis not in mortals to command the perfect reaction to a crisis; and many fall short at times of that degree which reasonable care demands.

The portion which I have underlined in the above extract is most applicable to this case. There will therefore be judgment for the plaintiff as against the 1st and 2nd defendants.

I will now consider the claim under the Fatal Accidents Act. This has been brought on behalf of the deceased's parents and his 3 sisters and 2 brothers. The evidence to ground this claim came from Carl George Smith, the father of the deceased, who is the administrator of the estate. He said that at the time of the death of his son, the latter was employed to him as manager of his gift shop, "Happy Holidays", situated at the Little Pub in Ocho Rios, as well as the manager of his haulage truck. He paid his son $500.00 per week in respect of the gift shop and $150.00 per week for managing his truck. From this sum of $500.00 the son paid $250.00 per week to his parents and gave $25.00 per week to each of the other children. All the other children were at school. Three were at the Excelsior Community College and two were in North American Universities. Carl George Smith appears to have been quite comfortable in respect of his finances. He described himself as a contractor and businessman. Besides his gift shop in one of our foremost tourist resort areas and his haulage truck, he owned and operated a marl quarry. In addition to his own residence, he owned another three houses which were subject to tenancies. He was quite proud of his success. His wife was the manager of the Pineapple Shopping Complex. This witness told the court that his son was provided with all his domestic needs; housing, food, laundry, utilities, etc. It is my view that this sum of $150.00 per week is attributable only to the deceased's living expenses and dependency in respect of either parent has not been proved. Similarly, there is no dependency as regards the $25.00 which the deceased gave to his brother and sisters. There is no evidence to suggest that this giving was other than as an expression of brotherly affection.

The claim under the Fatal Accidents Act therefore fails.

I now turn to the claim under the Law Reform (Miscellaneous Provisions) Act.

The sum of $6,500.00 for funeral expenses is not contested.

There will be an award of $3,000.00 for the loss of expectation of life. The cost of administration which is $1,013 is allowed. The estate can recover loss of the personal effects of the deceased as follows:

1 shirt	$150.00
1 watch	$600.00
1 bracelet	$500.00
1 pair shoes	$200.00

Six years elapsed between the death and the trial. At the time of his death the deceased was 21 years old. A multiplier of 14 years will be employed. At his death the deceased earned a gross salary of $26,000.00 p.a. There is a taxable allowance of $8,000.00. I estimate that the deceased would in respect of statutory deductions have to pay at a rate of 38 ½ percent. This was the agreed rate in Godfrey Dyer, Derrick Dyer v. Gloria Stone, executrix estate, Edward Jocelyn Stone (unreported) S.C.C.A. No. 7/88. Indeed, there is no evidence in this case as to statutory deductions. It is true that the father said he took tax of $50.00 per week but I formed the view that this was a sum which was merely trotted out. The deceased in the Dyer case died in 1982. This deceased died in 1984. The period covered in both cases is fairly similar. I therefore consider that rate of 38 ½ % which was the agreed rate in the Dyer case as representative.

38½ percent of $18,000.00 is $6,930.00 which leaves a balance of $11,070.00. The net income at the time of death is therefore $19,070.00 ($8,000.00 + $11,070). Hyacinth, a sister, was manager of the gift shop at the time of the trial. She was earning a salary of $600.00 per week. I take this as the salary the deceased would have been earning had he lived. There is no evidence that there is now a manager of the haulage truck nor if there is, the rate of remuneration. The father still owns it and presumably, it is still engaged in haulage. There is no evidence of the conditinn of the truck. In these circumstances, the court faces the difficulty of assessing the salary which the deceased would have been earning from

this occupation. I have decided to let the figure of $150.00 per week remain. The gross salary at the time of trial is $750.00 per week which is $39,000.00 per annum. After subtracting $8,000.00 as not-taxable income, there remains $31,000.00. Statutory deductions at the rate of 38½% reduces the sum of $31,000.00 to $19,065.00 ($31,000.00 - $11,935.00). The net income at the date of trial is therefore $27,065.00 ($19.065.00 + $8,000.00). The average net income for the period between the date of death and the date of trial is $23,067.00 ($19,070.00 + $27,065.00 devided by 2). The deceased's living expenses, as given by the father, is $250.00 per week which totals $13,000.00 p.a. These expenses do not include clothing and entertainment which I estimate to be $1,500.00 p.a. His father's evidence suggests that his son was given to wearing fine clothes and expensive jewellery. The deceased's living expenses is calculated to be $14,500.00 p.a. which is approximately 63% of his net income. The award for the pre-trial period is $51,029.00 which is 37% of $138,402.00 ($23,067.00 x 6). For the post-trial period the net income is $184,536.00 ($23,067.00 x 8). So the award will be 37% of this sum which is $68,278.00. Accordingly, under the Law Reform (Miscellaneous Provisions) Act the award is as follows:

Special Damages	$1,450.00
Funeral Expenses	$6,500.00
Administration Costs	$1,013.00
	$8,963.00

There will be interest at 3% p.a. on this amount of $8,963.00 from the date of the service of the writ on the 1st and 2nd defendants until the 26th July, 1990. For the 'lost years' -

Pre-Trial period	$51,209.00
Post-Trial period	$68,278.00
	$119,487.00

In addition, there is an award of $3,000.00 for the loss of expectation of life.

Finally, the costs of the plaintiff and those of the 3rd and 4th defendants are to be bourne by the 1st and 2nd defendants which costs are to be agreed or taxed.