JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 20/90

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR ESTATE LOUIS KELLY, DECEASED)	PLAINTIFF/ APPELLANT
AND	DR. RANDOLPH EDWARDS	DEFENDANT/ RESPONDENT

Messrs. M. Frankson and B. Marshall instructed by Messrs. Gaynair & Fraser for appellant

Mr. E. P. DeLisser instructed by Kelly, Williams & McLean for respondent

November 27 & 28, 1990 and March 18, 1991

WRIGHT, J.A.:

This is an appeal against the decision of Gordon, J. on February 13, 1990, in which he dismissed the claim of the plaintiff/appellant, who sought compensation on the behalf of the estate of Louis Kelly who, along with his two daughters, was killed when they were hit down by a car driven by the defendant/respondent on the dual carriage-way at Harbour View in the vicinity of the Caribbean Construction Company. The basis of the judge's decision was his conclusion that there was no proof of the cause of the accident and that speed alone is not evidence of negligence. This finding is challenged by two grounds of appeal, viz.:

"1. That the Learned Judge erred in law in holding that the Plaintiff/Appellant failed to establish a prima facie case of negligence against the Defendant/Respondent when there was sufficient evidence adduced at the trial which established on a balance of probability a prima facie case of negligence against the Defendant/Respondent for which the Defendant/Respondent has offered no explanation.

2. Further and/or in the alternative the Learned Trial Judge was wrong in law in holding the Defendant/Respondent not liable having found as a fact that the Defendant/Respondent was driving at a fast rate of speed to which the Defendant/Respondent failed to give an explanation by way of evidence adduced on his behalf so as to disprove and/or negative the inference of negligence on his part."

The trial began on April 6, 1988, and on the following day was adjourned sine die because of the absence of the plaintiff's witness. The trial was not resumed until February 12, 1990, and was concluded next day without the Court hearing one word of evidence from the defendant/respondent.

Alfred Burton testified that at about 5:45 p.m. on Wednesday 6th September, 1978, he was driving a minibus towards Bull Bay along the Harbour View dual carriage-way. He was travelling in the right lane behind a car. He responded to a signal from the car ahead and reduced his speed which was then 30 - 35 m.p.h. A BMW motor car travelling in the left lane, which was clear, sped past at between 60 and 80 m.p.h. It had passed him only a few chains when he heard the screeching of tyres and the sound of an impact. Mr. Burton arrived at the scene to behold a gruesome sight. The bodies of a father and his two daughters were dispersed - one child on the island

dividing the east-bound and the west-bound lanes of the dual carriage-way, the father on the white line between the two east-bound lanes and one daughter under the front wheel of the BMW three chains away. It was he who pulled the child's body from beneath the car. The defendant/appellant was there but no one assisted Mr. Burton in removing the child's body from underneath the car. Challenged in cross-examination about the speed of 60 - 80 m.p.h. of the BMW, he said it could be more - the BMW was "flying very low". Of significance, he said there had always been a sign indicating the entrance to gates 1, 2, 3 of the Caribbean Construction Company.

Sergeant Herman Segree of the Harbour View Police Station arrived on the scene at about 6:00 p.m. - just fifteen minutes after the incident, but by that time Louis Kelly had been rushed to the Kingston Public Hospital where he died. The bodies of the two children were resting on the island dividing the dual carriage-way. He saw blood and debris in the left lane before Gate #3 of the Caribbean Construction Company. A Bus Stop was in the vicinity of the gate. BMW LN 6675 with its complete front section, including the windscreen, damaged was three chains east of the children's bodies in the left lane and facing east. The day was fair and the road surface was dry asphalt.

At the scene he saw and spoke with the defendant/respondent, the registered owner of the car. He asked him for a statement but he declined stating that he could not do so until he had contacted his attorney. The car was removed to the Elletson Road Police Station for examination. Next day the defendant/respondent went to the police station and told the officer that, on the instructions of his attorney, he would not give a statement.

No measurements were taken but the scene was photographed. However, the Court did not have the benefit of these photographs.

The reticence adopted by the defendant/respondent continued at the trial. He gave no evidence and called no witnesses. That was, therefore, all the evidence as to liability which Gordon, J. had before him. Was he justified in coming to the conclusion that the defendant/respondent was not liable holding, as he did, that speed alone was not proof of negligence?

On the question of liability, Mr. Frankson for the plaintiff/appellant had made the following submissions:

1. Manifest that Edwards travelling at excessive and, consequently, improper speed.

2. Reasonable inference he mowed down victims.

3. Edwards not keeping proper look-out or else he would have seen traffic slowing down and also see the three persons whom he eventually killed in time to avoid the accident.

4. He was driving without due regard to other users of the road and that his manner of driving was dangerous and reckless.

For the defendant/respondent it had been submitted by Mr. Williams that the evidence of speed given by Mr. Burton ought not to be accepted because if it were true the victims would have been further dispersed. It was also contended that it was not open to the Court to infer that the signal to slow down was given to anyone but Mr. Burton and that even if the evidence of speed were accepted that alone would not be sufficient to establish negligence.

So far as the submission regarding the signal is concerned, it is obvious that it ignores the fact that it is only a white line which separates the right lane in which

Mr. Burton was travelling from the left lane in which the BMW was "flying very low" and the need for caution would equally apply to both lanes. Also, the submissions by Mr. Williams failed to consider other relevant matters, viz:

1. The presence of the sign indicating the three gates from which vehicular traffic or pedestrians could in all probability emerge at any time.

2. The presence of the bus stop in the vicinity of the Gate #3 before which the collision appears to have taken place.

3. The unexplained presence of the body of one child underneath the car three chains from the point of impact.

4. The inferences to be drawn from the very severe damage to the entire front of the car.

5. The fact that the collision took place on a straight stretch of road - no obstruction to visibility.

To my mind, these are very pertinent factors which did not receive the consideration they deserve.

On the question of speed, I begin with the fact that the defendant/respondent was travelling at a speed greatly in excess of the speed limit allowed anywhere in Jamaica which is 50 m.p.h. But that factor alone has been held not to be proof of negligence. In **Barna v. Hudes Merchandising Corpn.** (1962) Sol. Jo. 194 the defendant was driving in excess of the speed limit (30 m.p.h.) when he unexpectedly came upon another vehicle blocking the road in an endeavour to turn on to a main road. The defendant was held to be not liable in failing to avoid a collision. Again in **Tribe v. Jones** (1961) 105 Sol. Jo. 931, the defendant was held not guilty of dangerous driving when in the early morning, traffic being light, he drove at speeds between 45 and 65 m.p.h. without any accident. It was

held that a fast speed was not automatically dangerous although in many cases it might well be so.

Quinn v. Scott (1965) 2 All E.R. 588: (1965) 1 W.L.R. 1004, is often cited as authority for the proposition that high speed alone is not negligence. But there is a caveat to that pronouncement. It was held that high speed alone is not evidence of negligence unless the particular conditions preclude it [Emphasis supplied]. **Hurlock v. Inglis** (1963) 107 Sol. Jo., though a decision of a single judge, is based upon common-sense. The defendant's Jaguar, travelling at 100 m.p.h. on the M1, had got out of control and collided with another vehicle causing personal injuries. There were skid and tyre marks over 950 feet long. The defendant said he had swerved to avoid collision with a van which had swerved before him just as he was overtaking a car. Havers, J. held that while travelling at 100 m.p.h. on the M1 was not in itself negligent, the defendant, in the circumstances, was negligent. He had not given a satisfactory explanation of what had happened. He had slammed on his brakes and the car had travelled a considerable distance backwards.

Chapman v. Copeland (1966) Times Law Report (May 6) is more recent than the cases cited in which speed and the silence of the defendant were dealt with. One Mr. Chapman was waiting to cross the Great North Road which is a dual carriageway the first lane of which was twenty-four feet wide. When he had got seventeen feet across he was hit by a powerful Citroen car driven by the defendant Copeland. Measurements of the tyre marks showed that the car travelled 184 feet before pulling up. The victim fell nine feet six inches ahead of the car while his cycle was thrown thirty-four feet ahead of the car. Apart from the measurements and the language they spoke the only other evidence available to Mr. Chapman's widow was a Mr. Wragg, who had seen Mr. Chapman waiting to cross with his bicycle beside

him. He had looked away when he heard the screeching of brakes.

At the time, as in the instant case, the defendant elected not to call any evidence on his own behalf. The defendant stood on the point that no evidence of negligence had been adduced against him. He was found liable. On appeal (Master of the Rolls, Danckwerts, L.J. and Salmon, L.J.), it was held, dismissing the appeal (per Master of the Rolls):

> "That when the widow put forward a case as here, without being able, from the necessity of the case to call evidence, it was incumbent on the defendant if he sought to escape liability, to give his side of the case. The very fact that an accident had happened and a man had been killed called for an answer. No answer was given by this defendant; and on the slender evidence of the brake marks it seemed to his Lordship that the inference was plain enough, or at least sufficient for the Court's purposes.
>
> If the defendant had been going at a reasonable speed and keeping a good look-out surely he would have seen Mr. Chapman waiting to cross, made allowances and pulled up in time, to avoid an accident."

It was a unanimous finding of the Court that the defendant was negligent. Cited also before us was the case of **Gordon Townsend and another v. Jerome Farrell** S.C.C.A. 4/86 (December 18, 1987) (unreported) in which speed was held to be the operative cause of the accident. However, from an evidential point, it is quite distinguishable from the instant case in that evidence was adduced by both sides so that the Court had a full account of what happened.

I find that the rationale in **Chapman v. Copeland** (supra) is peculiarly apposite to the case under consideration though, on the evidence, I think the present is a stronger case having regard to the relevant factors to which I have

already referred. To my mind, it is a reasonable inference that it was the presence of Kelly and the two children on the road which necessitated the signal to slow down of which Mr. Burton spoke. At a speed of 60 m.p.h. the BMW would be going at eighty-eight feet per second. But Mr. Burton put the speed even higher. The victims would have no opportunity of getting out of the way of the BMW even with the co-operation of traffic in the right lane. Before they could make even a few steps they would have been mowed down. Had the defendant/respondent been travelling at a reasonable speed and keeping a proper look-out he ought to have been able to see them in time to avoid them. While it is legitimate for a defendant in such a position to elect not to give or call evidence, I must ask the question, how could he, in the face of the available evidence, if he wished to escape liability, or reduce his level of liability, adopt such a course? There is no question in my mind but that the sudden and violent extinction of three human lives in such circumstances call for an answer. Not even a whisper was vouchsafed. In the circumstances, there being no evidence to sustain a contrary view, I hold that the defendant/respondent is wholly liable.

I must now turn to a consideration of the question of damages. Unfortunately, on this difficult aspect of the case, we are without the assistance of the trial judge who merely recorded the evidence tendered but did not proceed to make an assessment. In the circumstances, it would be logical to remit the case for him to make the assessment but there are factors which incline me to a different conclusion. Twelve years have already elapsed since the accident and any deferment of a determination of the matter can only be prejudicial to the defendants. Added to that is the fact that all the evidence is already on record and when counsel argued the matter before

us both counsel merely adopted the submissions which they had made before the trial judge. I think, in those circumstances, we are in as good a position as the trial judge who would, on a referral, be doing no more than considering the recorded evidence and the submissions. One peculiarity about this case is that because of the long delay in bringing the case to trial all damages to be assessed have already accrued.

The evidence shows that the deceased Louis Kelly, who, according to his widow, was forty years of age at the time of his death, was for some years employed as a welder at Caribbean Construction Company and the record of his earnings shows that his last pay in September, 1978, was $103.04 per week. In addition, his widow testified that in the evenings and on Saturdays he did welding at the garage of one Mr. Jakoo from which he earned $100 - $200 per week. Accepting the additional earnings of $200 as a working base and adding the regular pay of $103 his weekly earnings would round off at $300. Of this amount the widow said he would give her $80 and, in addition, he would provide money for the children's clothes and bus fares. At one time they lived at Bull Bay but subsequently moved to Franklyn Town. It would seem that they lived as tenants. Accordingly, provision must be made for rent as well as light and water. For children's clothes, rent, light, water and bus fares I would allow the sum of $120 per week. The total dependency would thus be $200 weekly that is, two-thirds his weekly earnings.

At the time of the trial Mr. Winston Bennett from Caribbean Construction testified that the welders were then earning $300 - $400 per week basic and that over-time boosted the figures to $550 - $600 per week. Had Mr. Kelly been alive and still employed he would have earned the same because there was only one grade of welders. He further said that in 1978

there was a lull in the construction trade. I would adopt the figure of $400 per week and omit the over-time by way of discounting. The median for his weekly earnings would, therefore, be $300 + $400 ÷ 2 = $350 per week. That would yield a weekly dependency of $233.33 which, for one year, would amount to $233.33 x 52 = $12,133.16. In the light of the cases discussed in **Dyer v. Stone** S.C.C.A. 7/88 dated 9.7.90 (unreported), I would think a multiplier of eight years is appropriate. The total dependency would be $12,133.16 x 8 = $97,065.28, which is the amount to apportion between -

the widow

Ivanhoe born 13.6.74

Dalton born 1.2.77.

On the premise that the widow will be responsible for the care of the children, I would give her $67,065.28, to Ivanhoe $14,000 and to Dalton $16,000. Such then is the award under the Fatal Accidents Act. In addition, the widow will receive an award of $1,050 to cover funeral expenses.

Law Reform (Miscellaneous Provisions) Act.

For loss of expectation of life the conventional award of $3,000 will be made.

So far as an award for "Lost Years" is concerned, no evidence was tendered from which could be ascertained what surplus, if any, the deceased would have left over after spending for his own needs. Nor has it been disclosed whether, if such an award could be made, the widow would, also, benefit since she could not take both benefits. It follows that there is no basis on which any award can be made under this head.

The appeal is accordingly allowed. The appellant will have his costs of appeal and costs below to be taxed or agreed.

FORTE, J.A.:

I agree.

DOWNER, J.A.:

I agree.