IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

CIVIL APPEAL NO. 9/85

1-12-86
Reported

Before The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Georges, J.A.
The Hon. Mr. Justice Henry, J.A.

Between: Arthur Woods in his capacity as Administrator of the Estate of N. Edgar Woods, deceased .. Appellant

AND John Francis .. Respondent

Mr. P. Lamontagne, Q.C. with Mr. T. Shea of Hunter & Hunter for Appellant
Mr. N. Hill, Q.C., and Mr. William Rodger for Respondent

JUNE 2, 3, 4, 5, 6 and December 1, 1986

ZACCA, P.

This is an appeal against the judgment of the Chief Justice with respect to the quantum of damages awarded to the appellant. There is also a Cross Appeal by the respondent as to liability and in the alternative contributory negligence.

On June 18, 1983 at about 10.15 p.m., there was a collision on the West Bay Road between a Honda Motor Car driven by Edgar Woods (the deceased) and a Chevrolet Station wagon taxi driven by the respondent. As a result of the accident, Edgar Woods died. The respondent received injuries and was unconscious immediately after the collision.

Following the collision, the respondent was charged with the offence of causing death by dangerous driving. On December 5, 1983, the respondent was convicted on indictment in the Grand Court following a trial by jury for the offence of causing the death of the deceased by dangerous driving. An appeal to the Court of Appeal, against his conviction was dismissed.

The appellant who is the deceased's brother, in his capacity as Administrator of the Estate of N. Edgar Woods brought an action against

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the respondent to recover damages for negligence for the deceased's estate under the Estates Proceedings Law, 1974 and for the deceased's mother, his only dependent, under the Law of Torts Reform Law. There was a Counter Claim by the respondent for damages for negligence.

The learned Chief Justice gave judgment for the appellant on the claim and the counter claim and awarded damages of $102,340.00. This included special damages agreed at $10,340.00 and $2,000 for loss of expectation of life.

The appellant contends that the learned Chief Justice failed to adopt the proper approach in assessing damages under the Estate Proceedings Law.

On the Cross Appeal, the respondent contends that the issue of contributory negligence arose on the evidence and that the learned Chief Justice should have made a finding of contributory negligence. Counsel for the respondent argued that contributory negligence arose as a result of the driving of the deceased and also on the evidence that the deceased was not wearing a seat belt.

In assessing damages for the 'lost years' the learned Chief Justice observed that this was the first claim under this head that had come before the Courts in the Cayman Islands.

The doctrine of the "lost years" received recognition in England in the case of Pickett v. British Rail Engineering Ltd. 1979, 1 ALL E.R. 774.

In Pickett's case, the House of Lords held that a person whose expectation of life was reduced as a result of injuries sustained through the negligence of another person could claim not only for loss of earnings for his shortened period of life but for what he would have earned during the period of the "lost years".

At page 782, Lord Salmon stated :

> " Suppose a Plaintiff who is 50 years old and earning a good living with a reasonable expectation of continuing to do so until he reaches 65 years of age. As a result of the defendant's negligence he has contracted a disease or suffered injuries which cut down his expectation of life to, say, five years and prevent him from earning any remuneration during that period. Are the damages to which he is entitled confined to compensation for the loss of the remuneration he would probably have earned during those five years, or do they include compensation for the loss of the remuneration which, but for the defendant's negligence, he would probably have earned for a further ten years, i.e. for the rest of what would

" have been his working life? In my opinion there is no reason based either on practice or logic for supporting the view that he, and therefore his estate, is entitled to no damages in respect of the money he has been deprived from earning during these ten years.

Suppose that, in the case I have postulated, the plaintiff's action for damages for negligence came to trial two years after he first became incapacitated. He would obviously be entitled to compensation for the remuneration he had lost in those two years. He would also, in my opinion, be entitled to a lump sum to compensate him for the undoubted loss of remuneration which, but for the defendant's negligence, he would probably have earned in the next 13 years, i.e., up to the date when he would have reached retiring age. I do not accept that there can be any justification for limiting this compensation to compensation for the earnings he would have lost in the three years immediately following the trial, and awarding him nothing in respect of the remuneration he would, but for the defendant's negligence, have lost during the next ten years, commonly known in cases such as these as the 'lost years'."

At page 798, Lord Scarman concludes his analysis on damages for loss of future earnings in this way :

" I conclude, therefore, that damages for loss of future earnings (and future expectations) during the lost years are recoverable, where the facts are such that the loss is not too remote to be measurable. But I think, for the reasons given by Lord Wilberforce, Lord Salmon and Lord Edmund Davies, that a plaintiff (or his estate) should not recover more than that which would have remained at his disposal after meeting his own living expenses. "

Whilst accepting the principles of the "lost years" claim, the learned Chief Justice held that in assessing the damages he was not bound by the decisions of any Court save those of the Court of Appeal for the Cayman Islands and the Judicial Committee of the Privy Council. He stated, however, that the English cases and those of other dominions would be persuasive and valuable guides.

In his judgment at page 18 the learned Chief Justice said :

" Perhaps I should state here that I am not bound by the decisions of any Court save those of the Court of Appeal for these Islands and the Judicial Committee of the Privy Council. Naturally the English cases and those of other dominions will be treated as persuasive and valuable guides. But in the application of the doctrine to these Islands I must try to ensure that the application is fair and reasonable, and try where possible, to avoid anomalies, bearing in mind that cases differ and that the approach to different sets of circumstances may require modifications of principles to be applied in order to avoid an unjust outcome. "

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> " I start with the obvious principle and that is that the objective is to compensate the estate. That compensation must be fair. This was recognized in Gammell v. Wilson (per Lord Edmund Davies at p. 587). That is, after all, the whole purpose of the Estates Proceedings Law - to preserve actions for the benefit of the Estate so that it will not be denied the fruits thereof by reason of the earlier Common Law rule.
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> Secondly, I adopt the observation of Lord Salmon in Pickett v. British Rail Engineering Ltd. at p. 784 that "damages for the loss of earnings during the 'lost years' should be assessed justly and with moderation."
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> Thereafter, I depart from any rigid formula, treating each case on its merit and bearing in mind features which I consider best suited to the Islands. "

The learned Chief Justice held that the deceased's earnings at the time of his death was $75,000.00 a year. From that should be deducted $35.000 - being $20,000 for living expenses and $15,000 spent in support of his mother. He said that he was departing from English authorities in holding that the $15,000 should be included in arriving at the desired total expenditure.

He failed to apply the multiplicand/multiplier formula for assessing damages and observed that he was again departing from precedent.

In Pickett v. British Rail Engineering Ltd. (supra), the question of assessment of damages for the lost years was considered by the Law Lords. At page 781, Lord Wilberforce said :

> " My Lords, I have reached the conclusion which I would recommend so far without reference to Skelton v. Collins in which the High Court of Australia, refusing to follow Oliver v. Ashman, achieved the same result. The value of this authority is two fold; first in recommending by reference to authority (per Taylor, J.) and in principle (per Windeyer, J.) the preferable solution, and secondly, in demonstrating that this can properly be reached by Judicial process. The judgment, further, bring out an important ingredient, which I would accept, namely that the amount to be recovered in respect of earnings in the 'lost years' should be that amount after deduction of an estimated sum to represent the victim's probable living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependents and others and this he would do out of his surplus. There is the additional merit of bringing awards under this head into line with what could be recovered under the Fatal Accidents Acts. "

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At page 784, Lord Salmon stated :

> " One of the factors which, however, the Common Law does not, in my view, take into account for the purpose of reducing damages is that some of the earnings, lost as a result of the defendant's negligence, would have been earned in the 'lost years'. Damages for the loss of earnings during the 'lost years' should be assessed justly and with moderation. There can be no question of these damages being fixed at any conventional figure because damages for pecuniary loss, unlike damages for pain and suffering, can be naturally measured in money, the amount awarded will depend on the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate.
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> In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate, if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration.... "
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> I think that in assessing those damages, there should be deducted the plaintiff's own living expenses which he would have expended during the 'lost years' because these clearly can never constitute any part of his estate. The assessment of these living expenses may, no doubt, sometimes present difficulties, but certainly no difficulties which would be insuperable for the Courts to resolve, as they always have done in assessing dependency under the Fatal Accidents Act. "

Lord Edmund Davies also offered guidance by stating that in reaching the final figure, the Court should make a suitable deduction for the total sum which would have been expended by the plaintiff on himself during the 'lost years'.

Gammell v. Wilson, 1981, 1 ALL E.R. 578, was also a case which considered damages recoverable in respect of loss of earnings in the 'lost years'. This case followed and applied Pickett's case.

In Gammell v. Wilson, the House of Lords held that on a true construction of s. 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act, 1934, the restriction on an estate recovering or being deprived of a loss or gain to the estate consequent on a person's death applied only to a loss or gain directly consequent on the death and not to a loss or gain resulting from a right to recover damages which vested in the deceased immediately before his death and which then passed to the beneficiaries of his estate, whether they were his dependents or not.

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That construction coupled with the principle that a cause of action for loss of earnings in the 'lost years' vested in the deceased before he died (and in the case of instantaneous death vested in him immediately before he died) meant that the estate was not precluded by s. 1(2)(c) for recovering damages for the deceased's loss of earnings during the 'lost years' in a claim under the 1934 Act. Accordingly, even though it produced a result which may be neither sensible nor just, the Court was constrained to hold that the plaintiffs were entitled to the damages awarded for the 'lost years' despite the fact that those damages far exceeded the amount to which they were entitled under the Fatal Accidents Act, as dependents.

In that case, the Judge applied a multiplier in assessing damages for the 'lost years'.

This principle was not criticised or interfered with by the House of Lords.

Lord Diplock indicated that in assessing damages for the lost years there should be deducted from the total earnings the amount which the deceased would have spent out of those earnings on his own living expenses and pleasures since this would represent an expense that would be saved in consequence of his death.

At page 593, in his approach to the assessment of damages, Lord Scarman stated :

> " The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the Court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the Court must make the best estimate it can. In civil litigation, it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions; a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence, a teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there

"will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.

The problem in these cases, which has troubled the judges since the decision in Pickett's case, has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of loss working years accepted as reasonable in the case).

My Lords the principle has been settled by the speeches in the House of Lords in Pickett's case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death could suggest he was reasonably likely to achieve. Subtle mathematical calculations, based as they must be on events or contingencies of a life which he will not live, are out of place; the Judge must make the best estimate based on the known facts and his prospects at time of death. "

In considering the assessment of damages recoverable by a deceased's estate for the deceased's loss of earnings in the 'lost years', O'Connor, L.J., in Harris v. Empress Motors Ltd., 1983, 3 ALL E.R. 561 stated at page 575 :

" I return to the two decisions in the House of Lords, Pickett v. British Rail Engineering Ltd., 1979, 1 ALL E.R. 774 and Gammell v. Wilson, Furness V.B. & S. Massey Ltd., 1981 1 ALL E.R. 578. In my judgment three principles emerge :

(1) The ingredients that go to make up living expenses are the same whether the victim be young or old, single or married, with or without dependents ;

(2) The sum to be deducted as living expenses is the proportion of the victim's net earnings that he spends to maintain himself at the standard of life appropriate to his case ;

(3) Any sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings. "

I would adopt the three principles laid down by O'Connor, L.J., as being the principles to be extracted from the two decisions in the House of Lords.

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In the present case the deceased at the time of his death was earning $75,000.00 per year. He spent on himself $20,000.00 a year and in support of his mother he spent another $15,000.00.

Counsel for the respondent submitted that there should be a deduction of money spent on the dependent and that this is supported by Australian cases. The earlier Australian cases would tend to support this view but in the case of Fitch v. Hyde-Cates 1982 - 56 A.L.J.R. 270, it was held that there should be no deduction of money spent to support dependents.

The learned Chief Justice held that the sum of $15,000.00 which was expended by the deceased in support of his mother should be deducted as part of the total expenditure of the deceased.

In doing so he said that he was again departing from the English Authorities.

I can see no justification for departing from the English Authorities and would hold that the expenditure of $15,000 should not have been deducted.

In order to arrive at the multiplicand, only the deceased's living expenses of $20,000 should be deducted. The multiplicand would therefore be $55,000.00.

Counsel for the respondent submitted that the multiplier/ multiplicand formula was not the only formula that could be used in assessing damages for the lost years. That there was no duty on the Judge to use that formula. He referred to Australian cases where the Judges have used actuary tables in assessing damages, for the 'lost years'.

He further submitted that it was open to the Judge to use any formula he considered appropriate in assessing damages in a particular case.

It is to be observed that in the present case no actuarial evidence was before the learned Chief Justice. Clearly he could not adopt that formula.

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The multiplier/multiplicand formula has been used and recognized in the Courts of the Cayman Islands and Jamaica in assessing damages for loss of future earnings in the case of a living plaintiff. S.2 of the Estate Proceedings Law, 1974, preserves the deceased's cause of action. Damages are to be assessed on the basis of compensation for the loss as a result of a shortened life expectancy.

In England, s. 4(2) of the Administration of Justice Act 1982 abolished the 'lost years' claims in the case of deaths after December 31, 1982. No similar legislation exists in the Cayman Islands and therefore the claim for 'lost years' still exists. This was recognized by the Chief Justice in his assessment of damages. However, in his attempt to award moderate damages he departed from the multiplier/multiplicand principle on the basis that he was not bound by the House of Lord's decisions.

He used his own formula in arriving at the figure of $90,000.00 which he awarded as damages for the 'lost years'.

I can see no justification for departing from a formula which has been established in the Cayman Islands' Courts. Whether or not the decisions of the House of Lords are binding on the Courts of the Cayman Islands, they are certainly of much persuasive authority. Need we depart from the position in the Cayman Islands ?

The multiplier/multiplicand formula is one which can be calculated mathematically and whilst it may present difficulties in some cases, the present case does not seem to present any difficulties.

There is no reason therefore for adopting a different formula in the present case. The learned Chief Justice was not justified in departing from the multiplier/multiplicand formula merely because this formula would have awarded a much larger sum in damages.

The deceased was forty five years old at the time of his death. He was unmarried and in good health although he had one kidney surgically removed. His life expectancy was some 25 years and it would be normal for him to have worked at least for another 20 years.

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In arriving at a proper multiplier, account must be taken of his age, any known factors which would be likely to affect his life expectancy and any unforeseen vicissitudes of life. This should include the fact that he had only one kidney. No doubt, his annual earnings would have been increased over the years.

It is to be observed that at the trial before the learned Chief Justice, Mr. Hill for the respondent in addressing the Court on the issue of quantum of damages suggested that the multiplier should be moderate and indicated that a multiplier of 8 to 10 would be adequate.

Taking all these factors into account, including the fact that a lump sum is being awarded, I would hold that a multiplier of 10 would be reasonable and moderate.

Applying the multiplier of10 to the multiplicand of $55,000.00 I would award the appellant damages in the sum of $550,000.00

The learned Chief Justice's attempt to depart from the multiplicand/multiplier formula although laudable must await legislative pronouncement with respect to claims for "the lost years".

On the issue of liability, the learned Chief Justice held that the collision was due solely as a result of the negligence of the respondent. He found no contributory negligence. The issue of contributory negligence was forcefully argued by Counsel for the respondent on the hearing of his appeal. It was submitted that the deceased in not taking any evasive action was guilty of contributory negligence. It is also submitted that the damages should be reduced as a result of the deceased not wearing a seat belt.

At the trial, the plaintiffs did not call any witness but relied on certified copies of the evidence of witnesses who had given evidence for the Crown at the trial of the respondent before the Grand Court. S. 32(1) of the Evidence Act provides for the admissibility of such evidence and is as follows :

> "Without prejudice to section 33, in a civil proceeding a statement contained in a document is, subject to this section and to rules of Court, admissible as evidence of any fact therein stated to which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting

> "under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had,personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly was supplied by him to the compiler of the record indirectly, through one or more intermediaries each acting under a duty. "

By agreement between the parties, the depositions of crown witnesses taken at the Preliminary Enquiry and the Judge's summing up were also admitted in evidence.

The verdict of the jury did not negate the issue of contributory negligence. Assuming for the moment that there was contributory negligence on the part of the deceased, it was still open to the jury to convict the respondent on the charge of causing death by dangerous driving.

The respondent's version as to how the collision occurred was the same as that put forward at the trial before the jury. The jury by their verdict clearly rejected the account given by the respondent.

The plaintiff in order to establish liability relied on s. 37(1) and (2) of the Evidence Law. This section provides for the admissibility of relevant convictions in civil proceedings. S. 37(1) states :

> "In any civil proceedings the fact that a person has been convicted of an offence before any Court in the Islands (subject to sub-section (3)) admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed the offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceeding; but no conviction other than a subsisting one is admissible in evidence by virtue of this section. "

S. 37(2) of the Evidence Law provides :

> "In civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by any Court in the Island -
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> (a) he shall be taken to have committed that offence unless the contrary is proved. "

The burden of proof was therefore altered in the present case. The onus was on the defendant to satisfy the Court that he was not driving dangerously. To put it another way, that he did not commit the offence for which he was convicted.

In Taylor v. Taylor, 1970, 2 ALL E.R. 609, Davies, L.J., at page 612 states :

> " That section obviously, in contradistinction to s. 13 of the 1968 Act, which deals with the effect of convictions when they fall to be considered in an action of defamation, means that the onus of proof of, as it were, upsetting the previous conviction is on the person who seeks to upset it. It is probable, though I do not want to make any particular pronouncements about it at the moment, that that is, an onus of proof on balance of probabilities. But, having said that, it nevertheless is obvious that, when a man has been convicted by 12 of his fellow countrymen and countrywomen at a criminal trial, the verdict of the jury is a matter which is entitled to very great weight when the convicted person is seeking, in the words of the statute, to prove the contrary. "

Also in Wauchope v. Mordecai 1970 1 ALL E.R. 417, at page 419, Lord Denning, M.R. said :

> " So in this case, in view of the conviction, it has to be taken that the defendant had opened the door of the car so as to cause injury, unless the contrary was proved. The burden of proof in this civil case was altered. Instead of the burden being on the Plaintiff to prove that the defendant was negligent, it was for the defendant to prove that he had not opened the door so as to cause injury. "

The provisions of the Evidence Law is similar to the English provisions and so it was for the respondent to prove that he was not driving dangerously.

In summary, the plaintiff's case before the jury was that the respondent was overtaking other vehicles on the West Bay Road and in so doing went over to the right of the centre line and collided with the deceased's car which was travelling in the opposite direction on its correct side of the road.

The respondent's case was that he was travelling on his correct side of the road, that the deceased's car came out of a side road and collided with his vehicle whilst it was travelling on the correct side of the road. He denied overtaking any vehicles.

Clearly these two accounts were so different that the jury must have rejected the respondent's account in convicting him.

The plaintiff relied on the evidence given by the Crown witness at the criminal trial.

The evidence of Judy Wood was to the effect that the defendant's car overtook her car and she saw him overtaking another car when the collision

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occurred. She, however, stated that prior to the collision she did not see the lights of any oncoming vehicle. There was also the evidence of Roland Schwery. He was a passenger in the deceased's motor vehicle and was sitting to the left front seat. His evidence was to the effect that his car was being driven by the deceased on the left side of the West Bay Road going in the direction of George Town. The lights of the car were on. He observed a car coming from the opposite direction overtaking two or three cars and there was a collision.

They had left the Holiday Inn at about 9.30 p.m. proceeding to the Royal Palms Hotel which was about 1½ miles away. He said that the accident occurred at about 10.15 p.m. When he saw the lights of the on-coming vehicle, it was about 45 yards away. He denied that it could have been some 300 yards away but admitted that at the Preliminary Enquiry he had said that it could have been between 200-300 yards. He also denied that his car had driven out from a side road called the Dyke Road. He admitted that at the Preliminary Enquiry he had not said that the on-coming car was overtaking two or three cars. He was unable to recall whether his vehicle pulled closer to the left or stopped when he saw the on-coming vehicle.

There was also the evidence of police constable Martin Bodden who said that he saw the deceased's car coming in the opposite direction along West Bay Road. This evidence contradicted the evidence of the respondent that the deceased's car was coming out of the Dyke Road.

The evidence of police constable Ebanks was also relied on by the plaintiff. He was the investigating constable and took measurements at the scene of the collision. He drew a sketch plan which was not to scale. He said that he spoke to the respondent and asked him how the accident had happened. The respondent replied that the Honda had come from the opposite direction, zig, zagging in the road and collided with him.

No challenge was made to this witness as to the correctness or truth of this alleged statement. The respondent, however, in his unsworn statement from the dock said that the deceased's car had come out from the Dyke Road. This would be inconsistent with the statement allegedly made to constable Ebanks. Again at the trial before the

learned Chief Justice, the respondent's case was that the deceased's car had come out from the Dyke Road.

The evidence of constable Ebanks clearly placed the respondent's car over the centre line and on the deceased's side of the road. It may be that the deceased car was not as close to its left as was being put forward but was nevertheless on its correct side of the road.

Although the witness, Roland Schwery admitted that at the Preliminary Enquiry he had said that the on-coming car was about 200-300 yards away when he saw the lights, no explanation was offered nor was any asked for as to why he had said so at the Preliminary Enquiry. His evidence at the trial was that the oncoming car was 45 yards away. In my view his evidence at the Preliminary Enquiry cannot assist the respondent in the Court coming to a conclusion that the oncoming car was much further away when first seen by Schwery.

In an unsworn statement at the criminal trial, the respondent stated that on reaching near the Dyke Road, a car came from the Dyke Road without lights. It zig zagged and hit his car and his car went over the right hand side of the road.

The learned Chief Justice held that there was an abundance of evidence to justify the rejection of the respondent's version and the finding of the jury that it was the respondent's dangerous driving that was a substantial cause of the accident. That the dangerous driving was the overtaking of a car in the face of on-coming traffic when it was unsafe so to do.

He than asked himself the question: 'Does the evidence for the defence rebutt the statutory presumption, supported as it is by the record of the evidence of the Crown Witness?' He observed that the onus was on the defence to show, on a balance of probabilities, that it was not the defendant's negligent driving that caused the accident. In the alternative, it was open to the defendant to show that there was contributory negligence.

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The learned Chief Justice therefore considered the evidence of the Crown witnesses as given at the criminal trial and the evidence given by the respondent and his witness at the trial before him.

Before the Chief Justice, the respondent in his evidence maintained his version that he was on the correct side of the road when the deceased's car came out of the Dyke Road and collided into his right fender. That the deceased's car had no lights and he was unable to take any avoiding action as the deceased's car came out suddenly.

Unlike at the criminal trial the respondent called one witness, a Mr. Harris Meyersohn. His field of expertise was in vehicle collision analysis which included the interpretation of physical evidence. He came to the Cayman Islands in March 1985 and based his evidence on the transcript of the criminal trial, photographs, and the sketch plan prepared by constable Ebanks. He also examined the damage to the deceased's car. He also visited the scene of the collision.

His evidence supported the version of the respondent as to how the collision occurred in June 1983.

In considering the evidence of the respondent the learned Chief Justice at page 9 of his reasons for judgment stated :

> " I have dealt with the probabilities of the defendant's version earlier. His evidence did nothing to give it credibility. He was an unsatisfactory witness and I was left far from satisfied on the balance of probabilities that he was giving a truthful version of how the accident happened. I think that is all I need say about his evidence on the issue of rebutting the presumption adverse to him. "

Finally after considering the evidence of Mr. Meyersohn, the learned Chief Justice stated at page 14 of his reasons :

> " In the end, and leaving aside all the foregoing observations, Mr. Meyersohn's conclusions conflict directly with the evidence of eye witnesses who saw what happened. On the evidence of two eye witnesses, the deceased's car did not come out from the Dyke Road. It was driving steadily on its proper side of the road towards George Town at about 30-35 m.p.h. On the evidence of the two eye witnesses the defendant's car did come out and over the centre line. It did overtake another vehicle. And in doing so the accident occurred. That evidence is clearly consistent with the sketch map, Exhibit 1, prepared by police constable Ebanks and the photographs in Ex. N.

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> " That evidence was believed by the jury. The jury could not have convicted the defendant of the offence charged had they not believed that evidence. On the authority of Taylor v. Taylor the verdict of the jury is entitled to very great weight.
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> I find that the defendant has not discharged the onus on him in rebutting the presumption which arise from his conviction. "

The only evidence considered by the learned Chief Justice that was not considered by the jury was the evidence of Mr. Meyersohn.

In my view the evidence of Mr. Meyersohn, a witness who was reconstructing the events which had taken place, had to be considered along with the evidence of the Crown witnesses.

In view of the learned Chief Justice's findings and a consideration of the evidence in the case, I am unable to say that the evidence of the respondent and Mr. Meyersohn's was such that it could be said that the defendant has discharged the onus on him in rebutting the presumption which arises from his conviction.

I would, therefore, concur in the finding of the Chief Justice that the plaintiff has established liability in the respondent.

The question now arises as to whether there was contributory negligence on the part of the deceased. There are two issues involved in this aspect of the case :

(1) Did the deceased fail to take evasive action ? ;

(2) Are the damages to be reduced as a result of the failure of the deceased wearing a seat belt ?

The learned Chief Justice considered the question of contributory negligence with respect to whether (a) the deceased was driving without lights and (b) was he wearing a seat belt at the time of the collision.

His finding that the headlights on the deceased's car were on, led him to the conclusion that there was no contributory negligence on the part of the deceased in that respect.

There was evidence to support this finding of fact and I see no reason for interfering with such a conclusion.

However, on the hearing of the appeal, Counsel for the respondent submitted that the failure of the deceased to take evasive action amounted to contributory negligence. In support of this submission

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the case of Charran v. Savitri Singh and Another 1981, 30 W.I.R. 148 was cited. In that case both vehicles were driving about the middle of the roadway. It was held that the appellant should not have maintained his course near the middle of the road and so was guilty of negligence.

In the present case, however, the two versions at trial were so diametrically opposed, that the issue of both cars travelling near to the centre line and in opposite directions, cannot be given any weight. In view of the evidence led by the prosecution and which was relied upon by the plaintiff and the evidence led by the defence, and having regard to the trial judge's findings, there is no credible evidence for stating that the two vehicles were travelling in such a manner as to enable the deceased to take evasive action. The plaintiff's case is that there was a sudden overtaking and the only evidence as to the distance the cars were from each other at the time of the overtaking was the evidence of Mr. Schwery. In those circumstances, the evidence is not such that it can be said that the deceased could have taken evasive action.

The defendant himself stated in evidence that he could not take any avoiding action because the deceased's car came out of the Dyke Road suddenly.

In my view the evidence does not support the respondent's contention that the deceased's omission to take evasive action amounts to contributory negligence.

The learned Chief Justice held that failure to wear seat belts would be grounds for reducing the award of damages. However, he held that there was no evidence that the wearing of a seat belt would have saved the life of the deceased. He, therefore, concluded that the fact that the deceased was not wearing a seat belt would not in the circumstances of this case reduce the quantum of damages.

In Froom and Others v. Butcher 1975 3 ALL E.R. 520, it was held that the driver or front seat passenger in a motor vehicle who failed to wear a seat belt and was injured in an accident had to bear some responsibility for those injuries, even though he was not responsible

for the accident, if the injuries would have been avoided, or their extent reduced, by wearing a seat belt.

In that case there was evidence from which the Court was able to hold that the injuries could have been avoided if the driver had been wearing a seat belt.

In the present case, no evidence was presented as to whether the wearing of a seat belt would have prevented death occurring. In fact the issue was not pleaded or adverted to in the evidence at the trial, or in the submissions of Counsel which were concluded on May 5, 1985 and decision reserved.

The matter was raised for the first time on November 8, 1985 when the Court convened to hear submissions on the issue of seat belts. It would appear that this was as a result of the invitation of the trial Judge.

In my view unless there was evidence before the Court to enable the trial Judge to make a finding that the wearing of the seat belt would have prevented death occurring, he could not arrive at such a conclusion.

The learned trial Judge was therefore correct in holding that there was no evidence before him to assist him in coming to such a conclusion.

I would therefore conclude that the evidence does not support a finding of contributory negligence.

Special damages had been agreed at $10,340.00. I would award the plaintiff $560,340.00 which includes the award agreed for special damages.

The appeal is therefore allowed and the judgment of the trial Judge varied to one of $560,340.00 with costs to the appellant.

I would dismiss the cross apppeal with costs.

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

C.I.CA. No.9 of 1985

GRAND COURT CAUSE No. 112 of 1984

BETWEEN	JOHN FRANCIS	DEFENDANT/APPEL
AND	ARTHUR WOODS in his capacity as Administrator of the Estate of N. Edgar Woods deceased.	PLAINTIFF/ RESPONDENT

GEORGES, J.A. JUDGMENT

At about 10.15 p.m. on June 18, 1983 a collision took place on West Bay Road, near its junction with the Dyke Road, between a Honda motor car and a Chevrolet station wagon. The Dyke Road is an unlit road surfaced with marl branching off approximately at right angles eastward from West Bay Road. Edgar Woods, the driver of the Honda was killed almost immediately. Roland Schwery, his passenger, suffered moderately severe injuries. The driver of the station wagon, the defendant, John Francis, was injured but not as severely. He was charged with causing the death of Edgar Woods by dangerous driving and duly convicted by a jury on his trial.

Arthur Woods, the administrator of the estate of Edgar Woods, the deceased, sued the defendant under the Estates Proceedings Law for damages caused to the estate of the deceased by his negligence and under the Law of Torts Reform Law on behalf of the sole defendant of the deceased, his mother, for damages which she suffered by reason of his death.

The fact that the defendant had been convicted of causing the death of Edgar Woods by dangerous driving was clearly relevant to the issue of negligence in these proceedings and was admitted under s. 37(1) of the Evidence Law. The defendant's conviction having been proved, the defendant, by reason of s. 37(2) of the Evidence Law, was to "be taken to have committed that

offence unless the contrary is proved".

S.37(1) and (2) are in terms identical with s.11(1) and (2) of the Civil Evidence Act 1968 which was considered by the Court of Appeal in Stupple v. Royal Insurance Co. Ltd. (1970) 3 All ER. 230. The Court was agreed that the effect of that section was to shift the burden of proof. In this case, although Mr. Francis was the defendant, the burden rested on him to show that the death of the deceased was not caused by his negligence. The Court of Appeal was, however, divided on the weight to be given to the conviction, an issue which appears to me to be of some importance in the resolution of the issues raised in this case.

The plaintiff called no oral evidence to establish the defendant's negligence. In any event, the burden of disproving it already rested on the defendant. Relying on s. 30 of the Evidence Law the plaintiff tendered the notes of evidence of the witnesses who testified for the prosecution at the preliminary inquiry into the charge of causing death by dangerous driving and at the trial before the jury in the Grand Court. Summing up of the trial judge was also included.

The defendant, who had not given evidence at the trial in the Grand Court, gave evidence on his own behalf and called one witness, an expert; Mr. Harry Myersohn.

It was for the trial judge a novel situation. A proper approach to the evaluation of the evidence was vital and it was in this regard that the weight to be given to the fact of conviction was crucial.

Two approaches was taken in Stupple v. Royal Insurance Co. (supra). Lord Denning M.R. stated at p. 235.

> "I think the conviction does not merely shift the burden of proof. It is a weighty piece of evidence itself."

At page 236 he said -

> "If the defendant should succeed in throwing doubt on the conviction, the plaintiff can rely, in answer, on the conviction itself and he can supplement it, if he thinks it desirable by producing (under the hearsay sections) the evidence given by the prosecution witnesses

in the criminal trial, or, if he wishes,he can call them again. At the end of the civil case, the judge must ask himself whether the defendant has succeeded in overthrowing the conviction. If not, the conviction stands and proves the case."

Buckley L.J. disagreed. He stated at p. 239 -

"In my judgment no weight in this respect is to be given to the mere fact of conviction. If, as seems to be the case, I differ from Lord Denning M.R. in this respect, I do so with the greatest diffidence. The effect of the bare proof of conviction is, I think, spent in bringing s.11(2)(a) into play. But very much weight may have to be given to such circumstances of the criminal proceedings as are brought out in the evidence in the civil action. Witnesses called in the civil proceedings may give different evidence from that which they gave in the criminal proceedings. Witnesses may be called in the civil proceedings who might have been but were not called in the criminal proceedings; or vice versa. The judge may feel that he should take account of the fact that the judge or jury disbelieved a witness who is called in the civil proceedings, or that the defendant pleaded guilty or not guilty, as the case may be. Many examples could be suggested of ways in which what occurred or did not occur in the criminal proceedings may have a bearing on judge's decision in the civil proceedings; but the judge's duty in the civil proceedings is still to decide that case on the evidence adduced to him. He is not concerned with the evidence in the criminal proceedings except so far as it is reproduced in the evidence called before him, or is made evidence in the civil proceedings under the Civil Evidence Act s.2 or is established before him in cross-examination. He is not concerned with the propriety of the conviction except so far as his view of the evidence before him may lead him incidentally to the conclusion that the

> conviction was justified or is open to criticism; but even if it does so, this must be a consequence of his decision and cannot be a reason for it... .....In my judgment, proof of conviction under this section gives rise to the statutory presumption laid down in s.11 (2)(a), which, like any other presumption, will give way to evidence establishing the contrary on the balance of probability, without itself affording any evidential weight to be taken into account in determining whether that onus has been discharged".

Winn L.J. expressed no view on this issue. I am with respect, persuaded by this analysis by Buckley L.J. The judge's duty to try the case on the evidence remains. The fact that there has been a conviction should not predispose him to accepting the truth of the evidence presented to him. The evidence must be evaluated on its merits. The shift in the burden comes into play if, at the end, after evaluating the evidence, a doubt remains as to whether the plantiff has proved a case. Since the burden would then be on the defendant, the plaintiff would succeed.

The trial judge noted that not having the witnesses live, he could not assess their credibility. This was certainly the case. The plaintiff had, however, selected the method of proof and this method deprived him of the advantage which may have been conferred by the appearance of convincing witnesses in the box. The fact that the jury accepted them as credible should not be a factor predisposing the trial judge to do the same. The evidence must be evaluated, including such discrepancies as appear between evidence given at the preliminary inquiry and at the trial to arrive at an opinion of its weight. It is no part of the duty of the trial judge to speculate as to how the jury must have arrived at its verdict.

There were two versions as to how the accident occurred which were not reconciliable the one with the other. The plaintiff's version was that the deceased had been driving the Honda in a Southerly direction along the West Bay Road on his proper hand when the defendant in overtaking vehicles travelling North came on to the deceased's side of the road and collided with the deceased's

car. The defendant's version was that he was travelling North on his proper hand when the deceased's car emerged without lights from the Dyke Road and ran into his car.

A crucial issue, therefore, was whether the deceased's car had or had not come from the Dyke Road. There was evidence from Roland Schwery, a passenger in the Honda, that it had not. The critisicm may be levelled that he is a potential claimant and must have been a friend of the deceased. His evidence is supported, however, by P.C. Martin Bodden.

He testified that at about 11.00 p.m. that evening he was driving North on West Bay when he crossed a car going South bearing registration Number 15072. The car was on its proper side with headlights on. Shortly after he turned into a compound. Very shortly after some men came into the compound and told him something. As a result he drove South on West Bay and in the area of Cayman Resort he saw that the car he had crossed had been involved in an accident with a Chevrolet station wagon resignation number 6490. A man in the car was still pinned behind the wheel.

P.C. Bodden was challenged as to his ability to note the registration number of a car with headlights on travelling at 30 - 35 miles per hour. He insisted, however, that he was not mistaken about the number of the car he had crossed. His evidence was thus independent evidence confirming that of Roland Schwery. There was no reason for concluding that he was being deliberately untruthful. Once a finding is made that the deceased's car had been travelling South on West Bay Road and had not emerged from the Dyke Road the basis of the defendant's case disappeared. The inescapable inference is that he was either being deliberately dishonest by attempting to conceal how the accident had occurred or was completely unaware of how it had in fact occurred and was attempting after the event to work it out.

The defendant gave evidence at the hearing. The trial judge saw him and heard him and concluded that he was an unsatisfactory witness. The trial judge thus had an advantage which this court has not had and there is no reason for questioning

his assessment.

The defendant called an expert Mr. Myersohn. He testified that on an analysis of the damage to the vehicles, the marks on the road and the sketch plan drawn by P.C. Ebanks showing the position of the vehicles after the accident he concluded that the vehicles must have collided at an angle which was consistent with the defendant's version of the accident.

Arguments were addressed to us as to whether the evidence of Mr. Myersohn was admissible at all. He had no academic degrees in physics or engineering. He had done courses in metallurgy He described himself as an expert in accident reconstruction whose expertise had been acquired by practical experience. The Australian High Court in Clarke v. Ryan (1960) 103 CLR 486 took the view that the evidence of such an expert with no academic qualifications should not be accepted at all. The position in England is otherwise. In Williams Francis Murphy (1980) 71 Cr. App. P. 33 the Court of Criminal Appeal held that a recorder had not erred in allowing the prosecution to call a police constable as an expert witness to give his opinion as to the nature of the collision, the course of the defendant's vehicle thereafter and other matters said to be deducible from the marks in the road and the damage to the vehicles. A similar opinion was expressed in Oakley (1979) R.T.R. 417. Mr. Myersohn testified that he had given such evidence in courts in the United States. I would hold that the trial judge was right in admitting the evidence.

Where expert testimony of that sort which essentially cannot be exact, as Mr. Myersohn himself acknowledged, conflicts with credible oral testimony of eye-witnesses it cannot carry much weight. The trial judge quite properly did not give it any weight. I do, however, have reservations as to the correctness of taking judicial notice of knowledge which may be fed to some of us in schools when being taught physics and mathematics. Such matters should either be elicited in cross-examination or be given as evidence by an opposing expert. While the approach of the trial judge may be criticised in that regard, Iam satisfied

that in the context of this case his rejection of Mr. Myersohn's evidence is supportable.

I understood Mr. Hill to contend that even if the defendant's version was not accepted, the marks on the road indicated that the collision between the vehicles took place near the centre line with the defendant's car being atmost 2'8" over that line. If that were so, there would have been ample room on the Eastern lane to allow free passage of the Honda. Additionally there was a hard shoulder on which a car could be driven. In such circumstances even if the defendant's car had come on to the Eastern half of the West Bay carriageway the deceased, had he been taking care, would have avoided the collision. For that reason he could be held guilty of contributory negligence.

In support of that approach he contends that in assessing liability for a collision one should begin with the evidence which is not in dispute and against that background evaluate the acceptability of the oral testimony. The evidence of Judy Woods and Roland Schwery appeared to establish that the defendant's car had come completely on to the Eastern half of the West Bay carriageway. Had that been so there would have been a full head on collision on that side of the carriageway whereas the physical evidence indicated that the collision involved only the right side of the front of both vehicles and that it had taken place at worst, from the defendant's viewpoint, some 2'8" from the centre line.

Accepting this argument would involve constructing a version of the accident different from that put forward by either party at the trial and it would not be correct at this stage to do so. The evidence of both eye witnesses - the defendant and Roland Schwery - indicate that the course of driving which led to the collision was so sudden and unexpected that neither party had time for evasive reaction. It would be sheer speculation to find otherwise.

Accordingly I find the argument unacceptable and cannot on that basis find the deceased contributorily negligent.

Apart from the issue as to whether or not the Honda had come from the Dyke Road, there was the issue as to whether or not its headlights were on. There was evidence from P.C.

Bodden and Roland Schwery that they were. Judy Woods was not aware of the car travelling South which was involved in the collision until the collision had actually occurred. It is common ground that West Bay Road in that area has only a very slight curve. Visibility is good for a long distance ahead. One would have expected Judy Woods to have seen the lights of the approaching vehicle had they been on. The fact that she did not see them can be said to support the defendant's evidence on that point. But it does so only by inference. She may have missed the presence of oncoming lights. On that evidence a conclusion that the Honda did have its head lights on cannot be faulted.

Both sides agree that the likelihood was that the deceased was not wearing a seat belt at the time of the accident. It has been urged that that fact alone establishes that he was contributorily negligent. The trial judge held that the matter had not been adverted to at the trial and that there was no evidence directed to the point which could assist him.

There is persuasive authority for that approach in Froom v. Butcher (1976) Q.B. 286. The Court of Appeal in England held that in determining whether a plaintiff had been contributorily negligent the important question was what was the cause of the damage. This can only be established by evidence. Such evidence as there is in this case of the damage to the vehicles shows that the impact was concentrated on the deceased's side of the vehicle. The deceased was trapped in the vehicle and a mechanical device was needed to pry him free. It seems very unlikely that his injuries would have been less severe had he been wearing a seat belt.

Accordingly on the issue of liability and contributory negligence the conclusion reached by the trial judge seems plainly supportable on the evidence and should be affirmed.

In assessing damages under The Estates Proceedings Law 1974 the trial judge accepted the principle that the estate of the deceased was entitled to recover for lost earnings which the deceased would have received had his life not been tragically shortened. Neither side has questioned this approach.

The deceased was, however, very well paid. In the year

of his death he earned at the rate of nearly $75,000 per year. The evidence was that he spent about $20,000 on personal expenses and about $15,000 in assisting his aged and ailing mother. He was single and died shortly before his 45th biirthday. The post mortem report revealed that he had only one kidney but there is no evidence that this in any way affected his health. He took care of the accounts of a firm of attorneys and managed the corporate services department of its business. It was reasonable to infer that he had many years of profitable employment ahead barring the hazards of unexpected ill health or economic stagnation or recession in the Cayman Islands.

The traditional method of estimating a multiplicand and then selecting a multiplier would clearly have produced a very substantial sum for the benefit of the estate of a deceased whose closest relative and successor was a mother nearing 90 and in poor health. The trial judge accordingly held himself not bound to use such a method. He noted that a sum of $100,000 deposited at today's rate of interest in the United Kingdom and allowed to accumulate at compound interest for 21 years would yield approximately $800,000. He took into account the possibility that the deceased may have got married and that he may have retired early and that economic growth in the Cayman Islands might not continue without reverses. He was of the view that compensation should make good the loss to the estate and that loss could only be such sum as the deceased could save from his earnings. Deductions should be made not only for the money the deceased would have to spend on his own maintenance but also that spent on the maintenance of defendants.

On the other hand he noted that had the deceased lived on and saved he would have earned interest on his savings. There could be capital growth on investments as well as losses and the purchasing power of the dollar could fall. Taking all this into consideration he assessed a figure of $90,000.00.

The results produced by the conventional method of calculating damages for the loss of earnings for the "lost years" have generally been regarded as unsatisfactory by eminent English judges. In Gammell v. Wilson (1981) 1 All E.R. Lord Diplock,

Lord Edmund Davies, Lord Fraser of Tullybelton, Lord Russell of Killowen and Lord Scarman all were of the view that the law of England and Wales relating to damages for death recoverable by the estate of a deceased was neither sensible nor just but was so well established that change could only be brought about by legislation. There has been change in England. The method chosen was not a reform of the method of calculating damages but rather the provision in s.4(2) of the Administration of Justice Act that damages recoverable under s. 1 (1) of the Law Reform(Miscellaneous Provisions) Act 1934 for the benefit of the estate of a person who died on or after 1 January, 1983 shall not include any damages for loss of income in respect of any period after that person's death.

It seems to me beyond argument that the law in England on this issue is fully settled by decisions of the House of Lords. Assessment of damages for future loss of earnings are calculated by determining the appropriate multiplier and multiplicand. In cases where the person injured is alive and makes the claim this method of assessment has been accepted in Jamaica and throughout the Caribbean. As I have indicated the unsatisfactory results reached by this method when applied to a claim for "lost years" when the plaintiff is the estate of the deceased in no way arises from conditions peculiar to the Cayman Islands. Similar dissatisfaction was voiced in the United Kingdom. It would be appropriate to diverge from the settled law in England only when local circumstances make such divergence clearly necessary- de Lasala v.de Lasala (1979) 2 All E.R. 1146 per Lord Diplock at p. 1153.

I understood Mr. Hill to argue that in the area of damages, the common law principle which had to be followed was that damages should only be compensatory. The method of assessing damages to achieve that result was open to local variations. Clearly the contention has merit. Actuarial evidence may be relied on should this be available. The method used in this case did not, in my view, compensate for loss of earnings.

Some reliance was placed on the Australian case of Skelton v. Collins (1965-6) 115 CLR. 94. In that case the plaintiff was the injured party - not his estate. The accident had reduced

him to total unconsciousness. He was 17 years old. Taylor J stated at p. 122.

> "So far as his economic loss is concerned the material before us indicates that the plaintiff at the time of the injury was earning approximately £13 a week. That at the age of twenty-one he would probably have earned something in excess of £20 a week and that by the time he attained the age of thirty his salary would have been, had it not been for the accident some £2,000 to £3,000 per annum. In these circumstances it seems to me that on a balance of what his future income and expenditure on maintenance would have been the economic loss resulting from his destroyed earning capacity should not be rated highly. Particularly is this so when account is taken of the uncertainties and vicissilitudes of life."

A sum of £2,000 was assessed without reference to a multipher or multiplicand or to actuarial tables.

Fitch v. Hyde-Cates (1982) 5G A.L.T.R 270 was a case in which the action had been brought on behalf of the estate of the deceased. The economic loss was quantifiable. The trial judge assessed that as being of the order of $80 per week. He then quantified that loss by determining what sum of money invested at 5% would produce an income of over $80 weekly over 35 years so that the sum itself would be exhausted over that period. This proved to be $70,080. Reducing for contingencies he awarded $60,000. This was increased to $78,000 in the High Court on the basis that the rate of interest to be used for calculation should have been 3% rather than 5%.

This method differs significantly from that used by the trial judge who sought to assess what the deceased's savings would have been over the period of his working life and then found the sum which invested at prevailing rates would have produced an amount roughly equivalent to the estimated savings. Such a method does not appear to me to compensate the deceased for his loss of earnings resulting from his shortened expectation of life. The method used in Fitch v. Hyde-Cates (supra) clearly does. One of the issues discussed was whether in determining

the deceased's loss of earnings the sum to be deducted from his total earnings should include the sums he spent assisting his mother. Both Gammell v. Wilson (supra) and Harris v. Empress Motors Ltd. (1983) 3 All E.R. 561 decide that only the sum spent by the deceased on his own maintenance should be deducted. This was also the view taken in Fitch v. Hyde-Cates (supra) departing from the view expressed by Taylor J in Skelton v. Collins (supra). I am satisfied that this approach is preferable in principle though there is the possibility of duplication of liability.

The deceased in his final year was earning at a rate of approximately $75,000.00 a year. He was spending $20,000 on himself. This produces a figure of $55,000 annually as the multiplicand. A multipher of 10 appears reasonable producing a total of $550,000.

Accordingly the appeal should be allowed with costs, the sum of $560,340 (including $10,340 agreed special damages) being substituted for the sum of $102,340 awarded by the trial judge. The cross appeal is dismissed also with costs.

P.T. Georges, J.A.

HENRY, J.A.

On June 18, 1983, Mr. N. Edgar Woods was killed when the Honda motor car which he was driving collided with a Chevrolet station wagon driven by the Respondent. As a consequence of this collision the Respondent was prosecuted and convicted for causing death by dangerous driving. The Appellant in his capacity as administrator of the estate of Mr. Woods brought an action to recover damages for negligence for the deceased's estate under the Estates Proceedings Law as well as for his dependant under the Law of Torts Reform Law. The Respondent counterclaimed for damages for negligence. At the end of the trial the learned Chief Justice gave judgment for the Appellant on the claim and on the counter-claim and awarded damages of $102,340, including, $10,340 agreed special damages. The Appellant appealed and the Respondent cross appealed.

Essentially two issues have been raised in the appeal and cross appeal. The first relates to the proper approach to be adopted in assessing damages under the Estates Proceedings Law. The second relates to the issue of contributory negligence. The first issue arises because for the first time in the Cayman Islands a claim for loss of earnings during the "lost years" has been put forward on behalf of the estate of a deceased person. Such a claim received recognition for the first time in England in Pickett v. British Rail Engineering Ltd. (1979) 1 All E.R. 774. In that case the House of Lords decided that a person whose expectation of life was reduced as a consequence of injuries sustained through the negligence of another person could claim not only for loss of earnings during his shortened period of life but for what he would have earned during the period of life lost - the "lost years". On the facts of that case the decision did substantial justice in permitting the deceased's widow, who had been deprived of a claim under the Fatal Accidents Act by virtue of the deceased during his lifetime having obtained judgment, to recover in substance the damages she would have been able to obtain under the Fatal Accidents Act. Pickett

v. British Rail Engineering Ltd. was concerned with an appeal by the injured party against the quantum of damages awarded him. He died before the appeal could be heard and his widow was substituted as plaintiff. The principle established in that case was however later applied to claims brought on behalf of the deceased's estate regardless of whether or not the dependants would have a claim under the Fatal Accidents Act. In Gammell v. Wilson (1981) 1 All E.R. 578 the House of Lords decided that on the true construction of section 1 (2)(c) of the Law Reform (Miscellaneous Provisions) Act, 1934, the restriction on an estate recovering a loss to the estate consequent on a person's death applied only to a loss directly consequent on the death and not to a loss resulting from a right to recover damages which vested in the deceased immediately before his death. That construction, coupled with the principle that a cause of action for loss of earnings in the lost years vested in the deceased before he died (and in the case of instantaneous death vested in him immediately before he died) meant that the estate was not precluded by section 1(2)(c) from recovering damages for the deceased's loss of earnings during the lost years in a claim under the 1934 Act. Accordingly, even though it produced a result which was neither sensible nor just, the House was constrained to hold that the plaintiffs were entitled to the damages awarded for the lost years despite the fact that those damages far exceeded the amount to which they were entitled under the Fatal Accidents Act as dependants. In that case Lord Scarman set out the correct approach in law to the assessment of damages at p. 593 as follows:

> "Assessment of damages
>
> The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in the case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least

capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of possibilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man, well-established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.

The problem in these cases, which has troubled the judges since the decision in Pickett's case, has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in this House in Pickett's case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations, based as they must be on events or contingencies of a life which he will not live, are out of place; the judge must make the best estimate based on the known facts and his prospects at time of death. The principle was stated by Lord Wilberforce in Pickett's case [1979] 1 All E.R. 774 at 781-782, [1980] AC 136 at 150-151:

> "The judgments, further bring out an important ingredient, which I would accept, namely that the amount to be recovered in respect or earnings in the "lost" years should be after deduction of an estimated sum to represent the victim's probable living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others, and this he would do out of his surplus. There is the additional merit of bringing awards under this head into line with what could be recovered under the Fatal Accidents Acts."

The provisions of the Law Reform (Miscellaneous Provisions) Act 1934 which received consideration in Gammell v Wilson are reproduced in sections 2 and 4 of the Cayman Islands Estates Proceedings Law, 1974 and are as follows:

> "2. Subject to the provisions of this Law, on the death of any person after the commencement of this Law all causes of action subsisting against or vested in him immediately before his death shall survive against or, as the case may be, for the benefit of his estate.
>
> 4. Where by virtue of section 2 a cause of action survives for the benefit of the estate of deceased person, the damages recoverable shall not include -
>
> (a) exemplary damages; or
>
> (b) damages calculated with reference to the loss or gain to the estate of such person consequent upon his death other than in respect of funeral expenses."

In the instant case the learned Chief Justice accepted the principle that the deceased was entitled to damages for loss of earnings during the lost years, but he declined to follow decisions he considered not binding on him as to the method of assessing those damages. He considered that the application of a multiplier/multiplicand formula resulted in too high an

award and that in any event if that formula were to be used all the expenditure of the deceased (including that on dependants) ought to be deducted in order to arrive at the multiplicand.

The deceased was a comparatively young unmarried man who enjoyed a high salary and incurred relatively few expenses. In those circumstances there is no doubt that the application of the multiplier/multiplicand formula will result in the sort of high award which in a similar case in England was referred to as a windfall. Nevertheless once it is recognised that the award is intended to compensate the injured person (now deceased) for loss of earnings during the "lost years" there seems to be no reason in principle why the method of assessing the award should not be the multiplier/multiplicand system recognised and used in courts in the Cayman Islands to assess damages for loss of future earnings in the case of a living plaintiff. Furthermore, it is the deceased's cause of action which is preserved by section 2 of the Estates Proceedings Law, 1974. Accordingly the object of assessing damages is not to compensate the estate for the loss sustained as a result of the deceased's earlier demise but to compensate the injured party (now deceased) for the loss sustained as a result of his shortened life expectancy. No doubt there are difficulties inherent in this. In Gammell v. Wilson Lord Diplock observed, "In the result the law of damages for death has, in my view, reached a state for which I can see no social, moral or logical justification" and referred to "the slippery slope that led into a morass from which...only Parliament can now extricate us." Shortly thereafter Parliament did indeed intervene with section 4(2) of the Administration of Justice Act, 1982 which abolished "lost years" claims in the case of deaths after December 31, 1982. There has been no similar intervention in the Cayman Islands. While I sympathise with what may be an attempt by the learned Chief Justice to avoid the morass to which Lord Diplock referred, it does not appear to me that in the present state of

the authorities his approach can be justified. Although the decisions of the House of Lords may not strictly speaking, be binding, nevertheless as I have indicated the use of the multiplier/multiplicand formula in relation to a living plaintiff is well established in the Cayman Islands courts and there is no reason in principle for adopting a different formula in assessing damages of a like nature (loss of future earnings) where the injured party has died. Mr. Woods was 45 years old at the time of his death and apparently in good health, but he had had one kidney surgically removed. Taking those facts into account I would in applying the multiplier/multiplicand formula use a multiplier of 10. In so far as the multiplicand is concerned, I am of the view that from the deceased's earnings of $75,000 there should be deducted only his living expenses of $20,000 to arrive at a multiplicand of $55,000. The appropriate damages under this head would therefore be $550,000.

I now turn to the second issue raised in the appeal - that of contributory negligence. In so far as the circumstances surrounding the collision between the vehicles is concerned the Appellant relied entirely on the evidence given at the criminal proceedings against the Respondent. The evidence was given by the eyewitnesses Judy Wood and Roland Schwery and by Constable Phillip Ebanks who visited the scene and made measurements and a sketch plan, Det. Cons. Josephs who took photographs and Cons. Martin Bodden, Jr..Judy Wood's evidence is that she was driving behind the Respondent northwards along West Bay Road when he "pulled out to overtake the car that was in front of him and he hit the oncoming car coming from West Bay." She admitted however that she never saw the oncoming car until the moment of impact with the respondent's vehicle and she did not see the headlights of the oncoming car at any time. She was positive that at the time of impact the Respondent's vehicle was "completely over the right hand side of the road". Roland Schwery's evidence is that he was a passenger in the deceased's car travelling at a speed of 20 - 25 m.p.h. southwards along West Bay Road. They had left the Holiday Inn at 9.30 p.m. and were proceeding to the Royal Palms hotel some 1½ miles away. The accident he said occurred at about 10.15 p.m. He saw the lights of an oncoming vehicle apparently trying to overtake two or three cars. He said the lights were then 45 yards away not 300 yards,

although he admitted saying 200-300 yards at the preliminary inquiry. He also admitted that at the preliminary inquiry he had not said that the oncoming vehicle was trying to overtake two or three cars. He could not recall whether his vehicle pulled closer to the left or stopped when he saw the oncoming vehicle in his path.

The Respondent gave evidence and brought an expert witness to support that evidence the gist of which was that the deceased emerged from a side road called Dyke Road without headlights and drove into the Respondent's vehicle while he was driving northwards on his correct side of the road. The learned Chief Justice was not favourably impressed either by the Respondent or his expert as witnesses. But this apart there are other factors which make their version of the accident improbable. If Cons. Ebanks is to be believed, when he first asked the Respondent how the accident had happened, the Respondent "stated that the Honda had come from the opposite direction zigzagging in the road and collided with him". This is inconsistent with the Respondent's later version. If the evidence of Cons. Myles the certifying officer is to be believed, the steering wheel of the deceased's car had locked damaged into a straight position". If, as the expert's evidence and scale plan suggests, the deceased's car had emerged from Dyke Road turning to its left and collided with the Respondent's vehicle at a 30^{o} angle one would expect the steering to be in at least a slight left turn position. As far as can be judged from the photographs of the damaged vehicles, the damage appears greater than one would expect from a collision between two vehicles travelling, according to the expert, at a combined speed of 45 m.p.h. The scuff marks made by the punctured tyre and rim of the Respondent's vehicle on the road surface also appear inconsistent with the collision having occurred on the western side of the road. These scuff marks indicate more accurately than the generally parallel trail of water the actual position of the vehicle in the road. They commence at a point 7' 8" from the eastern side of the roadway and

and curve towards the right for 41' 6" to the point where the vehicle came to rest on the eastern side of the road. The curve is caused by the effect of friction between the punctured tyre and rim and the road surface. The road way at that point is 25' wide. According to the expert the collision would have occurred some 21' behind the point where the scuff mark begins. If it did and if the vehicle in that distance had been caused by the collision to swerve so far to its right I would have expected the friction from the damaged front wheel to cause a more violent swerve than it did. It is true that Ms. Wood's failure to see the lights of the on-coming vehicle before the collision suggests that it may, as the Respondent alleges, have emerged unlighted form the side road. It is also true that Mr. Schwery's uncertainty as to time arouses suspicion as to whether he was indeed travelling direct from the Holiday Inn to the Royal Palm hotel as he states. But Mr. Schwery was so vague as to time and distance that little significance can be attached to his evidence in that regard. On balance it seems to me that the learned Chief Justice was correct, both for the reasons he gave and for those indicated above, in rejecting the Respondent's version of the accident.

I have given consideration to whether, on the version of the accident put forward in the evidence on behalf of the Appellant, it can be said that there was contributory negligence on the part of the deceased. I do not think that it can. If there had been clearer evidence of the time and distance available to the deceased to take evasive action in the face of the Repondent's oncoming vehicle, it may have been possible to find that he was negligent in failing to take such action. The only evidence in this regard is the somewhat doubtful evidence of Mr. Schwery that he first saw the oncoming lights some 45 yards away. Taking account of reaction time and the fact that the vehicles would have been approaching each other at a combined speed of some 60 m.p.h. it is doubtful that the deceased would have had any real opportunity to avoid the collision in that distance.

The learned Chief Justice found that the failure of drivers and front seat passengers to exercise prudence and to take all available precautions (including the use of seatbelts) to minimise injury and diminish the chance of death in the event of an accident should be ground for reducing the award of damages. I respectfully agree. The learned Chief Justice also found that the accident in all probability would have killed the deceased whether or not he was wearing a seat belt. Counsel for the Respondent has submitted that the injuries which caused death (fractures of the sternum and ribs with consequent rupture of the aorta and contusion of the heart) must have been caused when the deceased was thrown forward into the steering wheel of the car and that this would not have occurred if he had been wearing a seat belt. This issue is one which was not raised at the trial but was raised by the judge himself subsequently when he invited addresses from counsel on it. No evidence was led in relation to it and in my view there is insufficient evidence to show that the deceased would not have died if he had been wearing a seat belt and to support a finding of contributory negligence on that ground.

In his award the learned Chief Justice included the amount of $2,000 in respect of "the conventional claim for loss of expectation of life." As I understand it this award was the arbitrary sum which by virtue of the decision in Benham v Gambling (1941) 1 All E.R. 7 used to be awarded under the same head under which "lost years" awards came to be made by virtue of the decisions in Pickett v British Rail Engineering Ltd. and Gammell v Wilson. It does not therefore seem to me that both awards can be made. I would therefore award $560,340 including the agreed special damages of $10,340.

For the reasons which I have given I would allow the appeal with costs and vary the judgment of the learned trial judge by substituting the amount of $560,340 for the amount of $102,340. I would dismiss the cross appeal with costs.