

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2021/0437

BETWEEN:

JULIAN JOHN

(Administrator of the Estate of AUSNIC BRAD JOHN, deceased)

Claimant

And

ERIC JOSEPH

Defendant

Appearances:

Ms. Alberta Richelieu of Counsel for the Claimant

Mrs. Maureen John-Xavier of Counsel for the Defendant

2023: July 24;
December 12.

JUDGMENT

- [1] **INNOCENT, J.:** The present claim arose out of a fatal motor vehicular collision that occurred on 11th December 2018 along the Vieux Fort-Laborie Highway at approximately 8 o'clock in the morning.
- [2] Mr. Eric Joseph (the 'defendant'), was the owner and operator of a motor omnibus travelling in a northerly direction towards the village of Laborie. En route, the defendant attempted to pass another vehicle that stood stationary on the left hand side of the highway and in so doing entered the opposite lane of the highway where he collided with the motor cycle operated by Mr. Ausnic Brad John (the 'deceased') who was travelling in a southerly direction towards the town of Vieux Fort.
- [3] The deceased suffered severe injuries which included severe head trauma, chest trauma, pelvic trauma and hepatic injury and pelvic fracture. He subsequently died

at hospital on the same day as a result of his injuries. He as 28 years old, and self-employed in the landscaping business in Canada and also engaged in the importation of motorcycles for sale. He was also the son of Mr. Julian John (the 'claimant').

- [4] The defendant who was 51 years old at the time of the collision suffered severe personal injuries which included: left zygomatic and maxillary fracture; fracture of the 2nd to 5th metatarsals of the left foot; fractures of the distal ends of the 1st to 4th metatarsals of the right foot; multiple facial fractures including a complete fracture of the left side of the face; compound fracture of the left zygomatic maxillary complex; loss of vision of the left eye; a deep facial laceration extending from the forehead across from the left side of the nose and culminating at the cheek; comminuted fracture of the orbital bone and fractured teeth.
- [5] The collision also resulted in the total loss of the defendant's omnibus.
- [6] The claimant is the administrator of the deceased's estate. By a claim filed on 2nd November 2021 he is sought to recover damages consequential on his loss of life for the benefit of the deceased's estate and on behalf of himself and another dependents in this case, the mother of the deceased, as a result of the defendant's negligence.
- [7] Therefore, the claim comprised two separate causes of action. The first pursuant to Article 609 of the Civil Code¹ wherein on the death of any person, all causes of action subsisting against or vested in him shall survive for the benefit of his succession. The second made pursuant to Article 988 of the Civil Code which permits the administrator of the estate of a deceased person to bring a claim to recover damages for the dependents of the deceased and to recover funeral expenses of the deceased if such expenses were incurred by the parties for whose benefit the claim was brought.

¹ Cap. 4.01 Revised Edition of the Laws of Saint Lucia

- [8] The claimant pleaded that the defendant was negligent in failing to take proper care to avoid colliding with the deceased while attempting to pass a stationary vehicle on his left hand side of the road; failing to keep a proper look out for the approach of the deceased; driving too fast and failing to take any steps to avoid the collision.
- [9] In his defence, the defendant denied that he was negligent in the manner alleged by the claimant; and that the collision occurred solely as a result of the negligence of the deceased. The defendant's pleaded case was that while driving along the highway there was a motor car driving ahead of him which indicated that it was turning left. The motor car stopped and he indicated right and moved away from the car towards the right hand side of the road presumably in a northerly direction. He alleged that when he did so the road was clear implying that there were no vehicles travelling in the opposite direction at the time.
- [10] He further alleged that before he could complete his maneuver and steer clear of the motor car he saw the motorcycle operated by the deceased travelling in the opposite direction at high speed. According to the defendant's pleaded case, he had no time to maneuver away from the motorcycle and it collided with his omnibus violently.
- [11] Essentially, the defendant pleaded in his defence that there was nothing he could have done to avoid the accident. The defendant pleaded that the collision would not have occurred but for the speed at which the deceased was travelling. The defendant also attributed the cause of the collision to the existence of what may be described as a blind corner which impeded the view of traffic travelling in either direction.
- [12] The defendant also counterclaimed for personal injuries, loss and damage sustained by him consequent on the collision. He also pleaded that the collision was caused or contributed to by the deceased's negligence in operating his motorcycle. He alleged that the deceased was negligent in that he drove too fast or otherwise in excess of the speed limit prescribed for that area; failed to keep any or any proper look out for traffic approaching from the opposite direction; failing to slow down

sufficiently as he approached the corner; failed to operate his motorcycle in such a manner to avoid colliding with him; and operated the motorcycle without having in force a policy of insurance and a driver's license authorising him to operate the same.

[13] In his reply and defence to the defendant's counterclaim, the claimant denied that the deceased was driving at high speed and pleaded that in fact it was the defendant who drove at high speed which was evidenced by the distance the omnibus stopped after the collision; and that the accident would not have occurred but for the defendant's negligent attempt at passing the stationary motorcar at high speed on the opposite side of the road and in the path of oncoming traffic. The claimant also pleaded that the defendant failed to obey the no overtaking sign erected on the left hand side of the road in the direction in which he was travelling. The claimant also denied that the deceased was negligent or that his driving caused or contributed to the collision.

[14] The issues arising in the present proceedings are:

- (1) whether the deceased died as a result of the defendant's negligence;
- (2) if (1) is answered in the affirmative, what is the measure and quantum of damages to which the claimant is entitled;
- (3) whether the claimant is entitled to recover damages both on behalf of the estate and the dependency;
- (4) whether the collision was attributable to the negligence of the deceased;
- (5) if (3) is answered in the affirmative what is the quantum of damages to which the defendant is entitled from the deceased's estate;
- (6) whether there was contributory negligence on the part of the deceased;
- (7) if (5) is answered in the affirmative what is the appropriate apportionment of liability between the respective parties.

The court will first determine the question of liability before proceeding to consider the questions related to damages.

- [15] Article 985 of the Civil Code provides that every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising.
- [16] Where a claimant relies on Article 985, the onus is on the claimant to prove as a precondition of the defendant's delictual liability that the damage was caused by the defendant's fault.²
- [17] The word fault is to be understood in its technical sense to signify the concept which is expressed in the word "act, imprudence, neglect, or want of skill," appearing in Article 985 and which is defined in Article 985 D (1) as:
- "negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would, apart from this article, give rise to the defence of contributory negligence."
- [18] Thus Article 985 falls to be interpreted in accordance with the Law of England by virtue of Article 917A of the Civil Code which provides that the Law of England relating to torts shall extend to Saint Lucia and the provisions of Articles 918 to 989 shall as far as practicable be construed accordingly.
- [19] The claimant must therefore prove on a balance of probability that the defendant owed the deceased a duty to take care, and that the defendant was negligent or in breach of that duty to take care, and that the injuries which the deceased suffered resulting in his death, were caused by the defendant's negligence or breach of duty.
- [20] The general principle is that a driver of a motor vehicle owed a duty to care to persons on the highway to drive with the degree of skill and care to be expected of a competent and experienced driver.
- [21] The undisputed facts are that at the material time there was a motorcar travelling in front the defendant's vehicle which stopped and the defendant attempted to maneuver right past the white car. It is also not in dispute that the collision occurred

² Per Sir Vincent Floissac in *North Rock Limited v Jardine and Another* 44 W.I.R. 162, 164

on the left hand side of the road heading south in the direction of Vieux Fort, that is, the side on the road where the deceased was operating his motorcycle.

[22] The main areas of dispute and contention between the parties as can be gleaned from the pleadings, evidence and submissions of the parties concern the speed at which both the deceased and the defendant were travelling and the precise area where the collision occurred. Also in dispute was whether either of them had done what was required of them to avoid the collision; and whether the manner of driving of either or both the claimant and the defendant amounted to negligence – the question of causation. Another area of contention between the parties involved the question of contributory negligence on the part of the deceased; although it appears from the claimant's written submissions that there is some concession with respect to the question of contributory negligence.

[23] The claimant relied on the testimony of Constable Imran Henry ('Constable Henry'), a police officer attached to the Laborie police station at the time of the collision and who investigated the collision. In his written evidence, Constable Henry said that the accident occurred during the morning rush hour and there was a lot of traffic on the road. He said that when he arrived at the scene of the accident the deceased was not on the scene; and the defendant was trapped in the omnibus and was being extricated therefrom. He saw that both the omnibus and the motorcycle had what he described as serious damage. He said that the defendant was subsequently taken away from the scene by ambulance.

[24] Constable Henry also said in his written evidence that he preserved the scene by marking the relative position of the two vehicles. He said that he returned to the scene of the accident on 31st December 2018 and the defendant was present along with Sandra St. Clair, Leancious John, Julian John, Gregor Hunte, Joseph Joseph and other police officers. He said that he showed parties present the positions that he had marked out previously and explained the same to them. He also said that he recorded an explanations from Eric Joseph and Gregor Hunte. Thereafter he

proceeded to take measurements which were witnessed and agreed to by the defendant.

[25] In cross-examination he said that he had met Gregor Hunte on the scene of the accident on 11th December 2018 but he did not speak to him on that day. He said that he did not recall an initial conversation with him wherein Gregor Hunte told him that he could not recall how the accident happened. He also testified that he recalled that during the reconstruction the defendant indicated that he was not feeling well and requested permission to leave. However, the defendant left after the measurements were taken. He denied that the defendant had left Joseph Joseph to represent him at the reconstruction and insisted that the defendant was present throughout the reconstruction.

[26] He said that he measured the width of the road at the point of impact to be 22 feet 6 inches; the point of impact to the left hand side of the road in a southerly direction that is in the direction of Laborie, measured 14 feet; the distance the omnibus travelled after the point of impact measured 15 feet 11 inches and the distance that the omnibus travelled from the point of impact to the motorcycle measured 6 feet 6 inches.

[27] In cross-examination, Constable Henry testified that there was a verge or shoulder on either side of the road which could be used by motorist in case of emergency. It was suggested to this witness in cross-examination that given the measurement that he took of the point of impact to the left hand side of the road in the direction of Laborie, meant that the defendant would have only occupied an area measuring approximately 3 feet of the opposite lane in which the motorcycle was travelling. He agreed that there would have been an approximate distance of 8 feet in the opposite lane that the deceased could have utilised in addition to the shoulder. He testified that he believed that there was enough space for the motorcycle to pass.

[28] He was also cross-examined in respect of some of the other measurements taken at the scene of the collision. He testified that the defendant indicated that he saw the motorcycle at the point of impact. He agreed that the white car had stopped on

the left hand side of the road in the direction of Laborie and that it was not entirely off the road but would have occupied most of the left hand lane. He testified that based on his investigation he believed that the white car was in a stationary position at the time of the collision. According to this witness, any one travelling in the opposite direction, presumably as the deceased was, would have been able to see the white car.

[29] Constable Henry said that the point of impact shown to him by the defendant was on the right hand side of the road heading in a northerly direction towards Laborie. In other words on the side of the road on which the deceased was travelling. He concluded that the defendant had overtaken the vehicle travelling ahead of him in the left hand lane heading in the direction of Laborie. He also said that there was a no overtaking sign erected on the left hand side of the road in the direction in which the defendant was travelling some distance away from the point of collision.

[30] He maintained his belief of the sequence of events giving rise to the accident under cross-examination. He said that speed was a contributing factor and played a significant role in the accident. He was pressed in respect of what was contained in his traffic accident report where he described how the accident happened. He was directed to where he had stated that "the motorcycle ... approached at high speed from the opposite direction, and collided with the motor omnibus."

[31] He was cross-examined and he said that there were a few road signs on both sides of the road. He said that there was a no overtaking sign approximately 315 feet from where the collision occurred. There was a speed limit sign on the left hand side of the road if one is travelling in a southerly direction towards Vieux Fort before the scene of the collision. He testified that he took no measurement in relation to the latter road sign. He agreed that this measurement would have been relevant to the case.

[32] On cross-examination he gave a description of the area where the collision occurred. He testified that the road where the collision occurred was not straight and flat. According to him, the road was gently sloping with a few bends and a few

corners. He also testified that the area where the collision occurred was a residential area with houses on both sides of the road. There were also pedestrians traversing the road. He testified that due to the condition of the road persons traversing the road would have to be careful at any time when travelling along the road.

[33] The claimant also relied on the testimony of Gregor Hunte who was a witness to the collision. He claimed to have witnessed the entire accident. He said that he saw an omnibus on the opposite side of the road from where he was standing and heading in the direction of Laborie stop to pick up a passenger. There was a white car that had stopped behind the omnibus. He said that it was at this point that he noticed the motorcycle driven by the deceased coming from the direction of Laborie and headed in the direction of Vieux Fort. He claimed that shortly thereafter he noticed another omnibus grey in colour, presumably the defendant's omnibus, travelling in a northerly direction towards Laborie behind the stationary white car. He said in his written evidence that the grey omnibus driven by the defendant did not stop behind the white motorcar but instead overtook the white car and collided with the motorcycle on the opposite side of the road.

[34] This witness was cross-examined. He testified that he was not present when the measurements were taken and he did not give a statement to the police. He said that the police never questioned him about anything. He denied that he showed the police officer any measurements. He testified that the road where the collision occurred had corners.

[35] He also testified that there was a no overtaking road sign approximately 300 feet from the scene of the collision but the defendant had not yet arrived at that sign. He also testified that the defendant did not slow down he just passed the car. He then retracted the statement and said that the defendant had not passed the car. He disagreed that the accident occurred because the deceased was speeding. He then retracted the latter statement and said that both vehicles had speed. He also testified that the defendant never stopped behind the car.

- [36] The claimant also relied on the testimony of Wilson Louis also known as “Farmer” who was the driver of the omnibus described by Gregor Hunte. He said that on 11th December 2018 he was driving in a northerly direction from Vieux Fort heading to Laborie. When he arrived at the location of the collision he stopped to pick up a passenger. While doing so he saw Gregor Hunte on the opposite side of the road. He said that he drove off and while doing so he saw the deceased passed him on a motorcycle which was travelling on the opposite side of the road headed in the direction of Vieux Fort. He stopped to pick up another passenger higher up the road just before the no overtaking sign located on the left hand side of the road in the direction of Laborie. According to this witness, a few seconds later he heard a loud sound. He said that he turned around and noticed a white car behind him. He said that he looked in his rear view mirror and he saw a lot of smoke and noticed that there was an accident on the left side of the road facing Vieux Fort. He did not remain on the scene.
- [37] In cross-examination he testified that it was after he heard the sound he turned and saw the accident. He claimed not to have seen how the accident happened.
- [38] In his written evidence the defendant testified that on his way to Laborie he noticed a motorcar which was driving directly ahead of him. He said that just as the car climbed the hill, the car indicated and stopped on the left hand side of the road. He said that he slowed down and put the omnibus in second gear and indicated right to signify his intention to move right away from the motorcar. He stated that he looked ahead and noticed that the road was clear. He maneuvered away from the car and before he had time to pass the car he saw a motorcycle coming towards him at what he described as “lightning speed”. He said that he had no time to react at was unable to move left or right. The deceased collided with his omnibus.
- [39] He claimed that were it not for the speed at which the deceased was travelling, the collision would not have occurred. He also opined that because of the speed at which the deceased was travelling taken in conjunction with the road not being straight there was nothing he could have done to avoid the accident.

[40] The defendant also said in his written evidence that there was an incline or what he described as “travelling up a slight hill” immediately before the location where the collision occurred. He said that there was a corner directly ahead which would affect the visibility of vehicles travelling in either direction.

[41] The defendant gave an elaborate explanation as to why, in his opinion, he could not be held liable for the collision on account of his negligence. In keeping with his pleaded case he said:

“I was not driving fast at all at the time of the accident and I had no speed. I drove at a speed which was appropriate and reasonable given the conditions prevailing at the time. Further, I was well within the speed limit. Immediately prior to the accident I had just travelled up a slight hill. Further I was driving slowly as I was waiting for the car ahead of me to stop so that I could maneuver away from it. I had a proper look out. Before moving right, I looked ahead of me and the road was clear. At the material time I had already slowed down, braked and was down to almost a stop. Given the speed at which the deceased approached me, there was no time of way to avoid the accident as I could not move neither left nor right. Further, there were obstructions on both sides of the road. I had no speed at the time. I was driving behind a car which I allowed to slow down and stop on the left. I slowed down behind the car before I proceeded to attempt passing it. There was nothing I could have done to have avoided the accident. I was driving very slowly at the material time and the deceased approached me at high speed leaving me with no choice to maneuver on either side.”

[42] The defendant testified in cross-examination that he had intimate knowledge of the area where the collision occurred. He denied overtaking the motorcar. He admitted to ending up on the other side of the road but qualified this admission with the word “partially”. He said that where the accident occurred was partially on the deceased’s side of the road. Under cross-examination he testified that:

“I was partially in the middle of the road. I agree that at all times I should be on my side of the road. I knew there was an issue with visibility on that road. I did what I did when I believed it was safe to do so. I could not have seen around the corner. The possibility existed that I could have waited behind the car. I chose not to remain behind the white car. I do not agree that if I had stayed behind the white car the accident would not have occurred.”

Interestingly, he also testified that:

“I am aware that that there have been a number of accidents on the same road.”

- [43] Having considered the oral and written testimony of the witnesses called on behalf of each party and the submissions concerning the credibility of the witnesses, and the inconsistencies and discrepancies in the evidence of the witnesses for the claimant, the court has arrived at the following factual conclusions.
- [44] The court accepts the defendant's evidence that he did not attempt to overtake the stationary vehicle that was ahead of him in the strict sense of the word. To the contrary, the court accepts the defendant's evidence that he had slowed down to permit the vehicle travelling ahead of him to come to a stop before proceeding on his way and thereafter sought to pass the vehicle by attempting to maneuver from behind the vehicle. The court also concludes that the defendant had not completed his maneuver when the collision occurred.
- [45] In any event, had the defendant been overtaking, the court has accepted the evidence that the no overtaking road sign was at a distance in excess of 300 feet from where the collision occurred. Therefore, the defendant had not yet arrived at the no overtaking road sign.
- [46] The foregoing conclusions are drawn from the following evidence. Given where the point of impact was, it can be easily inferred that the defendant did not utilise the entire part of the opposite lane. The defendant had only crossed over onto a portion of the opposite lane measuring less than 3 feet.
- [47] The court also accepts the defendant's evidence that he was not speeding at the time of the collision. The defendant only drove a short distance away from the point of impact. Not only was this evidence indicative of the speed at which the defendant was driving, but also it supports his evidence that he had just emerged from behind the motorcar when the collision occurred and that he was not overtaking at the time.
- [48] Had the defendant been overtaking, and the deceased had been on his left and proper side of the road, it was more likely than not that the point of impact would have been located somewhere nearer to the middle of the left lane in which the

deceased was travelling or nearer to the left hand side of that lane. In the premises, it is safe to infer that consistent with the defendant's case, he was not overtaking.

[49] The court accepted the evidence of Constable Henry that the collision occurred in a residential area and during the rush hour period. The court in arriving at the following conclusions regarding the defendant's driving took these matters into account; and concluded that given the location, nature and condition of the road at the time, there was the need to exercise care when traversing that stretch of road. Added to this, the court is mindful of the testimony of Constable Henry to the effect that the road where the collision occurred was not straight and flat. According to him, the road was gently sloping with a few bends and a few corners. The court accepted the defendant's evidence that he had just emerged from an incline when he approached the stationary white motorcar. From this it can be inferred that there would have been a decline if one were travelling in the opposite direction.

[50] In light of the inferences and conclusions that the court has arrived at in the foregoing paragraph, it is clear that by emerging from behind the stationary motorcar, the defendant ought to have exercised prudence in executing this maneuver. The maneuver which he executed involved traversing a portion of the opposite lane. Clearly, there was an inherent danger in executing such a maneuver; particularly where the evidence disclosed that there was a corner in the opposite lane and the defendant's view of oncoming vehicular traffic was impeded. The evidence given by the defendant in cross-examination at the trial lead to the inference that the defendant was aware of the inherent danger in emerging from behind the stationary motorcar in the existing circumstances. The court is reminded of the defendant's evidence that he knew there was an issue with visibility on the road and that he could not have seen around the corner. The defendant would have also admitted that there had been a number of accidents on the same stretch of road.

[51] The court concluded that the deceased was riding his motorcycle at a distance of approximately less than 3 feet from the middle of the road given the point of impact.

This left a distance of approximately in excess of 8 feet plus an additional 2 ½ feet if the road shoulder is taken into consideration. Therefore, it is only fair to conclude that the deceased was not riding the motorcycle on the left and proper side of the road at the time of the collision. The court has concluded that the only explanation for the position of the deceased's motorcycle at the time of the collision was that he was speeding. Had the deceased not been speeding he would have been able to operate the motorcycle nearer to his left hand side of the road.

[52] The inference of speed which the court has arrived at can also be inferred from the other evidence presented at the trial. The court accepts the evidence given by Constable Henry with respect to speed. The court found that a clear indication of the speed at which the deceased operated his motorcycle may clearly be reflected in the nature and extent of the personal injuries sustained by himself and the defendant; which in the court's view was indicative of a violent collision that occurred at high speed.

[53] The court also accepts that there was a road sign indicating that the speed limit for that area was 40 mph and that the deceased would have already passed that road sign at the time of the collision.

[54] It can be assumed, for the sake of argument, that a man driving an omnibus on a public highway in daylight sees a motor car stationary on that highway; the question that immediately arises is whether the driver of the omnibus had sufficient room to pass. If in fact, hypothetically speaking, there was no room to pass and passage was impossible because the road was too narrow or in involved entering the opposite lane of the highway, and, as would, inevitably be the result, a collision occurred, the court thinks that, prima facie, the defendant would be negligent.

[55] In the present case, there was presumably 'room to pass', as can be gleaned from the evidence, albeit that the defendant had to occupy a "small" portion of the opposite lane. In the court's view, this involved a dangerous margin of safety. To have passed the stationary motor car in such circumstances was an enterprise attended with risk. It required great care if a collision were to be avoided.

- [56] The defendant's evidence was that he slowed down until the motor car came to a stop in front of him. According to the defendant, he reduced his speed to a very low rate. He said essentially that he ensured that it was clear before he emerged from behind the stationary motor car.
- [57] It appeared from the defendant's evidence and the submissions made to the court, that the defendant took the view that it was too much to say that he should be precluded from moving as he had a small margin of safety. He saw that the opposite lane was clear and he made up his mind to go on and attempt to do it.
- [58] It can readily be inferred from the defendant's testimony that he felt that he was justified in making the attempt to pass the stationary motor car with all the degree of skill and care possible and without excessive speed.
- [59] The court is of the view that the defendant was not justified. A driver along a highway who sees a stationary vehicle on a highway plainly has to take all reasonable care to avoid a collision, and if there was in fact, room to proceed but nevertheless a collision occurred then in the court's view, this amounted to prima facie evidence that the driver had failed to discharge the duty to take reasonable care. The court therefore, is unable to conclude that by merely reducing his speed and ensuring that the road was clear, or that there was 'room to pass' in view of the conditions existing at the time, was taking all the reasonable care he should have taken.
- [60] It appears that the appropriate test to be applied in the present circumstances, was whether the defendant took all reasonable steps which a reasonable man in those circumstances would have taken. The court has formed the view that in such circumstances that existed at the time of the collision, the reasonable man ought to have taken all reasonable care, at any rate, a greater degree of care than has been shown by the facts of this case which amounted to no more than driving at a very slow speed. Therefore, the court concludes that the defendant has not shown demonstrably that he took all reasonable steps which reasonably ought to have been taken in the given circumstances.

- [61] In the premises, the court concludes that the claimant has proven that the defendant drove in the manner alleged in one instance mentioned in the particulars of negligence pleaded in the statement of claim; namely, that the defendant failed to take special care to avoid colliding with the deceased.

Contributory negligence

- [62] Article 989 D (2) of the Civil Code provides:

“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.”

- [63] It is accepted that the guiding principle in proving contributory negligence is whether the deceased by his acts or omissions contributed to his injuries, in the sense that he failed to take reasonable care for his own safety taking into account, as he must, that other users of the road are likely to be negligent. It is also a very salutary principle that, when one man by his negligence puts another in a position of difficulty, the court ought to be slow to find that other man negligent merely because he may failed to do something which, looking back on it afterwards, might possibly have reduced the amount of damage.

- [64] Contributory negligence did not depend on a breach of duty to the defendant but on lack of care by the deceased for his own safety. Although contributory negligence does not depend on duty of care, it does depend on foreseeability. Just as actionable negligence requires foreseeability of harm to others, so contributory negligence requires foreseeability to oneself.³

- [65] Causation is not sufficient to hold a person contributorily negligent; if it were blameworthiness would be the only criterion in assessing the degree of contributory negligence.

³ Alphonso and Others v Deodat Ramnath (1997) 56 WIR 183, 188;

- [66] In support of his case, the defendant in seeking to establish contributory negligence on the part of the deceased relied on the regulations made under the Motor Vehicles and Road Traffic Act; particularly, as it relates to speed limits and the requirement that motorist keep to their left and proper side of the road. The defendant also relied extensively on the fact that the deceased was not wearing any protective apparel or headgear and the time of the collision. In the circumstances, it was submitted on behalf of the defendant that this exemplified the lack of care by the deceased for his own safety.
- [67] Based on the foregoing submissions made by defendant, it is important to place the regulations into its true legal perspective. Failure to adhere to procedures that are stipulated in the regulations does not necessarily amount to negligence. It may, however, be relied upon as tending to establish or to negative liability. By same token a speed limit does not mean that it is safe to drive at that speed. A motorist should operate his motor vehicle according to the conditions existing at the time.
- [68] In the present case, the court accepts that the deceased's carelessness for his own safety was not sufficiently blameworthy to justify a finding of contributory negligence. It cannot be said that the defendant had failed to keep to his left and proper side of the road. Indeed he was travelling in the left lane at the time of the collision. It was the defendant who made an excursion into the opposite lane in which the deceased was travelling.
- [69] Based on the foregoing, the court concludes that the defendant has failed to prove that the deceased operated his motorcycle in a manner consistent with what is alleged in the particulars of negligence/contributory negligence contained in the defence and counterclaim.
- [70] Therefore, the court declines to make the finding that the deceased was negligent and suffered damage as a result partly of his own fault. Therefore, the court finds that there was no contributory negligence on the part of the deceased.

- [71] There are two aspects to apportioning responsibility between the claimant and the defendant, the respective causative potency of what they had done, and their respective blameworthiness.
- [72] Article 989 D (2) of the Civil Code requires that the court consider the claimant's share in the responsibility for the damage. However, the provision is premised on both parties being at fault. In the circumstances, it is impossible to consider the claimant's share without also considering that of the defendant.
- [73] Moreover, the court has to do what is just and equitable which includes being fair to the claimant as well as the defendant. Therefore, the court has to compare the one with the other. The court would inevitably have to do this if there were cross claims between the parties as in the present case. It must be kept in mind that Article 989 D (2) refers to responsibility for the damage and not responsibility for the collision.
- [74] The potential destructive disparity between the parties can readily be taken into account as an aspect of blameworthiness. Where there are cross claims the arithmetic will reflect the different amounts of damage done.
- [75] In the court's view, the defendant's conduct was very much more causatively potent than that of the deceased. To that extent it cannot be said that the deceased was at fault and therefore was partly responsible for his own death. The mere fact that the deceased was riding his motorcycle in the middle of the assigned lane or near its boundary did not automatically infer that there was fault on his part. In fact, the deceased was riding his motorcycle in the manner prescribed by the regulations referred to by the defendant. Additionally, the court is not prepared to find that the deceased's failure to wear the prescribed headgear amounted to any fault on his part relative to the damage suffered by him. The argument that had the deceased been clad with protective headgear he would not have sustained the injuries that he did which resulted in his death is speculative. In the absence of any empirical or expert evidence to substantiate this argument it is not opened to the court to venture into the realm of speculation.

- [76] In considering the matter, the court is mindful of the fact that it is always difficult in cases where the claimant was so severely injured that they perished and that the court is deprived of the benefit of their evidence. The party representing the deceased may feel that because of the defendant's negligence the deceased was not able to defend himself.
- [77] However, it must be borne in mind that the court is entitled to take into account the impressions gained from the witnesses, in particular Constable Henry and the defendant himself.
- [78] The Court is mandated by the provisions of Article 989D (3) of the Civil Code to assess and record the total damages which would have been recoverable if the claimant had not been at fault where damages are recoverable by any person by virtue of Article 989D (2) subject to such reduction as is therein mentioned.
- [79] Article 989D (5) of the Civil Code provides that:
- “Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the succession under article 609, the damages recoverable would be reduced under paragraph (2) of this article, any damages recoverable in an action brought for the benefit of the wife or husband, parent and child of the person under paragraphs (2) and (3) of article 988 shall be reduced to a proportionate extent.”
- [80] Article 609 (1) of the Civil Code provides that on the death of any person, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his succession. Therefore, the representative claimant is entitled to recover damages on behalf of the estate of the deceased.
- [81] Article 609 (2) (c) provides that where a cause of action survives for the benefit of the succession of a deceased person, the damages recoverable for the benefit of the succession of that person where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his succession consequent on his death, except that a sum in respect of funeral expenses may be included.

[82] Therefore, the representative party is entitled to recover on behalf of the deceased's estate damages for loss of expectation of life, the lost years and funeral expenses. In the present case, it did not appear that the claimant was seeking to recover general damages for pain, suffering and loss of amenities.

The Estate

[83] The deceased was 28 years old at the time of his death. He was unmarried and had no children. It appeared from the evidence presented that his only dependent was his mother. He died at St. Jude Hospital on 11th December 2018 the afternoon of the collision. His Certificate of Death attributed his cause of death to multiple blunt force injuries secondary to a motor vehicle collision. It appeared from the medical report that he was diagnosed with severe head trauma, chest trauma and pelvic trauma. There was surgical intervention which involved repair of a hepatic injury. The deceased was also diagnosed with a pelvic fracture. He was later the same day pronounced dead. Although the time of death is not readily ascertainable from the evidence, it is fair to infer that the deceased was still alive for some time after the collision.

Pain, suffering and loss of amenities

[84] Generally where death follows very shortly after injury an award of damages under this head is usually for a small or nominal sum. In the circumstances, the court makes a nominal award of \$1500.00 for pain, suffering and loss of amenities. Although from the nature of the injuries which the deceased suffered it may be inferred that he very well may have been oblivious to the extent of any pain occurring as a result of his injury, however, given that the deceased had survived for several hours post injury and had to endure a series of surgical interventions, the court thinks that such an award is justified.

Loss of expectation of life

[85] This is usually a conventional award. The amount of this award is not based upon any personal characteristics of the deceased such as his age and occupation. Such

an award only goes to substitute and prove beyond doubt that that such a loss of life expectation has resulted from the defendant's tortious act. The court will award the sum of \$4,000.00 under this head.

The lost years

- [86] The more troubling issue arises in relation to assessment of damages for the lost years. It appeared in the course of the proceedings that the claimant faced an almost insurmountable evidential challenge in proving damages for the lost years.
- [87] Although the effect of the defendant's counsel's cross-examination was self-evident in relation to this head of damages, it did not appear that Counsel for the claimant mounted any challenge to the position taken by the defendant. Presumably, Counsel for the claimant must have been left with the impression that sufficiently cogent evidence had been presented to substantiate such an award.
- [88] On the other hand, Counsel appearing for the defendant, in her written submissions, was stringently opposed to the claimant recovering any award for the lost years. In fine, Counsel for the defendant submitted that the claimant has adduced no credible or reliable evidence of the deceased's income to permit the court to make any, or any reasonable assessment of what the multiplicand ought to be in this case. To that extent, Counsel for the defendant alluded to what she perceived as the lack of veracity of the letter of employment produced to substantiate the deceased's income and the absence of any other evidence to support the same.
- [89] Mr. Julian John ('Mr. John'), the deceased's father testified that the deceased lived and worked in Canada. He said that the deceased lived with his brother. He testified that the deceased worked at a warehouse with him during the winter months and he was also engaged in landscaping which he undertook with his brother. He claimed that the deceased and his brother would split the income derived from the landscaping operation between them. The deceased's father also stated that the deceased would engage in other odd jobs for cash and also provided transportation services on a weekend to customers.

- [90] Mr. John also said that the deceased had started a small business in Saint Lucia that involved the importation of motor vehicles and motorcycles from Canada for resale. He claimed that the deceased earned the sum of \$50,000.00 Canadian Dollars annually as a landscaper.
- [91] Mr. Lincoln John, the brother of the deceased claimed to be the proprietor of a landscaping business. He claimed that the deceased worked with him in Canada. Essentially, Mr. Lincoln John's evidence mirrored that of the deceased's father. He too maintained that the deceased would only receive payment in cash.
- [92] The court also heard evidence from Ms. Serena St. Clair ('Ms. St. Clair') who is the aunt of the deceased. Her evidence was that she assisted the deceased with his business transactions that involved the importation and sale of motorcycles in Saint Lucia. She testified that she would transfer the proceeds of such sales to the deceased's bank account in Canada from her account in Saint Lucia. However, this witness was only able to produce evidence of only one such transaction. The court found this evidence seemingly odd considering that no evidence of the deceased's bank statements were adduced as evidence of his income. She said that she only collected the money and transferred it to the deceased but she had no personal knowledge of the motorcycles arriving in Saint Lucia.
- [93] This was the full extent of the evidence presented to the trial relative to the deceased's income. The evidential lacuna that existed in the present case also posed a challenge in respect of the dependency claim as will be seen shortly.
- [94] In the court's view, the letter of employment, if at all, was not substantiated by evidence of bank statements, tax returns or any other documentary evidence. The court is left to assume based on the evidence presented at the trial, that whatever income that was derived from the deceased's intermittent employment was expended largely on himself. Notwithstanding that the deceased was a Canadian citizen, as his brother claimed, there was no evidence presented that he paid taxes, expended money on utilities or in fact any expenditure at all from which at least some idea of his income could be extrapolated. The court is however reminded of

the brother of the deceased testimony that he and the deceased had worked “off the books” and accepted payment in cash so that they would not pay taxes. This was not unusual in certain circumstances; and would perhaps explain the absence of documentation to verify the deceased's income if in fact this evidence was believed. The court considered the fact that the deceased's brother contradicted himself when he later testified that he and the deceased filed taxes. This caused the court some doubt as to this witness's credibility.

[95] In short, Counsel for the defendant submitted that the claimant has failed to prove the deceased's income and therefore, the court ought to refrain from making any award for the lost years since it was incapable of quantification for lack of a multiplicand.

[96] The court having assessed the character and demeanour of the deceased's father and brother who testified at the trial with respect to this issue, it became apparent that they were aware of the evidential hurdle that they faced and made a valiant attempt at seeking to establish the deceased's income with the paucity of the evidence that they could muster. The deceased's brother, by his demeanour under cross-examination, seemed evasive and had difficulty explaining the letter of employment.

[97] Having found that the claimant has failed to prove the extent of the deceased's income, what approach should the court therefore adopt in these circumstances? The general principle is that a claimant is required not only to plead items of special damages but is also required to strictly prove the item of special damages sought to be recovered. The claimant having failed to do so the court declines to make any award under this head of damages.

Medical expenses

[98] Counsel for the defendant objected to the claimant's ability to recover certain items claimed as medical expenses. It appears that this objection was premised on what she described as the claimant has again fallen afoul of the requirement to strictly

prove this head of special damages. Counsel for the defendant submitted essentially that although the claimant had produced an invoice from St. Jude Hospital, the claimant has not provided any prove by way of receipt or otherwise that those expenses have been paid or in fact amounts to a debt incurred by the deceased's estate.

- [99] The court disagrees with the foregoing argument. The claimant relied on an invoice from St. Jude Hospital dated 14th May 2019 in support of their claim for medical expenses recoverable on behalf of the deceased's estate. The invoice showed hospital expenses incurred between 11th December 2018 and 12th December 2018 totalling \$7,672.20. The invoice specifically states that the financial obligations to St. Jude Hospital has not been fulfilled and that the payment is past due. In the circumstances, whether the invoice is paid or unpaid is irrelevant in the court's view. The fact remains that it was an expense incurred on behalf of the deceased's estate. Therefore, the court will allow the amount claimed in the sum of \$7, 7672.20 as special damages. Additionally, the claimant having presented receipts totalling \$755.90 for other medical expenses incurred,⁴ the court will allow these items to be recoverable as special damages. Therefore, the claimant is entitled to recover the sum of \$8,428.10.

Funeral expenses

- [100] The claimant has proven the loss claimed for funeral expenses. Accordingly, the claimant is entitled to recover the sum of \$12,250.00 claimed.⁵ Additionally, this sum was conceded by the defendant in his submissions.

The Dependency

- [101] Before dealing with an award in the dependency claim, Counsel for the claimant raised a technical point in her written submissions which the court finds appropriate to address at this stage. Counsel for the claimant advanced the argument that any

⁴ Exhibits BAJ 10-12

⁵ Exhibit E

overlap between the dependency claim under Article 988 and the claim brought on behalf of the estate under Article 609, the former should be disallowed.

[102] It appears that in advancing the foregoing proposition, Counsel for the claimant was relying on the provisions of the United Kingdom Law Reform (Miscellaneous Provisions) Act 1982 which amended the statutory provisions of the Law Reform (Miscellaneous) Act 1934 that were applied in **Gammell v Wilson**⁶ and other English Authorities. She further submitted that whereas in the present case, there appears to be an overlap, it would not be appropriate to make a second award in the dependency claim.

[103] It was held in **Gammell v Wilson**, applying the decision in **Pickett v. British Rail Engineering Ltd.**⁷ that section 1 (2) (c) of the Law Reform (Miscellaneous Provisions) Act 1934 was to be construed as referring only to losses or gains accruing because of the death and as excluding damages recoverable in a cause of action vesting in the deceased immediately before his death which, by section 1 (1) of the Act survived for the benefit of his estate, and that, since the cause of action so vesting in the deceased in each of these cases included the recovery of damages for loss of earnings during the lost years, damages were recoverable for the benefit of the estate for the loss of future earnings. The above-mentioned provisions of the 1934 Act were amended by the Administration of Justice Act 1982.

[104] Counsel's submission is unfortunate. It presupposes that the provisions of the Administration of Justice Act 1982 has been received into the law of Saint Lucia by virtue of Article 917A of the Civil Code.

[105] In **Veronique Ismael (Administratrix of the Estate of Emmanus Ismael, deceased) v Justin Albert and Anor**⁸ the learned trial judge held a similar view. Edwards J as she then was held, giving ambulatory effect to Article 917A that:

“The current position relating to the law in England is set out in Mc Gregor on Damages 17th ed. (2003) para 18-011. There, it has been stated that

⁶ [1982] AC 27

⁷ [1980] A.C. 136

⁸ SLUHCV2002/0717 (delivered 8th December 2006, unreported)

because the decision in *Gammell v Wilson* [1982] A.C. 27 inexorably led to large awards to the estate of the deceased, there was legislative intervention, “and Section 4 of the Administration of Justice Act 1982 amended section 1 (2) of the 1934 Act so that it now provides, by a new sub-section (a) (ii) that damages in an action for the benefit of the estate “shall not include any damages for loss of income in respect of any period after the person’s death.” In addition section 1 of the Administration of Justice Act 1982 eliminates any right of the estate to claim damages for the non-pecuniary loss of expectation of life so that the estate may now claim, apart from entirely proper accrued losses of the deceased by way of lost earnings and medical expenses before death, only for his pain and suffering, generally minimal or even non-existent in a fatal injury, and for his loss of amenities of life which may loom quite large as the Courts have given an objective quality to this head of damage.”⁹

- [106] Edwards J disagreed with the decision of Matthew J in **Auguste v Maynard** and held that it was no longer binding authority because of the provisions of Article 917A (3) of the Civil Code which states that where a conflict exist between the law of England and the express provisions of the Code or any other statute, the provisions of the Code or any other statute shall prevail. The learned judge went on further to hold that the Law of England for the purposes of Article 917A (1) is the current law of England for the time being relating to torts and that Article 917A (1) was ambulatory. Having so found, the learned judge held:

“I have pondered on the provisions in Article 609, and in my opinion the current law of England does not conflict with any Article 609 provision. None of these provisions reveal any preference for the common law reflected in *Gammell v Wilson* to be applied in survival actions over the current law of England ... The local statutory provisions are silent on the point in issue. If there is silence, then there can be no statutory conflict in my opinion.”¹⁰

- [107] The decision in **Ismael v Albert** was overturned by the later decision of the Court of Appeal in the case of **Cyril Mathurin and another v Anthony Augustin Qua Administrator of the Estate of Yasmin Natasha Augustin (deceased)**¹¹ where the sole issue on that appeal was whether the estate of the deceased was entitled to recover damages for the deceased's loss of future earnings during the years of life lost to her because of the defendants' negligence.

⁹ At para [120]

¹⁰ At para [123]

¹¹ [2008] ECSCJ No. 51; SLUHCVP2007/0041 (delivered 2nd June 2008)

- [108] The Court of Appeal recognised that under the Law Reform (Miscellaneous) Provisions Act 1934 of England and Article 609 of the Civil Code of Saint Lucia damages for the lost of years were recoverable. The Administration of Justice Act 1982 section 4 changed English law by abolishing the right to recover damages for the lost of years. Counsel for the appellant contended that this change in English law had effect in Saint Lucia by virtue of article 917A (1) of the Code, which extended English law to St. Lucia. Counsel for the respondent contended that article 917A (1) of the Code is qualified by article 917A (3) which provides that where a conflict exists between the law of England and the express provisions of the Code the provisions shall prevail.
- [109] Dismissing the appeal, the Court of Appeal held that notwithstanding the change in English law, damages can be recovered for the lost years in a case of death based on the provisions of Article 609 of the Civil Code, which states that on the death of any person after the commencement of this Chapter, all causes of action subsisting or vested in him shall survive against, or as the case may be, for the benefit of, his succession; and that the amendment to the English law of damages for the lost years did not extend to Saint Lucia because it conflicts with the express provision of the Code.
- [110] The reasoning of the Court of Appeal was that article 917A (1) of the Code is qualified by article 917A (3) which provides that where a conflict exists between the law of England and the express provisions of the Code the provisions of the Code shall prevail. Article 917A (3) provides that where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail.
- [111] This interpretation of Article 917A of the Civil Code was reaffirmed in the recent decision of the Privy Council in **Hilaire v Chastanet**.¹² However, in that case the Privy Council found no conflict with the common law as applied under the relevant provision of the Civil Code and the English statutory provision relating to defamation

¹² [2023] UKPC 22

cases. However, that case was decided based its own peculiar facts, and in the court's view, does not disturb the decision in **Mathurin v Augustin**.

[112] In the premises, the court finds Counsel's submission on this point to be self-defeating. It is for this reason that the court holds that the claimant is entitled to claim for both the dependency and the lost years.

[113] The claimant also faced a similar evidential barrier as with the claim for the lost years. The claimant provided no evidence to prove the dependency. The evidence of dependency came from the deceased's mother, Ms. Claudia Talbert ('Ms. Talbert'). Her evidence was that the deceased would remit the sum of \$900.00 to her monthly by Western Union money transfer and that she would obtain financial assistance from him upon request. Apart from this evidence, the court was furnished with no other evidence that proved that the deceased assisted in supporting his mother financially. The foregoing observation is compounded by the fact that in any event the claimant has failed to prove the deceased's income.

[114] In the premises, the court can make no award under the dependency claim the court having found that the claimant has failed to prove the loss suffered under this head.

Order

[115] In the circumstances, the court makes the following orders:

1. The claimant succeeds on the present claim to the extent set out by the court in the present judgment.
2. The defendant's counterclaim is dismissed.
3. The defendant shall pay to the claimant special damages recoverable on behalf of the estate as follows:

- (a) Funeral expenses - \$12,250.00 from 20th December 2018 to the date of judgment and thereafter at the rate of 3% to the date of payment and thereafter at the rate of 6% from the date of judgment to the date of payment; and

(b) Medical expenses - \$8,428.10 with interest thereon at the rate of 3% from 11th December 2018 to the date of judgment and thereafter at the rate of 6% from the date of judgment to the date of payment.

4. General damages for pain, suffering and loss of amenities in the sum of \$1,500.00 with interest thereon at the rate of 6% from the date of service of the claim form to the date of judgment and thereafter at the rate of 6% from the date of judgment until payment.
5. General damages for loss of expectation of life in the sum of \$4,000.00 with interest thereon at the rate of 6% per annum from the date of service of the claim form to the date of judgment and thereafter at the rate of 6% from the date of judgment until the date of payment.
6. The defendant shall pay prescribed costs to the claimant in the sum of \$3,926.71 in accordance with CPR 65.5.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar