

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil Division)
ST VINCENT & THE GRENADINES



Claim No. SVGHCV2021/0021

NATALYA KIDD JOHNSON
(By her father and next friend **EDWIN JOHNSON** OF Fairbaine)

Claimant

And

MC CARTNEY FORBES
(of Georgetown)
KENROY LAVIA
(of Bequia)

Defendants

Before: Hon. Mde. Justice M E Birnie Stephenson

Appearances:

Cecil A Blazer Williams for the Claimant
Chantè Francis with Duane A Daniel for the Defendant

2022: November 23
December 30 (Closing submissions)
2023: July

JUDGMENT

- [1] **STEPHENSON J.** On the 9th March 2018 there was a motor vehicle accident which involved a truck owned by the second named defendant and driven by the first named defendant and the claimant Natalya Kydd "Natalya". The accident occurred along the main road Stoney Ground also referred to as New Montrose in the vicinity of the Caribbean Imaging Centre and the Kingstown Government School which is also referred to as the Stoney Ground Primary School.
- [2] The claimant sues through her father and next friend as she is a minor. At the time of the accident, she was six years old having been born on the 16th February 2012.

[3] In the statement of claim¹ filed on behalf of the claimant, the negligence on the part of the first named defendant who was the servant and or agent of the second named defendant was particularised as follows:

- a. That the first named defendant drove too fast in all the circumstances
- b. he failed to keep any or any proper look out
- c. failed to see the claimant in time or at all
- d. failed to adequately in time or at all to heed or act upon the presence path and position of the claimant upon the road
- e. failed by means of his horn, lights or otherwise so to manage or control his vehicle to avoid the accident
- f. failed to stop and slowdown, to swerve or otherwise so to manage or control his vehicle to avoid the accident
- g. struck knocked down and injured the claimant
- h. exposed the claimant to a foreseeable risk of injury
- i. failed to observe that the area was a school zone and that there were school children in the area
- j. failed to take any or adequate care for the safety of the claimant and other school children and pedestrians.

[4] The particulars of personal injuries were as follows:

- a) Abrasion approximately 4X2 cm to the right parietal region with avulsion of 2 cm of the scalp
- b) Bilateral conjunctival haematomas
- c) Extensive friction burns to the right shoulder and proximal anterior chest wall approximately 6X5 cm
- d) Deformed left clavicle
- e) Friction burns on her abdomen to the right quadrant extending distally to pelvis
- f) Left arm swollen and deformed with decreased range of motion
- g) Friction burns to her right and left shoulders
- h) Displaced fracture of the right humerus as revealed in X-ray image
- i) Fracture to the 7th, 8th, 9th and 10th ribs as revealed in X-ray image
- j) Pulmonary contusion as revealed by CT scan
- k) Hemoperitoneum as revealed by and abdominal ultrasound

[5] The claimant relied on the medical certificate issued by Dr Jasmine Ellis -Davy a consultant in the surgical department of the Milton Cato Memorial Hospital.² This report outlines the injuries received by Natalya and the treatment and care that she received at the hospital consequently.

¹ Statement of Claim filed on the 24th February 2021

² Medical report attached to the claim form filed on the 24th February 2021 and marked "A"

- [6] Defences³ were filed by each defendant which they both contended as follows:
- i. That they put the claimant to strict proof that the claimant is a citizen of St Vincent & The Grenadines, that she was born on the 16th February 2012 and that the named next friend is her father
 - ii. It was admitted that on the date and time of the accident the first named defendant was driving motor vehicle registration number TD585 owned by the second named defendant towards Kingstown, but that the accident was not caused by the negligent driving of the first named defendant as stated in the claim
 - iii. The first named defendant asserted that the accident was caused solely by the claimant or in the alternative the claimant contributed to the accident when she ran suddenly from behind a van across the road and into the oncoming traffic.
- [7] The negligence on the part of the claimant was particularised as follows that she:
- a. Failed to keep herself safely out of the public road and away from oncoming traffic
 - b. Failed to place herself in such a manner so as to be conspicuous to motorists
 - c. Placed herself on the public road in a manner which was unsafe
 - d. Failed to take any or any adequate precautions to avoid the accident
 - e. Failed to heed the presence of the motor vehicle being driven by the first named defendant
 - f. In the premises failed to have any or any adequate regard for own safety
 - g. Crossed the public road in a manner which was unsafe or when it was unsafe to do so
- [8] The defendants asserted that claimant's injuries, loss of amenities and particulars of damage which were neither admitted or denied, were not caused by his negligence and he put the claimant to strict proof of same.

The evidence

- [9] The matter was tried on the 22nd and 23rd November 2022 and a total of eight witnesses gave evidence. At the beginning of the trial, it was agreed that pursuant to the case management order given by the Honourable Master that the trial was a bifurcated one and at this stage of the trial the court was only concerned with the question of negligence.
- [10] This court heard from Natalya Kydd the claimant and also from three people who can be referred to as eye witnesses to the accident. Mr Mc Cartney Forbes, Mr Corey Pompey and Ms Rackie Wright.

³ Defences filed on the 22nd March 2021

Natalya Kydd

- [11] Natalya gave evidence on her own behalf. At the time of the trial of the matter she was 10 years old and this court was satisfied that she could give evidence under oath that she understood the nature and seriousness of the oath⁴.
- [12] On the date of the accident Natalya was a student at the Kingstown Government Primary School located in Stoney Ground. On that fateful day she was on her way to school. She went to buy a new book bag with her mother and then boarded the van to go to school. When she arrived at Stoney Ground, she disembarked the van and went to the pedestrian crossing. Natalya told this court that she looked up and down to make sure no vehicle was coming. She said that a motor car stopped to allow her to cross the road that she crossed the road on the pedestrian crossing and as she was about to step onto the sidewalk on the other side of the road she was struck by TD585 and she lost consciousness.
- [13] Under cross examination Natalya told this court that by looking up and down she looked left and right before crossing the road. Under cross examination from counsel on behalf of the defendants Natalya told this court that she was late for school that morning having gone with her mother to buy her new book bag as her old one was torn.
- [14] Natalya was asked under cross examination if she remembered the day the accident happened, and she said yes. When asked about whether she was late for school Natalya told the court yes, she was late for school that day and she doesn't like being late for school. When asked about whether or not she walked in front of or behind the van her answer was that she walked behind the van. She told the court that on the day of the accident she was shorter and that the van was much taller than her.
- [15] Natalya under cross examination told the court that she walked across the road carefully having looked left and right before she crossed the road she however did not recall that the conductor asked a pregnant lady to help her cross the road or that the lady was holding on to her hand.
- [16] Counsel Mr Daniel sought to challenge Natalya's viva voce evidence using the statement from Mr Homer which is a report of a statement made by her with no supporting evidence as to who was with the child. Counsel Mr Williams objected to this attempt to contradict the child's evidence with a statement which was part of the reconstruction of the accident and with what the child was supposed to have

⁴ Natalya told the court she was 10 years old in common entrance class and that she knew what is the truth. She said "*Truth is the honest words that you are saying, if I do not tell the truth you are to face the consequences like something bad will happen.*" She told the court that she goes to church and to Sabbath School where she has been taught to always speak the truth and truth is the way of life." She also spoke of facing a bad consequence if you did not speak the truth. Counsel for the Defendant Mr Daniel made no submission regarding whether Natalya could give evidence in fact he told the court that he would leave it entirely to the court. Natalya was duly affirmed to give evidence.

purportedly said. Counsel Mr Daniel submitted that in cross examination the defendant must put his case to the claimant. The court did not permit the question.

[17] It was submitted by on behalf of the defendants in the closing submissions that Natalya's evidence as to what happened on the day of the accident is questionable. Counsel urged the court to look at her evidence with great suspicion as it relates to the manner in which she Natalya crossed the road as she was unable to recall everything that transpired, more particularly about Ms Wright being asked to see her cross the road or that Ms Wright was holding her hand before she crossed the road,

[18] Counsel further pressed the court not to accept Natalya's evidence that she looked up and down the road. Further, the court was invited to find that Natalya's version of what happened was clearly contradicted by Ms. Wright's evidence. On the contrary this court finds that Natalya's evidence stood up well to the skillful and rigorous cross examination from Counsel Mr Daniel. Using the reasonable man's test what happened to Natalya was a traumatic event and this court does not expect her to remember everything that happened on that date. Further this court considers that at the time of the accident Natalya was six years old and she was giving evidence in the matter some four years after the event. Should we really expect her to remember everything that happened?

[19] Counsel Mr Williams in his closing submissions said that Natalya's evidence was consistent in all material aspects. Counsel noted under cross examination when Natalya was asked about looking up and down if it was "up in the sky or on the ground" that her answer was left and right. Counsel also drew to the court's attention that Natalya told the court under cross examination that she walked carefully across the road and denied that she ran across the road.

[20] This court notes the accident in the case at bar occurred on a pedestrian crossing and also that Natalya more or less was on the other side of the road as in, she completed crossing road when her bag hooked in the fender of the motor vehicle. It is therefore this court's view that it matters not whether she ran or walked across the road. What is of concern is that the accident happened on the pedestrian crossing in the close vicinity of school at 9:00 to 9:30 in the morning when any reasonable road user can expect to see school children on the road in that vicinity. It is therefore in this court's respectful view that persons traversing in that area ought to exercise a high level of vigilance in this area.

Mc Cartney Forbes

[21] The witness statement of Mr Mc Cartney Forbes the first named defendant which was filed on the 29th April 2022 was allowed to stand as his evidence in chief. In his version of the accident Mr Forbes said that he was travelling in the direction of Kingston at around 9:45 AM that morning and that the truck he was driving was loaded with Flat

Stones an in the circumstances he was driving slowly. He said that the road was dry and that traffic was flowing freely.

[22] Mr Forbes said that as he approached the area where the accident occurred he had a clear view of the road ahead and he saw a minivan which was travelling in the opposite direction from him stop on the pedestrian crossing. He said that as he was about to pass the minivan, he caught a glimpse of a pregnant lady and a female school child and that the child bolted onto the road into the path of his truck. Then he immediately applied his brakes and the truck skidded and struck the child dragging her for a short distance before stopping.

[23] Under cross examination Mr Forbes said that both he and the minivan were travelling when he saw the minivan and the minivan was on top of the crossing. This court understands this witness to be saying when he saw the van both he and the van were moving which would have meant that the van had already let off the passengers. He said he was about four feet away from the minivan. Mr Forbes, under cross examination, said that he saw Ms Wright and Natalya immediately as he passed the back of the van. Mr Forbes maintained that Natalya sprinted out as he passed the back of the van which was on the pedestrian crossing and based on his earlier statement which van was moving and not stationary.

[24] Mr Forbes said that there were no cars before him, and he did not see a car stop in front of him in front of the crossing. Mr Forbes informed the court that he was coming from the Leeward side of the Island and that he was aware that there is a school in that area as well as a shopping mall and that he was aware that the area was frequented by pedestrians. Upon being pressed by Counsel Mr Williams, Mr Forbes was adamant that he saw the van about four feet away on the crossing and that he did not see Ms Wright and Natalya immediately when he was passing the back of the van. He said that the van was on the crossing and he saw them at the back of the van.

[25] In response to counsel's question as to whether he actually passed the van when he struck the child. His response was that it was simultaneous. Mr Forbes under probing cross examination from Mr Cecil Blazer Williams said that the child was not in the middle of the road but on the left side of the road and "almost before she reached the on the other side of the road the left side of the vehicle caught the child" Mr Forbes contends that Natalya was not on the pedestrian crossing at all that it was the van that was on the pedestrian crossing.

[26] Counsel Mr Williams put to this witness a number of things, that:

- a. He was much higher up the road than 4 feet away from the van and he had time to take cognizance of people who were exiting the van to cross the road. Mr Forbes said that was incorrect. There is a bus stop behind the crossing, and it is the responsibility of the driver and the conductor to cross children.

- b. That he did not exercise caution when approaching the area, especially when the van stopped at the crossing, he did not exercise caution that he ought to have exercised when he saw the van stop. Mr Forbes' response was that that was incorrect.
- c. Regarding the vehicle skidding forward, that the vehicle was not travelling in spite of its load at a speed it should not have been travelling. Mr Forbes said that is not true that is inertia and momentum. That you cannot stop the vehicle immediately.
- d. That the momentum has something to do with speed the faster the speed the skid would go much further because of the speed it was going at. Mr Forbes said he was not travelling at speed.
- e. That overall, he did not exercise due care and attention and that he failed to take into consideration the particular area he was driving and he failed to observe that there were persons coming out of the minivan and about to cross the pedestrian crossing at Mandela Highway Stoney Ground. It is noted that this is the crux of the claimant's case.

[27] Mr Forbes said he came out of his vehicle and upon realizing that Nataliya was pinned under the truck that he got back into the truck and reversed it so that she could be picked up. That both he and the conductor picked up Natalya

[28] Mr Williams on behalf of the claimant in his closing submissions referred to the statement of Mr Homer, the accident reconstructionist, who said that Mr Forbes was travelling at about 20 MPH. Counsel submitted that it takes an extreme stretch of the imagination to believe that Mr Forbes could glimpse Ms Wright and Natalya appearing from behind a minivan when he was about to pass 4 feet away and the left of the truck struck Natalya on the left of the crossing.

[29] Counsel pointed to the police report which stated that the left tire brake impression was 23 feet 10 inches which is an indication that the truck was travelling to fast in the circumstances. Counsel also noted and pointed out to the court that this evidence was adduced solely by the first named defendant Mr Forbes and that no examination of the truck was reported in the report adduced by him.

[30] Mr Williams also submitted that Mr Forbes' evidence was not corroborated by the other two eyewitnesses to the accident that is by Corey Pompey who was sitting in the truck next to him and Ms Wright who disembarked the Van with Natalya and who saw Natalya move across the road and be struck.

[31] Counsel Mr Daniels on behalf of the defendants stressed that Mr Forbes' explanation of how the accident is cogent and logical and urged the court to accept it as the truth, Counsel submitted that logically if the minivan stopped on the crossing that it is more than probable than not that the minivan would have been sitting on the entire crossing.

Counsel made reference to the height of the roof of the van and the average width of the pedestrian crossing to say that if Natalya and Ms Wright were at the rear of the minivan they would not have been standing on the crossing but instead before the crossing. Counsel further submitted that it follows that the claimant bolted across the road before the minivan drove off and that she would not have bolted across on the pedestrian crossing. This court notes counsel's submission in that regard but takes note that in the words of Mr Forbes when he saw the van both he and the van were moving.

[32] Counsel further submitted that Mr Forbes was passionate about the fact that he applied his brakes as soon as Natalya sprinted across the road in an effort to avoid hitting her and that in all the circumstances of the situation the only thing a reasonable man could do, was to apply the truck's brake system. Counsel also noted that Mr Forbes denied that the truck was travelling fast or that he was speeding. Counsel urged the court to find that this is consistent with the injuries sustained by Natalya which seem to have been predominantly caused by the fact that she was pinned and dragged,

[33] Counsel urged the court when it considers Mr Forbes' evidence to apply the working assumption that Natalya darted across the road very quickly which would have impacted the time available to the first defendant to react and brake given the fact that he was operating a huge vehicle with quarry stones. It is noted by the court that in his viva voce evidence Mr Forbes said that "the stones on the truck were flat and there was no overweight or overload".

Rackie Wright

[34] Ms Rackie Wright gave evidence on behalf of the defendants and her witness statement which was filed on the 29th April 2022 was admitted as her evidence in chief. It is the evidence of Ms Wright that she was pregnant on the day in question and that she was on her way to do an ultra sound at the Caribbean Imaging Centre in Stoney Ground and that when she disembarked the minibus she was asked by the minibus conductor to see the little girl (Natalya) across the street.

[35] Ms Wright said that she held the little girl's hand and walked behind the van and stopped to see if the road was clear. She said that she stopped to see if the road was clear, and that Natalya tried to pull away from her but she told her to wait as she noticed the oncoming truck. She said that Natalya's book bag appeared to have been caught in the front bumper of the truck and she was dragged a short distance before the truck came to a stop.

[36] Ms Wright said that the truck driver came out of the truck and went back into the truck to reverse it off of Natalya and he and the van conductor lifted and put Natalya in the van to take her to the hospital. She said she waited on the scene for the police, and

she told them what happened and proceeded to her intended destination to have her ultrasound.

[37] Ms Wright told the court that the van that herself and Natalya disembarked from moved off and they were standing to the back of the van. She also told this court that Natalya ran across the pedestrian crossing. This is contrary to the evidence given by the first named defendant.

[38] Ms Wright whose evidence this court feels was clear and truthful was accepted by the court. Ms Wright told this court that after getting off the van, she held on to Natalya's hand at the side of the road at pedestrian crossing to see if the road was clear. She said that Natalya pulled away from her and ran across the road into the path of the oncoming truck.

[39] This court understood that Ms Wright's evidence was that she could not run after Natalya in her gravid state. She further told this court that Natalya reached over to the other side of the road however her bookbag which was on her back hooked up in the truck's bumper causing Natalya to be dragged by the truck.

[40] It must be emphasised that Ms Wright made a good impression on this court. She testified in a believable manner and made it clear as to exactly what she remembered. This accident took place some four years before the evidence was given. This court accepts the evidence of Ms Wright as being of a good quality and it can be relied on.

[41] There is no doubt that she had a clear view of what happened and she also had a clear view of Natalya's actions on that faithful morning. This court finds it telling that the accident happened at the pedestrian crossing in that even though Natalya pulled away from Ms Wright, Natalya a six year old was on the pedestrian crossing.

Corey Pompey

[42] The witness statement of Corey Pompey was filed on the 29th April 2022 and was admitted as his evidence in chief. He could not remember the exact month and date of the accident. His evidence is that on the date in question he was working on the truck driven by Mr Forbes as the conductor. On the morning of the accident his evidence is that they were coming from Barrouallie with a load of face stones and travelling in the direction of Kingstown. He said the load was a regular load which was almost to the height of the pan in the truck. He said that he was sitting in the front passenger seat of the truck.

[43] Mr Pompey said that when the truck got in the vicinity of the Imaging Centre, he saw a minivan which was stopped on the opposite lane close to the pedestrian crossing. This witness said that the truck was being driven at the normal pace and there were no other vehicles ahead of the truck. He went on to say that he saw the pregnant lady, Ms

Wright and a small child in school uniform (Natalya) standing at the back of the minivan waiting to cross. It is noted that this witness said that the minivan was stopped before the pedestrian crossing and not on the pedestrian crossing.

[44] Mr Pompey said he saw the child pull away from the lady and run across the road and when she did that the truck was already close to her. He said he held his head in his hands when he saw what was happening and that it happened so fast, he was unable to say anything to warn the driver. This witness said Natalya ran in front of the truck and the truck hit her and dragged her for a short distance then it stopped.

[45] Mr Pompey said that he jumped out of the truck, and he saw Natalya was under the wheel of the truck, so he told Mr Forbes to go back in the truck and reverse the truck off of her which is what he did. He said he lifted up the child and started walking to the Milton Cato hospital with the child and she was alive and crying at the time. He said at the same time a van came up and stopped and he went into the van with the child and took her to the Hospital. He said when he got to the hospital the nurses took the child from him.

[46] Under cross examination when asked by Counsel Mr Williams whether he saw any vehicles in from of him, Mr Pompey told this court that when they were coming down there was a passenger van in front of them which stopped to let out passengers and that they pulled out from behind the van and after they passed the van there was no other vehicle in front of them. He went on to say that the other van was behind the pedestrian crossing and the little child had come run over. He said that the lady tried to hold the child on the crossing, but the child went.

[47] Mr Pompey, in answer to further questions from Mr Williams, said that he saw the child and the lady on the side of the road and that he could see clearly from where he was sitting as he was looking. He also said that they were almost at the pedestrian crossing when Natalya ran across. He could not remember whether the van from which Ms Wright and Natalya disembarked was still there when the truck struck the child.

[48] Mr Pompey could not tell the court what part of the truck struck Natalya, but he knew that when Natalya was on the ground she was on the left side of the truck. He agreed with Counsel Williams that Natalya was on the other side of the road when she was struck.

[49] Counsel Mr Williams submitted that based on Mr Pompey's testimony regarding them passing a van which was stopped in front of them that Mr Forbes was distracted when he was overtaking and that it is highly improbable that Mr Pompey or Mr Forbes could have seen Natalya pull away from Ms Wright behind the van that was either stationary or moving.

[50] Counsel on behalf of the defendant urged the court to regard the evidence of Mr Pompey as evidence which was truthful and honest. Counsel noted that this witness did not hesitate to say that he could not remember certain things however, his evidence supported the fact that the child was on the left side of the road and that Natalya and Ms Wright were on the side of the road when the truck was approaching and passing the pedestrian crossing.

The other witnesses, Edwin Johnson, Pamela Providence and Kenroy Lavia

[51] These three witnesses were not eyewitnesses to the actual accident. And their evidence cannot really assist the court in coming to a conclusion on the liability issue.

Mr Johnson

[52] The witness statement of Mr Johnson was filed on the 29th April 2022 and his witness statement was admitted as his evidence in chief. Paragraph 11 of his witness statement was duly struck out as being an opinion stated by the witness which is really a conclusion for the court to draw. He told this court that he is the father of Natalya, and he was not present when the accident occurred. This court notes that he is a party to this matter as the Next friend of Natalya who is a minor as is required by law. This witness exhibited copies of the Medical Report and Police Report filed in support of the claimant's claim.

Pamela Providence

[53] The witness statement of Pamela Providence was filed on the 29th April 2022 and was admitted into evidence as her evidence in chief. This witness was not an eye witness to the accident in fact her evidence was that after she heard the commotion outside her place of employment she ran outside where she saw the truck on top of Natalya and that part of the wheel was on the child. She stated that she observed that the truck was reversed off of the child and she saw the conductor of a van which was passing pick up the child and putting the child on the van and taking the child to the hospital.

Kenroy Lavia

[54] The witness statement of Mr Kenroy Lavia was filed on the 29th April 2022. He is the second named defendant. He was not an eye witness to the accident. Mr Lavia told the court that he is the owner of the vehicle involved in the accident and that Mr Forbes is his employee and on the day of the accident Mr Forbes was on that day driving in the course of his employment.

The expert's evidence

[55] This court also heard the evidence of Mr Mervin Homer who was deemed an expert by the Learned Master at case management. It is the defendants'

contention that Mr Homer is a qualified Accident Investigator. His evidence as adduced was primarily based on an accident Investigation report that he compiled with the assistance of his employees.

[56] This court wishes to comment on this witness' evidence. He was called as an expert witness pursuant to part 32 of the CPR 2000.

[57] What in law is an expert witness? CPR 2000 at Part 32(1)(b) provides "An expert witness means an expert who has been instructed to prepare or give evidence for the purpose of court proceedings".

[58] According to Stroud's judicial dictionary, an expert witness is "a person who has made the subject upon which he speaks a matter of practical study, practice or observation and he must have a particular and special knowledge of the subject"⁵.

[59] It is established law that where an expert gives evidence in civil proceedings the procedure is governed by Part 32 of CPR 2000(similar to part 35 of the UK CPR).

[60] The question for the court to determine in the case at bar is whether the first named defendant is in breach of his duty of care to other road users. That is that he on the day in question drove negligently.

[61] An expert's opinion on which the court is being called on to decide is unlikely to have any significant bearing on the court's determination of those questions. It is the court's function to consider at all times the facts adduced before it and the allegations made against the defendant and decide whether those allegations are proved to the required standard and if they are, whether judgement should be given in favour of the claimant?

[62] In his dissenting judgment in **Peter Griffiths -v- TUI (UK) Limited** it was held inter alia that the report of an expert can be rejected by the trial judge. It was held "The judge cannot be prevented from considering the quality of such evidence in order to determine whether the burden of proof is satisfied just because it is uncontroverted. The court is not a rubber stamp"

[63] Mr Mervin Homer was called as an expert witness for and on behalf of the defendants. He is a constable of police officer in the Bermuda Police Service(The BPS) with 19 years of policing experience. He told this court that he is an expert accident and traffic collision investigator in the BPS.

[64] Mr Homer told this court that he has attended the Bermuda Police Training School, the institute of Police Technology and Management at the University of Florida and

that he also attended the Institute of Public Safety at Broward College. This witness said that he has received training and instruction in At Scene Traffic Accident Investigation, Advanced Traffic Accident Investigation, Traffic Reconstruction Pedestrian/Bicycle crash investigation, Human Factors in Traffic crash Reconstruction, Investigation of Motorcycle Crashes and Occupants Kinematics for the Traffic Crash Reconstructionist. Further he receives monthly training sessions at the Traffic Collision Unit of the BPS.

[65] It was Mr Homer's evidence that his training covered various aspects of collision investigations and reconstructions involving motor vehicles which involved the collection, examination and analysis of evidence and facts, drawing inferences and offering opinions and conclusions based on the available evidence.

[66] Mr Homer said that having reviewed the provisions of the Civil Procedure Rules he understood his duty to the court in the case at bar which duty overrides any obligations to the party from whom he received instruction or by whom he was paid. In answering a question put to him by the court this witness told the court that this was the first time he was giving evidence as an expert in the High Court in St Vincent.

[67] Mr Homer said he visited the scene of the accident and interviewed multiple witnesses who were present at the scene of the accident.

[68] Mr Homer prepared a report and witness statement in the matter. Both the witness statement and the report were admitted into evidence with no objections from Counsel Mr Cecil Williams on behalf of the claimant.

[69] Mr Homer amplified his evidence to say that based on the information he received that the first named defendant's driver's licence was a valid one.

[70] In his report reference was made to a statement of Mr Esau Quashie. This person did not give evidence before this court and this court will not take this statement into consideration. In his report Mr Homer gave an overview of statements made by the witnesses who gave evidence in the matter and a review of the evidence given by this witness under cross examination this court understands and got the distinct impression that Mr Homer relied on the notes of his "workers" who purportedly interviewed the witnesses and that he did not interview the witnesses himself for purposes of preparing the report.

[71] Mr Homer based on his analysis of what was told to him and what pictures were taken by his workers and visiting the scene sometime after the accident that concluded that the first named defendant did not cause the accident and that the accident could have been avoided had the claimant "Natalya" ensured that the road was clear before the attempted to cross the road.

[72] This court does place great weight on all of this witness' evidence.

The measurements

[73] Included in the report of Mr Homer was correspondence to him regarding the measurements taken by the investigating officer on the day of the accident which is worth repeating in its entirety as the measurements of the accident scene are to be considered by the court in determining who may have been responsible for the accident.

[74] The measurements taken are as follows:

- (a) The width of the road at point of impact 27 feet 00 inches.
- (b) The width of road at point of impact as pointed out by the driver 19 feet 5 inches.
- (c) The length of Pedestrian crossing 23 feet 8 inches.
- (d) The width of Pedestrian crossing 6 feet 7 inches.
- (e) The distance of police point of impact to pedestrian crossing 11 inches.
- (f) The distance from right front wheel of the truck TD 585 to the centre lane 3 ft 5 inches.
- (g) The distance of drivers point of impact to centre lane 8 feet 2 inches
- (h) The distance of the police point of impact to centre lane 6 feet 3 inches
- (i) The length of tire impressions 23 feet 10 inches.
- (j) The distance from driver's point of impact to where Natalya fell 16 feet 11 inches.
- (k) Length of Truck Registration number TD585 17 feet 7 inches.
- (l) Width of motor vehicle TD585 7 feet 4 inches

Submissions on behalf of the parties

[75] This court now turns to the submissions by counsel concerning their respective legal positions adopted in the matter.

The issues:

[76] The issue for determination at this stage of the case at bar is whether or not the accident which occurred that day was caused solely by the first named defendant or by the claimant or in the alternative if it was caused by the negligence of the defendant that the claimant contributed to the occurrence by dashing across the road into the path of the vehicle driven by the first named defendant and owned by the second named defendant when it was unsafe to do so.

Submissions

[77] Counsel for the claimant submitted that the evidence and law support the claimant's amended claim and that the court ought to grant the reliefs sought by the claimant in the amended statement of claim filed.

[78] The claimant contends that the accident was caused solely by the negligent driving of the claimant who was in breach of Regulations 4,5 and 6 the Pedestrian Crossing Regulations of the Motor Vehicle and Road Traffic Act⁶. Regulations 4,5 and 6 provide as follows:

"4. Driver of vehicle to stop if pedestrian walking within crossing.

The driver of every vehicle shall stop his vehicle at the first line of a crossing if there is a pedestrian going from one side of the road to the other within such crossing.

5. Driver of vehicle approaching crossing to stop if necessary.

The driver of every vehicle approaching a crossing shall, unless he can see that there is no problem proceed at such speed as to be able, if necessary to stop before reaching such crossing.

6. Pedestrian to have precedence over vehicular traffic.

The driver of every vehicle at, or approaching a crossing where traffic is not for the time being controlled by a police officer, shall allow free and uninterrupted passage to any pedestrian who is within such crossing and every such pedestrian who is within such crossing and every such pedestrian shall have precedence over all vehicular traffic at such crossing"

It is the claimant's submission that based on the evidence before the court the first named defendant failed to observe these Regulations.

[79] Counsel for the claimant cited and relied on the judgment of Thom J in the case of **David Balcombe -v- Vaughn Lowman**⁷ where the learned judge was deciding the issue of whether the accident in issue was caused solely by the defendant or the claimant or whether they both contributed to the accident. The judge held that it is settled law that the driver of a motor vehicle on the road has a duty to exercise due care when driving on the road. The judge cited and applied the law as stated in the cases of **Cheryl Edwards Administrator of the Estate of Janique Lewis -v- Ethel Mills**⁸ and in **Page -v- Richard Doper**⁹ as follows:

the duty of a driver in the following terms:

⁶ Chapter 483 of the Revised Laws of St Vincent and the Grenadines 2009

⁷ SVGHCV2006/0375

⁸ ANOHC No 168 of 1998

⁹ T&T HCA No 2656 of 1998

"Drivers of motor vehicles are under a duty to exercise due care on the road. They are expected inter alia to determine what other users of the road are doing. They are expected to maneuver their vehicles in order to prevent and avoid accidents. They are expected to use and observe proper signals, signals must be clear and unambiguous and as far as practicable in keeping with the Highway Code. They must exercise due care and attention at all times. This might at times require a driver to stop in order to have a proper look out so as to determine whether it is safe to proceed or to overtake another vehicle. It all depends upon the circumstances including the weather, visibility, the number of vehicles on the road, the presence of pedestrians and the state of the road."¹⁰

And the duty of care as stated by Rowlatt J¹¹

"It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animal or things in the way at any moment, and he is bound to go not faster than will permit or his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. If there is any difficulty in the way of seeing, as, for example, a fog, he must go slower in consequence. In a case like this, where a man is stuck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if he was keeping the best look-out possible then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had had better lights or had kept a better look-out the probability is that the accident would never have happened."

[80] Counsel also cited and relied on the case **Kingsley Williams (by his mother and next of kin Christiano Cato -v- Wendell Toney and Isaac Yearwood**¹² where judgment was entered for the claimant and there was a finding that both the claimant and the second named defendant were responsible for the accident. Counsel noted that the trial judge found that the second named defendant failed to pay due attention to the approaching pedestrian cross in an area where there are five (5) schools. Further the trial judge stated that Under Regulations 5¹³ referred to earlier, a driver when approaching a crossing unless he can see that there is no pedestrian on the crossing is required to proceed at such speed as to be able if necessary to stop before reaching such crossing"

¹⁰ Cheryl Edward Case supra at paragraph 17

¹¹ Page -v- Richard and Doper supra at paragraph 4

¹² SVGHCV2005/0481

¹³ Supra

[81] Reference was also made to **Rodney Williams -v- Roland de Roche**¹⁴. In this case the claimant was injured when he attempted to cross the road at Arnos Vale in St Vincent. The court considered the previously cited duty of care that is expected of a driver. The judge also noted that "A pedestrian has a duty to ensure that it is safe to cross the road before entering a pedestrian crossing"¹⁵ and found that the claimant contributed to the accident having regard to the area where the accident occurred that he had not taken due care for had he looked to his right as he claimed he would have seen the claimant's vehicle coming towards the crossing. In the circumstances of that accident the court found the claimant to be equally responsible for the accident. Counsel Cecil Williams invited the court to consider that in the case at bar the claimant was crossing on the pedestrian crossing when she was struck by the vehicle driven by the first named defendant.

[82] Regarding the expert report as produced and relied on by the defendants it was the claimant's contention that this report should not be relied upon in that the report failed to meet the minimum standards as set out in Part 32.4 of CPR 2000 and in the circumstances submitted that the court ought not to give much weight or any weight at all to the said report. Counsel cited and relied on the dicta of Lady Justice Asplin in her judgment in **Peter Griffiths -v- TUI (UK) Limited**¹⁶ when she said "There is no rule that an expert's report which is uncontroverted, and which complies with CPR PD 35 cannot be impugned in submissions and ultimately rejected by the judge. It all depends upon all of the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim.

[83] Counsel's submission on behalf of the claimant was that the expert report was controverted in cross examination.

The defendants' submissions

[84] Counsel on behalf of the defendants examined the evidence of each witness in turn. Regarding the evidence of Natalya Kydd Counsel Chanté Francis pressed the court to view her evidence with great suspicion. Counsel pointed to the court that Natalya was unable to recall everything that transpired before the accident. Particularly that Natalya could not remember the conductor asking Ms Wright to help her cross the road and that Ms Wright was holding her hand to cross the road. Counsel questioned Natalya's evidence that she looked up and down before crossing the road against the fact that she could not recall "something as bold and routine as a pregnant lady hold her hand while waiting to cross"¹⁷

¹⁴ Claim No SVGHCV2008/01111

¹⁵ Ibid at paragraph 16

¹⁶ [2021] EWCA Civ 1442

¹⁷ Quoted from Counsel Daniel's closing submissions at paragraph 13

[85] Counsel submitted that the evidence of Mr Forbes was clear, cogent and consistent. Counsel emphasized that Mr Forbes only saw the claimant and Ms Wright on the side of the road in his peripheral vision behind the van which was stopped on the pedestrian crossing. It is to be noted that both Ms Wright and Mr Pompey told this court that the bus stopped before the crossing. This is court accepts these witnesses' evidence in this regard.

[86] Counsel Francis in her closing submissions further submitted that Mr Forbes said there was no vehicle in front of him and that there was no car that stopped in front of him at any point. A review of the evidence adduced at trial Mr Pompey who was in the truck cab with Mr Forbes said under cross examination that there was a minivan travelling in front of them which stopped to let off passengers and that they overtook that van.

[87] This was the evidence of Mr Pompey's as recorded by the court when he was under cross examination in this regard:

Question: Did you see any vehicles in front of you?

Answer: When we was [sic] coming down the passenger van was in front of us and it stop to let off passengers and we pulled out from behind the van.

Question: After you drove past this van that was in front of you was there any other vehicle in front of you other than the one that stop?

Answer: No

Question: How soon after passing that van did you see the other van stopped at the pedestrian crossing?

Answer: The other van was behind the pedestrian crossing and the little child run come over. The lady try to hold on the crossing and the child go

Question: Where exactly did you see the child and the lady on the crossing or behind the van where did you see them?

Answer: I saw them on the side of the road"

[88] Counsel further asked to the court to accept that Mr Forbes was not driving fast at the time of the accident and that it was Natalya who darted across the road into the path of the oncoming truck and that when she did so she was not on the pedestrian crossing. Counsel submitted that the extent of Natalya's injuries supports Mr Forbes' evidence that he was not travelling at a fast rate of speed but that her injuries were caused by the dragging of the truck after he applied his brakes when he saw Natalya break away from Ms Wright and dart across the road.

[89] Counsel urged the court to accept the evidence of Ms Wright and to consider Ms Wright to be an independent and unbiased witness as to what happened on the faithful morning. I agree with counsel for the defendants that inferences can be drawn from Ms Wright's testimony which does in fact show that Natalya pulled away from her and ran across the pedestrian crossing to the other side of the road, and that she actually made it to the other side of the road but it was her book bag that caught on the truck's fender causing her to be dragged. Counsel further encouraged the court shows that the fact that Natalya was dragged as a result of her bag being hooked in the truck's bumper clearly shows that Mr Forbes did in fact apply his brakes quickly enough to avoid striking Natalya head on. Counsel encouraged the court also to take into account the fact that Mr Forbes was driving a truck which was loaded with stones.

[90] Counsel Francis further submitted for the court's consideration that in her evidence Ms Wright said that the truck driven by Mr Forbes had in fact almost reached the pedestrian crossing when Natalya pulled away from her and ran across the road into the truck. Counsel submitted that Ms Wright's evidence shows clearly that Natalya "dangerously and unsafely darted across the road when the truck was almost upon them" and that she unable to run after her given her condition.

[91] Under cross examination Ms Wright told this court that when she disembarked the van she and Natalya moved to the back of the van before it moved off. She said they were standing on the pedestrian crossing and that the van stopped by the crossing. Ms Wright told this court under cross examination that she was standing at the pedestrian crossing with Natalya at the side of the road waiting for the traffic to pass and that Natalya pulled away from her and ran into the truck, it is to be noted that Ms Wright under cross examination said that she was "not too sure" about a car coming and stopping before the crossing.

[92] It is to be noted on re examination that Ms Wright said that when she and Natalya came out of the van they went and stood behind the van before the van moved off. She also said that she and Natalya were standing at the crossing. To this court's mind this means that they moved to stand at the pedestrian crossing which indicates that the van was either passed the pedestrian crossing or partially on the cross but not necessarily entirely on the crossing as submitted by Counsel Francis' submissions on behalf of the defendants.

[93] Counsel Francis on behalf of the defendants cited and relied on the locus classicus **Donoghue -v- Stevenson**¹⁸ to say that it is well established law that a duty of care is owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care the claimant will be harmed. Counsel further submitted that

¹⁸ [1932] AC at 579

it is a generally accepted principle that operators of motor vehicles owe a duty of care to fellow road users which includes pedestrians.

[94] Counsel Francis on behalf of the defendant submitted that it is necessary for the court to determine whether or not Mr Forbes was in breach of his duty and submitted that the court should consider whether or not Mr Forbes placed in the position he was placed in would have acted any differently. Counsel urged the court to consider the learning laid down in the words of Alderson B **Blythe -v- Birmingham Waterworks CO**.¹⁹ when he had this to say "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent and reasonable man would not do"²⁰

[95] Counsel submitted that in deciding as to what is the reasonable man in the circumstances of the case at bar and what is the standard of care expected of Mr Forbes in this case the court should consider the following:

- a. The likelihood of harm
- b. The seriousness of the injury that it risked
- c. The importance of the utility of the first defendant's conduct and
- d. The cost and practicality of measures to avoid them.

[96] It was submitted by the claimant that there is no evidence before the court to support the claimants' allegation that the first named defendant was driving at an excess rate of speed or above the speed limit. Counsel noted that the claimant failed to adduce any evidence which showed that the first named defendant was driving at a fast or excessive rate of speed. Counsel cited and relied on the case of **Derrick -v- Cheung**²¹ in this case the High Court of Australia was called upon to consider whether Court of Appeal of New South Wales erred in affirming the judge of first instance decision where it was found that a motorist who exercising reasonable care was liable for the injuries suffered by an infant who ran into the path of the appellant's vehicle because the collision might have been avoided had the motorist been travelling at a lesser speed that she was.

[97] In discussing the accident the High Court of Australia comprising of five judges held that "there was no basis upon which any finding of negligence on the part of the appellant could be made" It was stated that even though the occurrence of the accident was tragic and the collision a parents worst night mare the trial judge ought to have determined the issues according to law. It was opined that "... the proper test remains whether the plaintiff has proved that the defendant, who owed a duty of care has not acted in accordance with reasonable care."

¹⁹ [1843-1860] ALL E R 478

²⁰ Ibid at page 479

²¹ [2001] HCA 48 High Court of Australia

[98] Counsel also cited and relied on a decision emanating from Tasmania **Johnson - v- Johnson**²² this case concerned an accident involving a seven year old who was on a bicycle and was hit down by the defendant. It was held *inter alia* that the plaintiff carried the onus of establishing that it is more probable than not that the defendant was negligent in that he was travelling at an excessive speed and/or that he failed to keep a proper look out. It was also held that the defendant was driving below the speed limit when the child darted out onto the road.

[99] In applying these two cases to the case at bar it was submitted on behalf of the defendants that there is no evidence that the first named defendant was driving at an excessive speed or too fast as alleged. It was further submitted that the first named defendant's evidence that as soon as he saw Natalya dart out onto the street he applied his brakes was not challenged by the defendant and ought to be accepted by the court as the truth and therefore in the circumstances of the case the defendant was not in breach of his duty of care and therefore he was not negligent as alleged by the claimant.

[100] Counsel further submitted that it is important that the court that the degree of care must be proportionate to the degree of risk involved if the duty of care is not fulfilled²³. It was contended that the degree of risk involved in the case at bar. In the **Northwestern Utilities Case** as referred to by Counsel on behalf of the defendant essentially established that the degree of care which that duty involved should be proportionate to the risk involved.

Court's Considerations

[101] There is no dispute that at the time of the accident Mr Forbes was working for the second named defendant and was not on a frolic of his own. The question is the first named defendant was in breach of his duty of care to the claimant as a road user. I have taken all of the evidence relied on by the parties into account in coming to my conclusions.

[102] There is no evidence before the court that suggests the motor vehicle TD585 malfunctioned at or around the time of the accident. Further there is no evidence before the court that Mr Forbes was in any way incompetent or impaired at the time of the accident.

[103] There is no need to reiterate or rehash the evidence adduced by both sides in the trial herein. The primary issue to be determined in this case is whether the

²² Clayton Christopher Johnson By His Next Friend Donna Johnson v Rex Graeme Johnson [1997] TASSC 53 (21 May 1997)

²³ Re: Northwestern Utilities Limited -v- London Guarantee and Accident Co. Limited [1936] AC 108 at 176

accident was caused solely by the negligent driving of Mr Forbes or by the negligent actions of Natalya who it is to be noted was six years old at the time of the accident. In the alternative whether or not Natalya contributed to the cause of the accident so that this court should make a finding that she was contributorily negligent as contended by the defendants in the alternative.

[104] From the evidence this court finds as a fact that on the morning of the 9th March 2018, Natalya Kydd who was six years old at the time disembarked a van along with Ms Wright on her way to school that morning and she ran across the pedestrian crossing to the other side of the road and when she almost reached the other side of the road her book bag hooked on the front left bumper of the vehicle causing her to be pulled under the truck and dragged some distance causing her to suffer injuries.

[105] The defendants sought to make out a case of contributory negligence on the part of Natalya. In the case of children the test is whether or not a child has exercised the duty of care expected from children of the specific or similar age, intelligence and experience.

[106] This is a difficult question to analyse. In the case at bar, Natalya spoke of looking left and right she was also at the pedestrian crossing, and it is said and this court accepts the evidence of Miss Wright (the pregnant lady) that she pulled away from the adult whose assistance was sought to see her across the road safely and that she crossed at the pedestrian crossing.

[107] She, it would appear actually made it to the other side of the road as it would appear that it was her backpack that was caught in the left fender of the truck causing her to be dragged under the truck which it is clear to this court did not come to a stop at the pedestrian crossing. We have to say in this case but for the Grace of God that Natalya survived the accident.

[108] We are to bear in mind that children lack the judgment and intelligence of adults and there are factors which are to be considered in distinguishing the conduct of a six year old than that of an older child or an adult. The thought process of a six-year-old is to be considered different from an older child or an adult. Even when Natalya gave evidence her thought process would have been more mature than at the time of the accident as when giving evidence she was ten years old and in common entrance class.

[109] In the case at bar the defendants have sought to deny liability or in the alternative claim contributory negligence on the part of the six year old child.

[110] The capacity of the child is to be considered and decided on a case by case basis.

[111] A child's inability to be negligent can be rebutted if it can be factually shown that the child is sufficiently mature and has the ability to avoid danger and make intelligent judgments.

[112] This speaks to the to the importance of taking into account the "child's physical maturity, providing special safeguards and care including legal protection. In **Davies -v- Swan Motor Co**²⁴ **Bucknill LJ** said

"when one is considering the question of contributory negligence it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety"

[113] In considering recovery as to who is in part at fault ...it is important to separate out simple causation and the defendant must prove causation in that the claimant's fault must be shown to have contributed to the damage.

[114] When it is a child the standard of care to be applied is to be modified from that of an adult.

[115] How is that modification to be assessed. One has to refer to an objective criteria. ... the claimant is required only to show the degree of care reasonable in a child of the claimant's age in the case at bar or by assessment of the particular child's understanding.

[116] One has to look at what is just and equitable should the child's maturity and understanding be a relevant consideration.

[117] The defendants allege contributory negligence. It is trite law that in order to establish the defense of contributory negligence, the defendant must prove first that the claimant failed to take "ordinary care of himself "or, in other words, such care as a reasonable man would take for his own safety, and second, that his failure to take care was a contributory cause of the accident. **Re: Lewis v Denye**²⁵ per du Parcq L.J.

[118] The liability of children for contributory negligence was addressed in the **case of Gough v Thorne**²⁶ where a plaintiff aged 13½ years was hit by a car driven by the defendant when crossing the road. The Court of Appeal, Civil Division held that

²⁴ [1947] 2 KB 291

²⁵ [1939] 1 AER 310.

²⁶ [1966] 1 WLR 1387

an ordinary child of 13½ (unlike an adult) could not reasonably be expected to pause to see for herself whether it was safe to go forward when the lorry driver had beckoned her on, and so the plaintiff had not been negligent in relying entirely on the lorry driver's signal to her to cross.

[119] In that case the claimant in the company of her two older brothers was crossing the road. A truck stopped to allow them to cross. The truck driver also held out his hand to alert oncoming traffic that the children were crossing the road. The defendant in that matter drove between the truck on the bollards on the side of the road and in doing so knocked down the child. The Defendant sought to claim contributory negligence on the part of the claimant. At first instance the judge found contributory negligence on the part of the claimant. His judgment was overturned on appeal.

[120] The Court of appeal held that :

(1) that a very young child could not be guilty of contributory negligence although an older child might be, depending on the circumstances; that a judge should only find a child guilty of contributory negligence if he or she was of such an age as to be expected to take precautions for his or her own safety and should only make such a finding if blame could be attached to him or her.

(2) That, bearing in mind the fact that a child had not the road sense or the experience of older people, no blame could be attributed to the plaintiff in the circumstances of the present case since she had been beckoned by the lorry driver to cross the road and a child of 13½ could not reasonably be expected to lean forward to see whether any traffic was approaching. Accordingly, the judge was wrong in attributing any contributory negligence to her and the appeal must be allowed.

[121] Lord Denning, MR said²⁷ :

" A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."

²⁷ Ibid at at. P. 1390

[122] The matter was succinctly put by Persaud, JA in **Shalim Ghanie v Bookers Shipping**²⁸ at p. 405 in this way: - "The law, it seems, is that where a child is of tender years, the courts will not be prepared to find contributory negligence."

[123] If Natalya was older or if she was an adult she would have been liable in negligence to some proportion. This court is constrained to say that it was unfortunate that the conductor did not ensure that Natalya crossed the road in controlled circumstances which one can say may have been preferably in front of that bus to avoid the danger presented by the child crossing the road from behind the bus.

[124] The only evidence available to the Court is that the at the time of the accident Natalya was six years old. It should be borne in mind that children of this age would be given to failures to observe safety procedures when crossing the road. What is clear to this court in the case at bar is that Natalya was at the pedestrian crossing and headed to school when she was struck. In the premises, I find myself unable to find any contribution on the part of the Claimant.

[125] As the judge of fact in the case at bar I was clearly unimpressed with the defendant's expert evidence and his answers under cross-examination. This court takes into consideration and is guided by the words of Green J in **C v Cumbria University NHS Trust**²⁹ "... A Judge should not simply accept an expert opinion; it should be tested both against the other evidence tendered during the course of a trial, and, against its internal consistency". This court is not satisfied that this expert witness really carried out a thorough investigation of the accident and relied heavily on the words of his "workers" who were not themselves called as witnesses or their statements tested.

[126] A defendant has a right to defend. As to whether or not that defence is successful, at trial, is a matter for the Trial Judge. The expert evidence that was given failed in a major way to comply with the provisions in the Civil Procedure Rules 2000 governing expert witness evidence and this made the evidence most unsatisfactory.

[127] This court found the decision of Benjamin J in the Grenada Case of **Katisha Smith (by and through her next friend Roselyn Smith) v Raphael Rodney**³⁰ to be very helpful in making the decision as to liability in the case at bar. In that case the court stated that

²⁸ (1970) 15 WIR 403

²⁹ [2014] EWHC 61.

³⁰ NO. GDAHCV1996/0226

"In **cases** such as the present at bar, the court is required to have regard to all the factors for the purpose of determining what was a reasonable standard of care in all the circumstances. Each **case** turns on its own peculiar facts and the Court is oft wary about applying previously decided matters as precedent. The Court of Appeal in *Moore (an infant) v Poyner* [1975] RJR 127 prescribed the test to be applied by posing the following questions (at p. 132G): -

".... Would it have been apparent to a reasonable man, armed with commonsense and experience of the way pedestrians, particularly children, are likely to behave in the circumstances such as were known to the defendant to exist in the present **case**, that he should slow down or sound his horn or both?"³¹

...

"The defendant ought to have advised himself of the likelihood of a schoolchild seeking to cross into a by-road at that hour of the day having disembarked from a stationary bus on the opposite half of the road. The chance of a child running or emerging from behind the stopped bus required him to sound his horn and to proceed at a speed much less than 25 mph which this Court finds him to have travelling at the time of the collision. He neither sounded his horn nor slowed down. The Defendant therefore was in breach of his duty to the infant pedestrians likely to have been crossing the street and is therefore liable in negligence to the Claimant."³²

[128] I find that the cause of the accident was that the first named defendant caused the accident. This court is unable to make a finding of contributory negligence against Natalya as sought by the defendants. Such a finding would have been open to the court if Natalya was older, either a young adult or an adult but at the time of the accident it is to be noted that Natalya was six years old. This court is of the view that the first named defendant was negligent in that he failed to drive carefully in a school zone, that he failed in his duty of care to drive and or maneuver his vehicle with the necessary care as is required and expected of a competent and experienced driver.

[129] This court also takes into consideration and is fortified in its view after considering the provisions of the Pedestrian Crossing Regulations³³ particularly regulations 4,5 and 6. While required the first named defendant to stop his vehicle if a pedestrian is walking within the crossing. Even if Natalya was not in the

³¹ Ibid at paragraph 16

³² Ibid at paragraph 17

³³ Op cit

crossing when she was first seen by the first named defendant, specific regard must be had to Regulations 5 & 6 of the said Regulations³⁴.

[130] In the case at bar, there is no evidence that the first defendant drove in such a way that would have enabled him to stop before reaching the pedestrian crossing as required by the Regulations.

[131] This court finds that based on all the evidence presented at the trial the first named defendant failed to show that he exercised the duty of care required of him, particularly in the vicinity of a pedestrian crossing in what can be termed a busy area with a school nearby and a shopping centre. It is not in dispute that Natalya crossed the road this court finds that she did so at the pedestrian crossing. It is noted that the driver was approaching the pedestrian crossing and he ought to have been on the look out to see whether there was anyone at the crossing.

[132] In the case of **London Passenger Transport Ltd -v- Upson**³⁵ the House of Lords in considering the duty of care of a driver in the vicinity of a passenger crossing and considering the applicability of Regulations³⁶ which are similar to Regulations that are applicable in St Vincent and the Grenadines. After duly considering the Regulations it was held that reg. 3 applied to a crossing place controlled by lights and that the driver was in breach of the statutory duty imposed thereby since he had not a clear view of the crossing and yet failed to "proceed at such a speed as to be able if necessary to stop before reaching the crossing.

[133] In **Edyth Leonard -v- Ernest John**³⁷ Justice of Appeal Brian Alleyne S.C. in delivering the decision of the Court of Appeal said

"It is the clear duty of a driver approaching a pedestrian crossing to proceed at such a speed as to be able to stop if necessary, and to allow free and uninterrupted passage to any pedestrian who is on the crossing. Pedestrians within the limits of the crossing have precedence over all vehicular traffic. Charlesworth and Percy on Negligence ninth edition at paragraph 9-

³⁴ "5. Driver of vehicle approaching crossing to stop if necessary The driver of every vehicle approaching a crossing shall, unless he can see that there is no pedestrian thereon, proceed at such speed as to be able, if necessary, to stop before reaching such crossing.

6. Pedestrian to have precedence over vehicular traffic The driver of every vehicle at, or approaching, a crossing where traffic is not for the time being controlled by a police officer or traffic lights, shall allow free and uninterrupted passage to any pedestrian who is within such crossing, and every such pedestrian shall have precedence over all vehicular traffic at such crossing."

³⁵ [1949] 1 All ER 60

³⁶ Pedestrian Crossing Places (Traffic) Regulations 1941 made under the Road Traffic Act 1934 @ Regulation 3 & 5

³⁷ Civil Appeal No. 4 of 2003 (Grenada)

223 says 'If by the exercise of reasonable care, the driver can see that there is a pedestrian on the crossing, it is no defence to prove that, before moving on to the crossing, the pedestrian did not look to check for the presence of traffic'. I note that the duty of the driver is to exercise reasonable care, and it seems to me that, in the circumstances of this collision, given that it was a sunny and clear day, and there is no reason to believe that there was anything obscuring his vision, had the Respondent been exercising reasonable care, he would have seen the Appellant on the crossing."

[134] In **Ellis -v- Kelly**³⁸ the claimant was struck down by a vehicle and sustained serious injuries. The claimant was in what the court considered to be a "controlled area" of a pedestrian crossing. It is noted that the crossing was in the vicinity of a playground and the driver was familiar with the area. In the case at bar the crossing was in the vicinity of a school and shopping area as the first named defendant was aware. It was held in this case that a reasonable driver would have slowed down in approaching the pedestrian crossing and that he ought to have been alert to the possibility of children running out onto the road. It is noted that the claimant in this case (Ellis -v- Kelly) was 8 years old was found not to be guilty of contributory negligence as asserted by the defendant.

[135] Benjamin J in the **Katisha Smith** case said

"It may well be that had the Claimant been an adult she would have been liable in negligence to some proportion. By way of comment, it is unfortunate that the driver of the stationary bus assisted by his conductor did not ensure that the Claimant crossed the road in controlled circumstances preferably in front of that bus to obviate the danger presented by the child crossing the road from behind the bus. To my mind, this is a function intrinsic to the role of a bus conductor aided by the driver of the bus if the public roads are to be safe for pedestrians of tender years" ³⁹.

This court endorses the views of the learned judge.

[136] For reasons set out aforesaid it is the finding of this court that the defendant is liable in negligence to the claimant herein and there is no finding of contributory negligence on the part of the claimant.

Disposition

³⁸ [2018] EWHC 2031 (QB) * This case was not mentioned by either counsel but the court found it to be helpful in the consideration of the case at bar.

³⁹ GDAHCV1996/0226 at paragraph 20

[137] It is therefore ordered that:

- a. Judgment be entered in favour of the claimant in an amount which may be agreed between the parties or to be assessed by the Master in Chambers.
- b. The Court encourages the parties to consider coming to an agreement or settlement as to the damages to be paid to the claimant.
- c. Pursuant to Part 25 of CPR 2000, should the parties come to an agreement of the quantum of damages to be paid to the claimant the parties are to revert to the court for approval of any settlement or compromise of the claim and for directions regarding the payment of the said monies.
- d. Costs to be fixed costs as prescribed by CPR 2000.

[138] This Court wishes to record its gratitude to counsel on both sides for the manner in which the proceedings were conducted and for their helpful submissions in the matter.

M E Birnie Stephenson

High Court Judge

BY THE COURT

[Seal]

