

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV 2017/0404

BETWEEN:

[1] NOVELLA PHILLIP
[2] WAYNE PHILLIP

Claimants

And

[1] AKEEM BENJAMIN
[2] MARTIN MANSOOR
[3] MARK MANSOOR

Defendants

Appearances:

Mr. George Lake appearing with Mr. Ralph Bowen for the Claimant

Ms. C. Debra Burnette appearing with Mandi Thomas and Kyle Nicholson for the Defendant

2022: May 18th
June 28th
2023: February 27th

JUDGMENT

[1] **ROBERTSON, J.:** Tragedy struck the Phillip family at Carnival parade celebrations on August 2, 2016, in St. John's Antigua when Oniqua Phillip met her demise as a result of a motor vehicle accident. Oniqua Phillip, one of the masqueraders in the carnival festivities on August 2, 2016, succumbed to her injuries when a music truck driven by the First Defendant and owned by the Second and Third Defendants came into contact with her. At the time of her death Oniqua Phillip was the mother of an infant.

- [2] These proceedings were instituted by the parents of the deceased. The Claimants pleads that the proceedings were instituted on behalf of the estate for the benefit of the dependents of the deceased under the provisions of the Causes of Action (Survival) Act CAP 78 and the Fatal Accident Act CAP 166 and as persons beneficially interested under section 6 of the Fatal Accidents Act CAP 166. T

Overview

- [3] Oniqua Phillip was in a carnival parade in the vicinity of the Antigua Recreation grounds on Old Parham Road when a Mack Truck registration number C68, came into contact with her resulting in her death. The Second and Third Defendants owned and operated 2M Heavy Duty Enterprises and were the owners of the Mack Truck, registration number C68. The 2M Heavy Duty Enterprises is a business which offers a variety of heavy-duty services. The truck in question was hired by Abdo Mansoor & Sons Limited t/a Lava International to transport its music equipment for the carnival celebrations on 2nd August 2016.
- [4] The Claimants contend that the Defendants were negligent in the manner in which the truck was operated. The Defendant has defended the claim and contended that the death of the deceased was caused or contributed to by the negligence of the deceased.
- [5] In these proceedings the Claimants gave evidence in support of their case. The First, Second and Third Defendants gave evidence in support of their case.

The Law on Negligence, Application and Finding

- [6] The relevant principles in the law of negligence were well established in the often quoted case of ***Donahue v Stevenson***¹. It is equally well established that a duty of care exists by motorists to all road users. The duty owed by road users to other road users was expressed in the often-quoted case of ***Cheryl Edwards Administratrix of the Estate of Janique Lewis v Etnel Mills***²:

¹ (1932) AC 562 at 579.

² ANUHCv1998/0168.

“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 manoeuvre their vehicle in order to prevent and avoid accidents. They are expected to use and observe proper signals, signals must be kept clear and unambiguous and as far as practicable in keeping with the Highway Code. They must exercise due care and attention at all times. ... 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”

[7] It is to be noted that the greater the likelihood of harm the greater the level of caution that would be required of the motorist. Thus, in a matter where there are allegations of negligence arising from the management of a vehicle the Court considers not only the duty owed by the motorist as it is generally accepted that a duty is owed to fellow road users, but the Court also considers the entire circumstances including the likelihood of harm and the seriousness of any harm that is likely to be caused or is foreseeable. It is important to recognize that in the circumstances of fatal accident, it is not the fact of death which is proof of negligence but whether the death was as a result of a wrongful act or negligent act of the defendant³.

[8] In the circumstances of this case a Mack Truck was being operated during the Carnival parade. This vehicle carried a 40-foot trailer. The truck or rig was approximately 14 feet in length. Thus, the entire vehicle was in excess of 50 feet. The Carnival parade celebrations are characterized by a festive atmosphere with loud music, dancing, laughter, revelers, and persons being inebriated, the selling of a number of items such as food and souvenirs, and a relaxation of the pedestrians' normal road cautions. In such an atmosphere the ability to communicate becomes compromised and persons are likely to have a reduced appreciation for their safety. It is very much an occasion when the streets primarily become the domain of 'pedestrians'. Any person operating a vehicle under such conditions, particularly a vehicle of the size operated by the Defendants, would be expected to exercise extreme caution since there is a real risk of not only harm but serious harm to the revelers. Although the First Defendant indicated in his evidence that at the time of the accident, at night, the crowd had dispersed

³ Intended Administrator of the Estate of Kitwana Fyfield, deceased v Harris SKBHCV2013/0184 at para. 40.

the police's auto report of the incident indicated that at the time of the accident the Truck was surrounded by a very large crowd of Carnival revelers.

[9] The First Defendant gave his version of the circumstances which gave rise to the accident. The First Defendant, Akeem Benjamin, indicates that he has been driving trucks in the carnival parade for about five or six years, and he is employed as a truck driver by the Second and Third Defendants. Dave Whyte usually accompanies the First Defendant when he is hired to drive in Carnival parades. Mr. Whyte usually accompanies the First Defendant to relieve the First Defendant if he becomes tired, assists by clearing persons away from the sides of the truck, assists with the maneuvering of the truck particularly when the truck is required to turn, assists the First Defendant with spatial awareness on the proximity of objects to the truck and providing general directions. At the time of the accident Mr. Whyte was not present and the First Defendant indicated that he was receiving assistance from an individual by the name of Carlos. During cross-examination the First Defendant indicated that he was also receiving driving assistance from a security guard who was to the back of the trailer.

[10] The evidence of the First Defendant is that on the day in question he was parked on the south side of the Government House entrance and parked at the entrance of the Government House with the recreational grounds to the right-hand side. He readied himself to leave his parked position and received directions from the police to proceed. The First Defendant indicated that he drove on the right side of the roundabout then proceeded to try to get back to the correct side of the road. The First Defendant's evidence is that he was being directed by two uniformed police officers, that he put on the right indicator and kept blowing his horn to indicate to all in the vicinity that the truck was about to move. It was his evidence that the trailer is a left-hand drive trailer and that when driving straight he could see along the sides of the trailer, but and that there are blind spots when the vehicle is being turned. There was only one person, Carlos, clearing persons from the side of the truck.

[11] The First Defendant indicated that when he was turning, he was alerted that something had gone wrong. Carlos also 'banged' on the door of the truck and told the First Defendant to stop. The First Defendant also received instructions from a police officer not to move the truck.

[12] The witness admitted that during the turn there would have been blind spots and it was during the turning process that the deceased lost her life. The witness admitted that he had no vision of the length of the trailer, and he did not see the deceased in the mirrors of the truck. The witness indicated that upon turning the rig one loses visibility with the tail of the trailer and one would not see the tail of the trailer when the rig begins to turn or spin. Stated another way when the rig begins to turn there will be blind spots.

[13] The witness indicated that his assistant Carlos was to the front right of the truck clearing persons away from the truck giving directions and the witness was looking at both Carlos and the police officers. The witness indicated that there was a security guard at the back of the trailer.

[14] This Court notes that the incident occurred at night around 8:15 p.m. which meant that, unless the area was well lit, visibility was likely to be further compromised. This Court also notes the police report which stated that their investigations revealed that the First Defendant blew the horn of the truck. There was no account of the First Defendant continuously blowing the horn of the truck as was suggested by this Defendant.

[15] The evidence of Martin Mansoor is that the vehicle complied with the regulations set by the Antigua Festivals Commission and these regulations included the covering of the wheels from the rear of the trailer to the front of the trailer up to the area where the rig turning radius did not touch the covering, the provision of a roof system to protect the equipment and the provision of workmen. The equipment was strapped down to prevent it from accidentally falling and causing injury to any person, and a continuous rail system existed to prevent any of the workmen or performers from falling off the trailer bed.

[16] The evidence of Martin Mansoor is that six persons were employed to look after the equipment. These persons were to keep an eye out, move trees and wires with which the vehicle may come into contact. The evidence of Martin Mansoor is that four persons (including the driver) were employed to work with the driver. Mr. Mansoor could not provide any particulars of the persons so employed.

[17] It appears to this Court that the driver of the vehicle maneuvered around the roundabout when it was not safe to do so as it was at the point of turning that the wheels came into contact with the deceased

or when the driver maneuvered around the roundabout he did not have adequate assistance to safely drive around the roundabout.

[18] Additionally, this Court agrees with the submission of the Counsel for the Claimants that inadequate safety precautions were implemented by the owners of the vehicle. In the circumstances of a 50-foot trailer, there should have been a larger number of persons working around the truck to ensure that road users were kept a safe distance from the vehicle, additionally, the workers could have been provided with proper communication equipment which would have allowed the workers to communicate with each other despite the elevated noise from the music and persons. This Court does not accept that it is not practical for guard rails to be placed around the truck as such rails can be customized for the locations where the vehicle is required to traverse.

Vicarious Liability

[19] Where a principal gives their agent express authority to do a particular act which results in a wrongful act, the principal is responsible, jointly, and severally with the agent to the person against whom the act was done for any loss or damage occasioned⁴. The matter of agency is a question of fact⁵ and in the circumstances of this case there is no doubt that an agency existed between the First and the Second and Third Defendants.

Contributory Negligence

[20] In matters of contributory negligence, the Court considers a person to be contributory negligent if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent person, he may be hurt, and he must also take into account the possibility that others may be careless⁶.

[21] In the circumstances of this case the Court is required to ask itself if the deceased ought to have reasonably foreseen that her actions or inactions would have resulted in personal injury and/or death.

⁴ Halsbury's Laws of England: Agency (Volume 1 (2022)); 6. Relations between Principal and Third Persons; (4) Tortious Liability; 151. Agent's act expressly authorized by principal.

⁵ Rambarran v Gurrucharran (1970) 15 WIR 212.

⁶ Jones v Livox Quarries Ltd [1952] 2 QB 608 at 615 per Denning LJ.

There is no evidence of what exactly occurred at the time of the incident. The driver of the vehicle did not observe Ms. Phillip prior to and at the time that the wheel came into contact with the Ms. Phillip. The deceased's mother was not in close proximity at the time and the owners of the truck were not present. It is noted that the toxicology report indicates that the deceased was positive for THC, a controlled substance at the time of the incident. However, there is no evidence of when the substance would have been consumed and whether the levels would affect the decision-making process of the deceased at the relevant time. On the matter of alcohol consumption this Court notes that while the mother of the deceased indicated that the deceased consumes alcohol there is no positive indication for alcohol in the report with respect to the deceased's sample which was sent for testing. This supports the account of the mother of the deceased that the deceased did not drink or did not drink much alcohol on the day in question.

[22] It is accepted that the deceased came into contact with the right rear wheel of the truck in the area between the rig/truck and the trailer. This suggests that the deceased did not sufficiently heed the sound of the horn which the investigating report indicated was heard and the deceased is likely to have positioned herself in a manner and/or at a location that was likely to cause personal harm.

[23] In this Court's view the deceased contributed to her death and this Court has determined that the deceased's contributory negligence stands at 15%.

Measure of Damages

[24] The Claimants seek special and general damages. The Claimants plead that the Claimants bring this action on behalf of the Deceased's estate for the benefit of the dependents of the Deceased under the Causes of Action (Survival) Act and the Fatal Accidents Act and as persons beneficially interested under section 6 of the Fatal Accidents Act.

[25] On the matter of dependency, it is noted that while Novella Phillip as next friend of Eden Mims was removed from the proceedings, it is accepted by the parties that Eden Mims was a child of the deceased, and that the child was a dependent of the deceased. Eden Mims lived with the deceased prior to her death and both the deceased, and the minor lived with the First Claimant. Additionally, this Court notes that the tax information submitted shows that the minor was listed as a dependent

of the deceased. Further, it is noted that while the minor was not named as a party, the First Claimant did obtain Letters of Administration in respect of the estate of the deceased and the First Claimant was, along with the biological father of the child, granted legal and physical custody of the minor by an order of the Family Court of the State of New York granted.

The Dependency Claim

[26] In a dependency claim the dependent is entitled to the pecuniary benefit arising from the relationship which the person would have derived had the deceased continued living.

[27] In the past, the method used in the case of Harris v Empress Motors Ltd⁷ has been used for the calculation of the value of the dependency. In that case the Court noted that:

... the modern practice is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentages have become conventional in the sense that they are used unless there is striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided on its own facts. Where the family unit was husband and wife the conventional figure is 33% and the rationale of this is that broadly speaking the net income was spent as to one-third for the benefit of each and one-third for their joint benefit. Clothing is an example of several benefit, rent an example of joint benefit. No deduction is made in respect of the joint portion because one cannot buy or drive half a motor car. Part of the net income may be spent for the benefit of neither husband nor wife. If the facts be, for example, that out of a net income of £8,000 per annum the deceased was paying £2,000 to a charity the percentage would be applied to £6,000 and not £8,000. Where there are children the deduction falls to 25%, as was the agreed figure in the *Harris* case.”

[28] The deceased was 25 years old at the time of her death. The First Claimant, the mother of the deceased was in full-time employment. The mother of the deceased indicated that the family was a close-knit family and “as any parent expected her to be there for us financially emotionally to support and care for us in our senior years this has been taken from us”. The First Claimant has not specifically presented evidence which would cross the threshold so that the dependency of the First Claimant on the deceased could be said to have been substantially established. It is also noted that the First Claimant was in full-time long-term employment. Referring to the Second Defendant, it is noted that the deceased did not live with the Second Claimant and there is no evidence that the

⁷ [1983] 3 All ER 561.

Second Claimant depended on the deceased. Thus, the Court proceeds to consider the dependency claim as it relates to the minor.

[29] Prior to death Oniqua Phillip obtained a psychology degree and was employed as a social worker but was in her final year of earning a nursing degree. While the Claimants omitted to annex evidence of enrollment in the institution this Court notes that the tax information submitted for Oniqua Phillip refers to the said Oniqua Phillip being in an educational institution and the Court accepts the evidence of the Claimants that the discipline was nursing.

[30] Regarding the salary of Oniqua Phillip, the Counsel for the Claimant submits that at the time of death Oniqua Phillip was earning US\$1,600.00 per month or US\$19,200.00 annually and Counsel for the Claimants makes reference to tax information which was permitted into evidence by the Court. The tax information provided places the annual income at approximately US\$30,045.21. No explanation has been provided for the discrepancy however this Court notes that the Claimants have pleaded the income of the deceased at US\$1,600.00 per month.

[31] Counsel for the Claimant further indicated that if the deceased had lived and graduated from nursing school her salary would have increased to at least US\$70,000.00 per annum and further increased to approximately US\$100,000.00 per annum. This, Counsel supported through the presentation of documents from the U.S. Bureau of Labor Statistics on Occupational Employment and Wages, May 2018 for Registered Nurses. The statistics provides that the annual salary of registered nurses range from US\$50,800 to US\$106,530.00 there being a medium salary of US\$71,730.00 per annum. The Counsel for the Defendant submits that the Court ought to use the median is estimated at US\$70,000.00.

[32] On the matter of the dependence of the minor this Court notes that at the time of the accident the minor was two years old thus the period of dependence of the son would span a period of 16 years. If Ms. Oniqua Phillip had graduated in the field of nursing in 2017, she would have had to look for and find suitable employment in the field and would likely to have commenced employment at the lower end of the range. Assuming commencement at the lower end of the range the Court would assume that Oniqua Phillip, had she lived, would have been employed at a salary of US\$50,800.00

for approximately 5 years and having obtained experience in the field be in a position to earn an increased salary of US\$58,770.00 for five years and US\$70,000.00 for the following four years. Although Counsel for the Claimant has not indicated whether the sum is gross earnings or net earnings for a registered nurse, it would appear that the sums represent gross earnings. Additionally, there is no information regarding the applicable tax if any. This Court will apply a tax rate of 12.5 % to arrive at the net earnings of the deceased.

[33] In determining the multiplicand, the Court is required to deduct the living expenses of the deceased. At the time of the accident Ms. Oniqua Phillip was employed and living with her mother, the first Claimant. The First Claimant was employed in a long-term engagement. This Court is of the view that at the time of passing of Oniqua Phillip would have spent the lion's share of her earnings on her son and since she lived with the mother her expenses were likely to have been limited. Accordingly, this Court estimates her living expenses to be 25% of her income. Thereafter, with an increased income derived from having obtained experience in her chosen field as a registered nurse her expenses would be expected to increase as she assumed more of the expenses which are associated with an independent living arrangement. It is anticipated that by that time her living expenses can be estimated at 33% of her income.

[34] Accordingly, the applicable multiplicands and multipliers are:

- (1) US\$14,400.00 while a social worker and for a period of two years until she is able to find employment as a registered nurse.
- (2) US\$34,036.00 minus assumed tax rate of 12.5% or US\$4,254.50 = US\$29,781.50 in the first five years of Oniqua Phillip being employed as a registered nurse.
- (3) US\$39,375.90 minus assumed tax rate of 12.5% or US\$4,921.98 = US\$34,453.92 in the subsequent five years.
- (4) US\$46,900.00 minus assumed tax rate of 12.5% or US \$5,862.50 = US\$41,037.50 in the subsequent four years.

[35], The sum before the deduction for living expenses is US\$514,127.10.

- (1) US\$14,400.00 x 2 = US\$28,800.00 less US\$7,200.00 assumed living expenses
- (2) US\$29,781.50 x 5 = US\$148,907.50 less US\$49,139.47 assumed living expenses

- (3) US\$34,453.92 x 5 =US\$172,269.60 less US\$56,848.90 assumed living expense
(4) US\$41,037.50 x 4 =US\$ 164,150.00 less US\$54,169.50 assumed living expenses

[36] The sum after deduction for assumed living expenses is US\$346,769.23.

The Estate Claim

[37] Section 2(1) of the Causes of Action (Survival) Act provides that causes of action subsisting shall service for the benefit of the estate.

Loss of Expectation of Life

[38] This sum is usually a small and conventional sum. This Court awards the sum of \$5,000.00.

Earnings for the Lost Years

[39] This sum accounts for what the deceased would have earned less the sums which she would have likely spent on herself. This is estimated to be US\$346,769.23 for a sixteen-year period after the death of the deceased. Counsel for the Claimants has asked the Court to apply a multiplier of 21. This Court notes that in the case of **Mendy Phillip v Sheldon Gaston**⁸ St Rose-Albertini J (Ag.) applied a multiplier of 15 for a person who died at the age of 27 years old. In the case of **Collinford John v Gleanor John**⁹ a multiplier of 15 was used with respect to a person who died at the age of 27 years old. The working life of the deceased had she not died would have been 35 if she were to work until 60.

[40] In the circumstances of this case where the deceased died at the age of 25 this Court adopts a multiplier of 17. Accordingly, the difference between the lost years and the dependency claim is

⁸ SLUHCV 2016/0203 consolidated with Claim No. SLUHCV2016/0283 Julianne Fadlin and another v Sheldon Gaston et al.

⁹ SVGHCV2011/0327.

US\$41,037.50¹⁰ to this the assumed living expenses of the deceased (US\$13,542.37) is to be deducted. The net sum representing the lost years is US\$27,495.13.

Funeral Expenses

[41] The Claimants funeral expenses in the sum of US\$26,121.00 but has not provided evidence in support of the sum stated. The Privy Council in the case of **Felicia Andrina George Administratrix of the Estate of Hughes Williams (Deceased) v Eagle Air Services Limited**¹¹ awarded the sum of \$3,000.00 where funeral expenses were not proven. This Court makes an award in the sum of EC\$3,500.00.

Special Damages

[42] It is accepted that special damages must be specifically pleaded and specially proven. In the circumstance of this case the Claimant seeks special damages for cost of obtaining Letters of Administration, loss of wages of US\$1,600.00 per week for 106 weeks, school and day care of \$500.00 per month and food, clothes, medical and dental of \$400.00. The Claimants have not supported their claims on the matter of school and day care, food, clothes, medical and dental. In any event most of these items are within the umbrella of the award pronounced by this Court.

[43] On the matter of the Letters of Administration the documentary proof of same was not before the Court, the Court having given a ruling on the evidentiary challenge made by the Counsel for the Defendants.

[44] **This Court orders that:**

- (1) The Defendants are liable to the Claimant for negligence resulting in the death of Oniqua Phillip.
- (2) Oniqua Phillip's contributory negligence is placed at 15%.

¹⁰ See: Civil Appeal No. 6 of 1998 Tripple General Contracting Company Ltd. v Hermina Spencer.

¹¹ PC No. 1 of 2007.

- (3) The Defendants are liable in the sum of US\$294,753 (US\$346,769.23 less 15% contributory negligence -US\$52,015.35) on the Dependency Claim.
- (4) The Defendants are liable in the sum of US\$23,370.86 (US\$27,495.13 less 15% contributory negligence- US\$4,124.27).
- (5) The Defendants are liable for:
- (a) Funeral expenses EC\$3,500.00
 - (b) Loss of expectation EC\$5,000.00
- (6) The Defendants are liable to pay the prescribed costs of this action.

[45] Errata: In error, at the time of delivery the sum of US\$514,127.10 was stated. This is to be corrected to read the sum of US\$294,753.00 instead, and the sum of US\$41,037.50 is corrected to read the sum of US\$23,370.86.

Marissa Robertson
High Court Judge

By The Court

Registrar