

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0014

BETWEEN

SUSAN CECELIA MATTHEWS

FIRST CLAIMANT

AND

TAMEIKA ALMAL MATTHEWS
(ADMINISTRATRIX AND CO-ADMINISTRATRIX OF THE ESTATE OF
DEMOL KENLISH JAMES, DECEASED, OF BARROUALLIE)

SECOND CLAIMANT

AND

JULIAN GLASGOW

FIRST DEFENDANT

AND

NORMA GLASGOW

SECOND DEFENDANT

Appearances:

Mr. Sten Sergeant for the Claimants

Mr. Duane Daniel and Ms. Jenell Gibson and Chanté Francis for First Defendant

Claimants present

First Defendant present

2021: 29 June
30 June
13 September

JUDGMENT

Byer, J.:

- [1] This was a most unfortunate case. A son and father are dead, and answers must be given as to how this occurred. It is on these heart-wrenching facts that this claim was in fact filed by the mother and sister of the deceased man.
- [2] This claim arises out of a motor vehicle accident, which occurred on, or about 15 December 2016 around 5:00am between Demol Kenlish James (hereinafter referred to as “the deceased”) and HN739 owned by the second defendant and driven by the first defendant.

- [3] The deceased passed away and the instant claim is brought by the claimants as the Administratrix and Co-Administratrix of his estate, pursuant to the Compensation for Injuries Act for the benefit of the dependents of the deceased and the deceased's estate.
- [4] The claimants claim that the accident was caused by the negligence of the first defendant and that the deceased sustained personal injury and lost his life as a result.
- [5] The first defendant maintained that he was not negligent and that the accident was as a result of an inevitable accident and occurred without any intention, negligence or default on his part.
- [6] The first defendant asserted that on or about 15 December 2016 at around 4:45am he was driving his mini-bus HN739 towards the village of Keartons and that at the time his vehicle was carrying about five passengers. He maintained that he was driving his vehicle uphill slowly and that it was dark at the time, as the sun had not yet risen. The first defendant further maintained that the roadside vegetation had recently been cut and that grass and rubbish had been piled in mounds at various parts of the road.
- [7] The first defendant asserted that he encountered a vehicle parked on the right hand side of the road and, directly opposite this vehicle, was a large mound of grass and rubbish. He indicated in his witness statement that in order to avoid the vehicle, he drove over the mound of debris. Upon driving over the mound, the first defendant felt his vehicle roll over an object which he initially thought was a piece of wood. He stopped his motor vehicle and, upon inspection, realised that the deceased was caught beneath the mini-bus.
- [8] The first defendant, with assistance, lifted the motor vehicle using a jack and removed the deceased from under the motor vehicle, at which point the deceased was alive. He then transported the deceased to the hospital. The deceased later succumbed to his injuries.
- [9] The first defendant by his defence maintains that the motor vehicle accident was inevitable in all the circumstances and, in the alternative that the accident was wholly or partially as a result of the actions of the deceased.
- [10] At the pre- trial review undertaken by this court on 19 February 2021, both sides agreed that the matter would proceed to trial on the issues as identified in the pre- trial memorandum filed by the first defendant on 15 February 2021.
- [11] The issues identified there were as follows:
- (i) Whether the accident was caused as a result of the first defendant's negligence.**
- (ii) Whether the accident was as a result of an inevitable accident and without any intention, negligence or default of the first defendant, and**
- (iii) Whether the accident was wholly caused by or alternatively, was contributed to by the negligence of the deceased.**
- [12] At the trial of the matter, the court having been satisfied that the second defendant had not presented herself during the entirety of the proceedings, despite having been duly served by notice of advertisement in the newspaper by order of this court of 21 February 2019, this court determined that the second defendant would be bound by any decisions that this court may make against her.

- [13] On the filing of the submissions on behalf of the first defendant, counsel for the first defendant made an additional submission on an issue regarding the second defendant, that had not been raised and therefore not agreed to at the pre-trial review. It is also to be noted that the only acknowledgment of service that appears on the court file is one that was filed on 4 February 2019 in which counsel acknowledged service and came on the record for the first defendant only.¹
- [14] That being said, this court is unsure on what basis this additional issue was raised by counsel for the first defendant and certainly the claimant would not have had notice of the same to assist the court on the issue. This court finds that this is entirely prejudicial to the claimant and will not consider the aspect of the submissions of the first defendant that raises this new issue, however this court will address what finding it can make against the second defendant based solely on the pleadings of the claimant in that regard in due course of this judgment.

The Issues

- [15] Having read the submissions of both sides, this court determines that in order to address the matters raised on this trial, that the question of whether the defence of inevitable accident as raised by the defendant should be dealt with first. Once a determination is made on that issue and if the matter is to be considered further, the court will then deal with the question of whether the first defendant can be found liable in negligence and if so whether his liability should be reduced on the pleading of contributory negligence.

Whether the accident was as a result of an inevitable accident and without any intention or default of the first defendant

The Claimants' Submissions

- [16] On this issue, the claimants' position was that there was no evidence that was presented to the court upon which the first defendant could rely to show that the way the accident had occurred supported a finding of an inevitable accident.
- [17] In making this submission, the claimants made it clear that to succeed on this ground, the first defendant would have had to bring evidence to the court that his actions were without negligence, that his actions were in response to something over which he had no control and that it amounted to "a sudden and unheralded event."²
- [18] In the submission of the claimants, the first defendant had failed to show any such event, any such emergency that resulted in him having to take the action that he did which resulted in him driving over the deceased. As such the claimants made it clear that this defence must fail for the first defendant.

¹ Page 32 of the Trial Bundle filed 18/6/2021

² **Bodden v Solomon** [2004-2005] CILR 397

The First Defendant's Submissions

- [19] This issue was the nub of the case for the first defendant.
- [20] For the first defendant, having established what the law is with regard to inevitable accident and referring to several authorities in which that defence succeeded, the first defendant submitted that the factual matrix of the manner in which the accident occurred clearly substantiated a similar finding in their favour.
- [21] In so saying the first defendant examined the visibility at the time of the accident, the position of the deceased on the road, the inability of the first defendant to avoid the obstacle, the rate of speed at which the first defendant was travelling, the recollection of the eyewitnesses who were not brought to court but who had provided written police statements and the presence of debris on the road in the vicinity of the accident. In the submission of the first defendant when all these factors are read together and the circumstances of the accident are truly considered, counsel for the first defendant made it clear that there could not be any culpability attached to the actions of the first defendant and certainly if there was any such culpability, it should be at a reduced percentage (an argument that this court will return to later in this judgment if required).

Court's Analysis and Considerations

- [22] In the Halsbury Law's of England³ the defence of inevitable accident is stated to be considered where *"[a] collision... could not have been prevented by the exercise of reasonable care and ordinary skill. [However], where the defendant has prima facie caused the collision, in order to prove that the collision was an inevitable accident he must show that its occurrence was consistent with the exercise on his part of reasonable care and skill, and that he exercised reasonable care and skill."*
- [23] As both the claimants and the first defendant agree, to make a finding as to whether there were circumstances that amounted to an event that was completely unforeseen which could not have been avoided with the use of reasonable skill, there must be an assessment of the factual matrix as known which surrounds the occurrence of the accident.
- [24] The facts which are agreed as between the parties are that this accident took place early one December morning before the sun had risen. On that area of the road there was some illumination and the deceased had found himself, due to whatever cause, fallen on the side of the roadway travelled by the first defendant and other motorists. It is admitted by the first defendant that he in fact saw an object in the road but there was no evidence as to his slowing the vehicle to investigate the said object and that he then rolled over the deceased with his vehicle resulting in injuries from which he died.
- [25] From these facts the first defendant further sought to impress on the court that the visibility was poor, that there was one dim light in the area but not immediately over the area of the accident. That further there were other obstacles in the road which the first defendant sought to avoid by going around what he saw as an object in the road over which he could pass and which he did slowly. Further that no one in his van at that time on approaching the object in the road was able to

³ Shipping and Maritime Law Volume 93 (2017) para 788

identify that it was in fact a body in the road until he was already on top of it and that finding a body as an object was entirely unforeseeable and therefore there was nothing he could have done to avoid his rolling on the deceased.

[26] The court listened to the evidence of all the witnesses that were brought to the court that were tested on cross examination and although this court accepts that the police statements of the other eyewitnesses were admissible⁴ this court puts little weight on what those eye witness accounts contain, in that this court is entirely cognizant that eye witness accounts unless tested are of little use to a court.

[27] That being said, the sole eyewitness that was brought and who was vigorously cross examined was Mr Glenford Jack (hereinafter referred to as "Mr. Jack"). It is this evidence and the evidence of the first defendant that this court therefore must consider on this issue.

[28] What therefore did Mr. Jack tell the court in this regard;

*"6. On that morning rain fell but it stopped before I got into the bus. The bus proceeded to travel towards Keartons. In my estimation as a driver, Bugnah was driving at a speed of 40 to 60 miles per hour. He always hustles on early mornings. The street was well lit as the street lights were on. The road itself was partially dry. It was a chilly morning. There was no grass in the road. I did not see anyone walking on the road. When the bus got to the vicinity of Mattie O'Garro's shop in Barrouallie I heard the gentleman from Chateaubelair tell Bugnah "Yo run pon somebody, the person under the van". I saw something laying on the road before the gentleman shouted to the driver. The headlamps on the bus were on so I could have seen on the road clearly."*⁵

[29] On cross examination counsel for the first defendant attempted, but in this court's mind unsuccessfully, to shake the account given by Mr. Jack. Mr. Jack however did admit on cross examination that the morning in question was still dark and that the only lighting that was around apart from the lights of the van were streetlights and that facing forward he saw something in the road ahead of the van, but he was unaware as to what it was. He made it clear that the object did not run across the van nor was it upright in the road, he therefore saw no damage to the front of the vehicle when he alighted after the van came to a stop.

[30] When Mr. Jack was pressed on the observations made by the front seat passenger (a Mrs. Cruickshank who was not called) in her statement to the police that she had not seen a body in the road, Mr. Jack quite correctly in this court's mind, responded that everyone would or could see things differently. Therefore, he was unable to comment on the truth of whether this passenger did or did not see what she reported to the police. Additionally, when the statements of the other passengers who were not called were put to Mr. Jack he maintained his position with regard to his perception of the speed of the vehicle. Indeed, when this court assesses the evidence of this witness, this court accepts that as a driver he rightly assessed that the first defendant was "hustling" in the morning and that he was travelling at more than a moderate pace. However, the most important aspect of Mr. Jack's account in this court's mind was that he gave his view of what he would have done if he had approached an object in the road that he could not identify. Mr. Jack informed the court that he would in fact stop his vehicle, make a proper assessment of the

⁴ Evidence Act Cap 220 of The Revised Laws of Saint Vincent and the Grenadines 2009

⁵Paragraph 6 of the Witness Statement filed 24/2/2021

obstruction, not try to drive over it or drive around it but make sure it was safe to drive and then proceed.

[31] What did the first defendant however do in these circumstances? In his evidence in chief, he gave the impression that he was going slowly up a hill as he looked for passengers that day and that since the sun had not come out the area was dark. He further told the court in examination in chief that the road was wet from rain the night before and that road workers had left cut grass and rubbish at different points on the road.

[32] The first defendant stated that when he drove off from the bus stop in Keartons where he had picked up passengers, he saw a large mound of what he called grass and rubbish on his side of the road, the left hand side, and that there was one vehicle parked directly opposite the mound of grass and rubbish. He told the court that in order to avoid the parked vehicle he angled his van away from the parked vehicle and he was "forced" to drive over the mound of grass and rubbish then he said this:

"10. Whilst I was driving over the mound of grass and rubbish situated on the left side of the road directly opposite the vehicle, the weight of my mini-bus pressing downwards on the front part of the said mound partially revealed what appeared to be a piece of wood situated towards the mound's center.

11. When I went over the object which appeared to be a piece of wood, the front wheel of my mini-bus wasn't lifted. However, when the back wheel of my mini-bus went over the object, it lifted sharply.

12. When the back wheel of my mini-bus lifted sharply, I applied brakes and the clutch and came out of my mini-bus, looked under it and saw that the deceased was caught underneath my mini-bus."

[33] However, on intensive cross examination this version of events morphed and changed substantially. On cross examination the first defendant admitted the following: a) the area that the accident took place was not in fact a steep hill but a long stretch of road way that goes slightly up hill; b) the visibility on that road was good for at least 200 to 300 feet ahead; c) that the area was dark but that there were street lights in the vicinity however that they were dull and he was driving on low beam headlights; d) that when he said that grass and rubbish were lined up at various points along the road that in fact the mounds of grass and rubbish were straight across the road; e) that he was at least 49' 5" away when he first saw what he perceived as grass in the road; f) that there were in fact two vehicles parked alongside each other directly opposite the mound, the white rental being the one that was on the outside and admitted that this was the first time he was saying this; g) that when he went over what he thought was a piece of wood, and his back wheel was raised after the front tyre did not raise, that is when he realized it could not have been a piece of wood and came out and saw the deceased under the van; h) that the deceased having been stuck under the van was dragged some 20' as he did not realize that anything was under the van and i) and finally he admitted that having seen the report of the police officer as to the measurements of the road and the one vehicle that they saw parked on the side of the road, that there was in fact sufficient space for him to pass but he did not do that but rather drove over the grass and rubbish.

[34] When this court therefore assesses the evidence of Mr. Jack and the first defendant, this court on a balance of probabilities accepts that where the two contradict each other, this court prefers the

evidence of Mr. Jack. This court in seeing the first defendant give his evidence and hearing his story “bob and weave” as it went along left the court with the distinct impression that the first defendant was less than forthright with this court.

[35] That being said, the court on a balance of probabilities therefore accepts the following facts:

i) That the first defendant saw the object in the road at a distance that gave him the opportunity to stop and investigate

ii) That the first defendant did not slow down or stop due to the fact that he was in a hurry to make the first trip of the morning to Kingstown to return to the area

iii) That there was sufficient room for the first defendant to pass the mound of “grass and rubbish” safely without requiring him to drive over it as he did

iv) That there were no mounds of grass or rubbish lined straight across the road

[36] Having found these facts on a balance of probabilities, this court is satisfied that the circumstances that presented itself that fateful morning to the first defendant did not allow him to clothe himself in the defence of inevitable accident.

[37] It is clear to the court that the first defendant owed a duty of care to all users of the road, whether they are other motorists or pedestrians. Of course there is no dispute that at the time of the accident the deceased was not walking or “using” the road as one might have expected but this court is of the view that having all the conditions of that road including of his own making (not using high beams at a time when the area was dimly lit) it was incumbent on the first defendant to “...exercise reasonable skill or reasonable self possession”⁶ when he approached the obstruction in the road.

[38] There was a suggestion in the submissions of counsel for the first defendant that it would have been unreasonable for the first defendant to stop and inspect the obstruction given the time of the morning and the possibility of the “risk of robbery.”⁷ However there was no evidence as to this being a real possibility and in fact contrary to this suggestion, the first defendant in cross examination clearly stated that there was nothing stopping him from checking the nature of the obstruction if he wanted to. As the court in the case of **Page v Richards & Draper**⁸, quoted with acceptance in the case of **Gailius Mathurin and anr v Andrew Paul**⁹, “[i]t 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 animals or things in the way at any moment, and he is bound to go no faster than will permit of 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 struck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if 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

⁶**Bodden v Solomon** Supra at paragraph 19

⁷ Paragraph 47 of the submissions of the first defendant filed 12/7/2021

⁸ 1920 149 LT 263

⁹ SLUHCV2002/0867 at paragraph 29

had better lights or had kept a better look-out the probability is that the accident would never have happened”

- [39] This court therefore accepts on a balance of probability that there is no evidence to support a finding that a reasonably careful, skillful and self-possessed driver by reason of what occurred and what he saw, would have been unable to prevent the accident occurring¹⁰ and I therefore find that the first defendant is unable to rely on the defence of inevitable accident in these circumstances.
- [40] Having made this determination, this court will now assess whether the first defendant was therefore negligent. In considering this issue, this court must not only contemplate whether the first defendant was negligent but additionally whether there was any factor that mitigates any finding of negligence.

Whether the accident was caused as a result of the First Defendant’s negligence, for which he is liable

The Claimants’ Submissions

- [41] In the submissions of the claimants, the negligence of the first defendant was the sole reason for the occurrence of the accident in which the deceased lost his life.
- [42] The claimants submitted that once all the circumstances are assessed as to how the accident occurred, it was clear that the first defendant had not acted as a reasonable prudent driver; that he had not been keeping a proper lookout, that he was driving too fast in all the circumstances, that he failed to drive his vehicle in a manner that would not have caused injury and ultimately death to the deceased and that he failed to take into consideration other road users at the time. In those circumstances the claimants submitted that the first defendant must be wholly responsible for the accident.

The First Defendant’s Submissions

- [43] The submissions of the first defendant on this issue were wrapped together and argued with the submissions on the defence as pleaded of inevitable accident. Thus, having addressed their submissions from that specific point of view, the first defendant additionally submitted that in relying on inevitable accident, the first defendant was not negligent.
- [44] In the submissions of the first defendant, it was made clear that the first defendant had not failed in any of the duties owed to the deceased and having done all that he could, the death of the deceased was not a foreseeable result that would have been in his contemplation as he drove along that road that fateful December morning. The first defendant submitted that there was therefore no evidence to suggest that the first defendant had failed in any of his duties owed to another road user and as such the first defendant could not be found negligent and therefore liable for the accident.

¹⁰ **Sinclair et al v Nyehold** 29 D.L.R. (3d) 614 at 618

Court's Considerations and Analysis

- [45] When this court considers that it has already determined that the defence of inevitable accident is not available to the first defendant, the court must now be satisfied that the fundamental tenets of a finding of negligence have been made out. These are: 1) an existing duty of care, 2) careless behaviour by the defendant, 3) a causal connection between the first defendant's careless conduct and the damage suffered, 4) foreseeability that such conduct would have inflicted on the particular individual the particular damage that has been complained of. It is only when factors 1 to 4 are met that there then becomes the issue of, 5) the extent of the responsibility for the damage to be apportioned to the first defendant where others are also held responsible and 6) the monetary estimate of the extent of damage.¹¹
- [46] In assessing these factors, there is no dispute in this court's mind that the first defendant owed a duty of care to the deceased as a fellow road user. It was also the undisputed fact that the first defendant was required to drive his vehicle in a manner that would not cause injury or damage to other road users.
- [47] The questions that must therefore arise at this juncture are whether the first defendant breached that duty and whether the damage that occurred was foreseeable in all the circumstances.
- [48] When this court assesses the evidence that was elicited on examination in chief and cross-examination the court in this regard on a balance of probabilities accepts the following:
- i) the accident took place on a dark December morning in an area that was not particularly well lit in which the first defendant chose to drive on a reduced beam headlight. This resulted in him not being able to keep a proper lookout
 - ii) that the first defendant failed to stop and properly assess the nature of the obstruction on the road when he said there was nothing to prevent him from so doing. I accept that he was in fact hustling to make his first trip of the day and to pick up his passengers and that he was therefore driving at more than a moderate speed and failed to adjust his speed accordingly upon observing the obstruction. In this court's mind this could have been the only reason that the deceased suffered the injuries that he did that led to his death. This court having examined the autopsy report of Dr Tracee Barnard entered into evidence¹² it clearly showed that the first defendant had in fact driven over the length of the deceased's body from head to toes.
 - iii) that he failed to apply his brakes on approaching the obstruction. The admission of the first defendant himself was that the deceased was dragged for some time, pinned by the undercarriage of the van, which resulted in the deceased ending up some 20' away from the area identified by the first defendant as when he first saw the mound.
 - iv) that the first defendant failed to stop, slowdown or steer or otherwise control the van to avoid running over the deceased in that he made it clear to the court that there was enough room for him to pass between the grass/rubbish mound as he saw it and the car that was parked on the other side of the road. However, the first defendant also admitted that he chose to go pass over the area where he saw the obstruction without properly or at all assessing the content of that obstruction. In

¹¹Clerk and Lindsell on Tort (18th Ed) page 219

¹² Autopsy Report of Dr Tracee Barnard dated 19/12/2016

fact, it was clear from the measurements of the police officer that investigated the matter¹³ that the first defendant was so close to the left hand side of the road¹⁴ that there was in fact an almost 6' space that he had available to pass between the car parked as he alleged opposite the grass/rubbish mound and the grass/rubbish mound itself¹⁵. In this court's mind this was a clear indication that the first defendant made the conscious decision to take what he thought was the path of least resistance as opposed to him being forced (in his words) to make any other trajectory of travel.

- [49] In this court's mind, the claimants have not made out the other particulars of negligence as pleaded. However, the next question must be whether the issue of remoteness of damages applies in these circumstances, which would effectively put a limit on the liability of the first defendant.
- [50] It was of course submitted by the first defendant that running over a person who had fallen on the road could not have been at all foreseeable and as such those circumstances substantiated the argument of inevitable accident. However, this court has already dismissed the right to rely on that defence in that it can only be available where there was some evidence of the use of reasonable skill by the first defendant to avoid the accident. There was none present in this case. It is nevertheless not lost on the court that any sort of "...foolishness is foreseeable...some people do silly or absurd things or deliberately take risks. The question is however, whether what happened was the sort of thing that in the applicable circumstances this defendant acting reasonably ought to have foreseen such that the claimant ought to have been in his contemplation..."¹⁶
- [51] In the case at bar there is certainly (at least no longer) any allegation that the deceased did anything that put himself at risk for injury and death. However, the issue of remoteness of damage has nothing to do with what the deceased did or did not do, but rather whether in all the circumstances, what transpired could have been foreseen by the first defendant.
- [52] This court therefore finds that the first defendant fell short in his duty in the way a prudent driver may have acted, in that he made the conscious choice as far as this court is concerned to drive over what he considered was an obstruction in the road. Having done so, rather than ensure that it was safe to do so, the first defendant, in this court's mind must have foreseen that an untoward occurrence was a possibility. The fact that that occurrence however resulted in the first defendant driving his vehicle over a man lying prone on the ground, this court is hard pressed to find that he could have foreseen that this would have been such an occurrence.
- [53] Therefore, in order for this court, to attach liability to the first defendant, reasonable foreseeability is the primary test in determining remoteness of damage. In Halsbury's Laws of England¹⁷ this test is identified as where "the wrongdoer is only responsible for damage of a foreseeable type, that is damage which should have been foreseen by a reasonable person as being something of which there was a real risk even though the risk would actually occur only in rare circumstances, unless the risk was so small that the reasonable person would feel justified in neglecting it or brushing it

¹³ Report from the Commissioner of Police dated 18/1/2017 and hand written report of the officer Suzette Rogers dated 18/2/17

¹⁴ Distance of the front left when to the left side of the road 5'

¹⁵ The width of road at the point of impact – 14ft 6" and hand written report of Officer of Suzette Rogers dated 18/2/17 at page 104 of the TB

¹⁶ **Scott v Gavigan** [2016] EWCA Civ 544 at paragraph 17

¹⁷ *Damages* Vol 29 (2019) paragraph 409

aside as farfetched.” The text Buckley - The Law of Negligence and Nuisance¹⁸ defined this expression even more helpfully when they stated it thusly, “the expression “remoteness of damage” is most appropriately used to denote the problem of whether or not to ascribe legal responsibility to the defendant when it is clear that the claimant’s harm would not have occurred “but for” the defendant’s negligence but the causal chain happened to involve a particularly freakish concatenation of circumstances.”

- [54] Indeed this court accepts that the first defendant in having made that decision to drive his vehicle over an unknown obstruction could certainly have foreseen damage to his **vehicle**, but this court cannot stretch its mind to consider that he would have foreseen that he would have encountered a human being, who through no fault of his own, found himself on the road at the mercy of the traffic.
- [55] What this court does find is that the first defendant that morning in December 2016 was a careless driver. He was heedless to the circumstances at play at the moment. He took a risk that backfired on him but this risk which he was taking was not what in fact transpired and could not have been in his contemplation. This court in fact even accepts that the injuries and death of the deceased would not have happened “but for” the actions of the first defendant however as the court in the case of **Lochgelly Iron and Coal Ltd v McMullan**¹⁹ per Lord Wright stated, “[t]he duty of care required of all men is not to injure the property or person of another ... a person owes a duty to take care when he should foresee as a reasonable man that his acts and conduct are likely to cause physical damage to the person or property of another or others in the ordinary course of things, or in the circumstances actually known by him to exist at the time. If he can foresee consequences not intended by him which, though possible, are not probable, such consequences are regarded as too remote and he is under no duty to take care in respect of them.”²⁰
- [56] While the court does not accept that the first defendant did all that he could to have avoided the tragic events of this accident and that the death of the deceased would not have occurred “but for” the acts of the first defendant this court must accept that the concept of the remoteness of damage must apply in these circumstances and in that instance the first defendant cannot be liable for “...the damage [that] can be regarded as differing in kind from what was foreseeable.”²⁰
- [57] I therefore find that although the first defendant caused the accident, in that there could be no other cause ascribed for its occurrence, that the damage caused was too remote in law and as such this court finds that the first defendant is not liable in negligence.

Whether the accident was wholly caused by or alternatively was contributed to by the negligence of the Deceased.

- [58] In this court’s mind having now found that the first defendant was not liable, there is no utility in the court considering this issue. I therefore make no finding on this issue.

¹⁸ Common Law Series Part One - Chapter 3 at 3.03

¹⁹ [1934] AC 1 at 25

²⁰ Hughes v Lord Advocate [1963] A.C. 837 at 845 per Lord Reid

Position of the Second Defendant

- [59] However as this court had indicated earlier, I have²¹ to return to the issue of whether the second defendant could have been found to be liable by virtue of their ownership of the vehicle when the only pleading of the claimants was that the second defendant owned the vehicle which was driven by the first defendant as her servant or agent.
- [60] The court having found that the first defendant is not liable, there is no need for the court to address its mind as to whether the second defendant would have been bound by the finding against the first defendant as a matter of determination. However I do wish to put it on the record that in order for the claimants to have established the liability of the second defendant there would have been a need for them to lead evidence that the first defendant was in fact driving the vehicle "...for the owner's purposes under delegation of a task or duty."²² There was no such evidence and the first defendant did not respond to that allegation in the claim upon which the claimants could have taken it further. Indeed, the court in **Morgans v Launchbury**²³ made it clear that mere permission (if there was evidence of that) is not enough to establish vicarious liability.
- [61] Therefore if this court had made a finding of liability against the first defendant, this court is satisfied that there was nothing before it upon which it could make a positive finding as against the second defendant in that regard.

The order of the court is therefore as follows:

1. The claim of the claimants is dismissed in its entirety with costs to the first defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar

²¹ Statement of claim filed on the 18/1/2019 at paragraph 3

²² **Morgans v Launchbury** [1972] UKHL JO509-3 at paragraph 7

²³ Ibid