

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

CLAIM NO.: SLUHCV2017/0469

BETWEEN:

**PHILLIP ERIC PASTON BACON
STEPHANIE GILBERT
(Qua Administrators of the Estate of QUINTON GARRATHY, deceased)**

Claimants

and

**STEPHEN KING
RUMELIA KING**

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser for the Claimants

Mr. Alberton Richelieu with Mrs. Cynthia Combie-Martyr for the Defendants

2019: October 24;
November 11, 15; (Written submissions)
2020: August 25.

JUDGMENT

Background

[1] **CENAC-PHULGENCE, J:** The claimants, Phillip Eric Paston Bacon (“Mr. Bacon”) and Stephanie Gilbert (“Ms. Gilbert”), have brought this claim as Administrators of the Estate of Quinton Garrathy¹ against the defendants Stephen King (“Dr. King”)

¹ By Letters of Administration (Resealed) issued by the High Court of Justice of Saint Lucia on 14th July 2017 in Claim No.: SLUHPB2017/0241.

and Rumelia King (Mrs. King”) for damages pursuant to articles 609 and 988 of the **Civil Code of Saint Lucia**² arising from a fatal motor vehicle accident.

The Claim

- [2] The claimants’ case is that on 3rd August 2014 at approximately 1:30 a.m., Quinton Garrathy (“Mr. Garrathy”) disembarked a motor omnibus on the Gros Islet Highway in the vicinity of the Rodney Bay Marina and proceeded to cross the road when he was struck by motor vehicle registration number PG657 (“the vehicle”) driven by Sebastian King (“Sebastian”). As a result of the accident, Mr. Garrathy suffered serious injuries to his head and body which caused his death.
- [3] The claimants contend that the accident was caused by the negligence of Sebastian, who was at the time an inexperienced driver, driving by virtue of a provisional license. They allege particulars of negligence being that he (a) was driving too fast; (b) failed to swerve or manoeuvre the vehicle so as to avoid the accident; (c) failed to apply his brakes to bring the vehicle to a stop; and (d) failed to keep a proper lookout for other road users. They further contend that Sebastian was driving the vehicle at the material time with the authority and as the agents of the defendants, his parents, who are the registered owners of the vehicle. Additionally, they rely on the doctrine of *res ipsa loquitor*.
- [4] The claimants aver that at the date of the accident, Mr. Garrathy was 38 years of age and was employed by Virgin Atlantic Airlines. As a result of his death, Mr. Garrathy’s wife, Naomi Garrathy, and minor child, Olivia-Rae Garrathy, have suffered pecuniary loss and damage for which they claim general damages pursuant to articles 609 and 988 of the **Civil Code**, costs and interest.

² Cap 4.01 of the Laws of Saint Lucia (hereinafter referred to as “the Civil Code” or “the Code”).

The Defence

- [5] The defendants admit that at the material time, Sebastian was the driver of the vehicle involved in the collision with Mr. Garrathy from which he died, and that they were the registered owners of the vehicle.
- [6] They, however, deny that the accident was caused by any negligence on Sebastian's part. They contend that the accident was caused solely by the negligence of Mr. Garrathy, who suddenly dashed across the road from in front of a parked vehicle, and into the path of the vehicle being driven by Sebastian, without ascertaining whether it was safe to do so. Mr. Garrathy thereby created a sudden emergency, depriving Sebastian of the opportunity to swerve, slow down, stop or take other action to avoid the collision. In the circumstances, Sebastian reacted in the way in which a reasonable and prudent driver would. Further, Mr. Garrathy was at the time heavily intoxicated, which impaired his judgment, in that he failed to appreciate that it was unsafe for him to dash across the road into the path of the moving vehicle. The defendants state that *res ipsa loquitur* is inapplicable, as the cause of the accident can be explained, which is Mr. Garrathy's own negligence.
- [7] The defendants aver that, as the claim against Sebastian is prescribed, there is no valid, subsisting cause of action and all rights and remedies against him are absolutely extinguished. As a consequence, all actions against them, arising out of the collision, whether on the basis of agency, negligence or otherwise, are also prescribed.
- [8] The defendants also assert that as Sebastian is not a party to this claim, the claimants cannot rely on his alleged negligence to ascribe liability to them. Further, notwithstanding that the defendants granted Sebastian permission to use the vehicle, no principal/agent or master/servant relationship existed between them.
- [9] The defendants state that the claim discloses no cause of action capable of being sustained or liability capable of being ascribed to them and ask that the claim be dismissed.

Claimants' Reply to the Defence

- [10] The claimants allege that the defendants' assertions that (i) the claim against them is prescribed; (ii) there did not exist a principal/agent or master/servant relationship between them and Sebastian; and (iii) the claim discloses no cause of action or liability against them, ought to be struck out as an abuse of process, as the master previously made a ruling on these issues, which has not been appealed. The defendants are therefore estopped from raising them again.

The Issues

- [11] The issues that arise for determination are as follows:
- 1) Whether the claimants failed to comply with rules 8.7(1) and (3) and 8.9 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("CPR"), and if so, whether the claim for damages ought to be dismissed?
 - 2) Whether the claimants are improper parties to the claim for damages under article 988 of the **Civil Code**?
 - 3) Whether the defendants could be held liable for any negligence on the part of Sebastian, given that Sebastian is not a party to this claim, the claim having been struck out against him as having been prescribed?
 - 4) Whether there was any negligence on Sebastian's part, which caused the accident and consequent death of Mr. Garrathy, and whether the defence of sudden emergency is available to him?
 - 5) If Sebastian is found to have negligently caused the accident and death, whether the defendants are vicariously liable for his negligence, in particular, whether Sebastian was driving the vehicle as agent of the defendants?
 - 6) If so, whether the claimants are entitled to damages pursuant to articles 609 and 988 of the **Civil Code**?

Analysis

Issue 1: Whether the claimants failed to comply with CPR 8.7(1) and (3) and 8.9, and if so, whether the claim for damages ought to be dismissed?

- [12] Counsel for the defendants, Mr. Alberton Richelieu (“Mr. Richelieu”), submits that the claimants have failed to comply with CPR 8.7(1) and (3) and 8.9, which require respectively that the claim form or statement of claim – include all facts upon which the claimant relies; identify any document which the claimant considers necessary to his or her case; and where the claim is for personal injury, that, among other requirements, there be attached a schedule of special damages claimed. He submits that pursuant to CPR 8.7A, the consequence of such failure is that the claimant may not rely on any allegation or factual argument which is not set out in the claim but which could have been set out there unless the court gives permission, or the parties agree.
- [13] Mr. Richelieu states that the claimants have breached CPR 8.7(1) and (3) in relation to their claim for both special and general damages; and have also failed to attach to the claim a schedule of special damages. Therefore, the court is barred from considering evidence of special or general damages, whether detailed in their witness statements or summaries or disclosed in their list of documents. He submits that special damages must be specifically pleaded, particularized and proven. Relying on the case of **Charmaine Bernard (Legal representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**³, he further submits that the same principle applies to general damages, where it was stated that *“if a plaintiff suffers damage of a kind which is not the immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet.”* He argues that the mere statement in the statement of claim that *“the claimants claim damages”* without particularizing those damages or even identifying the documents to be relied upon in support, is insufficient to allow evidence of a particular kind of loss, which is not necessarily a consequence of the wrongful act, to be considered.

³ [2010] UKPC 15.

He points specifically to the loss set out at paragraph 10 of the amended statement of claim.

[14] Counsel for the claimants, Mr. Horace Fraser (“Mr. Fraser”), states that the question is the effect of non-compliance with CPR 8.7(3) and 8.9 and argues that the validity of the claim does not depend upon a document to be admitted at trial. He refers in particular to the deceased’s death certificate and the claimants’ Letters of Administration not being attached to the claim. Relying on the case of **Texan Management Limited et al v Pacific Electric Wire and Cable Company Limited**⁴, he states that in the pursuit of justice, procedure is the servant and not the master. He likens the filing of a valid claim to the filing of a valid notice of appeal whose validity, he says, does not hinge on filing of skeleton arguments or submissions. Further, he submits that non-compliance with the rules complained of does not attract a sanction. He also relies on the dicta of Barrow JA in **Craig Reeves v Platinum Trading Management Limited**⁵ where he states that not every instance of non-compliance will result in sanction, express or implied, and where there is a sanction, it will not usually be dismissal of an appeal, which must be exceptional. Where the non-compliance is trifling, the court is justified in rectifying the error in a summary manner as rule 26.9 permits, without resorting to the criteria in rule 26.8.

[15] Mr. Fraser submits that the defendants would not have been taken by surprise by the death certificate and Letters of Administration not being attached to the claim, given their disclosure in the prior proceedings before the coroner. He contends that the claimants do not claim any special damages and Mr. Garrathy’s age has been stated in compliance with the rules.

[16] Based on the claimants’ claim form and statement of claim, they do not appear to be claiming special damages and Mr. Fraser confirms this. The amended claim form indicates that the claimants are claiming general damages pursuant to articles 609 and 988 of the **Civil Code**, legal practitioner’s fixed costs, and service and court

⁴ Privy Council Appeal No. 018 of 2009.

⁵ HCVAP2007/0622 at paragraph 39.

fees. In the amended statement of claim, the claimants additionally claim interest and costs. Whilst the claimants could have sought special damages as part of their claim, they have opted not to do so. There can therefore be no failure to comply with CPR 8.9 in relation to the requirement to attach a schedule of special damages. There is also no breach of CPR 8.7(1) and (3) in relation thereto.

- [17] I note that paragraph 10 of the claimants' amended statement of claim, which is challenged by the defendants, states: "*As a result of the death of Quinton Garrathy, the minor child of the deceased and his wife have suffered and continued to suffer pecuniary loss and damage.*" This pleading is consistent with and supports the claim for general damages pursuant to articles 609 and 988 of the **Civil Code**.
- [18] In the case **Bernard v Seebalack** cited by Mr. Richelieu, the Board of the Privy Council does indeed state that "*where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed*"⁶, and the claimants have omitted to do so.
- [19] In that case, the appellant who was the claimant in the trial court sought leave to amend her statement of case to include particulars of special and general damages in a personal injury claim. The Board noted that her statement of case had given no detail of the claim for damages. The proposed amendment sought to introduce for the first time the age and date of birth of the deceased, his place/nature of employment, and that he was unmarried, without children, lived at home with his parents and his average monthly expenditure. This is distinguishable from the present case where this information, save Mr. Garrathy's expenditure, has been provided in the amended statement of claim, even if only very briefly.
- [20] The dicta in **Bernard v Seebalack** relied upon by Mr. Richelieu is a quotation from the case of **Perestrello v United Paint Co. Ltd.**⁷ It is worthy of note that in that case, the court, after noting that the claim was for unliquidated damages and that

⁶ At paragraph 16.

⁷ [1969] 3 All ER 479.

there was no question of special damages, added as a qualification: “[h]owever, if the claim is one which cannot with justice be sprung on the defendants at the trial, it requires to be pleaded so that the nature of that claim is disclosed... a mere statement that the plaintiffs claim “damages” is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act...”⁸

[21] In this regard, I have considered that under articles 609 and 988 of the **Civil Code**, the heads of damages that may be claimed are well established and known to be limited to an award for funeral expenses, a conventional award for loss of expectation of life⁹, pain and suffering, and loss of earnings for the lost years as a benefit to the succession of the estate of the deceased and the deceased’s dependents respectively.¹⁰ Of this, Mr. Richelieu would be aware. Further, these heads of damages are all immediate, necessary and natural consequences of the alleged wrongful act complained of, being death caused by negligent driving, and have been alluded to at paragraph 10 of the amended statement of claim. Therefore, the defendants could not in any way be taken by surprise or suffer any prejudice or unfairness, given that the pleadings specifically claim general damages pursuant to articles 609 and 988 of the **Civil Code**.

[22] The Board in **Bernard v Seebalack** remarked that the requirement to include in the statement of case a short statement of the heads of loss being claimed was not inconsistent with dicta of the Eastern Caribbean Court of Appeal in **Eastern Caribbean Flour Mills Ltd. v Ormiston Ken Boyea**,¹¹ which distinguished between pleadings and particulars of pleadings. The Board concluded that “*if a statement of case contains allegations which are sufficiently made... particulars... can be provided by way of further information and/or in the form of a witness statement.*”¹² In the circumstances, I am inclined to find that the brief statement of

⁸ Bernard v Seebalack at paragraph 16.

⁹ Felicia George v Eagle Air Services Limited [2009] UKPC 35 at para 3.

¹⁰ Cyril Mathurin et al v Anthony Augustin HCVAP 2007/041 delivered on 2nd June 2008; Veronica Auguste v Tyrone Maynard SLUHCv1984/044.

¹¹ Civil Appeal No. 12 of 2006 (St. Vincent and the Grenadines) delivered 16th July 2007.

¹² At paragraph 27.

the damages being claimed, as contained in the amended statement of claim, is sufficient to give notice of the nature of the claim to the defendants, which would then be left to be amplified by disclosure and witness statements.

[23] I also take into account the fact that this objection to the claimants' statement of case was never pleaded in the defendants' defence, even though they would have been aware of the deficiency from the date of service of the claim form and statement of claim. The defendants also have a duty to set out their case pursuant to CPR 10.5. The defendants never requested information in relation thereto pursuant to Part 34 or sought specific disclosure pursuant to Part 28, even though these were options available to them. Given these circumstances, it would be manifestly unfair for the defendants to allow the claim to proceed through case management and pretrial, the claimants having filed their list of documents and witness statements, to then take this challenge on the day of trial, thereby ambushing the claimants. For what it's worth, I also take judicial notice of the fact that general damages must be assessed by the court upon sufficient evidence being provided to substantiate the loss claimed, failing which the court must decline to make an award.

[24] I therefore conclude that the Court is in the position, on the basis of what has been pleaded in this case, to consider an award of general damages to the succession of the estate of the deceased and his dependents pursuant to articles 609 and 988 of the **Civil Code**.

[25] For completeness, paragraphs 1-3 of the amended statement of claim fully detail the capacity in which the claimants bring the claim and identify the Letters of Administration issued by the High Court of Justice of Ipswich, England on 31st October 2014 and resealed in accordance with the laws of Saint Lucia as appears by claim number SLUHBP2017/0241 issued by the High Court of Justice. In this regard there has been no failure to comply with CPR 8.7(1) and (3), and in their

defence at paragraph 9, the defendants admit Mr. Garrathy's death, which is therefore not in issue.

Issue 2: Whether the claimants are improper parties to the claim for damages under article 988 of the Civil Code?

[26] Mr. Richelieu contends that in relation to the claim for damages under article 988 of the **Civil Code**, the claimants are not the proper parties. He submits that pursuant to article 988(4), there being administrators appointed in respect of Mr. Garrathy's estate and no action having been brought by and in their names within 6 calendar months after his death, the claim ought to have been brought by and in the name of his dependents, being his wife and child. As this was not done, the claim cannot be maintained.

[27] I agree with Mr. Fraser that, on a proper construction of article 988(4), this is not what it provides. The plain meaning of the words is that the action should ordinarily be brought by the administrators of the deceased's estate. However, where administrators, having been appointed, fail to bring the action by and in their name within 6 calendar months of the date of death, the person(s) for whose benefit the action is given may bring the action by and in their own name(s). It is a permissive provision for the benefit and protection of a deceased's dependents in the case of an inactive, neglectful or complacent administrator. It ensures that in such circumstances, the beneficiaries do not lose their right of action or suffer undue delay in recovering that to which they are entitled. It does not connote that if that action is not brought within 6 months of the date of death, the administrators are thereafter barred from bringing the claim altogether and the responsibility then falls to the beneficiaries. I do not believe this was the intention of the drafters or is the ordinary meaning of the words of the provision as such interpretation would to my mind lead to a manifestly unfair outcome.

[28] For the avoidance of doubt, I agree with Mr. Fraser's submissions in relation to article 609(3)(b) of the **Civil Code**, although it does not appear to be in issue. The

requirement of article 609(3)(b) that the proceedings shall be commenced no later than 6 months after the deceased's personal representative took out representation, must refer to the date on which the grant of representation issued by the English Court was resealed by the High Court of Saint Lucia. The case of **David Black v Lambert Jones-Soomer**¹³ relied upon by Mr. Fraser, and the cases of **Finwegan v Cementation Co. Ltd.**¹⁴ and **Burns v Campbell**¹⁵ cited therein, support this position. These cases are authority for the fact that prior to the date the English grant of representation was resealed in Saint Lucia in accordance with article 1152A of the **Civil Code**, the claimants were not administrators with the capacity to institute this claim. Therefore, any prescriptive period could not begin to run against them until this date, such that the claim is not prescribed. I, however, am of the view that this provision would not be applicable to bar this claim in any event, as it appears to me, on a careful reading of the entirety of article 609, to relate specifically to a claim surviving against the estate of the deceased and not one for the benefit of the deceased's succession.

Issue 3: Whether the defendants could be held liable for any negligence on the part of Sebastian, given that Sebastian is not a party to this claim, the claim having been struck out against him as having been prescribed?

- [29] The record reveals that the claimants had initially filed this claim against Sebastian, as driver of the vehicle, who was the first named defendant, and Dr. King and Mrs. King, as the owners of the vehicle, who were the second and third named defendants, respectively. However, it appears that the claimants failed to serve the claim on Sebastian within the prescription period. Consequently, on 30th January 2018, the claimants filed an application pursuant to CPR 20.1 for leave to amend their statement of claim to remove Sebastian as a party and substitute references to him as "first defendant" with "Sebastian King". The defendants opposed the application, which was granted by the master on 5th September 2018, with the result

¹³ SLUHCv2003/0138.

¹⁴ [1953] 1 All ER 1130.

¹⁵ [1951] 2 All ER 965.

that Sebastian was removed as party and the claim proceeded against Dr. and Mrs. King.

[30] The master dealt with two main issues on the application: (i) whether the removal of Sebastian as a party to the claim barred the continuation of the proceedings against the second and third defendants and (ii) whether the cause of action survives against the owners? The defendants seek to raise both of these issues for determination again at trial of the claim. As Mr. Fraser noted in the reply to defence, the master, having considered those issues, ruled that *“the cause of action based on the principle of agency is still alive against the owners. The removal of Sebastian King does not extinguish the cause of action against the defendants as owners, who were served within the prescription period.”*¹⁶ I would add, for clarity, that she determined that the question of *“whether Sebastian King was acting as the defendants’ agent is a matter to be determined at trial.”*¹⁷

[31] It is a matter of fact that the master’s ruling has not been appealed and cannot now be challenged by raising the same issue again at trial of the claim. I therefore decline to consider this issue.

Issue 4: Whether there was any negligence on Sebastian’s part, which caused the accident and consequent death of Mr. Garrathy, and whether the defence of sudden emergency is available to him?

[32] In this jurisdiction, the law as it pertains to negligence is governed by articles 985, 986, and 917A of the **Civil Code**, which provide as follows:

“985. Every person capable of discerning right from wrong is responsible for damage caused either by his or her act, imprudence, neglect or want of skill, and he or she is not relieviable from obligations thus arising.

986. He or she is responsible for damage caused not only by himself or herself, but by persons under his control and by things under his or her care.

¹⁶ Claim No.: SLUHCV2017/0469 (delivered 5th September 2018) at paragraph 24.

¹⁷ Claim No.: SLUHCV2017/0469 (delivered 5th September 2018) at paragraph 22.

The father, or, after his decease, the mother, is responsible for the damage caused by minor children.

...

The responsibility attaches in the above cases only when the person subject to it fails to establish that he or she was unable to prevent the act which has caused the damage.

Masters and employers are responsible for damage caused by their servants and workmen in the performance of the work for which they are employed.

917A.

- (1) Subject to the provisions of this article, from and after the coming into operation of this article **the law of England for the time being relating to** contracts, quasi-contracts and **torts shall mutatis mutandis extend to Saint Lucia**, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris":

...

- (3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of this Code or of such statute shall prevail. (Added by Act 34 of 1956)."

[33] In **Northrock Ltd v Jardine**¹⁸ Floissac CJ explained the distinction between liability for damage caused by a defendant's act, imprudence, neglect or want of skill, which falls under article 985 of the Code and requires a plaintiff to prove fault; and liability for damage caused by the autonomous act of a person or thing under the care and control of a defendant, which falls under article 986. With respect to alleged negligence by Sebastian, article 985 is clearly the applicable provision and the claimants must prove fault on his part. It is trite that the English Law requires the claimants to prove that (i) Sebastian owed Mr. Garrathy a duty of care, (ii) he breached that duty, and (iii) that the damage suffered was caused by the breach, which damage was foreseeable.

¹⁸ (1992) 44 WIR 160 at 161-162, 165-167.

Did Sebastian owe Mr. Garrathy a duty of care?

[34] In the case of **Nettleship v Weston**¹⁹, it was established that:

“a learner driver is responsible and owes a duty in civil law towards persons on or near the highway to drive with **the same degree of skill and care as that of the reasonably competent and experienced driver**. The duty in civil law springs from the relationship which the driver, by driving on the highway, has created between himself and persons likely to suffer damage by his bad driving.”²⁰ (my emphasis)

It is well accepted that this duty and the standard of care applies to all drivers. It is therefore the case that Sebastian owed Mr. Garrathy a duty to drive with the skill and care of a reasonably competent and experienced driver, regardless of the fact that he was 17 years and 10 months of age and had only qualified as a driver approximately 40 days prior to the date of the accident. In this regard, Mr. Fraser’s submission that Sebastian’s license was provisional is of no moment. There is no different class of license called a provisional license. It is merely the case that a first license is issued for the period of one year and in order to be renewed, the driver is required to take a defensive driving class. It also attracts a different fee. However, it does not in any way restrict his ability to drive or impose a different duty or standard of care.

Did Sebastian breach that duty of care?

[35] Before delving into the evidence, I wish to note that when witness statements and summaries were filed by the parties, it became apparent that both parties had intended to use several of the same witnesses in support of their respective cases. This was addressed by the parties agreeing that where a witness statement had been filed, as opposed to a witness summary, the witness statement would be given precedence. As a result, it was agreed by order dated 16th October 2019 that the trial would proceed on the witness statements filed by Mr. Richelieu on behalf of the defendants and the witness summaries filed by Mr. Fraser on behalf of the claimants would be withdrawn on the day of trial.

¹⁹ [1971] 3 All ER 581.

²⁰ Per Salmon LJ at page 589 f; See also page 586 b and c per Lord Denning MR and page 594 f per Megaw LJ.

[36] Consequently, on the day of trial, the witness summary of PC564 Gillan Isidore dated 7th June 2019 was withdrawn and his witness statement dated 13th June 2019 proceeded to trial; and the witness summary of Romel Knight dated 7th June 2019 was withdrawn and his witness statement dated 3rd June 2019 proceeded to trial. Additionally, the witness summary of Cuthbert Gabriel dated 7th June 2019; the witness summary of Jimmy Francis dated 7th June 2019; and the witness statement of Garvin Busby dated 13th June 2019 were withdrawn by the respective parties. Therefore, the witnesses who gave evidence for the claimants were Mr. Bacon, Ms. Gilbert and PC85 Yannil Sam. The witnesses who gave evidence for the defendants were Dr. King, Mrs. King, Mark Sargeant, Dr. Wayne Felicien, PC564 Gillan Isidore and Romel Knight.

Claimants' Evidence

[37] The evidence of Mr. Bacon and Ms. Gilbert were identical and provided information relevant only to assessment of damages. As they were not present when the accident occurred, they could not provide any evidence relevant to establishing liability.

[38] The only other witness for the claimants was PC85 Yannil Sam ("PC85 Sam") attached to the Scenes of Crime Office of the Royal Saint Lucia Police Force. His evidence was that he was on duty on the morning of 3rd August 2014, when at about 2:30 a.m., PC564 Gillan Isidore ("PC564 Isidore") informed him of the collision involving Mr. Garrathy and the vehicle driven by Sebastian.

[39] He attended the Victoria Hospital along with PC564 Isidore at approximately 2:45 a.m. He met with a Dr. Cenac who informed that she had pronounced Mr. Garrathy dead at 2:08 a.m. He observed Mr. Garrathy's body on which he saw mud and blood. He saw apparent blood on his legs, knee area, the left side of his shirt, and the right side of his face. He took digital images of the body and then proceeded to Rodney Bay to the scene of the accident.

[40] He arrived at the scene at about 3:20 a.m. along with PC564 Isidore, who pointed out the vehicle which was on the left side of the road facing north. He observed damage to the left front side of the vehicle which included: dented and broken frame area above left front tyre, broken left side of front bumper, broken left side of front lights, and combination cracks on the left bottom corner of front windshield. There was also vehicle debris on either side of the road. On the left side, south of the vehicle, he observed a pool of apparent blood, 1 left side of black shoe, 1 right side of black shoe, and a yellow key. He took images of his observations as well as a swab of the apparent blood, and collected the shoes and key, which were labelled, packaged, sealed and signed. PC85 Sam also states that he recorded various measurements.

[41] The vehicle, which was kept in custody of PC564 Isidore, was later that day again examined by him in the presence of PC564 Isidore, Dr. King and Sebastian. More images were taken of the vehicle as well as samples. He also returned to the scene along with PC564 Isidore and other officers, where he took additional images and recovered some of the debris. The samples and debris recovered were labelled, packaged, sealed and signed. The images were transferred from the flash card on which they were stored to a blank non-rewriteable DVD, which was labelled, sealed and signed and copies made.

Defendants' Evidence

[42] Dr. King and Mrs. King's witness statements are also identical, and, as they were not present when the accident occurred, contain no evidence in respect of liability.

[43] PC564 Isidore's evidence was that he was attached to the Traffic Department of the Gros Islet Police Station and was on duty on 3rd August 2014 at about 1:30 a.m. when he received a report of a vehicular accident near the Rodney Bay Marina. He proceeded to the scene along with other officers. On arrival, he found the vehicle on the left side of the road facing Gros Islet (north) with hazard lights flashing. The vehicle had damage to its left fender, left side of bonnet, left edge of front bumper,

left side mirror and the left bottom of the windshield was broken. He also noticed a pair of black shoes scattered and an area which appeared to be blood on the left side of the road facing north.

[44] A young male who identified himself as Sebastian was seated in the driver's seat of the vehicle. There were also several fire personnel on the scene with whom he spoke. He stated that he marked the vehicle's position on the road with spray paint and asked Sebastian to show him the point where he believed he made contact with the pedestrian. He marked the point of impact identified by Sebastian with orange spray paint in the presence of his father and lawyer.

[45] He then requested a brief explanation from Sebastian which he recorded in his pocketbook:

"I was coming up the stretch going to Gros Islet direction, a bus was parked on the left side of the road facing Gros Islet, and there were two passengers giving him his bus fare, the bus was slightly in the road, and the passengers even more in the road, so I went to the right side to avoid the passengers, and as I pass the bus one of the passengers run across the road and I heard an impact, I then stopped immediately, and switch off the vehicle."

[46] He took the name of possible eyewitnesses, following which he left for the Victoria Hospital along with PC85 Sam. They met with Dr. Cenac and observed the body identified as Mr. Garrathy which had injuries. They thereafter returned to the accident scene where he took measurements which were also recorded in his pocketbook.

[47] PC564 Isidore states that on 8th August 2014, about 9:00 a.m., he attended the Victoria Hospital Mortuary where he met with Ashley Garrathy who is Mr. Garrathy's brother, PC St. Marie, Dr. Odalis Wilson, and Dr. Wayne Felicien. Samples of blood were extracted from the deceased by Dr. Wilson and handed to PC St. Marie of the Scenes of Crime Office.

- [48] He concluded, based on the post-mortem examination, statements, the area of damage to the vehicle and the measurements recorded, that Sebastian was not careless in the manner he drove on that morning.
- [49] In cross examination, PC564 Isidore indicated that he did not notice any brake impressions on the road at the scene of the accident. He was asked whether he knew that the speed limit on the Castries/Gros Islet Highway is 20 mph, to which he responded that he was not aware. He was also not aware that the driver's manual contains a section which tells a driver how to proceed when a bus is putting down passengers.
- [50] Romel Knight ("Mr. Knight") states that on the night of 3rd August 2014 he had been selling chicken from his caravan near the Rodney Bay Marina. At about 1:00 a.m., he was out of chicken and so was there with a few friends. He was seated, watching in a southern direction. Whilst there, he noticed a minibus that had stopped on the same side of the road as the Marina, facing north. He then saw a white man dash across the road. The man did not look either right or left, but just dashed across the road from the front of the parked minibus. At the same time, the vehicle knocked the man and threw him to the left side of the road, and the vehicle stopped. He says he saw what happened because before the impact, there were persons on the bus shouting to the white man "stop!", but he did not stop. In cross examination, he confirmed that Mr. Garrathy did not pause or stop at all, although persons were shouting to him to stop. He indicated that approximately 3 seconds elapsed between persons telling Mr. Garrathy to stop and the impact.
- [51] Dr. Wayne Felicien ("Dr. Felicien"), a registered medical practitioner, gave evidence that in or about August 2014 he was Senior Registrar of the Ezra Long Laboratory of the Victoria Hospital. On the night of 3rd August 2014, he observed the conduct of a postmortem examination carried out by a Dr. Odalis D. Wilson ("Dr. Wilson"), who was then Consultant Pathologist at the Victoria Hospital. That postmortem examination was conducted on the body of a Caucasian male, approximately 177cm

in height which was identified as Mr. Garrathy, by his brother Ashley Garrathy. In addition to Dr. Wilson and himself, also present at the examination were Ashley Garrathy, PC564 Isidore, and Corporal 263 St. Marie.

[52] Dr. Felicien states that at the end of the postmortem examination, certain findings were made by Dr. Wilson as to the cause of death and she recommended that toxicology tests be carried out. As a result, blood samples were taken and handed to Corporal 776 Marcus Bastien attached to the Scenes of Crime Office. As far as he is aware, the samples were sent to the NMS Labs for testing. On 19th January 2016, said Corporal 776 Marcus Bastien handed him a copy of a toxicology report from NMS Labs. On reading the report, he observed that Mr. Garrathy's blood alcohol level was "257 +/-0.015", which he interpreted to mean that his blood alcohol level was above normal such that it could cause drunken stupor. The toxicology report was exhibited to his statement.

[53] Mark Sargeant ("Mr. Sargeant") is an Accident Reconstructionist. He stated that he was asked by Mr. Richelieu to conduct a traffic accident investigation and prepare a report. His instructions were to determine, as best as possible, the manner in which the accident occurred, the cause, and the contribution of the driver to the cause, if any.

[54] Having perused Mr. Sargeant's report, I note that it took into account both scientific and circumstantial evidence. The circumstantial evidence comprised the statements of witnesses to the accident, as well as the report of the coroner²¹ following an inquest to determine whether any person could be held criminally responsible for the cause of death; that is, whether it was the result of mere accident or unlawful in the sense of dangerous driving.

²¹ Notice of Verdict in Inquest Touching the death of Quinton Garrathy, First District Court (Coroner's Court) in the District of Gros Islet, dated 10th October 2016 before His Honour, Mr. Ermin Moise, Coroner.

- [55] Mr. Sargeant noted that there were several inconsistencies in the statements of the witnesses, most importantly, as to the speed at which the vehicle was travelling. Further, he stated that to look primarily at the damage to the vehicle as an indication of speed, may lead to a dangerous interpretation. He noted that the structures that were impacted were not the major support structures of the body of the vehicle and were not the toughest or most reinforced areas of the vehicle. The human body, made up of water, acts as a hard object and would have offered some resistance to the vehicle, thereby causing some of the deformation seen on the vehicle. The important consistency identified was that Mr. Garrathy was intoxicated.
- [56] Mr. Sargeant, however, was able to provide conclusions based on scientific evidence, and this is the most valuable aspect of his report. His ultimate conclusion is that the accident was virtually unavoidable in the circumstances. Two main points emerged from his report relating to speed and visibility. Mr. Sargeant determined that the speed of the vehicle was between 27.27 mph and 30.15 mph. Using the speed of 30.15 mph and the distance between the point of Sebastian going around the minibus and the point of impact at the front of the minibus, it would have taken only 0.4 seconds to get to the point of impact. Further, latitudinal visibility would have been impacted as Mr. Garrathy was crossing from the western to eastern side of the road, at a time when part of the road was blocked by the minibus from which Mr. Garrathy disembarked. This block significantly reduced the amount of time that Mr. Garrathy would have been able to see the oncoming vehicle and that Sebastian would have been able to see Mr. Garrathy running across. Mr. Sargeant states that his findings show that the accident would have been unavoidable, even if Sebastian had been traveling at 20 mph.
- [57] Mr. Sargeant states that the police's markings of the location of the vehicle confirms that the minibus was partially in the road, taking up at least 3 ft of the road. Therefore, if a person starts to run from the front of the minibus, it would have been extremely difficult to see the person before they emerged from in front of it. Considering that the impact to the vehicle was just over the front left light, this meant

that just milliseconds before the impact, Mr. Garrathy was not yet in front of the vehicle. It was only at the point of impact that he was at the front of the vehicle. Therefore, Sebastian's visibility to see Mr. Garrathy running across would have been reduced. Added to this is the time that Sebastian had to perceive that Mr. Garrathy was in the area, which must be taken into account.

[58] Mr. Sargeant's expert opinion is that based on visibility, it stands to reason that Sebastian would not have had enough time to perceive Mr. Garrathy and respond. Visibility, he says, is not only based on being able to see a person but the amount of time a driver is given to recognize that there is an object and to respond, which takes place in several stages. Even if the vehicle was traveling at 20 mph, it would have taken 0.6 seconds for Sebastian to move from behind the minibus to the front. This is still less than the accepted time for a driver's perception and reaction to take place at night. He offers that several authors have suggested perception reaction time to be between 1.5 to 2-3 seconds, and the length of time is based on whether it is day or night, whether the area is well-lit or not, and the person's state of mind. He concludes that only a fraction of time would have occurred between Sebastian getting from the back to the front of the minibus, which is even smaller than the amount of time it took for the accident to occur, which made it unavoidable.

[59] He states further that Sebastian's perception would have been adversely affected by the over stimulus from light and then sudden loss of light. The fact that the vehicle was traveling towards an object that was dimly lit in the absence of reflectors, and the small surface area upon which it was illuminated would also have affected visibility. Additionally, the dark colours worn by Mr. Garrathy, which were not visible at night, would have made it harder for Sebastian to see and distinguish him.

[60] In cross examination, Mr. Sargeant agreed that if the vehicle had been travelling at 10 mph, the impact on Mr. Garrathy would have been less, explaining that less momentum would have been transferred.

Discussion

- [61] The claimants have failed to make out their case that Sebastian's negligence caused the accident and consequent death of Mr. Garrathy. They have not adduced any evidence as to how the accident occurred or any negligent acts or omissions on Sebastian's part. The evidence of PC85 Sam only speaks to his observations of the body and inspection of the scene after the accident but offers no opinion or conclusion as to cause or fault.
- [62] Further, nothing arises on the defendants' evidence that could be of any assistance to the claimants. The evidence of Romel Knight, the only witness who observed the accident, was that Mr. Garrathy dashed across the road without even pausing and despite being warned by others that it was unsafe. He did not raise any matter which could suggest fault by Sebastian, as alleged.
- [63] PC564 Isidore concluded, to the contrary, based on the post-mortem examination, statements, areas of damage to the vehicle and the measurements taken at the scene that Sebastian was not careless in the manner he drove. I accept Mr. Richelieu's submission that the Court may accept and attach due weight to PC564 Isidore's conclusion based on section 66 of the **Evidence Act**²², which provides an exception to the rule that prohibits opinion evidence. Section 66 provides that where a person has specialized knowledge based on training, study, or experience, the opinion rule does not prevent the admission or use of that person's evidence of an opinion that is wholly or substantially based on that knowledge. I accept that as an investigating officer attached to the Traffic Department, PC564 Isidore would, by virtue of experience in such matters, be in a position to offer an opinion. His opinion is unchallenged and corroborated by the expert.
- [64] The claimant's case appears to be that Sebastian was speeding, or at least driving inappropriately fast in the circumstances. Mr. Fraser, in his submissions, stated that Sebastian drove in excess of the speed limit which is 20 mph within the meaning of

²² Cap 4.15 of the Laws of Saint Lucia.

the **Local Authorities Ordinance**²³ and the **Motor Vehicles and Road Traffic Act**²⁴ of 1994 (“the 1994 Act”).

[65] However, his submission as to the speed limit being 20 mph overlooks the fact that the 1994 Act was repealed and substituted by the **Motor Vehicles and Road Traffic Act**²⁵ of 2003 (“the current Act”). The speed limit of 20 mph to which Mr. Fraser refers was contained in the Third Schedule of the repealed 1994 Act. The current Act does not contain any provisions or schedule setting out any speed limits. Further, the savings clause in the current Act saved only subordinate legislation made under the repealed 1994 Act, which was immediately in force and so far as it is not inconsistent with the provisions of the current Act.²⁶ As the speed limits under the 1994 Act were not contained in any regulations, but in the primary legislation itself, they were not saved. Therefore, whether by oversight or otherwise, there appears to be no legally established speed limits in the State of Saint Lucia.

[66] Mr. Fraser submitted that the following factors suggest excessive speed: (i) Sebastian’s testimony before the coroner that he drove at 40 mph; (ii) there being no brake impressions on the road; (iii) the vehicle stopping 157 feet from the point of impact; (iv) the location of Mr. Garrathy’s body being 65 ft 8 in from the point of impact; (v) Mr. Sargeant confirming that the crack to the windshield was likely the result of his body coming into contact with it.

[67] I accept Mr. Sargeant’s uncontroverted evidence in particular, his scientific conclusions concerning speed and visibility. He is the only witness in this matter who provided any evidence of speed. Neither Romel Knight who witnessed the accident, nor the investigating officers, based on their investigation, gave any evidence or opinion of speed. Sebastian was never summoned to give evidence in this claim; his statement to the coroner is not evidence before this Court and in any

²³ Chapter 239.

²⁴ Act No 13 of 1994.

²⁵ Cap 8.03 of the Laws of Saint Lucia, section 198.

²⁶ Section 198.

event, is inadmissible per section 55(4)(c) of the **Evidence Act**; and the coroner's report can only be given very limited weight, if any at all. Further and in any event, any references to speed by witnesses, including Sebastian, are only estimates and are subjective, whereas speed must be measured or calculated. Mr. Sargeant considered the measurements and the damage to the vehicle; however, he arrived at the conclusion of speed being between 27.27 mph and 30.15 mph upon scientific bases. Mr. Fraser, as a lay person in this regard, is not in a better position than the expert to come to the conclusion that Sebastian was driving at an excessive speed of 40 mph.

[68] The uncontroverted evidence before this Court is that Mr. Garrathy simply dashed across the road without even pausing to look left or right to determine whether it was safe to do so. I accept Mr. Sargeant's conclusion that Mr. Garrathy dashing into the road from in front of a parked vehicle would have reduced his visibility to Sebastian and reduced the time in which Sebastian had to perceive him and react. The time in which Sebastian would have had to see and perceive Mr. Garrathy would only have been a fraction of a second, 0.4 of a second to be exact, and this would not have been sufficient time for him to respond in a manner different from which he did to avoid the accident.

[69] Indeed, it is the evidence of Mr. Sargeant in his report and under cross examination, that even at the speed of 20 mph for which Mr. Fraser advocates, he could not say the accident would not have occurred. Mr. Fraser disagrees with his position; however, again, Mr. Fraser is not in a position to. According to the expert, at 20 mph, the time in which to see, perceive and react to Mr. Garrathy would still only have been a fraction of a second. Mr. Fraser's suggestion that had Sebastian been driving at 10 mph, the impact would have been less, and Mr. Garrathy would not have died, is unreasonable as a basis to impute negligence. One must look at the duty the law imposes, not only on Sebastian as driver, but also on Mr. Garrathy, who was also a road user.

[70] A driver of a motor vehicle has a duty to exercise due care when driving. The extent of this duty was described by Thom J in **Semol May v Lancelot Stevenson**²⁷ quoting from Rawlins J in the case of **Cheryl Edwards (Administrator of the Estate of Janique Lewis) v Ethel Mills**²⁸ in the following terms:

"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 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."²⁹

[71] However, it has also been said of the duty of care by Slade J in **Berrill v Road Haulage Executive**³⁰:

"Paraphrasing the words of Lord Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155, **a driver is not bound to foresee every extremity of folly which occurs on the road.** Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. **He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do, albeit negligently.**" (my emphasis)

[72] Further, it has been established that speeding does not necessarily amount to negligence. In **Quinn v Scott and another**³¹ Glyn Jones J said:

"The high speed alone is not evidence of negligence unless the particular conditions at the time preclude it."³²

[73] In respect of the duty of a driver towards pedestrians, in **Karen Janet Eagle (By her Litigation Friend E. E. Giles) v Garth Maynard Chambers**³³ it was stated:

"It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an

²⁷ Civil Claim No. 8 of 2005 (Saint Vincent and the Grenadines, delivered 3rd July 2006).

²⁸ Claim No. ANUHCv1998/0168 (delivered 28th November 2002).

²⁹ *May v Stevenson*, at paragraph 17.

³⁰ [1952] 2 Lloyd's Rep 490.

³¹ [1965] 2 All ER 588.

³² At page 590.

³³ [2003] EWCA Civ 1107.

oncoming vehicle... The court 'has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon': Latham LJ in *Lunt v Khelifa* [2002] EWCA Civ 801, para 20."³⁴ (my emphasis)

[74] Similarly, in **Edyth Leonard v Ernest John**³⁵, Alleyne JA explained:

"7. 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 9-223 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'...

8. If a pedestrian suddenly steps from the footpath onto a crossing, just as a vehicle is about to enter the same area, so that the driver is given no chance of avoiding a collision, there may be no breach of (statutory) duty, provided that all reasonable care has been taken by the driver, having regard in particular to the fact that a crossing is present. The learned author of Charlesworth continues 'In terms of civil liability, the driver could possibly avoid all responsibility, although more usually it is shared'."³⁶ (my emphasis)

[75] How have these principles been applied in case law? In **Edwards v Mills**, the learned judge considered that the road on which the accident occurred was paved; there was no indication that it was wet or that there was anything unusual with the surface; it was relatively straight and long so that a driver would have a good view along it for some distance, although the old house and trees on the lot where the children played might have created some degree of limitation. He considered also that the road was a busy one, in a residential area, and people were usually sitting on the roadside and children were usually playing in the road, which was the case on the afternoon of the accident. All of the witnesses agreed that there was very little time within which the defendant could have seen Janique, although they disagreed as to whether the defendant was speeding in the circumstances that

³⁴ At paragraph 16.

³⁵ Civil Appeal No.4 of 2003 Grenada (delivered 21st June 2004).

³⁶ At paragraphs 7-8.

prevailed. In all these circumstances, Rawlins J held that the main concern was whether the defendant kept the level of lookout that was required particularly having seen children in the area. He found that if she did, she might have seen Janique at the time her son, who was in the passenger seat, did. Thus, she contributed in some measure to the accident, in the degree of 20%.

[76] In **Quinn v Scott**, the first question was whether it was negligent on the part of the first defendant to drive at a speed of 75 mph. The Court considered that high speed alone is not evidence of negligence unless the particular conditions at the time preclude it. This road was some thirty-two feet wide; divided into three traffic lanes; it was straight for a considerable distance with slight undulations insufficient to impair the first defendant's vision of what lay ahead of him. There was no evidence that any traffic, whether wheeled or pedestrian, might be expected to emerge from side turnings or openings at the side of the road; the traffic was not heavy. Given those conditions and the position of the other vehicles on the road at the time, the court did not find that the first defendant was negligent in driving and overtaking at a speed of 70-75 mph.

[77] The second question was notwithstanding his speed, should the first defendant not have been able, if he had used proper care and skill, to stop his car before reaching the tree that had fallen into the road; or if he could not, to reduce his speed such that after passing through the tree, which must to some extent have checked his speed, he would have been travelling so slowly that the impact would not have injured the plaintiff? The facts as found were that a tree had suddenly and unexpectedly fallen into the road some fifty yards or more ahead of the first defendant, and after hitting the tree, his car got out of his control and collided with the plaintiff. The court held that where so alarming an event occurs as, for example, the unexpected fall of a tree in front of a car travelling at high speed, the reactions of the driver may be momentarily checked rather than accelerated. As to what happened after the Jaguar hit the tree, it was unreasonable to say that the first defendant did anything a reasonable motorist would not have done or failed to do

anything a reasonable motorist would have done to control his car. It was found that the first defendant was not guilty of any negligence.

[78] In **Eagle v Chambers**, in re-apportioning the liability of a driver of a motor vehicle for colliding with and injuring a pedestrian from 40% to 60%, the Court of Appeal took into account several factors. The road was wide, nearly straight, and well-lit; there was not much traffic and nothing to obstruct the driver's view. More so, it was a restricted road in a built-up area; it was a sea-front road in a seaside resort in early summer with attractions for visitors on both sides of the road and cars parked in the middle. Car drivers have to be on the look-out for pedestrians in the road and while a driver might not expect someone to behave as the claimant had been behaving, it was certainly to be expected that there might be pedestrians in that particular road at that time as an event had just finished and there were people on the pavement outside heading for their cars. The longer a person is in the road, the easier it should be to see them, especially if they are wearing light coloured clothing and remain in roughly the same place in relation to traffic approaching from behind. Although there was evidence that the claimant had been wandering or unsteady, there was no evidence that she had staggered or changed direction suddenly. She had been walking along the road for some time. There was nothing to prevent the defendant taking evasive action, as others had done before him. Further, the defendant had been driving needlessly in the offside lane or straddling the white line; he was driving at or a little above the maximum permitted speed on a road he knew that particular care should be taken to look out for and avoid pedestrians; and he knew that he had had enough to drink to affect his driving abilities.

[79] In terms of the claimant's carelessness for her own safety which was held sufficient to justify a finding of contributory negligence, the Court of Appeal acknowledged that she had put herself needlessly at risk by walking along the middle and then the offside lane of the carriageway without keeping a proper lookout for vehicles coming from behind and had been doing so for some time; she had ignored at least two warnings from sensible people and rejected attempts to help her in terms which

suggested that she was not totally unaware of the danger she was putting herself in.

[80] In **Rodney Williams v Rohand De Roche**³⁷, the claimant alleged that as he was about to cross the road and after looking to see that it was clear to cross, he stepped out and the defendant's motor car went over his left foot. In his witness statement he had stated that he was standing in front of a stationary van, although he stated differently in cross examination. He claimed that his resulting injury was the result of the defendant's negligence. The defendant denied that the accident was due to his negligence and alleged that the accident was due to the claimant's negligence in that: (a) the claimant attempted to run across the road when it was unsafe to do so and did not look right, then left, then right again to ensure that there was no traffic on the road; and (b) he had little time to adjust mentally and to avoid striking the claimant who in effect ran directly into his vehicle.

[81] Thom J adopted the principle stated in the **Cheryl Edwards** case that drivers of motor vehicles have a duty to take care when driving on the public road. They have a duty to be on the look-out for pedestrians using the road. She considered the defendant's evidence and held that if it was correct that he was driving at a slow pace with his foot on the brake and he had seen the claimant when he exited the bus, then he would have been able to avoid the accident. She emphasized, that it was not a situation where the claimant suddenly appeared from in front of the van and the defendant had not seen him. In the circumstances, she found that both the claimant and the defendant were negligent. The claimant misjudged the speed at which the defendant's motor vehicle was approaching and he attempted to cross the road. She noted that there is no pedestrian crossing in that area which is a very busy area and that a pedestrian is required to take due care before crossing the road. The defendant was negligent in that he did not keep a proper lookout. He was approaching an area that was very busy particularly during the period between 4-5 p.m., and the accident occurred by a bus stop. The defendant had testified that

³⁷ Claim No. 111 of 2008.

there was no speed limit sign in the area, however, she noted that the speed limit is fixed by the Road Traffic Act and stated that drivers of motor vehicles have a duty to acquaint themselves with the speed limit of the area where they drive.

[82] The present case, in its totality, is unlike any of those mentioned above. The accident occurred on a main road, at a point where it was straight and there is usually an unobstructed view of the road. The road may be busy, depending of the time of day or night. The accident occurred sometime after 1:00 a.m. when the road is not usually particularly busy. It is in a built-up area; on one side is the popular Rodney Bay Marina and on the other side, the equally popular lot on which several food trucks are parked and from which a variety of food is sold into the early hours of the morning. There is a bus stop on either side of the road, however, at the time of the accident, there was no pedestrian crossing in the area where Mr. Garrathy was attempting to cross. As noted above, there is no speed limit and I have accepted that Sebastian was travelling at about 30 mph. I have also accepted the undisputed evidence that Mr. Garrathy disembarked the bus and suddenly and immediately dashed across the road from in front the bus without pausing or stopping to look left or right, or in any way determine whether it was safe to cross the road. He did so despite persons shouting to him, warning him of impending danger.

[83] In that regard the circumstances are more akin to the tree falling suddenly and unexpectedly in **Quinn v Scott**, where the defendant, for that reason, escaped liability, despite travelling at high, though not unreasonable, speed. It is dissimilar to **Eagle v Chambers** where although the claimant was not taking care for her own safety, she did not suddenly run into the road as Mr. Garrathy did. There was no sudden change of her movement which would have prevented the driver from seeing her and taking the necessary evasive action. The conditions of that road, being very busy and the presence of persons on the road as well as the speed and drinking of the driver also makes that case in which liability was apportioned distinguishable.

- [84] **Edwards v Mills** is also distinguishable where the road was also a very busy one in which children were usually playing and the driver had in fact seen the children playing. The most similar of the cases is **Williams v De Roche** where the claimant attempted to cross from in front a parked vehicle, where there was no pedestrian crossing and in the vicinity of a bus stop. However, in that case the driver had testified to seeing the claimant and the learned judge made a finding of fact that claimant did not suddenly appear from in front of the van. It was also a very busy main road in peak hour traffic. These factors make it distinguishable from the present case.
- [85] I agree that Sebastian, as a driver of the vehicle on that ill-fated night, had a duty to exercise due care on the road and to anticipate the actions of other road-users, even if negligent, so far as was reasonably foreseeable. He would have been expected to maneuver the vehicle in order to prevent and avoid accidents, though he would not have been bound to foresee every extremity of folly which could have occurred.
- [86] As a pedestrian, Mr. Garrathy undoubtedly also had a duty of care in how he used the road. In particular, he was required to take due care before crossing the road, and to stop and look to ensure that it is safe to do so. The evidence reveals that Mr. Garrathy failed manifestly in his duty when he suddenly and carelessly dashed into the path of the oncoming vehicle, and thereby deprived Sebastian of any opportunity to avoid the collision. These are circumstances in which the law accepts that a driver may avoid liability.
- [87] I accept that a prudent driver passing a bus stop where a bus is letting off passengers in the vicinity of the Marina and Food Truck lot would be expected to exercise additional care and to keep an even greater look out, as there would be the possibility that someone who disembarked the bus may wish to cross the road. The evidence from the statement taken from Sebastian by PC564 Isidore set out in his witness statement is that Sebastian saw the bus and two passengers and, as a precautionary measure, manoeuvred to the right, away from them. This

demonstrated that he was keeping a look out, anticipating the actions of others and in doing so took all reasonable care.

[88] However, it could not, by any stretch of the imagination, be reasonably foreseeable that a pedestrian would, in a single motion, in one fell swoop, disembark and dash across the road from in front of a bus without even a pause. This is not the reasonable or even unreasonable behaviour of a pedestrian that is foreseeable; and even the most prudent and experienced driver would have found himself in the same predicament that night. Given Mr. Garrathy's unfortunate actions and accepting Mr. Sargeant's evidence of speed and visibility which rendered the accident unavoidable, in these extraordinary circumstances, I find Mr. Garrathy solely responsible for his injury and Sebastian not liable.

[89] For completeness, I find it important to make a brief comment on the issue of the toxicology report and references by Dr. Felicien and Mr. Sargeant to Mr. Garrathy being intoxicated on that night, in respect of which both parties made submissions. Mr. Fraser, on the ground of hearsay, challenged the admission into evidence of statements by Mr. Sargeant regarding the toxicology report and the toxicology report itself exhibited to the statement of Dr. Felicien. He submits that the report could only be admitted pursuant to section 55 of the **Evidence Act**, which has not been satisfied and the report was also not certified in accordance with section 57 thereof. Mr. Richelieu's position is that under section 57 of the **Evidence Act**, Mr. Fraser was required to give notice of objection, which he did not. Having not raised this issue at pre-trial review or any time prior to trial, it is unacceptable to do so on the day of trial.

[90] I agree with Mr. Richelieu that the claimants' have had knowledge of the toxicology report long before this claim was even filed. The report was part of the evidence before the coroner's inquest. It has been disclosed in this matter from the date ordered for disclosure, and a witness statement filed in respect of it. It is manifestly unfair at this stage for Mr. Fraser to make this objection, especially as Mr. Fraser

advocates for the use of the coroner's report for the findings of fact made therein, which includes a finding that Mr. Garrathy was intoxicated on the basis of the toxicology report. It cannot be that he is entitled to pick, choose, and refuse, although the Court cannot and I have not had regard to the coroner's report.

- [91] I would agree that Mr. Seageant, in his report, is not entitled to make conclusions based on the toxicology report and I would not have regard to conclusion # 2 of his report.³⁸ However, Dr. Felicien, as a registered medical practitioner and then Senior Registrar of the lab that conducted the postmortem examination based upon which the recommendation was made to obtain a toxicology report, and having received the said report, has simply interpreted the findings therein. This I believe he is in a position to do. In any event, the fact of intoxication has had no impact upon my decision, which would be the same regardless of whether Mr. Garrathy was intoxicated or not.

Vicarious Liability and Agency

- [92] Having found that Sebastian was not negligent and therefore not liable for the accident and death of Mr. Garrathy, it is unnecessary to go on to consider the issue of vicarious liability. However, for completeness, I would simply state that, on the law and evidence, there is no basis on which I could have found Dr. and Mrs. King vicariously liable, in any event.
- [93] The law is as stated by Lord Donovan in the Privy Council decision of **Rambarran v Gurrucharran**.³⁹ The following applicable principles can be distilled:
- i. The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he

³⁸ Bundle 3 at page 61.

³⁹ (1970) 15 WIR 212 at pages 214-215. See also *Barnard v Sully* (1931), 47 TLR 557, DC, 36 Digest (Repl) 104, 524; and *Hewitt v Bonvin* [1940] 1 KB 188.

lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.⁴⁰

- ii. The onus of proof of agency rests on the party who alleges it.
- iii. Ultimately the question of service or agency is always one of fact.
- iv. An inference may be drawn from ownership that the driver was the servant or agent of the owner. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it.
- v. The fact of driving with the consent of the owner does not of itself establish service or agency.
- vi. It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit, in his own interest, and on his own concerns.

[94] The present is not a situation where no more is known than that at the time of the accident the car was owned by the defendants giving rise to a presumption, by virtue of that ownership, that Sebastian was driving as their servant or agent. Evidence bearing upon the question of service or agency has been provided and that evidence remains uncontroverted. The uncontroverted evidence of the defendants is that permission was given to Sebastian on the night of the accident to go out with his friends. There was no arrangement or agreement between Sebastian and either Dr. or Mrs. King to do any task, run any errand, or do anything for either of them. He was not carrying out any act at either's request or on either's behalf. In the face of this clear evidence, the defendants could not be held vicariously liable for Sebastian's acts since he was not driving as their servant or agent.

[95] Mr. Fraser seems to suggest that in respect of liability of the defendants, article 986 of the **Civil Code** applies and therefore fault need not be proven and the only way

⁴⁰ See *Ormrod and Another v Crosville Motor Services Ltd and Another (Murphie, Third Party)* [1953] 2 All ER 753.

the defendants can escape liability is to establish that they were unable to prevent the accident which caused Mr. Garrathy's death. However, given that Sebastian has not been found negligent and is therefore not liable for the accident or death of Mr. Garrathy, (i.e. he did not cause the injuries or death) there is no need to discuss the applicability of article 986 to the circumstances of this case.

Conclusion

[96] Based on the foregoing discussion, the claimants have not proven their case on a balance of probabilities. I therefore order as follows:

1. The claim is dismissed.
2. Prescribed costs to the defendants in the sum of \$7,500.00.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar