

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2016 /0203

BETWEEN:

MENDY PHILLIP

(Qua Administrator of the Estate of JOE WEL ADOLPHUS
AUGUSTUS PHILLIP aka JOEWEL ADOLPHUS AUGUSTUS PHILLIP)

Claimant

And

- 1. SHELDON GASTON**
- 2. CLID ISIDORE**
- 3. CONSTRUCTION INDUSTRIAL EQUIPMENT LIMITED**

Defendants

Consolidated with:

CLAIM NO. SLUHCV2016 /0283

BETWEEN:

- 1. JULIENNE FADLIN**
Representative party of the Estate of
SHALLA LEANDA RAYMOND
- 2. DELLA ETERNITY SHARRISS NORLEY**
by her Next Friend **JULIENNE FADLIN**

Claimants

And

- 1. SHELDON GASTON**
- 2. CLID ISIDORE**
- 3. CONSTRUCTION INDUSTRIAL EQUIPMENT LIMITED**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Alberton Richelieu for the Claimant, Mendy Phillip

Mr. Eghan Modeste for the Claimant, Julianne Fadlin

Mr. Alvin St. Clair for the First Defendant

Mrs. Esther Green-Ernest for the Second and Third Defendants

2018: November 22, 23,

2019: February 21,
March 26,
April 15,
June 28,

2020: March 30

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** This matter concerns two consolidated claims brought by separate claimants against the defendants. They arise out of the same motor vehicle accident and concern the same issues. The earlier claim¹ is filed by Ms Mendy Phillip (“Mendy”), in her capacity as Administrator of the Estate of Joewel Adolphus Augustus Phillip (“Joewel”) and will be referred to as “Mendy’s claim”. The later claim² is filed by Ms. Julianne Fadlin in her capacity as representative party for the Estate of Shalla Leanda Raymond (“Shalla”) ³ and next friend of Della Eternity Sharriss Norley (“Della”) ⁴ and will be referred to as “Julienne’s claim”. Della is the minor child of Shalla, born on 15th November 2011⁵.

¹ Filed on 7th April 2016

² Filed on 10th May 2016

³ By Order of the Court dated 9th February 2015

⁴ By order of the Court dated 21st April 2016

⁵ See Exhibit JF7

- [2] Both Mendy and Julienne plead that the first and second defendants, as the drivers of the two vehicles involved in the accident, were negligent, thereby causing the death of Joewel and Shalla. Further, that the third defendant is the employer of the second defendant and is vicariously liable for his negligence.
- [3] The defendants deny liability for the accident, with the respective drivers casting blame on each other and the third defendant denying that it is the employer of the second defendant or the owner of the truck he was driving.

The Issues

- [4] The following issues arise for determination: -
1. Whether the first defendant, Sheldon Gaston ("Sheldon"), by his act, omission, neglect, or want of care or skill caused or contributed to the loss or injury alleged by the claimants?
 2. Whether the second defendant, Clid Isidore ("Clid"), by his act, omission, neglect, or want of care or skill caused or contributed to the loss or injury alleged by the claimants?
 3. Whether the third defendant, Construction Industrial Equipment Limited ("CIEL"), is vicariously liable for the negligence, if any, of the second defendant?
 4. What measure of damages are the claimants entitled to, if any?

Mendy's Claim

- [5] Mendy asserts that on 22nd May 2013, Joewel was a passenger in motor omnibus registration number M594 (the "bus") owned and driven by Sheldon. The bus was travelling along the Vieux Fort /Micoud Highway in a southern direction, when it violently collided with motor truck registration number TJ6280 (the "truck"), driven by Clid, as servant or agent of CIEL, thereby causing Joewel's death.
- [6] She alleges that both Sheldon and Clid were negligent in that they drove at excessive speed; failed to stop, slow down, swerve, or in any other way manage their respective vehicles so

as to avoid the collision; and failed to take any special care to avoid the collision. Additionally, she alleges that Sheldon failed to keep as close as possible to his left side of the road. She alleges that Clid was in the employ of CIEL and puts him to strict proof of ownership of the truck, as she says the Police Report of Investigating Officer Corporal Faucher, dated 9th February 2015, states that the owner of the truck is CIEL.

- [7] She asserts that as a result of the negligence of the defendants, Joewel met his untimely demise and thereby lost the normal expectation of life. His estate has suffered loss and damages, and she intends to rely on the doctrine of *res ipsa loquitor* in advancing the claim.
- [8] She says that Joewel was a fisherman with the Gros Islet Fisherman's Cooperative, earning \$125.00 per day, and from his earnings he assisted with the maintenance of their three minor siblings. She claims special damages in the sum of \$3,600.00, general damages pursuant to Articles 609 and 988 of the **Civil Code**⁶ ("the Code"), interest and costs.

Julienne's Claim

- [9] Julienne claims that on 22nd May 2013 at approximately 6:30pm, Shalla was a passenger aboard the bus driven by Sheldon along the Vieux Fort/ Micoud Highway towards Vieux Fort. Clid was the driver of the truck, in his capacity as the servant or agent of CIEL, during his employment, and with the authority and consent of CIEL.
- [10] She asserts that both defendants were negligent in that they failed to keep to their left and proper side of the road; failed to keep any or any proper look out for each other; failed to stop, slow down, swerve or in any other way steer or control their respective vehicles so as to avoid colliding with each other; drove too fast in the circumstances; drove carelessly and without due care and attention, and failed to heed the presence or approach of each other so as to avoid the collision. She additionally alleges that Sheldon failed to blow his horn or otherwise alert Clid of his approach and failed to apply his brakes in time or at all.

⁶ Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

- [11] She avers that Shalla was due to commence employment at Rituals Coffee House on 27th May 2013 and would have earned \$8.00 per hour from which her infant daughter Della was to benefit. She says the collision, which resulted in the death of Shalla, was caused by the negligence of Sheldon and Clid, and CIEL is vicariously liable for Clid's negligence. She claims, jointly and or severally, against the defendants, special damages in the sum of \$6,474.98; interest thereon at the rate of 6% per annum from 22nd May 2013; damages for loss of expectation of life; damages pursuant to Articles 609 and 988 of the Code; interest and costs.

Sheldon's Defence

- [12] Sheldon's defence to both claims are materially the same. He says the collision and the death of Joewel and Shalla were not caused or contributed to by his negligence and denies the particulars of negligence alleged against him.
- [13] He avers that the collision was caused by Clid's negligence as the servant and/or agent of CIEL. He contends that CIEL is liable for the loss and damage suffered by the claimants, as Clid was driving during his employment with CIEL's authority and consent. He says that he was executing a left corner when he saw the headlights of another vehicle approaching from the opposite direction. As he went past that vehicle, he felt and heard an impact to the right side of his bus. His passengers shouted to him to stop and when he did, he saw that the glass panels of the right-side windows were broken. When the truck came to a stop, he saw a metal bar hanging from it.
- [14] He avers that at all material times he drove at a reduced and appropriate speed, kept to his left and proper side of the road; slowed down prior to the collision in aid of maneuvering a left hand bend; kept a look-out for oncoming vehicles; drove with due care and attention; and did all that a prudent driver would do while driving.
- [15] He adopts the particulars of negligence pleaded by Mendy and Julianne against Clid and CIEL. He further asserts that Clid was driving the truck with a metal pole hanging out beyond the width of the truck on its right side. The pole extended onto his left and proper side of the

road, ripping into the right side of the bus, thereby causing the death of the two deceased and damage to his vehicle. He states that this was the only contact between the vehicles. He pleads further particulars of negligence against Clid and CIEL stating that they failed to ensure that the metal bar was properly secured in place on the side of the truck before proceeding unto a public road. That the pole did not become dislodged during the collision but was dislodged before the collision thereby transforming the truck into a dangerous object which ought not to have been driven on a public road. He avers that the Investigating Officer erred in his judgment and assessment of the accident and wrongly concluded in the Police Report that he was to blame for the accident.

Clid and CIEL's Defence

- [16] Clid, in his defence, states that he was driving the truck uphill in the vicinity of Mon Repos on his left and proper side of the road. He observed the lights from the bus approaching at a speed from the opposite direction, and in a manner that appeared to be out of control. He says as it was raining heavily, and the truck, being a heavy vehicle, was proceeding slowly uphill. When it appeared to him that the bus was on a collision path with the truck, he tried to avoid the collision by swerving further left. However, despite this effort, the bus collided into the right side of the truck and made contact with the metal bar attached to the box of the truck. Clid states that as far as he is aware, the metal bar was attached and in place and there was nothing sticking out or dislodged from the truck up to the time of the collision.
- [17] CIEL in its defence states that it is not the owner of the truck, as alleged by Mendy, nor was it Clid's employer, as alleged by both claimants, and is therefore not a proper party to the proceedings. At the material time, Clid was employed by a company called C.I.E. Limited and the truck was owned by another company called R.G. Investments Inc.
- [18] Clid and CIEL both say that the collision was caused solely by Sheldon's negligence and not by any act, neglect or want of skill on Clid's part as servant or agent of C.I.E. Limited. They aver that Sheldon was negligent in that he failed to keep a proper lookout; failed to keep to his left and proper side of the road; drove at a speed which was excessive having regard to the conditions at the time, in particular, at night, on a wet road, and on a highway on which

any reasonable driver would expect heavy equipment and trucks to traverse; failed to stop, swerve, slow down, or in any other way control the bus so as to avoid the collision; and failed to have any or sufficient regard for other vehicles reasonably travelling on the road at the time. Consequently, they deny that they are liable to the claimants for damages as alleged or at all.

The Evidence

[19] Trial spanned several days and the Court heard evidence from Mendy, Julianne, Sheldon, Clid, Anslem Clauzel, Operations Manager of CIEL, Carlton St Omer (a witness called by Sheldon), Alwyn Lake and Michael Sargeant, expert witnesses called by Sheldon, and Chenry Baughman, expert witness called by Clid.

[20] **Mendy Phillip**: Mendy's witness statement closely mirrored the facts as stated in her statement of claim. In cross examination she accepted that she was not present when the accident occurred and does not know how it happened. She knew that Joewel was a fisherman and knew how much he earned as she was the one who held his takings at the end of the day. At the time of the accident, he lived alone, and their three younger siblings lived at her mother's house. However, she, Joewel and her stepfather cared for them. These three siblings are the children of her mother and stepfather. Her mother is deceased, and she is appointed by the court to look after them. Two of them currently live with her, while the other lives with her stepfather. She explained that a letter from the Gros Islet Fisherman's Cooperative, indicating that Joewel had applied for a Fisherman's ID should have been produced with her witness statement as Exhibit MP3 but unfortunately is missing. He never got the ID because he passed away.

[21] **Julienne Fadlin**: Julianne's witness statement also mirrored her statement of claim. In cross examination, she accepted that she had no knowledge of how the accident occurred or who owned the truck. She does not know Clid or whether he drove the truck with the knowledge and consent of CIEL. She could not say whether the collision was caused by Clid's negligence; however, the police officer who was on the scene of the accident told her certain things, which she has relied on in her claim.

[22] **Sheldon Gaston**: In his witness statement Sheldon says that at the time of the accident he was driving to Vieux Fort at about 30 miles per hour, it was raining heavily and there were 6 passengers on the bus. He was driving on his left and proper side of the road around a left turning corner. As he turned the corner, he saw the headlights of another vehicle approaching in the opposite direction. As he went past the vehicle he heard and felt an impact to the right side of his bus. The passengers shouted to him to stop, so he cleared the corner and came to a stop at the side of the road. He got out of the bus to see what happened and observed that the three glass panels of the right-side windows of the bus were broken. He saw a truck which came to a stop on the opposite of the road with a metal bar hanging from it. Three passengers who were all seated on the right side close to the windows were injured. A police officer arrived on the scene and tried to calm him down, as he was quite agitated. Sometime after, other police officers and the ambulance arrived, and the injured passengers were taken to St. Jude Hospital. He later learnt that two of the passengers had succumbed to their injuries. At the scene, a police officer marked the road with a nail, he gave a report of how the accident occurred and the officer issued him a Notice of Intended Prosecution. He concluded that the accident occurred because of the metal bar, which was hanging from the side of the truck, as the box of the truck made no contact with the bus at any time.

[23] When asked to comment on portions of Clid's witness statement, he stated that his bus was not out of control because he was not driving fast at the time. He was driving about 30-35 miles per hour, the bus did not slide onto the truck at any time, there was no indication that he applied brakes or that his vehicle skidded as a result, as there was absolutely no need to do so. He also stated that the indictment against him for causing death by dangerous driving was dismissed. He insisted that he kept to his left, but it was impossible, on account of the weather, to see the metal bar hanging from the truck. He admitted that all he saw were two lights approaching from a distance and agreed that he would have had to be very careful because visibility was poor, and he could only see a short distance ahead.

[24] When asked whether he was driving closer to the middle of the road within his lane, he responded that he was closer to the left, taking the corner closer to the edge. However, he

accepted that he and Clid showed the police different points of impact, both of which were closer to the middle of the road. He agreed it was probable that at the time of the accident, both he and Clid were passing each other close to the middle of the road and near to each other. He went on to say that the distance the metal bar protruded beyond the truck was about 3-4 inches. When shown a photograph of an exemplar truck, he identified the metal bar as the long rod on the side of the truck hinged from the top and hanging vertically. He explained that the extent of its protrusion would depend on whether one is taking a corner and whether the metal bar is swinging. He said, if stationery, it would protrude about 3-4 inches. He further testified that the metal bar did not damage the front of his bus, the windshield, or the driver's door. He was not aware of any obstruction from the truck, nor did he see anything protruding from it, as it approached him. He disagreed that it was the base pin hinged at the bottom of the truck and not the bar which had caused the damage, injury and death of the passengers.

[25] He testified that on the day of the accident, he was working on his usual bus route and stopped to speak with his friends. He returned to meet them after his trips were finished. It would be unfair to say that he had drinks with them as he only had one beer. He agreed that he stopped 482 feet from the point of impact, but said it was not because it took him time to become aware of the accident. It was that he consciously stopped away from the corner to prevent any vehicle from running into the bus. He said he knew Joewel used to go fishing and would sell fish, but he did not know whether he had children or siblings, other than Mendy.

[26] **Carlton St. Omer:** Carlton stated that he was a passenger on the bus, seated on the right side when the accident occurred. They were travelling along the highway at a moderate speed as it was raining very heavily. While going around a corner, driving on their side of the road, a truck going in the opposite direction made contact with the bus. He felt that his arm was injured and called on Sheldon to stop the bus. When he looked back, he realized that the tinted glass window was no longer there, and two passengers seated behind him appeared to have been struck on the head. When the bus came to a stop and he got out, he realized what had happened. Sheldon was still seated in the driver's seat and appeared to be in shock. He explained to him what had happened and eventually he came out of the bus.

He, Carlton, went towards the truck and saw a metal bar hanging down the side and concluded that it was the bar which struck the bus.

[27] When asked to comment on portions of Clid's witness statement, he said when they approached the corner Sheldon was not driving fast. He was driving slowly, the bus did not get out of control, it was on the left, and the truck was on the right. When asked if the bus was on the extreme left, he said it was on its side of the road, although it may have been closer to the white middle line of the road when it approached the corner. He testified that before they decided to accompany Sheldon on the trip, Sheldon had been working. He was not liming with them. After work, Sheldon asked him to accompany him on the trip and had one Carib beer. Carlton said he only became aware of the accident when he felt the blow to his arm, and that is when he called out to Sheldon to stop the bus. Sheldon replied, "what for". Someone else screamed and he then told Sheldon that something hit the bus. Sheldon stopped the bus on the straight road, away from the corner.

[28] **Clid Isidore:** In his witness statement, Clid stated that he is a truck driver, and on the day of the accident, he was employed by a company called C.I.E. Limited. He was driving a 10-wheel dumper truck along the Castries/ Vieux Fort Highway, in the direction of Castries. He believes that the truck was at that time owned by a company called R. G. Investments Inc. There were two other employees travelling on the truck with him. It was raining very heavily, and he had the headlamps and fog lights on. The truck is a heavy vehicle and he was proceeding slowly uphill at no more than 30 miles per hour when he observed bright lights coming towards him from the opposite direction. He saw the vehicle approaching at a speed and it appeared to be out of control. He noticed the vehicle leaving its left and proper side of the road, coming onto the path of the truck. He tried to pull more to the left, but the vehicle collided with the metal bar attached to the side of the truck, which holds the covering for the tray of the truck in place. After the impact, he stopped the truck, disembarked and noticed the bus lower down the road. He stated that the metal bar was attached in place and there was nothing dislodged from the truck up to the time of the collision. At the time of the accident he had been driving for 25 years and there was nothing more he could have done to avoid the collision, except to pull more to the left. He says the collision was caused by Sheldon who did not keep to his side of the road and was driving too fast.

- [29] In cross examination, he confirmed that at the time of the accident, he was employed by C.I.E. Limited which is the same as CIEL and the truck was owned by RG Investments Inc. He could not recall whether he was informed that the truck was owned by R.G. Investments Inc. before or after the accident. He agreed that he was on a work assignment and what he was doing was work related. He stated that it didn't really matter whether he believed that the truck was owned by CIEL, because he just goes to work. He accepted that he informed the police officer that the truck was owned by CIEL. He agreed that R.G. Investments Inc. and C.I.E. Limited are related companies belonging to a group of companies having the same owner. He agreed to the suggestion that it was all one enterprise.
- [30] He testified that it was raining so heavily that visibility would have been affected. When asked whether it would have been more prudent to park on the side of road and allow the rain to subside, he replied that if it is safe to drive, he drives. When asked if he knew that it was part of the rules in the Driver's License Book, to park and wait for the rain to subside, he said he does not remember that. He said the metal bar was in place until the bus hit it. He accepted that the front of the truck passed the bus without impact but disagreed that he failed to safely maneuver the back of the truck beyond the bus. He was asked whether he had failed to keep the truck to the far left to ensure no impact with the bus. He replied that the truck is a left-hand drive and he was certain that he was hugging the white line on the left side of the road. When asked whether he would have had a clearer view of the bus if the truck had been a right-hand drive, he replied that as long as he was in the left lane, if a vehicle comes into his lane that is not his fault. He was adamant that he kept to the extreme left. He agreed that he and Sheldon each showed the police officer different points of impact almost to the middle of the road. He was not sure of the size of the truck but agreed that the tires on either side would have been close to the white lines on either side of its lane.
- [31] He agreed that there was a shallow drain on his left side of the road and stated that he could not put a heavy truck on the side of the road. As he was already on the left side, there was no need to go into the drain. He also stated that because of the width of the truck it would always be near the center line of the road, but he would still be on his proper side of the road. He disagreed that the deceased were injured as a result of the metal bar and stated that it was the hinge pin which had sliced through the bus.

[32] He agreed that the box of the truck is wider than the wheels, and the cab is smaller than the box. If one were to stand behind the bus and look forward, the only protrusion would be the rear-view mirror, but if one did the same in relation to the truck, a metal bar protruding from the side would be seen. He could not say that without the bar on the truck, there would have been no accident. He disagreed that if his account was correct, the first impact would have been to the front of the truck. He did not accept that if the bus did not collide with the front of the truck, it could not have been out of control. He stated that the reason the cab of the truck did not come into contact with the bus is because the cab is smaller in width than the box.

[33] He denied that something protruded more than one foot from the box of the truck, over the center line of road and struck the bus, causing the injury and death which occurred. It was put to him that because of the size of the truck which takes up the entire width of his side of the road, coupled with poor visibility and the protrusion from the box of the truck, he should have taken greater care in how he drove. He responded that as far as he knows, he was on his side of the road and is not at fault.

[34] **Anselm Clauzel**: In his witness statement, Anselm stated that he is employed with CIEL as Operations Manager, as he was at the time of the accident and when the claim form was served. He says Clid was employed by C.I.E. Limited and the truck was owned by R.G. Investments Inc at the time of the accident. He denies that CIEL is liable to the claimants for damages occasioned by the accident or at all.

[35] In cross examination, he disclosed that he is the operations manager for a group of companies which includes CIEL, R.G. Investments Inc and RG Industrial Products Ltd. He did not know the legal intricacies of the companies and just oversees them. He could not say if the companies formed part of one business enterprise, but says they were connected in terms of their location. He has been the operations manager for about 11 years but did not know if there was a general name for the group of companies. He had only heard of the name Rayneau Group of Companies and knew of it loosely. Yet he agreed that the group staff wore a uniform which he was then wearing, and which had the insignia Rayneau Group

of Companies on it. He stated that as operations manager for the group, he deals with each company separately and he considers his employer to be CIEL.

[36] He remained resolute that R.G. Investments Inc was the owner of the truck and that the police report was incorrect. He agreed that the truck was not stolen by Clid, nor taken without the permission of relevant personnel. He agreed that R.G. Investments Inc would have consented to Clid using that truck, but disagreed that the companies were intertwined, and the truck was being used by one company for the business of another because they are all part of one group. It was put to him that on the day of the accident CIEL had responsibility and control of the truck to ensure that it went out and returned in the same condition, to which he said he did not know because the driver had control. He was asked if the driver had control on behalf of the company, to which he answered that he did not know. He was asked if all the vehicles had the insignia of Rayneau Construction & Industrial Products Ltd engraved on them and he replied yes. He was asked whether as operations manager, he would have knowledge of transactions or business between C.I.E. Limited and R.G. Investments Inc. He responded that his duties are wide, but he has no knowledge of intercompany transactions. The owner would know, but he did not know who the owner was and would not assume. In response to whether he had to account to anyone after the accident and if he knew why an employee of C.I.E. Limited was driving the truck, he said he was called after the accident because he deals with accidents and is responsible for informing the insurance company. Assignment of drivers was not his responsibility and a supervisor would have granted permission for driving the truck

[37] He remained steadfast that he was employed with CIEL and Clid was employed by C.I.E. Limited which are different companies. In response to questions from the Court, he stated that the correct name of the 3rd defendant is Construction & Industrial Equipment Ltd. and C.I.E. Limited which is Clid's employer is a different company. The company that owns the truck is R.G. Investments Inc and is a different company to Rayneau Construction and Industrial Products Limited. He agreed that he had referred to 4 separate companies over the course of his testimony.

[38] **The Police Report:** Investigating Officer Corporal 65 Faucher was not called to testify by any party. The police report was entered into evidence by the claimants, without objection from the defendants. It was a typical accident report comprising the particulars of the two vehicles involved and the measurements taken at the scene. It referenced two points of impact as given by each of the drivers but was devoid of the sort of evidence which would assist a court in determining the most likely point of impact. The owner of the truck is stated as Construction Industrial Equipment and the owner of the bus as Sheldon Gaston. The salient information in relation to measurements are summarized below: -

1. The width of the road at Sheldon's point of impact was 21 feet 8 inches and the point of impact was 8 feet 8 inches from the left side of the road facing Micoud (south).
2. The width of the road at Clid's point of impact was given as 21 feet 10 inches and the point of impact was 10 feet 4 inches from the left side of the road facing Mon Repos (north).
3. The bus stopped 482 feet 6 inches from Sheldon's point of impact.
4. The truck stopped 161 feet 4 inches from Clid's point of impact.
5. The distance between the two points of impact was 18 feet 5 inches.
6. The bus was 17 feet in length and 5 feet 10 inches in width.
7. The truck was 24 feet 9 inches in length and 8 feet 10 inches in width.

[39] The report contained a finding that Sheldon failed to keep to his left and proper side of the road, thereby colliding with the truck and would be prosecuted for the offence of causing death by dangerous driving. Sheldon testified without challenge, that the criminal case against him was dismissed.

The Expert Witnesses

[40] Each of the expert witnesses stated in their respective report that they had complied with the duty to the court to be truthful, objective, independent and unbiased in compiling the reports. From their investigations, they had included all matters considered to be relevant to the issues in the claims.

[41] **Mr Alwyn Lake:** Mr. Lake was called by Sheldon. He is an insurance loss adjuster, investigator and accident reconstructionist by profession and resides at Rodney Bay, Gros

Islet. His report is dated 14th March 2016. In summary, he said that the metal bar at the side of the truck was not properly secured, was unhinged and caused the accident. That is so because the front of the vehicles made no direct contact and the real damage was from the right middle pillar to the rear windows of the bus. He says this finding is consistent with the damage to the mirror on the driver's side which is consistent with something hitting it from the top but not making any contact with the rest of the front driver's side of the bus. As the vehicles passed each other, that object hit the middle to the rear of the bus at a sustained level, above the side bottom panel. He stated that he had examined an exemplar truck similar to the one involved in the accident but was unable to say what distance the bar would have had to extend from the truck, in order to make contact with the bus. The measurements presented by the police did not include the length of the protruding bar, or the degree to which it extended beyond the side of the cargo box. In that regard, he says the police report was deficient and further measurements would have been required to arrive at a determination on which driver was at fault. He concluded however, that had it not been for the metal bar, both vehicles would have gone past each other safely. The damage to the mirror on the right driver's side of the bus meant that it was the metal bar which hit the mirror and not the hinge pin which is affixed to the bottom of the tray of the truck. He opined that the occurrence may best be described as a freak accident, because of the unusual combination of events that came together to cause the untimely death of the two individuals.

[42] In cross examination, he did not agree that both drivers were responsible for the accident and said he had found nothing to indicate that Sheldon had caused the accident. He was aware that it was raining heavily at the time of the accident and agreed that heavy rain does change the visual aspect of the road and could affect visibility from opposing headlights. He opined that the duty of a driver in such circumstances is to be aware of external conditions and drive in a manner that would ensure his safety and that of other users of the road. He agreed that in these conditions it would have been prudent to stop and park on the side of the road but none of the drivers did that before the accident.

[43] Although the evidence revealed that both drivers were driving almost to the middle of the road, and despite the fact that neither one made any effort to pull over and stop, he took the view that Clid may have been negligent in failing to properly secure the metal bar to the side

of the truck. Mr. Lake interviewed Sheldon but did not interview Clid during his investigations and did not address the malleability of the metal bar in his report. In his view, whatever struck the bus would have had to remain at a consistent height based on the damage done to the bus, and that was consistent with a moving object getting closer and deeper into the bus as the vehicles passed each other.

[44] **Mr Mark Sargeant**: Mr. Sargeant was also called by Sheldon. He is a forensic scientist, traffic accident investigator and fire investigator. He resides at Christchurch, Barbados. His report was dated 16th July 2016. It contained details of his educational achievements and professional experience and provided an extensive analysis of the accident scene, measurements taken, the condition and design of the road and the likely movement of the vehicles along the road.

[45] His conclusions were as follows: -

1. The arm of the truck extended, crossed, damaged and entered the right side of the bus, resulting in the damage to the bus and injury to its occupants.
2. For that to have occurred it meant that the truck was encroaching or getting closer to the bus as it came around the bend.
3. There is no evidence to suggest which vehicle was offside at the time of the accident.
4. The arm which supports the cover of the tray was not connected or bolted down and caused the impact between the two vehicles.
5. There is no evidence to support where the exact point of impact occurred.
6. There is no credible evidence to suggest any reckless driving of either vehicle.

[46] In cross examination, he stated that inspection of the bus revealed contact damage to the right side, starting at the top of the right door mirror and then eventually making contact with the side of the body of the bus from about the second seat in the cabin. The depth and magnitude of the damage became increasingly deeper and greater going toward the back tail. That is evidence of an inward trajectory. With such trajectory, if the pin which is affixed to the base of the arm of the truck and usually extends about 1.5 inches was to cause such damage, the bus would have had to be going into the body of the truck. If this was so, at

minimum one would have seen a transfer of orange paint from the truck to the body of the bus. There are also some very large wheels under the tray of the truck, which would have caused significant damage to the body of the bus. In the absence of damage that would be associated with such trajectory, a collision with the load base pin on the truck is not sustained by the evidence.

[47] He was unable to testify about the flexibility of the arm as the metal was not tested. Based on what he has seen on similar trucks, the length of the pin is about 1.5 inches, but he could not confirm that was the length of the one on the actual truck. He says that the length of the pin would not be relevant to his conclusions because the damage to the right wing mirror is to the top only, and if the damage was caused by a protrusion connected to the truck, it would have had to damage not just the top, but also the outer side of the mirror. Further, the damage on the side of the bus is significantly larger than the pin head depicted on the exemplar and the actual truck. During his investigations, he did not use the police measurements and relied only on the point of impact shown to him by Sheldon and did his independent survey of the road. He made valiant attempts to view the truck involved in the accident and to interview Clid and the other passengers on the truck, but for some unknown reason he was unable to do so.

[48] Regarding Mr Baughman's report, he stated that it is incorrect to say that a vehicle going downhill would be moving faster than a vehicle going uphill. There was no empirical evidence of speed which could have led to this conclusion; therefore, it is an assumption. He stated that it is a contradiction to classify the accident as a sideswipe head-on collision and there is no evidence of a head-on collision. The only evidence is of a sideswipe collision.

[49] He explained that the term cantor in his report refers to the tilt in the road, in both directions, which sloped towards the center of the bend or the eastern side of the south bound lane. The design of the road creates centrifugal forces, such that when a vehicle takes the bend in either direction it would cause a centrifugal force that would keep it from going off the road and keep it going towards the center of the road. That would apply to both vehicles and is designed to overcome inertia. Thus, the cantor of the road would have caused both vehicles

to remain on the road and move towards the middle of the circle of the bend, irrespective of direction. In response to Mr Baughman's statement that the cantor would affect the bus and not the truck, he disagreed, reinforcing that the cantor would affect both vehicles driving in either direction, because of the deliberate design of the road to keep both vehicles on the road where there is a bend and also an elevation.

[50] He agreed that the bus appeared to be very close to the center line of the road and was not as close as it could have been to its left side. He disagreed, however, that the location of the bus on the road aided in making contact with the truck.

[51] **Mr Chery E. Baughman**: Mr. Baughman was called by Clid. He is an Accident Reconstructionist by profession and resides in West Palm Beach, Florida. At the time of his investigations, he had 35 years of training and some 40 years of hands on experience in the field of accident reconstruction. His report was dated 9th April 2018 and contained a detailed curriculum vitae.⁷ He traveled to Saint Lucia in March 2018 and met with Clid and other persons. He visited the scene of the collision where he took measurements. He also took photographs of the truck and an exemplar, which showed the proper configuration of the metal bar on the date of the accident. He did not meet with Sheldon during his investigation and did not examine the bus.

[52] The salient portions of his report are reproduced below. He wrote: -

"We have a Toyota van weighing about 7,000 pounds, going downhill at a greater speed with inertia acting upon it. A body travelling in a straight line will continue to do so until acted upon by an outside force. In this case, steering input to make the van turn more to maintain its lane of travel. Inertia acts upon the dump truck as well. The slower, heavier truck will not need as much steering input and will tend to go wider towards the outside of the curve. The cantor, or actual super elevation of the road will have little or nothing to do with the large truck..."

... everyone agrees that there was heavy rainfall and night darkness at the time of the collision ... Estimates of distance and timing are severely skewed... It becomes very clear that with nighttime, heavy rain, a downhill road for the van and a curvature to the left overwhelmed Mr Gaston allowing him to go wide and cross the center line. This caused a sideswipe head-on collision to the load arm base pin on the

⁷ Exhibit CEB1

dump truck. This collision resulted in two fatal injuries in the transport van. I can find no improper driving or actions on the part of the dump truck or Mr Isidore.”

[53] In his view, the metal bar on the truck had nothing to do with the resultant damage or injuries, and Sheldon and the bus were the proximate cause.

[54] In cross examination, he explained what he meant by a sideswipe head-on collision. He said there is the full head-on where the nose of two vehicles collide, but there are other degrees called offset and if it is far enough that the vehicle misses, but at some point slap each other that is a side swipe contact in a head-on fashion. He explained the configuration of the arm on the truck as a U-shaped contraption which is pulled back to cover the tray when the truck is full and when it is empty it comes forward. The arm is all one piece which goes across the truck from side to side as one bar. It is attached on either side of the truck by a pin which is 1.25 inches in diameter and 4 inches long, stuck to the side of the truck. The top of the bar has a canvass attached and the latter is attached to the top of the truck. In his view the damage was caused by the 4-inch pin on the tray of the truck, which is at a consistent height along the side of the bus and went deeper into the bus as it moved to the rear. He opined that the pin would not penetrate all the way in, and it would be parts of the van which moved in and did further damage to the passengers.

[55] He did not agree that the pin penetrating the bus should have left other visible signs of contact and stated that he had seen crashes with no paint transfer, or if there was it would be microscopic transfer. He explained that usually when two vehicles collide with sheet to sheet metal or plastic, they rub against each other during engagement causing enough friction to heat the paint and transfer from one vehicle to another. In this case it was glass and some sheet metal on the bus, but on the truck it was hardened steel alloy with not enough area of flat material to allow long enough contact to cause transfer. He rejected outright any suggestion that his report was biased or skewed in favour of Clid and CIEL, or that it was devoid of findings which were consistent with the evidence.

- [56] **Joint Statement:** At pretrial review, the three experts were directed to provide a joint statement on the areas of agreement and disagreement and the reasons for disagreement⁸
- [57] Mr Sargeant and Mr Baughman produced a statement dated 19th January 2019. They agreed on the location of the accident, the direction in which the vehicles were travelling, that rain and night conditions would have affected the drivers, that there was insufficient evidence to determine the actual point of impact and that the damage seen along the right side of the bus was at a consistent height.
- [58] Mr Sargeant disagreed with Mr Baughman that it was a sideswipe head-on collision, because there is a major difference between a head-on collision and a sideswipe collision. He disagreed that the accident was caused by the hinge pin and maintained that it was the arm of the tray disconnecting and extending outwards and striking the right side of the bus. In support, he maintained that the impact did not transfer any paint from the truck unto the bus and the width of the area of impact was much larger than the circumference of the hinge pin. Thus, the pin could not have caused the extent of the damage seen.
- [59] Mr Baughman stuck to his position that the cover arm could not and did not cause the straight-line damage seen on the side of the bus. He remained adamant that it was caused by the hinge pin because of its correlating height and rigidity and the cover arm was too flexible and floppy to inflict the damage seen on the bus. In his opinion, the bus drifted over the center line of the road and swiped the truck, knocking the cover arm off the hinge pin.
- [60] They agreed that their major point of disagreement was the cause of the accident.

Issues 1 and 2: Did Sheldon, or Clid, or both, by their act, omission, neglect or want of care or skill cause or contribute to the loss and injury suffered by the claimants?

Submissions

⁸ See CPR32.15 (5), (6) & (7)

[61] Mr Alberton Richelieu argued, on behalf of Mendy, that having regard to the undisputed evidence that it was raining heavily and the fact that the police took measurements for two different points of impact as given by each driver, it cannot be said with any degree of certainty where the true point of impact was. Both points, however, suggest that the accident happened somewhere close to the middle of the road, and as such both drivers failed to keep as far left as required by law. They are therefore equally liable. Further, the doctrine of *res ipsa loquitor* applies such that it unnecessary to determine whether it was the dangling metal bar or the base pin of the truck which caused the collision. A reasonable inference can be drawn from the vehicles passing so close to each other, that it was some projectile from the truck which caused the damage to the bus and the injury to the passengers. Therefore “the thing speaks for itself”.

[62] He submits that the negligence of both drivers is premised on the ruling in **Nettleship v Weston**⁹, which establishes that a driver owes a duty of care to anyone who uses the road to drive with the degree of skill and care to be expected of a competent and experienced driver. He also relies on an extract from **Halsbury’s Laws of England**¹⁰, which states that when two persons on the highway are moving in relation to one another as to create the risk of collision, one owes to the other a duty to move with due care and attention, and this is true especially if they are both in control of vehicles. He submits further that both drivers contravened Regulation 21 of the **Motor Vehicle and Road Traffic Regulations**¹¹ (The Regulations) when they failed to keep as close as possible to the left-hand side of the road. The Regulations state as follows: -

*“Regulation 21: RULES TO BE OBSERVED BY DRIVERS
Every driver of a motor vehicle shall comply with the following rules:
(5) To keep on the left, on meeting or being overtaken by vehicles
(b) When meeting... other vehicles he shall keep as close as possible to the
left or near side of the road.”*

[63] Additionally, Counsel says that there was a greater duty of care on Clid, as the driver of the truck, to exercise due care and attention when approaching vehicles moving in the opposite

⁹ [1971] 3 All ER

¹⁰ Vol 34, 4th Edition at para 44

¹¹ Cap 134 of the Revised Edition of the Laws of Saint Lucia

direction because of the overall size of the truck and the metal bar and hinge pin protruding from the side of the tray. He cited Rule 21(15) of The Regulations which states:

“PROJECTIONS

He shall not carry on the motor vehicle... or shall not suffer or permit to be carried thereon... any... iron beam... or... thing projecting on either side of such motor vehicle... more than one foot beyond the plane of the wheels of such motor vehicle.”

[64] Counsel contends that Mr Sargeant’s expert evidence is uncontroverted and his account of the accident should be preferred. His findings were impartial when compared to that of Mr Baughman, which he says was deficient. All three experts agreed that heavy rain would have affected visibility and judgment of the drivers. None of the drivers saw it fit to slow down or pull over to the side of the road until the rain abated. Instead they continued driving without any regard to the weather conditions and in doing so failed to drive in the manner that a competent and experienced driver would.

[65] Mr Richelieu further says that despite the varied versions of the accident, given by the experts, the reasonable inference to be drawn from the evidence is that the dangling bar projecting from the side of the truck is the more probable cause of the injury to the two deceased, because both drivers failed to keep as close as possible to the left of their respective sides of the road. He concludes that whereas Sheldon may appear to be less blameworthy, he and Clid are both liable for the accident which led to the fatalities.

[66] Mr Eghan Modeste, on behalf of Julianne, argued that the accident occurred because Clid drove and operated the truck negligently by failing to properly secure the metal bar on the tray of the truck, thus causing it to strike the upper part of the right side of the bus. Clid, though admitting that the size of his truck took up almost the entire lane, did not see the need to keep to his extreme left or stop until the rain subsided. Both drivers drove too far from their left sides of the road, and the heavy rains coupled with poor visibility around a bend are all factors which contributed to the accident.

[67] He preferred the evidence of Mr Lake and Mr Sargeant and discounted Mr Baughman’s evidence as unreliable, as his investigation was conducted some 5 years after the accident. He submitted that when the exemplar truck was examined by the Court and the parties in

April 2019, it became clear that the cause of the accident and the damage was not just the pin or the bar, but the pin, the bar and the metal housing unit for the pin. He says it became even more evident, when a bus similar to the one Sheldon was driving was positioned next to the truck, that the damage to the rear panel lined perfectly with the metal housing unit for the pin, leaving a gap of approximately 5 inches from top to bottom. Mr Modeste argued that while one of the vehicles may very well have crossed the center line of the road, both vehicles drove too close to each other, resulting in the collision. The fact that there was no front or lower body contact between the bus and the truck suggests that the two vehicles approached each other very closely and remained very close to each other. In the circumstances, both drivers were jointly liable for the collision and liability should be apportioned at 50% each.

[68] In response, Mr Alvin St Clair, on behalf of Sheldon, argued that if no liability can be attributed to the manner in which Sheldon and Clid drove, the Court must consider whether any one of the vehicles was itself a dangerous object or instrument on the road. He said contact between the two vehicles is not disputed but submitted that it was from the metal bar hanging loosely to the right side of the truck, which caused it to be a dangerous instrument on the road, and that was the cause of the accident. Clid, he says, had failed to ensure that the bar was properly secure to the tray of the truck. Alternatively, Clid drove the truck in such a manner which caused the bar to become dislodged and strike the bus. Had it not been for the dangerous condition in which the truck was being driven, no accident or damage would have occurred.

[69] Mr St Clair contends that the doctrine of *res ipsa loquitor* does not apply and instead relied on dicta from a decision of the Newfoundland Court of Appeal in **Bow Valle Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd**¹². In summary, the court said the test of causation is the “but for” test, where the claimant is required to show on a balance of probabilities that but for the defendant’s negligence, the injury would not have occurred. The test is to be applied in a robust common-sense fashion, without the need for scientific evidence of the precise contribution the defendant’s negligence made to the accident. This

¹²(1995) 126 DLR (4th) 1

common-sense inference flows, without difficulty, from evidence connecting the breach of duty to the injury, such that it permits the court, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. Where 'but for' causation is established by inference only, it is open to the defendant to argue or adduce evidence to show that the accident would have happened without the defendant's negligence, such that negligence was not a necessary cause of the injury, and that it was in any event inevitable.

[70] He submits that Sheldon was on his proper side of the road even though he may not have been driving to the far left. While, there is no evidence to assist with a definitive point of impact, the wheel-based measurements contained in the police report placed each vehicle on its respective side of the road. From the fact of the collision, the only plausible explanation is that the metal arm protruded beyond the tray of the truck and traversed the middle of the road. Without that protrusion there would have been no accident. The first contact with the bus was by a hanging object as opposed to one protruding outward, as the first point of contact was to the inner top of the wing mirror on the driver's side. This leads to the conclusion that prior to the initial contact, the metal bar was already dislodged from the hinge pin. When considered against Mr Sargeant's report, that is the only logical explanation for the accident. He should be considered the most impartial expert as he gave a more reasonable assessment of the accident. He says Mr Baughman's report contained several inconsistencies and unreliable conclusions.

[71] In concluding, he urged the Court to find that there was nothing in the evidence, whether factual or inferential, which pointed to negligence on Sheldon's part. Even if Clid says he was not negligent in the way he drove, it was his negligent act or omission in driving the truck with the metal bar hanging loose beyond the right side of the truck which created a danger on the public road. But for this hanging bar, there would have been no collision, no injury, no damage and no loss of life.

[72] Mrs Esther Greene-Ernest, on behalf of Clid and CIEL, contends that it was Sheldon who drove negligently and collided with the tray of the truck. But for Sheldon's failure to keep to his left and proper side of the road, the collision, and resulting loss would not have occurred.

The metal bar was at all times attached and secured to the truck and there was no unlawful protrusion, or anything dislodged from the truck up to the time of the collision. She submits that the police report gave the reason for the accident as Sheldon's failure to keep to his left and proper side of the road. It contained no reference to an unlawful metal protrusion from the truck, and absent from the report was any reference to a bar or pin as having caused or contributed to the accident. None of the witnesses testified to having seen a metal bar protruding from the truck before the accident, and only evidence is that after the accident the bar was seen hanging down the side of the truck, still hinged to the top.

[73] Counsel submitted that Mr Lake's opinion that the bar was not properly secured before impact is pure speculation with no evidence to support such conclusion. His belief that it was a freak accident belies the finding that any party was negligent. She submits if the pin is found to be the more probable cause of the collision, it would mean that the two vehicles came into very close proximity with each other.

[74] Counsel stated that the law in this jurisdiction is contained in Articles 985 and 986 of the Code and the claimants must prove negligence on Clid's part. She agreed that the standard to be applied is that of the average competent and reasonable driver as established in **Nettleship v Weston**. Further, the duty of care is aptly stated in **Halsbury's Laws** already alluded to. The evidence must be assessed and, on a balance of probabilities, determine which of the drivers departed from the standard, having regard to all the conditions prevailing on the road on that day.

[75] Mrs Ernest says the doctrine of *res ipsa loquitur* would only apply in the absence of an explanation of how the accident occurred and Clid has provided the explanation that Sheldon failed to keep to his left and proper side of the road. Clid said he saw the bus coming unto his side of the road; attempted to pull more to the left; but going any further left would have ditched the truck. Though Sheldon says he was as close as possible to his left, Clid's evidence is to be preferred, as Carlton, who was a passenger on Sheldon's bus, testified that when Sheldon was asked to stop after passengers were injured, he replied "stop for what". The reasonable inference is that he was not keeping a proper lookout. From the expert reports, there is no evidence that the truck had any protrusion which was unlawful,

and the presence of the hinge pin or metal bar is not evidence of negligence, as there is nothing to suggest that the pin or the bar protruded beyond the truck's side of the road at the time of the accident.

- [76] Counsel argued that the road differs in width at different points and there is no evidence of the actual point of impact to determine the width of the road at that point. She suggested that the value of Mr Baughman's report was in relation to the pin and the bar. He said the bar would not have had the rigidity required to cause such damage and maintained that it was the pin which had the degree of rigidity to cause the damage. At the point of first contact, the bus hit the pin and the bar became dislodged. He found no evidence that the bar was dislodged before the accident and if that was the case, it would have dropped vertically and not protruded horizontally and the bus would have had to come close to the arm to cause impact. There was no evidence that the bar was contorted in any way to have caused the extent of damage and injury seen. In the circumstances, had Sheldon not left his side of the road and collided with the pin of the truck, the accident would not have happened.

The Law

- [77] The law concerning the tort of negligence is found in Articles 985, 986, 917A and 1137 of the Code, which state: -

"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 relievable 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...
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...*

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"...

(2) ...

(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.

1137. Any question relating to evidence, which is not covered by any provision of this Code or of any other statute, must be decided by the rules of evidence as established by the law of England."

[78] In **Northrock Ltd v Jardine**¹³ Floissac CJ explained the distinction between liability for damage caused by a defendant's own acts, 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 within the care and control of a defendant, which is caught by article 986. The latter he said creates a presumptive or defeasible liability on the part of a defendant and exempts a claimant from proving fault. This presumptive liability is rebutted by a defendant proving that he was unable to prevent the damage by any reasonable means.

[79] The doctrine of *res ipsa loquitor* is explained in **Halsbury's Laws of England**¹⁴ as follows:

"Under the doctrine of res ipsa loquitor a plaintiff establishes a prima facie case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

¹³ (1992) 44 WIR 160 at 161-162, 165-167

¹⁴ Volume 33, Fourth Edition (Reissue), paragraphs 664-668.

[80] In **Northrock v Jardin**¹⁵, the Court of Appeal described the maxim as no more than a rule of evidence affecting onus, which enables justice to be done when the facts bearing on causation and care exercised by the defendant are at the outset unknown to the plaintiff and ought to be within the knowledge of the defendant. In that case, the respondent was able to prove by way of uncontradicted direct and expert evidence that it was reasonable to infer that the resultant vibrations from explosions on the defendant's nearby quarry had caused or substantially contributed to the damage to his house. Since in the ordinary course of things, detonation at a quarry would not cause damage to a dwelling house if reasonable care is exercised to avoid such damage, it was more probable than not that the damage was caused by the defendant's negligence. *Res ipsa loquitor* therefore applied to shift the onus to the appellant to rebut this presumption. The court held that the appellants might have rebutted the presumption by explaining the most probable cause of the vibrations and by proving that such did not connote negligence on their part or could have operated irrespective of the absence of negligence; or that irrespective of the cause of the vibrations or even if they were inexplicable, all reasonable care and precaution had been taken to avoid the damage such that the appellant was not negligent. Having failed to adduce such evidence, the court held that the presumption of negligence survived, and the proper conclusion invited by the evidence was that the damage was caused by the negligence of the appellants, their servants or agents.

[81] In the present case the motor vehicles involved in the accident were being driven by the defendants when the damage, injury, and death occurred. In my view article 985 is the applicable provision and must be interpreted by reference to English law of negligence, which requires a claimant to prove that the defendant owed a duty of care, breached that duty, and the damage suffered was caused by that breach of duty.¹⁶

[82] The case of **Armstrong and another v First York Ltd**¹⁷ is instructive on the treatment of expert evidence. There the court accepted that: -

¹⁵ At page 11.

¹⁶ At page 7-8.

¹⁷ [2005] 1 WLR 2751

“...where such evidence is disregarded the court must give clear and cogent reasons for doing so...

...More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate...

“.....We do not have trial by expert in this country; we have trial by judge.” In the last resort it is for the judge-or it may be the jury in a criminal trial as the triers of fact-to determine, on the balance of probability, on all the evidence they receive, where the probabilities lie.”¹⁸

- [83] That court also said that there was no principle of law that the evidence of an expert in an unusual field, doing his best with his experience to reconstruct what had happened based on secondhand material, had to be dispositive of liability. It is for the judge in each case to determine on all the evidence where the balance of probability lay. In so doing, the responsibility of the court is to direct itself correctly on matters of law, carefully consider and balance the evidence on both sides and give clear reasons for its decision.

Analysis

- [84] It is the law that both drivers owed a duty of care to each other and to other road users, including the passengers on the bus. I agree that the standard expected of each of them would be that of a competent and experienced driver as established in **Nettleship v Weston**.
- [85] The precise point of impact is unknown and there is a difference of expert opinion on whether it was the pin or arm which caused the damage, injury and death. However, I find the principle stated by the House of Lords in **Mc Ghee v National Coal Board**¹⁹ and adopted by our Court of Appeal in **Northrock v Jardine** to be applicable here. It was said:

¹⁸ At paragraphs 1, 27-28, 30 & 33

¹⁹ (1972) 3 AER 1008

*"With regard to proof of causation, it is well established that damage suffered by the plaintiff will be held to have been caused by the defendant's negligence if the plaintiff proves on a balance of probabilities or by reasonable inference that the negligence substantially contributed to the damage or to the risk or danger thereof. Such negligence may either operate alone or concurrently or successively with other factors in such a manner as to form a component of one compound or cumulative cause."*²⁰

[86] Both drivers admitted they were driving at night, it was dark, it was raining very heavily, and visibility was poor. Considering the unfavorable prevailing conditions, they both would have had to be extremely cautious in proceeding along the road. Clid was driving a very large left-hand drive truck which took up almost the entire width of the northbound lane, while Sheldon was driving a bus with passengers on board. It seems obvious that in blinding rain, with poor visibility on a wet road at nighttime, a competent and experienced driver would have considered pulling over to a safe place to allow the heavy rain to subside and visibility to improve. However, neither driver thought it fitting or prudent to do so. This failure, in my view, caused or contributed to the accident and the resulting damage, injury and death.

[87] Where there are separate points of impact, the court usually looks at the location of broken or shattered glass, vehicle debris on the road, other distinctive markings such as gouge and tyre or skid marks, to assist in ascertaining the more likely point of impact. In this case, there were no such indications from the parties or the police report. There was also nothing in the experts' reports to assist the Court in that regard. Mr Sargeant and Mr. Baughman provided opposing scientific conclusions on the effect that the cantor of the road would have had on either vehicle and its ability to remain on its left and proper side of the road. Nonetheless, having regard to all the evidence, the points of impact identified by each driver was less than 2 feet from the center line, on either side of the road. By the drivers' own admission therefore, the point of impact occurred somewhere close to the center line of the road. From this, it can be inferred that both Sheldon and Clid drove very close to the center of the road, as opposed to their far left. Sheldon might have been more culpable in that regard considering that the bus was smaller in width than the truck.

²⁰ At pages 8-9

- [88] Despite this considering their failure to observe the rules of the road by keeping to the far left as they drove past each other; I conclude that both drivers caused or contributed to the sideswipe collision between the two vehicles.
- [89] Carlton, who was a passenger on the bus, stated that upon being struck on his arm, the two passengers seated behind him screaming and upon realizing that the entire right middle window panel of the bus was gone, called out to Sheldon to stop the bus. Sheldon's response was "stop for what?". It was only when Carlton informed him that something had hit the bus that he finally came to a stop some 482 feet away. That is despite the fact that Sheldon's driver side wing mirror, which would have been in his plain view had first been struck and damaged. This evidence is significant as it demonstrates that an accident of this magnitude had occurred and Sheldon, as the driver of the bus, was unaware of it. It leads to the conclusion that Sheldon could not have been keeping a proper lookout or driving with the care and skill required of a competent and experienced driver.
- [90] I further accept that the driver side wing mirror was the first point of contact between the bus and the truck. The damage was to the inner top of the mirror, while the outer part remained intact. That is consistent with the metal arm being loose and dangling prior to the collision and is the only plausible explanation for the damage caused only to the inner top of the mirror. Had the hinge pin, which is affixed to the tray of the truck been the cause of this contact, it would have struck the outer and not inner top of the mirror. It follows therefore that this first contact could not have been with the hinge pin and consequently could not have been the cause of the dislodgement of the metal arm, as alleged.
- [91] The damage from the middle window pillar extending to the rear of the bus seems consistent with Mr Sargeant's explanation. He opined that because of the short distance that the hinge pin extended from the truck, had it made contact with the bus, there would have been more extensive damage to the body of the bus, caused by the tray and even the wheels of the truck. Having examined an exemplar truck and similar bus, I accept that the damage appears to be more in-keeping with an object striking the bus at a consistent height, with force, while still maintaining some distance between the two moving vehicles and moving further into the bus as the vehicles passed each other. No damage was seen on the body of the truck or the

bottom metal panel of the bus, below the broken windows. The area directly below the damaged section of the bus remained intact. I conclude on a balance of probabilities, it is more likely that the metal bar was dislodged prior to the accident, struck the inner part of the mirror and continued with a ripping force along the cabin windows, moving further into the bus as the two vehicle passed each other, thereby causing the damage, injury and fatalities. Clid was negligent in driving the truck with the metal arm unhinged on a public road. It would have been foreseeable to a reasonable and prudent driver that the unhinged metal arm posed a risk of severe damage or injury if it made contact with another vehicle. A reasonable and prudent driver would not have taken that risk.

[92] Mr St Clair's submission on the 'but for' principle applies. But for the presence of both vehicles on the road on that night, driving in severe weather conditions with blinding rain and poor visibility, too close to the center of the road, with the metal bar on the truck unhinged, and Sheldon not keeping a proper lookout or paying sufficient attention, the accident would not have occurred. Both drivers failed to take all reasonable care, as a prudent and reasonable driver would to avoid the accident.

[93] Based on the foregoing, I conclude that both Sheldon and Clid drove without due care, attention and skill and failed in their duty of care to the other users of the road. They are equally responsible for the accident which caused the untimely death of the two deceased.

Res Ipsa Loquitor

[94] I am of the view that the doctrine of *res ipsa loquitor* is not applicable to the circumstances of this case but will address it for completeness.

[95] One precondition for applying the doctrine is that it is not possible for a claimant to prove precisely the relevant act or omission that set in train the events leading to the accident, or the cause of the accident is unknown.²¹ Conversely "*if the causes are sufficiently known,*

²¹ Halsbury's Laws of England/Negligence (Volume 78 (2018))/3. Proving Negligence/(2) Res Ipsa Loquitor/64. Inference of defendant's negligence.

*the case ceases to be one where the facts speak for themselves, and the court must determine whether or not, from the known facts, negligence is to be inferred.”*²² In this regard, in **Ratcliffe v Plymouth and Torbay Health Authority**²³, Hobhouse LJ explained that *res ipsa loquitur* “is merely a guide to help to identify when a *prima facie* case is being made out. When expert or factual evidence has been called on both sides at a trial, its usefulness will normally have long since been exhausted.”

[96] Although there are aspects of the claims which have not been resolved by direct evidence, such as a conclusive point of impact or whether the damage was caused solely by the arm or pin, the circumstances of this case are unlike those in which the causes are truly unknown or inexplicable.²⁴ From inception, both claimants pleaded particulars of negligence against both defendants; and both Sheldon and Clid denied negligence from their pleadings and lead evidence (including expert evidence) to demonstrate that they exercised all reasonable care and skill. They each presented an explanation for the cause of the accident that connotes no breach of care by either one. It is from assessing the weight of this very evidence and the inferences that can reasonably be drawn, that I have found that negligence on the part of both Sheldon and Clid has been established.

[97] Another precondition for the application of the maxim is “*that the incident must have been under the sole control of the defendant or his employees...But there must be no possibility that other people may have been involved.*”²⁵ *Prima facie*, the thing which causes the accident must be shown to be under the management of the defendant such that it affords

²² Halsbury's Laws of England/Negligence (Volume 78 (2018))/3. Proving Negligence/(2) *Res Ipsa Loquitur*/65. Absence of explanation. See *Barkway v South Wales Transport Co Ltd* [1950] AC 185 where the House of Lords held that *res ipsa loquitur* did not apply because the court had evidence of the circumstances of the accident and the negligent system of tyre inspection in the defendant's garage. See also *Thomas v Curley* [2013] EWCA Civ 117 where the Court of Appeal dismissed the appeal holding that the judge had not improperly applied *res ipsa loquitur* as alleged or at all because he had not drawn an inference of negligence from the mere fact of injury. Instead, he considered all the evidence and inferred that negligence was the cause of the damage.

²³ [1998] Lloyd's Rep Med 162 at 177.

²⁴ *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596, Ex Ch. (a bag of sugar fell from the defendant's warehouse and injured the plaintiff); *Byrne v Boadle* (1863) 2 H & C 722. (a flour barrel fell from an upper window onto the plaintiff walking on the street below); *Kealey v Heard* [1983] 1 All ER 973. (planks on a scaffolding collapsed); *Watson v Thomas S Whitney & Co Ltd* [1966] 1 All ER 122. (a car door handle projecting over a pavement caught a pedestrian's sleeve); *Chaproniere v Mason* (1905) 21 TLR 633, CA. (a stone was found in a bun); *Ballard v North British Ry Co* 1923 SC (HL) 43 (a railway wagon ran off the track); *O'Hara v Central SMT Co Ltd* 1941 SC 363 (a bus swerved suddenly, and a passenger fell from the platform onto the road); *Mars v Glasgow Corporation* 1940 SC 202 (a passenger was injured by the sudden braking of a tramcar).

²⁵ Tort: The Law of Tort (Common Law Series)/Chapter 13 Negligence: Breach of Duty/F Proof of Breach/The conditions necessary for the application of the maxim [13.44]

reasonable evidence, that the accident arose from his want of care.²⁶ Here, there are two defendants and the claimants cannot prove that either Sheldon or Clid, individually was the sole cause of the accident, such that it must have been by the negligence of either one that the damage was suffered. The evidence as I have accepted reveals the contrary, and is unlike the case of **Milliken v Glasgow Corp**²⁷ where it was established by evidence that it could not have been the fault of one of the participants in a motor vehicle collision, and it was held that this gave rise to an inference of fault by the other participant and the doctrine was applied.²⁸ I am simply not of the view that the preconditions for applying the doctrine have arisen in this case.

Issue 3: Is Construction and Industrial Equipment Limited vicariously liable for the damages caused by the negligence of Clid Isidore?

Submissions

[98] Mr Richelieu submits that the police report stated the owner of the truck as Construction Industrial Equipment, and therefore it is not the claimant's fault if the wrong party is named, as it is based on information received from the police. He says that there is a proximate business relationship between CIEL, C.I.E. Limited, and R.G. Investment Inc., and if the truck was loaned from R.G. Investment Inc., then CIEL assumed custody and control of the truck and is also liable. He submits that, in any event, there is no legal requirement that a finding of liability for the acts of a servant, requires that the employer be found to be the owner of the vehicle involved in the accident.

²⁶ Halsbury's Laws of England/Negligence (Volume 78 (2018))/3. Proving Negligence/(2) Res Ipsa Loquitur/64. Inference of defendant's negligence.

²⁷ 1918 SC 857

²⁸ See also *Gee v Metropolitan Rly Co* (1873) LR 8 QB 161, where a few minutes after a train started the door flew open and the plaintiff fell out, it was held that there was evidence of negligence by the railway company. However, in *Easson v London and North Eastern Rly Co* [1944] 2 All ER 425, where a child had fallen out of a train door, the plaintiff failed because although the door might have swung open through the fault of the defendant, some other person, such as a careless passenger, might have been the cause. Similarly, in *Inglis v London, Midland and Scottish Rly Co*. 1941 SC 551, the thing which caused the accident, which was a door in a railway carriage, was held not to be in the complete control of the defendants.

- [99] Counsel argued that the policy consideration which forms the basis of vicarious liability is the fairness to be derived from having the employer as the defendant with the means, assume responsibility for the liability. He questioned whether, as a matter of policy the claimant should be placed in the position of being unable to enjoy the fruit of judgment if it is not possible to enforce against Clid, if he is found negligent. Mr Richelieu submits that there is no evidence to rebut the presumption that CIEL is Clid's employer or the owner of the truck. He says even if it appears that Clid was not an employee of CIEL and it is asserted that the companies are different, the oral evidence of Clid and Anslem should be given minimal weight, because it is rather strange that no certificates of incorporation for these companies have been adduced to verify what is being said by these witnesses. He says this may be a case of a parent company with several subsidiaries and this calls for an assessment on the balance of probabilities, and consideration must be given to the maxim "he who asserts must prove".
- [100] In any event, Counsel urged that if it should be found as a matter of law that CIEL was not a proper party to the proceedings, a cost award should not be made against Mendy because she relied on the police report which in turn may not have been a credible source of information.
- [101] Mr Modeste submits that Clid admitted that at the time of the collision he was returning from a work assignment. The police report stated the owner of the truck as Construction Industrial Equipment, intending to mean CIEL. Since Clid was not on a frolic of his own, CIEL should be held liable for his negligent acts, as he was at all material times its employee, servant or agent. Counsel stated that if it turned out to be otherwise, the most which can be said is that the police report had birthed the assertion that the truck was owned by CIEL.
- [102] Mrs Ernest argued on behalf of Clid and CIEL that at the time of the accident, Clid was employed by a company called C.I.E. Limited and not CIEL. The truck was not owned by CIEL but by R.G. Investments Inc, which is not a party to these proceedings and Exhibit AC1, which is a copy of a Vehicle Inquiry from the Transport Division and Licensing Authority, is evidence of this. She agreed that as a general rule an employer is vicariously liable for the actions of his employee while in the course of dispensing his duties under a

contract of employment; however, CIEL not being Clid's employer is not a proper party to the claim and as such is not liable for his actions.

[103] Counsel explained that the party named as the 3rd defendant is CIEL but there is a separate company called C.I.E. Limited which is Clid's employer. Also, the truck was loaned from R.G. Investments Inc to C.I.E. Limited and neither are parties to the claim. Both Clid and Anslem testified to the difference between the two companies and their evidence was uncontroverted and sufficient for these purposes.

[104] Mrs Ernest submits that the police report does not deal with or name the employer. It only references the driver and owner and not the relationship between the parties. Vicarious liability contemplates a relationship of employer and employee and on this issue Clid's evidence is corroborated by that of Anslem, that he was not employed by CIEL. The claim, as originally intituled, provided no certainty of the entity named as 3rd defendant or what sort of entity it is. The claimants were put on inquiry from very early in the defence and again in the witness statements that CIEL was not the employer.

[105] She says in relation to agency that the evidence of ownership has been provided and CIEL is not the owner of the truck and again is not a property party to the claim. As there has been no amendment to the claim, the pleadings must be taken as is and the claims against CIEL dismissed.

Analysis

[106] The law is pellucid that in order to fix vicarious liability on the owner of a vehicle for the negligence of its driver, it must be shown that at the material time the driver was the owner's servant or was acting as his agent. To establish a relationship of agency it must be shown that the driver was using the vehicle at the owner's request, express or implied and was doing so in performance of a task or duty delegated to him by the owner. The fact that a driver uses the vehicle with the owner's permission and the purpose for which it was being used was one in which the owner might have had an interest or concern, is also insufficient

to establish vicarious liability²⁹. The driver must be doing something for the owner and even the mere fact of consent by the owner to the use of the vehicle is not proof of agency³⁰

[107] Mr Richelieu referred the Court to the Privy Council decision in **Harry Rambarran v Gurrucharran**³¹ where the Board accepted that “*where all that is known of the facts is that at the time of an accident the vehicle was owned but not driven by A, it can be said that A’s ownership affords some evidence that it was being driven by his servant or agent*”.

[108] However, Board further said that the presumption is rebuttable by proof of the facts, and once the facts in relation to agency are sufficiently known, the question must be decided on the totality of the evidence. In that case the claim was instituted against the party who was the owner of the vehicle on the premise that the driver, who was his son, was acting as his agent. The Board examined several cases on the issue of agency and concluded that ultimately, the question of service or agency is always one of fact and the onus of proof rests on the party who alleges it.³² In allowing the appeal, the Board upheld the trial judge’s decision that any inference based solely on the appellant’s ownership that the driver was his servant or agent was displaced by the fact that the driver had a general permission to use the car and was using it for his own purposes on that day. On the evidence, it was impossible to assert that merely because the appellant owned the car, the driver could not have been using it for his own purpose, as he was entitled to do.

[109] I agree that the claimants were given early notice of the averments in relation to Clid’s employer and ownership of the truck in Clid’s and CIEL’s defence. It was the duty of the claimants and their legal practitioners to use the processes provided under the rules to advance the claims. Part 34 of the **Civil Procedure Rules 2000** (“CPR”) makes provision for obtaining information about any matter which is in dispute in the proceedings and orders for compelling a reply to such request. Part 28 also deals with specific disclosure of the documents that a party is reasonably believed to have in its possession.

²⁹ *Morgans v Launchbury* [1972] 2 All ER 606; *Nicholls v Tuff* (1992) 41 WIR 140 at 141

³⁰ *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120 at 1122

³¹ [1970] 2 ALL ER 749

³² *Bernard v Sully* 47 T.L.R. 557; *Hewitt v Bonvin and Another* [1940] 1 K.B. 188; *Manawatu County v Rowe* 1956 New Zealand Law Report 78

- [110] These processes were available to investigate and ascertain the veracity of the averments made at paragraphs 2 (a) to (d) of Clid and CIEL's defence. The claimants could have sought from Clid specific disclosure of his employment contract, salary slip, or annual tax returns, all of which would have aided in determining at the very least who his employer was. These matters must be substantiated by factual evidence and not mere assertions or speculation and would necessitate that the employer or owner be properly joined as a party to the proceeding.
- [111] As it stands, there is not a scintilla of evidence to assist the Court in determining who Clid's employer is. The claimants say, based on the police report, it is CIEL, but that is not stated in the report. Clid and Anslem say it is a company called C.I.E. Limited and Mr Richelieu says they have provided no documentary evidence to substantiate this. As I understand it, the onus rests on the claimants in the first place to provide the evidence to substantiate their assertion. Simply put, they or their legal practitioners never bothered to investigate these matters and instead relied solely on the information contained in the Police Report, which as it turns out contains no information on Clid's employer and is inconclusive of ownership of the truck. The way the claims were originally constituted in relation to the 3rd defendant left much to be desired, as there was no certainty as to what sort of entity is *Construction Industrial Equipment*.
- [112] The evidence confirming that R.G. Investment Inc was the owner of the truck at the time of the accident remains unchallenged, and that company has not been joined in the claims, to pursue the allegation of agency. The Vehicle Inquiry Sheet dated 13th June 2016 from the Licensing Authority discloses that the truck was registered on 9th November 2011 to R.G. Investments Inc and had no previous owner at the time of registration.³³ I agree with Mrs Ernest that evidence of ownership has been provided and Construction Industrial Equipment or CIEL is not the owner. As no amendment was made to address this, the claimants remain bound by their pleading.

³³ See page 242 of Trial Bundle 1

[113] They have failed to satisfy the Court that CIEL is Clid's employer or joined the party who owns the truck. Further there are no pleadings or factual evidence in relation to agency between Clid and R. G. Investment Inc. as owner. In my view, it is inconceivable that a claim of vicarious liability whether by employment or agency, could be advanced with any measure of success in these circumstances. I therefore conclude that both claimants fail on this issue.

Issue 4: To what measure of damages are the claimants entitled?

Mendy's Claim

[114] Mendy claimed special damages in the sum of \$3,600.00, damages pursuant to Article 609 and 988 of the Code, interest and costs. Mr Richelieu submits that the measure of damages to be awarded under Article 609 falls under three heads, namely loss of expectation of life, funeral expenses and loss of earnings in lost years. The claim pursuant to article 988 ordinarily referred to as the dependency claim is for damages awarded to the dependents of the deceased. He says however, that the law recognizes that in the event of an overlap between the dependency claim under article 988 and the survivorship action under article 609, the former should be disallowed.

[115] I accept as settled law in this jurisdiction that Article 609 (1) and (2) of the Code permits an award for funeral expenses, a conventional award for loss of expectation of life as a benefit to the estate of the deceased³⁴ and damages calculated as loss of earnings for the lost years.³⁵

[116] This article stipulates that:

“(1) On the death of any person after the commencement of this chapter, all causes of action subsisting against or vested in him shall survive against, or, as the case maybe, for the benefit of his succession...”

³⁴ Felicia George v Eagle Air Services Limited [2009] UKPC 35 at para 3

³⁵ Cyril Mathurin et al v Anthony Augustin HCVAP 2007/041 delivered on 2nd June 2008; Veronica Auguste v Tyrone Maynard SLUHCV1984/044

(2) Where a cause of action survives as aforesaid for the benefit of the succession of the deceased person the damages recoverable for the benefit of the succession of that person-

(a) ...

(b) ...

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his succession consequent on his death, except that a sum in respect of funeral expense may be included."

Special Damages

[117] It is well established that special damages must be pleaded and proved.³⁶ This was particularized in Mendy's statement of claim as the cost of the police report in the sum of \$200.00 and funeral expenses in the sum of \$3,400.00. No receipt was provided in relation to the sum expended for the Police Report. Although the accepted standard is that expenditure must be substantiated by documentary evidence, I note that the report was a critical document to the claim, and it was exhibited as part of the evidence. It appears to incur a standard cost of \$200.00. In the circumstances, I am prepared to allow this amount. Funeral expenses were substantiated by copy of a receipt from Cricks Funeral Home, in the name of Mendy Phillip, for services rendered for burial of Joewel Phillip and is allowed. Therefore, special damages in the sum of \$3,600.00 is awarded.

Loss of Expectation of Life

[118] There is no special formula or methodology for calculating an award for loss of expectation of life. Invariably, the courts strive for uniformity by examining awards made in similar cases within the jurisdiction.

[119] Mr Richelieu and Mrs Ernest both say that based on existing authorities the sum awarded is currently set at \$3,500.00. Mr Modeste has asked the court to increase the amount to \$5,000.00 on the premise that in 2016, that sum was considered reasonable, taking into

³⁶ *Ilkiw v Samuels* [1963] 1 WLR 991; *Heerallal v Hack Brothers (Construction) Ltd* (1977) 24 WIR 117; McGregor on Damages 16th Edition at para 43-006

account the effect of inflation since the date of the incident and was awarded in similar circumstances.³⁷

- [120] I have perused the authorities provided by Counsels and note that over the years the sums have increased incrementally from \$2,500 to \$5,000.00. Moreover, as recently as 2019 in this jurisdiction³⁸ the amount was increased to \$5,000.00 in a similar case.³⁹ Considering that it is a conventional award which the courts have seen fitting over time to uprate, so as to remain fiscally relevant at the time of assessment, I will allow an award of \$5,000.00 in each claim.

Loss of Earnings for the Lost Years

- [121] The calculation of an award under this head considers the number of years which the deceased would have been expected to work, but for the accident. The compensation to his estate is for the income which he would have earned during these lost years, less the cost of maintaining and providing for himself the facilities of a reasonably satisfying and enjoyable life during such period.⁴⁰ It is calculated using a conventional formula comprising a multiplicand and multiplier. The multiplicand is usually the least amount the deceased would have been earning had he not died as a result of the accident. The multiplier is derived by taking into account the age of the deceased at the date of death and the likely period he would have worked, but for the accident, and may be discounted to allow for the many contingencies, vicissitudes and imponderables of life.⁴¹

- [122] Here the starting point would be the guidelines established by Lord Diplock in **Cookson v Knowles**⁴² which calls for a two-stage assessment. He stated the following: -

³⁷ Sandra Ann-Marie George (administrator of the Estate of Karlos George) v Nigel Don-Juan Glasgow SVGHCV2011/0465, delivered on 2nd February 2017.

³⁸ Germina Cherubin v The Attorney General SLUHCv2017/0319 delivered on 7th March 2019

³⁹ Jallim v Ghirawoo SLUHCv2003/0483; Bertha Compton (nee Blaize) Qua Administratrix of the Estate of the late Macrina Blaize) v Dr. Christina Nathaniel et al, SLUHCv2000/0031, delivered on 20th August 2010 at para 9; Delma Elick v Kert Joseph SLUHCv2016/0222 at para 7-8; Valencia Delaire et al v Anel Chedy SLUHCv2016/0432 delivered on 13th July 2017

⁴⁰ Plummer et al v Conway Bay Limited SLUHCv2000/1041; August v Maynard SLUHCv1984/0440

⁴¹ See Martin Alphonso et al v Deodat Ramnath (1997) 56 WIR 183 at pages 192-193

⁴² [1978] 2 All ER 604 at 609

*“I agree therefore with that part of the decision of the Court of Appeal that holds that, as a general rule, in fatal accident cases the damages should be assessed in two parts, **the first and the less speculative component being an estimate of the loss sustained up to the date of trial, and the second component being an estimate of the loss to be sustained thereafter.**”* [My emphasis]

[123] Joewel died on 22nd May 2013 at St Jude Hospital, as a result of brain damage and blunt trauma resulting from the accident. This is confirmed by his death certificate produced as part of Exhibit MP1. At the time of death, he was 27 years as shown by his National Identification Card and Birth Certificate produced collectively as Exhibit MP4. Mendy testified that prior to his death he was an avid fisherman and earned on average \$125.00 per day. She says she knew that the sum was correct as she was the one who kept his earnings at the end of each day. Sheldon stated that he knew that Joewel would go fishing and sold fish. Mendy also testified that from his earnings, Joewel assisted her with the care of their three minor siblings who attended the Gros Islet Primary School, as their mother had passed away some years prior. She was appointed tutrix of the minor children by order of the court dated 25th July 2015.⁴³ She was also granted Letters of Administration of Joewel’s estate on 11th November 2015.⁴⁴

[124] Mr Richelieu submits that although no evidence was provided of Joewel’s membership in the Gros Islet Fisherman’s Cooperative it does not mean that his estate should be denied compensation. He referred the Court to the case of **Delma Elick v Kert Joseph**⁴⁵ which he says demonstrates the posture which the courts have adopted in such cases. Once there is evidence to suggest some sort of vocation, the court can accept and fix a figure as it thinks fit. He asked that the Court considers a sum which is reasonable in the circumstances.

[125] Mr St Clair and Mrs Ernest say however, there is no proof of the deceased’s occupation as a fisherman and as such there is no evidence on which the Court can calculate this award.

[126] It is true that the claimant provided no documents to substantiate Joewel’s wages. I accept however that the nature of this vocation is such that he would not generally be expected to

⁴³ See Exhibit MP5

⁴⁴ See Exhibit MP2

⁴⁵ Claim No. SLUHCV 2016/0222 at para 12

issue a salary slip to himself or maintain sales records to substantiate his wages. In the circumstances, I accept as the sum proposed by Counsel of \$2,000.00 net monthly earnings as reasonable and that sum will be used as the multiplicand for consideration of an award under this head.

[127] Pre-trial loss of earnings: This is the approximate loss already sustained from the date of death up to the date of trial. Applying the principle in **Cookson v Knowles** the multiplier for pre-trial loss is the actual number of years between death and trial. Having accepted that Joewel's net pay as \$2,000.00 per month, this figure must be discounted by a percentage which is representative of what he would have spent in maintaining and providing for himself. Mr Richelieu says it would be safe to assume that he would spend 25% of his earnings on himself. Mr St Clair and Mrs Ernest both say the reduction should be 30%. I accept that in the absence of any evidence, the authorities suggest that the reduction is generally calculated at 30% of net income. This would reduce his net monthly earnings to \$1,400.00. The period between the date of death and the date of assessment is 82 months. Consequently, the award for pre-trial loss of earnings is $\$1,400.00 \times 82 = \$114,800.00$.

[128] Post-Trial Loss of Future Earnings: This is the approximate loss which the estate will sustain from the trial onwards. The multiplier for post-trial loss is computed by deducting the pre-trial period from the multiplier.

[129] This requires the use of a multiplicand which is the equivalent of the net annual earnings of the deceased at the time of death. In this case it would be $\$1,400.00 \times 12 = \$16,800.00$. Joewel was 27 years at the date of death. There is no evidence that he suffered from any ailments or that he would not have been gainfully employed as a fisherman for several more years, but for the accident. Having considered the legal authorities and the circumstances of this case, I accept that a multiplier of 15 would generally apply to a person of his age. From this must be deducted the period of 82 months (6.83 years) which accounts for the time between the date of the death and the date of assessment and the applicable multiplier would then be 8.17 years. Therefore, the award for post-trial loss of future earnings is $\$16,800.00 \times 8.17 = \$137,256.00$

[130] Consequently, total damages for loss of earnings for the lost years is \$114,800+\$137,256.00=**\$252,056.00**

The Dependency Claim – Article 988 of the Civil Code

[131] Article 988 of the Code provides inter alia: -

“(2) Where the death of a person is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect of his or her injury thereby, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony.

*(3) Every such action shall be **for the benefit of the wife or husband, and every parent and child of the person whose death has been caused**, but notwithstanding anything contained in this Code with regard to prescription, no such action shall be commenced at any time later than 3 years after the death of such deceased person.” [My emphasis]*

[132] Mrs Ernest contends that there is no evidence of dependents for the purposes of this head of damages and no parties are named in the claim, who would qualify as dependents.

[133] I have examined the provision, and while Mr Richelieu says it need not be considered on account of overlap, I am of the view that it ought not to be considered for the reason that no evidence has been proffered in relation to any of the categories of dependents (spouse, parent or children) who are entitled to benefit from an award under Article 988.

Julienne’s Claim

[134] It is said that Shalla was a strong, healthy, energetic and active young lady at the time of the accident. She was 23 years old, with her full life ahead of her. She was pronounced dead upon arrival at St Jude Hospital on 22nd May 2013 as a result of brain damage secondary to subdural and subarachnoid hemorrhage and lacerated right vertebral artery sustained in the accident. These matters are substantiated by her death certificate and Postmortem Examination Report produced as Exhibits JF5 and JF6 respectively.

[135] Mr Modeste argued that her estate is entitled to special damages; loss of expectation of life and loss of earnings for lost years pursuant to article 609; a dependency claim pursuant to article 988 and costs. With respect to loss of earnings he contends that Shalla was due to commence employment at Rituals Coffee House on 27th May 2013 from which she would have earned wages at an hourly rate of \$8.00.⁴⁶ Concerning the dependency claim, he says she left behind her minor daughter Della born on 15th November 2011 who would have benefited from her earnings. Della's birth certificate was tendered as Exhibit JF7.

Special Damages

[136] I am satisfied on the evidence that this claimant pleaded and proved the particulars of special damages⁴⁷ for the cost of obtaining the police report and funeral expenses in the total sum of \$6,444.65 and will award the said sum.

Loss of Expectation of Life

[137] As determined at paragraph 120 above the sum awarded is \$5,000.00.

Bereavement

[138] Mr. Modeste claims the sum of \$10,000.00 for bereavement on behalf of Julienne as the parent of Shalla. He referred the Court to the case of **Veronique Ismael v Justin Albert et al**⁴⁸, as authority for the request.

[139] In **Germina Cherubin v The Attorney General**⁴⁹ Cenac-Phulgence J considered a similar request against the backdrop of article 609 and disallowed it on the premise that a claim for bereavement does not fall into any of the categories of actions which may be brought pursuant to article 609. She reasoned that if the deceased would not have been able to pursue a claim for damages for bereavement, the estate cannot in a survival action under

⁴⁶ See Offer of Employment-Exhibit JF8

⁴⁷ See particulars set out at paragraphs 13 of the statement of claim and 11 items listed at paragraphs 15 of the witness statement of Julienne Fadlin with Exhibits JF 9 thru to JF15, at pages 77-83 of Trial Bundle1

⁴⁸ SLUHCV2002/0717, delivered on 8th December 2006 at para 99

⁴⁹ Supra note 52 at para 26-28

article 609 pursue such a claim unless specifically legislated. Thus, the law as it stands does not provide for a claim for bereavement in this jurisdiction. There is no need to revisit the point. I am in complete agreement with the reasoning, and for consistency in the application of the law, I so adopt. Therefore, I make no award for damages for bereavement.

Pain and Suffering

- [140] On perusal of the authorities, this head of damages is usually permitted in instances where the deceased died after some time (days, weeks or months) had elapsed since the accident. The accident occurred about 6:30pm and Shalla was pronounced dead upon arrival at St Jude Hospital at 7:25pm. Although there is no evidence of the duration that she may have survived after sustaining the injuries which caused her death, I consider the modest request of \$2,500.00 for pain and suffering, however short, to be reasonable and will allow this sum.

Loss of Earnings for the Lost Years

- [141] Pre-trial loss of earnings: On the strength of the employment offer letter dated 24th March, 2013 from Rituals Coffee House, I accept Mr Modeste's calculation that at the time of death Shalla had a job offer from which she would have earned net pay of \$1,536.00 per month. For reasons already explained this sum will be discounted by 30% which represents what she would have spent in maintaining and providing for herself. This would reduce her net monthly earnings to \$1,075.20, which would serve as the multiplicand for arriving at pretrial loss of earnings. The period between the date of death and the date of assessment is also 82 months. Thus, the award for pre-trial loss of earnings is $\$1,075.20 \times 82 = \$88,166.40$.
- [142] Post-trial loss of future earnings: In this case, the multiplicand, which is the equivalent of the net annual earnings of the deceased at the time of death, would be $\$1,075.20 \times 12 = \$12,902.40$. Mr Modeste submitted that it is likely that she would have worked for a further period of 42 years until the pensionable age of 65 and a multiplier of 19 should be applied to her net annual income. Mrs Ernest submitted that the authorities suggest a multiplier of 14.

[143] Shalla was 23 years at the date of her death, still relatively young and in good health. Considering that there is no rigid formula for the selection of a multiplier, and it is usually driven by the individual facts and circumstances of each case taking into account any contingencies of life, I accept that a multiplier of 19 would be reasonable in this case. There is no evidence that she suffered from any ailments or that she would not have been gainfully employed for several years, but for the accident. There was no need to factor any increases in earnings over the years as there was no evidence to substantiate this. The period of 82 months (6.83 years) which accounts for the time between the date of the death and the date of assessment must be deducted, thus, the applicable multiplier is 12.17 years. The award for post-trial loss of future earnings is therefore $\$12,902.40 \times 12.17 = \$157,022.21$.

[144] Consequently, total damages for loss of earnings for the lost years is $\$88,166.40 + \$157,022.21 = \underline{\$245,188.61}$.

Dependency Claim – Article 988 of the Civil Code

[145] Mr Modeste argued that Shalla's daughter Della would have benefited from her earnings. He submits that she would have spent 70% of her net earnings on household and living expenses for her sole dependent Della. This, he says, should be considered as the applicable multiplicand. I have considered the circumstances, and the likely costs entailed in caring and providing for a minor child of Della's age and conclude that 65% is a more reasonable assumption. The multiplicand is therefore 65% of \$1,536.00 which is \$998.40.

[146] Mr Modeste submits that at the date of death Della would have been almost 2 years and would have had a full dependency period of 16 years which should be used as the multiplier. I accept this to be the case, given the age of the minor child at the time of death.

[147] In computing the award, the multiplier is applied in the same manner as loss of earnings for lost years. The award is therefore calculated as follows: -

1. Pre-trial dependency - $\$998.40 \times 12 \times 6.83 = \$81,828.86$
- 2 Post-trial dependency - $\$998.40 \times 12 \times 9.17 = \$109,863.94$

[148] The total dependency award is $\$81,828.86 + \$109,863.94 = \underline{\$191,692.80}$.

- [149] Mr Modeste says a double award is permissible based on the applicable provisions of the Code which say nothing of discounting or adjustment of awards. He says on a strict application of articles 609 and 988, both awards are permitted in this jurisdiction. Counsel further says that interest is payable at the rate of 6% per annum pursuant to Article 1009A of the Code on the global sum awarded as damages from 22nd May 2013 (the date of the accident), until payment in full.
- [150] Mrs Ernest contends that the legal authorities establish that there cannot be a duplication of awards if the dependent under article 988 is the same person who would benefit from the estate under article 609. The practice is that the court may determine both, but the higher award is what would be allowed.
- [151] I have perused the applicable authorities and they suggest that due regard must be given to any sum awarded as loss of earnings for lost years under article 609 to avoid an overlap with an award under article 988. I am also guided by dicta in **Felicia George v Eagle Air Services Limited**⁵⁰ where the Privy Council cited with approval the statement of Lord Edmund-Davis in **Gammell v Wilson**⁵¹ that: *“If those who benefit under the [Law Reform (Miscellaneous Provisions) Act] and the Fatal Accidents Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected”*. I accept that the same principle applies to an overlap in the survivorship claim under article 609 and the dependency claim under article 988, such that a beneficiary of the deceased’s estate who also stands to benefit as a dependent is unable to receive both awards.
- [152] Applying this principle to the instant case, Della who is the sole dependent of the deceased and a beneficiary under the deceased’s estate is precluded from receiving both awards. In the circumstances, the amount of \$191,692.80 assessed as the dependency award, for the benefit of Della, under article 988 is to be paid out of the loss of earnings award of \$245,188.61 under article 609 and the balance of \$53,495.81 is to be distributed to the remaining beneficiaries of the succession estate of the deceased.

⁵⁰ [2009] UKPC 35 at para 8

⁵¹ [1982] AC 27

[153] Interest: The general practice emanating from the Court of Appeal decision in **Martin Alphonso et al v Deodat Ramnath**⁵² is that interest ought to be paid to a claimant for being kept out of money which ought to have been paid to him. General damages for loss of expectation of life and loss of earnings does not attract pre-judgment interest and post judgment interest is permitted at the statutory rate from the date of judgment until payment. With respect to special damages, the general rule is that pre-judgment interest is permitted at half the statutory rate from the date of death until judgment and post judgment at the statutory rate from date of judgment until payment. Regarding awards for pain and suffering, pre-judgment interest is permitted at half the statutory rate from the date of service of the claim and post judgment at the statutory rate until payment.

[154] Costs: With respect to costs I note from the case management order dated 12th July 2017 that the parties agreed to prescribed costs as the applicable costs in the proceedings and I will so order. I consider it disproportionate to award costs to the third defendant as an application could have been made very early in the proceedings to be removed as a party. Consequently, the third defendant will bear its own costs of these proceedings

Conclusion

[155] In concluding I therefore make the following orders: -

1. The first and second defendants by their negligent conduct in driving the bus and truck respectively are jointly liable for the injuries which caused the death of the two deceased and the damages and loss arising from the accident.
2. The claims against the third defendant are dismissed and I make no order for costs.
3. The first and second defendants shall pay to Mendy Phillip as administrator of the estate of Joewel Phillip deceased, the following sums in equal proportions: -
 - i) Special damages in the sum of \$3,600.00 with interest at the rate of 3% per annum from 22nd May 2013 (date of death) to the date of judgment and 6% per annum from the date of judgment until payment.
 - i) Damages for loss of expectation of life assessed at \$5,000.00 with interest at the rate of 6% per annum from the date of judgment until payment.

⁵² Supra note 55 at page 195 of the judgement

- ii) Damages for loss of earnings assessed at \$252,056.00, with interest at the rate of 6% per annum from the date of judgment until payment.
- 4. The first and second defendants shall pay to the estate of Shalla Raymond, deceased, the following sums in equal proportions: -
 - i) Special damages in the sum of \$6,444.65 with interest at the rate of 3% per annum from 22nd May 2013 (date of death) to the date of judgment and 6% per annum from the date of judgment until payment.
 - ii) Damages for pain and suffering assessed at \$2,500.00, with interest at the rate of 3% per annum from the date of service of the claim to the date of judgment and at the rate of 6% per annum from the date of judgment until payment.
 - iii) Damages for loss of expectation of life assessed at \$5,000.00 with interest at the rate of 6% per annum from the date of judgment until payment.
 - iv) Damages for loss of earnings assessed at \$245,188.61, with interest at the rate of 6% per annum from the date of judgment until payment.
 - v) The dependency claim is assessed at \$191,692.80 and shall be paid out of the sum awarded for loss of earnings.
- 5. The claimants are entitled to prescribed costs pursuant to Part 65 of the CPR to be paid by the first and second defendants in equal proportions.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar