

EASTERN CARIBBEAN SUPREME COURT

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2015**

CLAIM NO. SKBHCV2013/0184

**In the Matter of a Fatal Accident involving
Kitwana Fyfield (Deceased)**

**And in the Matter of the Fatal Accidents Act,
Cap 23.10 of the Revised Edition (2002) of the
Laws of St. Christopher and Nevis**

**And in the Matter of the Law Reform
Miscellaneous Provisions Act, Cap 5.08 of the
Revised Edition (2002) of the Laws of the St.
Christopher and Nevis**

**And in the Matter of the Causes of Actions
(Survival) Act, Cap 5.05 of the Revised Edition
(2002) of the Laws of St. Christopher and
Nevis.**

BETWEEN:

**ELIZABETH ANNETTE FYFIELD
(Intended Administrator of the Estate of Kitwana Fyfield, deceased)
Claimant**

and

**DWIGHT HARRIS
Defendant**

Appearances:

Ms. Natasha S. Grey of Chesley Hamilton & Associates for the Claimant
Mr. Nassibou Butler of Butler, Butler & Butler for the Defendant

2015: April 28
July 15
October 23

JUDGEMENT

- [1] **CARTER J.:** Kitwana Fyfield, (“the deceased”), tragically lost his life in a motor vehicle accident on the 29th day of June 2012.
- [2] His mother, Elizabeth Annette Fyfield, has filed the instant claim as Intended Administrator of the Estate of the deceased. Her claim is based on the provisions of Section 3 of the **Fatal Accidents Act**, and the allegation that she has made against the defendant is that he caused the death of the deceased by his wrongful and/or negligent act. The claimant’s claim is on behalf of herself and also on behalf of the minor son of the deceased as his dependants.
- [3] The claimant contends that the defendant is liable for the following:
- “a. Damages on behalf of the deceased’s dependants under the Fatal Accidents Act Cap 23.10*
 - b. Damages on behalf of the deceased’s dependants under the Causes of Action (Survival Act) Cap 5.05*
 - c. On behalf of the Estate of the deceased under the Law Reform (Miscellaneous Provisions) Cap 5.08*
 - d. Interest pursuant to section 27 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act Cap 3.11*
 - e. Costs*
 - f. Such other relief as the court may deem fit.”*
- [4] In the claimant’s Reply and Defence to Counterclaim filed herein on the 8th of October 2013, the claimant accepted that part of her claim, brought under the provisions of the **Law Reform (Miscellaneous Provisions) Act** Cap 5:08, was untenable and the trial proceeded on the basis that this aspect of the claim was withdrawn.
- [5] In relation to this action in negligence the claimant listed a number of particulars with respect to the defendant, that he, on 29th June 2012;
- “a. Drove on the wrong side of the road when it was not safe to do so.*
 - b. Failed to heed the presence of the motorbike driven by the deceased on the road.*
 - c. Failed to maneuver his vehicle to avoid a collision involving the*

deceased.

d. Drove his vehicle too fast in all the circumstances.

e. Failed to apply his brakes to prevent a collision involving the deceased.

f. Failed to exercise proper care and attention in driving his vehicle.

g. Drove his bus in such a manner that the deceased who was on the right side of the road was struck.

h. Drove in such a negligent manner as to cause the deceased to sustain multiple injuries including deformity of both shoulders with visible open fracture of right arm and visible deformity of both lower extremities resulting in his death.

i. Fail to stop his vehicle, slow down or maneuver his vehicle in a manner to avoid a collision thereby causing injury and death to the deceased.

j. Failed to pay heed to and to have regard to all the circumstances of the road on which he was driving.

k. Failed to have regard for the safety and well being of the deceased.”

[6] The defendant denied that there was any negligence on his part and instead filed a counterclaim in which he stated that it was the deceased's negligence that caused the accident.

[7] The main issue arising therefore is as to the liability of either the deceased or the defendant for the accident that occurred on the 29th day of June 2012. The secondary issue is the extent of any damages due to the claimant or the defendant as a result of the court's finding of the liability of either party.

Liability for The Accident

[8] Both the claimant and the defendant testified at trial and each called three (3) witnesses in support of their respective cases. Witness statements were admitted as Evidence-in-Chief of the various witnesses.

Miguel Stevens

[9] In relation to the main issue, the witness Miguel Stevens was the only witness for the claimant who gave evidence of what happened on the date in question. His Evidence-in-Chief was that:

“ ...

2. On the 29th day of June, 2012 at about 3:30pm I was coming from the road by Horsfords Automotive Showroom with one of my friends and I was going to cross over on Wellington Road on the mountain side.

3. I looked to my left and to my right before I attempted to cross the road. As I started to cross the road, I saw a passenger bus that was travelling in an easterly direction towards Cayon side at a speed of about 5-60 mph.

...

7. After I crossed the road, I looked in the direction that the bus was heading and I recognized it had crossed over into the right hand lane of the road, I saw the bus had hit something and I did not know what it was. I also heard a loud sound as if there had been a collision.

8. I ventured up the road to where I had seen the bus hit something and I realized that it was my neighbour, Kitwana Tyrone Fyfield. He looked as if he had suffered a number of injuries from looking at his body lying on the ground.

..."

- [10] In Cross-Examination, Mr. Stevens agreed that he was "good friends" with the deceased and his family. He was not a licensed driver at the date of the incident and further, that he had no way of testing the speed of the defendant's vehicle or any other vehicle. He could not say why the bus had crossed over onto the right hand side of the road, he did not see the collision and he could not say what the bus had hit, before he got to actual scene of the accident. Mr. Stevens in answer to the court said that the defendant's bus crossed on the right side of the road and that it was after this that he heard the noise of the collision.

Dwight Harris

- [11] The evidence of the defendant was that:

"2. On the 29th of June 2012 at about 3:30 p.m, I was driving my said bus. I left Baker's Corner to go to Tabernacle. There were 7 to 9 passengers in my bus. I was driving along Wellington Road to Tabernacle at about 20 to 25 mph. I made one stop for a passenger to get off the bus opposite Horsford Motor Vehicle Show Case. After the passenger left the bus I continued driving in the same direction. From Horsford Motor Vehicle Show Case to Florence Nightingale Lane is about 20 feet.

3. When I got into the area of Miss Slack School the deceased Kitwana Fyfield who was riding a four wheel motor cycle came from a side road on my left side above Miss Slack School known as Florence Nightingale Lane without stopping at the stop sign. I was driving on my left side. When I realized that he was not stopping, I applied my brakes and in an effort to avoid a collision, I pulled away as close as possible to my right side of the road and the motor cycle continued to come towards my bus and when

the deceased came out without stopping, the motor cycle, the deceased tried to swing right in the direction of Baker's Corner and he collided with the right front side of my bus.

4. I was about two car lengths away from Florence Nightingale Lane when I saw the motor cycle coming from Florence Nightingale Lane. He did not stop at the junction at Florence Nightingale Lane and Wellington Road. He came straight out and collided with my bus. There was one passenger on the front seat of my bus i.e. my son Dwight Junior. The road condition was dry and there were no vehicle travelling in the opposite direction and there was no vehicle travelling in front of me. I don't drink alcoholic beverages.

...

[12] In Cross-Examination his evidence was that:

"I know the speed limit for Wellington Road which is 20mph. I was driving about 20 – 25mph. I did not maintain that speed on Wellington Road...My estimate is two car spaces when I saw him...I saw him about two car spaces away... When I passed the pre-school I then saw Mr. Fyfield come out of the stop without stopping. I was driving on the left hand side of the road. I went over unto the right hand side of the road. When I saw the deceased come out of the Stop, I was not able to bring my vehicle to a stop. I did not hit Mr. Fyfield when I first saw Mr. Fyfield I applied my brakes and I try to avoid any collision by pulling on the right. Mr. Fyfield continued to follow the bus and as a result of that he collided with my bus where I stopped on the right side. I was travelling 20 – 25mph within the speed limit. At that speed and apply brakes you would not be able to stop in time. It is slow driving. I applied my brakes and I did come to a stop."

[13] In answer to Counsel for the claimant he said further:

"I have been driving for over 10 years. I do not agree with you that if I had stayed on left I would not have hit Mr. Fyfield."

[14] When it was put to him that *"if he had stayed in lane there would never have been a collision"* he stated, *"He leave the Stop and came out on my left hand side of the road."*

Lauston Percival

[15] The defendant called three (3) witnesses. Lauston Percival is a police officer who was travelling behind the defendant's vehicle at the material time. In Evidence in Chief he stated:

“On Friday 29th June 2012 at about 3:30pm I was driving along Wellington road traveling from Baker’s Corner to R.L.B. International Airport. Motor Omnibus H902 was driving in front of me. When H902 got in the vicinity of Florence Nightingale Lane, I saw a four (4) wheel motor bike come out of Florence Nightingale Lane unto Wellington Road without stopping at the Stop. The bus then pulled over to the right side or the seaside of the road to avoid colliding with the motor bike and the motor bike collided to the front of H902 and then ran into a concrete and wooden bench on the eastern side (seaside) of the road. There were no vehicles travelling in the opposite direction at the times there weren’t any vehicles immediately behind me at the time. When the accident took place I was in the vicinity of Edwards Lane passing Ms Slack Pre-School and that is the distance I had behind the bus from the time we left Baker’s Corner. I recall that the bus made one stop to let off a passenger near Horsford Vehicle Show Case. There was no vehicle travelling in front of the bus immediately before or at the time of the accident.”

- [16] Under Cross-Examination, Mr. Percival confirmed that the defendant was not driving at a speed of 50-60 mph. Instead he confirmed that the defendant was travelling between 20-25 mph. His evidence was that the defendant was driving directly in front of him on the date in question. He stated that he had been behind the defendant’s vehicle from the time that the vehicle was at Baker’s Corner. His evidence contradicted that of the witness, Mr. Stevens, in that he said that he saw no pedestrians crossing in the vicinity of Horsfords Showroom, in front of the defendant’s vehicle. He stated that he did see the deceased’s vehicle before the collision and that he was less than thirty (30) feet away from Florence Nightingale Lane when he first saw the deceased’s four-wheeler. He could see the junction at Wellington Road and Florence Nightingale Lane clearly. In answer to the court he confirmed that he was travelling at a constant speed of about 20mph behind the defendant from baker’s corner and that the defendant was also travelling at a constant speed.

Winston Hobson

- [17] Winston Hobson was the second witness called by the defendant. His evidence was of some import and assistance to the court in attempting to resolve this issue of liability. Mr. Hobson, like Mr. Lauston Percival, stated that he had no previous connection to either deceased or defendant. His evidence was as follows:

"On Friday the 29th day of June 2012 about 3:30 p.m. I was walking coming down Wellington Road in the direction leading to Baker's Corner. As I was approaching the stop at the junction of Florence Nightingale Lane and Wellington Road, I was about 10 feet away from the stop at the junction of Florence Nightingale Lane and Wellington Road when a 4 wheel motor cycle approached the said stop. He slowed down and just came straight out. On his way out a bus was approaching on the Wellington Road travelling in the direction from Baker's Corner to Airport. The bus man tried to avoid the bike man by pulling right and applying his brakes but the bike man tried to beat the bus by coming out a little faster and at that point they collided. The bike man got knocked off the bike and hit the bench on the side of the road. I am a driver for the past 20 years. The busman was driving about 30 mph. There were no vehicles in front of the bus and there were no vehicles coming from the opposite direction at the time of the accident."

- [18] Under Cross-Examination he amplified certain important aspects of his evidence: He stated that the deceased when he was coming out of Florence Nightingale Lane, *"he slowed a little; he looked left and he came out, he didn't stop"*. The court notes that the defendant's bus was coming from the right of the deceased and if the court accepts the evidence of Mr. Hobson, it would in effect mean that the deceased did not look in the direction of the approaching defendant as he exited Florence Nightingale Lane unto Wellington Road.
- [19] Of some relevance is Mr. Hobson's statement that when he first saw the defendant's bus it was on the left hand side of the road. He said *"I heard the motor bike and I saw the bus coming. I was thinking that the person would stop. The bike I could not see until I heard it when I got close....When I saw the quad bike at the junction the bus was about 15-20 ft. I think the bus was going at 25-30 mph. I have been driving for 15 years or so."*
- [20] **Dwight Harris, Jr.**, the son of the defendant and a passenger in his father's bus at the time of the accident, also gave evidence on behalf of the defendant. His evidence was much the same as that of the defendant in relation to the manner in which the incident occurred.

- [21] In written closing submissions Counsel for the claimant submitted that the court should not believe the evidence of the defendant or his witnesses. She highlighted some aspects of the defendant's evidence that was contradictory and submitted that the court should disregard the evidence of the defendant's son, Dwight Harris, Jr. who was 15 years of age at the time of the incident, because he would not have possessed the experience or knowledge to accurately provide the distance that the bus was traveling.
- [22] She further submitted that the witness Hobson's estimate of the speed at which the defendant's vehicle was travelling should not be relied on because his evidence was that he was not paying much attention to the defendant's bus which he saw from a distance as his attention was captured by the deceased motorcycle. As a result, he would not be able to satisfactorily determine the speed of the bus. She also asked this court to give little weight to the evidence of the police officer Lauston Percival that the defendant was travelling along the rout at about 20-25mph as the court could have expected the officer to offer a more definite estimate of speed from someone she termed "*a professional witness*."¹
- [23] Counsel for the claimant submitted that the court should find that it was the defendant's negligence that caused the accident that "*a prudent driver would have kept in his lane and kept more left seeing that oncoming traffic (including the deceased vehicle) would have been travelling in the right lane. A prudent driver would have been mindful that the deceased vehicle would have been travelling in the right lane... that the defendant was also negligent as he entered onto the wrong side of the road when it was not safe to do so.*"
- [24] In response, Counsel for the defendant's main thrust was that the court should not rely on the evidence of Miguel Stevens the sole witness called by the claimant. Counsel submitted that, "*...Stevens did not see the collision thereby rendering his testimony not only inoperable but totally and utterly false...had Stevens in fact*

¹ Written closing submissions of claimant filed on 28th July 2015, at paras. 11-12.

*witnessed the collision...he would have had an ideal view of the collision and would have been able to provide a more accurate account.”*² Counsel for the defendant asked this Court to find therefore that Mr. Stevens did not substantiate the claimant’s case and that the claimant did not establish that the defendant was negligent in any way.

Court’s Findings

[25] Having heard the evidence of all of the witnesses and in particular those witnesses who gave evidence of the collision, and having considered all the evidence in this case, the court finds the following facts:

- (i) The accident occurred on the 29th day of June 2012 at approximately 3:30 pm.
- (ii) The defendant was driving his bus from Baker’s Corner along Wellington Road on the left, northern lane of Wellington Road. The defendant was driving at approximately 20-25 miles per hour
- (iii) The deceased was driving a four wheel motorized bike, P4879 exiting Florence Nightingale Lane unto Wellington Road.
- (iv) The deceased failed to come to a complete stop at the intersection of Florence Nightingale Lane and Wellington Road. The deceased drove from Florence Nightingale Lane unto Wellington Road into the path of the defendant on the left, northern lane of Wellington Road.
- (v) The defendant in an effort to avoid colliding with the deceased pulled his bus from the left lane unto the right lane of the road away from the deceased. The deceased did not come to a stop as he exited Florence Nightingale Lane and his vehicle collided with the defendant’s vehicle in the right southern lane of Wellington Road.

² Written closing Submissions of defendant filed on 24th July 2015, at pg 6 para 15

- (vi) The defendant's vehicle was damaged. The deceased suffered fatal injuries as a result of the accident.

[26] **Clerk & Lindsell on Torts**³ has concisely set out the requirements which a claimant must prove to establish a defendant's negligence as:

- (a) The existence in law of a duty of care situation;
- (b) Careless behaviour by the defendant;
- (c) A causal connection between the defendant's careless conduct and the damage;
- (d) Foreseeability that such conduct would have inflicted on the particular claimant the particular damage of which he complains; (Once (a) to (d) are satisfied, the defendant is liable in negligence and only then the next two factors arise);
- (e) The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible;
- (f) The monetary estimate of that extent of damage.

[27] A driver of a motor vehicle has a duty to exercise due care when driving on a road. In **Cheryl Edwards Administrator of the Estate of Janique Lewis v Ethel Mills**⁴ Rawlins J, has stated the duty of a driver in the following terms:

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

[28] The deceased cannot be absolved from any responsibility for this accident and in the court's view he was solely responsible for the accident. This Court accepts

³ 18th ed. at page 219

⁴ ANUHCv 168/1998

and believes the evidence of the defendant's witnesses, Lauston Percival and Winston Hobson. The deceased on the evidence, bore the stop at Florence Nightingale Lane. He did not stop or look in the direction of the oncoming traffic as he exited Florence Nightingale Lane. If he had done so he would have seen the defendant's bus, as the evidence is that the weather was good, visibility was clear and as a user of the road who knew that he was exiting Florence Nightingale Lane, a minor road unto a major road, the deceased had a duty of care to stop before he did so. The evidence is that the deceased did not stop.

[29] By exiting Florence Nightingale Lane unto Wellington road without stopping the deceased acted recklessly. Even if the Court had found that the defendant was speeding as the claimant alleges, [the court has not made such a finding] if the deceased had properly exercised the necessary duty of care he would have seen the defendant's approaching vehicle, but he failed to do so, he failed to stop at the intersection and make sure it was safe before he exited Florence Nightingale Lane and was negligent in all the circumstances.

[30] The defendant did observe the deceased as he exited Florence Nightingale Lane. He swerved to avoid a collision with the deceased and stopped his vehicle. His vehicle did not go beyond Florence Nightingale Lane when it stopped which further strengthened the court's view that the defendant had not been speeding and was driving at 20-25mph at the time of the accident. On the evidence, it is the swerve to avoid the deceased that resulted in the defendant's vehicle being in the right lane. The defendant had sufficient time to swerve away from the deceased but the deceased did not stop. Instead the deceased crossed the left lane, across the path of the defendant even as the defendant swerved in an effort to avoid him.

[31] The deceased crossed the defendant's left lane and continued into the right where the accident occurred. This is not a case where the deceased was travelling in the right hand lane when the defendant's vehicle struck him. The defendant entered into the right hand lane only in an effort to avoid the deceased in the left lane, the defendant's proper lane. The defendant sought to manage his vehicle so as to

avoid the collision. There is no evidence to suggest that the defendant did not act reasonably in so doing.

[32] *“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. This is the issue throughout the trial and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on the balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not so satisfied the plaintiff’s action fails.”*⁵

[33] I find that the claimant has failed to prove on a balance of probabilities that the collision was as a result of the defendant's negligence.

[34] The claimant has therefore failed to prove a basis for her claim under Section 3 of the **Fatal Accidents Act**. No wrongful and/or negligent act on the part of the defendant has been proved as alleged in her claim. Similarly, the claim for damages under the **Causes of Actions (Survival) Act** also fails.

Is the Claimant Entitled to Damages Under the Fatal Accidents Act?

[35] The **Fatal Accidents Act** at section 3 states that:

“(1)Where the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, 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 is caused in such circumstances as amount in law to felony.

(2) In assessing damages in any action, whether commenced before or after the coming into operation of this subsection, brought under this Act, there shall not be taken into account any sum paid or payable on the death of the

⁵Henderson v Henry E Jenkins and Sons and Evans, [1970] AC 282 at page 301; approved by Baptiste JA in Margaret Blackburn v James Al Bristol, GDAHCVAP2012/0019

deceased under any contract of assurance or insurance, whether made before or after the coming into operation of this subsection.

(3) In any action brought under this Act, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.

(4) The provisions of the preceding subsection shall not apply in relation to any action in respect of the death of any person before the coming into operation of that subsection.”

[36] Counsel for the claimant has submitted that even if the court were to find that negligence was not proved that the claimant is still entitled to nominal damages. She referred this Court to the case of **Emmanuel Etienne v Gregory Massicot**⁶ in support of this submission. In that case Thomas J. (Ag.) awarded nominal damages in the sum of \$10,000.00 in a similar case. In brief, the claimant in **Etienne** had brought a claim under the **Fatal Accidents Act** in Dominica as widower and dependant of his deceased wife after she was killed in a motor vehicular accident. The claimant alleged in essence that the defendant driver of the motor vehicle in which the deceased had been travelling had caused the deceased's death as a result of negligence, leading thereby to bereavement and the defendant's loss and damage.

[37] The Learned Judge found that the claimant had failed to discharge the burden of proof to satisfy the court that the defendant was in breach of his duty of care and thus negligent in causing the death of the deceased. However, the Learned Judge found that this was a fit case for the award of nominal damages after noting that one of the circumstances in which nominal damages may be awarded is where the fact of loss is shown but the requisite evidence was not adduced⁷.

[38] This court has carefully considered this decision and it unable to agree that in the instant case the claimant is entitled to nominal damages. Damages of any sort can only be awarded where a claim has been proved. **In The Estate of Cyril Thomas**

⁶ DOMHCV2010/0139

⁷ Ibid. pg. 20

Buften⁸ Barrow J.A. stated that it is for a claimant to provide the basis for the court to make an award for damages, even a nominal award. That Court held that in the absence of that evidence forthcoming from the claimant, that a court can, however, make a nominal award that is *justifiable on the scale of common experience*.⁹

[39] In McGregor on Damages it is stated as follows:

*“A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damages and as to the amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where the right has been infringed. If the fact of damage is shown but no evidence is given as to the amount so that it is virtually impossible to assess damages, this will generally permit the award of nominal damages.”*¹⁰

[40] The basis of the claim under the **Fatal Accidents Act** has not been borne out on the evidence in this case. It is not the fact of death that entitles an action for damages to be brought under the Act. Rather it is proof of “*death caused by any wrongful act, neglect or default*” that attracts an entitlement to bring a claim for damages. If the fact of loss caused as a direct result of such wrongful act, neglect or default is successfully proved under the Act, but such loss could not be quantified, it is only then that a court will consider an award of nominal damages.

[41] As distinct from the case in **Etienne**, in the instant case it is the deceased’s negligence that this Court has found caused the resultant accident on the 29th of June 2012. There is no basis for the award of damages, even nominal damages to the claimant in this case under the **Fatal Accidents Act** nor under the **Causes of Actions (Survival) Act**.

⁸ The Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Buften & Lona Eileen Buften Antigua & Barbuda, C.A No. 22 of 2004 at para. 22

⁹ See also Greer v Alstons Engineering Sales and Services Ltd. (Trinidad and Tobago) [2003] UKPC para.6

¹⁰ McGregor on Damages, para. 8-001

Is the Defendant Entitled to Damages?

[42] The defendant in his counterclaim pleaded that the deceased was either solely responsible for the accident or contributed to it. The particulars of the deceased's negligence pleaded by the defendant were:

- “1. Failed to observe the stop sign at Florence Nightingale Lane and failed to stop before exiting from the said Florence Nightingale Lane.*
- 2. Failed to keep any or any proper lookout or to have any or sufficient regard for other vehicles including the defendant's omnibus that were or might reasonable be expected to be on the said Wellington Road.*
- 3. Exited from Florence Nightingale Lane into Wellington Road when it was unsafe to do so.*
- 4. Failed to keep any or proper lookout as he attempted to drive pass in front of the claimant's said motor omnibus H902.*
- 5. Failed to stop, slow down or apply his brakes sufficiently or in time or at all or to maneuver the said motor bike P4879 to avoid hitting the defendant's said Toyota Hiace motor omnibus H902.*
- 6. Drove his motor bike too fast in all the circumstances.*
- 7. Failed to heed the presence of the motor omnibus driven by the defendant on the road.*
- 8. Failed to have regard to and pay heed to all the circumstances and condition of the road in which he was driving at the time.”*

[43] This Court finds that the defendant has successfully proved on a balance of probabilities that the collision was as a result of the deceased's negligence. It is ordered that judgment be entered for the defendant on the counterclaim

[44] It is settled law that special damages must be pleaded, particularized and be "strictly" proved.¹¹ The onus is therefore on the defendant to prove his loss on the counterclaim.

[45] The defendant on the counterclaim alleged damage to his vehicle's:

- 1 Front bonnet severely bent and twisted*
- 2. Front bumper bent severely*
- 3. Right headlamp severely cracked*
- 4. Front windshield smashed*

¹¹ Grant v Motilal Moonan Ltd (1988) 43 WIR 372 per Bernard CJ

5. Air filter housing broken
6. Right side step broken
7. Number plate broken”

[46] In his Evidence-in-Chief he claimed damages, including special damages as follows:

<i>“Costs of parts</i>	<i>\$ 8093.62</i>
<i>Costs of sundries and parts</i>	<i>\$ 650.00</i>
<i>Labour costs of repairs</i>	<i>\$ 2500.00</i>
<i>Loss of use for 95 days at \$400.00 net per day</i>	<i>\$38,000.00</i>
<i>Depreciation</i>	<i><u>\$ 5000.00</u></i>
<i>TOTAL</i>	<i><u>\$54,243.62”</u></i>

[47] In written submissions¹² to the court on this issue Counsel for the claimant did not take issue with the particulars of damage to the defendant’s vehicle as pleaded. Counsel however submitted that the court should find that the defendant has not proved most of his special damages. She emphasized to the court that the defendant had provided no documentary evidence to substantiate his evidence that his bus made an average of \$400.00 per day or the means by which he had arrived at that figure or indeed of the earning capacity of his vehicle. She therefore concluded that the court should find that the defendant’s claim for loss of use should fail. She also contended that there being no documentary evidence of the value of any depreciation to the defendant’s vehicle as a result of the accident, that the court should likewise reject this evidence and find that the claim for depreciation had not been proved.

[48] At trial the defendant admitted during cross examination that although he did have a document from his insurance in support of his claim for depreciation that that document was not tendered into evidence by him. There was no other basis before the court to substantiate his claim for depreciation in the amount of \$500.00.

¹² Claimant’s written closing submissions filed on 28th July 2015

- [49] On the issue of loss of use, the defendant testified that he worked his bus for about sixteen (16) hours per day, seven (7) days a week except Sundays when he may go to church. He maintained that he received approximately \$400.00 per day from the use of his bus immediately before the accident. The defendant stated that he had received monies for loss of use of the vehicle from his insurance company after the accident, but only to cover a period of two weeks. He stated that the figure that was applied by his insurance company in relation to the loss of use was \$400.00 per day.
- [50] The defendant did not provide any documentary evidence to substantiate this amount. Nor did he call any independent evidence to assist in this regard. The court is therefore left to determine this matter only upon the credibility of the defendant's oral evidence.
- [51] Halsbury's Laws of England¹³ states the basic rule that where a profit-earning chattel that is used by the plaintiff in the course of his business is damaged or destroyed, the plaintiff is entitled to loss of profits during a reasonable period of repair. The defendant was adamant at trial that the parts to repair his vehicle could not be sourced on island and it is for this reason that there was some considerable period before repairs could be completed. The defendant's claim in the instant matter, as stated at paragraph 46 above, was for loss of use for a period of 95 days.
- [52] At trial the defendant did not pursue his claim for "*sundries and parts*", as set out in his counterclaim, and with respect to that part of the claim relating to the costs for parts, he indicated that he purchased the parts for the sum of \$6651.31 and not \$8093.62 as originally claimed. The defendant also provided receipts for repairs, to the vehicle totaling \$2500.00. The claimant did not dispute these receipts. In cross-examination the defendant further revealed that he had recovered some

¹³ 4th Edition at paragraph 88

monies from his insurance for the damages sustained to the vehicle as a result of the accident. He put the figure that he recovered in the range of over \$10,000.00.

[53] The court notes that Counsel for the defendant did not address the issue of damages in his written closing submissions.¹⁴

[54] It is the court's view that the defendant has not sufficiently proved his damages as particularized in his counterclaim relating to depreciation and loss of use. That the defendant has suffered loss and damage to his bus is not in doubt. For this reason the court will award nominal damages only in relation to the unproved value of this loss. Such a nominal special damage award in this case is in the court's view the sum of \$1500.00 for depreciation and \$10,000.00 for loss of use. The defendant is further awarded the sum of \$6651.31 for the costs of parts and \$2500.00 for the costs of repairs.

[55] The claimant is to pay to the defendant the sum of \$20,651.31 as special damages with interest at the rate of 5% per annum on that sum from the date of judgment until payment in full.

[56] Costs to the defendant to be prescribed cost pursuant to **CPR 65.5**.

Marlene I. Carter
Resident Judge

¹⁴ Defendant's written closing submissions filed on the 24th July 2015.