

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2018-04488

BETWEEN

ERROL PHILL

**(appointed Administrator Ad Litem of the Estate of NICHOLAS KERVIN PHILL
otherwise NICHOLAS PHILL, Deceased, pursuant to the Order of the Honorable
Mr. Justice R. Mohammed made on November 20th 2018)**

Claimant

AND

RAJESH RAMSAMOOJ

First Defendant

JAZCO CONTRACTING SERVICES LIMITED

Second Defendant

SAGICOR GENERAL INSURANCE COMPANY LIMITED

Third Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Mr. Phillip A. Wilson instructed by Ms. Andesha M. Germain
for the Claimant

Ms. Amina Maaria Hasnain-Mohammed instructed by Ms.
Andrea Orie for the Defendants

Date: 1 April 2022

JUDGMENT

The Claimant's Case

1. This claim involves a fatal motor vehicle accident, which led to the death of Nicolas Phill ("the deceased") who was twenty-five (25) years of age at the time. The claimant, the father of the deceased and the Administrator Ad Litem of his estate, commenced proceedings against the defendants, for the injuries and loss caused by the first defendant.
2. The first defendant was the driver of motor vehicle registered as TCC 2491 ("the truck"), and the second defendant was the registered owner of the said vehicle.
3. The third defendant was joined as a party in these proceedings as the insurer of the truck. By the Policy of Insurance issued by the third defendant to the second defendant, the third defendant agreed to insure the second defendant in respect of any liability arising out of the use of motor vehicle TCC 2491 on a public road in Trinidad and Tobago as required under the Motor Vehicle Insurance (Third Party Risks) Act Chapter 48:51. Accordingly, the third defendant is liable to indemnify the second defendant in respect of any damages, interest and costs awarded to the claimant.
4. On the 3 December 2014 at approximately 3:30pm, the deceased was driving motor vehicle PBB 896 ("the car"), proceeding south towards Fyzabad on the left lane of the Siparia Old Road. The first defendant while driving the truck, was on the right lane proceeding north on the Siparia Old Road.
5. The claimant's case is that upon reaching the bottom of Robert Hill, the left wheel of motor vehicle TCC 2491 became stuck in mud, which caused the first defendant to negligently swerve and cross unto the lane for the

traffic going in the opposite direction. Consequently, the first defendant collided head on with motor vehicle PBB 896 causing the deceased to sustain fatal injuries, loss and damage.

6. The claimant contends that the accident and death of the deceased was caused by the negligence of the first defendant in his management and control of the truck by:
 - a. Failing to take sufficient care in handling and management of motor vehicle bearing registration number TCC 2491 by causing the said motor vehicle to swerve and cross unto the lane and path of motor vehicle bearing registration number PBB 896;
 - b. Failing to have or maintain adequate or effective control of motor vehicle bearing registration number TCC 2491;
 - c. Failing to stop, slow down, swerve or in any other way maneuver, manage or control motor vehicle bearing registration number TCC 2491 so as to avoid collision with motor vehicle bearing registration number PBB 896;
 - d. Failing to properly steer, swerve, slow down, brake, stop or otherwise control of maneuver motor vehicle bearing registration number TCC 2491 in sufficient time or at all so as to avoid collision with motor vehicle bearing registration number PBB 896;
 - e. Failing to apply brakes in time or at all and/or steer or control motor vehicle bearing registration number TCC 2491 so as to avoid collision with motor vehicle bearing registration number PBB 896;
 - f. Failing to take proper care so as to avoid collision with motor vehicle bearing registration number PBB 896;
 - g. Failing to keep a proper distance;
 - h. Failing to keep and/or maintain a proper lookout;
 - i. Failing to have any or proper regard for other road users;

- j. Driving at an excessive and/or improper speed having regard to the circumstances;
 - k. Failing to give any or adequate thought to the maneuver which you were performing;
 - l. Driving without due care and attention;
 - m. Driving in a reckless and dangerous manner in the circumstances; and
 - n. The claimant will further rely on the happening of the accident as evidence in itself of the first defendant's negligence.
7. As a consequence of the allegations of negligence, the claimant claims against the first and second defendants:
- a. Damages for loss in the Estate of the deceased resulting from the negligence of the first named defendant;
 - b. Loss of expectation of life;
 - c. Loss of income earning years;
 - d. Damages for the dependents of the deceased under the provisions of the Compensation for Injuries Act Chapter 8:05;
 - e. General Damages;
 - f. Special Damages;
 - g. Costs;
 - h. Interest at the statutory rate of 12% per annum from the 3rd day of December to the date of judgments pursuant to the Supreme Court of Judicature Act Chapter 4:01; and
 - i. Such further and/or other reliefs as the nature of the case may require and as the Court may deem just.
8. The claimant further claims against the third defendant:
- a. A declaration that the third named defendant is liable to satisfy the or any judgment that is obtained against its insured, the second

named defendant, in addition to all the costs and interest payable in respect of such judgment and any other costs for which its insured, the second named defendant may be liable;

- b. An order that it do pay to the claimant the or any judgment that is obtained against its insured, the second named defendant, in addition to all costs and interest payable in respect of such judgment and any other costs for which its insured, the second named defendant may be liable;
- c. Loss of expectation of life;
- d. Loss of income earning years;
- e. Damages for the dependents of the deceased under the provisions of the Compensation for Injuries Act Chapter 8:05;
- f. General Damages;
- g. Special Damages;
- h. Costs;
- i. Interest at the statutory rate of 12% per annum from the 3rd day of December to the date of judgments pursuant to the Supreme Court of Judicature Act Chapter 4:01; and
- j. Such further and/or other reliefs as the nature of the case may require and as the Court may deem just.

The Defendants' Case

- 9. The defendants admit that a collision occurred between motor vehicles TCC 2491 and PBB 896 near Robert Hill Siparia. However, the defendants aver that the deceased caused the collision when he veered onto the northbound lane of the wet roadway and continued thereon downhill at a fast speed into the path of motor vehicle TCC 2491, a dump truck, which at the time was carrying a load of sand dirt.

10. In response, the first defendant pulled left, partly off the roadway, applied brakes, which caused the truck to slow down. The first defendant then sounded his horn at the deceased, whose head was down at the time. Subsequently, the deceased raised his head but did not and/or could not at that point prevent motor vehicle PBB 896 from colliding violently with motor vehicle TCC 2491 on the latter's left and proper lane.
11. Motor vehicle PBB 896 upon colliding with the front of motor vehicle TCC 2491 continued travelling under the cab of the latter vehicle and exited on the right side of it. Motor vehicle PBB 896 then spun around and eventually came to a stop at the back of motor vehicle TCC 2491, which at that time had already come to a stop.
12. Due to the nature and/or severity of the impact of the said collision, the right front tires of motor vehicle TCC 2491 burst and the left front tire was dislodged from the rim. What is more, the air brakes system and steering controls were damaged and/or otherwise affected, rendering it impossible for the first defendant to maintain effective control of motor vehicle TCC 2491 after the impact. In those circumstances, the defendants aver that motor vehicle TCC 2491 came to a stop across the roadway after the collision without any negligence on the part of the first defendant.
13. The defendants pleaded that the subject collision was caused wholly and/or in part by the negligence of the deceased in the driving, management and/or control of motor vehicle PBB 896 by:
 - a. Driving too fast in the circumstances;
 - b. Failing to keep any or any proper lookout;
 - c. Driving, drifting, veering and/or swerving from his proper lane and onto the first defendant's proper northbound lane thereof;

- d. Failing to remain on and/or return to his proper southbound lane of the roadway;
- e. Failing to observe and/or appreciate in time or at all the presence, proximity and/or pathway of motor vehicle TCC 2491 which was lawfully proceeding in the northbound lane;
- f. Colliding with motor vehicle TCC 2491 on its northbound and proper lane;
- g. Driving with is head down;
- h. Failing to have or maintain any or proper, effective and/or adequate control of motor vehicle PBB 896;
- i. Failing to brake in time or at all;
- j. Failing to steer a proper course;
- k. Driving without due care and attention;
- l. Failing to stop, slow down, steer, maneuver, manage and/or control motor vehicle PBB 896 sufficiently or at all, so as to avoid the subject collision;
- m. Driving in a reckless and/or dangerous manner in the circumstances;
- n. Creating an emergency situation in which, in spite of all that the first defendant did, or could reasonable have expected to do in the circumstances, he could not prevent PBB 896 from colliding with TCC 2491; and
- o. Failing to appreciate in time or at all the presence of water on the roadway.

The Issues

14. The main issues for the court's determination are whether:

- a. The accident which occurred on the 3 December 2014 along the Siparia Old Road was due to the negligence of the first defendant;
and
- b. The estate of the deceased is entitled to any damages.

The Evidence

15. The claimant and Mr. Clint Baksh testified in support of the claimant's case. The first defendant was the sole witness to proffer evidence for the defendants.

- Clint Baksh

16. This witness knew the deceased to be a taxi driver. Mr. Baksh would often observe the deceased waiting for passengers on the Fyzabad taxi stand in Siparia and at times, he travelled with him.

17. On the 3 December 2014, Mr. Baksh was the front seat passenger of a taxi travelling from Siparia to Fyzabad along the Siparia Old Road. The taxi was traveling behind a white truck TCC 2491. That day was sunny and the traffic was a little busy.

18. Upon approaching Robert Hill, the witness saw that the truck attempted to go around a bend on the left side of the road. The left rear wheel of the truck slipped off the road and the truck swerved going over into the other lane for vehicles heading to Siparia. There was a pool of water and sand and what looked like a water leak at the right side of the roadway.

19. Simultaneously, another car PBB 896 was proceeding in the opposite direction down Robert Hill along the Siparia Old Road heading towards Siparia. The witness avows that he saw the driver of the truck cross over

to the opposite lane of the roadway and onto the path of the oncoming car PBB 896.

20. Mr. Baksh suddenly called out to his taxi driver who was at the time bringing his vehicle to a stop. Vehicle PBB 896 began to pull to the left attempting to avoid contact with the truck however, the truck's both front wheels rode over the car as they collided.

21. Mr. Baksh jumped out of the taxi and on approaching PBB 896 saw that the driver was sitting motionless in the car with both his hands still on the steering wheel and his head barely on his shoulders. The driver of the truck then exited his vehicle and was holding his head with both hands shouting out, "Boy I now kill ah man dey I wrong yuh no, I wrong boy, I wrong."

22. Mr. Baksh with the assistance of another man pulled off the left front door of the car PBB 896 took out a young man and placed him on a pallet to lie down. The young man then provided a number for his mother to whom Mr. Baksh called.

23. Inside motor vehicle PBB 896 there was a limp body of another young man located behind the driver's seat who appeared to be dead; there were also two girls.

24. Mr. Baksh waited until the police arrived and saw that they viewed the scene without exiting the police vehicle and drove away. Mr. Baksh asked the police if they were not going to do anything but they got back into their vehicle and drove off leaving the two girls and young man in the vehicle.

25. The witness did not speak to the truck driver who was talking on his cellphone. Mr. Baksh then left the scene and went home. Sometime thereafter, Mr. Baksh contacted the claimant and spoke to him.

- Errol Phill

26. Mr. Phill, father of the deceased, was appointed Administrator Ad Litem of the estate of the deceased pursuant to the order of the Honourable Justice R. Mohammed made on the 20 November 2018. The witness' evidence is that the deceased was born on the 31 August 1989 and was twenty-five (25) years of age at the time of the accident and his death. At that time, the deceased was a self-employed taxi driver.

27. Sometime in the afternoon of the 3 December 2014, Mr. Phill received a call that his son was in an accident. Mr. Phill rushed to the scene and saw that his son was still lying in his car with both hands on the steering wheel and his head cut off. The deceased's car was smashed and Mr. Phill saw a white truck bearing registration number TCC 2491. Mr. Phill remained on the scene of the accident until the deceased's body was removed from the car and taken away.

28. The next morning Mr. Phill went to the San Fernando General Hospital where he identified his son's body.

29. Later that week, Mr. Phill buried his son at the Siparia Cemetery. Nine Hundred and Forty Dollars (\$940.00) was spent on the deceased's wake and Six Thousand and Nine Hundred Dollars (\$6,900.00) was spent on the funeral.

- Rajesh Ramsamooj

30. During the period 2014 to 2016, the second defendant employed Mr. Ramsamooj as a Heavy T driver. Mr. Ramsamooj drove various ten tonne trucks including the dump truck in these proceedings along with a water truck and a flatbed truck.

31. On the 3 December 2014, Mr. Ramsamooj was driving the second defendant's dump truck TCC 2491 assigned to him. The witness says that he was accustomed driving this truck and was never involved in any other accident apart from the subject collision of these proceedings.
32. On the 3 December 2014, Mr. Ramsamooj's job involved taking truckloads of "sand dirt" from a Quarry in Siparia to the Oropouche roundabout, where ongoing highway works were being done. On average, the first defendant made four trips in a day and it was not the first time he performed this job.
33. Mr. Ramsamooj commenced work that day at about 7:00am. At about 3:30pm, Mr. Ramsamooj was making his way to the Oropouche roundabout with a full load of sand dirt. He was driving north along the Siparia Old Road in an area known as Robert Hill. The witness' evidence was that the roadway in that area is approximately 18 feet wide and is not entirely flat as there is an incline.
34. Before the first defendant approached the incline, he was driving in third gear at approximately 30 miles per hour. However, to go up the incline the first defendant put the truck in a lower gear, which resulted in the truck having more power but was moving at a lower speed. At the time of the accident, Mr. Ramsamooj engaged the truck in its second gear.
35. Although it was not raining on the material day, both lanes of the roadway were wet due to a ruptured water line further up the road. Because the first defendant noticed the wet roadway whilst making his earlier trips throughout the day, he was mindful of it at the material time.
36. The first defendant averred that as he was proceeding up the incline, he observed a white car speeding down the incline and crossing over the

white line onto his side. The said car kept proceeding towards the first defendant while the driver's head was down. Mr. Ramsamooj stated that he immediately began to pull to the left, applying brakes and sounded his horn. Upon sounding his horn, the driver of the white car raised his head up but instead of pulling his car to the left, he slammed into the right front of the truck, which was still travelling forward.

37. Although he applied brakes, Mr. Ramsamooj indicated that a dump truck such as the one in question operates with air brakes and does not stop immediately.

38. When the car struck the right front of the truck, it did not come to an immediate stop as the first defendant felt the car pass under the cab of the truck. He felt as though the right front wheel of the truck was being pushed back and the left front wheel was moving forward. Mr. Ramsamooj felt and saw the truck moving to the right at an angle across the roadway, but was unable to do anything to stop it. At that point, the steering felt light in his hand and it locked, preventing the first defendant from controlling the direction of the truck. The truck came to a stop across the roadway and faced northeast. The white car then came out from under the truck on the right side and spun around before it came to a stop at the back of the truck.

39. The first defendant denied that the left front wheel of his truck was stuck in mud causing him to swerve or drive the truck across the roadway colliding with the white car on its lane. This witness' evidence is that the dirt on the side of the road was dry and hard.

40. What is more is that the first defendant says that the truck never collided with the white car on the southbound lane. The point of impact was on his lane because the said car came across to that lane. The left side of the truck

was about one foot off the northbound roadway and ended up across the roadway after the vehicles collided. Mr. Ramsamooj asserted that he never lost control of the truck before the collision, but due to the impact, he was not able to steer the truck to keep it on the left lane.

41. At the scene of the accident, the first defendant pointed out where the truck was at the point of the impact and police officers took measurements. After speaking to the police officers, Mr. Ramsamooj walked around the truck observing the damage. The right front tire of the truck was ruptured. The air in the left front tire went down and the rim became exposed, which caused a dig mark in the roadway. The first defendant then picked the pieces of the chassis' front spring off the ground and further observed that the front bumper, grill, right headlight and gearbox were all badly damaged. The air tank was ruptured and the steering and brakes systems of the truck were also damaged due to the impact.

42. The truck was wrecked to the Siparia Police Station on the same day where the first defendant made a report of the accident. The first defendant was then requested to return to the police station to provide a detailed report statement about what had happened and he did so on the 8 December 2014. On the 8 December 2014, Mr. Ramsamooj related the events that occurred on the day of the accident and the interviewing officer wrote what he was saying. The interviewing officer then read over the statement and the first defendant confirmed its truth and affixed his signature at the bottom of each page.

Findings of Fact

43. In arriving at its findings of fact, the court considered the learning in *Horace Reid v Dowling Charles and Percival Bain*¹ cited by Rajnauth-Lee J (as she then was) in *Winston Mc Laren v Daniel Dickey and Ors*². In determining the version of the events more likely in light of the evidence, the Court is obliged to check the impression of the evidence of the witnesses on it against the: (1) contemporaneous documents; (2) the pleaded case; and (3) the inherent probability or improbability of the rival contentions.

44. The Court of Appeal in *The Attorney General of Trinidad and Tobago v Anino Garcia*³ took the position that in determining the credibility of the evidence of a witness, any deviation by a party from his pleaded case immediately calls his credibility into question.⁴

45. The court noted some inconsistencies in the claimant's evidence and pleaded case.

46. The claimant's pleaded case is that on the material day, motor vehicle PBB 896 was proceeding south on the left lane of the Siparia Old Road towards Fyzabad. The first defendant in control of TCC 2491 was on the right lane proceeding north on the said road towards Siparia. Mr. Baksh's witness statement was that he was the front seat passenger of a taxi travelling from Siparia to Fyzabad along the Siparia Old Road behind a white truck TCC 2491.

47. Under cross-examination when he was asked whether his taxi and the truck were travelling on the northbound lane he stated that he was going

¹ Privy Council Appeal No. 36 of 1987

² CV2006-01661

³ Civ. App. No. 86 of 2011 at paragraph 31

⁴ As cited by Madame Justice Margaret Mohammed in CV2017-01900 *Prakash Thackoor v Sarah Ramdeen* at paragraph 15

to Fyzabad and that he did not know if that was the northbound lane.⁵ The evidence demonstrates that the witness and truck were in fact travelling north towards Fyzabad and PBB 896 in the opposite lane was travelling south but not towards Fyzabad as pleaded but towards Siparia.

48. The evidence whether the deceased was heading to Fyzabad or Siparia is of no consequence. The final destination of the deceased and the first defendant are not material. What is material is the relative positions of the vehicles on the roadway at the time of the collision. On this, there is agreement. Both the claimant and the defendants agree that the truck and the vehicle driven by the deceased were travelling in opposite directions when the collision occurred.⁶ What is at issue is whether the deceased drove into the path of the first defendant or whether the first defendant lost control and so negligently drove the vehicle as to have caused the collision.

49. Mr. Baksh gave inconsistent evidence as it related to the front wheels of the truck he saw rolling over the car. In his witness statement at paragraph 10, Mr. Baksh indicated that the both front wheels of the truck rode over the car. Under cross-examination, Mr. Baksh stated that while in the taxi, he could see the left front wheel of the truck but not the two wheels. When counsel for the defendant put Mr. Baksh's witness statement to him, he questioned whether he stated both front wheels and averred that he said the back wheel in his statement – i.e. that the back wheel rolled over the car and broke the windscreen. When the witness was shown his witness

⁵ Trial Notes page 33 lines 9 - 13

⁶ Paragraphs 11 of re-amended statement of case, and 9 of amended defence. Paragraphs 8 of witness statement of Clint Baksh and 9 of the witness statement of Rajesh Ramsamooj.

statement, which said that both front wheels rode over the car he agreed that was correct and that was what he saw.⁷

50. The court is satisfied on the evidence given by Mr. Clint Baksh. Mr. Baksh was in a position to observe what occurred. He saw the maneuver with sufficient time to shout to the person driving his taxi before the collision. The court believes that the witness' recounting of the finer details could have been impacted by the passage of time. He however accepted that the account given in his witness statement was correct.

51. Mr. Baksh gave contrary evidence in relation to the direction of the truck after the accident. Under cross-examination, the witness indicated that when the accident happened, "the truck face back Siparia" and "the truck face my taxi face-on"⁸. However, the contemporaneous photographs, which the claimant agreed under cross-examination is what he saw when he came on the scene after the accident happened, showed that the truck was not facing the taxi in a southerly direction towards Siparia, but in an easterly direction across the Siparia Old Road. It is clear, from evidence already considered, that Mr. Baksh gets confused about directions. This inconsistency is easily resolved by resort to the pictures taken on the scene on the day of the accident.

52. Paragraph 12 of the claimant's pleaded case stated that the left front wheel of motor vehicle TCC 2491 was stuck in mud causing the driver of the said vehicle to negligently swerve and cross unto the lane for traffic going in the opposite direction. Under cross-examination, the claimant admitted that he was not there at the time of the accident, he did not see that and there was a lot of speculation going on at the time. He agreed that

⁷⁷ Trial notes pages 39 - 40

⁸ Trial notes page 39

it was someone else who gave him that information about the truck's left front wheel being stuck.⁹ Nevertheless, the claimant eventually said that the wheel was not stuck in the mud.¹⁰ From all accounts, the claimant was not present, the court placed no reliance on this evidence. The only eyewitness Mr. Baksh said in his witness statement and in cross-examination, that the left rear wheel that was stuck in mud.

53. In his witness statement, the claimant averred that the deceased was a single man with no children, however, under cross-examination the claimant admitted that this was not true as he did in fact have one child.¹¹ The issue of paternity of any offspring of the deceased is beyond the scope of the dispute in this case.

54. In arriving at its finding of fact, the court also considered the admissions made by Mr. Baksh. Under cross-examination, Mr. Baksh indicated that while in the taxi he was under the influence of a drug and as a result, he could not see 100 percent anything ahead of the truck because he was focused, "When you have drug, you does be focus".¹² In fact, Mr. Baksh's admission may well strengthen his evidence. He was focused only on what was ahead of him and that was the vehicle driven by the first defendant and the maneuvers made by that vehicle.

55. While Mr. Baksh insisted that, he could still see what was going on ahead of the truck¹³ the court found on a balance of probabilities that his view would have been impeded by the truck itself. Under cross-examination, Mr. Baksh agreed that if there was something ahead of the truck that

⁹ Trial notes page 10 and 11

¹⁰ Trial notes page 12 line 26

¹¹ Trial notes page 27 lines 15 – 25

¹² Trial notes page 35

¹³ Trial notes pages 35 and 36

caused it to move over to the left i.e. slightly off the road he would not have been able to see.¹⁴

56. However, whether or not there was something ahead of the truck, is not a relevant factor in the court's exercise. The first defendant's case is not that there was something ahead of him that caused him to swerve. Rather the first defendant has asserted that the deceased drove into his path. This assertion Mr. Baksh has dispelled with his eyewitness account of what occurred.

57. On 3 December 2014, the truck driven by the first defendant was situated on the northbound lane and the car driven by the deceased was on the southbound lane, travelling in opposite directions.

58. Around 3:30pm that day, although there was no rain, the vicinity of Robert Hill was wet due to a water leak. Water was observed gushing down the hill, running across the road from the southbound lane to the northbound lane settling in the sand where the truck was proceeding.¹⁵ Around this time, the first defendant in control of the truck was located at the bottom of Robert Hill. The first defendant put the truck in a lower gear to attain more power to proceed up the hill.

59. The first account of what the first defendant said about the collision comes from Mr. Baksh. After witnessing the collision, Mr. Baksh jumped out of the taxi, even before the driver came to a complete stop. He then saw the driver of the truck exit the truck. The driver was holding his head with both

¹⁴ Trial notes page 36 lines 28 - 34

¹⁵ Cross-examination of Clint Baksh, trial notes pages 36 and 37; witness statement of Rajesh Ramsamooj at paragraph 8

hands and bawling out “Boy I now kill ah man dey I wrong yuh no, I wrong boy, I wrong”.¹⁶

60. This statement was admitted into evidence by virtue of the Hearsay Notice filed by the claimant on the 17 August 2021. It appears to be a spontaneous reaction by the first defendant about what had just occurred. It supports the observations made by Mr. Baksh.

61. The first defendant’s first account of the events that took place is in his statement to the police.¹⁷ The statement was made on the 8 December 2014, five days after the collision, the first defendant indicated:

“The vehicle came down the hill with some pace and passed the middle of the roadway. When I saw the vehicle was coming to my lane, I pulled the vehicle to the extreme left off the roadway and sounded the horn on my truck when the other vehicle was coming towards my truck. I saw the driver raised his head and afterwards the vehicle collided with the front of my truck. When the vehicle collided with the truck, my steering locked causing the truck to stop length way across the roadway. I came out of the truck. I went by the car PBB 896 which came to a stop a short distance away from my truck and saw the car was badly damaged.”

62. The first defendant indicated that he did swerve to the extreme left of the roadway when the car driven by the deceased came into his lane. There is no indication from him that the truck had at anytime come off the roadway. He gives the impression that he pulled to the left of his lane. However, on the state of the evidence, the court did not believe the first defendant that the deceased veered the car onto his lane and that he pulled the truck to the left. Had he pulled the truck to the left, the truck would have been to the left at the point of the collision.

¹⁶ Witness statement of Clint Baksh, paragraph 12

¹⁷ Witness statement of Rajesh Ramsamooj Exhibit “R.R.2”

63. The court considered whether Mr. Baksh was a credible witness. Mr. Baksh gave his witness statement some six years after he witnessed the events and it is human nature for memories to fade. The court also considered the nature of the incident; the horrific scene of the collision and of seeing the deceased almost decapitated and in a sitting position with both hands still holding the steering wheel of the car. The court finds it was more likely than not to have left an indelible impression on the average human being.

64. The court considered further, that Mr. Baksh of his own volition approached the claimant to tell him what he witnessed. Mr. Baksh has no interest in the outcome of this case. When he was unsure, he said so when he realized he made a mistake, he admitted it. When he believed it was important to say he was high, he said so. Mr. Baksh's evidence is that what he told the claimant a few weeks after the incident and what he related to the court were the same. It was what he witnessed. Barring lapses explainable by the passage of time, the court accepted Mr. Baksh as being a credible witness.

65. Mr. Baksh's eyewitness account was that he saw the truck going around a bend on the left side of the road and the left rear wheel of the truck slipped off the road. Under cross-examination, the witness clarified that when he said, "slip off the road" he meant that the left rear wheel of the truck moved slightly off the roadway causing the truck to swerve off the road. Thereafter, the first defendant tried to regain control of his vehicle.¹⁸ Mr. Baksh further explained that he saw the truck first move to the left slight off the roadway and then swerve to the right southbound side of the road. Mr. Baksh also indicated, "So when that [water] crossing that road

¹⁸ Trial notes page 33 lines 26 - 38

depends on your vehicle or how you maneuvering to take your corner your vehicle will come off the road”.¹⁹

66. The court considered the contemporaneous photographs of the scene. They depicted the respective positions of the vehicles after the collision. The first photograph attached to the first defendant’s witness statement²⁰ demonstrated that the truck was not on the northbound lane it was travelling on but on the opposite southbound lane facing an easterly direction. The rear left wheel was on the dividing white line of the roadway with the tail of the truck projecting on to the northbound lane.

67. Based on the position of the truck, the court was satisfied on a balance of probabilities of the eyewitness account given by Mr. Baksh. The first defendant indicated that when he saw the car speeding down the incline and crossing over onto his lane, he pulled his truck to the extreme left of the roadway, applied brakes and sounded his horn. Had the first defendant pulled to the extreme left the truck would not have been in the position it was after the collision.

68. The police arrived on the scene shortly after the collision. The police report was adduced into evidence by virtue of a Hearsay Notice filed by the claimant. The police report contained in the Station Diary Day Duty documented the position of the vehicles. The car was facing in a northerly direction, the deceased’s body was still in the vehicle. The truck was facing an easterly direction across the roadway. The truck had damages to the left tyre, right tyre, axle, front and damages to the right side. The officers recorded the information given to them by the first defendant:

¹⁹ Trial notes pages 36 - 37

²⁰ At exhibit “R.R.1”

“he was proceeding in a northly direction along Robert Hill, Siparia, heading towards Fyzabad direction. Within the vicinity of Light Pole 45 observed vehicle PBB 896 proceeding the opposite direction skidded on the wet roadway, causing the said vehicle to loose control. The said driver further stated he pulled to the extreme left side of the roadway to avoid collision but the said vehicle collided with his truck and spunned on the roadway”²¹

69. This account recorded by the police officers, does not accord with the first defendant’s pleadings nor his evidence that the deceased was speeding down the hill with his head down.

70. The first defendant did drive with due care and attention when he drove the truck around the corner. As a result the truck ran off road.

71. The first defendant immediately pulled the truck to the right of the road. However, since the first defendant was at the time not in full control of the truck, when he attempted to steer the truck back onto the northbound lane, he swerved past his lane across into the southbound lane in which the deceased was proceeding.

72. The first defendant was well aware of the conditions of the roadway. It was not the first trip he had made along that route that day, he had made several trips before.²² He knew the lay of the land and the conditions of the road. On those earlier trips, while the weather was not rainy, the first defendant noticed that the roadway was wet, there was a burst water line further up the road.²³ This is consistent with the evidence given by Mr. Clint Baksh. Mr. Baksh’s evidence in chief is that there was a pool of water and what appeared to be a water leak.²⁴ Mr Baksh’s said in answer to

²¹ Trial bundle, page 356.

²² Paragraph 4 of first defendant’s witness statement.

²³ Paragraph 8 of the first defendant’s witness statement.

²⁴ Paragraph of Clint Baksh’s witness statement

questions in cross-examination, that the rear left wheel went off the road into mud. According to Mr. Baksh, there was mud as a result of the water leaking and pooling at a particular point. Further, according to Mr. Baksh water was gushing down the hill in front of the truck.

73. Mr. Baksh said the deceased was in control of the car and never lost control of it before the collision.

74. The position of the car after the collision does not satisfy the court on a balance of probabilities that the deceased was accelerating while going downhill or driving at a fast rate of speed. The position of the deceased's car is more likely a result of the fact that it collided with a ten-ton truck. Further, based on the first defendant's sudden maneuver, it seems likely that the deceased had little opportunity to take any evasive actions before the truck was literally on top of the car. The court has not found favour with the first defendant's version of how the incident occurred. Similarly, the court has disregarded the evidence given by the first defendant that the deceased was speeding down the hill.

The Law and Analysis

75. To be successful in a claim for negligence, the claimant must establish that: (1) there is a duty of care owed by the defendant to the claimant; (2) the defendant breached that duty of care; and (3) damage was suffered by the claimant consequent to the defendant's breach.²⁵

76. In the case of CV2011-01911 *Angela Mitchell v Leon Brown and others*²⁶ Justice Rahim recited the duty of care a driver of a motor vehicle owes to other road users:

²⁵ Charlesworth & Percy on Negligence 13th Edition Chapter 1 at paragraph 1-19

²⁶ At paragraph 38

“The duty is to take reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the road. The standard of care which road-users must exercise is that of the reasonable road-user. The reasonable driver is not entitled to assume that other road-users will exercise the appropriate degree of care, and if their conduct is within the realm of foreseeability they will be liable for injury: Common Law Series: The Law of Tort. Chapter 13, paragraphs 13.53.”

77. The court accepts the defendants’ submission that the standard of care is one of reasonableness and not perfection and therefore care must be taken not to impose any higher duty on the driver.²⁷ In *Ahanonu v South East London and Kent Bus Co. Ltd.*²⁸ Laws L.J emphasized:

“The Judge, as my Lord has said, has in effect sought to impose a counsel of protection on the bus driver...” Such an approach I think distorts the nature of the bus driver’s duty which was of cause no more nor less than a duty to take reasonable care. There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant’s safety than a duty to take reasonable care.”

78. Justice Rahim at paragraph 40 of his judgment *Angela Mitchell* [supra] indicated that reasonable care in this context connotes the observation of traffic rules and regulations. Failure to comply with these rules and regulations is a matter to be taken into account in deciding whether there was negligence.²⁹ The learned Judge highlighted section 38(5)(2) of the Motor Vehicle and Road Traffic Regulations Part VII which states:

“When meeting other vehicles he shall keep as close as possible to the left or near side of the road.”

²⁷ Civil Appeal No. 169 of 2008 and Civil Appeal No. 121 of 2008 *Singh v Ansola* at paragraph 16

²⁸ (2008) EWCA Civ. 274 at paragraph 23

²⁹ Charlesworth & Percy on Negligence 13th Edition Chapter 10 at paragraph 10-127

79. Importantly, there must be a causal connection between the defendant's conduct and the damage sustained by the claimant. Furthermore, the kind of damage suffered by the claimant must not be so unforeseeable as to be too remote.³⁰ The learned authors in *Charlesworth on Negligence*³¹ noted that the "but for" rule is generally the starting point in establishing the causal connection between the negligent conduct and the damage suffered:

"The Claimant seeks to show that but for the Defendant's negligence the injury complained of would not have arisen. If he succeeds, there is no additional requirement to show that the Defendant's negligence was the only, or the single or even chronologically the last cause of injury. This threshold "but for" test is based on the presence or absence of one particular type of causal connection: whether the wrongful conduct was a necessary condition of the occurrence of the harm or loss. The test does not distinguish between legally relevant and other causes, yet it is not its function to do this. It identifies whether the conduct in question was a cause. At this stage we do not need to concern ourselves with all the other factors which combined to produce the total environment in which the damage could happen."

80. Justice Kokaram in CV2015-00344 *Haroun Baksh v The National Gas Company of Trinidad and Tobago Ltd* cited the author Sarah Green in her text *Causation in Negligence* who simplified the basic causal principles as:

- A Defendant will only be liable where she has on the balance of probabilities, made a difference to the Claimant's normal course of events.
- A Defendant will only be liable for that difference which on the balance of probabilities she can be determined to have made to the Claimant's course of events.
- A Defendant is entitled to take her victim as she finds her at the time of her breach of duty."

³⁰ Clerk & Lindsell on Torts 19th Edition Chapter 8 at paragraph 8-04

³¹ At paragraph 6-04 cited by Justice Kokaram in CV2015-00344 *Haroun Baksh v The National Gas Company of Trinidad and Tobago Ltd* at paragraph 89 of his judgment

81. The defendants submitted that if the court finds negligence on the part of the first defendant, they claimed contributory negligence on the part of deceased based on a finding of speed, inattention and loss of control. In the case of CV2017-00083 *Jeremy Baptiste v Paramount Transport & Trading Company Limited*, Justice Harris succinctly quoted the principle of contributory negligence and the pertinent aspects of the law:

“13. As stated in Charlesworth & Percy on Negligence, 12th Edition, (4-03) Contributory negligence 'applies' solely to the conduct of a claimant. It means that there has been some act or omission on the claimant's part which has materially contributed to the damage caused and is of a nature that it may properly be described as negligence. For these purposes, "negligence" is used in the sense of careless conduct rather than in its sense of breach of a duty.

14. The said Charlesworth & Percy (4-10) states that, "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonably prudent man, he might hurt himself; and in his reckonings he must take into account the possibility of others being careless."

82. There is no doubt the first defendant owed the deceased, and all other road users a duty of care. The duty owed was to take reasonable care to avoid causing damage to the deceased, other persons and their property of any kind while using the road. The law does not envision perfection. What is expected is that drivers and road users would take reasonable care to prevent damage and injury. If the damage caused is not foreseeable, then there is no negligence or liability. However, if it could be predicted that the actions in question would have led to damage, then it liability must be assigned.

83. His obedience to traffic rules and regulations is another indicator as to whether reasonable care was exercised by the first defendant.
84. In the instant case, the first defendant so managed the truck causing firstly, the rear left wheel to run off roadway and secondly swerved the truck onto the opposite lane of traffic in the path of a vehicle lawfully using the roadway. The court is satisfied to the extent that that the first defendant breached his duty of care.
85. Additionally, the first defendant failed to keep on his rightful northbound lane. Section 38(5)(2) of the Motor Vehicle and Road Traffic Regulations Part VII stipulates that when meeting other vehicles, the driver is obligated to keep as close as possible to the left side of the road. The first defendant is clearly in breach of this regulation as he steered the truck to the right side of the road, out of his rightful lane. This breach is also evidence that the first defendant failed in his duty of care.
86. There is no doubt that maneuvering a vehicle onto the lane of oncoming traffic heading in the opposite direction from which the vehicle is travelling, would cause a collision. As such, when the first defendant swerved onto the opposite lane he was travelling in, it was foreseeable that a collision with cars proceeding on that lane would occur. Therefore, the accident resulting in the death of the deceased was not too remote.
87. But for the first defendant swerving onto the opposite lane of traffic, the accident would not have occurred. According to the law, the wrongful act of the first defendant swerving onto the opposite lane, which made a difference in the deceased's normal course, is sufficient to prove causation in negligence.

88. The defendants are of the view that the deceased was contributorily negligent on a finding of him speeding, inattention and loss of control of his vehicle. The court already made a finding that the deceased was not speeding downhill on the day in question. The court found, neither that the deceased was inattentive, nor did he lose control of his vehicle. There is no evidence from which the court could find contributory negligence on the part of the deceased.

Other legal issues raised by the defendants

89. In addition to the main issues, the defendants raised two other legal issues. Firstly, whether the claimant is estopped from pursuing this claim and secondly, whether the pleadings are so narrow that the court cannot make any findings of fact favourable the claimant's case.

90. On the first legal issue, the defendants contend that with respect to liability for the subject collision, that issue was already determined by the admission of negligence and/or in the judgment on admission in CV2017-00447. Accordingly, the claimant is estopped from re-opening the same in this claim. Alternatively, the claimant's claim amounts to an abuse of process.

91. In the related matter of CV2017-00447 *Keith Lewis (As The Administrator Ad Litem of the Estate of Kia Trazae Lewis Deceased) v Keon Nelson, Motor One Insurance Company Limited, Jazco Contracting Services Limited and Sagicor General Insurance Incorporated*, the first defendant was the owner of the car and the first co-defendant was the insurer of the first defendant. The vehicle was driven by the deceased, whose Estate was not represented. The matter was settled on admission of liability made by the first defendant (owner of the car) and first co-defendant.

92. According to Zuckerman,³² the

“...the general doctrine of estoppel per rem judicatam consists of two distinct rules known as cause of action estoppel and issue estoppel. Cause of action estoppel implies that once a cause of action has been adjudicated, the parties to the proceedings are estopped from asserting or denying (as the case may be) that particular cause in any subsequent proceedings to which they are also parties....the related doctrine of issue estoppel holds that parties to legal proceedings are bound by the court’s finds of discrete issues that were essential to the final resolution of the proceedings in which the findings were made.”

93. This court is not bound by the admissions made in *Keith Lewis* (supra). The parties were not the same. The driver of the vehicle owned by Keon Nelson, the deceased in this claim, was not a party in *Keith Lewis* (supra). Further, the court made on findings on discrete matters in *Keith Lewis* (supra). The claimant cannot be estopped from reopening the issue of liability – these proceedings are not a reopening of the issue of liability by the claimant. These matters were not pleaded or asserted in the evidence in this case.

94. On the second legal issue, the defendants in its closing submission posited that based on the face of the evidence, it is not open to the court to find that the reason the first defendant swerved on to the southbound lane was due to the roadway being wet. In support of their submission, they relied on two authorities: *Paramount Dry Cleaners Ltd v Rita Bennet*³³ and *Newman v Whitbread plc*³⁴.

³² Zuckerman on Civil Procedure Principles of Practice 3rd Edition, paragraph 25.64

³³ (1974) 22 WIR 419

³⁴ (2001) EWCA Civ 326

95. In *Paramount* [supra] the respondent was a presser employed by the appellant laundry service. The respondent while at work sustained burns to her right hand and forearm.

96. The trial judge rejected the version of the accident advanced by the respondent but opined on another theory on how the respondent sustained the injury.

97. In allowing the appeal, the Court of Appeal of Jamaica held that there was no evidence on which the trial judge could have made the findings on the alternative theory. The Court of Appeal held that, in rejecting the account given by the respondent, there ceased to be any evidential basis to make the finds.³⁵ The court further held:

“that once the respondent’s evidence was rejected it was not open to the trial judge to assign a theory of his own as to the cause of the respondent’s injury. There could therefore be no justification for any debate as to the alleged failure in the appellant to provide a safe system of work. Although the respondent did plead such failure and particularised the factors alleged to constitute that failure, whatever evidence she gave as to the cause of her injury was totally rejected. There was, therefore no basis on which the trial judge could have found that her injury was due to a failure in the appellant to find a safe system of work.”

98. In *Newman* [supra] the claimant had recently returned to work when while walking through the premises, fell on an internal short flight of four stairs in a public part of the building. She claimed that her employers fell afoul of regulation 5(1) of the Workplace (Health, Safety and Welfare) Regulations 1992, in that the measurements in the construction of the short staircase showed that it was slightly distorted and twisted and the handrails were at different heights to each other.

³⁵ “Indeed this theory as to the cause of the accident was not, at any time, adumbrated by anyone during trial. It certainly was not suggested in the pleadings.” at page 423 para H

99. At the trial of the matter, the claimant put her case thus, that:

“The construction of the steps was such they did not accord with British standards. There had been a number of previous accidents on the steps and the variation in the risings and goings was such as to lead to a serious risk that an accident would occur which in the event of the claimant did occur.”³⁶

100. The trial judge found that none of the differences in the measurements of the goings and the risings or in the level of the handrails made any difference or specific contribution to the accident. There was no question of lack of familiarity or bad lighting. The judge then embarked on an unargued case for the claimant.

101. The Court of Appeal held that since the case was never advanced in the way the judge finally found it to be, it was plainly unfair to the defendants. The defendants did not have an opportunity of dealing with it and whether pleaded or not, it was not a live issue in the case. The case was not put in cross-examination, it was not referred to in the evidence called and no expert evidence was called. It was a totally new case introduced by the judge’s own construct only in his judgment and was not the claimant’s case. As such, the Court of Appeal allowed the appeal and decided the case in favour of Whitbread.

102. Upon examining the cases submitted, the court disagreed with the defendants on their application to the case at bar as they were distinguishable.

103. In the instant proceedings, the claimant’s evidence elucidated by Mr. Baksh, has not been rejected by this court. On the contrary, the court

³⁶ At paragraph 4

found Mr. Baksh to be a credible witness and was satisfied on a balance of probabilities of his eyewitness account of the manner in which the collision occurred.

104. While the pleadings were narrow, the issue of water was not proffered as a probable cause of the accident. Instead, it was fact relevant in relation to the conditions of the roadway. This was pleaded by the defendant.

105. Pleadings, according to Lord Wolf M.R. in *Mc Philemy v Times Newspaper Ltd and others*³⁷ as cited by Justice Harris in CV2017-03067 *Nickel's Sports Club and another v Nigel Scott* are not to be all consuming, rather:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together [at 793] with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the GENERAL NATURE of the case of the pleader [emphasis mine]. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction--Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.

³⁷ (1999) 3 ALL RE 775

As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest. Although in this case it would be wrong to interfere with the decision of Eady J, the case is overburdened with particulars and simpler and shorter statements of case would have been sufficient. Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged. In this case the distinct impression was given by the parties that both sides were engaged in a battle of tactics. Each side was seeking to fight the action on, what from that party's perspective appeared to be, the most favourable ground. The dispute over particulars was just being used as a vehicle for that purpose. If disputes of the nature which have occurred in this case are necessary, they should certainly not be dealt with in isolation. They should be dealt with at hearings where all the outstanding issues are resolved. I regret that it seems all too likely that in this case the decision on this appeal will be followed rapidly by a further bitterly fought interlocutory skirmish over the question of whether the case should be heard by a judge alone or a judge sitting with a jury. The defendants' delay in seeking leave may have contributed to the need for the additional hearing. However, proper case management by the parties required the consolidation of the three hearings. At a case management hearing, instead of a sterile argument as to whether a particular fact should or should not be pleaded as a particular of justification, if necessary and desirable, the issues to be decided at the trial could, failing agreement, have been identified by the court and a decision taken as to what evidence would be appropriate for this purpose".

106. The claimant's particulars of negligence as recited above in this judgment included that the first defendant was negligent in failing to take sufficient care in handling and management of the truck; failing to have or maintain adequate control of the truck; failing to stop, slow down, swerve or maneuver the truck; failing to keep a proper lookout; failing to give any

or adequate thought to the maneuver which the first defendant was performing; and driving in a reckless and dangerous manner in the circumstances.

107. The first defendant's failings as alleged, are in the context of the road conditions including the fact that the first defendant was aware of the water leak and the conditions caused by such leak. The courts are guided not to entertain contests over pleadings unless there is some obvious purpose to be served.

108. In this case, the defendant says that since it was never pleaded that water on the road caused the truck to swerve, it is not open to the court to make that finding. The court has not made that finding. The evidence established that the rear wheel of the truck driven by the first defendant ran off the roadway in an area where there was mud as a result of the water leak. In attempting to regain control of the truck the first defendant performed a maneuver which resulted in the truck going into the lane traversed by the deceased.

Damages

- Pain, suffering, loss of amenity

109. Wooding CJ in *Cornilliac v. St. Louis*³⁸ provided us with a time-honoured approach to assessing general damages in cases of this nature. The several sub-heads of damage to be contemplated are: a) the nature and extent of the injuries sustained; b) the nature and gravity of the resulting physical disability; c) the pain and suffering which had to be endured; d) the loss of amenities suffered; and e) the extent to which, consequentially, pecuniary prospects have been materially affected.

³⁸ (1965) 7 W.I.R. 491 at 494

110. However, since the deceased died on the spot, he suffered no pain, injury or disability because of the accident. Therefore, the court will not make an award for general damages for pain, suffering and loss of amenity.

- Loss of expectation of life

111. The court agrees with the defendant that the conventional sum of \$25,000.00 in recognition of the loss of expectation of the deceased's remaining life should be awarded re: *Lionel Rackal v Darryl La Pierre and anor* CV2015-01441; *Lopez v Narine and others* CV2017-02453 as awarded on the 29 April 2021.

- Loss of earnings for lost years

112. The claimant pleaded that the deceased was employed with him as a mason/welder and earned a salary of \$400.00 per day. He further pleaded that the deceased worked as a taxi driver working routes from Fyzabad to San Fernando or Siparia to Fyzabad.

113. The claimant in his witness statement made no mention of the deceased being employed by him as a mason/welder. Furthermore, there was no evidence of any income earned, the deceased's usual expenses, his future economic prospects, his educational background or anything that could assist the court in making an appropriate award.

114. Under cross-examination, the claimant admitted that the deceased was not a licensed taxi-driver and he was in fact a "PH" driver using a private vehicle for hire.³⁹ Pursuant to section 8 of the Motor Vehicle and

³⁹ Trial notes pages 21-23

Road Traffic Regulations, “No person shall use a motor vehicle for a purpose other than that for which it is registered.” As such, the use of a private registered motor vehicle for hire or reward is an offence in Trinidad and Tobago.

115. The defendants submitted that the maxim of *ex turpi causa no oritur actio* applies to the instant case. At paragraph 8-33 of Clerk & Lindsell the authors explained that the maxim meant that where a claimant’s own wrongdoing is intimately connected with his negligence claim against the defendant, he may be denied recovery on the basis of the defence of illegality.

116. However, the defendants did not plead the defence of illegality; as such the court will not consider the submission nor make any finding of illegality.

117. In any event, the court notes that there is no evidence that the deceased was plying the car for hire the day and time, the collision occurred leading to his death. The only evidence is that the deceased was driving a vehicle on the roadway when he met his demise. Further, the court is not blinded to the fact that a certain segment of the traveling population in Trinidad and Tobago, depends on PH drivers for their transportation needs. This would not have been an appropriate case, the court finds, to apply the maxim *ex turpi causa no oritur actio*.

118. Given the state of the evidence, the court is satisfied that the deceased engaged in employment, which would earn him no more than, the minimum wage payable in Trinidad and Tobago.⁴⁰ The court is satisfied therefore, that the deceased earned approximately \$120.00 working eight

⁴⁰ Minimum Wages Act Chap. 88:04, Minimum Wages Order, Order 2.

hours per day. Given a six-day workweek and a four-week month, the court is satisfied that the deceased earned no more than \$2,880.00 per month.

119. The court is also satisfied that the employment practices of the deceased would make it difficult for the claimant to produce documentary evidence of his earnings.

120. This head of damage compensates for the earnings the deceased would have made from the time of death to the time of retirement, having regard to his living expenses for both himself and any dependents. The court adopted the multiplier-multiplicand approach in arriving a pecuniary figure. The court also applied the guiding principles in assessing of being just and moderate, Re: *Pickett v. British Rail Engineering Limited* [1980] AC 136.

121. The starting point for the multiplier is the remaining number of years of working life until the deceased stopped working.

122. In consideration of the appropriate multiplier the court was guided by Rajkumar J (as he then was) in *Alice Lee Poy John v. Securiserve Limited and another* CV2008-01892 at paragraphs 19 and 21:

“I note the case of *Young v Percival* [1974] 3 All ER 677 at 681 referred to in *Harris v Empress* at page 565(c) where the Court assessed the right multiplier to be 14 in respect of the Deceased aged 29 and considered a multiplier of 16 was too high. I note also the case of *Mallett v McMonagle* [1970] AC 166 at 177 per Lord Diplock at page 565(b):

‘In cases such as the present where the deceased was aged 25 and the appellant his widow about the same age Courts have not infrequently awarded 16 years ...of dependency. It is seldom that this number of years purchase is exceeded.’

The award is not susceptible to precise mathematical calculation but constitutes a Court’s best effort at projecting from the evidence into the future and estimating as best as it can what the Deceased’s prospects would have been. It is a process, however, that is necessarily uncertain.”

123. The court also considered the following cases:

| Case Name | Age | Multiplier |
|--------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|-------------------|
| HC 2475/1984 <i>Ivan Ramjit v Richard Canhigh</i> | A 25-year-old deceased teacher at a retirement age of 60 | 14 |
| CV2005-000129 <i>Mooniram Heru v Indarjit Singh and another</i> | A 25-year-old deceased at a retirement age of 65. | 15 |
| HCS-542/1986 <i>Sumintra Mohammed v Mohammed and others</i> | A 30-year-old deceased truck driver | 14 |
| HCA No 2656 of 1998 <i>Maureen Samuel (LPR of the Estate of Stephen Duncan) v. Susan Salraj</i> | A 32 year old deceased | 12 |
| Privy Council Appeal No. 86 of 2002 <i>Peter Seepersad v Theophilus Persad and Capital Insurance Limited</i> | The injured taxi driver was 35 years old at the time of injury | 16 |

124. The court also consider the defendant’s submissions and the Privy Council case of *Scott v. The Attorney General (Bahamas)* 2017 UKPC 15 at paragraph 23. The court expounded that the award of general damages

ought to be adjusted taking into account the background of society and should reflect the local conditions and expectations.

125. The deceased was 25 years old when he died. There was no evidence of any known factors that would have otherwise reduce his life span. It can be inferred by the court, that he would have worked until about the age of 65 years, working at the minimum wage.

126. A conservative multiplier, the court decided is 15 years.

127. The multiplicand represents the net annual earnings of the deceased after deductions are made for the usual living expenses of the deceased had he lived. In Civil Appeal P115 of 2013 *Robert Cardenas v. Mark Zimmer and Presidential Insurance Mendonça* JA approved the approach in arriving at the multiplicand in this jurisdiction as set out by Lord Justice O' Connor in *Harris v. Empress Motors Limited* [1983] 3 All ER 561: (1) The ingredients that go to make up 'living expenses' are the same whether the victim be young or old, single or married, with or without dependants. (2) The sum to be deducted as living expenses is the proportion of the victim's net earnings that he spends to maintain himself at the standard of life appropriate to his case. (3) Any sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings.

128. In *Tawari Tota-Maharaj v Autocenter Limited and others* HCA No. 46 of 2003 Rajkumar J. (as he then was) at p.8 held "that under the Fatal Accidents Act, the amount of living expenses is conventionally assessed at no more than one-third of net earnings."

129. The court believes that given the court's findings that the deceased earned on the minimum wage, the court believes it reasonable to find that the deceased's living expenses would consume 50% of his earning.

130. With an accepted net income of \$2,880.00, this would equate to \$34,560.00 per year. Taking into account the ½ deduction for living expenses, that the deceased would have used, the multiplicand would be the sum of \$17,280.00 per year. The court would reduce the multiplicand by 5% for unforeseen events that would have prevented the deceased from working. The multiplicand is therefore reduced to \$16,416.00 per annum.

131. Applying the multiplier of 15 years to the multiplicand, the court awards damages for the loss of earning for the lost years in the sum of \$246,240.00.

132. On that award, interest is to be paid from 30 November 2018 (date of filing) to 31 March 2022 (date of judgment) at the rate of 6% per annum. Therefore, the sum of interest for loss of income during the loss years is \$63,973.15.

- The dependency claim

133. Section 3 of the Compensation for Injuries Act Chap 8:05 states:

"3. Whenever the death of any person is caused by some wrongful act, neglect, or default, and the act, neglect or default is such as would before the commencement of this Act (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case 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 shall have been

under such circumstances as amount in law to an arrestable offence.”

134. An award under the Compensation for Injuries Act is divided into two parts: pre-trial loss and post-trial loss. Accordingly, Lord Denning in *Cookson v Knowles*⁴¹ had this to say:

“ The pecuniary loss to the widow and children should be divided into two: the one part being from the date of death to the date of trial; the other part being from the date of trial onwards into the future....”

135. Lord Denning continued:

“...the first part being included in the special damages up to the date of trial, the second part being the loss of future earnings from the date of trial onwards....The first part is calculated arithmetically just like special damages. The second part should be calculated by taking the earnings which the deceased would have been receiving at the date of trial and then using an appropriate multiplier.”

136. The principle, as expounded by Lord Denning was cited and relied on in CV2009-02051 *Karen Tesheira v Gulf View Medical Centre* per Justice Kokaram as well as by this court in HCA 2656 of 1998 *Samuel v Salraj*.

137. The second part of the dependency, between the trial and the end of the dependency requires the court to use the regime of the multiplier and multiplicand. This principle was restated by Lord Diplock in the House of Lords of *Cookson v Knowles*⁴² in this way:

“For the purpose calculating the future loss, the dependency used as the multiplicand should be the figure to which the annual dependency would have amounted at the date of trial.”

⁴¹ [1977] 2 All ER 820 at 823 b-c

⁴² [1978] 2 All ER 604 at page 612

138. The appropriate multiplier is calculated from the number of years dependency, had the deceased lived⁴³. The learned Justice Kokaram cited *Mallet v McMonagle*⁴⁴ where Lord Diplock said:

“The starting point in any estimate of the number of years a dependency would have endured is the number of years between the date of the deceased’s death and that at which he would have reached normal retiring age...”

139. Accordingly, the first part of the dependency claim from the 3 December 2014 when the deceased died up until the date of trial in 23 August 2021, ought to be treated as special damages and thus must be specially proved. Archie JA (as he then was) stated clearly, the principles to be applied when pleading special damages in Civ App 20 of 2002 *Anand Rampersad v Willie’s Ice Cream*. Archie JA, quoted Goddard CJ in *Bonham-Carter v Hyde Park Hotel* [1948] 64 Law Times of 177:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court: This is what I have lost; I ask you to give me these damages.” They have prove it.”

140. The Archie JA (as he then was) went on to say:

“Special damages are generally those past pecuniary losses calculable at the date of trial. It is well accepted that special damages must be specially pleaded and proven.”

141. The claimant did not plead or prove special damages claimed for dependency up to the date of the trial nor after trial. Consequently, the claimant’s dependency claim was unsupported by evidence and as such, the court is unable to make an award under this head.

- Special damages

⁴³ See *Karen Tesheira v Gulf View Medical Centre* per Kokaram J at paragraph 159

⁴⁴ [1970] A.C. 166 at page 170

142. The claimant gave evidence that later in the week when his son died, he incurred expenses of \$940.00 on the wake and \$6,900.00 on his son's funeral costs. In support of his evidence, he attached the receipts to prove these expenses. Accordingly, the claimant has discharged his evidential burden and is entitled a cumulative award of \$7,840.00 under the head of special damages. The first and second defendants shall pay interest on the sum of \$7,840.00 at the rate of 1% from the 30 November 2018 to 31 March 2022.

Disposition

143. Having determined the main issues; that the accident which occurred on the 3 December 2014 along the Siparia Old Road was due to the negligence of the first defendant and that the estate of the deceased is entitled to any damages, it is hereby ordered:

- a. That there be judgment on liability for the claimant against the first and second defendants; and
- b. That the third defendant is liable to indemnify the second defendant for the damages awarded.

144. With respect to general damages, the first and second defendant shall pay the claimant:

- i. Loss of expectation of life in the sum of \$25,000.00; and
- ii. Income for the lost years in the sum of \$246,240.00. The first and second defendants shall pay interest at the rate of 6% per annum on the sum of \$246,240.00 from the 30 November 2018 to the 31 March 2022 in the sum of \$63,973.15.

145. With respect to special damages the first and second defendant shall pay the claimant:

- i. The sum of \$7,840.00. The first and second defendants shall pay interest on the sum of \$7,840.00 at the rate of 1% from the 30 November 2018 to the 31 March 2022 in the sum of \$261.33.

146. The defendants shall pay the claimant's costs as prescribed on the damages awarded of \$279,080.00 in the sum of \$49,408.00. Based on submissions for wasted costs consequent on two adjournments of the trial at the behest of the claimant, the court reduces the costs to \$39,408.00.

147. There shall be a stay of execution for sixty days

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran