

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

[CIVIL]

SUIT NO. DOMHCV2010/0139

BETWEEN:

EMMANUEL ETTIENNE

the Widower and Dependant of Carmen Lucia Ettienne,

Deceased

Claimant

and

GREGORY MASSICOT

Defendant

Appearances:

Mr. Alick Lawrence, S.C. and with him Ms. Rose-Anne Charles of Alick Lawrence
Chambers for the Claimant

Mr. Stephen K. Isidore and Ms. Ernette C.J. Kangal of Stephen Isidore & Associates for
the Defendant

2014: March 19, 20

April 11th

July 11th

JUDGMENT

[1] **THOMAS, J.(Ag):** On 26th July 2010, the court was presented with a Claim Form filed by Emmanuel Ettienne, the widower and dependant of Carmen Lucia Ettienne, who died on 20th August 2007.

[2] The claimant, Emmanuel Ettienne, claims against the defendant, Gregory Massicot, for damages resulting from the death of Carmen Lucia Ettienne, deceased, the wife of the claimant.

[3] The claimant claims:

(a) Special damages in the sum of \$36,425.00

- (b) Bereavement in the sum of \$5,000.00
- (c) Damages for dependants under the Fatal Accidents Act Chapter 7:59
- (d) Interest
- (e) Prescribed costs
- (f) Further and other relief as the court deems fit.

Pleadings

- [4] The claimant's case as pleaded in his Amended Statement of Claim is that at about 8:30 a.m. on 20th August 2007, the deceased was a passenger on the motor vehicle bearing registration PL388 driven by the defendant, Gregory Massicot of Vieille Case public road between Ambas and the Balthazar Bridge.
- [5] The further averment is that the defendant whilst driving on the wet road lost control of the said vehicle which plunged into a precipice. It is also contended that Carmen Lucia Ettienne died instantaneously as a result of 'traumatic shock' due to multiple and severe injuries in main organs and tissues.
- [6] According to the claimant, it is believed that her death was caused as a result of the negligence of the defendant leading to the bereavement and the defendant's loss and damage.
- [7] The claimant pleads particulars of damages, particulars of loss of the Estate, particulars pursuant to the **Fatal Accidents Act**¹ for the benefit of persons, and there is also a schedule of the special damages claimed.

Defence

- [8] In his defence, the defendant admits that the claimant is the widower of the deceased, and also that the deceased was a housewife. Instead, the defendant says that the deceased was never self-employed as a farmer and that the said deceased was a housewife up and until her death on August 20th, 2007.

¹ Chap. 7:59 Laws of Dominica

[9] But while the defendant admits the date, time and location of the death, as pleaded by the claimant, he does not admit of the cause and circumstances of the death. Instead, the defendant avers that it was the condition of the road resulting from a landslide which had taken place as a result of a recent storm. And it is his contention that he tried to control the vehicle which had swayed across the road, but that after a while he lost control of the vehicle and the bus went slowly off the road and down the precipice backwards.

[10] The defendant denies the particulars of negligence pleaded by the claimant by saying that on the day in question he "never" drove at excessive speed, he "tried relentlessly to prevent the vehicle from continuously swaying but his efforts were unsuccessful due to the extreme mud that was on the wet road", and the vehicle was steered and maneuvered so as to avoid the vehicle from going off the road and into the precipice backwards.

[11] In further answer to the particulars of negligence the defendant says that his proper driving care and skill could not have prevented the vehicle from going down the precipice.

[12] The defendant's final answer to the allegations of negligence is that: "*The accident was unavoidable and a diligent driver exercising the due care and skill would not have been able to avoid the accident.*"²

Reply

[13] The claimant joins issue with the defendant on his defence and advances the following contentions: the deceased was not a self-employed farmer; the defendant drove at an excessive speed on the wet road; does not admit or deny that the defendant went over to Penville as he avers not knowing if it is true; it was not raining heavily on the morning in question, there was only a slight drizzle; and the debris from the landslide was removed from the road and the road surface was left with some mud, since it was not washed away.

² Defence filed 12 July 2010

Evidence

Emmanuel Ettienne

[14] In his witness statement speaks to his marriage to the accused and the 3 children of the marriage. Ettienne also details the work of the deceased as being a housewife- cooking, washing, cleaning and looking after the children. It is also the claimant's evidence that she assisted him on the farms working "about three days per week".

[15] With respect to the 20th August 2007, the claimant gives the following details of his activities and those of his wife. He had to transport some people to Calibishie before going to the farm, his wife woke up at about 4:00 a.m. and prepared his breakfast and lunch to enable him to take two meals; his wife was also going to Portsmouth on the said day; the claimant left home at about 6:00 a.m. at which time his wife, son and daughter were in good health.

[16] In further evidence the claimant says he received a phone call while he was still in Calibishie and that as a result of what he was told he went towards Penville; when he reached the Vieille Case Health Center he saw a lot of people there and he learnt something; and that as a result he went into the health center and saw his wife lying on a bench, thought she was unconscious, but when he held her hand he realized that she was dead.

[17] According to Ettienne his wife's body was taken from Vieille Case to the Portsmouth Hospital and then to Roseau, and that he subsequently witnessed the post mortem being performed. He says further that he saw his son while at the Roseau Hospital with a bandage on his forehead and a fresh bandage on his left arm.

[18] Also detailed in his evidence are the cost of funeral arrangements and cost of help he had to hire to do what his wife did at home and on the farms.

[19] Under cross-examination Emmanuel Ettienne maintained what he said in his evidence in chief concerning the work done by his wife. In addition, the witness gave evidence of the abode of the children, and that his wife also looked after the grandchildren of which he had two.

[20] The witness went further in his evidence to say that he usually harvested bananas once a week and twice per week when he has plenty and that his wife would be with him for the day. And even further that when his wife is not harvesting with him she brings breakfast, weeds the bananas after, and carries fertilizer and other inputs.

[21] The witness was cross-examined on his farms, he said he had four and gave the locations and the distances between them. The farms the witness named are: Fort Poncant, Cap Carib, Galba and Lower Penville.

[22] When cross examined on paragraph 11 of his witness statement, the witness testified that he hired Iris George to do what his wife did and paid her \$40.00 per day from which he did not deduct Social Security contributions.

[23] The witness was next cross examined about the defendant and the proceedings in the Magistrate's Court which he faced. In this regard, Etienne said he was aware of the Magistrate's ruling. Etienne also denied that he told the defendant that he must pay.

Rudolph Benjamin

[24] Rudolph Benjamin in his witness statement revealed that he lived in Penville and that he did farming as well as construction. His further evidence is that he knew the claimant and the defendant. As far as Etienne is concerned, Benjamin said that he was a farmer and they both worked on each others' farms regularly.

[25] In relation to the claimant's wife, Benjamin's evidence is that he knew her and that she assisted the claimant on his farms and met her there on many occasions doing work such as weeding, washing and packing bananas and that he also knew she took produce to Portsmouth marked for sale each Saturday.

[26] Finally, at paragraph 7 of his witness statement, Benjamin gives evidence that since the death of his wife, the claimant now goes to Portsmouth to sell his produce; and since the death too, he has seen the claimant employ Irving George to do the weeding.

[27] Under cross examination Benjamin testified that he met the claimant's wife on the farms and that she carried the boxes and then she took the produce to the market.

Eslie Laville

[28] Eslie Laville's evidence in her witness statement that she is the sister of the deceased. It is also her evidence that: 'Gregory Massicot (the defendant) operated a passenger bus service; Emmanuel Ettienne to be a farmer for many years; and assisted the claimant and her sister to harvest and pack bananas.

[29] The witness also gave evidence of her knowledge of the events of 20th August 2007, when her sister died as a result of an accident.

[30] It is the witness' further evidence after her sister's death, she went to the home to cook and clean for her husband for which she was paid \$350.00 per month.

[31] Under cross examination Eslie Laville testified that the claimant did not give her any receipts and that she does not do any other work for money.

[32] In giving evidence of the relationship with her sister, the witness said that she never went to the farms owned by her sister's husband and as such she was not sure what her sister did on the farms.

[33] In re-examination Eslie Laville testified that the claimant asked her to work for him after the accident.

Cleopas Ettienne

[34] Cleopas Ettienne is the son of Emmanuel Ettienne, the claimant and Carmen Ettienne, the deceased.

[35] The witness gave evidence of his residence with his parents up to 2005 when he started college in Roseau, and also of the work done by his mother at home and on the farms and at the Portsmouth market.

[36] The witness concludes his evidence –in-chief with matters relating to his mother’s body which he saw at the Portsmouth hospital.

[37] Under cross examination Cleopas Ettienne testified that on the day of the accident he was in Massacre. In further evidence the witness says that he did not speak to his brother, who was also in the bus with his mother, about the accident. He went on to testify that he did not know how the accident happened.

Gregory Massicot

[38] Gregory Massicot in his witness statement details the events of 20th August 2007, while driving his passenger bus from Penville and, in particular, on approaching the Balthazar Bridge. According to him, the vehicle started to swerve across the mud on the road because the rain had fallen. It is his further evidence that he applied brakes to keep the vehicle on the road, but that it kept swerving until he lost control totally and the bus went down backwards sliding into a precipice with all seven persons, including the claimant’s wife, on board.

[39] In the remainder of his witness statement Massicot details his involvement with the police investigation into the matter, the funeral of the deceased, which he attended, the criminal charge brought against him in the Magistrate’s Court and the eventual withdrawal of the said matter.

[40] In cross-examination Massicot gave detailed evidence of the physical characteristics of the road to Balthazar Bridge with the road being very steep downhill.

[41] In terms of the driving of the vehicle on the day in question, the witness testified that: the road on which he drove is very steep downhill, to the accident, he had been driving for 20 years; the road is dangerous when wet and more so when it has mud; he drove at a speed of 30 miles per hour; the vehicle dragged in the mud; the brakes were applied because the vehicle was swaying; and the vehicle did not spin because of fast driving.

Ferdinand Le Blanc

[42] Ferdinand Le Blanc in his witness statement says that he lives at Mount Pa Jean, Vieille Case, and further that he knew both the deceased and the claimant.

[43] The witness describes the road as being subject to a landslide about 75 yards away from his home, and the fact that there was still some mud on the said road after the landslide had been cleared.

[44] At paragraph 5 to 8 of his witness statement, Le Blanc details the condition of the road on the morning of 20th August 2007, at about 8:15 a.m. and of hearing a vehicle going downhill and the events that followed.

[45] According to Le Blanc, the vehicle he saw was Gregory's bus which was stuck between two rocks by the precipice before the bridge.

[46] Under cross-examination the witness again described the sloping of the road and the precipice with a grass strip of 7 feet before the precipice.

Thomas Coipel

[47] Thomas Coipel says he is a police officer attached to the Vieille Case Police Station. He also says that he knows the "accused", Gregory Massicot very well and also the deceased.

[48] Coipel's further evidence is that on 20th August 2007, at about 8:30 a.m., while on duty he received a report of a traffic accident which occurred at Ambas, close to the Balthazar bridge.

[49] In the remainder of his witness statement, the witness details his actions in terms of the investigation leading to the arrest and charge of Gregory Massicot and the eventual withdrawal of the charge.

[50] The cross examination and re-examination of Thomas Coipel centered on the condition of the road on the morning in question.

Issues

[51] The following issues arise for determination:

1. Whether the death of Carmen Lucia Ettienne, the deceased, was as a result of the negligent driving of the defendant;
2. Whether the deceased had any dependants within the meaning of the **Fatal Accidents Act** to give rise to entitlements;
3. If the answer to Issue No. 2 is in the negative, whether the claimant is entitled to nominal damages;
4. Whether there is liability for costs.

Issues No. 1

Whether the death of Carmen Lucia Ettienne, the deceased, was as a result of the negligent driving of the defendant;

[52] It is appropriate to begin with basis findings of fact, given the importance of the claimant's case.

[53] The basic findings of fact are as follows: on 20th August 2007, Carmen Lucia Ettienne was a passenger in a bus driven by the defendant. She sat in the back seat of the bus which fell into a precipice. The bus fell backwards between two stones and Carmen Lucia Ettienne was injured and taken to the hospital.

[54] On 21st August 2007, Dr. Miguel Oviedo, Pathologist, Princess Margaret Hospital, in his post-mortem report gave his opinion that the cause of death of Carmen Lucia Ettienne, as being

"Traumatic Shock due to Multiple and Severe Injuries in main organs and tissues as a result of a Motor Vehicle Accident."

[55] A further finding of fact by the court is that the bus was on the Amba road approaching the Balthazar Bridge. The road's surface contained residue of mud resulting from a landslide a few days earlier after the road had been cleared. In this regard, the court also accepts and finds as a fact that on the day in question there was rain prior to 8:00 a.m.

Fatal Accidents Act

[56] The claimant's case is grounded on Section 3 of the **Fatal Accidents Act**³. It is in these terms:

- "3 (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the injured person to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured.
- (2) Subject to section 4 (2), every such action shall be for the benefit of the dependants of the person (hereinafter called "the deceased") whose death has been so caused."

[57] It is clear that section 3 of the **Fatal Accidents Act ("the Act")** gives a right of action on three bases; namely wrongful act, neglect or default. In this case before the court, the claimant has grounded his action on neglect which translates to mean negligence on the part of the defendant.

Negligence

[58] According to **Clerk & Lindsell on Torts**⁴ there are four requirements of the tort of negligence, namely:

1. The existence in law of a duty of care situation, i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;

³ Chap. 7:59 Laws of Dominica

⁴ 18th ed. At para. 8-04

2. Breach of the duty of care by the defendant, i.e., that he failed to measure up to the standard set by law;
3. A causal connection between the defendant's careless conduct and the damage;
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote'."

The learned authors go on to say that: "when the four requirements are satisfied, the defendant is liable in negligence."

[59] In his Amended Statement of Claim, the claimant pleads the following particulars of negligence with respect to the defendant:

- a)* the defendant drove at a speed excessive on the wet road and in the circumstances;
- b)* the defendant failed to drive with due care and attention;
- c)* failed to steer, swerve or manoeuvre the vehicle as to avoid the vehicle plunging into a precipice.

[60] These averments are denied by the defendant at paragraph 7 of his Defence and contends:

- i.* That on August 20, 2007 he intended driving from Vieille Case to Portsmouth that morning to conduct business for himself whereupon a friend of his telephoned him whilst he was still in Vieille Case and asked him if he could come and give her a ride to Portsmouth.
- ii.* He then left home in Vieille Case to pick up the friend of his who was waiting for him at lower Penville bus stop.
- iii.* The defendant went over to Penville to collect his friend. On arrival at the bus stop in Lower Penville, the deceased asked the defendant for a ride to Portsmouth and the defendant agreed.
- iv.* The deceased together with the defendant's friend and four other persons boarded the defendant's vehicle and the defendant drove off normally.
- v.* It was raining heavily that morning and the road in Ambas close to the Balthazar Bridge area where the accident took place was wet and muddy from the remains of a landslide that had recently took place during the passage of Hurricane Dean.

- vi.* On reaching the said area in Ambas, the vehicle started swaying across the wet road. The defendant tried to slow down the vehicle and attempted to get it under control from the swaying across the road but was unsuccessful. The vehicle kept on swaying on the wet and muddy road until it went off the road and then into the precipice backwards. The precipice is about 100 feet deep. The defendant together with all the persons on board the vehicle went down in the precipice on the vehicle.
- vii.* The defendant together with the other passengers suffered multiple injuries. The deceased was also on the vehicle and died soon afterwards.

In the view of the court, the foregoing pleadings set out the case for and against negligence, as alleged by the claimant and denied by the defendant.

Submissions

[61] Learned Senior Counsel for the claimant, Mr. Alick Lawrence, S.C., makes the following preliminary observations as a precursor to his submissions:

“Neither the Claimants nor his witnesses were present at the time of the accident. Consequently, his case of negligence depends on a proper analysis of the evidence of the Claimant and his witnesses and the documents (which were tendered by mutual agreement at the commencement of the trial).”⁵

[62] Learned Senior Counsel submits that the following are the key issues which emerged in the evidence:

- a)* That the defendant was likely to be in a hurry and therefore likely to be driving fast.
- b)* That he did not realize that road conditions had worsened.
- c)* That because of a steep drop in the road immediately at the point of the slide he could not see that the road condition had worsened.
- d)* Failure to apply brakes before the mud.
- e)* The behavior of the vehicle on the slippery road.

⁵ Para. 4 of the claimant’s closing submissions

[63] Learned Senior Counsel expands on every "key" issue some of which are self explanatory. This is the case with (a) and the point here is that the defendant having to go off his schedule to accommodate his friend. According to Learned Counsel, "on that morning the drive would have taken an unplanned 60 minutes away from his day."

[64] With respect to "key" issue (b) concerning the road conditions, Learned Senior Counsel, places doubt on the defendant's contention as the effect of continuing rain and the effect on the road. The submission continues thus:

"12. However, the evidence of his witness Ferdinand Leblanc was that the rain that morning was light and could not have washed more mud onto the road. Mr. Leblanc appeared to be an honest and disinterested witness and the Claimant did not seek to challenge his credibility. Officer Coipel who tried to support the Defendant's story about mud washing onto the road could not explain why this did not form part of the report he made on his second visit to the site on the morning of the accident. (His first visit was to assist in the rescue). He stated that he had returned to conduct his investigations and had made a thorough observation of the scene. The resulting report contained in his statement at p. 32-33 of the Bundle 3 and reflected in para. 12 of his witness statement contained no such observation. However a month later [Bundle 3, p. 45] this development was inexplicably entered into another report and was reflected in para. 21 of his witness statement. In cross-examination the officer could not even offer one good reason for this discrepancy. We submit that this was because he never made such an observation."

[65] With respect to "key" issue (c) relating to the defendant's contention that he could not see the worsened condition of the road, the following is submitted:

"14. The evidence of both Ferdinand Leblanc and Police Officer Coipel was that there was no point on the road in the area of the accident where one could not see the road surface ahead of him. According to Coipel this muddy patch started on a brow on the road and therefore would have been visible for some distance before reaching it. Additionally, according to Coipel's measurements the muddy patch stretched for about 332 feet [see p. 33 of Bundle 3] so if it had in fact worsened it is not true for the Defendant to assert that he could not see it and was taken by surprise-unless he was not paying attention."

[66] Regarding “key” issues (d) and (e), these relate to the defendant’s failure to apply the brakes before the mud and the behavior of the vehicle on the slippery road pointing to the vehicle being driven onto the mud.

[67] On behalf of the defendant the following is a summary of extracts from the written submissions:

- “25. ...Phoebe Fabien Ettienne, son of the deceased, and also a witness for the Claimant who was a passenger on the Defendant’s bus on the day and time of the accident was not called and no explanation was given for not doing so. It is submitted that he would have been an excellent witness to call to give evidence in this matter to establish...that in truth and in fact the Defendant had been negligent and thus wholly liable for the ensuing death of the deceased.
31. The Defendant refuted the suggestions put forward by Counsel for the Claimant and told the Court that on the said day, the call to pick up his friend did not interrupt his plan for the day as he had no special time to leave home that day.
32. The Defendant indicated that he did apply his brakes but not sharply as had been suggested nor did he do so just before reaching the wet patch with the mud and that he was unable to tell the Court what Felicien LeBlanc heard. The Defendant further informed the Court that while on the wet patch, he applied the brakes because the vehicle starting swerving. He explained that by swerving he meant that the vehicle was *“dancing in his hand”*. He added that road was a steep one (that from the top brow, visibility is poor until one proceeds downwards) wet and muddy which caused it to be slippery and that despite his best efforts, the vehicle continued swerving and reversed into the precipice. We submit that whether or not Felicien Leblanc heard brakes being applied, is not indicative of the fact that the Defendant was speeding.
34. Officer, Thomas Coipel also testified that he had visited the scene of the accident and his observation was that there was mud on the road and that it had rained earlier that morning and that as a result the road was wet and slippery...He also mentioned that close to the place where the accident occurred, the brow of the hill was steep and that if one is at the top, seeing what lies ahead at the bottom was not visible unless you proceed downwards. When questioned about the width of the shoulder on the left hand side where the precipice was, he stated that it was about 5 feet.
40. It so happens that there was insufficient evidence to secure the committal of the Defendant on the charge and the matter went no further. We in the same vain respectfully submit that after going through the Civil trial, the evidence remains unchanged, that there is insufficient evidence on the balance of probability to find the Defendant guilty of driving negligently on the day of the accident. The Defendant’s case is clear that there is there no evidence of negligence at all.
43. Two of the Claimant’s witness namely Rudolph Benjamin and Eslie Laville were cross examined about whether rain had fallen that morning and whether they were aware of the presence of mud on the road. In their testimony they both agreed that the rain had fallen earlier that morning and that there was mud on the road as

a result. The Claimant however, asserted that no rain had fallen that morning. It is clear that the Claimant was not being truthful. The Claimant later admitted under cross examination.

44. As a result of the above, it is submitted that there is overwhelming evidence which supports the Defendant's assertion that the incident was an unfortunate accident. All witness questioned about the rain and mud that morning except the Claimant answered yes; there is no conclusive evidence to refute the Defendant's claim that he was not speeding..."

Analysis

[68] As noted above, there are four constituents of the tort of negligence, the first of which is the duty of care. The submissions on both sides did not address this constituent and the court has interpreted this to mean that it is accepted that such a duty was owed by the defendant to the deceased as well as the other five persons in the vehicle at the material time.⁶

[69] The second constituent is whether there was a breach of the duty of care owed. In this regard it is said⁷ that:

"A defendant will be regarded as in breach of duty of care if his conduct falls below the standard required by the law. The standard normally set is that of a reasonable and prudent man. In the often cited words of Baron Alderson:

'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would or would not do; or something which a prudent and reasonable man would not do.'

The key notion of reasonableness provides the law with a flexible test, capable of being adapted to the circumstances of each case. For example a motorist should drive with reasonable care, but the speed at which it would be reasonable for him to travel when driving through a crowded town is slower than along an open and deserted country."

[70] It is the context of the foregoing principles of law that the respective submissions must be examined and analysed. Learned Senior Counsel for the claimant has invited the court to find:

- i.* The defendant was in a hurry that morning;
- ii.* That he was driving faster than normal despite the worst than normal condition of the road;

⁶ See: Clerk & Lindsell, Op. cit, @ paras 8-05 to 8-26

⁷ Clerk & Lindsell, Op. Cit @ para 8-119

- iii.* That he failed to slow down sufficiently or at all before driving onto the muddy part of the road;
- iv.* That he drove onto the muddy patch of the road at a speed excessive for the road condition;
- v.* If as he alleged he did not realize the road condition had worsened when he drove onto it, it was because he was not paying attention given that the road surface was visible on approach;
- vi.* Consequently, the defendant drove negligently that morning and that it was his negligence that caused the accident.

[71] On the other hand, Learned Counsel for the defendant contends that there is an absence of proof that the defendant was speeding on a road that was affected by rain and mud; and further that the claimant has failed to discharge the burden of proof.

[72] In the face of the evidence, the law and the submissions, the court must highlight the following findings and facts that are common ground:

1. The admission by the claimant that he had left Penville at 6:00 a.m. on the morning of 20th August, 2007. The evidence also reveals that the claimant's witnesses were not present at the scene of the accident.
2. The court accepts as a fact that the road on which the vehicle travelled at the material time is steep and it contained mud and water on its surface.
3. The mud was as a result of a storm that affected the island which brought rain and landslide that affected area.
4. The court accepts as a fact that it rained in the area of Penville prior to 8:00 a.m. on the said day.
5. The defendant has maintained in his evidence that he was not driving fast at the time of the accident. And there is no direct evidence contradicting his evidence.
6. The defendant is a driver for some 20 years and lives in Vieille Case.
7. The court also accepts as fact that the road upon which the defendant drove his vehicle is very steep with a precipice in excess of 80 feet deep.

8. The court takes judicial notice of the fact that in the Caribbean the month of August falls within the hurricane season when storms and weather systems, of varying strengths, accompanied by rain, abound.

[73] Learned Senior Counsel conceded that neither the claimant or his witnesses were present at the scene of the accident. In effect therefore, Learned Senior Counsel is asking the court to draw reasonable inferences in the circumstances. At the same time, however, the findings cited above are part of the equation. In this context Learned Senior Counsel is asking the court to infer reasonably that the defendant was driving at excessive speed, driving faster than normal and failed to slow down on a wet and muddy road. This of necessity must come from the defendant's evidence as he was the only person who was present at the accident to give evidence.

[74] It is the determination of the court, that, in the absence of direct evidence on the issue, expert or other evidence is relevant to establish any or all of the following: the manner in which brakes should be applied in the circumstances, if at all; the extent of the mud and water; the consequences of mud and water on a vehicle in descending motion with seven persons on board; what could have been done to stop the vehicle; the behavior of motor vehicle tyres of the type on the vehicle in question; and at what point, in descending a steep road should a prudent driver assess the risk of driving on the mud and water.

[75] In the context of the evidence as suggested there may be a better understanding of the defendant's statement to Officer Coipel that "...when I applied the brakes, I feel the transport dance in my hands. It just start to dance in the road and spin around and reverse down the hill and over the cliff." In like manner Rudolph Benjamin's evidence under cross examination that he is a driver and mud can slide on mud and you can pull you in a vehicle.

[76] By definition, any circumstance where unusual action is required, especially to save lives, equates to an emergency. Thus in **Clerk & Lindsell** the following learning is recorded in the context of acting in an emergency:

"Where the defendant's conduct has occurred in the course of responding to an emergency that circumstance will be regarded as relevant to the objective

standard of case required. All that is necessary in such a circumstance is that the conduct should not be unreasonable, taking the exigencies of the particular situation into account. Thus in **Ng Chun Pui v Lee Chuen Tai** the Privy Council held that a driver of a coach, who had braked, swerved and skidded when another car had cut in front of him without warning had acted reasonably in the emergency."

[77] Again, there is no evidence to contradict the defendant's evidence that he was not speeding and had applied the brakes.

[78] As noted by Learned Counsel for the defendant, the deceased's son, Fabien Ettienne, who was a passenger would have aided the claimant.

[79] Another issue that is relevant but in respect of which there is no evidence is whether he knew of the condition at the bottom of the slope or whether he saw it after the brow. Of relevance in the context of reasonable action is one measurement taken by Officer Coipel being:

"From top of landslide to area of road where the bus went off: 332 feet. This measurement is also the area of the road that was wet and slippery."⁸

[80] In finding that the defendant's action was not unreasonable the court must equate the distance of 332 feet to a 100m or 100 yards⁹ for an athletic event so as to make the distance clearer. And the width of the road is a mere 21 feet 8 inches with a shoulder of 5 feet and then a precipice in excess of 80 feet in depth. Thus the defendant's choices were either limited or non-existent. Therefore, the contention of Learned Counsel for the defendant that in order to assess what lies ahead, the defendant would have to proceed further has merit.

[81] Learned Counsel for the defendant submits that the claimant has failed to discharge his burden of proof which the law places on him. With this contention the court agrees, having regard to all the circumstances, especially the absence of persons on the scene of the accident. The legal dimension of the burden of proof in this context is well explained and illustrated as follows:

⁸ See: Statement of Thomas Coipel, Bundle 3. Documents at page 34

⁹ 1 metre =1.094 yards- Concise Oxford Dictionary, p. 1362

“The onus of proof, on the balance of probabilities, that the defendant has been careless falls upon the claimant. If the claimant’s evidence is equally consistent with the presence or absence of negligence in the defendant; his action will fail. Thus in **Pickford v Imperial Chemical Industries PLC**, the claimant’s claim in respect of repetitive strain injury failed. It was held that the onus was on the claimant to prove that her condition had been caused by repetitive movements whilst typing. Whilst the defendant employer’s failure to prove an alternative explanation was a factor to be taken into account in deciding whether the claimant had discharged the onus, it was not decisive as it still left open the question of what caused the injury.”¹⁰

Inferences

[82] Part of the difficulty faced by the court stems from the fact that Learned Senior Counsel has asked the court to draw certain inferences that the defendant driving ‘faster than normal’, ‘excessive speed’, or ‘was in a hurry’.

[83] The difficulty lies in the fact that a reasonable inference must be drawn from evidence which the court accepts as fact. And in fact there was no evidence that the defendant drove fast or at excessive speed. What Ferdinand LeBlanc heard was the sound of brakes and the impact of the vehicle on the stones in the precipice. These pieces of evidence do provide the basis for an inference as to speed. Nor is LeBlanc shown to be an expert to render an opinion as to the quantity of rain that will cause mud to become dangerous. In like manner, as regard Officer Coipel, the fact of a discrepancy in his evidence does not necessarily destroy the remainder of his evidence.

Conclusion

[84] It is therefore the determination of the court that the claimant has 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 driving his vehicle on 20th August 2007 and thereby caused the death of Carmen Lucia Ettienne. As such, there is no need to examine the other constituents of the tort of negligence.

¹⁰ Clerk & Lindsell, *Op Cit*, @ para 8-149

Issue No. 2

Whether the deceased had any dependants within the meaning of the Fatal Accidents Act to give rise to entitlement.

[85] Given the court's determination that the claimant did not discharge his onus of proof regarding negligence the issue of dependants does not arise for consideration.

Issue No. 3

Whether the claimant is entitled to nominal damages

[86] The death of Carmen Lucia Ettienne on 20th August 2007, as a result of an accident in a vehicle driven by Gregory Massicot is not in issue. What is in issue is whether the defendant was negligent in the driving of his vehicle.

[87] According to **McGregor on Damages**,¹¹ 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 adduced.

[88] Such an award was made by the Court of Appeal of Trinidad and Tobago and did not "warrant interference by their Lordships" at the Privy Council despite challenge by learned Counsel for the appellant.¹² Having regard to all the circumstances the court determines that this is a fit case for the award of nominal damages, and accordingly awards an amount of \$10,000.00.

Issue No. 4

Whether there is any liability for costs

[89] In all the circumstances of the case since there is no award of damages on the merits. The claimant was not a successful party within the letter and spirit of Part 64.6 of **CPR 2000** and as such there is no award of costs. In this regard too the relevant reasoning of Devin J in **Anglo-Cyprian Agencies v Paphos Industries**¹³ guided the court.

¹¹ 17th ed. @ paras. 10-001 to 10-006

¹² *Greer v Alstons Engineering Sales and Services Ltd.* (Trinidad and Tobago) [2003] UKPC @ para. 6

¹³ [1951] 1 ALL ER 873

ORDER

[90] IT IS HEREBY ORDERED as follows:

- 1) The claimant has 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 driving his vehicle on 20th August 2007, thereby causing the death of Carmen Lucia Ettienne. As such there is no need to examine the other constituents of the tort of negligence.
- 2) Given the determination of the court as set out in paragraph 1 above, the question of the dependants of the deceased within the meaning of **Fatal Accidents Act** does not arise for consideration.
- 3) The death of Carmen Lucia Ettienne in the accident involving the defendant's vehicle coupled with the claimant's inability to prove negligence is one of the circumstances in which nominal damages may be awarded.
- 4) The court therefore awards the claimant nominal damages in the amount of \$10,000.00.
- 5) In all the circumstances of the case there is no award of costs.

Appreciation

[91] The court wishes to record its profound appreciation for the excellent submissions on both sides which aided the court in its determination.

.....
ERROL L. THOMAS
HIGH COURT JUDGE [AG.]