IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2015 : No. 382

B E T W E E N :

SANDRA MATTHEWS-WILSON
ON BEHALF OF THE INTENDED ESTATE OF HAILE MATTHEWS

Plaintiff

and

LESLEY ANNE COX

Defendant

JUDGMENT

Road Traffic Accident – Fatal Injury – Duty of Care – Driving in excess of legal speed limit – Claim for Damages under Fatal Injuries (Actions for Damages) Act 1949 – Effect of Survival of Actions Act 1949 – Contributory Negligence - Law Reform (Liability in Tort) Act 1951 – Claim for Bereavement

Date of trial: 22nd-23rd January 2018

Date of Judgment: 29th January 2018

Mrs. Simone Smith-Bean, Smith Bean & Co for the Plaintiff

Mr. Jai Pachai, Wakefield Quin Ltd. for the Defendant

ELKINSON, AJ

Introduction

1. The Plaintiff is the mother of the late Haile Matthews who died in a road traffic accident which occurred at 12.45 a.m. on Friday, 18th January 2013. Mr. Matthews was riding his Black Honda motorcycle on Montpelier Road, Devonshire. He was travelling south. The Defendant was driving a Suzuki motor car and had with her a passenger, Mary Jane Tumbridge. She was heading north. Montpelier Road is 6.6 meters wide and the lanes are separated by a yellow centre line. The fatal collision occurred approximately 30 metres past No. 3 Montpelier Road, opposite the Arboretum. The accident occurred in the northbound lane of Montpelier Road.

2. The Plaintiff brings the action on behalf of the two infant dependents of Mr. Matthews, who at the time of trial were 11 and 15 years of age.

3. The Plaintiff issued a Specially Endorsed Writ of Summons on the 21st October 2015 alleging that the accident was caused by the negligence of the Defendant. In the course of the trial, counsel for the Plaintiff accepted that the accident occurred in the northbound lane but maintained that at the time of the accident the Defendant's motor vehicle was straddling the centre yellow line travelling at a speed of approximately 50 kph. The allegation was that the motor car knocked Mr. Matthews from his motor cycle and that he became trapped under the front bumper of the motor car. It was alleged that the car continued to travel forward in a northerly direction for a distance of some 14.1 metres, dragging Mr. Matthews along under the front of the vehicle.

4. The claim was made under the Fatal Injuries (Actions for Damages) Act 1949 seeking General Damages, Special Damages and Damages for Bereavement.

5. The Defendant in her Defence and Counterclaim denied any negligence and defended the action on the basis that it was caused wholly and solely by the negligence of Mr. Matthews.

6. The Defendant's positive averment in the Defence was that she was driving well within her lane going north and that Mr. Matthews had swerved across the road into her lane, initially appearing to be on a collision course with the wall running parallel to the northbound lane. He swerved his motor cycle away from the wall and collided head-on into the motor car. The Defendant believed Mr. Matthews was travelling well in excess of the speed limit and she relied on the investigation conducted by the Bermuda Police Service which concluded that the Plaintiff was on the incorrect side of the road and that his blood alcohol level post-mortem

was 206 milligrams of alcohol per 100 millilitres of blood and 293 milligrams of alcohol per 100 millilitres of urine.

7. There was a Counterclaim made at the time of the filing of the Defence. Counsel for the Defendant indicated in his written Submissions just prior to the hearing that the Counterclaim was being abandoned.

8. Mr. Matthews was brought to King Edward VII Memorial Hospital after the accident where he was pronounced dead. The local media reported that he was the second road death for 2013.

9. On the 24th January 2013, the insurers of Mr. Matthews' motor cycle paid out the sum of $21,692.83 to the Defendant to reimburse her for her motor car which was written-off in the accident.

10. Counsel for both parties agreed that all of the police statements and other material could be adduced into evidence without the need for the various witnesses to appear at trial, save for the Plaintiff, the Defendant and the experts for each of the parties.

The Evidence

11. There are only two witnesses to the accident. The Defendant and her passenger, Mary Jane Tumbridge. The evidence of Ms. Tumbridge consisted of her witness statement made on the 18th January 2013. She was not called to be cross-examined. She recounted how she had been at a friend's house where the Defendant, who was a friend from childhood, was also present. Ms. Tumbridge lives in England but often comes home to Bermuda on vacation. Ms. Tumbridge was staying on Happy Valley Road and Mrs. Cox offered to give her a lift. As they travelled northwards along Montpelier Road, Ms. Tumbridge described what happened on passing the Arboretum. She stated,

> *"There were no other vehicles in front of us. At this point, we had just reached the lip of the hill and I believe I saw a dark shape travelling in the southbound lane and then suddenly out of nowhere it came over into our lane and appeared as though it hit the wall. After seeing this, the shape came straight for our windscreen. Lesley (the Defendant) immediately applied brakes and my seatbelt tightened preventing me from flying forward. I heard a loud bang and the airbags deployed."*

This statement was given to the police the same day as the accident, less than 10 hours after it occurred.

12. The Defendant also gave a statement to the police that same day. As she drove Ms. Tumbridge home, she described how she turned on to Montpelier Road heading towards Happy Valley Road. She was unfamiliar with the area and asked Ms. Tumbridge to indicate where the turn to Happy Valley Road was. She recalls her answering and, as the car reached the crest of the hill, she saw a bike that was in the southbound lane swerve across the road into her lane and, whilst it looked as if it was going to hit the stone wall to her left, he swerved away from that and collided head-on into the front of the car. The Defendant describes slamming her brakes on when she saw the motor cycle veer into her lane and then the sound of the crash. The airbags deployed and the car filled with gray smoke. She stated that she was screaming, grabbed her phone and then realised that the car was rolling. She then pulled up the handbrake. She saw the bike about 20 to 30 feet in front of the car in the northbound lane and a person lying in front of the front wheels, under the bumper. He was wearing his black helmet and he was completely still with blood flowing from his body. Another car arrived on the scene and the driver of that car also telephoned the Emergency Services. The Defendant observed a cell phone approximately 30 feet behind her car.

13. There was a subsequent witness statement from the Defendant made on the 5th November 2015, which was done at the request of her attorney who was instructed when proceedings had been issued by the Plaintiff. In that statement she confirmed the truth of the statement of the 18th January 2013 and gave some further details about the evening. She stated that she had no alcoholic drink and was in fact drinking diet coke. She estimated her speed prior to reaching the crest of the hill on Montpelier Road as approximately 40 to 50 kph and that as she was not sure where the Happy Valley Road turn-off was, she had taken her foot off the accelerator. In her estimation, she was driving somewhere between 40-45 kph prior to "*slamming brakes*." She said that she subsequently, when asked if she had been drinking by the police officers, offered to take a breathalyser test. She estimated the speed of Mr. Matthews at somewhere between 70-80 kph. She referred to the extensive damage to her car which she described as "*basically cut in half."*

14. She said that she did everything in her power to avoid the bike rider colliding with the car which she thought would have involved her reacting by steering the car towards the middle of the road so the bike rider could have travelled in between the wall and her car. That and the fact that the car rolled slowly forward when she was getting out was her explanation as to why the car wheels were seen in pictures, taken after the accident, as being slightly over the

centre line. It was only when she got out of the car did she realise that it was rolling forward and she leaned in and pulled up the handbrake.

15. Mrs. Matthews-Wilson, the mother of Mr. Matthews, gave evidence of the fact of the accident and how she had concerns at the errors contained in the police report which was dated the 12th December 2013. She said that the errors were that the date of the accident was mistakenly put as 2012 when it was 2013, her son's date of birth was misstated and the spelling was not correct. Mrs. Matthews-Wilson's witness statement was made the week before trial and counsel for the Defendant took objection in respect of hearsay statements contained in it. Mrs. Smith-Bean quite properly considered the objections made and agreed the exclusion from the witness statement of certain paragraphs and sentences that were clearly hearsay. Mrs. Matthews-Wilson spoke as to how the fatal accident had affected her family and how they were still struggling to come to terms with what happened to Mr. Matthews some 5 years later. She had the view that the investigation into the accident was biased and that was borne out, for example, by the fact that when she visited Prospect where the car was stored, she observed that it had been placed at the very back of the storage area. Her view was that the car was untouched and she noted that both windows were wound all the way down.

16. As regards the evidence of Mrs. Matthews-Wilson, this traumatic event is still troubling for her and her family and in her evidence she expressed her distress and anger about it. She was angry at the Defendant whom she blamed for it. She had made a statement to the police on the 21st January 2013 where she set out that her son suffered from seizures since the time he had been attacked some six years earlier. He took daily medication for those seizures. She said that he had two seizures in December 2012 and went back and forth to New York and New Jersey for treatment for them. She said that whilst he was a home-body, he would go out for an occasional drink. On that Thursday evening before the accident, he left home at around 9 p.m. and went either to Devonshire Recreation Club, located up the road from the scene of the accident, or the Mid Atlantic Boat & Sports Club on the North Shore Road.

17. There does not appear to be any dispute between the parties that alcohol was consumed by Mr. Matthews on the evening in question and the figures for the amount of alcohol in his blood and urine are not in controversy. Counsel for the Plaintiff submitted that the effect of this amount of alcohol in his blood stream was a matter for debate. As regards the condition of the motor car, whilst Mrs. Matthews-Wilson described the car as 'untouched', the photographs put before the court showed a motor vehicle with very extreme damage to the front, airbags deployed and a windscreen which showed evidence of a forceful impact. The pictures of the Honda motor cycle show a bicycle which is relatively intact from the saddle backwards but with the complete front of the motor cycle apparently obliterated. The

Transport Control Department examined the motor cycle and noted that the front handles and frame were pushed backwards into the front seat.

18. The cross-examination of Mrs. Cox by Mrs. Smith-Bean was a valiant attempt to try and demonstrate that the Defendant had failed to act as a reasonable driver as she travelled along the northbound lane on a relatively bright lit road, with a dry road surface. Mrs. Cox was firm in confirming her evidence as set out in her written statements, particularly as to how she had spent the evening and that she was travelling well within the unofficial speed limit for Bermuda roads. She stated she had done everything possible, once she saw Mr. Matthews, to avoid hitting him and that her only "fault" was being on the road itself. She said she could not have done anything differently.

19. I accept Mrs. Cox's evidence in respect of the fact that she had not been drinking alcohol. She was cross-examined on this and maintained her position that she had only been drinking diet coke and that just before the accident she had taken her foot off the accelerator when she had questioned her passenger as to where was Happy Valley Road. She was firm in her view that Mr. Matthews was speeding and I accept that that was her impression. From her evidence and from the evidence of the Defendant's expert, Mr. Lewis, which I will refer to later, I am satisfied that Mr. Matthews was indeed speeding in the sense of being well above the "*unofficial*" speed limit. I found Mrs. Cox to be a truthful witness. I observed that she too was greatly affected by this tragic accident.

20. The issue of the unofficial speed limit was relevant as counsel for the Plaintiff maintained the position that the official speed limit of 35 kph is the legal speed limit and by Mrs. Cox traveling above that speed she was in breach of the law and was negligent.

21. Mr. Pachai referred me to two Bermuda cases where there has been judicial notice taken of the fact that although the speed limit is 35 kph, 50 kph is regarded by many as the unofficial speed limit. Further, the Bermuda Police Service has made it known that motorists would only generally be ticketed for travelling above this speed. – **See Kate Thomson v James Thomson and Colonial Insurance Company Limited [2013] Bda LR 48 [No. 6?]** and **Dwayne L. Brown v Brandon Levon and Ervin Dean Grant [2015] SC (Bda) 20 Civ.** where the learned Chief Justice stated, *"... I take judicial notice of the notorious fact that most drivers in Bermuda travel on open roadways within an unofficial speed limit of approximately 50 kph."*

22. There is no question that speed can be equated to negligence but it depends on the circumstances. Even if a motorist is driving within the legal speed limit of 35 kph, it still may be *"speeding"* for the purpose of determining negligence if the speed, in the context of the

road conditions, the weather, the general area and the amount of traffic and other conditions then present, would make it unsafe. There is case law, albeit from an earlier time when the pleasure of driving a fine motor car at high speed was appreciated, where driving a Jaguar motor car at 75 mph on a country road in England was not evidence of negligence. As the judge there stated, in appropriate conditions certain motor cars may safely be driven at high speeds unless the particular conditions at the time preclude it. **See Quinn v Scott & Another [1965] 2 All ER 588.**

The Expert Evidence

23. In the end, only two experts were called, one for each of the parties. Mr. Pachai, counsel for the Defendant had indicated that he would call Inspector Simons of the Bermuda Police Service, who was the Traffic Collision Investigator who attended the scene of the accident shortly after it occurred but determined subsequently not to call him. In his written statement, Inspector Simons described the accident as a head-on collision, that the Suzuki motor car was on the correct side of the road prior to the collision and, for reasons unknown, the motor cycle was on the incorrect side. He prepared a sketch plan of the scene which was used by the experts for the parties who gave evidence and who were each cross-examined.

24. The expert for the Plaintiff, Mr. James Keenan, prepared a report for the court dated 10th May 2016. Mr. Keenan had been a police officer with the Merseyside Police for 30 years and in that time had attended scenes of fatal and serious injury accidents, collected and evaluated evidence and endeavoured to reconstruct the incidents to determine their cause before presenting the evidence to the English courts. He now is an accident investigator with Keith Borer Consultants in Durham. Mr. Keenan gave a helpful report and does not greatly disagree with the expert evidence of the Defendant's expert, Mr. Philip Lewis.

25. In considering his evidence, the main area of disagreement, which in my view does not in any event greatly affect the issue of negligence, is that Mrs. Cox was at the time of the collision straddling the centre road marking. Mr. Keenan forms this view from the pictures taken after the collision occurred. Indeed, one sees the front wheels of the motor car slightly over the centre line but I am of the view that this does not assist as to where the motor vehicle was at the time of the actual impact. Not least, the evidence from Mrs. Cox, which I accept, was that the car rolled forward when she was getting out of it. She also gave evidence of some attempt to avoid the accident albeit that I accept that there was no violent turn of her steering wheel which would in all probability have been evident post-accident by the angle of the front wheels. Her evidence was that she was driving in the centre of the northbound lane. Mr. Lewis, the expert for the Defendant, opined that she may have been driving close to the centre

road marking or even on it. However, given Mrs. Cox's evidence, I find that on the balance of probabilities Mrs. Cox was driving within her lane travelling north and not straddling the centre line before impact.

26. Mr. Keenan then dealt with the issue of the 35 kph speed limit and that if she had been travelling at the maximum speed of 35 kph, she would have been able to brake her vehicle much earlier than she did. If she had done that, he opined, the impact would have been at a lower speed, the motor cycle would not have been projected as far as it did and that Mr. Matthews may not have become trapped under the motor car.

27. The issue of being trapped under the motor car arises from the description from one of the attending police officers that Mr. Matthews was found *"... underneath the front of the car*." I do not accept that he was ever trapped under the motor car for the reasons that Mr. Lewis gave, namely that when the car rolled forward, if Mr. Matthews had been under it, it would have dragged him along a very rough surface and there would have been evidence of road rash or even degloving. Further, there was no need for any lifting equipment or for the fire brigade to use equipment to get him out.

28. I asked counsel for the Plaintiff to indicate what evidence was before the court which I could rely upon to show that the outcome of the collision would have been different if it had occurred with the Defendant travelling at a lower speed or if the point of impact had been in a different location on the front of the motor vehicle, not being central to it. Mr. Keenan was clear in expressing he could not say how it would have affected the outcome of the collision. Counsel for the Plaintiff was unable to explain or offer any evidence as to how the outcome would have been different.

29. Mr. Philip Lewis is a former police inspector of the Bermuda Police Service having served with them for over 30 years. He was a Traffic Collision Investigator and Crash Reconstructionist with the Bermuda Police Service. In fact, as came out in evidence, he had trained Inspector Simons, the investigator in this case and Mr. Lewis, then Inspector Lewis, was in charge of the unit at the time of the investigation. He was critical of some of the steps which he believed had not been taken by his former trainees, not least that absent from the reports was any mention of a further investigation of the scene of the accident in the daylight hours. Mr. Lewis is presently operating his own consultancy offering crash investigation and reconstruction from his home in Barbados. He prepared his report on the 21st June 2017.

30. As indicated above, he and Mr. Keenan, both being consummate professionals in this area, differed very little in their conclusions as to where the accident occurred (the northbound lane) and the mechanics of the accident. The areas of disagreement related to precisely where

in the northbound lane the accident occurred and as regards that, I find that Mr. Lewis' evidence in respect of the location of impact in the northbound lane is more compelling than that of Mr. Keenan. Mr. Keenan relied heavily on the first location of a piece of debris found behind the motor car as establishing the point of impact. I think that Mr. Lewis, perhaps because of his experience with motor cycles and auxiliary cycles on Bermuda roads, was more conscious of the fact that mopeds and motor cycles tend to have their plastic shells fragment on impact and travel great distance, sometimes nowhere near where the actual point of impact is. He was critical of the fact that there was insufficient identification of some parts of the plastic debris on the sketch before the court and from what part of the cycle it came from. The sketch map relied on by Mr. Keenan (and prior to him, his colleague, Mr. M. Littler, whose report was referred to by Mr. Keenan) identified that there was a piece of debris some 16 metres behind the motor car. However, this piece of debris in itself was never identified by the investigating officers and could well have been the cell phone that Mrs. Cox referred to. Again, with his advantage of experience in connection with motor cycles and auxiliary cycles, I accept Mr. Lewis' evidence that the extensive damage to both vehicles is unlikely to have been the result of the motor car travelling around 45 kph: that the motor cycle would have been responsible for a substantial part of the force in the collision and that this would have been as a result of the motor cycle travelling at a high speed.

Was the Defendant Negligent?

31. Counsel for the Plaintiff submits that there must have been some degree of negligence on the part of the Defendant and that she could have done something more to have prevented the fatal injury which occurred to Mr. Matthews. Both counsel submit that the appropriate test is whether Mrs. Cox's driving fell below the standard of a reasonable driver in Bermuda. In considering that standard of care, I have in mind the words of Lord Justice Laws in the case of **Ahanonu v South East London and Kent Bus Company Limited [2008] EWCA Civ. 274,** an appeal in respect of a finding by a judge that a bus driver was negligent when negotiating a very tight bend in the vicinity of railings which said, *"Warning, Buses Turning. Pedestrians Must Keep To The Footways."* The judge in the trial court held the driver should have expected a pedestrian to take the extremely dangerous path which the claimant had taken and also found that, in the seconds leading up to the accident, the driver should have used his mirrors to see the claimant and then somehow have acted to avoid the accident. This in circumstances where the bus driver had buses turning in front of him into a depot.

32. Lord Justice Laws said that the judge had, in effect, *"... sought to impose a counsel of perfection on the bus driver ..."* This *"distorts the nature of the bus driver's duty which was of course no more or 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."

33. In this case, I accept the evidence of Mrs. Cox that she could do nothing more than she did on the day in question. I find that the speed that she was travelling at, be it the 45 kph that the experts estimated or the 40 kph that she herself estimated, did not contribute to the accident occurring. I find that the Defendant was not negligent in driving at the speed and in the manner she did prior to and at the time of the accident. I find that Mr. Matthews was travelling at a speed much greater than that of Mrs. Cox as opined by Mr. Lewis in his expert report. The damage to the motor car was extreme. It was a three year old motor vehicle that was written–off by the insurers. "*Written-off"* means that the insurers did not think it economical to repair. The pictures presented in evidence show extensive damage to the motor car and I find that if the Defendant had been travelling at a lower speed, 35 kph, being the legal limit, it would have been highly unlikely that it would have made any difference to the outcome of this tragic motor accident. Neither of the experts put forward any view as to why Mr. Matthews was on the wrong side of the road. There was also evidence from the Government Analyst that there was a cannabinoid substance present in his blood. However, as this can be present for several days after use, I make no finding as whether this played any role in this accident. On the balance of probabilities, I find the levels of alcohol in his blood and in his urine would have played a major part in this road fatality as intoxicants have done in the past and will no doubt do in the future.

34. I cannot accept that the driving of the Defendant in any way fell below the standard of a reasonable driver in Bermuda on this road, on the 18th January 2013 at 12.45 a.m. She was not negligent and in all the circumstances the claim fails.

Contributory Negligence

35. Although it is unnecessary for me to consider the issue of contributory negligence, I do so out of deference to the submissions made by Mrs. Smith-Bean and her suggestion that I should find negligence on the part of Mrs. Cox and that an appropriate reduction in damages would be 60% for the contributory negligence of the deceased. She referred the court to the Law Reform (Liability in Tort) Act 1951, section 3 which deals with the apportionment of liability where there is contributory negligence.

36. Section 3(1) states;- *"Where any person suffers damage as the result partly of its own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall*

not be defeated by reason of the fault of the person suffering the damage, but the amount of damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …"

37. One must bear in mind that at all times a motor car is *"potentially a dangerous weapon"* and that those driving motor cars owe clear duties of care to those around them, as was stated by Mr. Justice Coulson in **Stewart (protected party by his litigation friend Ramwell) v Glaze [2009] EWHC 704**, quoting Lord Justice Leighton in **Lunt v Khelifa [2002] EWCA Civ. 801**. That case dealt with a claim where the injured party had catastrophic head injuries after walking, inexplicably, into the road having moments before been sitting at a bus stop talking to a friend. He was struck by the Defendant's BMW motor car. There, as in this case, events happened quickly and the Claimant put the alternate case that in the event the court found that the BMW driver was not negligent to have collided with the Claimant, he should have done so at a lower speed.

38. Mrs. Smith-Bean on behalf of the Plaintiff submitted to the court that what occurred in this case happened very quickly, in one or two seconds, emphasised by her with a click of her fingers. This was in the context of Mrs. Smith-Bean submitting that Mrs. Cox could have seen very little before the collision, particularly in regard to how fast Mr. Matthews was travelling. The same timing of course applies to how much the Defendant could do in that split second to avoid the motor cycle which it is accepted by the experts and I have found was driving in the wrong lane. The difference in speed from the legal limit, the breach of which counsel for Plaintiff so heavily relies upon to establish negligence on the part of the Defendant, to the estimate of speed given by the Defendant and her expert is somewhere between 5 and 10 kph. Mr. Keenan gave evidence that under emergency braking, a vehicle travelling at 35 kph would take about 6.4 metres to stop. By extrapolation, travelling at 40 kph would add less than one metre to this figure. Mr. Keenan was unable to give any view about the speed of the motor cycle before the collision. Mr. Lewis, on the other hand, was clear in expressing that this was a very high impact collision and he opined that the motor cycle would have been responsible for the energy that resulted in the extensive damage to both vehicles and that this was as a result of high speed on the part of the motor cycle.

39. Contributory negligence on the part of a Plaintiff is only relevant if there is a finding of negligence on the part of the Defendant. I have not so found here. However, if I were to be wrong in my conclusions as set out earlier in this judgment, based on the evidence of Mrs. Cox that she considered the Plaintiff was speeding and possibly going at 70 kph and that of Mr. Lewis in respect of the high speed impact caused by the motor cycle travelling at a high

speed, and the fact that the accident occurred in the Defendant's lane on a straight roadway, I would go so far as to say that the Plaintiff, if I were to consider the issue of contributory negligence, was 80% to blame for the collision. Any damages that the Plaintiff may have been entitled to would have been reduced by that percentage.

Survival of Actions Act 1949

40. Counsel for the Plaintiff sought damages for the loss of Mr. Matthews' income into the future. The Plaintiff set out the deceased's earnings per annum, that there would have been increases in line with inflation and he would have been expected to retire at age 65 and that his loss was calculated on 34 years of work before retirement. The claim was stated to be made under the Fatal Injuries (Actions for Damages) Act 1949. Section 2 of this Act states, *"if death is caused by any wrongful act, neglect or default which is such as would, if death had not ensued, have entitled a person injured to maintain an action and recovery damages in respect thereof, the person who would have been liable if death had not ensured, shall be liable to an action for damages, notwithstanding the death of the person injured."*

41. However Section 3 of the Survival of Actions Act 1949 expresses that the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages and

"(a) In relation to a death occurring on or after the 1st August 1988, shall not include –

(i) any damages for loss of income in respect of any period after that person's death …"

42. In this instance, if there were to have been an award of damages to the Plaintiff, a substantial part of the claim would have been excluded. There is no right of recovery for damages in respect of loss of income of a deceased person.

43. As regards the dependency claim for the two children, the Plaintiff's case for establishing the deceased's loss of income was based on two affidavits, one of which was unsworn, from the mothers of the children who set out a claim of approximately $9,000 and $11,000 being received from the deceased on an annual basis. The evidence of his income was scant at the time of his death. He was earning $17 per hour as a Sales Associate and was in a probationary period. A contractor provided a letter indicating that the deceased worked as a construction labourer assisting in masonry and painting earning approximately $700 per week.

44. In a dependency claim, it is not how much the deceased earned but how much of that income was given to those claiming the dependency that is relevant. Further, the scant evidence concerning the deceased's earnings does not give any assistance as to how many hours he

worked in the boutique and how it was he was that he would also have been employed at the construction company at the same time on a weekly salary. Mrs. Smith-Bean on behalf of the Plaintiff explained from the bar that the Defendant did not have a bank account and dealt only in cash. I have no reason to doubt counsel but it is unhelpful in seeking to put forward a calculation in relation to a dependency claim, where the figures that are offered are not coherent, not to put forward any reliable evidence. It appears to be suggested that he had two jobs but it is impossible to ascertain what his gross salary would have been from those jobs from the evidence before me. That evidence suggests, as best as I can ascertain, that he would likely have earned somewhere between $25,000 - $30,000 a year. The contributions to his children, on the documents that have been put before the court, suggest that these amounted to approximately $20,000 a year. I find it highly unlikely and implausible that he would have managed to live on less than $10,000 per year, being the balance left over, and that it was more likely that the most he would have contributed to both dependents would have been $10,000. I have not been provided with any details of the multipliers used by counsel for the Plaintiff in making the calculation in her Re-Amended Schedule of Damages and Losses but on the basis of the children being aged 7 and 11 years old at the time of his death, the respective multipliers would be, in my estimation, 9 and 5 respectively. This would equate to the sums of $25,000 and $45,000 respectively, totalling $70,000 to which there would be applied the 80% reduction. This would amount to $14,000 as a total sum for the dependency claim.

45. The Plaintiff also sought funeral expenses in the sum of $8,181. Again, this would be subject to the 80% reduction.

Bereavement

46. The Plaintiff in her Writ sought a payment under the Fatal Injuries (Actions for Damages) Act 1949 for bereavement. However, the statutory sum for bereavement of $15,000 can only be claimed by the wife or husband of the deceased. The deceased was never married. Under Section 2A of that Act, a parent can claim but the deceased has to have been a minor who was never married. In the circumstances of this case, no payment could be made to the Plaintiff under this head of claim.

Conclusion

47. The Plaintiff's claim fails as no case was made out that showed the Defendant's driving in the early morning hours of 18th January 2013 fell below the standard of a reasonable driver. On the contrary, the evidence points to the deceased being wholly responsible for the accident in

that he was driving his motor cycle at a high speed with somewhere between two and a half to three times the legal limit of alcohol in his blood.

48. Giving the findings of the court, it would appear that the appropriate order is that costs follow the event and that the Defendant should have her costs. The Plaintiff has been legally aided in this case and the normal order is that if a successful party is awarded costs against a legally aided party they are not enforceable without the leave of the court. Mr. Pachai has indicated on behalf of the Defendant that he wishes to make an application in respect of seeking costs against the Legal Aid Department. In the circumstances, I shall hear the parties as to the appropriate costs order to be made.

DATED this 29th day of January, 2018

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JEFFREY P. ELKINSON, ASSISTANT JUSTICE