

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 1998/0168

BETWEEN:

**CHERYL EDWARDS Administrator of the Estate of
JANIQUE LEWIS**

Claimant

AND

ETHEL MILLS

Defendant

Appearances:

Mr. Kelvin John for the Claimant

Dr. Errol Cort for the Defendant

2002: November 7, 9, 28

JUDGMENT

- [1] **RAWLINS, J.:** An accident occurred on a bye-road in Clare Hall in St. John's, Antigua, at about 2:45 o'clock on the afternoon of Sunday the 10th day of September 1993. As a result, a three-year-old girl, Janique Lewis, died. The Claimant is her mother. She obtained Letters of Administration on the 8th day of April 1998. She instituted the action herein by way of a Writ of Summons, specially endorsed on the 12th day of May 1998. She has claimed that the accident was caused by the negligent driving of the Defendant, who drove the vehicle, motor car registration number PA 5218, at the time of the accident. She claimed special damages in the sum of \$1539.00, general damages, interest and costs

under the provisions of **the Causes of Action (Survival) Act, Cap. 78 of the Revised Laws of Antigua and Barbuda.**

- [2] The Defendant has denied liability. The action became ripe for hearing under the Eastern Caribbean Supreme Court Rules, 1970. The Pleadings were filed on the 17th day of April 2000. However, the matter fell under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (hereinafter referred to as "CPR 2000"), which effectively replaced the 1970 Rules from the 1st day of July 2001.
- [3] The Pre-trial Review was conducted under Part 38 of CPR 2000 on the 2nd day of May 2002. The Parties filed witness statements, which contain the evidence in chief of the witnesses. The right to cross-examine on them was reserved. They were also ordered to provide estimates of costs. The Order limited the trial to the issue of liability only, damages, if awarded, is to be assessed upon subsequent application.

The Evidence

- [4] The evidence on behalf of the Claimant is contained in her witness statement and in that of her son, Jean Pierre Edwards, and in their *viva voce* evidence given at the trial. In keeping with the noblest traditions of the profession, at the commencement of the trial, Dr. Cort signified his consent to have the documents that are attached to the witness statement of the Claimant admitted into evidence. It gives me pause to record my profound appreciation for the manner in which both Counsel facilitated the conduct of the trial. They readily assisted the Court in every aspect. They were cordial to each other and courteous to the witnesses. Yet, they represented the interests of the clients vigourously and with a level of advocacy that was uplifting. Exhibit C.E.L. 2 contains an Auto Accident Report of the Traffic Commissioner. Counsel also agreed to admit the Witness Statements of Police Inspector McLean Hunte filed on the 26th day of July 2002, with the Auto Accident Report, a copy of the Post Mortem Report of Dr. G.E.M. Thomas, and copies of the statements of Trevor Edwards and the Defendant that were taken by the Police after the accident. They also agreed during the trial to have the Witness Statement of Milford Barthley of Clare Hall, which was filed on the 29th day of May 2002 admitted into evidence. The evidence on

behalf of the First Defendant is contained in her witness statement and that of her son, Trevor Mills, and in the *viva voce* evidence that they gave at the trial.

The evidence of the Claimant

- [5] The evidence of the Claimant does not afford any assistance on the actual occurrence of the accident. In her witness statement, the Claimant stated that Janique Lewis , her fourth child, was born on the 11th day of April, 1990. She said that at the time of the accident, she lived in Clare Hall. She still lives there. She says that the area is a densely populated residential area in which many children live. The speed limit for vehicles in that area is 20 miles per hour. She said that at the time of the accident, she was in the house. The children were outside playing cricket. At about 3:00 p.m. she was called. She went outside and realized that an accident had occurred. She saw Janique lying on the side of the street motionless as if dead. She observed blood coming from her nose and ears and brain tissue coming from her nose. She took her to the Hospital where she was pronounced dead. She was buried on Monday the 18th day of October 1993.
- [6] In cross-examination, the Claimant said that her son, Jerome Edwards, was with the children outside while they played. She admitted she was not supervising the children because she was inside the house. When she saw Janique after the accident, she was lying on the side of the road close to the gutter. The road was paved. There were and still are narrow open gutters on both sides of the road. The road runs from east to west. Her house is on one side. At the time of the accident, there was a large dump tree, an old house and a "shack-shack" or flamboyant tree on the other side of the road. The children were playing cricket on the lot of land beside the dump tree. The "shack-shack" tree hung over the road.
- [7] Jean Pierre Edwards, a son of the Claimant, said in his witness statement that he lived with his sister, Janique, at Clare Hall. He said that immediately before the accident, he was playing cricket with Janique and another sibling, Javier Lewis, on the lot of land on the opposite side of their home. He described Clare Hall as a heavily populated residential area where many children live. They are constantly crossing the road. At the time of the

accident he was 14 years old. He said that he wanted Janique to return home. He looked up and down the road. He saw no vehicles. He told Janique to go across the road. She hesitated for about one minute before she started to cross the road. When she eventually started to cross, he saw the car that was driven by the Defendant traveling very fast on the road approaching Janique. The car did not slow down. He had no opportunity to do anything. The front of the car hit Janique on her head with great force. She fell forward. The car drove over her and rolled her along underneath, battering her head and body. It eventually drove from over her and stopped quite a distance away from Janique, whose body had come to rest about 12 feet from where she was first hit by the car.

[8] Jean said that he ran towards his sister. He noticed that her head was battered. He also noticed that blood was coming from her ears, nose and mouth. She was lying on the ground unconscious, with several injuries on her body. The Defendant who was in the car with her son was crying and holding her head, and saying that she did not intend to hit Janique.

[9] In cross-examination, Jean admitted that at the time of the accident he would have been 13 years old. He said that Janique and Javier were under the dumps tree, and other kids who had just returned from the beach were there as well. He said that he was the one who had responsibility for his siblings. He said that Janique had indicated that she wanted to go home, but then it appeared that she wanted to stay. She hesitated. He said that he did not escort Janique across the narrow gutter because he did not see a car coming. However, he thought that it was his responsibility to take her over safely. He said that by the time that he saw the car he shouted his sister's name. By the time that she looked back the car was coming straight at her. He said that the distance from the point of impact to where Janique's body came to rest was about 30 feet. The accident report indicates that this distance was about 7 feet.

The evidence of the First Defendant

[10] In her witness statement, the Defendant said that at about 2:45 p.m. on the day of the accident, she was driving her car along the paved bye-road at Clare Hall from east to west

at about 15 miles per hour. Her son, Trevor Mills, was also in the car. There were no other vehicles driving along that road. She observed a group of children in the road about 30 feet ahead of her approaching car. They were playing. She sounded her horn and slowed the car to about 5 miles per hour. The children moved to the side of the road. She continued to drive at about 5 miles per hour when Janique ran from under the dumps tree on the left side of the car and ran across the path of the car. Janique struck the fender of the car with her head. She ran towards the right side of the road and fell. She said that she was in a state of shock, but stopped immediately and exited the car. She said that the child was taken from the scene. She (the Defendant) gave a statement to the Police.

[11] In cross-examination, the Defendant insisted that she could not have done anything to prevent the accident. This, she said, was because when she first saw Janique, she ran straight across the road. She said :-

"I did not see Janique playing with the children. I do know that I saw the children. The children crossed the road leaving Janique the youngest one behind. I observed from when I was about 30 feet away. When I observed this, she was the only lone person who was left to run across."

[12] The Defendant said that she was going to work for 3:00 o'clock at the Halcyon Cove Hotel and she was not driving fast. Although her son was with her in the car, she was not taking him somewhere first. In fact, he was going to take the car home for her. She said that she was not having a conversation with her son at the time of the accident. She said that she did not panic when she first saw Janique. She did not swerve away. She had to press her brakes. She did not let go the steering wheel. She was frightened after she realized that Janique had touched the car. She insisted that Janique did not go under the car.

[13] In his witness statement, Trevor Mills, the son of the Defendant said that immediately before the accident, his mother was driving slowly, at about 15 miles per hour, along the road. He noticed children playing about 30 feet ahead when she sounded the horn and slowed to about 5 miles per hour. The children ran out of the road. A few moments later he saw Janique run across the road directly in front of the car. She had run out from under a dumps tree in some bushes. She seemed to have struck her head on the fender of the

car and fell. The Defendant braked immediately and stopped the car. He noticed no obvious cuts or bruises on the child.

[14] In cross-examination, Trevor Mills said that he was not speaking with his mother at the time of the accident. He said :

"The first time that I saw Janique that afternoon, I saw her skipping the gutter. At that time the car was traveling from east to west. At that time the car was a little away. When I saw the child skipping the gutter, I called my mother ... I said, "Ettie", and the child was right there. When I said "Ettie", my mom was in shock. I cannot recall whether she pulled the steering wheel away. I do not recall feeling any jerking as if the brakes were mashed immediately."

He continued:-

" If I were behind the wheel on an accident like that, I would not have been able to avoid the accident even if going at 5 miles per hour [B]efore she stopped, my mother was making her way out of the car ... she was holding her head and screaming. She made her way out of the car before it stopped. I pulled up the handbrake. The car was heading towards a gutter on the left hand side of the road."

[15] In his witness statement, Milford Barthley said that he was sitting at the side of the road on the afternoon of Sunday the 10th day of October 1993 when he witnessed the accident. He said that the Defendant appeared to be traveling at less than 20 miles per hour. He observed that children were playing around the road in the area, and saw Janique run from south to north across the road right in front of the Defendant's car. The child was hit, but continued until she fell down on the (north) side of the road. He said that he had seen the child running around at large just before the accident, unsupervised by her mother or any other adult. He was not cross-examined at the trial.

Is the Defendant Liable wholly or in Part?

[16] First, the legal principles are considered. These will then be applied to the evidence adduced in the case.

The legal perspectives

- [17] Drivers of vehicles are under a duty to exercise due care on the road. They are expected to determine and anticipate the actions and movements of other users of the road. They are expected to maneuver their vehicles or to stop in order to prevent and avoid accidents. They are expected to keep a proper look out and to exercise particular care and attention in residential areas and in places where elderly persons and children are or are likely to be.
- [18] Counsel for the Claimant referred to the question of speed limits contained in the Highway Code. It is important to put the Code into its true legal perspective. The effect of **section 88 of the Road Traffic Act, Cap. 463 of the Revised Laws of Antigua and Barbuda, 1992**, imports the Highway Code of England. It does not however render the Code binding as statutory regulation. Failure to carry out procedures that are stipulated in the Code does not necessarily amount to negligence. It may, however, be relied upon as tending to establish or to negative liability. From this perspective, it may be noted that the Code directs drivers in paragraph 55, to drive slowly in residential areas. It states, in paragraph 56, that a speed limit does not mean that it is safe to drive at that speed. A driver should drive according to the conditions. Paragraph 63 requires drivers to show consideration to pedestrians by driving carefully and slowly when they are about, especially in residential areas. Paragraph 64 directs drivers to watch out for children and elderly pedestrians who may not be able to judge speed and who could step into the road in front of a vehicle. Mr. John submitted that in the circumstances of this case, the Defendant was duty bound to keep her eyes out for children and to keep a proper lookout. He further urged the Court to take into account the socio-economic realities of the Caribbean where children are an integral part of our societies especially in rural areas. They play in the road. There is little or no parental supervision.
- [19] Mr. John also drew attention to **Paragraph 823 of Charlesworth on Negligence (Fifth Edn.)**. It is under the rubric "Lookout". It states that when there are pedestrians about, a driver must be ready in case a pedestrians steps from a footpath or from behind an obstruction. It indicates that a driver must also be prepared for children, knowing that they

may be expected to run suddenly on to the road. It is my view that, for this case, the import of the statements contained in Paragraphs 11, 17 and 18 foregoing is that the Defendant, in driving through Clare Hall on the afternoon of the accident, had a special duty to keep a proper lookout for children playing and running about, particularly since she saw them and knows the area.

Application to this case

[20] All of the witnesses appear to agree on the basic factual circumstances of the accident. They agree that the road on which it occurred was paved. There is no indication that it was wet or that there was anything unusual with the surface. They agree that the road is relatively straight and long, so that a chauffeur on it would have a good view along it for some distance. This was confirmed on our visit to the *locus*. It also appeared from that visit that the old house that was on the lot of land where the children played, and the trees that were on the land might have created some degree of limitation on what otherwise would have been a totally un-obscured view along the road and from the area where the children played. The witnesses also agree that the road was a busy one. People were usually sitting on the roadside, and children playing in the road. This was also true on the afternoon of the accident. All of the witnesses also agree that there was very little time within which the Defendant could have seen Janique.

[21] The witnesses disagree as to whether the Defendant was speeding in the circumstances that prevailed. The Defendant and her son insist that she was driving at about 5 miles per hour at the time of the accident. Barthley said that she was driving slowly at less than 20 miles per hour. Jean Pierre Edwards said that at the time of the accident, the car was traveling very fast and did not reduce the speed or apply brakes. The evidence of Trevor Mills, the son of the Defendant, corroborated that the Defendant did not apply brakes. It is noteworthy that the Defendant and her son said at the trial that immediately before the accident she had reduced her speed to 5 miles per hour. In her statement to the Police after the accident, the Defendant had said that she reduced her speed from 20 miles per hour to about 10 – 15 miles per hour. It is my view that the injuries, which were sustained by Janique, as described in the Post Mortem Report of Dr. G. E. M. Thomas are not

consistent with the collision with a car traveling at only 5 miles per hour. They do not appear to be consistent either with Janique having been rolled over constantly by the car after she was struck. However, I am inclined to conclude that the Defendant was not driving as slowly as the circumstances required at the time of the accident.

[22] It is clear that the Defendant did not exercise control of the vehicle after the accident. It is not clear, however, whether this contributed to the death of Janique. My main concern though is whether the Defendant kept the level of lookout that was required particularly having seen children in the area. It occurs to me that if she did, she might have seen Janique at about the same time that Trevor did. If she was indeed driving at 5 miles per hour, she should then have been able to brake in time to reduce the chances of the collision with Janique. She contributed in some measure to the accident. Having considered all of the circumstances of this case, I find that the Defendant is liable, in part, on the claim herein in the degree of 20%.

[23] With respect to the issue of costs, both Counsel have submitted estimates in the sum of \$5,000.00. These were not, however, particularized. In the particular circumstances of this case, I think that justice will be served by the payment of costs in the sum of \$4,000.00 to the Claimant.

Order

[24] On the basis of the foregoing, the following is the Order: -

1. Judgment is entered for the Claimant on the claim against the Defendant to the extent of 20% of the claim.
2. Accordingly, the Defendant to pay to the Claimant damages for 20% of the loss occasioned as a result of the accident, the said damages to be assessed.
3. The Claimant to apply for assessment of damages within 28 days of today's date, the said application to be supported by Affidavit, exhibiting thereto the relevant documents.
4. The Defendant to pay the Claimant costs in the sum of four thousand dollars (\$4,000.00).

5. The date for assessment of damages and to be fixed by the Registrar during the month of January 2003 or so soon thereafter as may be convenient.

Hugh A. Rawlins
High Court Judge

Civil cause – negligence - defendant driving through residential area - motor vehicle accident - death of child results – whether the Defendant liable in whole or in part – witness filed and served a witness statement but does not attend trial due to illness – parties consent to the use of the witness statement – weight to be accorded