

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

GDAHCV2010/0302

BETWEEN:

GEORGE JOLLY
ANN CHARLES
(Administrators of the Estate of Kriston Jolly, deceased)

Claimants

and

VALLEN FRANCOIS
GABRIEL FRANCOIS

Defendants

Appearances:

Mrs. C. Edwards, Q.C, with her Ms. C. Johnson, for Claimants

Mr. A. John, with him Ms. N. Pivotte, for Defendants

2011: July 4, 6
December 1

JUDGMENT

[1] **PRICE FINDLAY, J.:** This is a tragic story and a sad one. The vibrant life of a six-year-old boy came to a sudden end on the afternoon of 20th July 2009. His name was Kriston Jolly.

[2] The claim filed on behalf of the deceased boy by his parents reads as follows:

- (i) General damages
- (ii) Special damages in the sum of 22,415.00
- (iii) Damages under the Law Reform (Miscellaneous Torts) Act, Cap 167
- (iv) Interest
- (v) Further or other relief

(vi) Costs

- [3] The morning of 20th July, 2009 dawned well for the Jolly/Charles family. Kriston, 6, (the deceased), had slept in his parents' bed the night before, and arose that morning eager and ready to attend summer classes at the Call Centre in Seamoon, along with his brothers and sisters.
- [4] The deceased was the youngest of four children and was described in the evidence as being bright, very active and disciplined, a child who took part in sporting activities and generally was enjoying his childhood.
- [5] The family all had breakfast together that fateful day, and the bus which their parents had arranged for, collected the siblings from their home and headed to their summer classes in the parish of St. Andrew.
- [6] Classes were held all day until around 2:00 p.m. when they ended. The siblings went to use the computers at the Centre while awaiting the arrival of the bus to take them home to Mt. Home.
- [7] One of them, Angelo, left to check to see if the bus had arrived. He did not return in a timely manner, so the eldest, Kristal, went to look for him. She saw him on the left side of the road, on the opposite side of the Call Centre.
- [8] She went to get him in order to bring him back to the Call Centre. Kriston (the deceased) came out looking for her. She crossed the road, leaving the deceased on the right side of the road. It was her evidence that Kriston did not follow her. He stood on the right side of the road while she crossed to collect Angelo.
- [9] She crossed the road, took Angelo's hand and was preparing to cross back to the side of the road where the deceased was standing. She could see him clearly as he had not moved.
- [10] When she looked up she saw a white bus coming in her direction at a fast speed and driving in a zigzag manner. The bus was heading towards Pearls.

- [11] The bus continued travelling in this manner and collided with the deceased who had not moved from where she had left him at the side of the road.
- [12] She described the bus as hitting the deceased, he was spinning under the front wheel of the bus, and he was thrown into a sort of drain on the right side of the road.
- [13] The deceased, upon being hit, went down face first and the front wheel of the bus ran over him and he "pitched out of the back right wheel and was thrown into a sort of drain on the right side of the road".
- [14] The deceased was lying on his side on the grass; he still had his bag on his back. Kristal crossed the road with Angelo, ran to where the deceased lay. He made no sound.
- [15] The passengers came out of the bus. Kristal picked up the deceased. She described his eyes as being sort of closed, his mouth open, his tongue out. She cradled him in her arms. She saw bruises to his forehead and an area above his right eye began to swell.
- [16] A lady, Ms. Ramdhanny, came in her vehicle and she took both Kristal and the deceased to Mirabeau Hospital.
- [17] At Mirabeau the deceased was taken into a room and placed on a bed. Kristal telephoned her father and spoke with him.
- [18] She saw her brother a little while later, after which he was placed in an ambulance. This was the last time she saw her brother.
- [19] She went home and told her relatives what had happened. Later her mother called and told her that her brother had died.
- [20] She still has flashbacks about what happened. She drifts off in class. It has affected her school work.

- [21] At the time of the accident, Kristal was 14 years old.
- [22] She denied that the deceased had crossed the road with Angelo and herself. She denied that the deceased was in the byway on the opposite side of the road to the Call Centre. She denied that he ran from the byway and into the path of the bus, causing the collision.
- [23] At the site visit Kristal pointed out where the deceased was standing. It was an area to the right of the bus stop and slightly in the road, approximately 2 ft. from a grass verge at the side of the road. She was adamant that the deceased did not move from where she saw him standing.
- [24] In cross-examination she did not accept the areas pointed out by the First Defendant as being correct.
- [25] Both the mother and father of the deceased gave evidence. They spoke of the good times they shared with their son, of his vibrant personality, of his scholastic accomplishments. They spoke of him being a kind and responsible child for his age. They were proud of their son. They miss him. His loss has left a void in their lives. His mother said that she never expected her son to die before her. She never expected that she would bury her son.
- [26] They both testified that they had taught all their children about road safety and the dangers of public roads.
- [27] They were not present at the accident and therefore could only speak of what happened after they were informed of the tragic event.
- [28] They were both informed of the accident by way of a telephone call. The father called Mirabeau Hospital and spoke with the nurse, who told him of his son's condition. He went to the General Hospital to wait for the ambulance to arrive.
- [29] He saw his son in the ambulance. His head was open; blood was coming from his mouth, ears and nose. He was attached to a machine. He appeared to be dead.

- [30] He telephoned his life partner; he told her things did not look good.
- [31] He went into the room with his son. The doctor and nurses worked on him, but it was too late. He was informed that they had lost him. His son was dead. He could not contain his grief; he started to bawl.
- [32] He went back into the room and looked at his son. It then fell to him to inform his life partner that their son was dead.
- [33] Ann Charles said that she left work immediately as she got the news of the accident. She was still en route when she received the news of her son's death. She had to identify her son's body at the autopsy.
- [34] The parents buried the deceased on the 4th August 2009. They both testified that the loss of Kriston has left a gaping hole in the family. Father is haunted by the image of his son lying cold in the hospital.
- [35] All of the family suffer from despair and anguish at the loss of Kriston.
- [36] Lauren Ramdhanny was the Good Samaritan who came upon the accident scene after the collision and at the request of a man she took the deceased and his sister Kristal from the scene to the Mirabeau Hospital. She did not witness the collision. She dropped them off at the hospital and left. She later learnt of the death of the deceased.
- [37] The First Defendant gave evidence in the matter along with three witnesses. He was a bus driver of the bus HAD113 for about five years before the date of the accident. He had seven passengers on board.
- [38] The route he drove that fateful day was his regular route. He testified that he drove that route several times a day. He was well familiar with the area. He was aware of the byway, he was aware that the Call Centre held classes for children during the summer period.

- [39] On the day in question he was travelling at approximately 25 - 30 mph on the subject road. In cross-examination he said that even though there was a corner prior to getting to the byway and his sight was obscured, he felt it was responsible and reasonable to drive at that speed.
- [40] The road was dry and it was sunny. He was on his left side of the road.
- [41] As he approached the by-road he could not see beyond the corner. He was within 4 - 5 ft. of the byway when he saw a child run from the byway into the road.
- [42] He applied brakes and pulled to the right at the same time to avoid hitting the child.
- [43] The child did not stop, and collided with the front of the bus. He could not stop before the impact even though he applied his brakes, because there was little time between the child running into the road and the impact.
- [44] He testified the child was not flung by the bus. He denied that he was driving on the right side of the road. He denied that he was driving too fast. He denied that he failed to stop, slow down or control his vehicle to avoid the collision.
- [45] He stated that he was deeply affected by the death of the deceased but that he was not negligent and not the cause of the collision that took the deceased's life.
- [46] He testified that it was he who flagged down Ms. Ramdhanny and asked her to carry the deceased and his sister to the hospital.
- [47] He gave the police measurements at the scene the afternoon of the accident. The measurements are as follows:

"Measurements taken

HAD113

Width of road at point of impact	-	20 ft. 8 ins.
Point of impact to left of road	-	15 ft. 7 ins.
Point of impact to right of road	-	5 ft. 1 in.
Length of vehicle	-	15 ft. 10 ins.

Width of vehicle	-	5 ft. 6 ins.
Right front wheel to right of road	-	off road
Right rear wheel to left of road	-	off road
Left front wheel to left of road	-	15 ft.
Left rear wheel to left of road	-	14 ft. 8 ins.
Point of impact to where child fell	-	7 ft.
Point of impact to where driver first saw child	-	28 ft. 6 ins.
Width of side road	-	15 ft. 3 ins.
Point of impact to middle of side road	-	31 ft.
Point of impact to fixed point 1 on right of road	-	27 ft.
Point of impact to fixed point 2 on left of road	-	31 ft. 7 ins."

- [48] I note here that at the site visit, the First Defendant pointed out certain areas which to the Court were contradictory to those measurements and those areas he pointed out to the police on the day of the collision.
- [49] The point of impact pointed out by the First Defendant at the site visit placed the collision as having taken place on the left to middle of the road. In contrast, the measurements he gave to the police show that the collision took place on the right side of the road, some 5 ft. plus into the right lane of the said road.
- [50] It is also noteworthy that the damage to the bus was, according to the police report, to the right side of the front panel and the grill.
- [51] The First Defendant in cross-examination attempted to resile from the measurements taken by the police at the scene. He did not agree that what he showed the police at the scene and what was in the police report were the same thing.
- [52] He stated that what he showed the Court at the site visit and what he showed the police was the same thing.
- [53] He asserted that he saw the child coming out of the byway (on the left side of the road) and swerved the bus to the right and still hit the child with the front right portion of the bus.

- [54] He was adamant, as were his witnesses, that the deceased was not standing on the right side of the road prior to the collision. He denied zigzagging in the road. He insisted that he did not hit the child on the right side of the road.
- [55] But it would seem to the Court that from the measurements given by the First Defendant to the police, that is precisely where the collision took place, on the right side of the road.
- [56] He also did not accept that the impact was to the right side of the bus, but in his own defence at para 4, it is pleaded, "... the child nevertheless continued running into and across the main road and impacted the front right part of the First Defendant's vehicle."
- [57] This accords with the damages recorded by the police in their report.
- [58] He denied that the damage to his vehicle was on the right side and testified that the information in the police report is incorrect.
- [59] He also denied that his vehicle travelled some 28 ft. 6 ins. between where he first saw the deceased and the point of impact.
- [60] It is interesting that the police report consisted of measurements pointed out by the First Defendant only, to the police. No witness to the accident gave any other measurements, and no one gave or pointed out any measurements on behalf of the deceased.
- [61] The three witnesses for the Defendant told similar versions of the events.
- [62] Two were passengers sitting in the front of the bus. Gail Stephen was sitting next to the driver and Irica Perrotte was at the end of the front seat near the front passenger door.

- [63] Both testified that the bus was travelling at medium or moderate speed; not fast, not slow. The bus approached the corner and about 3 ft. – 4 ft. from the byway the deceased appeared and ran into the path of the bus.
- [64] The bus immediately pulled to the right into the road to avoid hitting the child. The bus continued on and stopped about 10 ft. – 12 ft. away from where the collision occurred.
- [65] Irica Perrotte said that the bus stopped more to the right side of the road, partly on the road and partly off the road.
- [66] Gail Stephen in cross-examination stated that the child impacted the centre of the bus, not the right side of the bus. She stated that when the collision took place the bus was on the left side of the road. In re-examination she said that the bus was not “dead left” but a little towards the centre of the road.
- [67] Ms. Perrotte could not assist the Court with what part of the front of the bus hit the deceased; she could only say the front of the bus collided with the child.
- [68] She was sure that the child ran into the road from the byway, but importantly, she testified that the child was on the right side of the middle of the road when the collision took place.
- [69] Reagel Alexander also testified for the Defence. She stated she was at the bus stop on the opposite side of the road to where the byway is located.
- [70] She saw three children leave the area of the bus stop and go into the byway. She saw the Defendant’s bus stop and drop off passengers and continue in her direction.
- [71] She saw the three children running towards the Seamoan Main Road, two of them stopped. The smallest continued into the road. She saw the bus swing into the middle of the road away from the child, but there was a collision.

- [72] The child fell on the right side of the road by the bus stop, or not far from it.
- [73] In cross-examination she testified that she shouted "Vallen, Vallen" even though at the time she did not know the Defendant's name. She said the bus swung to the left and then to the right. The child came into contact with the right side of the bus. She also said that the child was not standing to the right of the road.
- [74] What this Court also finds interesting is that none of the Defendant's witnesses from the bus state that they observed either Kristal or Angelo Jolly standing in the byway at the time of the collision, nor do they speak of seeing either of them run from the area of the byway to where Kriston lay after the collision.
- [75] I find it somewhat unlikely that the child having run (according to the Defendant and his witnesses) from the byway on the left side of the road would have hit the Defendant's vehicle on the right side causing the damage stated in the police report.
- [76] I further find that the point of impact pointed out by the Defendant to the police placed that point of impact squarely on the right side of the road. The Defendant's attempt to place the point of impact on the left side of the road was not successful.
- [77] Looking at the totality of the evidence and having observed the witnesses in the witness box, I prefer the evidence of Kristal Jolly to that of the Defendant and his witnesses.
- [78] I am persuaded by the oral evidence along with the measurements contained in the police report that the collision took place on the right side of the road where Kriston Jolly was standing, watching his brother and sister on the opposite side of the road.
- [79] I do not believe that the deceased child ran from the byway into the road in front of the Defendant's bus.

- [80] I believe that the Defendant driving the bus at 25 – 30 mph came around the blind corner and was zigzagging on the road and lost control of the vehicle, crossed to the right of the road and hit the deceased on the right side of the road some 5 ft. 1 in. from the right of the road.
- [81] As a result the bus sustained damage to the right panel and grill to the front of the Defendant's vehicle. I also find that as a result of the accident the deceased child ended up on the right side of the road close to or on the grass verge to the right of the road.
- [82] I find that the cause of the collision was the First Defendant as the driver of the bus on the day in question. He drove his bus in a negligent manner.
- [83] While he on the evidence was driving within the stated speed limit, I find that he failed to manage or control his vehicle in such a way as to avoid the collision. I find that in driving in a zigzag manner, he drove without due care and attention. I also find that in crossing onto the right side of the road that he was driving on the wrong side of the road and that he failed to operate the vehicle in a proper and/or competent manner.
- [84] I also find that his failure to sound his horn as he came around what has been described as a blind corner also contributed to the collision. This is more so in light of the fact that the Defendant testified that he was familiar with the area, this being his regular route, coupled with his knowledge that at the time of the accident there was a very strong likelihood that children would be in the area, as classes would be out at around that time.
- [85] In light of the fact that I do not find that the deceased ran from the byway and into the road in front of the Defendant's bus, I make no finding as to the contributory negligence of the deceased.

[86] With respect to the claim for damages, I agree with Counsel for the Defendants that the claim for the costs of the administration of the estate of the deceased is not sustainable.

[87] The dictum of Wooding, CJ in **Deonarine v Narine** [1968] 14 WIR 33 at page 36, commends itself to the Court. The learned CJ stated,

“I would accordingly refer to s. 28 of the Judicature Act which provides for the survival of actions in tort for the benefit as in this case of the estate of a deceased. It thereby abrogated the common law. But the survival was subject to the provisions of the section, and sub-s. (2) (c) provides as follows:

“(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person

.....

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.”

It should be observed, first, that what is made to survive is the cause of action, which would have been vested in the deceased but for his death. Secondly, the cause of action is not made to vest in his estate so as to entitle the estate to claim for any loss or damage it may have suffered by reason of his death; it remains his cause of action for such loss and damage as have been sustained by him, and it is that action for that loss and damage which his personal representative is enabled to maintain, any damages recovered being for the benefit of his estate. This is made very plain by LORD MACMILLAN in **Davies v Powell Duffryn Associated Collieries, Ltd.** (4) ([1942] A.C. at p. 610), where he said:

“The rights conferred by the Law Reform Act for the benefit of the estates of deceased persons are the rights to maintain after the death of such deceased persons all causes of action vested in them. These rights are to be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts. This means, as I read the words, that on the death of a deceased person it shall be competent to maintain actions both under the Law Reform Act and under the Fatal Accidents Acts. The rights of action in the two cases

are quite distinct and independent. Under the Law Reform Act the right of action is for the benefit of the deceased's estate; under the Fatal Accidents Acts the right of action is for the benefit of the deceased's dependants."

Thirdly, the exception in para. (c) of the subsection permits the funeral expenses to be claimed by way of damages and this express inclusion must mean that any expenses incurred by the estate of the deceased and not by him are a loss to the estate and are accordingly excluded. Fourthly, sub-s. (5) provides that the rights conferred by the section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on their dependants by the Compensation for Injuries Ordinance. As LORD MACMILLA said in the passage from his judgment which I have just quoted, this means that the rights of action under that Ordinance and under the Act are quite distinct and independent. Under the Act the right of action is for the benefit of the deceased's estate and the claim is for the injury and loss suffered by him; under the Ordinance the right of action is for the benefit of the deceased's dependants and the claim is for the injury resulting to them from his death. For these reasons I am of opinion that administration expenses cannot be claimed as an item of loss or damage in actions for the benefit of a deceased's estate under the Judicature Act, and I so hold. The damages for the benefit of the estate in this case should therefore be reduced to the sum of \$3,050."

[88] It is to be noted that s. 28 (2) (c) of the Trinidad & Tobago Judicature Act is in identical terms to that of the Law Reform (Miscellaneous Torts) Act of Grenada, s. 2 (2) (c).

[89] I quote from Hewlett J in **Jeffers v Dyer et al** Vol. 2 OECS Law Reports 336 where he states:

"The right of action under the Law Reform Act is for the benefit of the deceased's estate and the claim is for the injury and loss suffered by him. This will include funeral expenses. Pain and suffering should also be considered ..."

[90] I have reviewed comparable cases in the Eastern Caribbean and taken into account the present comparative value of the EC dollar, and I would award the sum of \$10,000.00 for loss of expectation of life, and pain and suffering. Death in this case was not instantaneous but occurred within hours of the receipt of the fatal injuries.

[91] I would also award the following special damages:

Funeral expenses	\$14,855.00
Medical Report	150.00
Police Report	10.00
Headstone expenses	2,990.00
Wake expenses	2,600.00

[92] In conclusion, judgment is entered for the Claimants in the following sums:

Special damages	\$20,605.00
General damages	\$10,000.00
With costs of	\$ 7,650.00

[93] I would like to thank Counsel for their insightful submissions.



Margaret Price Findlay
High Court Judge