COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2013/CLE/gen/01945

IN THE MATTER of the Fatal Accidents Act Chapter 71, Statute Laws of the Commonwealth of The Bahamas

B E T W E E N

CHEERENE GREEN

(As Administratrix of the Estate of Jacinda Jasmine Colebrook, (deceased) and on behalf of all dependants of Jacinda Jasmine Colebrooke)

Claimant

AND

~~**ARSENE DIEUGSTE**~~

~~**As Personal Representative of the Estate of MAURE NOEL, deceased**~~

~~**(And by Order to carry on)**~~

~~First Defendant~~

PETER COREY BOWE

Second Defendant

AND

GOLD ROCK CORP. LTD

Third Defendant

Before: The Hon. Chief Justice Sir Ian R. Winder

Appearances: Norwood Rolle for the Claimant
Genell Sands for the Second and Third Defendants

Hearing date(s): 13 February 2024

JUDGMENT

WINDER, CJ

[1.] This is a **Fatal Accidents Act** ("FAA") claim arising out of a road traffic accident ("the accident") which occurred on the Grand Bahama Highway (the "GB Highway") on 12 January 2011 involving Jacinda Jasmine Colebrook ("Colebrook"), her passenger, Maurice Noel ("Noel"), and the Second Defendant, Peter Corey Bowe (Bowe). The burnt remains of Colebrook and Noel were found in the vehicle following the accident.

[2.] The Claimant, Cheerene Green, is Colebrook's mother and purports to sue as the administratrix of Colebrook's estate and on behalf of Colebrook's dependants. The particulars of the persons for whom this action is brought, at the date of the commencement of the action, are set out in the Claimant's Re-Amended Writ of Summons as follows:

> Cheerene Green, age fifty-six (56) years who was born on 10 February, 1957;
>
> Ariel Newbold, age twenty (20) years, who was born on 1 November, 1993;
>
> April Colebrook, age sixteen years (16) years who was born on 12 April, 1997;
>
> Cherelle Colebrook, age thirteen (13) years who was born on 6 October 2000;
>
> Travis Colebrook Jr., age eleven (11) years who was born on 18 May, 2002; and
>
> Vaughn Aelx Colebrook, age nine (9) years who was born on 26 August, 2004;

[3.] Bowe's role in the matter has been noted above. The Third Defendant, Gold Rock Corp. Ltd, is Bowe's employer and the owner of the vehicle he was driving at the time of the accident.

[4.] In advance of trial, the parties agreed that, on 12 January, 2011, a collision occurred in the eastbound carriageway of the GB Highway between (i) a 1998 Jeep Grand Cherokee driven by Colebrook but owned by Noel and (ii) a 1999 Ford Expedition driven by Bowe but owned by the Third Defendant. The parties also agreed that, upon impact, both vehicles caught on fire.

[5.] It is disputed whether the accident was the result of Bowe's negligent driving, whether the Third Defendant is vicariously liable for Bowe's conduct and whether the accident was the cause of Colebrook's death. The Defendants also deny liability on the basis that Colebrook was responsible for the accident. The Third Defendant disclaims vicarious liability.

[6.] By their Statement of Facts and Issues, the parties distilled the issues that require the Court's determination to the following five issues:

(1) Was Bowe negligent in the driving and control of his vehicle on the date and at the time of the accident?

(2) Was Bowe performing duties for or acting on behalf of the Third Defendant at the time of the accident?

(3) Was the accident the proximate cause of Colebrook's death?

(4) Did any negligence or recklessness on the part of Colebrook cause or contribute to the accident?

(5) Is the Claimant entitled to damages under the **FAA** and, if so, what is the quantum of those damages?

The Claimant's Evidence

[7.] The Claimant relied on the evidence contained in her witness statement filed on 1 November 2023 and the evidence contained in the witness statement of her sister, Rose Green Thompson ("Thompson"), filed on 1 November 2023. The Claimant also relied on the evidence of Dr. Mandi Pedican ("Dr. Pedican") and ASP Christopher Farquharson ("ASP Farquharson"). Dr. Pedican and ASP Farquharson were cross-examined but the Claimant and Thompson were not.

The Claimant

[8.] The Claimant testified that she was informed by one of her nieces at about 10:30 am on 12 January 2011 that Colebrook was believed to have been a traffic fatality on the GB Highway. She travelled to Freeport on 14 January 2011 with Thompson and Colebrook's youngest child to identify Colebrook's body. After arriving in Freeport, she visited the scene of the accident with Thompson and Colebrook's father and searched a burnt white Jeep on a grassy area on the western side of the road said to have been driven by Colebrook but found no evidence identifying her. The Claimant was subsequently not permitted by the Royal Bahamas Police Force ("RBPF") to see Colebrook's remains as they were badly burned. Colebrook was identified by DNA based on blood samples.

[9.] The Claimant further testified that she was informed at a Police Inquest that Colebrook was a fatality in the accident when the vehicle she was in was hit from behind and exploded. An officer named ACP Seymour who was said to have been the first person at the scene of the accident recounted that he had been travelling to work in the opposite corridor of the GB Highway when he heard the collision, saw the blaze. ASP Seymour reported the accident to the Fire Services Department and drove to the scene of the accident where he was later joined by officers from the Fire Services Department. Another RBPF officer explained to the Claimant that, when Fire Services arrived, they helped Bowe and did not attempt to save Colebrook as the blaze was too big. The RBPF could not confirm how long it took for the fire truck to arrive.

[10.] The Claimant described Colebrook as a mother of 5 children who was employed by the Ministry of Education as a Janitress at the Maurice Moore Primary School. The Claimant said that, at the time of her death, 4 of Colebrook's children lived with her in Freeport, where she had been

transferred to in 2005 to care for her ailing father. Colebrook's youngest child lived with the Claimant. The Claimant had cared for Colebrook's youngest child since his birth. The Claimant and Colebrook's brother and sister regularly sent Colebrook money to assist her with the payment of her rent and other bills.

[11.] According to the Claimant, Colebrook's family made prior arrangements with and payments to a funeral home for the cremation of her remains, but she was cremated without the family's knowledge because the RBPF released her remains directly to the funeral home. Three of Colebrook's four children in Freeport returned to New Providence with the Claimant after the accident. Colebrook's oldest child remained in Freeport in the care of her grandfather until after her graduation from high school.

Thompson

[12.] Thompson's evidence mainly corroborated the Claimant's evidence and, therefore, need not be summarized in any great detail. It is worth highlighting however, that Thompson stated in her evidence that when she, the Claimant and Colebrook's father visited the scene of the accident on 14 January 2011: (i) the white Jeep attributed to Colebrook was on a grassy area on the right side of the road and was "very burnt", but the front seating area was not as burned as the rear; and (ii) the other vehicle in involved the accident, which was smaller, had signs of being burnt and damage to its front and had travelled through the bushes/trees and stopped on a pine tree.

Dr. Pedican

[13.] Dr. Pedican is a forensic pathologist who has been the Head of the Department of Pathology and Laboratory Medicine for the Grand Bahama Health Services in the Public Health Authority ("PHA") since 2013. She attended trial on a witness summons. She was called by the Claimant as a custodian of the PHA's records but was also deemed an expert in pathology and forensic pathology by the Court upon a viva voce application made by the Claimant.

[14.] A copy of an autopsy report dated 17 January 2011 prepared by the now-deceased Dr. Cornelius Kachali ("Dr. Kachali"), who was the Director of Pathology and Laboratory Services at Rand Memorial Hospital at the time of the accident, was admitted into evidence through Dr. Pedican. Dr. Kachali's Autopsy Report was prepared after an examination of Colebrook's body on 17 January 2011. Dr. Pedican confirmed that the original of Dr. Kachali's Autopsy Report had been destroyed during Hurricane Dorian, and that it appeared to her that the copy tendered was a duplicate of the original.

[15.] Dr. Kachali's Autopsy Report stated *inter alia*:

SUMMARY OF THE AUTOPSY FINDINGS AND DIAGNOSIS:

History of being recovered from burnt vehicle with the following autopsy findings:
A. Global charring with extensive body mutilation.
B. No evidence of gunshot wounds.
C. No gross evidence of natural disease.

SUMMARY AND COMMENTS: Investigation and autopsy findings show that death is attributed to probable fatal thermal injuries in a two vehicle corrosion accident. However, the manner of death cannot be established; further investigation and evaluation may elucidate the situation. Other scenarios cannot be completely excluded.

CAUSE-OF-DEATH STATEMENT: Probable fatal thermal injuries.

MANNER OF DEATH: Based on the circumstances, the manner of death is classified as undetermined. The autopsy of the body of Jane Doe #1, allegedly Ms. Jacinda Celebrook, is performed by Cornelius Kachali, M.D., Consultant Pathologist and Director of Pathology and Laboratory Services at Rand Memorial Hospital, Freeport, Grand Bahama, Bahamas, on 17/1/2011. The identification is done by DNA analysis; see attached copy of the report from the DNA Labs International

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SPECIAL PROCEDURES

- X-ray done on charred remains: no projectiles/bullets.
- Tissue sent for DNA analysis: report attached.
- Blood sample sent to Bahamas Police Toxicology Lab: results pending.

[16.] When asked about Dr. Kachali's Autopsy Report in cross-examination, Dr. Pedican accepted that it was correct to say that Dr. Kachali's Autopsy Report was not conclusive as to Colebrook's cause of death. Dr. Pedican agreed that it was also correct to say that the manner of death could not be established by Dr. Kachali, who classified it as "undetermined". Dr. Pedican applied the label "undetermined" to the cause of death as well. She explained that "undetermined" implied a lack of information necessary to be sure of the particular manner or cause of death. She accepted that it meant that Dr. Kachali "did not know" Colebrook's cause of death.

[17.] Dr. Pedican also confirmed that, according to Dr. Kachali, at the time of his autopsy report, other scenarios could not be excluded and further investigation and evaluation was required. Dr. Pedican was unaware of whether any further investigations or evaluations were in fact carried out by Dr. Kachali and was unaware of any further or follow-up reports prepared by Dr. Kachali. Dr. Pedican agreed that Dr. Kachali would not have had access to the results from a sample of Colebrook's blood sent to the RBPF's Toxicology lab when he completed his autopsy report – the results had not yet been obtained as of 17 January 2011.

[18.] Dr. Pedican confirmed in cross-examination that, according to an agreed Miami-Dade County Medical Examiner Department's Toxicology Report dated 22 April 2011 obtained by the RBPF, no carbon monoxide was detected in Colebrook's blood and Colebrook had no significant alcohol in her system at the time of her death. Dr. Pedican accepted that the failure to detect carbon monoxide in Colebrook's blood most likely meant that Colebrook did not inhale the products of

combustion and accepted that it was possible that Colebrook was not alive at the time of the fire which resulted from Bowe's collision with her vehicle.

[19.] Dr. Pedican also confirmed that, according to Dr. Kachali's Autopsy Report, there was no soot in Colebrook's lungs, trachea or stomach, nor any froth in Colebrook's airways. Dr. Pedican accepted that the presence of soot in the trachea and lungs or stomach of a person would usually indicate whether a person was alive at the time of a fire. Dr. Pedican also agreed that Dr. Kachali's Autopsy Report provided no evidence of inhalation by Colebrook around the time of her death.

[20.] However, Dr. Pedican resisted when it was put to her by Counsel for the Defendants that there was no evidence Colebrook was alive at the time of the fire. She explained that a certain interval of time was required for the process of the inhalation of soot and the deposition of soot and carbon monoxide. Dr. Pedican preferred to say that there was no evidence Colebrook was actively breathing for the time required for soot or carbon monoxide to accumulate.

[21.] Dr. Pedican clarified in re-examination that a lack of carbon monoxide in the blood does not necessarily mean that a victim of a fire was deceased at the time of the fire. Dr. Pedican said that, if one is unconscious and not inhaling normally, or is impaired from normal respiration, or has some other situation or injury which would compromise them breathing, then it is possible carbon monoxide would not be detected in the blood, though it is usual to expect some trace amount of carbon monoxide in the blood if the person was breathing. If Colebrook suffered other injuries, they might not have been evident because of the severe charring thermal injuries she suffered, and that could also explain why no carbon monoxide was detected in her blood.

[22.] Dr. Pedican also explained in re-examination that the fact that Dr. Kachali's Autopsy Report recorded that Colebrook's hands and arms were absent at the time of the autopsy did not mean that Colebrook's hands and arms had been severed. When one's body is responding to thermal injuries in a fire, depending on which part of the body is exposed to the flames, the heat can cause the extremities to burn and disappear. As a result, one can come across the remains of victims of fires where all that remains of them is their torso. The extremities are usually charred and shrunken and the hands and feet can be separated and burned off or shrunken and shriveled away due to the heat.

ASP Farquharson

[23.] ASP Farquharson is the Officer-In-Charge of the Traffic Division for Grand Bahama and the Northern Bahamas, a position he has held since 22 March 2023. In that capacity, he is responsible for the day-to-day operations of the Traffic Division, including the investigation of traffic accidents. Like Dr. Pedican, he attended trial on a witness summons. He was called as a custodian of the RBPF's records.

[24.] A police report dated 28 December 2018 concerning the accident issued by Supt. Jeremy Henfield (the "Henfield Report") was admitted into evidence through ASP Farquharson. ASP Farquharson was initially unable to recall seeing the Henfield Report on the RBPF's file but he described the facts as being consistent with the RBPF file respecting the matter. After a brief adjournment, during which ASP Farquharson contacted his Deputy to show him the RBPF's file, he confirmed that the Henfield Report was on the RBPF's file.

[25.] ASP Farquharson volunteered in cross-examination that he had not read all of the RBPF's file before giving evidence, and that he had been posted in Abaco at the time of the accident and was unfamiliar with the section of the GB Highway where the accident occurred as it was in 2011. ASP Farquharson thus had no personal knowledge of the accident or its investigation. While ASP Farquharson was able to confirm that Sgt. 1035 Bennett was the investigating officer assigned to the accident, he was unable to dependably speak to the details of the accident or the investigation.

[26.] The Henfield Report stated that Bowe had been charged with driving a motor vehicle without due care and attention contrary to **section 46** of the **Road Traffic Act**. This contradicted the contents of a standard form Road Accident Report signed by Sgt. 1035 Bennett, which indicated that no charges were being made in connection with the accident ("the Bennett Accident Report"). ASP Farquharson said that the Bennett Accident Report appeared to be an official report – though he was unfamiliar with the form – and that it appeared to have been prepared by Sgt. 1035 Bennett. ASP Farquharson could not say whether the RBPF's investigation into the accident had been completed when it was prepared but said it normally would be.

[27.] ASP Farquharson stated that ordinarily, following an accident, the Police Control Room would be contacted, Traffic Division officers would be dispatched, measurements would be taken and Notices of Intention to Prosecute would be issued. In more serious accidents, or accidents involving fatalities, a more in-depth investigation would take place. At the end of the RBPF's investigation, a report would be prepared and a conclusion would be reached as to who was responsible for the accident, if possible. If a driver was charged with an offence in connection with the accident, the fact of that charge would be noted on the police report, which would state that the name of the person charged, the charge, and the result of any court proceedings. ASP Farquharson confirmed that it appeared to him from the RBPF's file that all of the necessary steps were taken in relation to the accident.

[28.] ASP Farquharson said that he could not explain why, if Sgt. 1035 Bennett had indeed ticked "no" on the part of the Bennett Accident Report indicating whether any charges were being made, Sgt. 1035 Bennett had done so, because, as far as he was aware, Bowe had been charged with driving without due care and attention. ASP Farquharson accepted, however, that he could not prove or disprove what he had said about Bowe being charged, that he could not confirm the veracity of the Henfield Report, and that he could not confirm whether Bowe had ever been served

with a summons to answer the purported charge of driving without due care and attention or arraigned to answer it.

The Defendants' evidence

[29.] The sole witness for the Defendants was Bowe, who gave a witness statement in support of the defence filed on 7 November 2023.

[30.] Bowe testified that he is the Operations Manager at the Third Defendant's operations in Freeport, Grand Bahama and has been working in that capacity for the past 23 years (11 years at the time of the accident). His usual hours of work are 6:00 am to 6:00 pm. About 2 months prior to January 2011, the Third Defendant hired in-house security for its premises located on the GB Highway. As part of his responsibilities, he would let the guard in at 6:00 pm every evening and relieve him at 6:00 am the following morning because the guard did not have keys to the premises. Bowe would also usually return to work each night after letting the security guard in to check on him.

[31.] Bowe said that, on Wednesday, 12 January 2011, after 9:00 pm, but before 10:00 pm, he set out in the Third Defendant's Ford Expedition to the Third Defendant's premises to check on the security guard. The weather was "pretty fair" in that it was not rainy and the road was dry but visibility was low because it was a dark night. He headed east in the right/southern lane of the eastbound carriageway of the GB Highway with his low beams on and at a speed of about 40 to 42 miles per hour, which was under the speed limit of 45 miles per hour. The road was not heavily travelled by many vehicles and the traffic condition was fair. However, about 800 feet. from the Third Defendant's premises (in his witness statement, he put the distance as 800 yards), he suddenly caught a glimpse of a red reflector on the rear of a vehicle. Seeing this, he quickly turned on his high beams, and realized that the vehicle, a Jeep Grand Cherokee, was stationary, but it was too late for him to avoid a collision as he only saw the vehicle seconds before impact.

[32.] Bowe gave evidence that the Ford Expedition collided with the rear of the Jeep Grand Cherokee that Colebrook was driving. Bowe said in his witness statement that the Ford Expedition he was driving came to a rest on the southern side of the Grand Bahama Highway while the Grand Cherokee he collided with came to rest in the eastbound lane of the Grand Bahama Highway. According to Bowe, there were no witnesses to the accident. Bowe made no attempt to estimate how far each vehicle travelled and, in cross-examination, Bowe could not say precisely how far his vehicle travelled after impact. He said only that it came to a stop on the median of the GB Highway. In the course of questioning by the Court, Bowe described the GB Highway as 2 dual-lane carriageways separated by a grassy median of about 10 feet.

[33.] Bowe denied any responsibility for causing or contributing to the accident. Bowe claimed that he was observing the roadway at the time of the accident but that the Jeep Grand Cherokee was stationary or parked and unlit and unilluminated in his lane. Bowe claimed that the vehicle

did not have its hazard lights on and no steps had been taken by the driver to warn or alert other motorists of the presence of the vehicle or to move it onto the side of the road so that it did not pose an obstruction to other motorists. Bowe said that he did not recognize the vehicle earlier because the relevant section of the GB Highway was dark and not well-illuminated. Bowe described the road as "pitch black" between Grand Bahama Farms and the Third Defendant's premises with no street lights or businesses to light the roadway. He emphasized that he was familiar with the road because he drove it every night, 7 days a week, as part of his job.

[34.] Bowe admitted that he did not apply brakes or take any steps to avoid hitting the Colebrook's vehicle, but said that this was because it was already too late when he noticed it. In questioning by the Court, Bowe admitted that the left lane of the corridor he was in was available at the time of the accident, i.e. it was unoccupied, but claimed that he had no time to maneuver into it once he noticed Colebrook's vehicle. Bowe could not say in cross-examination what sort of visibility low beams would have offered him but disagreed when it was put to him by Counsel for the Claimant that he would have had a visibility of about 160 to 200 feet. Bowe could not say if the accident would have been avoided had he been travelling with his high beams. Bowe claimed that he normally drove with low beams and there were oncoming cars in the other carriageway.

[35.] According to Bowe, upon impact, both his vehicle and Colebrook's vehicle caught on fire. He noted in his evidence that a few international articles had reported that the location of the plastic gas tank behind the rear axle and below the rear bumper on Jeep Grand Cherokees made between 1993 and 2004 made the gas tank vulnerable to exploding in a rear end impact. He said that the front of his vehicle was on fire but he was able to get out of it. The Jeep Grand Cherokee was also on fire but he could not get close to it. He said that, after he exited his vehicle, he ran to the Third Defendant's premises and used the telephone to call the Fire Station. He returned to the scene of the accident with the Third Defendant's security guard, who called the RBPF. Both vehicles were still on fire. Emergency responders arrived about 10 minutes later.

[36.] Bowe said that when the fire truck arrived, the firemen extinguished the fires to both vehicles and told him that 2 people were in the Jeep Grand Cherokee. He was fully conscious and taken by ambulance to the hospital. He was discharged from hospital the same night, as he had only minor lacerations and bruising to his forehead. He later learned that the driver of the Grand Cherokee was Colebrook and the front seat passenger was Noel. It was rumoured in Freeport around the time of the accident that Colebrook and Noel were already dead before the accident.

[37.] Bowe said that he gave the RBPF a statement after the accident and he has always maintained that the vehicle he hit was stationary in the right-hand lane of the GB Highway with no lights on. He exhibited to his witness statement two newspaper articles from the *Freeport Times* newspaper dated 14 January 2011 and 24 January 2011 reporting that he had told the RBPF an account to that effect. He maintained that he had never been charged or prosecuted by the RBPF in connection with the accident and stood by that position under cross-examination. According to

him, he had only been in one previous accident at the time of the accident and the other driver had been found to be at fault.

Discussion and analysis

The Fatal Accidents Act

[38.] The **FAA** creates a statutory cause of action for the benefit of the dependants of a person who has died as a result of the wrongful act, neglect or default of another.

[39.] **Section 3(1)** of the **FAA** provides that:

> Where the death of any person is caused by the wrongful act, neglect or default of any other person and such act, neglect or default would but for his death have entitled the person injured to maintain an action for damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

[40.] **Section 4(1)** of the **FAA** provides that:

> An action under this Act shall be brought for the benefit of any person who is the wife, husband, parent or child of the deceased or who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person.

[41.] **Section 4(2)** provides that an action under the **FAA** must be brought in the name of the executor or administrator of the deceased or, where there is no executor or administrator, or where they fail to institute an action within 6 months of the deceased's death, any person or persons entitled, on behalf of all persons entitled. The phrase "person entitled" is defined in **section 2** to mean "a person for whose benefit an action may be brought under this Act".

[42.] No issue was taken with the standing of the Claimant to maintain this action. No evidence was adduced by the Claimant of letters of administration having been granted to her in Colebrook's estate. However, the Claimant, as one of Colebrook's parents, falls within **section 4(1)** of the **FAA** as a person for whose benefit an action may be brought, and no action was commenced within 6 months of Colebrook's death by the representative of her estate, whomever that person may be. The Claimant is a proper claimant on the basis of her relationship to Colebrook and need not rely on her status as the purported administratrix of Colebrook's estate.

[43.] It is a condition precedent to the existence of a valid cause of action under the **FAA** that the wrongful act, neglect or default which caused the death of the deceased is such that, had they not died, the deceased would have been entitled to maintain an action for damages in respect of it against the person who wrongfully caused their death. This requires that a hypothetical question be asked, and the *punctum temporis* at which the test is to be taken is the moment of the deceased's death. If, for any reason, the deceased could not have maintained an action at the moment of their

death, had they not died, no cause of action arises under the **FAA** for the benefit of their dependants: **New Providence Building Supplies Limited v Johnson** [2008] 5 BHS J No. 72 per *Osadebay JA* at paras [39] and [40].

[44.] The death of the deceased must be proved to have been caused by the wrongful act, neglect or default of the defendant about which complaint is made. If the deceased was the sole, effective cause of their own death, causation will not be established and no action will be available under the **FAA** for the benefit of the deceased's dependants. Where the deceased was only partly responsible for their own death as a result of a failure by them to take reasonable care for their own safety, their contributory negligence may be taken into account when assessing damages under the **FAA**, pursuant to **section 4** of the **Contributory Negligence Act**.

[45.] Pursuant to **section 5(1)** of the **FAA**, the Court may:

> ...award such damages as it may think proportioned to the injury resulting from the death to the persons entitled respectively; and shall, after deducting costs not recovered from the defendant, divide such damages among such parties in such shares as the court may direct.

[46.] The right to damages of each person entitled under the **FAA** is restricted to the pecuniary loss sustained by them, in the sense of the loss of a benefit in money or money's worth which, if the deceased had survived, would have accrued to them by virtue of their defined relationship to the deceased. The practice which is frequently followed is first to assess the loss to the family as a whole and then to apportion the sum. No regard is had to any insurance money, benefit, pension or gratuity which has been, or will or may be, paid as a result of the death of the deceased.

[47.] Pursuant to **section 5(2)** of the **FAA**, damages may be awarded in respect of the deceased's reasonable funeral expenses, provided that they were incurred by a person entitled. There is no statutory definition of what constitutes a recoverable "funeral expense" under the **FAA**. There are two questions to be answered when considering any claim for funeral expenses, Firstly, whether the expense claimed properly qualifies as a "funeral expense" and, secondly, whether the expense was, in all the circumstances, including the deceased's station in life, creed, and racial origin, reasonably incurred: **Gammell v Wilson** [1982] AC 27.

Was Bowe negligent in the driving and control of his vehicle on the date and at the time of the accident?

[48.] The first substantive issue which arises for determination is whether Bowe was negligent in the driving and control of his vehicle on the date and at the time of the accident. As *Charles J* (as she then was) observed in **Miguel Fernander v Neptune Watertoys Limited d/b/a Blue Adventures** [2020] 1 BHS J No. 10 at para [71], it is "well established law" that a driver of a vehicle on the road owes a duty of care to other road users to drive carefully and to take proper

care not to cause damage to other road users. In order to fulfil this duty, the driver ought to keep a proper look out, observe traffic rules and avoid excessive speeds.

[49.] The Court of Appeal has emphasized the principle that parties are bound by their pleadings in several recent decisions. It suffices to refer to **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 as authority for this proposition. In an action based on negligence, parties are bound by their particulars of negligence given. It is therefore appropriate to refer to the Claimant's pleaded particulars. Those particulars are:

> The Second and Third Defendants and/or their servants/ agents were negligent by:
> (a) Failing to keep any proper lookout or have any or sufficient regard for traffic that was or might reasonably be expected to be on the said road;
> (b) Failing to see the First Defendant's vehicle or the vehicle in which the deceased was passenger [sic] in sufficient time to avoid the said collision or at all;
> (c) Failing to stop, slow down, to swerve or in any other way so as to manage or control the said motor vehicle so as to avoid the said collision;
> (d) Failing to drive along the said vicinity and exercise due care and attention to avoid the said collision;

[50.] In the absence of any evidence from a police officer who was involved in the investigation of the accident, the Claimant relied on the Henfield Report to establish that Bowe was negligent. Counsel for the Claimant submitted that, per the Henfield Report, Bowe was travelling east along the GB Highway in the right eastbound lane when he failed to pay attention to the traffic ahead and rear-ended Colebrook's vehicle. Counsel submitted that Bowe was found to be at fault for the accident by the RBPF and was charged with driving a motor vehicle without due care and attention, contrary to **section 46** of the **Road Traffic Act**. Counsel submitted that, based on his own testimony, Bowe was speeding and under the influence of alcohol and, in all the circumstances, his overall conduct fell short of what a reasonable man would have done.

[51.] The Defendants invited the Court to accept Bowe's account of the accident and to find that the accident was not caused or contributed to by any negligence on the part of Bowe but was wholly caused or contributed to by Colebrook. Counsel for the Defendants submitted that a mere charge is not relevant to the issue of liability, that the Henfield Report was incorrect, unsupported and cannot be relied upon and that the Claimant failed to adduce any evidence that the Defendants caused or contributed to the accident. Counsel for the Defendants referred the Court to two cases in which the driver of an unlit vehicle which was stationary on the road at night was held wholly responsible for the collision which ensued in support of the position that Colebrook wholly caused the accident. In **Holford Stewart v George Alfred Francis Hancock** [1940] 2 All ER 427, a motorcyclist collided with an unlit stationary vehicle at night in circumstances where another vehicle which had been summoned by the stationary vehicle had pulled over nearby with its lights on facing the motorcyclist. In **Alexander Fortheringham v Thomas John Prudence** [1962] CLY 2036, a motorcyclist travelling at a slow rate of speed at night ran into the back of an unlit lorry

with no functioning reflectors despite trying to swerve past it once he noticed it. In both cases, the driver of the unlit vehicle was held entirely at fault.

[52.] The issue of whether Bowe was negligent in the driving and control of his vehicle turns on what is to be made of his evidence. As Bowe described events, he was a blameless and unfortunate victim of circumstance. Counsel for the Claimant characterised Bowe as an incredible, unreliable and unbelievable witness who fabricated his account of the accident. Counsel for the Defendants, on the other hand, characterised Bowe as a credible witness whose account of how the accident occurred was unrefuted by the Claimant and consistent from the night of the accident.

[53.] Bowe came across as a calm and collected witness and generally performed well under cross-examination, answering questions clearly, confidently and with little hesitation. However, I do not place great weight on how Bowe appeared in the box. Bowe was giving evidence of events occurring some thirteen years ago in a context in which clarity and confidence might well tend to suggest unreliability. In addition, in modern times, it is now acknowledged that credibility involves wider considerations than mere demeanour, as *Lord Pearce* famously noted in his dissenting speech in **Onassis v Vergottis** [1968] 2 Lloyd's Rep 403 at page 431.

[54.] There is virtually no contemporaneous evidence before the Court against which Bowe's evidence can be tested. The closest thing to contemporaneous evidence is the *Freeport News* articles dated 14 January 2011 and 24 January 2011, which contain hearsay evidence but nonetheless form part of the evidence before the Court. The articles corroborate some of the high-level details of the accident provided by Bowe, including his evidence of the positions of the vehicles after the accident, and also his evidence that he has consistently maintained his account of the accident since the night of the accident. That fact alone is, however, of limited purpose, as the mere fact that an account is repeated does not make it true.

[55.] The Henfield Report provides a useful foil against which Bowe's evidence can be tested, as it is an independent, albeit brief, account of the accident and the results of the RBPF's investigation. The Defendants rightly submitted that the maker of the Henfield Report was not called as a witness or cross-examined, and it does conflict with the Bennett Accident Report, but I am not persuaded that the report ought not to be given considerable weight. Based on ASP Farquharson's evidence, the report would have been prepared in the discharge of a professional duty by a member of the RBPF with reference to the contents of the RBPF's file and it was approved by the Officer-in-Charge of the Grand Bahama Traffic Division. It is, on the face of it, a reliable document.

[56.] The Henfield Report reported *inter alia* that:

(1) a white 1999 Ford Expedition License Plate No GB 5574 driven by Bowe was involved in a traffic accident with a 1998 Cherokee Jeep, License Plate No 36708 registered to

Noel and driven by Colebrook on the GB Highway "just west" of the Third Defendant's premises on 12 January 2011 at about 10.12 pm on 12 January 2011.

(2) police investigations revealed that Bowe's vehicle was travelling east along the GB Highway in the right eastbound lane when he failed to pay attention to the traffic ahead and rear-ended Colebrook's vehicle. Bowe's vehicle travelled some distance forward and separated out of control and collided into a pine tree located in the centre median.

(3) as a result of the collision, both vehicles were engulfed. The driver and passenger of vehicle no 36708 were discovered burnt beyond recognition in the front driver and passenger seat. The driver of vehicle no GB 5574 escaped with minor injuries.

(4) the RBPF investigation into the matter has been completed and it was concluded that Bowe was found to be at fault for the accident and charged with driving a motor vehicle without due care and attention contrary to **section 46** of the **Road Traffic Act**.

[57.] Bowe did not mention that his vehicle travelled some distance forward, separated out of control and collided into a pine tree located in the centre median in his witness statement. Nor did Bowe reveal that fact under cross-examination. Bowe stated only that his vehicle ended up on the median. It is, however, a detail that adds colour to the picture, and the truth of the allegation is not in doubt. Thompson spoke in her evidence of following a trail of vehicle marks on the GB Highway through the trees where Bowe's vehicle had "stopped on a pine tree" when she visited the scene of the accident on 14 January 2011, and she was not cross-examined. Bowe's failure to be completely forthright on how his car responded to the collision with Colebrook's vehicle casts doubt about the sincerity of his evidence on areas problematic for him.

[58.] Despite such doubt, I accept Bowe's evidence, and find, that Colebrook's vehicle was stationary or parked and unlit and unilluminated in the right lane of the eastbound carriageway of the GB Highway when Bowe came upon it. While certainly not what one would usually expect, the allegation is not so improbable as to be incredible. Similar situations are not unheard of, as the case law provided by Counsel for the Defendants, including **Hancock** and **Prudence**, demonstrates. In addition, the Claimant failed to refute Bowe's account of the state of Colebrook's vehicle by any reliable, positive evidence to the contrary. That is a criticism that can be made of the Claimant's case more broadly. Counsel for the Claimant attempted to undermine Bowe's evidence on this point but his attempt was, with respect, ineffective, for the reasons advanced by Counsel for the Defendants in her written closing submissions.

[59.] Based on the evidence that is before the Court, I also find that:

(1) on Wednesday, 12 January 2011, between 9:00 pm and 10:00 pm, Bowe set out in the Third Defendant's white 1999 Ford Expedition License Plate No GB 5574 to the Third Defendant's premises on the GB Highway to check on the Third Defendant's security

guard. Bowe had worked that day from 6:00 am to 6:00 pm. Bowe had not taken any medication nor had any alcohol.

(2) the GB Highway had 2 dual-lane carriageways separated by a grassy median of about 10 feet at the time. The 2 carriageways or corridors were separated by bush and the eastbound and westbound traffic travelled in 1 direction only. At the time of the accident, Bowe was heading east in the right/southern lane of the eastbound carriageway of the GB Highway with his low beams on at a speed of at least 40 to 42 miles per hour. The speed limit was 45 miles per hour.

(3) at the time of the accident, the GB Highway was dark and poorly lit. It was a dark night and there were no street lights or businesses to light the roadway. The road was not heavily travelled by many vehicles and there was no traffic in the immediate vicinity of Bowe when the accident occurred. The traffic condition and weather were fair. It was not rainy and the road was dry. There was no mist or fog.

(4) at approximately 10:12 pm, about 800 feet from the Third Defendant's premises, while in motion, Bowe glimpsed a red reflector on the rear of a vehicle. Seeing this, Bowe turned on his high beams and saw Noel's white 1998 Jeep Grand Cherokee License Plate No 36708 which Colebrook was driving in his lane and realized it was stationary.

(5) Bowe noticed Colebrook's vehicle seconds before impact. Bowe's Ford Expedition collided with the rear of Colebrook's Jeep Grand Cherokee. The Ford Expedition travelled some distance forward, separated out of control and collided into a pine tree in the centre median of the GB Highway. The Jeep Grand Cherokee came to a rest in the centre of the eastbound lane facing southeast.

(6) Bowe did not apply brakes or take any steps to avoid hitting the Jeep Grand Cherokee, such as by swerving into the available left lane, which was unoccupied at the time of the accident. Taking into account the rate of speed that he was travelling, Bowe could not have come to a complete stop by applying brakes between the period of time when he noticed Colebrook's vehicle and he collided with it.

[60.] On balance, I have come to the conclusion that Bowe was negligent in failing to keep any proper lookout, in failing to see Colebrook's vehicle in sufficient time to avoid the accident, in failing to stop or swerve so as to avoid the accident, and in failing to exercise due care and attention to avoid the accident.

[61.] I have reached this conclusion because the traffic and weather conditions were fair, the roadway at the time of the accident was not busy and, while I have accepted that the relevant

section of the GB Highway where the accident occurred was dark and poorly lit, Bowe was driving with functioning headlights, Colebrook's vehicle was white, Colebrook's vehicle had functioning reflectors, and Colebrook's vehicle was unobstructed. Despite these matters, Bowe, by his own admission, only "glimpsed" a red reflector on Colebrook's vehicle moments before impact and had no time to stop or take evasive action.

[62.] I consider that a proper and available inference is that Bowe was travelling at an excessive speed for the use of his low beams and Bowe must have been paying inadequate attention to the road. Had Bowe been driving as a reasonable and prudent driver would have been in the circumstances, Bowe would have been able to come to a complete stop within the distance of his vision or to manoeuvre into the available left lane of the carriageway he was travelling. At the very least he should only have driven at a rate of speed to permit him to see any obstacles which may present itself in the roadway. He did none of these things. For the avoidance of doubt, I do not rest my conclusion on the disputed statement in the Henfield Report that Bowe was charged by the RBPF in connection with the accident.

[63.] In my view, both **Hancock** and **Prudence**, are distinguishable. In **Hancock**, the motorcyclist negotiated a danger, the lights of the car facing him, which provided some explanation for his failure to notice the stationary vehicle in good time to avoid it. Here, I find that there was no such collateral or extraneous danger facing Bowe. On the evidence, there was nothing which could justifiably have served to divert Bowe's attention. In **Prudence**, the motorcyclist had driven slowly and carefully such that the English Court of Appeal was prepared and able to infer that the motorcyclist must have blamelessly been misled by something so as not to have noticed the stationary lorry in good time. Here, there is no benevolent inference Bowe can benefit from as he was not driving appropriately.

Was Bowe performing duties for or acting on behalf of the Third Defendant at the time of the accident?

[64.] Turning next to the issue of whether Bowe was performing duties for or acting on behalf of the Third Defendant at the time of the accident, in **Sands Sr. (father of the deceased Lance H. Sands Jr.) and others v. Evelyn and another** [2019] 1 BHS J. No. 19, the Court discussed the principles of vicarious liability in road traffic cases. At para [4], the Court stated:

> As a general rule, a person will be vicariously liable only where the tortfeasor is his agent acting in the course of the employment. Likewise, the vehicle owner is liable only where the driver was driving for some purpose of the owner.

[65.] Although the Defendants put the Claimant to proof that Bowe was performing duties for or acting on behalf of the Third Defendant at the time of the accident, Bowe's evidence was that

he was acting in the course of his employment and driving for the benefit of the Third Defendant when the accident occurred. The Third Defendant did not controvert that evidence. I therefore accept Bowe's evidence. The Third Defendant is thus vicariously liable for the negligent driving of Bowe.

Was the accident the proximate cause of Colebrook's death?

[66.] The next issue which arises for consideration is whether the accident was the proximate cause of Colebrook's death. With respect to this issue, it can be seen from **Miguel Fernander v Neptune Watertoys Limited d/b/a Blue Adventures**, *op cit*, that the usual rule respecting causation in negligence is that a claimant must prove that, "but for" the defendant's wrongful conduct, he would not have sustained the harm or loss in question. Where the "but for" test is satisfied, remoteness arises, but on the arguments, it is only factual causation that is a live issue as there has been no suggestion the damage here was unforeseeable.

[67.] I remind myself that the general rule of law, enshrined in the provisions of the **Evidence Act**, is that the burden of proving a fact in proceedings lies on the person who asserts its existence. The Claimant therefore bears the burden of proving that the accident caused Colebrook's death. I remind myself also that it is the Claimant's pleaded case that Colebrook burned to death as a result of the accident. There is strictly no burden on the Defendants to postulate or prove some alternative cause of Colebrook's death. However, I must ask myself whether the Claimant has discharged the burden of proof in light of any alternative explanation provided for Colebrook's death.

[68.] I remind myself also that the standard of proof is the balance of probabilities. Neither the seriousness of the allegation, the consequences of the allegation, nor the inherent likelihood of the allegation, alters this. A fact is proved on the standard of the balance of probabilities if the Court is able to conclude on the evidence that it is more likely than not that it occurred. Thus, the standard of the balance of probabilities requires that I must stand back and ask myself the ultimate question of whether I am satisfied that the suggested explanation for Colebrook's death advanced by the Claimant is more likely than not to be true after conducting an overall assessment of the evidence, taking into account that it is open to me to find that the Claimant has not proven her case.

[69.] Based on the evidence that is before the Court, I find that:

(1) upon Bowe's vehicle impacting Colebrook's vehicle, both vehicles caught on fire (this is an agreed fact).

(2) the fire was directly or indirectly caused by the impact of the front of Bowe's vehicle with the rear of the vehicle Colebrook was driving.

(3) the fire originated at the rear of Colebrook's vehicle and spread to the front of the vehicle.

(4) Bowe was able to exit his vehicle but neither Colebrook nor Noel exited their vehicle.

(5) Bowe could not get close to Colebrook's vehicle upon exiting his vehicle due to the strength of the fire.

(6) when the Fire Services Department and RBPF arrived at the scene of the accident, they made no attempt to rescue Colebrook due to the strength of the fire.

(7) the Fire Services Department extinguished both vehicles and discovered Bowe's vehicle was partly destroyed by fire while Colebrook's vehicle was totalled or extensively destroyed by fire.

(8) Colebrook and Noel were discovered burnt beyond recognition in the front seat and passenger seat of the Jeep Grand Cherokee and were pronounced dead at the Rand Memorial Hospital. They were identified by DNA identification.

(9) Bowe suffered only minor lacerations and bruising on his forehead. He was discharged from the Rand Memorial Hospital the same day as the accident.

(10) Dr. Kachali conducted an autopsy of Colebrook's remains on 17 January 2011 and:

(a) there was no soot present in Colebrook's trachea, lungs or stomach and no froth present in the airway passages, mouth or nose.

(b) Colebrook's distal arms were absent, due to the fire.

(c) Dr. Kachali attributed Colebrook's death to probable fatal thermal injuries in a two-vehicle collision accident. Dr. Kachali found global charring with extensive body mutilation, no evidence of gunshot wounds (based on an x-ray) and no gross evidence of natural disease.

(d) Dr. Kachali could not establish the manner of death and could not completely exclude other scenarios.

(11) on 10 March 2011, blood samples from Colebrook were submitted by the RBPF to the Toxicology Division of the Miami-Dade Medical Examiner Department for analysis. The Miami-Dade Medical Examiner Department found that Colebrook's blood contained 0.04% ethanol and they detected no carbon monoxide in Colebrook's blood using a co-oximeter.

(12) the matter was forwarded to the Coroner's Court by the RBPF for further determination but Her Majesty's Deputy Coroner for Freeport determined that an inquest was not needed.

[70.] The Claimant's case on causation was set out at paras [55] to [84] of Counsel for the Claimant's written closing submissions. The Claimant relied on Dr. Pedican's evidence, ASP Farquharson's evidence and a Fire Services Department report dated January 2024 which was not in evidence. The Claimant submitted that Bowe's collision with Colebrook's vehicle caused it to explode and "but for" this, Colebrook would not have died in the fire that resulted. While, in theory, the absence of carbon monoxide, soot or froth in the air passage and stomach of a fire victim can suggest that the person in question predeceased the fire, there may be intervening causes and circumstances which should be taken into consideration before such a conclusion is made. Each case must be based on its own circumstances. The theory that Colebrook was dead before the accident is not substantiated by Dr. Kachali's Autopsy Report.

[71.] The Defendants' case on causation was set out at paras [56] to [68] of Counsel for the Defendants' written closing submissions. The Defendants submitted that it was rumoured that Colebrook and Noel were already dead before the accident and the evidence adduced at trial established that Colebrook was already dead at the time of the accident, which accounts for the presence of her unlit vehicle on the GB Highway at night. The Defendants submitted that Dr. Kachali's Autopsy Report was not conclusive about Colebrook's cause of death or manner of death and Dr. Kachali did not have the benefit of toxicology results when he said that Colebrook's death was attributable to probable fatal thermal injuries. Dr. Pedican confirmed that the lack of carbon monoxide detected in Colebrook's blood in the toxicology results and the lack of soot in her trachea, lungs or stomach suggested she was not alive at the time of the fire and there was no evidence of inhalation around the time of Colebrook's death. In sum, the evidence is balanced at best and, therefore, the Court should find that the Claimant failed to prove her case.

[72.] Notwithstanding the forceful submissions made by Counsel for the Defendants, on the state of the evidence, I am unpersuaded that the uncertainty identified by the Defendants should be permitted to carry the day. In my estimation, the case for believing that Colebrook died as a result of the fire caused by the accident is stronger than the case for not so believing. I find that Colebrook died in the fire caused by the accident and my reasons for reaching this conclusion are:

(1) Dr. Kachali's Autopsy Report found Colebrook's death to be attributable to probable thermal injuries sustained in the accident: "Investigation and autopsy findings show that death is attributed to probable fatal thermal injuries...". Dr. Kachali found no evidence of projectiles or bullets or gross evidence of disease during Colebrook's autopsy.

(2) Dr. Kachali expressed the view that further investigation and evaluation was necessary to determine the manner in which Colebrook died and that other scenarios could not be excluded, but the evidence suggests that no further autopsy work was ever done by Dr. Kachali and, when the matter was referred to the Deputy Coroner for Freeport, the Coroner found that an inquest into Colebrook's death was not necessary.

(3) the fact that no carbon monoxide was detected in Colebrook's blood and no soot was detected in Colebrook's lungs, trachea or stomach both suggest that Colebrook was not alive at the time of the fire but, based on Dr. Pedican's evidence, do not necessarily exclude the possibility that Colebrook was alive at the time of the fire.

(4) Dr. Pedican provided a reasonable explanation for the absence of carbon monoxide or soot – Colebrook's breathing was inhibited or impaired or she was not alive long enough for carbon monoxide or soot to accumulate. The evidence before the Court tells that Colebrook was involved in a rear-end collision at some speed and that the fire that resulted was both swift and strong.

(5) the Court does not need to be sure to the standard of medical or scientific certainty in order to make a finding on the balance of probabilities. The conclusion that Colebrook died as a result of probable fatal thermal injuries is the immediate and obvious conclusion to be drawn from the fact that Colebrook was involved in a fire which "engulfed" her vehicle.

(6) this is not a case of several plausible competing causes of death set up against one another. No other plausible, competing cause of death has been identified to explain Colebrook's death, let alone both her death and Noel's. The rumour that Colebrook and Noel were both shot before the accident is not supported by the results of Dr. Kachali's Autopsy Report or any other evidence.

(7) the presence of Colebrook's vehicle on the GB Highway in a stationary and unlit state is susceptible to a number of more innocent, and more inherently likely explanations than the explanation that Colebrook and Noel were dead at the time.

Did any negligence or recklessness on the part of Colebrook cause or contribute to the accident?

[73.] The next issue which requires consideration is whether any negligence or recklessness on the part of Colebrook cause or contribute to the accident and, therefore, her death. In relation to this issue, I must determine whether Colebrook demonstrated a lack of reasonable care for her own safety which caused or contributed to the accident, and, if so, I must take a broad approach and apportion responsibility for the accident between Bowe and Colebrook based on the two factors of blameworthiness and causation.

[74.] The burden of proving contributory negligence lies on the Defendants. The Defendants' pleaded particulars of contributory negligence are as follows:

> The deceased, Jacinda Jasmine Colebrook, driver of the Cherokee Jeep was negligent and/or reckless in that she:
>
> (i) Allowed or caused the Cherokee Jeep to be parked or stationary in the right/southern lane of the eastbound carriageway of the Grand Bahama Highway;
> (ii) Drove or parked or allowed or caused the Cherokee Jeep to be stationary or near stationary in the right/southern lane of the eastbound carriageway of the Grand Bahama Highway at night time in a section of the Grand Bahama Highway where there are no street lights or businesses to light the road in any way without any of the vehicle's lights being on or any other form of illumination of the vehicle;
> (iii) Failed to use the vehicle's hazard light indicators or to take any other steps to warn or alert other motorists of the presence of the Cherokee Jeep which was stationary or near stationary on the highway;
> (iv) Failed to drive or otherwise to move the Cherokee Jeep off the highway onto the side of the road and out of the way of other motorists who would be using the highway;
> (v) Allowed the vehicle to stand in any such place or street so as to cause an obstruction in such place or street or inconvenience to any member of the public, in particular Bowe;
> (vi) Negligently or willfully prevented, hindered or interrupted the free passage of other traffic, in particular Bowe;
> (vii) Failed to exercise due care and attention;
> (viii) Failed to keep any or any proper lookout or to have any sufficient regard for other motorists who would be using the highway;
> (ix) Failed to observe or heed the presence of the vehicle driven by Bowe;
> (x) Failed to take any reasonable and/or proper precautions to prevent Bowe from colliding into the Cherokee Jeep.

[75.] Without belabouring the point, I am satisfied that the Defendants are entitled to succeed on their pleaded defence of contributory negligence. Subparagraphs (i), (ii), (iii), (iv), (v), (vi), (vii) and (x) of the particulars of contributory negligence have been made out on the evidence – I refer to my findings at para [59] above. Colebrook therefore failed to take ordinary care for herself. Equally, I am satisfied that Colebrook's failure to take ordinary care for herself was a contributory cause of the accident and the damage sustained by her. Causation is, I hope, self-evident. The real issue is at what percentage Colebrook's contributory negligence or contribution should be assessed.

[76.] The Defendants submitted that Bowe's contribution to the cause of the accident should not exceed 25% with the greater portion of the blame falling on Colebrook. In support of this submission, the Defendants relied on **Brown v Thompson** [1968] 1 WLR 1003, **Kunwarsingh v Ramkelawan** [1972] 20 WIR 441 and **Chop Seng Heng (sued as firm) v Thevannasan s/o Sinnapan** [1975] 3 All ER 572.

[77.] In **Brown v Thompson** [1968] 1 WLR 1003, a car drove into the back axle of an unlit lorry which was stationary in the road at night without working rear reflectors. The car's speed was not more than 40 miles per hour but the car was travelling with dipped headlights and did not see the lorry in time to take effective avoiding action. The trial judge held that the driver of the car either ought not to have been driving with dipped headlights if he was driving at the speed he was or, if he was driving with dipped headlights, he ought not to have been going so fast in the particular conditions that existed, or if it was reasonable to go at that speed, then he could not have been keeping as good lookout as he should have done. The English Court of Appeal upheld the trial judge's apportionment of liability 80% to the lorry driver and 20% to the driver of the car.

[78.] In **Kunwarsingh v Ramkelawan** [1972] 20 WIR 441, a car drove around a curve at a speed of 25 miles per hour into an unlit van which had pulled abreast a stationary car with its park lights on the right side of the road. The driver of the car had not seen the unlit van until he was 8 to 10 feet from it. He attempted to swerve to avoid hitting the van but the right front fender of the car struck the left rear fender of the van and the car overturned. *Rees J* found that the van was an obstruction and a danger to other users of the road and that its owner had been negligent. However, *Rees J* also found that the driver was at fault because, if he did not see the van until he was 8 feet from it, he was not keeping a proper lookout and, if he saw the van and did not stop before striking it, he was driving at a speed at which he could not stop within the limits of his vision. The judge found the defendant owner of the van to be much more to blame than the driver of the car. The judge assessed the responsibility at 75% to the owner of the van and 25% to the plaintiff, the owner of the car.

[79.] In **Chop Seng Heng v Thevannasan s/o Sinnapan** [1975] 3 All ER 572, a driver crashed into the rear of a stationary lorry which was parked with its hazard lights on at 35 miles per hour after navigating a winding blind left-hand bend in misty conditions. The Judicial Committee Privy Council approved an apportionment of 75% and 25% which had been arrived at by the first instance judge.

[80.] While I have derived assistance from the authorities provided by Counsel for the Defendants, the appropriate apportionment of liability must turn on the specific facts of each case. In the present case, in the absence of any excuse for the presence of Colebrook's vehicle on the GB Highway in the state that it was in, Colebrook must bear most of the responsibility for the accident. However, I recognize that the accident was by no means inevitable, granting Colebrook her defaults. I refer to paras [61] and [62] above. In the circumstances, I will assess Colebrook's contributory negligence at 75%.

Is the Claimant entitled to damages under the FAA and, if so, what is the quantum of those damages?

[81.] The last issue is the issue of the quantum of damages under the **FAA**. In this regard, there was little difference between the parties on the approach that should be taken when calculating damages under the **FAA**, though the parties differed on the correct application of those principles to the facts. It is to be noted that the Claimant developed her claim as one solely for financial dependency (with no element pertaining to services dependency or loss of a mother's special care and attention) and funeral expenses.

[82.] In **Swann v Butler (d/b/a G.B. Mufflers & Radiators)** [2013] 1 BHS J No.8, a case relied on by the Defendants, *Evans J* (as she then was) helpfully reviewed the basic legal principles applicable to the assessment of damages under the **FAA** in deciding a dependency claim brought by the mother of a man who was killed in an accident at work. Her decision was upheld by the Court of Appeal in **Butler v Swann** [2014] 1 BHS J No 117, who described her, at para [72], as having used the "correct principles in assessing the damages". At paras [93] to [97] of her decision, *Evans J* said:

> 93 Section 5(1) of the Fatal Accidents Act provides that in an action under that Act, the Court may award such damages as it may think proportioned to the injury resulting from the death to the persons entitled. Section 5(2) provides that damages may be awarded in respect of the reasonable funeral expenses of the deceased person if such expenses have been incurred by a person entitled.
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> 94 Pollock C.B. in 1858 adopted the test that damages must be calculated in reference to a reasonable expectation of pecuniary benefit as of right, or otherwise, from the continuance of life (Franklin v S.E, Ry, 1858 3 H & N 211 at 213-214): Winfield and Jolowicz on Tort at page 504).
>
> 95 In Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601, at p 617, Lord Wright expressed the general principles to be applied in estimating the amount of damages to be awarded as follows:
>
> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt." (See also Nation and Nation v Collins and Shakespeare (1961) 4 WIR 513).
>
> 96 In a later case, Cookson v Knowles [1978] 2 All ER 604, Lord Diplock, at page 612, provided the following summary of the principles for assessing damages in fatal accident cases:
>
> (1)In the normal fatal accident case, the damages ought, as a general rule, to be split into two parts:
> (a)the pecuniary loss which it is estimated the dependants have already sustained from the date of death up to the date of trial ("the pre-trial loss"), and
> (b)the pecuniary loss which it is estimated they will sustain from the trial onwards ("the future loss").

(2)Interest on the pre-trial loss should be awarded for a period between the date of death and the date of trial at half the short term interest rates current during that period.
(3)For the purpose of calculating the future loss, the "dependency" used as the multiplicand should be the figure to which it is estimated the annual dependency would have amounted by the date of trial.
(4)No interest should be awarded on the future loss.
(5)No other allowance should be made for the prospective continuing inflation after the date of trial.

97 Then in the case of Harris v Empress Motors Ltd. [1984] 1 WLR 212, O'Connor, LJ, said that the modern practice in calculating the dependency is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself.

[83.] The "modern practice in calculating the dependency" referred to by *Evans J* at para [97] of **Swann v Butler** was considered in greater detail by *Thorne J* in **Garvey v Butler** [1993] BHS J No. 114, where he said at paras [45] and [46]:

45 The modern method of calculating the dependency is to deduct a percentage of the net income to represent what the deceased would have spent on himself. As O'Connor L.J. stated in Harris v. Empress Motors Ltd. [1984] 1 W.L.R. 212 at p. 216:

"In the course of time the courts have worked out a simple solution to the similar problem of calculating the net dependency under The Fatal Accidents Act in cases where the dependants are wife and children. In times past the calculation called for a tedious inquiry of how much housekeeping money was paid to the wife, who paid how much for the children's shoes etc. This had all swept away and the modern practice is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentages have become conventional in the sense they are used unless there is striking evidence to make the conventional figure inappropriate because there is no departure from the principle and that each case must be decided upon its own facts. Where the family unit was husband and wife, the conventional figure is 33 percent and the rationale of this is that broadly speaking, the net income was spent as to one-third for the benefit of each and one-third for their joint benefit. No deduction is made in respect of the joint portion because one cannot buy or drive half of a motor car. Part of the income may be spent for the benefit of neither husband or wife. If the facts be, for example, that out of the net income of GBP8,000 per annum the deceased was paying GBP2,000 to a charity the percentage could be applied to GBP6,000 and not GBP8,000. Where there are children the deduction falls to 25 percent as was the agreed figure in the Harris case."

46 In Coward v. Comex Houlder Diving Ltd. (July 1988) Gibson L.J. accepted this principle although he was careful to point out that it was always capable of being displaced by evidence. For example, if the joint income was low, it was likely that more than one-third would be applied to the joint benefit.

[84.] The "conventional percentage approach" (as it was put by Counsel) was discussed by Simon Levene in **Heads of Damage (2nd) edition**, a text relied on by the Claimant, at pages 47 to 48 as follows:

Valuing the dependency (1): loss of main breadwinner

Steps i First, calculate the value of one-off items, the funeral expenses, etc.

ii The initial approach in calculating the loss of dependency on income is to use household accounts. Using these it may be possible to work out the sum spent on the family, and then deduct the amount that the deceased spent on his own living expenses. It is seldom possible to account for the whole of the deceased's income this way, but certain expenses (mortgage, gas, electricity and telephone bills) will give a minimum expenditure.

iii In the absence of accurate information about the deceased's outgoings, the dependency will usually be assessed like this for an ordinary breadwinner of ordinary means.

Deceased sole breadwinner, claim by spouse, no children
1/3 spent by deceased on himself alone
1/3 spent by deceased on his wife alone
1/3 spent by deceased on joint expenses

Delete the third that the deceased spent on himself alone: the Plaintiff was dependent on the third he spent on her alone, and she also had the benefit of all the remaining third. The dependency is therefore 2/3.

Deceased sole breadwinner, claim by spouse, children
¼ spent by deceased on himself alone
¼ spent by deceased on his wife alone
¼ spent by the deceased on children alone
¼ spent by deceased on joint expenses

Delete the quarter that the deceased spent on himself alone: the widow and children were dependent on the half that was spent on them, and also had the benefit of all the remaining quarter. The dependency is therefore ¾

It may be possible to claim a higher percentage where the breadwinner's income was low. ...

[85.] Colebrook was married at the time of her death but separated from her husband. The complete lack of mention of him in the Claimant's evidence bears this out. However, the parties did not provide authority illustrating the application of the "conventional percentage approach" to the situation of a single-parent household. The English High Court decision of **Laniyan v Barry May Haulage** [2001] Lexis Citation is, however, a helpful illustration. In that case in which a minor brought a dependency claim after the loss of his mother in an accident, the "conventional percentage approach" was adopted in the absence of evidence of how the family finances were broken down and the judge used a 2/3 dependency until the claimant attained the age of eighteen and a ½ dependency for later years. The mother lived separately from the claimant's father and the father did not contribute to the family finances before the accident.

[86.] In his written submissions, Counsel for the Claimant advanced a bold claim for an award in the amount $357,093.60 broken down as follows:

Special damages:
Pre trial Annual salary $13,900 x 0.80 = 11,120 x 14 = $155,680.00

Expenses	4,000.00	
	25.00	
	310.00	4,335.00
		$160,015.00
Interest 4%	160,015.00 x 4% for 13 years	$137,308.60
		$297,323.60

Pecuniary

[annual dependency multiplier [17.3] less pre-trial years [13] [8.07]

$13,900.00 x 4.3	$59,770.00
Total	$357,093.60

[87.] It is clear that the Claimant is not entitled to an award of $357,093.60. I accept Counsel for the Defendants' submissions that:

(1) there is no evidence that Colebrook's income was $13,900 per annum. No evidence was adduced by the Claimant of Colebrook's salary at the time of her death. The only evidence at all pertinent to the matter was Claimant's evidence that Colebrook was employed by the Ministry of Education as a Janitress at Maurice Primary School. I accept that evidence, but it is not proof that she earned $13,900 per annum.

(2) there is no evidence that the Claimant was dependent on Colebrook or could expect to receive financial contributions from Colebrook in the future. The evidence is in fact the other way. I accept the Claimant's evidence that the Claimant and Colebrook's brother and sister regularly sent the Claimant money to Freeport to assist her with her rent and bills, but no evidence was given suggesting a reasonable expectation of reciprocal contribution. Accordingly, no damages can be awarded to the Claimant for income dependency under the **FAA**.

(3) the number of years to Colebrook's retirement or the end of her working life is not the "predominant factor". The multiplier used in calculating dependency should be taken to the date that Colebrook's children would have ceased to be dependent on her. That age, on the evidence, is 18 years of age, as there is no evidence that Colebrook's children have gone on to tertiary education, or would have gone on to tertiary education had Colebrook not died.

(4) no award for post-trial or future loss can be made because the dependency of all of Colebrook's children ceased prior to trial. I find that Colebrook had 5 children at the time of her death and the following particulars are established on the evidence:

Name of child	Date of birth
Ariel Newbold	1 November 1993
April Colebrook	12 April 1997
Cherelle Colebrook	6 October 2000
Tavaris Colebrook Jr.	18 May 2002
Vaughn Colebrook	26 August 2004

From this, Colebrook's youngest children were aged 21 and 19 years of age, respectively, at the time of trial.

[88.] I am unable to accept Counsel for the Defendants' submission that, although Colebrook's youngest child was Colebrook's biological child, he should not be taken to be one of Colebrook's dependants for the purposes of the **FAA** and the dependants are limited to Colebrook's older children who lived with her in Freeport.

[89.] In my view, it is not necessary for a dependant to establish that any pecuniary advantage was derived from the deceased before their death, only a "reasonable expectation of pecuniary benefit as of right, or otherwise, from the continuance of life": **Taff Vale Railway Co v Jenkins** [1913] AC 1. It is clear that Colebrook cared for 4 of her 5 children on limited means. It is reasonable to conclude that, had she lived, as her children reached adulthood, she would have honoured her legal and moral obligation as a mother to her youngest child.

[90.] I am likewise unable to accept Counsel for the Defendants' submission that, in the absence of any evidence of Colebrook's earnings, the Court cannot make any award for financial dependency because it cannot determine the dependency to be awarded. The assessment of the damages for loss of dependency is a jury question. There is no basis for saying that Colebrook earned nothing at the date of her death. I am entitled to proceed on the basis that Colebrook earned at least the minimum wage. The **Minimum Wages Act** applies to employment by or under the Crown in right of the Government.

[91.] In the result, I proceed on the footing that the Claimant would have earned at least $150 per week between 12 January 2011 and 14 August 2015 and, after the coming into effect of the **Minimum Wages (Increase In Minimum Wages) Order, 2015**, $210 per week from 15 August 2015 to 26 April 2022 (the date that Colebrook's youngest child turned 18). For convenience, I will take the middle figure of $180 per week or $9,360 per annum.

[92.] Counsel for the Claimant submitted that, as Colebrook was a single-head of household, it is to be presumed that she would have spent 20% of her income on herself and the remaining 80% on her children and, therefore, the "conventional percentage" the Court should apply when calculating dependency should be 80%. However, as Counsel for the Defendants correctly observed, the Claimant provided no authority for the suggested figure of 80% and no evidence of Colebrook's expenses was adduced to justify departing from the usual conventional percentages.

[93.] Proceeding on the assumption that Colebrook spent 1/3 of her earnings on herself, I assess Colebrook's children's dependency at $120 per week or $6,240 per annum.

[94.] I adopt a multiplier of 10.5. I have taken into account **Knauer v Ministry of Justice** [2016] AC 908, para [7]. I have borne in mind such personal characteristics as are known about Colebrook including her age and employment and there is no evidence that her children have predeceased trial. I decline to adopt a multiplier of 8 as suggested by Counsel for the Defendants because I do not accept that Colebrook's dependants for the purposes of the **FAA** are limited to her eldest 4 children.

[95.] In the result, using a multiplicand of $6,240 per annum and a multiplier of 10.5, I assess damages for loss of support before deduction for contributory negligence at $65,520.

[96.] Special damages must be specifically pleaded and proven: **Johnson v Brown** [2015] 1 BHS J No. 81 at para [23].

[97.] In the Claimant's Re-Amended Writ of Summons, the Claimant claimed for the following special damages:

Funeral expenses	$4,478
Airline Tickets to and from Freeport, Grand Bahama	998
Living accommodations in Freeport	700
Re-location to New Providence	900

[98.] Addressing the special damages claimed in turn:

(1) the Claimant did not prove that $4,748 was spent on Colebrook's funeral. The Claimant adduced a receipt dated 20 January 2011 in the sum of $4,000 paid to Restview Memorial Mortuary and Crematorium Limited for her cremation. However, no amount can be awarded for this payment, as the receipt records that the payment was received from Alexander Newbold, Colebrook's father, and he is not a person on whose behalf

this claim has been brought as it is framed in the Claimant's Re-Amended Writ of Summons.

(2) no evidence was led to substantiate $998 was spent on air travel to and from Freeport. The Claimant adduced Western Air Invoices dated 14 January 2011 in the amounts of $160 and $150 respectively for tickets for the Claimant, Vaughn Colebrook and Thompson. However, Thompson was not listed as a person on whose behalf this claim has been brought and I am not satisfied that these tickets constitute "funeral expenses". No authority was provided by Counsel for the Claimant to support the Claimant's case that they should be treated as such.

(3) no evidence was led to substantiate the $700 claimed for living accommodation in Freeport and I am not satisfied that the expense is properly to be treated as a "funeral expense". No authority was provided by Counsel for the Claimant to support the Claimant's case that they should be treated as such.

(4) no evidence was led to substantiate the $900 claimed for re-location to New Providence and I am not satisfied that the expense is properly to be treated as a "funeral expense". No authority was provided by Counsel for the Claimant to support the Claimant's case that they should be treated as such.

[99.] **Section 4** of the **Contributory Negligence Act** provides:

> Where any person dies as a result partly of his own fault and partly of the fault of any other person or persons, any damages recoverable in an action brought for the benefit of the dependants of that person under the Fatal Accidents Act shall be reduced as aforesaid.

[100.] After taking into account Colebrook's contribution to the accident which caused her death, which I have assessed at 75%, the result is that the damages awarded to the dependants are reduced to $16,380.

[101.] Taking into account the circumstances of the case, I apportion the damages awarded among the dependants as follows:

(1) Ariel Newbold – 5%

(2) April Colebrook – 15%

(3) Cherelle Colebrook – 20%

(4) Travis Colebrook Jr. – 25%

(5) Vaughn Colebrook – 35%

[102.] **Section 3** of the **Civil Procedure (Award of Interest) Act** empowers the Court to make an order for an award of interest, at such rate as it thinks fit, on the whole or any part of the debt or damages, for the period between the date the cause of action arose and the date of judgment.

[103.] Relying on **Birkett v Hayes** [1982] 2 All ER 710 and **Jerome v Lafleur** [2001] BHS J No 106, the Defendants submitted that any award of interest on pre-trial loss in this case should be reduced on account of unreasonable delay by the Claimant in bringing the action on for trial. Counsel for the Defendants highlighted that the trial took place 13 years after the death of the deceased and that the Claimant's Writ of Summons was amended thrice, with the most recent amendment being made on 12 June 2023.

[104.] The Claimant submitted that the Court ought not to follow **Jerome v Lafleur** [2001] BHS J No. 106 to reduce interest on any award of damages. Counsel for the Claimant submitted that the Claimant did not have the financial resources to pursue this claim and relied on "goodwill" to progress the matter. Counsel highlighted the fact that the Claimant required financial assistance from the Registrar of the Supreme Court by waiver of the fees to commence the action and was first represented by the legal aid section of the Eugene Dupuch Law School.

[105.] In **Birkett v Hayes** [1982] 1 WLR 816, the English Court of Appeal considered the award of pre-judgment interest on awards for pain, suffering and loss of amenity in personal injury actions. The English Court of Appeal discussed, among other things, the appropriate rate of interest to be awarded and the period for which interest should be awarded. In his judgment, *Watkins LJ* stated at page 825:

> Clearly these provisions confer a discretion on the court to decide what part of an award of damages shall carry interest, the rate of that interest and the period for which it should be given. That discretion has now to be exercised so as, following the decision in Pickett's case [1980] A.C. 136, to award interest on general damages in personal injury cases at, following the guidelines now laid down by this court, the rate of 2 per cent and, having regard to the circumstances of the case, for the period deemed to be appropriate.
>
> Usually this period will run from the date of the writ to the date of trial, but the court may in its discretion abridge this period when it thinks it is just so to do. Far too often there is unjustifiable delay in bringing an action to trial. It is, in my view, wrong that interest should run during a time which can properly be called unjustifiable delay after the date of the writ. During that time the plaintiff will have been kept out of the sum awarded to him by his own fault. The fact that the defendants have had the use of the sum during that time is no good reason for excusing that fault and allowing interest to run during that time.

[Emphasis added]

[106.] In **Jerome v Lafleur** [2001] BHS J No. 106, a personal injury action, *Lyons J* awarded interest on past loss at the rate of 4% per annum for 7 years, as the case should not have been delayed longer than that. Trial took place between 13 and 15 November 2001, approximately 13 years after the accident occurred and 12 years after the action was commenced.

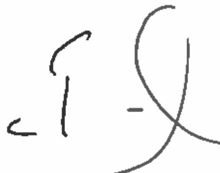
[107.] In the particular circumstances of this case, I consider that a similar result should obtain as in **Jerome v Lafleur**. While I accept that the Claimant may have been hindered in her ability to prosecute this action due to her impecuniosity, that is not a matter for which the Defendants are responsible and, in doing justice between the Claimant and the Defendants, it would be unjust for the Defendants to have to pay pre-judgment interest for a period longer than 7 years. This action could in principle have been tried well within that period. A claimant is not entitled to insist on a defendant waiting indefinitely for them to be able to find counsel.

Conclusion

[108.] For the reasons given, there will be judgment against the Defendants in the amount of $16,380. In accordance with **section 3** of the **Civil Procedure (Award of Interest) Act**, pre-judgment interest on that sum is awarded at the rate of 3% per annum from 24 August 2013, when the Writ of Summons was filed, to 24 August 2020. The judgment debt bears interest at the statutory rate of 6.25% per annum from the date of judgment until payment pursuant to **section 2** of the **Civil Procedure (Award of Interest) Act**.

[109.] I will invite the parties to make submissions as to the appropriate order for costs by written submissions to be lodged and served within 21 days. Any party seeking costs shall lodge and serve a statement of costs with their submissions to enable a summary assessment of costs to be made. Any representations or submissions on the amount of costs to be awarded shall be lodged and served within 14 days thereafter.

Dated the 15th day of May 2024



Sir Ian R. Winder
Chief Justice