

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2016/CLE/gen/01348**

**BETWEEN**

**ANTHEA CHERRIE CULMER**

**(Next friend of an Infant)**

**AND**

**JUSTIN RASHAD CULMER**

**(On behalf of all Dependents of the Late Jason Creton Culmer)**

**Plaintiffs**

**AND**

**TREVOR BASIL JOHNSON**

**Defendant**

**Appearances: Lessiah Rolle for the Plaintiffs**

**Wellington Olander for the Defendant**

**14 May 2019, 8 August 2019, 25 November 2019 and 2 February 2021**

**Closing Submissions: 12 April 2021, 25 August 2021 and 28 September 2021**

**JUDGMENT**

## WINDER J

This is a claim under the Fatal Accidents Act arising from a traffic accident which took place on Carmichael Road on 20 September 2013. The plaintiffs claim to be the dependents of the late Jason Creton Culmer who died immediately following his involvement in the traffic accident. It was agreed that that trial would be split and the Court would be concerned only with the question of liability.

1. The Claim was brought by specially indorsed Writ of Summons dated 13 September 2016. The Statement of Claim, indorsed on the Writ of Summons, provides in part as follows:

1. The Plaintiffs at the date of the death of the Deceased resided at Hopkins Drive, Coral Harbour, New Providence, The Bahamas; and currently at Venice Bay, New Providence, The Bahamas.
2. The Plaintiffs are the ex-wife and mother of the children of the late Jason Creton Culmer, deceased, namely Justin Rashad Culmer and the minor child Javaughan Raheem Culmer, and the son of the Deceased, respectively.
3. The Plaintiffs brings this action on behalf and for the benefit of all persons entitled and the dependents of the Deceased, pursuant to Section 4(1) and (2) of the Fatal Accidents Act, Chapter 71.
4. The Defendant resides at or last known address is No. 16 Taylor Street, Nassau Village, New Providence, The Bahamas.
5. The Deceased was self-employed with an average annual income of \$45,000.00.
6. The Deceased during the course of his lifetime supported all of the persons entitled.
7. On the 20<sup>th</sup> September 2013 the late Jason Creton Culmer, deceased, was driving his 1990 green Honda CRV Jeep Licence Plate No. 110113 due east on Carmichael Road when the Defendant so negligently drove, managed, and controlled his 1990 Blue Volvo Tank Truck, Licence Plate No. M-4271 due east along the said road and caused or permitted his said vehicle to violently collide with the Deceased vehicle.
8. The collision was caused by the negligence of the Defendant.

### PARTICULARS OF NEGLIGENCE

9. The Particulars of negligence are that the Defendant at the material time:
  - 9.1 Failed to keep any or any proper lookout;
  - 9.2 Failed to keep maintain and or drive his vehicle in the left lane;
  - 9.3 Drove too fast in all the circumstances particularly as it was raining and or the road was wet;

- 9.4 Failed to have any or any sufficient regard for traffic that was or might reasonably be expected to be oncoming on a main road;
- 9.5 Failed to see the 1990 green Honda CRV Jeep driven by the Deceased in time or at all;
- 9.6 Failed to steer or control the 1990 Blue Volvo Tank Truck or to apply his brakes adequately or at all to avoid colliding with the 1990 green Honda CRV Jeep driven by the Deceased.
- 9.7 Failed adequately or at all to observe or heed the presence, path, position and approach of the 1990 green Honda CRV Jeep driven by the Deceased;
- 9.8 Drove into the right lane and into the path of and collided with the 1990 green Honda CRV Jeep driven by the Deceased; (sic)
10. In consequence of the matters aforesaid, and by reason of the negligence of the Defendant the late Jason Creton Culmer, deceased, sustained severe and fatal injuries, survived for a few minutes but was pronounced dead by Dr. D. Musgrove at the Princess Margaret Hospital.

#### PARTICULARS OF INJURIES

11. The Particulars of Injuries are that the Deceased suffered Blunt Force Trauma to Torso and Extremities and succumbed to his injuries at the scene.

2. The Defendant (Johnson) filed a Defence on 21 October 2016 which provided in part as follows:

...

3. The Defendant deny that the said collision was caused by his negligence as alleged in paragraph 7, 8 & 9 of the Statement of Claim or at all and each and every allegation of negligence on the part the (sic) Defendant contained therein and in the particulars thereto is denied.
4. The Defendant say that the said collision was solely caused or alternatively contributed to by the negligence of the deceased.

#### PARTICULARS OF NEGLIGENCE

- a) Driving at a speed which was excessive in the circumstances.
- b) Failing to keep any or any proper look-out.
- c) Failing to drive in the eastbound lane.
- d) Driving while intoxicated with ethanol.
- e) Failing to stop, to slow down, to swerve or in any other way so to manage or control his said 1990 green Honda CRV jeep as to avoid the collision.
- f) Driving while said vehicle was not licenced or insured.
5. The Defendant deny paragraph 10 of the Statement of Claim.
6. The Defendant admit paragraph 11 of the Statement of Claim.

3. At trial the Reserve Superintendent Richard Rahming (Rahming), Althea Culmer, Justin Culmer and Superintendent Harry Williams gave evidence for the plaintiffs. Johnson, Inspector Cyprian Collie and Police Constable 3400 Wilson gave evidence in Johnson's case.

4. Rahming's examination in chief provided:

1. I am a Traffic Accident Reconstructionist.
2. I was employed with the Royal Bahamas Police Force for Forty (40) years beginning sometime in June 1973 and retiring in July 2018 as a Reserve Superintendent. I worked the last Thirty (30) years in the Traffic Division.
- ...
4. I have completed investigations and reported on Six Hundred and Four (604) Fatality Scenes as at the 20<sup>th</sup> September 2013.

#### 6. PHYSICAL EVIDENCE

1. (RP) The Reference Point that I used was a B.E.C wood light pole situated off the south edge of Carmichael Road east from Blyden Road.
2. (POI) The Point of Impact was 11'-0" from the north edge of Carmichael Road in the east bound lane and 34'-4" west from the RP.
3. (1) = The 1900 Volvo Fuel Tanker right front wheel came to rest 18'-6" east from the western boundary and 21'-8" north from Quality Store. The Right rear wheel was 20'-3" from Quality Store. This vehicle was facing in a south/west direction.
4. (2) = The 1996 Nissan Honda CRV Swift right front wheel came to rest 76'-0" west from the RP and on the north edge of the roadway and the right wheel was 2'-2" off the north edge of the roadway. This vehicle was facing in a south/east direction.
5. (A) = Gouge mark made by the Volvo truck 8'-0" north from the south edge of the Roadway and 38' – 6" west from the RP.
6. (B) = Gouge and scrape marks made by the Nissan Honda CRV Jeep 2'-2" north from the Center line.

5. Wilson's examination in chief was as follows:

...

3. Around 4:40 a.m. on the said date of 20<sup>th</sup> September, 2013 I arrived at a road traffic accident that occurred on Carmichael Road, New Providence, Bahamas involving two vehicles one a 1990 Volvo Tank Truck License number M4271 and the other a Honda CRV License number 110113.
  4. I examined both vehicles and in the said Honda CRV was a male in the driver's seat who appeared dead.
  5. The said Honda CRV had no license disc attached to the Windshield and attached to the said Windshield was a certificate of inspection that expired May, 2013.
6. Johnson's evidence in chief was as follows:

...

3. In September, 2013 I was the owner of several motor vehicles including a Blue left-hand drive 1990 Volvo Tanker Truck License #M4271.
4. On the 20<sup>th</sup> September, 2013 around 4:30a.m. I was travelling west bound on Carmichael Road in the said 1990 Volvo Tanker Truck destined for Mount Pleasant Village to see my mother to take her automobile for servicing at my Gas Station.
6. At approximately 2,000 feet in the eastbound lane [Northern side] I noticed a vehicle's headlight coming towards my said vehicle. It was a 1990 Green right-hand drive Honda CRV. When it was about 200 feet the said Honda CRV came into my lane; I turned my vehicle defensively to the left to Avoid colliding with the Honda CRV which had entered my west bound travel lane.

7. Forensic scientist Collie's examination in chief provided as follows:

...

6. On the 30<sup>th</sup> December, 2013 I received from Ms. Chantal Curtis the following items labelled Deceased Jason Culmer for analyses to wit:
  - a) One sealed post-modem kit containing toxicological samples;
  - b) One plastic tube containing file;
  - c) Three plastic tubes containing blood;
  - d) One plastic tube containing vitreous humour; and
  - e) Two tubes containing urine.
7. My analysis detected no drugs in the blood and urine.
8. Ethyl Alcohol (ethanol) is a euphorogenic, Central Nervous System (CNS) and respiratory depressant drug. The reported analytical findings detected the presence of ethanol at a concentration of 0.16% w/v (161mg/100ml) in the whole blood, 0.22% w/v (222mg/100ml) in the urine and 0.16% w/v (155mg/100ml) in the vitreous humour specimens. The intensity of the CNS effects of ethanol is proportional to the concentration of ethanol in the blood.
9. My conclusion based on the concentration of ethanol (alcohol) found in Jason Culmer blood, urine and vitreous humour, it can be stated that at

and around the time of death of Jason Culmer he was in the "excitement" stage of alcohol influence, the clinical signs and symptoms of the excitement stage of alcohol influence include but are not limited to the following: emotional instability, loss of critical judgment, impairment of perception, memory and comprehension, decreased sensory response, increased reaction time, reduced visual acuity, peripheral vision and glare recovery, sensory-motor incoordination and impaired balance.

10. Further, the deceased Jason Culmer was under the influence of drink to such an extent as to be incapable of having proper control of a vehicle. However, the effects of this concentration may have been mitigated by the decedent's tolerance to ethanol. ...

8. The Agreed Statement of Facts and Issues provided as follows:

STATEMENT OF FACTS

1. At the material time the Plaintiffs and the late Jason Creton Culmer, deceased resided at Hopkins Drive, Coral Harbour, New Providence, The Bahamas.
2. The Plaintiffs are the ex-wife and mother of the children of the late Jason Creton Culmer, Deceased, and the son of the Deceased, respectively.
3. The Defendant resides at or last known address is No. 16 Taylor Street, Nassau Village, New Providence, The Bahamas.
4. On the 20<sup>th</sup> September 2013 at about 4:00am the Deceased and Defendant were driving on Carmichael Road when they collided resulting in the Deceased death:
  - 4.1 The deceased, was driving his 1990 green Honda CRV Jeep Licence Plate No. 110113 due [east] on Carmichael Road.
  - 4.2 The Defendant was driving his 1990 Blue Volvo Tank Truck, Licence Plate NO. M-4271 due west along Carmichael Road.
5. The Report of Reserve Superintendent Richard Rahming dated the 20<sup>th</sup> September 2013 concluded that the Defendant who was travelling due west on Carmichael Road was partially in the east bound lane where the point of collision impact occurred.
6. At the material time Carmichael Road was wet from rain (possibly raining) and water had settled along the southern side of the west bound lane.
7. Mr. Cyprian Collie the Forensic Toxicologist Report of the 6<sup>th</sup> October 2014 concluded that the deceased was in the excitement of alcohol influence.
8. On the 24<sup>th</sup> September 2013 the Pathologist Dr. Caryn Sands supervised Dr. Derek Musgrove in performing the postmortem examination on the deceased concluding that the deceased:
  - 8.1 Was brought in dead

- 8.2 Suffered blunt force trauma to the head, torso and extremities
9. At the time of his death the Deceased was self-employed and supporting his Ex-wife, children and mother.

STATEMENT OF ISSUES

1. Did the Defendant owe the deceased a duty of care?
2. Did the Defendant negligently breach that duty of care?
3. Did the Plaintiffs suffer damages and loss?
4. What is the Plaintiffs measure of damages?

9. There is no dispute between the parties as to the legal principles involved. The parties owed each other a duty of care as road users. Negligence (or contributory negligence) will result where damages occur as a result of that breach of duty.

10. This case is to be determined considerably on the assessment of the evidence received at trial. The only eyewitness to the events was Johnson. However having observed his demeanor as he gave his evidence, I did not find him to be an entirely impressive witness. I did not accept his evidence that he was travelling solely in his lane at the time of the collision. I am prepared to find that due to the considerable build up of water in his lane he drove his vehicle toward the center of the road at the time he collided with the deceased.

11. I accepted the expert evidence of Rahming that the point of impact took place in the eastbound lane in which the deceased was driving. According to Rahming:

- (1) The road is 24 feet and 4 inches wide and the point of impact of the accident occurred 11 feet from the north side of the East Bound Lane.
- (2) There was a puddle of rainwater along the West Bound Lane intruding about 7 – 8 feet into the road before, at, and beyond the point of impact.
- (3) Gouge Mark A created by the undercarriage of Johnson's vehicle making contact with the road was 8 feet north of the side of the West Bound Lane from Johnson's vehicle. This is the distance of the puddle of water onto the west bound lane suggestive that Johnson was not driving through the puddle of water but rather partly in the east bound lane.
- (4) The gouge mark from the deceased's vehicle was 2 feet 2 inches north of the road center line suggesting that the deceased was within his east bound lane.

Rahming's evidence is consistent with the evidence of Superintendent Harry Williams that: most of the gouge marks were in the East Bound Lane; that there was a puddle of water in the West Bound Lane; and the point of impact occurred in the East Bound Lane.

12. I am also satisfied that Johnson was travelling at a high rate of speed, as after he collided with the right side of the deceased's vehicle his vehicle continued moving ahead for a further 80 feet before coming to a stop. Johnson said that he saw the deceased about 2,000 feet in the distance and indicated that he did not sound his horn and couldn't recall whether or not he applied brakes.

13. I did not find any merit in the submission that the vehicle driven by the deceased had no license disc attached to the Windshield and that the certificate of inspection had expired 5 months earlier. Respectfully, there was no proximate connection between these matters and the cause of the accident.

14. I am satisfied that, on balance, the accident, leading to the death of the deceased, was caused by Johnson's breach of duty and therefore his negligence.

15. I am also satisfied that there is some merit in Johnson's claim of contributory negligence. Section 3(1) and 4 of the Contributory Negligence Act provides:

3. (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced by such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:..

4. 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.

In *Lewis v Denye (1939) 1KB pg. 540 at 554*, Du Parq L.J stated:

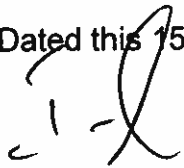
"In order to establish the defence of **contributory negligence**, the Defendant must prove, first, that the Plaintiff failed to take 'ordinary care for himself,' or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a **contributory cause** of the accident."



16. Inspector Cyprian Collie, the Forensic Toxicologist, gave evidence that alcohol was found in such concentration in the deceased's blood, urine and vitreous humour, that it can be stated that at and around the time of his death he was in the "excitement" stage of alcohol influence. According to Collie, *"the clinical signs and symptoms of the excitement stage of alcohol influence include but are not limited to the following: emotional instability, loss of critical judgment, impairment of perception, memory and comprehension, decreased sensory response, increased reaction time, reduced visual acuity, peripheral vision and glare recovery, sensory-motor incoordination and impaired balance."* On this evidence I am satisfied that it is more likely than not that the deceased failed to take ordinary care for himself and that this failure was likely a contributory cause of the accident or damage sustained by the deceased.

17. In the circumstances I assess the fault on the deceased at 30% reducing any award to the dependents to 70%. In the circumstances I give judgement to the dependents of the deceased to be assessed by the Registrar of the Supreme Court. The plaintiffs shall have 70% of their reasonable costs to be taxed if not agreed.

Dated this 15<sup>th</sup> day of November 2021



Ian R. Winder  
Justice