

IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 464 of 2018

**HILDA SUYAPA CONTRERAS
(Suing on behalf of Minor Grandchildren)
CHRISTIAN CONTRERAS
CHRISTIANY CONTRERAS
KIANA CONTRERAS**

CLAIMANTS

AND

ISMAEL CASTILLO

DEFENDANT

AND BETWEEN

**ISMAEL CASTILLO
AND**

DEFENDANT/ANCILLARY CLAIMANT

**YINY PAOLA PEREZ
as the personal representative of the
estate of Christian Jancarlos Contreras**

ANCILLARY DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Hearings - 2019

18th & 25th June

Written Submissions

Claimants and Defendant – 16th July

Oral Submissions and Decision

29th July

Mr. Mansel C. Turton for the Claimant and Ancillary Defendant

Mr. Allister T. Jenkins for the Defendant/Ancillary Claimant

Keywords: Tort – Negligent Driving – Death – Dependency Claim –

Assessment of Damages – Torts Act Cap 172 (the Act)

JUDGMENT

1. On a summer night in July of 2017, Christian Contreras was riding his motorcycle along the Phillip Goldson Highway. Ismael Castillo was driving a white van with several passengers along the same highway. They were going in the opposite direction. The two vehicles collided close to the Burrell Boom junction. The accident proved fatal for Christian Contreras who succumbed to his injuries some five days later.
2. Christian Contreras' pleaded dependents have brought this claim for both special and general damages. They allege that in an effort to overtake a vehicle Ismael entered Christian's lane and caused the collision.
3. Ismael Castillo, on the other hand, lays blame on Christian's own negligent driving. He says he, Ismael, was forced to swerve on to the left hand side of the road because Christian had swerved into his path on the right hand side of the road. Then, just before the collision occurred, Christian swerved back on to the left hand side. He denies attempting to overtake any vehicle and brings an ancillary claim against Christian's personal representative for damages for Christian's negligent driving. He further contends that the Claimants have failed to specifically plead special damages and in any event Christian's dependants cannot bring a claim for loss of expectation of life under section 9 of the Torts Act.

The Issues:

4. 1. Whether Ismael Castillo's negligent driving caused Christian Contreras' death.
2. What if any damages are owed to the Claimants by Ismael Castillo.

On the ancillary claim

5. 1. Whether Christian Contreras caused or contributed to his own death.
2. What if any damages are owed to Ismael Castillo by the estate of Christian Contreras.

Whether Ismael Castillo negligently caused Christian Contreras' death/Whether Christian Contreras caused or contributed to his own death:

6. The only eyewitness presented by the Claimants was Remi Mejia. He explained that on the night of 22nd July, 2017, while parked at the side of the road with mechanical problems, he saw a white van traveling away from the direction of Belize City. The traffic was heavy. Near the Burrell Boom Village, the white van suddenly left the right side of the road and in an attempt to overtake the vehicle ahead of it, collided with a motorcycle going in the opposite direction.
7. This witness gave no testimony of distance, visibility or the aftermath that ensued. Under cross examination he explained that the collision occurred just before the Burrell Boom junction, not near the Burrell Boom Village as he had originally testified. He said he was outside his car and was able to see all that transpired. The collision happened fast and he could not remember all that had happened. He could not say whether there were people in the white van. He admitted that he did not assist the police in their investigation of the matter because it was late at night and he needed to "*reach home.*" He left the scene 15 minutes after it occurred and the police had not yet arrived.

8. In his defence Ismael Castillo testified that he was driving the white van which was involved in the collision. It had been rented to transport adults and two minors to a conference in Belize City. He was returning to Orange Walk that night when he saw a motorcycle coming towards him. As he got closer he noticed that the cycle was approaching at a speed and was continuously swerving from one side of the road to the other. It was coming directly at him so he swerved to the opposite side of the road (the left hand side) to avoid a collision. That was when the motor cycle once again swerved back into the same lane as Mr. Castillo and caused the collision.

9. He maintained that the collision was unavoidable because the shoulder of the road on the right hand side slopped down into a bushy ditch and it was unsafe for him to try to pull over there. At the scene he saw only his passengers, Christian Contreras (the deceased) and the passengers of a vehicle that had been driving behind the deceased. Christian was lying on the left hand side of the road bleeding and his motor cycle was in the middle of the road. The police came and processed the scene. They took the motorcycle away. An ambulance came and took the injured Christian. Ismael then went to the Ladyville Police station and gave a statement and urine samples. The police subsequently issued a report which he annexed to his witness statement.

10. Under cross examination Ismael did not waiver. He denied that he was going very fast or that he had left his correct lane in an attempt to overtake another vehicle. He said there was no heavy traffic that night and there was no vehicle ahead of his. People started coming on the scene only after the accident had occurred. He volunteered that he has been driving for a company for many years, he was not tired that night nor had he been drinking. He had been designated the driver for the entire return trip from Orange Walk.

11. Ismael also presented the eye witness testimony of Minalia Manzur, a passenger in the white van. She said the white van was fully occupied and was not being driven at a fast rate. She said she was sitting right behind the driver's seat and was constantly looking at the oncoming traffic. She saw the motorcycle approaching from the opposite direction. It was driving from one side of the road to the other. Ismael slowed down. As it got closer, the cycle swerved into the white van's lane so Ismael swerved on to the left lane to avoid a collision. The cycle swerved back into the left lane and collided into the centre of the van. Christian and the cycle spun into the air and the occupants of the white van were flung to the floor. She made impact with the dashboard but no one in the white van suffered any injuries.
12. When she exited the van, Christian was on the left hand side of the road bleeding. There were also passengers from a vehicle that had been traveling behind Christian. She called the police and they arrived to process the scene. Shortly after the police arrived, the ambulance came and took Christian away. The white van and the motorcycle were taken to the Ladyville Police Station and she accompanied Ismael there. He gave a statement and two urine samples. She later learnt through the news media that Christian had passed away.
13. In cross examination she too explained that the accident happened quickly but she saw everything as her eyes were continuously on the road and she had a clear view. Although Counsel for the defence did his best to shake her she did not budge.
14. Indira Wallace, the investigative Corporal (now Sergeant) in relation to the incident, conducted her investigations and determined that "*Christian Contreras appeared to be at fault.*" She also informed that since she filed her report there had

been no instructions or directions to charge Ismael Castillo. When cross examined she revealed that she had taken measurements at the scene but had not brought them. Scenes of crime personnel had also processed the scene. As part of her investigation that night she had sought eyewitnesses, but found none. She agreed that she had not seen the accident and could not say how it occurred but she had formed her opinion from the measurements and a sketch plan she had made and her own observations at the scene. When asked, she admitted that she was not an expert at “*technology*,” but she was trained to investigate road traffic accidents. She would therefore look for skid marks, debris, etc and consider the point of impact in order to give her opinion. The report which was attached to her witness summary and another police report relating to the incident were put to her for comparison and comment. She explained that neither were prepared by her and she could not explain why their contents differed.

Consideration:

15. Counsel for the Claimant posited that from the state of the evidence before the Court “*it all boils down to credibility.*” He said the statements from the defence were mainly self-serving since Minella Manzur was Ismael Castillo’s sister. Further, P.C. Wallace’s testimony was based solely on what she had been told.
16. The Defence seemed to agreed that the determination ultimately lay with which evidence was most believable. He urged the Court to cast doubt on Mr. Mejia’s testimony which he said, was scant and unreliable for various reasons. He asked the Court to consider that Mr. Mejia was only called as a witness after the original witness for the Claimant could not attend trial. He had

allegedly been contacted by a man and informed of these proceedings while the police investigator could not find a single eye witness.

17. Counsel also submitted that Mr. Mejia seemed uncertain of where the incident actually occurred. Originally, he stated it was near the Burrell Boom Village, then under cross examination said it was close to the Burrell Boom junction, an area with which he also said he was very familiar and traversed daily. How then could he have made such an error in his witness statement. He also questioned Mr. Mejia's inability to recall details about the vehicle which the Defendant was supposedly attempting to overtake that night.
18. Counsel then drew the Court's attention to where Mr. Mejia was possibly situated (inside the car with the hood up as the mechanic worked) when the accident occurred and whether he could really see all that he said he saw. He even queried how Mr. Mejia was able to leave the scene only 15 minutes after the accident occurred when the would have been *"a crowded/busy road/ accident scene, with a van and a motor cycle blocking the road..."*
19. This Court finds no difficulty in Mr. Mejia's inability to recollect the vehicle which was allegedly being overtaken or that he left the scene before the police arrived. His appearance as a witness belatedly caused no concern nor what seemed like a genuine error as to the location of the scene. The Court was more concerned with Counsel's submission of the blocking of the road by the van, motor cycle and crowd since that appeared nowhere in the evidence before the court. In fact the evidence was that the accident occurred in a single lane of the highway and according to Mr. Castillo *"only the occupants of the white van, the passengers of another vehicle that was driving behind the Deceased, the Deceased himself and I were present at the scene of the accident."* He did say people came after but he

never spoke of the street being blocked and neither did Ms. Manzur or Indira Wallace.

20. The Court expected that Indira Wallace, the Investigating Officer, would have shed some light on how the accident had occurred. The witness summons served on her asked for her to provide the police report, the investigative report and all documents in her possession or control relating to the said accident. She brought nothing, saying everything was on a file sent to the Director of Public Prosecutions. She did not speak to the point of impact on the white van or the location of the vehicles or any debris, on the road. She did not speak to the condition of the road or the lighting in the area. Her testimony left so much to be desired.
21. So, what evidence was actually provided indicates that the Defendant was off his hand (admitted by the Defendant) and the point of impact was the centre of the front of the white van (Ms. Manzur's and the Defendant's own testimony and the Defendant's pleadings) with the front of the motor bike (police report). Counsel for the Defendant asked the Court not to simply apply the presumption of negligent driving because the Defendant was driving on the wrong side of the road at the time the incident occurred. He asked that all the circumstances be considered first.
22. He presented in support **Lonnie Robinson v Jasmine Samuel ECSC HCCV 42/2007** which referenced Commonwealth Caribbean Tort Law by Gilbert Kodilyne at paragraph 27:

"In the text Commonwealth Caribbean Tort Law by Gilbert Kodilyne, 2nd Edition – 2000, page 117, it states:

"In deciding whether there has been a breach of duty, the Courts in the Commonwealth Caribbean have frequently had recourse to certain presumptions of negligence.

Negligence is commonly presumed where, for example ... the defendant's vehicle collides with the plaintiff's vehicle which is traveling in the opposite direction, the point of collision being on the plaintiff's side of the road."

23. Counsel continued:

*"23. In **Morales De Habet v Adolfo Medina et al BLR Vol 4 p 173** [TAB 2] Barrow J, as he then was, referenced Clerk and Lindsell on Torts 18th Ed. At paragraph 12 as follows:*

12. In Clerk and Lindsell on Torts 18th Ed., 7-201, it is said that when an accident happens on the defendant's wrong side of the road, it is an indicator, not necessarily conclusive of negligence on the part of the defendant. What that fact does is to call for an explanation from the defendant.

24. The Defendant says that this presumption has been sufficiently rebutted in that:

(1) He was forced to swerve unto the left hand side of the road to avoid a collision with the deceased who had swerved unto his path and was coming at a speed; and

(2) He could not swerve to the shoulder of the road because the portion of the Phillip Goldson Highway where the accident occurred slopped off into a ditch and grass bush, so that it was unsafe for him to have pulled off to the right hand side of the road, especially since there were several passengers including two children in the van who he was also responsible for.

*25. The Supreme Court of Bahamas in **Lockhart v Dean [1991] BHS J. No. 95***

[TAB 3] noted that it is justifiable for a driver to be on the wrong side of the road to avoid a collision at paragraph 57:

"If, which seems more probable, the plaintiff swerved to the right after seeing the defendant begin to turn right, blew his horn and applied brakes at the same time, he was only trying, in the heat of the moment, to avoid an apprehended collision, that would not be negligence for as long ago as (1803) in the case of Clay v Wood 5 Esp. 44, it was decided if a collision can be better avoided by going on the wrong side of the road it is not merely justifiable to do so, but obligatory."

26. The Defendant urges the Court to accept his evidence, instead of that of Mr. Mejia, who he says was not present on the scene of the accident. The Defendant therefore reiterates that this accident was caused by the negligence of the deceased."

24. As motor vehicle users on the road, both parties certainly owe a duty of care to each other. That the Defendant was off his hand indicates that there may have been negligence on his part and it calls for explanation. His explanation, is fairly bizarre and does not meld comfortably with the facts. Mr. Castillo's evidence is that he noticed that the deceased was swerving

from one side of the road to the other so he began to apply his brake. Then he saw the deceased coming directly at him on the right hand side of the road so he swerved into the left lane. We must begin with his explanation of why he was unable to pull further on to his own side of the road to avoid this oncoming vehicle.

25. Mr. Castillo testified that the right side of the road sloped into a ditch and posed a danger. It must be remembered that this was a motor bike not another vehicle of a size comparable with the van or bigger. Further, this incident occurred on the highway, not a narrow side road. We can only assume, therefore, that the motor bike was closer to the far right side of Mr. Castillo's lane rather than to the centre. We willingly make this assumption as this positioning would make it most difficult for Mr. Castillo to move any further right without causing danger to himself and his passengers.
26. If the motor bike was going as fast as Mr. Castillo says ("*at a speed*") and he had swerved to avoid the collision, then what time did the motor bike have to swerve back into his path and still collide with the centre of the front of his van. In those circumstances, it seems more than likely that it may have collided with the side of his van or one side of the front of the van. What is also quite telling is that it was the front of the motorbike (not the side) which received the damage (as stated in the police report on which the investigator relied).
27. The dead centre of the front of the van tells me that the motor bike was coming straight at the front of the van and had not simply and suddenly swerved into the path of the van as the defendant would have the Court believe. In a head on collision, both vehicles must have been coming directly

at each other. This does seem more consistent with the Defendant attempting to overtake and moving into the opposite lane to do so. Without more, this court finds on a balance of probability the Defendant, Ismael Castillo's negligence caused the death of the deceased.

28. Of concern too is the fact that Ms. Manzur did not offer herself as an eyewitness to the investigating officer at the scene. Unlike Mr. Mejia, she was still on the scene when the investigations were being conducted, why did she not step forward then and explain all she had seen. From her testimony to this Court, she would have been able to offer pertinent assistance to the investigation. Yet, the investigator maintains that although she searched at the scene, she could find no eyewitnesses. Having found the Defendant solely liable, we appreciate that the counterclaim must be dismissed and we can now move to the assessment of damages for the Claimants.

29. What if any damages are owed to the Claimants by Ismael Castillo. Yiny Paola, the mother of the three minors alleged to be the deceased's children, informed that she had been in a common law relationship with the deceased up to the time of his death. She gave birth dates for the minors but presented no birth certificates to prove that they were in fact the deceased's children. This lacuna proves fatal for this claim as the defence neither admitted nor denied this assertion and therefore required the Claimants to prove it. This is made clear by Rule 10.5 (3)(c) of the Supreme Court Civil Procedure Rules that the defence must state any allegations which *"are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove."*

30. The Claimants have failed to do so. In **Anita Gale Ortega v Eaton Belisle Civil Appeal No. 2/2017** the Court of Appeal upheld the trial Court's decision to dismiss the dependency claim where there was no proof of paternity other than the bald statement of the witness in circumstances where the Claimants were called upon to prove same. The claim for the dependents must fail and there will therefore be no need to discuss quantum.
31. Originally, Hilda Contreras, the alleged mother of the deceased, was joined as a dependent. However, when the Claim was amended Hilda appeared only as the next friend of the minors and not in her own personal capacity. She claimed quite clearly that she was suing only "*on behalf of deceased's three minor children.*" She did not offer any evidence to prove her own status as a dependent either. Equally unfortunate is that there was no claim brought by the estate although Yiny Paola the Defendant in the ancillary claim had been appointed administratrix ad litem.
32. The counterclaim has for obvious reasons been dismissed. For guidance only the Court will briefly discuss the damages claimed therein. Although none of the passengers in the white van were injured, the van was extensively damaged. According to Ismael, a total of \$13,261.66 was spent in repairs. Ismael exhibits only an estimate while claiming that he had already repaired the van. Why then was a receipt not exhibited. Moreover, having already repaired the van, that cost becomes special damages and should have been specifically pleaded. It was not. Alternatively, if they wanted to use Mr. Estrada as an expert to give a quotation of the likely cost to repair the van, he ought to have been appointed as such by the Court. There was no application to this effect made.

33. **Costs:**

Because of the nature of these claims and the parties agreement to the same amount in costs both the claim and the ancillary claim, each party shall bear their own costs.

Determination:

1. The Claim and the ancillary claim are both dismissed.
2. All parties shall bear their own costs.

**SONYA YOUNG
SUPREME COURT JUDGE**