IN THE COURT OF APPEAL OF BELIZE, A.D. 2024
CIVIL APPEAL NO. 33 of 2018

BETWEEN:

ABELARDO JOSE MAI Appellant

and

EDGAR NISSANI ARANA Respondent
Administrator ad Litem of the Estate of
Julia Arana a.k.a. Julia Arzu

Before:

The Hon Madam Justice Louise Esther Blenman — Chief Justice
The Hon Madam Justice Hafiz Bertram — President
The Hon Madam Justice Minott-Phillips — Justice of Appeal

Appearances:

Ms. Pricilla Banner and Julie- Ann Ellis Bradley for the Appellant
Ms. Sheena Pitts for the Respondent

2023: 2 October
2024: 8 February

JUDGMENT

[1] **HAFIZ BERTRAM P:** Julia Arana ('Julia') was a pedestrian crossing a poorly lit highway when the appellant, Abelardo Jose Mai ('Mr. Mai') struck her with his vehicle at or near the median line causing her severe injuries which resulted in her death. Mr. Mai was not keeping a proper lookout and driving too fast although within the speed limit. He saw Julia upon impact and therefore he had no time to brake. Abel J ('the trial judge') found that the accident was caused by Mr. Mai's negligence and rejected his arguments of contributory negligence. He awarded damages to Edgar Nissani

Arana, ('Arana') Administrator ad Litem of the Estate of Julia Arana in the sum of $217,149.36 and costs to be agreed by the parties or to be assessed by the Court.

[2] Mr. Mai appealed against the judgment of the trial judge. The issues in the appeal included the assessment of damages and liability for the accident. That is, whether Mr. Mai was negligent and whether there was contributory negligence by Julia. Also, whether Julia who succumbed 58 days after the accident died as a direct result of the injuries which she received from the accident or other intervening causes. Mr. Mai further challenged the assessment of costs. On 2 October 2023, this Court heard the appeal and reserved its decision.

Background facts

[3] On 1 April 2016, sometime between 7:30 pm and 9:00 pm, Mr. Mai was driving his pick-up truck when he collided with Julia who attempted to cross a straight stretch of the Philip Goldson Highway. She suffered multiple severe head and bodily injuries and was hospitalised for 39 days. She died 19 days after she was discharged from the hospital.

[4] Mr Mai was travelling southwards from the direction of Corozal to Orange Walk when the collision occurred, close to San Martin Gas Station ('Gas Station'), Trial Farm, Orange Walk. There were no streetlights on the highway except for lights on vehicles on the highway at the time and lights from the Gas Station.

[5] Some hours before the collision Julia and her husband, Buenaventura Arana Romirez (BAR) went to the home of their son, Arana who resided directly across the road from the Gas Station. They spent a few hours there after which they decided to go home. To do so, they intended to take a dollar taxi going southwards to Orange Walk. BAR crossed the Highway to stop a dollar taxi whilst Julia was talking to Arana and his friend, Carlos under a palapa. BAR was speaking to the taximan when Julia attempted to cross the highway. Mr. Mai was driving in the same direction as the dollar taxi which had left the scene when the collision occurred.

[6] Just before crossing the highway, Julia spoke to Arana who bid her farewell at his gate which is close to the highway. The collision occurred shortly after Julia left the gate. Unfortunately, Julia died 58 days later.

[7] On 26 May 2017, Arana commenced a road traffic claim for damages in his capacity as Administrator ad Litem on behalf of the estate of Julia pursuant to the **Torts Act, Cap 172** and **Administration of Estates Act,** Cap 197, in respect of personal injuries and subsequent death of Julia. Arana claimed that the road traffic accident was caused by the negligence of Mr Mai. The particulars of negligence included driving recklessly, without due care and attention and failure to keep any proper lookout.

[8] Mr. Mai in his defence denied that he was negligent and that the injuries from the accident caused the death of the deceased. Mr. Mai stated that Julia was negligent and the particulars of negligence included Julia's failure to keep any proper lookout, failed to have any proper regard for her safety, acted without sufficient regard for the traffic, attempted to cross the highway when it was manifestly unsafe to do so and caused herself to come violently into collision with his vehicle.

[9] The witnesses for the Claimant were Arana, BAR and Dr. Hugh Sanchez, Pathologist, who was an expert witness. Mr. Mai testified on his own behalf and an expert witness, Dr. Loyden Ken, testified for the defence. Dr. Loyden is a Pathologist and he performed the post-mortem on the deceased. Dr. William Coleman and Dr. Vasquez Cruz who treated Julia at the hospital testified as expert witnesses.

[10] The trial judge determined three issues at trial: (a) Negligence (b) Contributory negligence; (c) whether the death of the deceased was caused by the collision and (d) the quantum of damages due to the estate.

[11] The trial judge granted judgment in favour of the estate of the deceased and awarded $203,090.81 as general damages and $14,058.55 as special damages. The total damages being $217,149.36. He also ordered costs in the sum to be agreed by the parties or to be assessed by the Court.

The Appeal

[12] Mr. Mail appealed the judgment of the trial judge on the grounds that:

(a) the decision of the trial judge was unreasonable and against the weight of the evidence;
(b) the award of damages was excessive and contrary to established principles on which damages are to be awarded in fatal accident claims.
(c) the order for costs to be assessed was bad in law.

Mr Mai sought an order setting aside the orders of the trial judge.

Findings of the trial judge relevant to the appeal

[13] The trial judge found that Mr. Mai *"[w]as not keeping a proper lookout and was more likely than not driving at an excessive speed*."

[14] He accepted the latter version of the evidence of Mr. Mai which was that he "*did not see the deceased until the very last moment because of his excessive speed in all the circumstances of the case and his failure to keep a proper lookout.*"

[15] The trial judge found that it is likely that Mr Mai was travelling in excess of 35 mph and nearer to 50 mph at the time of the collision between his truck and Julia.

[16] The court rejected the evidence of Mr Mai as presented by the insurance company and therefore did not accept that Julia in any way or materially contributed to the collision by her carelessness. Further, the trial judge rejected the notion that she was under the influence of alcohol at the time of the collision.

[17] The trial judge stated that Mr. Mai more likely than not may have swerved to avoid the black taxi but concluded that it was the failure of Mr Mai to keep a proper lookout while driving the truck at an excessive speed which was the main causal factors for the collision.

[18] The court found that given the severe poly trauma and the severe nature and extent of the personal injuries which Julia received as a result of the collision and the evidence of Dr. Sanchez which he accepted, such injuries were the direct cause of her death and she would not have died but for those injuries. The trial judge concluded from all the evidence, that Julia died as a result of her weakened condition which resulted from all of her injuries

"*which included the brain trauma, liver laceration and displaced fracture to the pelvis all of which were injuries arising directly from the collision, as well as from the broncho pneumonia with pulmonary abscedation which was likely as a result of such injuries and her condition arising from the collision and not any hospital acquired infection."* As such, he found that Julia did not die from other intervening or pre-existing causes.

The Law under which the action was issued

The Torts Act, Cap 172

Action lies for causing death

[19] Section 9 of the Torts Act provides for an action for damages for causing death as follows:

> " 9. Where the death of a person is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect of his injury thereby, 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, and although the death was caused under such circumstances as amount in law to felony."

[20] Section 10 of the Torts Act provides that "Every such action shall be for the benefit of the wife or husband, and every parent and child of the person whose death has been caused .."

Administration of Estates Act, Cap 197 – Action on behalf of Estate

[21] Section 26(4) of the Administration of Estates Act provides:

> " (4) On the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate …"

Issue 1: Whether the decision of the trial judge was unreasonable and against the weight of the evidence

[22] Ms. Banner submitted that the decision of the trial judge was unreasonable and against the weight of the evidence as he failed to fully appreciate the relevant facts. Further, that the trial judge did not properly analyse the conflicting testimony nor did he state the reasons as to his findings in respect to credibility. As such this is an appropriate case for a review of the trial judge's finding of fact. Counsel also contended that the trial judge had an obligation and duty to provide reasons for the decisions that he made.

Principles applicable to the review of findings of fact by the Appellate court

[23] A first instance judge has the advantage of seeing the parties and the other witnesses particularly with reference to credibility and findings of fact. Therefore, great deference is paid to the findings of fact by a trial judge. As an appellate Court, I must bear in mind, in reviewing the record of evidence, that the trial judge saw and heard the witnesses and therefore his findings of fact should not be disturbed unless plainly unsound. The court will only "*interfere with his findings of fact if it becomes clear that there was no evidence to support them; that the judge misunderstood the evidence; or that he made findings which no reasonable judge could, in the circumstances, have made*. See **Stephanie Jones v Jessie Stephenson**, Civil Appeal No. 21 of 2016, Court of Appeal of Belize dated 22 June 2018 at paragraphs [11] to [13]; **Pickle Properties Limited v Stephen Leslie Plant,** BVIHCMAP2016/0032, dated 30 January 2018 at [33]; **Weymont v Place** [2015] EWCA Civ 289.

Standard of reasoning required by judges in their judgments

[24] The primary factual evidence in the present case was of great importance and only two persons witnessed the accident, Mr. Mai and Julia's husband, BAR. Julia had not given any statement before her death to the police.

[25] The case of **Flannery and Another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services)** [2000] 1 All ER 373, is instructive in relation to the standard of reasoning required of judges in their judgments. In that case the trial judge, without providing any reasons merely stated that he preferred the evidence of the valuer's expert witness and dismissed the claim. On appeal it was held that the judge had been under a duty to give reasons, and had not done so. Without such reasons, his judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for his conclusion. Accordingly, the appeal was allowed and a new trial ordered.

Was the trial judge's findings in the present case inconsistent with the evidence?

[26] The task of the trial judge was not to reach a conclusion based on 'certainty' as to what occurred, but rather to come to a reasoned view as to the most probable explanation. The trial judge established liability based on Mr. Mai's failure to keep keeping a proper lookout and the excessive speed that he was driving under the circumstances.

[27] In finding Mr. Mai negligent, the trial judge considered all the evidence and this includes the oral evidence, examination-in-chief and cross-examination. He also accepted the submissions of counsel for Mr. Arana. At paragraph 153 of the judgment, under the heading of "*Determination*" he stated that "[H*]aving carefully considered all of the evidence and heard counsel I have no hesitation in accepting the submissions of counsel for the Claimant."* In relation to credibility of the witnesses, he went on to state that he did not consider that Mr. Mai was a credible witness and "*I find that wherever his version of the description of the collision differs from that of BAR I accept the evidence of BAR."*

[28] In his style of writing, the trial judge under the heading of "Determination," where he made findings of facts, did not restate all the evidence stated elsewhere in the judgment. But, as shown in the preceding paragraph, he stated that he had considered all the evidence. I note however, that the clarity in some findings are unclear. In relation to the grounds of appeal, this Court must review what was said by the trial judge in his oral judgment, the written judgment and the entirety of the relevant evidence to consider inconsistencies, if any.

Speed of the truck at time of collision

[29] The trial judge found on a balance of probabilities that it is likely that Mr. Mai, at or about the time of the collision between his truck and Julia, was travelling in excess of 35 mph and nearer to 50 mph. Both Mr. Mai and Mr. Arana testified as to speed. The expert witness, Dr. Coleman who treated the deceased at the hospital after the accident testified that "*This type of RTA traumatic injury may result from impact by motor vehicle travelling between 30 and 50 mph."* In my view, it was reasonable for the trial judge to find on a balance of probabilities that Mr. Mai was travelling nearer to 50 mph having heard from the expert witness, Dr. Coleman who treated the injuries received by the deceased.

Whether the speed was excessive and failure to keep a proper lookout

[30] Whether the speed was excessive would depend on the circumstances of the case and not on the speed limit. The circumstances being the parked taxi and BAR standing on the highway. In cross-examination, Mr. Mai's evidence was that there was no taxi in front of his vehicle in his lane obstructing his path. Another version is that he did not know if a taxi was there and cannot agree with counsel for the respondent.

[31] The evidence established that BAR was standing on the road talking to the taximan. The trial judge stated that Mr. Mai more likely than not may have swerved to avoid the black taxi. In my view, the presence of a taxi parked partly on the shoulder and partly on the highway would have been visible to a driver who was driving in the same lane. Therefore, it was reasonable for the trial judge to conclude that Mr. Mai more likely than not swerved to avoid the taxi.

[32] It was also reasonable for the trial judge to find on a balance of probabilities that the main causal factors for the collision was that Mr. Mai failed to keep a proper lookout while driving at an excessive speed. An obstruction on the road, being the taxi, the lane where Mr. Mai was driving would require a reasonable and prudent driver to slow down. Had he done so, he would have been able to see the deceased in the middle of the road. By his own evidence he had lights on his vehicle and did not see Julia until the impact.

Consequence of seeing the deceased upon impact

[33] Ms. Banner submitted that the trial judge found as a fact that Mr. Mai did not see Julia until the very last moment. Therefore, counsel argued that Mr. Mai is not negligent. She referred to the evidence which showed that Julia had left her son Arana and crossed the highway within two to five seconds trying to catch a dollar taxi. Learned counsel contended that this evidence is corroborative when taken together with an analysis of Mr Mai's own evidence that:

(a) When he looked ahead on the road there was no one crossing; and

(b) He dipped his light for an oncoming vehicle when within seconds Julia entered the roadway.

[34] I have reviewed the record on this point of contention and saw that Mr. Mai gave different versions as to when he first saw Julia. Therefore, the trial judge's finding that Mr. Mai did not see Julia until the last moment must be put in context considering Mr. Mai's defence and his evidence on this point as shown below:

(i) Mr. Mai in his defence stated that the deceased suddenly ran from the left side of the highway across the path of an oncoming vehicle and collided in the side of his vehicle in the area of the fender and headlamp.

(ii) At paragraph 3 of Mr. Mai's witness statement he stated that the deceased suddenly ran across from the left hand side of the highway into the path of his vehicle whilst he was travelling on the right hand side. Further, that it happened so quickly he braked and tried to swerve in order to avoid hitting her. He also stated that she had barely missed being hit by an oncoming vehicle as she had ran across its path. (para 4 of WS) See Vol. 1 (b) – p. 50.

(iii) The statement to the insurance company also stated that he saw her running.

(iv) In cross-examination, Mr. Mai said that he saw the deceased only "at the point of impact." (The trial judge believed this evidence.)

[35] As shown above, Mr. Mai contradicted himself in relation to when he first saw Julia. It was not unreasonable for the trial judge to find that Mr. Mai saw her upon impact. There was no corroborating evidence that he braked and the judge obviously did not find him credible that he had seen her before the impact. In my view, had Mr. Mai seen the deceased run across from the left side of the road where another vehicle barely missed colliding into her, he would have been able to brake before the collision. It was reasonable for the judge to accept Mr. Mai's evidence in cross-examination, which counsel for the Respondent skilfully elicited from him, that he saw the deceased upon impact. Mr. Mai's evidence that he tried to brake and swerved upon seeing the deceased was unreliable.

[36] What is the consequence of seeing a pedestrian upon impact? The evidence the trial judge found credible was that Mr. Mai saw Julia upon impact. Ms. Banner submitted that while Mr Mai was required to be on the look-out, he was constrained by matters within the limits of his visibility. Counsel argued that since Mr. Mai did not see the deceased until the very last moment he was not negligent. In support of her submissions, counsel relied on **Qamili v Holt** [2008] EWCA Civ 1625, a case in which a driver had very little time to stop or avoid an accident involving a pedestrian. The court in that case stated that even a complete failure to observe a pedestrian on the part of a driver until the moment of impact was not itself highly presumptive of negligence.

[37] Each case must be determined on its own factual circumstances. Mr. Mai was found negligent because of excessive speed and not keeping a proper lookout. In my view, the location where Julia was hit by Mr. Mai's vehicle is crucial and not because he saw Julia

upon impact on a poorly lit highway. The collision had not occurred in the right lane where Mr. Mai was driving as will be shown below.

Location where the collision occurred

[38] The trial judge found that the deceased "*may have been at or near the middle of the highway* at the time of the collision (and was not near the middle of the highway) at or about the median line" and Mr. Mai failed to notice the deceased because he was not keeping a proper lookout and was therefore driving in a negligent manner. – para 158. The finding in the written judgment is nonsensical and seems to be an error in preparation of the written judgment. I will therefore, seek to clear up this conundrum by reviewing the oral judgment in relation to location.

[39] In the oral judgment handed down by the trial judge, at page 1313 of the Record, Volume III, the trial judge said that "***This court accepts that the deceased may have been at or near the middle of the highway at the time of the collision at or about the median line*** *and that the defendant failed to notice the deceased presence because he was not keeping a proper lookout and was therefore driving in a negligent manner.*" The oral judgment is logical as it clearly states that the deceased may have been at or near the middle of the highway, the middle being the median line. The words "and was not near the middle of the highway" in the written judgment was not what the trial judge stated in in his oral judgment. I am satisfied that the oral judgment portrays the finding of the trial judge based on the evidence of BAR whom the trial judge found credible.

[40] The evidence of BAR was that he crossed the road so he could stop a taxi for himself and the deceased. At this time, Julia was talking with her son, Arana and his friend Carlos under a palapa. BAR had almost completed crossing the road when he stopped a black taxi that was passing by. The taxi stopped partly on the shoulder of the highway and partly on the highway itself. It was approximately in the middle of the shoulder and the highway and as such obstructed the highway. After the taxi had stopped, BAR turned around and called out to Julia to tell her that he had stopped the taxi. He then turned around and started to talk to the taxi man telling him to wait for his wife who was coming. At this time BAR was facing the taxi man at the driver's side of the vehicle. When BAR turned around to see if Julia was coming, he heard his son, Arana telling Julia "*Hasta manana,*

mami." He said there was no other vehicle on the road from the side where Julia was walking.

[41] BAR further testified that Julia was walking across the highway to meet him when he heard the engine of a vehicle and saw that the vehicle was in the same lane where he was standing as if travelling from Corozal to Orange Walk. He said that Julia was struck by the vehicle, flung and fell on the highway. That "[When] my wife was hit by the grey hilux she was close to the middle or dividing lines of the two laned highway. (Witness statement of BAR para 24 – page 39 of the Record).

[42] In cross-examination, BAR's evidence was that the dollar taxi stopped nearly in the middle of the road and not the edge and he talked to the taximan. He called out to his wife to come quickly but she did not run. At that time, other people got into the taxi. At the same time, he heard the engine of another vehicle coming fast and the driver did not brake. At this time, BAR was standing in the middle of the highway and the deceased was crossing the highway. The cross-examination continued as follows from page 630 of the record:

> "Q. Where the vehicle collided with your wife, that was in the middle of the highway, correct?
>
> A. Yeah when de mek the wiggle waggle soh da right deh he push ah and afta that he continue.
>
> Q. Okay but let me ask you but **it was around the middle of the highway, correct, near the double line?**
>
> A. **Ih neva reach da the middle yet.**
>
> Q**. But it was near the double line where it was?**
>
> **A. Yeah**. (page 631 of the record)

[43] The trial judge found that *the deceased may have been at or near the middle of the highway.* Having accepted BAR's evidence on Julia's location, the trial judge did not find Mr. Mai's evidence credible that the deceased was in his lane on the right side of the highway when he collided into her. I have reviewed the entirety of the evidence on this point and see no reason to interfere with the trial judge's finding that *that the deceased may have been at or near the middle of the highway at the time of the collision at or about the median line.*

Time of the accident – dark or dusk?

[44] Learned counsel, Ms. Banner submitted that the trial judge was incorrect about the time of the accident. The contention is whether it was dusk or dark. The evidence of the time of the accident was not consistent, being sometime between 7:30 pm and 9:00 pm. BAR's evidence in cross-examination is that the accident occurred "*Before 8:00 p.m., you could call it 7:30 p.m. to 8:00 p.m*." (page 643). The trial judge in the introduction of his judgment stated that the accident occurred at 6.30 – 7:00 pm, at dusk. There was no consideration by the trial judge of all the evidence on the approximate time of the accident. Since the evidence showed that there were no street lights except lights from the Gas Station and headlamps of vehicles on the highway, I am of the view that it was dark at the time the accident occurred and further the exact time of the accident is not significant for the purposes of the appeal.

Cause of death

[45] The court found that given the severe poly trauma and the severe nature and extent of the personal injuries which Julia received as a result of the collision and the evidence of Dr. Sanchez which he accepted, such injuries were the direct cause of her death and she would not have died but for those injuries. The trial judge concluded from all the evidence that Julia died as a result of her weakened condition which resulted from all of her injuries "*which included the brain trauma, liver laceration and displaced fracture to the pelvis all of which were injuries arising directly from the collision, as well as from the broncho pneumonia with pulmonary abscedation which was likely as a result of such injuries and her condition arising from the collision and not any hospital acquired infection*."

[46] In my view, it was not unreasonable for the trial judge to rely on the evidence of Dr. Sanchez as to Julia's cause of death. Her injuries were significant and as such, it was reasonable for the trial judge to find that Julia did not die from other intervening or pre-existing causes.

Contributory negligence by Julia

[47] The court rejected the evidence of Mr Mai as presented by the insurance company and therefore did not accept that the deceased in any way or materially contributed to the collision by her carelessness. Julia was near or at the middle of the Highway or median lines when she was struck by Mai's vehicle. In my view, it was dangerous for Julia, an

adult pedestrian, to cross the highway when there was an oncoming vehicle and especially so at night on a poorly lit highway. She must have seen the vehicle which had lights and should have foreseen that Mr. Mai would overtake the taxi parked partly on the highway. In my view, the trial judge erred in not finding that Julia crossed the road when it was unsafe for her to do so.

Conclusion

[48] The decision of the trial judge was not unreasonable and against the weight of the evidence in finding that Mr. Mai was negligent. Mr. Mai caused the accident and the trial judge was not plainly wrong in making this finding as Julia was not in the path of Mr. Mai's vehicle. However, the trial judge erred in failing to find that Julia contributed to the accident. She had to bear some responsibility for being near or at the middle of the highway in poor lighting conditions. She attempted to cross the road when it was unsafe to do so.

Issue 2: Whether the award of damages was excessive

The approach of the Court of Appeal in reviewing damages

[49] In **Flint v Lovell** [1934] All ER Rep 200 at pages 202-203, Greer LJ gave the following guidance, which directs how the Court of Appeal must approach the issue of damages in an appeal:

> "I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

The award made by the trial judge

[50] In relation to general damages, the trial judge made an award for pain and suffering and loss of amenities, gratuitous care, loss of earnings. As for special damages, the judge awarded an amount as agreed by the parties. The table below shows the details of the award:

General Damages		
Pain and suffering and loss of amenities		$175,000.00
Gratuitous Care		$ 5,600.00
Loss of earnings		$ 2,000.00
Loss of Expectation of Life		$ 20,490.81
	Sub total	$ 203,090.81
Special Damages		
		$ 14,058.55
	Total damages awarded	**$217,149.36**

[51] Mr. Mai's contention is that the award of damages was excessive and contrary to established principles on which damages are to be awarded in fatal accident claims. The Respondent agrees with the award made by the trial judge.

A*ward for pain and suffering and loss of amenities*

[52] The trial judge in making the award considered the law in relation to assessment of damages. He relied on **Icilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd. & Anor** Claim No. 2005 HCV 294 at paras 3 & 4 where Sykes J summarised the established principles in relation to assessment of damages. He also sought guidance from the oft cited authority of **Cornilliac v St. Louis** (1965) 7 WIR 491, which outlines the factors to be considered in assessing personal injuries cases. These factors are:

(i) the nature and extent of the injuries sustained;

(ii) the nature and gravity of the resulting disability;

(iii) the pain and suffering which had to be endured ;

(iv) the loss of amenities suffered and

(v) the extent to which consequently the injured person's pecuniary prospects have been affected. (not applicable in the instant case since death occurred).

[53] In assessing the damages, the trial considered the relevant factors, that is, the very serious nature and extent of the injuries suffered by the deceased, the nature and gravity of the resulting physical disability, the pain and suffering which Julia endured and the temporary loss of amenities which she suffered before her death.

[54] The trial judge also considered a range of personal injuries cases in this jurisdiction for awards made by the trial courts. Both parties cited numerous cases to the trial judge. At paragraphs 128 to 133 of his judgment, he discussed several of those cases which he considered to be more relevant. The first of those is the authority of **Oscar Corado v Consuelo Banner,** Supreme Court of Belize Claim No. 16 of 2015. The Claimant had suffered injury to his wrists joint, pelvis and collarbone and was hospitalised for five days. He survived but suffered pain in the wrist, neck and right buttock. In January 2016, the court awarded $90,000 for pain and suffering and loss of amenities.

[55] The second authority considered by the trial judge was **Ernesto Flores Jr. & Yanera Flores v Duran Harban**, Supreme Court of Belize Claim No. 750 of 2010. An 8 year old suffered significant injuries to his body and severe head trauma which caused permanent brain damage. He was hospitalised for 40 days, surviving life threatening injuries. He was diagnosed with permanent disability included difficulty walking, unable to speak clearly, deformity in his right lower extremity and neuro-behavioural changes. He needed lifelong physical rehabilitation and occupational speech therapy. An award was made on the 5 July 2013 in the sum of $250,000 as general damages.

[56] The other two relevant cases are consolidated claims, **Marleni Magana (Intended Administratrix of the Estate of Raul Magana & Seleni Magana & Julian Magana** and **Christian Magana (infants by their next friend Marleni Magana) Enrique Montejo & Roque Riverol**, Supreme Court of Belize Consolidated Claims Nos: 189 of 2007 & 190 of 2007 (**the Magana cases**). In April 2006, Marleni Magana, Seleni Magana and Julian Magana suffered personal injuries as a result of a car accident.

[57] Marleni was awarded $65,000.00 for fractures to her leg which had to be affixed with nails and a rod. She spent 16 days in the hospital but healing of the leg required 8-10 months. Julian who was a baby suffered polytrauma and bilateral fractures of the femurs. She had external fixators and the recovery period was 3-6 months. She was awarded $60,000.00 as general damages.

[58] Seleni was 10 years old at the time of the accident and her injuries included head trauma, hip fracture, intra-cranial hypertension. She was placed on a mechanical ventilator to keep her alive. Eight days after the accident Seleni had a surgery to open her skull to gain access to

the brain in order to remove a blood clot and allow the brain to swell without being crushed by the skull. She had surgery for other significant injuries. She would never be a functional citizen. Seleni was awarded $250,000. in general damages.

[59] The trial judge considered the range of awards in the considered cases. At paragraph 172 of his judgment, he stated that he had carefully considered the **Magana case** and he was of the view that the decision was somewhat "out of sync" in relation to general damages awarded for injuries for Marleni, Seleni, and Julian as opposed to the **Flores case**. He had a difficulty to reconcile **Flores'** case with **Magana's** case.

[60] In relation to general damages of $250,000.00 awarded to Seleni, he was of the view that because her award of special damages was significant, this may be an explanation as to why her general damages was significantly mitigated.

[61] After careful consideration of all the authorities by the trial judge and his views on Seleni's award of general damages, he relied on **Flores** case as a comparable for guidance in relation to pain and suffering and loss of amenities. He applied a range from $100,000.00 to 250,000.00. to the present case (Julia's case).

[62] The trial judge took into account the injuries sustained by Julia and all the evidence relating to her suffering which culminated in her death. He stated that Julia's case was unlike any of the other cases to which he was referred to by counsel. Further, it was significant that she succumbed to her serious injuries. He considered the nature and extent of her suffering was extreme and great, warranting an award of 175,000.00.

Did the trial judge err in his approach?

[63] In my view, the trial judge made no error in his approach to the quantification and award of damages under the heading of pain and suffering. He correctly applied the law and reviewed awards made by the court in this jurisdiction for personal injuries cases and chose **Flores** for guidance as he considered that authority to be the most relevant and appropriate in the circumstances of Julia's case. Flores was awarded $250,000.00 for brain injuries and he survived though with permanent disability. He had pain and suffering for 40 days.

[64] The authorities that the trial judge considered as shown in the preceding paragraphs, in which all the Claimants survived, had a range of injuries, including serious leg injuries and brain injuries resulting in various degrees of pain and suffering and loss of amenities. The awards ranged from $60,000.00 - $250,000.00. The awards for pain and suffering for Flores and Seleni both of whom had serious brain injuries were $250,000.00 respectively. The range the trial judge chose was $100,000.00 to $250,000.00 and he awarded Julia's Estate $175,000.00. which is $75,000.00 below the maximum.

[65] Ms. Banner argued that the authorities considered by the trial judge in the instant case and awards made by the court in those cases for pain and suffering and loss of amenities provided a fair and reasonable framework within which to assess what would have been likely and reasonable award had Julia not met her untimely death. In my view, the pain and suffering endured by Julia and loss of amenities cannot be underestimated because she did not spend as much time in the hospital like the other Claimants who took a long period to recover. The fact that she died from her injuries is significant and shows the severity of the injuries, and the evidence showed the pain and suffering and loss of amenities. As such, I reject the Appellant's submission that an award of $15,000.00 to $20,000.00 is appropriate for 2 months pain and suffering and loss of amenities.

[66] In my view, so far as it is possible, comparable injuries should be matched with comparable awards. But in relation to pain and suffering matching from previous cases is not an easy task. The cases considered by the trial judge are just general guidelines as no two cases are alike even if the injuries and disabilities may be similar. The sum of $175,000.00 awarded by the trial judge represented his assessment of what is a fair and reasonable compensation based on the circumstances of the case and which I note fell way below the upper end of the range of $250,000.00. For those reasons, it is my view, that the damages awarded under the heading of pain and suffering and loss of amenities was not excessive.

Damages for Loss of expectation of Life

[67] The trial judge awarded $20,490.81 in damages under the heading of 'Loss of Expectation of Life,' and he gave reasons for doing so.

[68] The Appellant submitted that a conventional sum of $3,500.00 should be awarded for loss of expectation of life. Ms. Banner argued that the trial judge gave no justification for the

award of $20,490.81 other than to say that reliance was placed on the "researches" and "arguments" of counsel for Mr. Arana, though he did not make express reference to same.

[69] I have reviewed paragraphs 177 and 178 of the judgment of the trial judge on this issue and it is seen that he relied on the arguments of counsel for the claimant which suggested that the conventional sum is not BZ$3,500.00. He gave reasons as to why he departed from that sum and awarded $20,490.8, as shown below:

> "[177] For the loss of the deceased's life I would award the sum of $20,490.81. In arriving at this figure this court relied on the significant researches and persuasive arguments raised by Counsel for the Claimant which suggested that the conventional figure for death is not the sum of BZ$3,500,00 which had been awarded by the Hon. Chief Justice of Belize some thirteen years ago in the case of **Adita Canul & Ors. v Francis Alfaro & Alba Alfaro**, Supreme Court Action No. 552 of 2000 18 May 2005, and which appeared to have been followed last year by Young J in the Belize case of **Tiffany Tracy Williams v Carlos Jose Rodriguez & National Fishermen Producers & Co-Operative Society Limited**, Supreme Claim No. 542 of 2016 at para. 34. It does not appear, however, that Young J's attention was brought to the House of Lords decision in **H. West & Son Ltd and another v. Shephard**, [1963] UKHL 3 (May 1963). This court does not consider that the sum in H. West & Son is unreasonable and rather this Court consider in all the circumstance this figure is fair."
>
> [178] This figure of BZ$3,500.00 cannot any longer be considered the conventional figure for so-called loss of expectation of life and in any event makes a mockery of the value, all-be-it notional or conventional, which can be placed on a person's life."

[70] I have reviewed the authorities presented in this matter and other authorities of the lower court, including a more recent decision from Young J, where the conventional sum awarded was in line with the award given by the trial judge. In **Ivan Rene Penner v Gerhard Penner**, Supreme Court of Belize Claim No. 158 of 2020, Sonya Young J in a decision dated 25 September 2020 awarded BZ $20,500.00 for each of the two deceased who died as a result of negligent driving. At paragraph 10 of her decision the judge said:

> "**General Damages:**
> 10. The sum of $20,500.00 is awarded for each parent for loss of expectation of life. This is not intended to be the value placed on a life; **it is only a nominal show of respect for that life**. ..."

[71] I am satisfied that the award made by the trial judge of $20,490.81 was appropriate considering **Canul's** decision was 13 years old when applied in **Tiffany Williams**. Inflation should not be the only consideration. I agree with the trial judge that an award of *"BZ$3,500.00 can no longer be considered the conventional figure for so-called loss of expectation of life."*

L*oss of earnings*

[72] The trial judge awarded $2,000.00 for loss of earnings to the Estate on account of Julia's death which he stated appears to have been proven. The Appellant's position on loss of earnings was that it was not pleaded and no particulars given. Therefore, the trial judge in making the award relied on speculation and hearsay evidence. Ms. Banner submitted that there was no evidence of the alleged income of Julia, income tax, or social security payments.

[73] In the Statement of Claim, it was stated that prior to death, Julia experienced pain and suffering, loss of amenities and *loss of past and future earnings*. Loss of earnings was not claimed under the heading of Special Damages and there were no particulars given as submitted by the Appellant. The trial judge's award was therefore one of general damages based on evidence before him. He did not under the circumstances of the pleadings in this case use a multiplicand and multiplier.

[74] I am inclined to treat the award as nominal damages since Julia worked when necessary though no evidence of income tax or social security payments. The trial judge accepted the evidence of Arana and Julia's husband that she worked. The evidence as shown by the witness statement of BAR, at paragraph 11 was that Julia worked as a domestic for different families and earned roughly between 150.00 – 200.00 per week. She also did babysitting and earned roughly $80.00 per week. Further, whenever she had not been working for anyone, she made coconut bread and tablata for sale and earned about 75.00 to 100.00 per day.

Conclusion

[75] For the reasons stated, the damages awarded by the trial judge was not excessive for negligence. The trial judge did not make a finding of contributory negligence and as such there was no discussion of apportionment of the damages. Nevertheless, **section 6(3) of the**

Torts Act provides that where damages are recoverable by any person by virtue of subsection (2) of that section subject to such reduction as is therein mentioned, **the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.** That total damages being $ $217,149.36 as found by the trial judge.

Apportionment of damages for contributory negligence

[76] This Court found that there was contributory negligence by Julia and therefore it is in a position to determine the apportionment of damages. To do so, **section 6** of the **Torts Act** is applicable with guidance from case law.

Contributory negligence and reduction of damages

[77] Section 6 of the **Torts Act** provides:

> "6(1) In this section,
> "fault" means negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.
>
> 6(2) 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 to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage,**
> ……
> (3) Where damages are recoverable by any person by virtue of subsection (2) of this section subject to such reduction as is therein mentioned, **the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.**
>
> (5) **Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under section 26 (4) of the Administration of Estates Act, Cap. 197, the damages recoverable would be reduced under subsection (2) of this section**, any damages recoverable in an action brought for the benefit of the wife or husband, parent and child of the person under sections 9 and 10 of this Act, shall be reduced to a proportionate extent."

[78] Section 6(2) does not say how responsibility is to be apportioned and addresses responsibility for the damage and not responsibility for the accident. It addresses the

reduction of damages to the extent as the court thinks **just and equitable** based on the claimant's share in the responsibility of the damage. It is therefore one of broad judgment as there is no formula for what is just and equitable. It is not something of mathematical precision. Each case must depend upon its own particular facts and the outcome from other case laws are for guidance only.

[79] In **Stapley v Gypsum Mines Ltd** [1953] 2 All ER 478 at 486, [1953] AC 663 at 682, Lord Reid stated:

> 'A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in **causing the damage** apart **from his blameworthiness**.'

[80] An approach to the assessment of blameworthiness, in cases concerning motorists who drive negligently and hit careless pedestrians, can be seen in the judgment of the Court of Appeal, in **Eagle (by her litigation friend) v Chambers** [2003] EWCA Civ 1107, [2004] RTR 115. In that case, the claimant had been walking down the middle of a well-lit road, late at night, while in an emotional state. The defendant motorist would have seen and avoided her if he had been driving with reasonable care. He had however failed to see her. His ability to drive safely was impaired by alcohol. The trial judge reduced the claimant's damages by 60%. On appeal, that apportionment was reduced to 40%.

[81] In the present case, although the accident was caused by Mr. Mai's negligence as found by the trial judge, Julia was contributorily negligent and the trial judge erred in not making that finding. Therefore, I have to assess to what extent Julia was contributorily negligent and reduce the award of damages accordingly. This has to be done by considering the factual circumstances of this case.

[82] Mr. Mai was negligent in colliding with Julia who was in the middle of the highway and not in his path. He observed the road ahead but did not keep a proper look-out when he veered to his left. Had he kept a proper look-out, he would have been able to see Julia and adjust his speed. By his own evidence he saw her upon impact. He was unable to avoid the collision because as found by the trial judge, he was driving at an excessive speed and most likely he

was overtaking the taxi that was parked partly on the shoulder of the road and partly on the highway. He should have slowed down his speed to take into account the potential danger of the parked taxi. He would have seen and avoided Julia if he had been driving with reasonable care. As such, it is my view that he should bear more than 50% of the responsibility for the accident.

[83] On the other hand, Julia was careless in crossing the highway when it was unsafe to do so. She did not take reasonable care for her own safety as she was in the middle of a poorly lit highway with a speed limit of 55 mph, when Mr. Mai's vehicle was approaching with its headlights on from the opposite side of the highway and a taxi parked partly on the highway. Maybe she did not look to her right side before crossing or she failed to make a reasonable judgment as to the risk posed by Mr. Mai's vehicle. Mr. Mai's vehicle posed a risk even if a taxi was not parked partly on the road.

[84] However, I bear in mind as well that Julia did not step in the path of Mr. Mai's vehicle as in the case of **Ehrari v Curry** [2007] EWCA Civ 120, [2007] RTR 521 (where contributory negligence was assessed at 70%), in which a pedestrian steps directly into the path of a car which is travelling at a reasonable speed, and the driver fails to take avoiding action as promptly as he ought to have done. In such a case, the more direct and immediate cause of the damage can be said to be the conduct of the pedestrian, which interrupted a situation in which an accident would not otherwise have occurred. This is not the case here as Julia did not step in the path of Mr. Mai's vehicle. Therefore, under the circumstances of this case, it is my view that Julia should bear 40 % of the responsibility for the accident which is just and equitable. Accordingly, the damages awarded to the Estate of Julia would be subject to a reduction of 40% for contributory negligence.

Costs

[85] The trial judge ordered Mr. Mai to pay Arana cost in the sum agreed by the parties or should otherwise be assessed by the court rather than the Registrar. Also, statutory rate of interest was awarded from the date of the judgment being 26 September 2018. Miss Banner submitted that if the judgment below is set aside, then Mr. Mai's is entitled to the cost of the court below and the costs of the appeal. That is not the case, but Mr. Mai has partially succeeded in the appeal on the issue of contributory negligence.

Is this an appropriate case for each party to bear its own cost?

[86] The apportionment of liability is 40% for Julia and 60% liability to Mr. Mai. In my view, under such circumstances, where the parties share liability with a 10% difference, it is appropriate for each party to bear its own costs in the court below and this Court.

Disposition

[87] Accordingly, for those reasons, I propose the following Order:

(1) The Appeal is partly allowed as Julia Arzu was contributorily negligent for the accident.

(2) The Apportionment of liability is 60% for the Appellant, Mr. Mai, and 40% for the Respondent (the Estate).

(3) The award of damages by the trial judge to the Estate is set aside and would be subject to 40% reduction.

(4) Mr. Mai to pay damages to the Estate in the sum of $130,289.62.

(5) Statutory rate of 6% interest is awarded on the sum of $130,289.62 from the date of the judgment of the High Court, 26 September 2018.

(5) Each party to bear its own costs in the court below and this Court.

[88]

Minnet Hafiz Bertram
President

[89] I concur.

Louise Esther Blenman
Chief Justice

[90] I concur.

Sandra Minott-Phillips
Justice of Appeal