



[2022] JMSC Civ 69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV00619

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| BETWEEN | THE ADMINISTRATOR GENERAL OF JAMAICA (Administrator of Estate of Estate Gregory Omair Sinclair) | CLAIMANT |
| AND | NATIONAL COMMERCIAL BANK | 1ST DEFENDANT |
| AND | DIONNE ELLIS | 2ND DEFENDANT |

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016HCV01480

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| BETWEEN | KADIAN LINTON | CLAIMANT |
| AND | NATIONAL COMMERCIAL BANK | 1ST DEFENDANT |
| AND | DIONNE ELLIS | 2ND DEFENDANT |

IN OPEN COURT

Oraina Lawrence and Janeak Bailey instructed by the Administrator General of Jamaica for 1st Claimant

Monique Thomas instructed by Bignall Law for the 2nd Claimant

Joerio Scott and Chad Lawrence instructed by Samuda and Johnson for the Defendants

Heard: September 22nd, 2021, November 10th, 2021, February 14th, 2021, February 21st – 22nd, 2021 and June 8th, 2022

Motor Vehicle accident – Negligence - duty of motorist while turning from major road to minor -negligence – duty of care – overtaking along unbroken white lines

HUTCHINSON, J

BACKGROUND

- [1] On the 21st of March 2015 there was a fatal collision in the vicinity of the George Lee Boulevard and Cecile Avenue in Portmore, St Catherine. The collision took place between a Toyota Corolla motorcar, registration 6497GM which was being driven by Ms Ellis and a Honda motorbike, registered 2812 J which was being driven by Mr Sinclair, now deceased, with Ms Kadian Linton as his pillion rider. While the passengers in the motor vehicle did not sustain any injuries, damage was observed to the right driver and passenger doors as well as the right wing mirror and running board. Both Mr Sinclair and Ms Linton sustained a number of injuries.
- [2] On the 13th of April 2016, claim 2016HCV01480 was filed by Ms Linton against the Defendants seeking damages for negligence on the part of the 2nd defendant for the manner in which she was alleged to have operated the motor vehicle owned by the 1st Defendant. On the 19th of February 2018, the Administrator of Jamaica having been appointed as Administrator of the Estate of Gregory Sinclair filed a claim on behalf of his dependants pursuant to the Law Reform (Miscellaneous Provisions) Act and Fatal Accident Act in which damages are being sought for the benefit of named dependants of Gregory Sinclair.

- [3] On the 29th of April 2021 the matters were consolidated. The evidence before the Court was largely found in the accounts provided by Kadian Linton and Dionne Ellis and these have been summarised below.

CLAIMANTS' CASE

- [4] It was the evidence of Ms Linton that on the 21st of March 2016, she was the pillion rider on the motor cycle which was being operated by her spouse Gregory Sinclair. Sometime during the morning they were travelling in the Portmore area where he was transporting her to work. On approaching the intersection of George Lee Boulevard and Cecile Avenue, a Toyota motor car which had been travelling ahead of them made a sudden left turn without any indication. She said that this caused Mr Sinclair to apply his brakes but he was unable to avoid colliding into the right side of the motorcar.
- [5] Ms Linton stated that as a result of the collision they were both thrown into the air. Mr Sinclair was thrown from the bike and landed on the roadway but she held onto the bike and went over onto Cecile Avenue with it. It had been stated in the pleadings that both vehicles had been travelling in the same direction when the 2nd defendant made a sudden right turn but in her amplified evidence Ms. Linton insisted that the vehicles had been travelling in opposite directions and the driver made a left turn. The latter position was maintained by her under strenuous cross examination.
- [6] Ms Linton reported that she lost consciousness and was later transported to the hospital along with her spouse. She was admitted with injuries to her head, face, knee, left foot, hand and hip for which she had to undergo several surgeries. Mr Sinclair on the other hand succumbed to his injuries. As a result of the life changing nature of her injuries, Ms Sinclair reported experiencing job loss and financial challenges, a situation which was exacerbated by the loss of the financial support usually provided by Mr Sinclair. Ms Linton also gave evidence of the negative impact that the loss of his financial support had on Mr Sinclair's dependents. In the

course of her evidence in chief Ms Linton acknowledged that as a result of the blow to her head, she experienced extreme moments of memory loss. She also recounted having to rely on friends and family members to fill in the gaps whenever she 'thinks back and has to bring up these memories'.

- [7] Ms Linton was cross examined about her recollection of events and she denied that she was told what happened by friends and family. She insisted that they could not have told her anything as they weren't there. She was re-examined on this and agreed that she had been told about the accident by family and friends but insisted that they had not been present. She denied the suggestion that Mr Sinclair had been had been overtaking the car which had been travelling in the same lane and she also disagreed that the car had been turning right at the time they sought to pass it which resulted in the collision. It was suggested to Ms Linton that her account was unreliable as she could not remember what happened. The medical report produced by Dr Garfield dated November 30th, 2019 was shown to her where it was noted that she could not recall the accident details and she denied that any of this was true.

DEFENDANTS' CASE

- [8] The evidence relied on by the defendants was contained in the witness statements of Ms. Ellis. She stated that on the day in question she was travelling along the George Lee Boulevard en route to Family Life Ministries on Cecile Avenue. She was driving a Toyota motorcar and was accompanied by her son and daughter. On approaching this junction, she observed that no vehicles were travelling in the opposite direction. She said that she checked her rear view mirror and observed the motorcycle with both riders making the turn from Port Henderson Road onto George Lee Boulevard, a far distance away from her car. She then turned on her indicator and began turning onto Cecile Avenue. In the process of making this turn, she heard an explosion and felt an impact to the right side of her vehicle. She saw when the riders were thrown into the air and stated that the male fell onto the

roadway on George Lee Boulevard while the female and the bike ended up on Cecile Avenue.

- [9] She was cross examined and acknowledged that while she checked her rear view mirror, she did not check the side mirror. She stated that the bike was about ½ a kilometre from her when she began making the turn. She agreed that she did not see the bike overtaking her vehicle although it was stated in her particulars of claim that the rider had been overtaking. It was suggested to her that she had failed to signal her intention to turn and she disagreed with this suggestion. She insisted that not only did she use her indicator but there was also an unbroken white line in that area. She also clarified that she would have been turning onto Marlene Avenue in order to get to Cecilia Avenue which runs across it.
- [10] Ms Ellis denied that she had made the turn without checking her rear view mirror. She also denied suggestions that she had been speeding and failed to exercise sound judgment. She also disagreed that she had failed to indicate or engaged in reckless driving.

POLICE REPORT

- [11] The police report exhibited in this matter was prepared by Cpl Bartley of the St Catherine South Division. The report outlined that there was damage observed to the right driver and passenger doors as well as the right wing mirror and running board. In respect of the motorbike, the officer observed extensive damage to the front section of same. As a result of her investigation, Cpl Bartley arrived at the conclusion that both vehicles had been travelling along George Lee Boulevard in the same direction with the motorbike travelling behind the car. She found that on arriving at the junction with Marlene Avenue the driver of the motorcar was making a right turn when the bike began to overtake it and this resulted in a collision.

ISSUES

[12] It is not in dispute between the parties that given the very different accounts as to how the accident occurred, the Court now has to determine the following issues;

- a. Whether the defendants owed a duty of care to the claimants, and if so, whether there was breach of that duty; specifically, did Ms Ellis fail to keep a proper lookout and suddenly and without warning turn into the path of the motorcyclist thereby causing the collision;
- b. Whether Mr Sinclair was travelling at an excessive speed and/overtaking, failed to keep a proper lookout on approaching the junction and rode into the path of the motor car being driven by Ms Ellis.
- c. Whether the defendants' actions caused injury and loss to the claimants and if so were they foreseeable;
- d. Was there contributory negligence on the part of the Claimant
- e. the quantum of damages, if any, to be awarded.

SUMMARY OF SUBMISSIONS ON LIABILITY

[13] While submissions were made by respective Counsel on the issues of liability and damages, I believed it to be prudent to address them separately as the question of quantum would properly arise once liability has been determined. It was submitted by all the Attorneys that the case law and legislation on this area provide useful guidance in deciding whether a duty of care would have been owed to the Claimants. In respect of the statutory provisions they made reference to Section 51(1) (d) and (e) as well as 51(2) of the Road Traffic Act. Section 51(1) of the Road Traffic Act provides rules that all drivers of motor vehicles using public roadways should observe. The relevant sections are outlined below;

51(1) (c) 'a motor vehicle shall not be driven alongside of or overlapping, as so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction'

51(1)(d) a motor vehicle "shall not be driven so as to cross or commence to cross or be turned in a road if by doing it obstructs any traffic;"

Section 51 (1)(e) a motor vehicle "proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road";

- [14] Section 51(2) which was also highlighted by Counsel cautions every driver that they have a duty to take necessary action to avoid an accident. It states;

"Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

- [15] Sections 27 and 32 (i) of the Road Traffic Act (RTA) of Jamaica were also highlighted as relevant and these provide as follows,

27 "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable,

32(i) if any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence.

- [16] The case of ***Adolph Allen v Orandy Moving & Storage Company Limited*** [2017] JMSC Civ. 73 was also cited on behalf of the Claimant and Counsel submitted that the Court relied on the Island Traffic Authority Road Code 1987 which provides at section 95(1) of the Road Traffic Act, that a driver should "always be able to stop his or her vehicle well within the distance for which they can see the road to be clear" (no. 4, pg. 7); before slowing down, stopping, turning or changing lanes, check rear view mirror, signal intention either by hand or indicator light signals and make sure they can do so without inconvenience to others and importantly, "never make a sudden or last minute" turn, as it is very dangerous to do so" (no. 6, pg. 7).

- [17] Counsel also asked the Court to take special note of what she described as the tenets outlined, namely;

1. "Well before you overtake or turn left or right, slow down or stop; use mirrors then give the appropriate signal";
2. One should "not travel too closely to the vehicle in front of you" and
3. "Always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops".
4. When turning, a driver must "signal intention to turn to other road users well in advance of their turn."

[18] Counsel submitted that applying the principles in the **Adolph Allen** case to the instant claim, it is clear that the 1st Defendant had a duty of care to indicate before making the right turn and she failed to do so. Counsel also argued that in the instant case, there was no physical or extrinsic evidence before the Court and as such, the matter was entirely dependent on the credibility of the respective witnesses. She submitted that Ms Ellis's credibility had been undermined by her admission that she did not actually witness Mr Sinclair overtaking her car. Counsel also contended that by making the turn without checking her side mirror Ms Ellis displayed negligent conduct which resulted in the collision.

[19] The decision of **Nance v British Columbia Electric Railway Company Ltd [1951] AC 601** was also relied on by the Claimants in support of their submission that there is a common law duty as well as statutory duty for drivers of motor vehicle to exercise reasonable care while operating their vehicle on the road. The case of **Berrill v. Road Haulage Executive [1952] 2 Lloyds Rep 490** was also cited where it was held that: "a driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do albeit negligently."

[20] The decision in ***James Mitchell & Aaron Gordon v Leviene McKenzie and Darrel Gordon SCCA104/1991*** was also relied on by the Claimant. In that matter, a collision occurred when a truck travelling on the soft shoulder tried to make a right turn across the roadway and collided in a bus which had been travelling along the main road in spite of the efforts of the bus driver to avoid same. It was the ruling of the Court that the driver of the bus had not been negligent as the truck driver had turned across the roadway without any indication and was solely liable for the collision. Counsel submitted that that situation was no different from the instant claim as the deceased had also sought to avoid the collision and same had been wholly caused by Ms Ellis making an unexpected turn.

[21] Counsel asserted that the Defendant's case that Mr Sinclair had been overtaking was unreliable as she had admitted in cross examination that she did not observe him doing so. She also argued that by failing to check her side mirrors the defendant had failed to display the requisite due care and attention or any awareness of other road users. She asked the Court to find that the acts and omissions on the part of Ms Ellis rendered her solely liable for the collision and the consequences which flowed therefrom. Counsel argued in the alternative, that if the Court did not believe that the defendant was solely liable she should be found to bear the lion share of the responsibility for what had occurred and the award of damages against her be apportioned accordingly.

[22] In respect of the visit to the locus during the course of the trial, Counsel conceded that contrary to the evidence of Ms Linton, both vehicles would have been travelling in the same direction. She argued that the witness was unfamiliar with the area and asked the Court to accept that this resulted in her being mistaken in her recollection of this evidence. Counsel asserted that even if Ms Linton was mistaken about this aspect she was consistent in her account that the collision occurred when Ms Ellis turned when it was unsafe to do so.

[23] In submissions made on behalf of the Defendant, Counsel acknowledged the relevance of the legislation and authorities cited. He argued that the evidence

showed that no fault could be attached to the conduct of the 2nd defendant who had wholly complied with her duties under the Road Traffic Act. Counsel submitted that the case for the Claimants had been entirely undermined by the contradictions revealed in the evidence of Ms Linton which disclosed that she was not able to see the roadway based on her position behind Mr Sinclair nor could she honestly recall what had occurred.

- [24] Counsel highlighted what he described as her contradictory accounts in respect of the direction of travel as well as the turn made by the 2nd defendant. He contrasted this with the evidence of Ms Ellis which he described as clear and consistent as to the steps taken prior to the turn; including the distance that the Claimant would have been from her car at the relevant time. Counsel asked the Court to carefully examine both accounts bearing in mind the responsibility of the Claimants to prove their case to the requisite standard. He submitted that on a detailed analysis of the evidence and law it is clear that the collision was entirely the fault of Mr Sinclair.

APPLICABLE LAW

- [25] The relevant principles in relation to the law of negligence were laid down in the locus classicus of ***Donoghue v Stevenson [1932] UKHL 100*** where Lord Atkins stated as follows:

‘.. reasonable care must be taken to avoid an act or omissions which a reasonable man can foresee may cause injury to a neighbour’.

- [26] This principle was considered and expanded on by our Court of Appeal in ***Glenford Anderson v. George Welch [2012] JMCA Civ.43*** in which Harris JA stated at paragraph 26 of the judgment as follows:

“It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty”

[27] In *Donoghue v Stevenson* (supra), it was made clear that the care that is to be taken is based on the foreseeability test and the standard is that of the ordinary reasonable man placed in the same circumstances as the defendant. As such in cases involving persons who are road users the standard of care is that of the ordinary and reasonable road user.

[28] It is not in dispute that the local legislation established a statutory duty of care vis a vis road users and this was previously highlighted at Sections 27, 32 and 51 of the Road Traffic Act. There has also been a plethora of authorities on the common law duty owed by one road user to another which include *Nance v British Columbia Electric Company* and *Bourhill v James Young 1941 S.C. 395, 429*. In the latter Lord Jamieson enunciated the relevant principles which were later approved by the House of Lords (1943] A.C. 92) as follows;

- a. the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway,
- b. this duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.
- c. Reasonable care means the care which an ordinarily skilful driver would have exercised under all circumstances, and connotes an avoidance of excessive speed, keeping a good look out, observing traffic rules and signals.

[29] In light of the competing accounts of the witnesses the resolution of these claims will turn upon the careful consideration of the relevant legal principles as well as the facts which are found to be proved. As such, the issues identified were individually examined with this approach in mind.

Did the defendant owe a duty of care to the claimants, and if so, was there a breach of that duty; specifically, did Ms Ellis fail to keep a proper lookout and suddenly

and without warning turn into the path of the motorcyclist Mr Sinclair thereby causing the collision.

Was Mr Sinclair travelling at an excessive speed and/or overtaking, failed to keep a proper lookout and rode into the path of the car being driven by Ms Ellis.

[30] Although, these issues had been listed separately I was satisfied that they are so inextricably intertwined that they can properly be disposed of together. It was noted that although the accounts provided by the parties agreed on some factors they were diametrically opposed on the issue of liability. In light of this fact, a question which has been properly raised by both sets of attorneys is the credibility of the respective witnesses, which they argue impact their reliability as a whole.

[31] The evidence of Ms Linton disclosed that neither she nor Mr Sinclair were familiar with the area where the collision occurred. It was in fact acknowledged that they had stopped for directions in order to locate Megamart where she was to commence employment. She stated that although Mr Sinclair was seated in front of her she was able to look over his shoulder and observe the roadway during the journey. It was in doing so that she was able to observe the car travelling from the opposite direction and turning left across their path without any indicator. This evidence, if accepted, could in and of itself be sufficient to affirm that there was a breach of duty by the 2nd Defendant. This was not the end of her evidence however, as she went on to say that the first time that she noticed the car was when the accident was about to happen. I found this utterance to be of some significance as it called into question whether Ms. Linton had indeed been watching the roadway as she had professed.

[32] The particulars of claim and amended particulars in the 2016 matter were examined as well as the particulars in the 2018 claim. It was noted that Ms. Linton's pleadings stated that they were hit from the motorcycle when the driver of the car made a right turn. The amended particulars also stated that both vehicles had been travelling in opposite directions at the relevant time. In her evidence however, the

direction of the turn made by the defendant was markedly different from the pleadings in both claims.

- [33]** In the course of the trial there was a visit to the locus during which both Ms Linton and Ms Ellis were allowed the opportunity to point out the area along which both vehicles had been travelling as well as the turn taken. It was apparent that contrary to what had been asserted by Ms Linton in evidence, both vehicles would have been travelling in the same direction along George Lee Boulevard. It was also clear that the only turn which could have been made was to the right. Both of these points have been conceded by her Counsel. The roadway in question was a dual carriage way with vehicles traveling in opposite directions. There were no broken lines along this section of the roadway and this it was acknowledged by both sides that this was the case at the relevant time. In circumstances where the vehicles were heading in the same direction, it raised the question as to the position on the roadway of the motorcycle just prior to the collision.
- [34]** Had Mr Sinclair been travelling one car length behind the car or at a safe distance behind and within the speed limit the 'sudden turn' if it did occur would have placed him towards the rear or rear panel of the car. The evidence of Ms Linton that he tried to brake but was unable to avoid hitting the car, undermines her insistence that Mr Sinclair was not speeding as not only did he hit into the right side of the vehicle but he did so with such force and momentum that the riders as well as the bike were thrown into the air and over the car.
- [35]** It is not in dispute that at the time of the collision, the car was moving from George Lee Boulevard onto Marlene Avenue and in doing so it would have been partially positioned across the lane of traffic heading in the opposite direction. Ms Linton gave no evidence of Mr Sinclair swerving into the other lane to avoid the collision in order to explain how he could have come into contact with that side of the car. It is my opinion that the inescapable inference in these circumstances is that he must have been overtaking the car as it turned. The location of the damage supports the conclusion that the motorcycle was in the process of riding

alongside/overtaking the car at the relevant time, an action which would have been prohibited given the unbroken white lines. The report prepared by Cpl Bartley which was admitted into evidence at the instance of the Claimant lends further support to this finding.

[36] In continuing my examination of these issues, I carefully considered whether Counsel's submission that Ms Ellis's failure to check her side mirrors was sufficient to prove that she was negligent and/or at least partly responsible for the collision. While Ms Ellis made this concession, it was within the context of having checked her rear view mirrors and seen the motorcycle and its passengers some distance away. Additionally, the area was marked by an unbroken white line which prohibited overtaking by any motor vehicle. In executing this manoeuvre Ms Ellis would have been required to not only check behind her but also in front of her in the event of oncoming traffic. I did not believe that Ms Ellis failed to act with due care and attention by not taking the additional step of checking the side mirrors. From her observation, the distance of the motor cycle away from her car clearly obviated the need to do so. In this regard, I found the reasoning of the Court in ***Berrill v. Road Haulage Executive [1952] 2 Lloyds Rep 490*** most useful, as having taken the steps that she did, Ms Ellis was not 'bound to foresee every extremity of folly which occurs on the road.'

[37] The importance of the rider/driver of an overtaking vehicle keeping a proper lookout and driving at an appropriate speed and distance in order to ensure that there is no difficulty in dealing with an emergency has been emphasised at Section 51(c) of the Road Traffic Act as well as in a number of decided cases. From a review of the evidence herein, I am satisfied that Mr. Sinclair did not comply with these requirements.

[38] Before leaving this point, it should be noted that there were other concerns in respect of the reliability of Ms Linton's account as a result of contradictory utterances made by her. These were contained in her evidence in chief, cross examination and re-examination and involved her ability to recall the details in

respect of the 'accident.' It was previously noted that in her witness statement Ms. Linton had expressed her difficulty in recalling what had occurred.

[39] A similar notation was made in the report prepared by her attending physician shortly after the collision. Ms Linton also stated that the gaps had to be filled in by friends and family. She denied this in cross examination but made a partial admission in re-examination. In my review of this portion of her evidence, I was left with some doubt as to whether she was in fact able to recall anything at all and I also wondered if this explained the contradictory details which had been observed in her particulars of claim and witness statement.

[40] In light of the foregoing, I concluded that while Ms Ellis owed a duty of care to both Ms Linton and Mr Sinclair, there was no breach of same on her part. I believe that she took the necessary safeguards before executing the turn. I am satisfied to the requisite standard that the collision which occurred was entirely as a result of the poor decision made by Mr Sinclair to overtake her vehicle as she did so. While Ms. Ellis conceded that she did not actually see the motorcycle overtaking, the evidence establishes that this is an inescapable inference that can be drawn from the circumstances discussed above.

Whether the defendants' actions caused injury and loss to the claimants and if so were they foreseeable;

[41] In light of the findings above, it is clear that although Mr Sinclair and Ms Linton sustained devastating injuries which ultimately proved fatal for him, these could in no way be attributed to the actions of Ms. Ellis or the 1st Defendant.

Was there contributory negligence on the part of the Claimant

[42] The Law on contributory negligence is found at Section 3(1) of the Law Reform (Contributory Negligence) Act (Jamaica.), which reads:

"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 damages".

[43] In ***Jones v Livox Quarries Ltd [1992] 2 Q.B. 608,615***, it was noted by Denning L.J. that a Claimant will be found guilty of contributory negligence if there is evidence that he did not act as a reasonable and prudent man in circumstances where he ought reasonably to have foreseen that by failing to act as a reasonable and prudent man, he might hurt himself, taking into account the possibility of others being careless. Where the Defendant raises contributory negligence the burden of proof on a balance of probability rests on him (see ***Caswell v Powell Duffryn Associated Collieries Ltd. [1940] A.C. 1***).

[44] In my assessment of the evidence in this matter, I considered whether there was a legal or factual basis on which it could be concluded that the Claimants were only partially liable for the collision and resulting damage. In light of my earlier discussion and findings, I did not believe that this was the case and as such further consideration of this possibility is irrelevant to the instant claim.

The quantum of damages, if any, to be awarded

[45] While it is recognised that a devastating loss would have been suffered by Ms. Linton in her own right as well as by the dependants of Mr Sinclair, the award of damages can only be considered where liability has been established on the part of the defendants. The evidence presented by the Claimants having failed to prove same there can be no such award.

Conclusion

[46] As such judgment is entered in favour of the defendants on the consolidated claim. Costs awarded to the defendants to be taxed if not agreed.