

IN THE SUPREME COURT OF BELIZE, A.D. 2000

ACTION NO. 552

	ADITA CANUL (suing as the Widow and Administratrix of the Estate of CLEMENTE CANUL) JARMIN MALONEY CANUL JAMIRA ALEXANDER CANUL (by their next friend VICENTE CANUL)	Plaintiffs
BETWEEN	AND	
	FRANCIS ALFARO ALBA ALFARO	Defendants
	AND	
	DEALS ON WHEELS ARTURO MATUS	Third Party

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Michel Chebat for the plaintiffs.
Mr. Linbert Willis for the defendants.
Mrs. Melissa Balderamos Mahler for the third party.

JUDGMENT

This case arose out of a fatal motor accident that, on the evidence, took place in the early hours of December 17th 1999 about 2 ½ miles on the Northern Highway. The accident resulted in the death, according to the evidence, on the spot, of Clemente Canul. His widow and administratrix of his estate, Adita Canul, and his two minor children, Jafmine Maloney and Jamira Alexander, have by their next friend, Vicente Canul, joined to bring this action claiming damages against the defendants pursuant to the Law of Torts Act – Chapter 172 of the Laws of Belize, Rev. Ed. 2000.

The relevant sections of this statute provide in terms 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.
10. 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, but notwithstanding anything contained in the Limitation Act, no such action shall be commenced at any time later than twelve months after the death of such deceased person.
11. Every such action shall be brought by and in the name of the executor or administrator of the person deceased, but if in any case there is no executor or administrator of the person deceased, or if, there being such executor or administrator, no such action is, within six calendar months after the death of such deceased person, brought by and in the name of such executor or administrator, the action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit the action is thereby given:
- Provided that no more than one action shall lie for and in respect of the same subject matter of complaint.*
12. ...
13. In any such action the plaintiff shall state on the writ of summons full particulars of the person or persons for whom and on whose behalf such action is brought, and the nature of the claim in respect of which damages is sought to be recovered.”

2. Only the first and second defendants were sued in the writ taken out for the plaintiffs. This despite a clear reference to the truck (license plate No. CZL-A-3200) as the cause of the collision pleaded in the particulars of negligence in the Statement of Claim. However, in the Defence on behalf of the defendants, it was specifically alleged that the collision was caused or contributed to by the negligence of the driver of the truck bearing registration plate No. CZL-A-3200. During the course of the hearing of this case it became evident that in the interest of justice, it was necessary to take out and serve a Third Party Notice. This was duly done,

necessitating a break in the hearing; and with the leave of the Court, this was subsequently served on the Third Party (Deals on Wheels and Arturo Matus).

3. From the evidence, the late Clemente Canul was a friend of the first defendant, Francis Alfaro, who was in fact the godfather of Canul's two minor children. Together, the late Canul and Alfaro shared a house at Belama Phase 2 with Arnaldo Howe (who testified as the first witness for the plaintiffs).
4. These three friends decided on the eve of the fateful day, 16th December 1999, to go to a party in Ladyville at 10:30 in the evening, in the company of two female friends. The means of transportation that evening was a Toyota Corolla car registered in the name of the wife of the first defendant; but she had gone to the U.S.A. and left the car in his possession and he was driving it that fateful early morning.
5. Again, from the evidence, a lot of beer was drunk at that party in Ladyville. In his evidence in chief, for example, Arnaldo Howe said, when asked by Mr. Chebat for the plaintiffs, to describe his state of mind when they left the party at Ladyville for Belize City:

"A: We were all drinking. All of us were drinking.

Q: You were all drinking?

A: We were at a party."

Also, in answer in cross-examination by Mr. Willis for the first and second defendants he stated:

"Q: What were you all drinking at the party?

A: Belikin.

Q: Beers?

A: Yes, beers.

Q: How many beers did you drink?

A: I don't know.

Q: I suggest to you that you drank more than ten beers?

A: I don't know.

Q: That would be correct?

A: That is your suggestion. I don't know.

Q: You don't know if you drank more than ten beers?

A: I don't know.

Q: Mr. Alfaro, (the first defendant and driver that day) he also drank more than ten beers?

A: I don't know.

Q: Mr. Alfaro, he also drank beers?

A: All of us were drinking.

Q: I suggest to you Mr. Alfaro also drank more than ten beers?

A: I don't know.

Q: I suggest you were all intoxicated from drinking the beers?

A: You could be right."

(emphasis added)

6. On the amount of drinking that evening just before the fateful events few hours into the morning of 17th December 1999, it is perhaps also helpful to recall the testimony of Mr. Francis Alfaro, the first defendant, this time under examination in chief by his own learned counsel, Mr. Willis:

"Q. What happened next?

A. Well while we were at the party we partied and drank.

Q. Tell the Court what you drank.

A. We were consuming local beers.

Q. Who all were consuming local beers?

A: The three of us that went and other people – Mr. Howe, Mr. Clement and myself.

Q. How much beers did you consume?

A: I can't specify, over ten.

Q. That would be ten pints?

A: Belikin pints.”

7. Again, on the amount of drinking and the incident that day, Mr. Alfaro stated, among other things, in cross-examination by Mr. Chebat for the plaintiffs:

“Q. I am putting it to you, sir, that you were at that time so drunk that you failed to see the vehicle in time to avoid a collision?

A: Probably, yes.

THE COURT: You understand the question?

WITNESS: Yes, I understand the question.

Q: I put it to you, sir, that you were so drunk Mr. Alfaro, that you failed to stop, you failed to slow down or you failed to swerve to avoid colliding into that parked vehicle.

A: I tried to avoid it but I pressed brakes and it still ran under it, the portion of the truck that we knocked.”

8. Also, in answer to cross-examination by Mrs. Melissa Mahler, learned attorney for the Third Party in relation to alcohol and the collision that day, Mr. Alfaro said:

“Q. Isn't it true Mr. Alfaro, that in addition to being charged with causing death by careless conduct, manslaughter by negligence, driving without due care and attention, you were also charged with negligent

harm, you were also charged with driving with alcohol concentration above the prescribed limit? (emphasis added)

A: Yes, ma'am."

9. I have tried to recount the evidence in this case and the amount of alcohol that was consumed by the first defendant and his friends (including the late Clemente Canul and Arnaldo Howe the first witness for the plaintiffs) in the evening of 16th December just before the tragic accident in the early hours of 17th December which has resulted in this case as it became evident in the course of the hearing that much may depend on it. Indeed, in the light of the evidence as a whole in this case, much, very much was to turn on the amount of alcohol consumed that evening in the resolution of this case.
10. The material facts of this case are themselves brief, perhaps, as brief as the tragic accident that ended the all-too-brief life of the late Clemente Canul himself, for he was only 28 years old when he met his death in the early hours of 17th December 1999.
11. From the evidence the three friends with their female companions arrived from their residence in Belama at the party in Ladyville at about 9:30 in the evening of 16th December. At the party a good amount of beer was consumed by them all, including the late Clemente Canul and the first defendant, who was driving that night. I have earlier recounted the evidence of drinking. They stayed at the party until after midnight. In the early hours of December 17th, they left Ladyville for Belize City where they dropped off their female companions. After dropping off the ladies, Mr. Howe testified that he requested Mr. Alfaro, their driver and the first defendant to take him to a restaurant by the name of Kiss to buy some food as he was hungry. After this, he testified that they then

set off for their residence in Belama and he took his seat in the Toyota Corolla car behind Mr. Alfaro, the first defendant. In the car Mr. Howe testified that he relaxed and closed his eyes and did not know what was happening until when he heard an impact. This impact was the collision between the car and a truck parked on the Northern Highway about 2 ½ miles from Belize City. Mr. Howe testified that the truck was just parked, stationary, but the vehicle they were in, that is the car, was nearly underneath the truck on the passenger side – the side on which Clemente Canul was sitting. Mr. Howe further testified that he got out of the car and he observed that the whole of the front of the car was caved inside and when he pushed Clemente Canul he couldn't move. When asked whether it was the whole front of the car that caved in, Mr. Howe explained that it was the passenger side where Canul was trapped.

The issue of liability

12. It was established from the evidence that Clemente Canul met his death as a result of the fatal crash of the Toyota Corolla car into the back of the stationary truck in the early hours of 17th December 1999, on 2 ½ miles on the Northern Highway, when the car and its occupants were heading from Belize City for Belama.

The issue of liability for the collision therefore arises at two levels: First, as to the car and secondly, as to the parked truck, if any. The issue of liability of course, determines who is responsible, in damages, for the death of Clemente Canul and therefore to his survivors and dependents.

13. It is the case of the plaintiffs that the collision was wholly caused by the negligent driving of the first defendant, Francis Alfaro. The plaintiffs alleged in their Statement of Claim that the first defendant was negligent in that on the day in question: a) he drove at a

speed which was too fast; b) failed to keep any or any proper lookout or to have any sufficient regard for traffic on the said highway; c) failed to have or keep any or any proper control of the Toyota Corolla car; d) failed to see the truck licensed No. CZL-A-3200 in sufficient time to avoid colliding with it or at all; and e) failed to stop, slow down, to swerve or in any other way so to manage or control the car so as to avoid the accident.

14. It should be noticed that the plaintiffs never alleged any negligence of or attributed any to the parked stationary truck.
15. It was the Defence that raised the issue of the liability of the truck when it specifically alleged that the fatal collision was caused or contributed to by the negligence of the driver of the stationary truck. As a result of this, as already stated, at paragraph 2 above, with the leave of the Court, a Third Party Notice was issued and a Statement of Claim claiming contribution from the Third Party or an apportionment of liability between the defendants and Third Party was filed. This is the second level of liability.
16. First, on the issue of liability as regards the role of the car or more particularly, its driver in the collision. I have already set out the grounds alleged by the plaintiffs of the negligence of the driver, of the car, the first defendant (at paragraph 13 above). The first defendant for his part in his Defence, in addition to disclaiming any liability for the collision, averred that the loss suffered by the plaintiffs was occasioned by the contributory negligence of the deceased, Clemente Canul himself. This was because the defendant said Clemente Canul: a) failed to wear a seat belt while he was riding as a passenger in the front seat of the Toyota Corolla car while the first defendant was driving it on that day; b) traveled as a passenger in the said Toyota car on that day when he knew that the first defendant had consumed alcohol in such quantity as

was likely to impair his capacity to drive safely; c) knowing that he would be traveling as a passenger in the said car, engaged with the first defendant in a bout of drinking alcohol to such an extent that his thought and perception were so impaired that he was unable to foresee the danger in traveling in the Toyota car driven by the first defendant.

17. The case for the plaintiffs, therefore, is that the first defendant solely caused the collision and that it was his negligence that caused the death of Clemente Canul. From the evidence there is no denying that the three friends, including the deceased Clemente Canul and the first defendant, Mr. Alfaro, were drinking perhaps ten beers in the evening just before the collision. Indeed in answer to Mr. Willis, the learned attorney for the first defendant to the suggestion:

“Q: Mr. Alfaro, he also drank beer?

A: All of us were drinking.

Q: I suggest you were all intoxicated from drinking the beers?

A. You could be right, maybe.”

I need not recount again the role alcohol played in the collision. The first defendant himself admitted in evidence that just before the incident he had drunk over ten beers (see in particular, paragraphs 5, 6, 7 and 8 above). The first defendant also said in evidence that on the way home to Belama from Belize City that day, that he did not see the parked truck and when he tried to react to it, it was too late; he collided into the rear left portion of it.

18. From the evidence, I am therefore driven ineluctably to find and hold that principally, it was the state of Mr. Alfaro, the first defendant that early morning that caused the collision with the

parked truck that resulted in the death of Clemente Canul. Indeed, he further stated in evidence that while they were at the restaurant in Belize City where they had stopped at the behest of Mr. Howe to buy some food before returning home after the party in Ladyville, he, Alfaro, went to the bathroom to freshen up and wash his face and mentioned to his other two friends, that is Howe and the late Canul, that he was feeling sleepy. Yet, he continued to drive with the tragic consequence that has resulted in this case. The blood/alcohol content of the defendant was given as 140 mg/100 ml, well over the legally permitted level of 80 mg/100 ml blood. I therefore find and I hold that the first defendant's state on that day was such that his ability to operate and maneuver the car safely was impaired. In this he was negligent.

19. But the defence pleaded contributory negligence on the part of the late Clemente Canul. This, of course, is not entirely exculpatory of the first defendant. I have set out the particulars of what the defence says were the contributory negligence of Clemente Canul (see paragraph 16 above). On the evidence, I cannot help but find that there was some contribution or fault on the part of the late Clemente Canul in bringing about his tragic death that day. First, neither he nor his driver was wearing a seat belt on that day. Secondly, and perhaps more importantly, Canul and his other two friends, in particular, the first defendant and driver of the car, Alfaro, were engaged in what was really a binge of drinking to such an extent that he should have known that it was not safe, even bordering on the foolhardy, to have sat in the front passenger seat and allow Alfaro to drive. And this, even after Alfaro said he had told them he was feeling sleepy to drive. Inevitably therefore, I find that Clemente Canul himself contributed to his own death. His actions just prior to the early morning hours of December 17th, 1999

and in those fateful hours, consisted, I find, in a disregard for his own safety.

On the evidence as a whole however, I find that the first defendant and the driver that day, who alone was in control of the car and therefore had it in him whilst in drink to do greater harm must therefore bear by far the greater responsibility for the collision – Owens v Brimmell (1976) 3 All E.R. 765; (1977) 2 WLR, 943.

20. I therefore hold the first defendant liable for the collision but reduce his liability by 15% representing the late Clemente Canul's contribution to the cause of his death. The ratio of liability therefore is 15/85%. Any damages to the plaintiffs would be accordingly reduced by 15%.
21. I must record here the refreshing candour of Mr. Michel Chebat, the learned attorney for the plaintiffs, who in his final submissions on their behalf, candidly conceded that if I were to find contributory negligence on the part of the late Clemente Canul, and therefore the loss suffered by the plaintiffs, such loss ought not to be more than 10%. It is a welcome concession, but on the facts of this case, and given the conduct of the three friends that evening, drinking well into the early hours of the day just before the collision, and Clemente Canul's voluntarily riding in the front passenger seat of the car and without a seat belt, with a driver who must have been drunk, I don't think 15% of contributory negligence by him would be excessive.
22. Secondly, I now turn to the issue of contributory negligence between the defendants and the Third Party.
23. The Third Party, Deals on Wheels and Arturo Matus, represented by Mrs. Melissa Balderamos-Mahler, stoutly denied any negligence on their part by reason of the parking of the truck on the Northern

Highway on the day in question and the collision of the Toyota car into its rear left portion. They disclaimed all liability for the collision; and averred in their Defence instead that the collision was in fact caused solely by the negligence of the defendant Alfaro, and re-echoed almost the same particulars of negligence as had been averred against him by the plaintiffs.

24. Mr. Arturo Matus, one of the Third Party, testified in this case. He stated that he had parked the truck on the extreme right hand side of the highway about 3 o'clock in the afternoon on the day before the collision in front of his cousin's office of A & M Engineering because the yard was full. He then went home after 5 p.m. and after watching television retired for the night. He further said that around 4:30 in the morning, he received a call from his cousin informing him that someone had just crashed into his truck. He testified that when he parked the truck other vehicles could pass it freely and that he had parked it right under a lamp post and that there were two lamp posts lights on each side of where he was parked. Importantly, he testified that the truck had break lights and reflectors on the back.
25. On the evidence, I am satisfied that the truck was not parked or left in the dark. I find that there was sufficient lighting in the area around the truck and that it had reflectors on its back so as not to constitute a danger to other road users even at that time of the collision. Sergeant Raymond Berry, the investigating police officer who was summoned to the scene soon after the accident, testified that where the accident occurred had Shell One Stop Station across the road which was lit at the time, so there was illumination in the area and that it was not a foggy night. Furthermore, from the evidence, other vehicles were able to pass the stationary truck

freely, that is, until after the defendant slammed into its left rear portion, and even after the collision.

26. I am therefore satisfied that on the evidence, in terms of liability, vis-à-vis the third party, it was the defendant's negligence, contributed to no doubt, by his inebriation that day, that solely caused the collision. As between the two, I don't think that I can, on the evidence, find any negligence or contributory negligence against the third party. As Mrs. Balderamos-Mahler correctly submitted on behalf of the third party, when there is a collision between a moving vehicle and a stationary vehicle which is plainly visible, the onus is on the driver of the moving vehicle to show that he has taken all reasonable care not to cause the collision – **Randall v Tarrant (1955) 1 All E.R. 600; (1955) 1 WLR 255.**

27. On the evidence in this case, it is clear that Mr. Alfaro, the defendant of the moving Toyota car, has not discharged this onus. This, again on the evidence, not doubt, due to his state that day and the manner in which he was driving. He candidly admitted that he did not see the truck until when he reacted to it – it was too late.

28. In the result, I find no liability on the part of the third party.

Damages for the death of Clemente Canul

29. The plaintiffs have brought this action, as I stated at the outset, pursuant to the Law of Torts Act, as the widow and administratrix of the estate of the late Clemente Canul and by his two minor children, by their next friend. The Act itself does not state the measure or quantum of damages that may be awarded in an action for causing the death of another. The task of the Court is to make an award that can best approximate the loss of the pecuniary benefit the claimants had with the deceased person, had he not died. There can, of course, be no objectively verifiable value of the

life of a human person. But the Courts try as best they can, to assess the value of the dependency the claimants might have lost thereby and make an appropriate award in damages.

30. The object of the exercise is to provide the widow and other dependents of the deceased with such sum by way of damages which with prudent investment will be sufficient to supply them with material benefits of the same standard and duration as they would have received from the earnings of the deceased had he not been killed by the negligence of the defendant – Mallett v McMonagle (1970) A.C. 166 at page 174 per Lord Diplock; and (1969) 2 WLR, 767. Indeed, in the words of section 12 of the Law of Torts Act:

“12. In every action such damages proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought may be awarded, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the parties for whose benefit the action is brought in such shares as the court ... may direct.”

31. In estimating the value of dependency the claimants have lost by the death of the deceased, recourse is had to the annual figure of the dependency (the multiplicand) and this is multiplied by a figure representing the number of years that the dependency might reasonably be expected to last (the multiplier). Mr. Chebat, the learned attorney for the plaintiffs, helpfully gave an estimate of the calculation of the damages the plaintiffs should be awarded.
32. Given the evidence in this case, concerning the earnings of the late Clemente Canul, that he earned the sum of \$1,500.00 per month in addition to \$200.00 allowance for food and traveling; out of this

monthly total of \$1,700.00, Mrs. Adita Canul, his widow and the first plaintiff, testified that he kept half for himself. From the evidence this was a reasonable amount, given that at the time of his death Mr. Canul though his family lived in Santa Rita Layout in Corozal, was, because of his employment, staying in rented accommodation in Belama and had to pay for food and other sundry items.

33. I therefore accept Mr. Chebat's calculation of the multiplicand in this case as correct. That is to say: $\$1700 \div 2 \times 12 = \$10,200.00$.

34. In so far as the multiplier is concerned, it is in evidence that at the time of Clemente Canul's demise, he was 28 years old with two minor daughters, Jafmine and Jamira who were three and two years old respectively. His widow, the first plaintiff, was about 26 years of age at the time, and not working. In all the circumstances therefore, I think I will accept the figure 16 as reasonably representative of the number of years the dependency of the plaintiffs could have been expected to last.

35. I therefore calculate the value of the plaintiffs' dependency as follows:

$$\begin{array}{r} \$ 10,200.00 \\ \underline{\quad \times 16} \\ \$163,200.00 \end{array}$$

36. I therefore conclude that the damages the plaintiffs are entitled to is the sum of \$163,200.00. However, in view of my finding of 15% contributory negligence on the part of Clemente Canul, (see paragraphs 19 and 20 above), this sum of \$163,200.00 will be off set by 15%, that is, by \$24,480.00.

37. I therefore award the sum of \$138,720.00 representing the damages for loss of dependency the plaintiffs suffered by the death of Clemente Canul.

38. This sum of \$138,720.00 will carry interest of 4% from the date of Mr. Canul's death, that is, 17th December 1999 to the date of this judgment.

39. The award of damages to the plaintiffs shall, pursuant to section 12 of the Law of Torts Act, be distributed as follows:

Adita Canul (widow)	-	50%
Jafmine Canul (daughter)	-	24%
Jamira Canul (daughter)	-	26%

40. Mr. Chebat in his written submissions urged that the sum of \$3,600.00 should be awarded for the loss of expectation of life. I accept this submission but award \$3,500.00 for loss of expectation of the life of Clemente Canul. He was in the prime of life and had just started a new job.

Costs

41. I also award the plaintiffs the costs of this action in the sum of \$5,000.00. To the third party, who was forced by the claim of contributory negligence against it by the defendants, to defend and ward off successfully this claim, I award as well, the sum of \$3,000.00 as costs.

A. O. CONTEH
Chief Justice

DATED: 18th May 2005.