[2016] JMSC Civ. 223

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 00473

BETWEEN	**GIFTON ALEXANDER**	**1ST CLAIMANT**
AND	**GARDEON ALEXANDER**	**2ND CLAIMANT**
	(Personal representatives of the Estate of Vincent Alexander, deceased)	
AND	**MORRIS HILL LTD**	**DEFENDANT**

Mrs Nesta-Claire Smith Hunter and Ms Marsha Smith instructed by Earnest Smith & Co for the Claimants

Mrs D. Senior-Smith and Mr O. Senior- Smith instructed by O Senior -Smith & Co for the defendant.

Negligence and /or Breach of employer's duty - Whether deceased employee or independent contractor - Res ipsa loquitur

Fatal Accidents Act – Law Reform (Miscellaneous Provisions) Act

Damages – Assessment - Loss of dependency - Loss of expectation of life

Heard: June 26 and 27 and December 19, 2016

LINDO, J.

[1] The claimants, children of Vincent Alexander, deceased, as the administrators of his estate, are claiming damages under the Law Reform (Miscellaneous Provisions) Act

(LRMPA) and under the Fatal Accident's Act (FAA). They claim that the deceased was employed to the defendant as a driver and that on February 10, 2006 he was driving the defendant's truck which developed mechanical problems and lost control and during his attempt to escape, the truck overturned on him and he died as a result of the injuries he received.

[2] On March 10, 2009 the claimants filed an amended claim form and amended particulars of claim in which they claim that the deceased's death was as a result of the defendant's negligence and/or breach of employer's duty to provide a safe and adequate plant and equipment and that as a result of the death of the deceased his estate has suffered loss and damage and incurred expenses and that his dependants have lost the value of their dependency. They also seek to rely on the doctrine of *res ipsa loquitur*.

[3] The defendant has denied liability and in the amended defence filed on December 24, 2014 asserts that the truck was in good working condition when it was given to the deceased, indicates that the deceased was an independent contractor and that the accident was "caused solely by the deceased or contributed to materially by him" .

[4] At the trial which commenced on June 26, 2016, birth certificates in respect of Jamar Murray, Tamale James, Sherece Lounse, Steven Anderson, Donovan Taylor and the deceased, Vincent Alexander, immunization certificate in respect of Richard Alexander, the title, registration certificate and fitness certificates in respect of the motor truck, as well as receipts for payments made, totalling $395,696.00, were agreed and admitted in evidence. .

[5] Gifton Alexander, Gardeon Alexander and Leo Brown a.k.a. Audley Strachan, gave evidence in support of the claim and the witness statement of Kenneth Jones dated January 29, 2014 was admitted in evidence as hearsay, while Morris Hill and Kelvin Hill gave evidence on behalf of the defendant.

[6] The claimants' evidence is that the deceased, a truck driver who was 79 years old at the time of his death, was working as an employee of the defendant for about a

year, driving a truck owned and maintained by the defendant and that he earned approximately $12,000.00 per fortnight and spent $8,000.00 per month on his grandchildren.

[7] Gardeon Alexander states that she lived with the deceased and he was responsible for the bills at the house and that he gave her money "to do the grocery" and would give regular sums to some of his grandchildren each month.

[8] Gifton Alexander states that the deceased did minor service work on the truck he owned and that he started to work with the defendant and was given a truck to drive when his own truck was damaged. He also states that the deceased would park the truck on land owned by Kenneth Jones.

[9] Both claimants indicate that as a result of the death, the family incurred funeral and other expenses.

[10] When cross examined, Gifton Alexander said his father used his own truck to carry different things and he carried marl for Morris Hill and that when he got the truck from Morris Hill he would carry trips for Morris Hill. He insisted that the truck his father got from Morris Hill was an old truck and when asked what year it was he said "in the 70s"

[11] He admitted that Mr Morris Hill and his father were friends and agreed that Mr Morris Hill paid the expenses for the funeral home and for the building of the grave and materials, but denied that he also paid for goat meat.

[12] Under cross examination Gardeon Alexander said she could not recall if Mr Alexander's truck broke down in the latter part of 2005 and neither could she remember if he started to drive the truck belonging to Morris Hill in November 2005. She insisted that the truck was parked at Mr Hill's garage and that during the lunch time it would be parked "two houses away" as it could not be parked by their house.

[13] The witness statement of Leo Brown dated January 29, 2014 and filed January 31, 2014, identified by Audley Bygrave as his witness statement after he was sworn, was admitted in evidence after an objection was taken and the court heard submissions

from Counsel and ruled that it could be admitted. The witness stated that his correct name is Audley Bygrave. In the statement, signed "Leo Brown", he states that he was employed to the defendant. He also states that on the day in question he saw the truck being driven by the deceased, that it started to "run back as if it was out of control" and that the deceased jumped out of the truck and it overturned on him.

[14] Under cross examination, he indicated that he was not employed under the name Leo Brown, did not attend school by that name and had no identification in that name. When it was suggested to him that he was not being truthful in his witness statement that his name was Leo Brown he admitted it, but disagreed when asked if the certificate of truth was a lie.

[15] When asked how far he was from where the truck was being loaded he said "I was right there" . He said he was "in the pit", the truck was a left hand drive and that the truck ended up on a banking on the right side and the truck leaned and turned over on the right hand side. When further questioned he said he did not remember what happened as "we were so frightened".

[16] The evidence contained in the witness statement of Kenneth Jones is that the truck the deceased drove for the defendant was parked on his property when the deceased finished work in the evenings and that the deceased did morning maintenance which is "like checking water and oil" on the truck. The evidence also is that the defendant has a maintenance area and servicemen for its vehicles and that when the deceased was younger he worked as a mechanic but he has never seen him do general mechanic work on the truck as he had no mechanical tools.

[17] Mr Morris Hill gave evidence that the defendant has to employ independent contractors to carry out its contractual obligations in respect of the haulage of bauxite and marl. He states that these independent contractors provide services using their own trucks and they are paid based on the work they do. He indicates that the deceased worked with the company for nearly ten years as an independent contractor and was paid based on the trips he made and he used his own truck "until it could no longer operate". He states that he gave the deceased the truck as soon as he received it and

it did not change his employment status with the company. He further states that the truck was “a new truck and in proper working order” and the deceased was the first person to use the truck and he had it for about four months before the incident.

[18] In cross examination, Morris Hill indicated that he is the first owner, in Jamaica, of the truck in question and while the deceased had it, it was licensed and insured by him or his son. He agreed that he had a garage where trucks are serviced and hastily added “except that one”. He also agreed that when the deceased had his own truck he did work for the defendant and other people but he could only use the truck given to him to do work for the defendant.

[19] Mr Morris Hill was unable to say how much the company was paying the deceased, indicating that “Kelvin does all the business for the company”. In relation to the maintenance of the truck he stated that the deceased maintained it, and further said “the arrangement was between him and my son”. He however insisted that the deceased was not an employee, but was a contractor.

[20] Kelvin Hill’s witness statement dated April 11, 2014 stood as his evidence in chief. His evidence is that the deceased was an independent contractor and he got one of the company’s trucks to use “simply because of the close relationship he had with my father...”

[21] In amplifying his witness statement, Kelvin Hill explained that when he said the truck was a new truck, he meant that it was new to Morris Hill Ltd. he said it was just imported, so he considered it new to the fleet.

[22] Under cross examination he stated that the witness, Audley Bygrave, who gave his witness statement in the name Leo Brown, was “a part of the team” but that he did not know whether he was employed or contracted. He indicated that the defendant had employees and contractors and maintained that the deceased was a contractor. He indicated that the defendant had no written contract with the deceased and explained that the arrangement with the deceased was special. He said it was more of a benefit to the deceased than to the company and indicated that the deceased was responsible for maintaining the truck.

[23] He explained that in relation to persons employed by the company who drive the company's trucks, he dictates the time of work and the work they do, but that he does not have a say in relation to the working hours of contracted persons. He said he could not recall the arrangement of his father as it relates to the deceased and said he could not recall if the deceased was allowed to use the truck to do his own work. He stated that he believed the deceased was paid fortnightly but could not remember how much he was paid.

[24] When he was asked what the benefit to the company was, for Mr Alexander driving the truck, he said it was more a benefit to Mr Alexander, "given the opportunity to operate it to make money to fix his truck". He also stated that at the time of the incident the deceased was doing work for Morris Hill Ltd and that he did not dictate the time when the deceased worked, and when pressed in relation to whether he dictated the work the deceased was to do with the company's truck he said "not in so many words".

[25] I have given consideration to the submissions of Counsel including the authorities cited in relation to the issue of liability and will not restate them.

Law and analysis

[26] The claimants have a duty to prove on a balance of probabilities that the death of the deceased was as a result of the negligence of the defendant and /or breach of employer's duty to provide a safe and adequate plant and equipment.

Whether the deceased was an employee or independent contractor.

[27] An employer normally enjoys the power and control over the work of the employee who is bound to obey his orders and instructions while an independent contractor undertakes to produce the result required by the employer, but in the actual execution of the job to produce such result, he is not under the control of the person for whom he does that work.

[28] On the un-contradicted evidence before this court, I find that the deceased was operating the truck owned by the defendant when it overturned. I find on a balance of probabilities that the truck was under the management and control of the defendant and

that the work carried out by the deceased such as the drawing of dirt was done under the supervision of the defendant. It is clear that the defendant had an interest in the purpose for which the truck was being driven by the deceased.

[29] I believe it is more likely that the deceased was employed to the defendant as a driver, driving the defendant's truck and taking directions from the defendant as to how and when he did the work of the defendant. I find as a fact that when given the truck to drive he could only carry out the work of the defendant as assigned to him by the defendant and that he was paid a salary on a fortnightly basis. This points me to a finding that he was in fact an employee and not an independent contractor as the defendant would have the court believe.

[30] I also find that it is more likely than not that the maintenance of the truck was done at the defendant's garage. I find it hard to believe that the defendant, with a fleet of trucks, would lend a newly acquired truck to the deceased for him to use for his sole benefit and even have him service it at some place other than at the garage which it had for that purpose.

[31] I find that what existed between the deceased and the defendant was an oral contract which obliged the deceased to carry out work for the defendant and that the defendant provided the means by which this job was carried out and also that the defendant was responsible for maintaining the vehicle and the deceased was paid on a fortnightly basis as an employee of the defendant.

[32] I find that the claimants generally remained consistent as it relates to their witness statement and the evidence elicited under cross examination and remained unshaken. Their witness Audley Byfield /Leo Brown was not very convincing.. He did not stand up well under cross examination although he appeared to be frank with the court in being willing to concede that he was lying when he said his name was Leo Brown. I have not placed much weight on the evidence contained in the witness statement of Kenneth Jones.

[33] The witnesses for the defendant were not very forthright, each one suggesting that the other knew about the terms and conditions under which the deceased was

employed but neither of them being frank with the court. Kelvin Hill was not even able to tell the court what was the nature of the employment of the witness Leo Brown aka Audley Byfield although acknowledging that he was "a part of the team".

***Res ipsa loquitur* –whether it applies**

[34] The principle of *res ipsa loquitur* was defined by Earle CJ in **Scott v London & St Katherine Docks Co**. (1865) 150 ER 665 at 667 as:

> "*where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".*

[35] The case of **Scott** was discussed in the Jamaica Court of Appeal in **Jamaica Omnibus Services Limited v Hamilton** (1970) 12 JLR where it was held that the principle applied where the door of the appellant's bus flew open while the bus was in motion. Fox JA, at page 279 of the judgment, stated that to obtain the assistance of the doctrine, the claimant must prove that the 'thing' causing the damage was under the management of the defendant or his servants and that in the ordinary course of things the accident would not have happened without negligence.

[36] The case was also discussed and applied in the case of **Adele Shtern v Villa Mora Cottages Ltd & Anor.** [2012] JMCA Civ 20 where there was no evidence given as to how the accident occurred and Panton P at paragraph [66] said:

> *"...the appellant having proved that she received an electric shock from an ordinary domestic refrigerator during the course of its everyday use...raised a prima facie inference that the accident was caused by the negligence of the respondents...No answer having been provided by the evidence of adduced on behalf of the respondents to displace that prima facie evidence, the appellant was accordingly entitled to succeed by virtue of the operation of the maxim, res ipsa loquitur."*

[37] The principle operates to provide a claimant with prima facie evidence of negligence so the question is whether the facts and circumstances of this case furnish prima facie evidence of negligence. It is for the claimants to establish the facts from

which the inference can be drawn that the death of the deceased was the result of the defendant's negligence. If the cause of the injury leading to death is in doubt or can be attributed equally to some cause other that the negligence of the defendant, the claimants would have failed to prove their case.

[38] The case of **Lloyde v West Midlands Gas Board** [1971] 2 All ER 1240 shows that the principle is applicable in circumstances where the claimant cannot prove precisely what was the relevant act or omission which led to the accident and in **Courage Construction Ltd v Royal Bank Trust Co** (1992) 29 JLR 115 at 118 Rowe P said:

> *"If there is evidence as to the cause of the accident the doctrine of res ipsa loquitur has no application"*

[39] It has been shown on the evidence which I accept to be true, that the truck owned by the defendant overturned causing the death of the deceased at a time when it was being operated by the deceased who was employed to the defendant. An accident of the kind is not one that would ordinarily occur in the absence of negligence on the part of someone.

[40] There was no attempt by the defendant to show, that the deceased met his death by some other means other than by the overturning of the truck. There was no evidence of negligence on the part of the deceased although it was pleaded that "the accident was caused solely by the deceased or contributed to materially by him". In short, no evidence has been provided to this court as to the cause of the accident.

[41] The evidence which I accept as true is that the truck was loaded, the deceased entered and began to drive it, it started to move backwards, he got out and the truck overturned on him. In the normal course of things a truck does not move backwards and overturn. The claimants claim that the truck was defective but have brought no evidence to substantiate this claim while the defendants claim that they gave the deceased the truck to drive and he had it for four months and he maintained it and was the first driver since it was acquired by the company. A certificate of fitness in respect of the truck, tendered and admitted in evidence shows that the certificate was issued on April 26,

2005 and would remain in force until June 13, 2006 but in my view this does not provide any evidence from which the court can find on a balance of probabilities that ten months after the date of issue of the certificate, the truck was in perfect working condition.

[42] This court finds that the truck was under the management and control of the defendant while being operated by the deceased, an employee. There is no evidence that the deceased's death was caused by any voluntary action on his part or contributed to by him and although the defendant has given evidence and provided a Certificate of Fitness for the motor truck, I do not find that that is sufficient to explain how the accident could have occurred without negligence on its part and thereby rebut the presumption.

[43] It is therefore my view that the facts speak for themselves and raise an inference of negligence against the defendants and that the source of the negligence falls within the scope of the duty owed by the defendant to the deceased.

Contributory negligence

[44] The defendant has contended that the accident was "caused solely by the deceased or contributed to materially by him". There is however no evidence provided to this court from which I can find that any act of the deceased caused or contributed to the accident leading to his death.

[45] In view of all the foregoing this court finds that negligence has been established against the defendant. This shall therefore be judgment for the Claimants against the defendant..

Claimants' submissions as to damages

[46] Counsel noted that the deceased was 79 years at the time of his death and he died intestate, a widower, survived by his children and grandchildren and that he earned $12,000.00 per fortnight as a trucker. She indicated that he contributed $8,000.00 per month to his grandchildren and spent the remainder on himself. She proposed a multiplicand of $8,000.00 and in proposing a multiplier of two years, she placed reliance on the case of **Burnett James v Caribbean Steel Co Ltd & Lorna Clarke**, Suit No

CL1993/J340, reported in Khan, Vol. 5 at page 63, where a multiplier of 1½ years was applied in the case of a 69 year old man. She submitted that a multiplier of 2 is appropriate as the witnesses agree that the deceased was in good health.

[47] In relation to the claim under the LRMPA, Counsel submitted that the estate of the deceased paid $52,460.00 towards funeral expenses and $58,250.00 as the legal cost of the Letters of Administration.

[48] Under the head of loss of expectation of life, Counsel noted that this court awarded $150,000.00 in respect of the death of the deceased in the case of **Brenda Hill & The Administrator General Jamaica v The Attorney General,** [2014] JMSC Civ. 217, unreported, delivered on December 19, 2014, and submitted that in light of the devaluation of the Jamaican currency a reasonable award would be $175,000.00.

Defendant's submissions as to damages

[49] Counsel for the defendant noted that the only evidence in relation to the earning of the deceased was from Gardeon Alexander who stated that the deceased was earning $288,000.00 at the time of his death and that the contribution on a yearly basis to the dependants was itemised as

i. $42,000.00 for electricity
ii. $96,000.00 to the grandchildren and
iii. $96,000.00 for food.

[50] It was also noted that there was no evidence as to the personal expenses of the deceased or how much he would retain for himself and therefore Counsel suggested that the court has a duty to speculate as to what the deceased would have reasonably retained for himself in light of the circumstances of the case. This position Counsel indicated was upheld in the case of **Troy Huggins v The Attorney General for Jamaica** [2014] JMSC Civ 53, unreported, delivered April 24, 2014.

[51] Counsel expressed the view that the figures presented by the dependents are unreasonable having regard to the fact that the deceased would have contributed 8/10 of his earnings per annum to the dependents and retain less than 2/10. She therefore

suggested that a more realistic approach would be to speculate that the deceased would have given 2/10 of his earnings to the grandchildren, 3/10 to the claimants and would have retained 5/10 for himself.

Damages

The court now has to determine the quantum of damages that the estate of is entitled to recover under the **Law Reform (Miscellaneous Provisions) Act,** and that which the near relations or dependants are entitled to under the **Fatal Accidents Act** and also the amount of special damages that they are likely to recover.

[52] The **Fatal Accidents Act (**FAA) provides a right of action to 'near relations' of a deceased person against the person liable in law for his death, while the **Law Reform (Miscellaneous Provisions) Act** (LRMPA) provides a right of action to the personal representatives of a deceased person for the benefit of the estate of the deceased, in circumstances where the deceased died due to the unlawful actions of another.

[53] By virtue of section 4(1) of the FAA the claimants are near relations of the deceased and under the LRMPA they are the personal representatives of the estate of the deceased.

[54] Damages under the FAA seek to compensate the near relations of the deceased For the "actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person". (See Sec 4(4))

[55] In the case of J**estina Baxter Fisher & Anor v Enid Foreman & Owen Moss C**laim No. 2003 HCV 0427, unreported, delivered October 15, 2004, Clarke J. at page 24 of his judgment said:

> *'the pecuniary loss in question means the actual financial benefit of which they have been deprived and which it is reasonably probable they would have received if the deceased had remained alive.'*

[56] The Court must calculate the annual dependency on the deceased by the near relations and then determine the estimated years that the deceased would have supported that dependency. This is used as the multiplier. The earnings of the deceased less his personal and living expenses (the dependency or multiplicand) are multiplied by the multiplier.

[57] In considering the award to be made, the case of **Davies v Powell Duffryn Associated Colliers Ltd.** [1942] AC 601 provides some guidance. There Lord Wright said:

> *"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of employment. Then there is the estimate of how much was required or expended for his personal and living expenses. The balance will give a datum of basic figure which will generally be turned into a lump sum by taking a certain number of years purchase"*

[58] The deceased in the case at bar was 79 years old at the time of his death. The age of retirement is sixty and as at 2015, the average life span of a male in Jamaica was said to be pegged at 73.9 years. The deceased has therefore worked well past the time at which he would have been expected to retire. I accept the evidence that he was a healthy man since he was still working at that age.

[59] I also accept that he earned $12,000.00 per fortnight so his annual net income is estimated at $288,000.00. There is no evidence before the court as to what sum he would have spent on himself. The estimate of the net contribution to the dependants is a question of fact and according to the evidence of the 2nd claimant, he gave a portion of his earning to his grandchildren on a monthly basis and he gave her money for groceries. I believe in view of the circumstances it is reasonable to estimate that he would likely retain about half of his earnings for his personal use.

[60] I agree with the submission of Counsel for the defendant that a reasonable multiplier would be one year. This leads me to a finding that the loss of dependency would be $144,000.00. This sum is to be divided among the grandchildren and the claimants.

[61] The amounts spent on Mr. Alexander's dependants were challenged especially in relation to Jamar Murray who was said to be only one year old when he died but the evidence in relation to the figures show that he would have given the younger grandchildren slightly less than he gave the older ones. I have used that evidence of the amounts paid to determine the award to be paid to each of the grandchildren and I am of the view that there should be two thirds to the claimants and one third divided among the grand children.

[62] Under the LRMPA the estate of the deceased is entitled to benefit from any claim to which the deceased would have been entitled and the award is usually made for loss of expectation of life, funeral expenses, other special damages and the "lost years". Damages for lost years, has been said to be "a calculation of the loss to the estate by virtue of the loss of earnings of the deceased during the lost years, being years between retirement and death".

Loss of expectation of life

[63] The case of **Rose v Ford** [1937] AC 826 provides settled law that a claim for loss of expectation of life is maintainable on behalf of the estate of the deceased.

[64] Damages under this head are in respect of loss of life and not of loss of future pecuniary prospects, no regard being had to financial losses or gains during the period which the victim has been deprived (See **Benham v Gambling** [1941] AC 157). The authority of **Benham v Gambling** also indicates that only very moderate sums should be awarded for this head of damages.

[65] In assessing damages under this Act the court has to take a practical approach. (See **Doris Fuller (Administrator of est. Agana Barrett, decd.,)** v **The Attorney General,** Claim No CL1993/F152, unreported, delivered July 5, 1993.

[66] In **Brenda Hill & Administrator General Jamaica v The Attorney General,** *supra*, this court, citing the case of **Rose v Ford,** *supra,* stated :

> "*… a claim for loss of expectation of life is maintainable on behalf of the estate of the deceased. A conventional sum is usually awarded under this head of damages as such a loss is incapable of quantification using any*

*known arithmetical formula. I have considered the cases cited by Counsel (**Gordon & Others v The Administrator General** 2006HCV1878, unreported, delivered January 6, 2011, in which the sum of $150,000.00 was awarded and **The Attorney General of Jamaica v. Devon Bryan (Administrator for the estate of Ian Bryan) [**2013] JMCA Civ 3 where the Court of Appeal reduced an award of $250,000.00 made in 2007 to $120,000.00."*

[67] The court then made an award of $150,000.00 in respect of a deceased who was 48 years old at the time of his death. This court finds that as the deceased was 79 years and had long past the age of retirement, the award should be discounted. An award of $100,000.00 is therefore made.

Disposition

Damages under the Law Reform (Miscellaneous) Provisions Act

Special damages awarded in the sum of $119,590.00 with interest at 6% per annum from February 10, 2006 to June 21, 2006 and at 3% per annum from June 22, 2006 to the date of judgment.

Loss of expectation of life - $100,000.00 (No interest)

Damages under the Fatal Accidents Act

Loss of Dependency awarded in the sum of ($144,000.00; $48,000.00 to the grandchildren and $96,000.00 to the claimants). The sum to the grandchildren is apportioned as follows:

Shereece Lounse $9,000.00

Richard Alexander $9,000.00

Dovion Taylor $9,000.00

Tamale James $9,000.00

Steven Fitzroy Anderson $6,000.00

Jamar Murray $6,000.00

The sum of $32,000.00 to the 1st Claimant and $64,000.00 to the 2nd Claimant

The claimants are also entitled to costs which are to be taxed if not agreed.