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Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F-037 of 1991

BETWEEN	LANCELOT FORBES		PLAINTIFF
A N D	THE JAMAICA PUBLIC SERVICE COMPANY LIMITED	FIRST	DEFENDANT
A N D	VIVIAN ANGUS	SECOND	DEFENDANT

Norman Samuels for Plaintiff.

Gordon Robinson instructed by Nunes, Scholefield, DeLeon and Company for first Defendant.

Alvin Mundell for second Defendant.

Heard: 8th April, 1994, 3rd, 4th, 5th 7th, 12th, 14th October, 1994 and 7th July, 1995.

Ellis J.

The Claim

The plaintiff claims to be compensated by the defendants for personal injuries, loss and damages which he suffered on the 17th day of July, 1990 at Bailey's Vale in St. Mary. He claims that his injuries, loss and damages were suffered while he was a maintenance worker and linesman apprentice engaged by the second defendant to do work under a contract between the first defendant and the second defendant.

It is the plaintiff's contention that his injuries, loss and damages were as a result of:-

(a) negligence of the first defendant;

(b) negligence of the second defendant;

(c) the combined negligence of both defendants or

(d) breach of the Occupiers Liability Act by the first defendant;

(e) breach of the Electric Lighting Act by the first defendant.

The plaintiff supported his calim by evidence from Lloyd Forbes, Angella Francis, Othneil Ellis, Leroy Cousins and himself and in addition certain documentary evidence.

Plaintiff's Case

The plaintiff stated that after he left school he worked on his father's farm for about two years. He then secured employment with the second defendant who was

contracted to "bush", that is to clear bush from the electric lines, installed by the first defendant.

He and the men who worked with Angus, second defendant would go to the first defendant's office at Port Maria where men who worked with first defendant would tell Angus where work was to be done.

On the 17th July, 1990 he did got to first defendant's office where a supervisor told Angus that they would be working at Bailey's Vale on that day. The supervisor, Mr. Walsh drove the men including the second defendant to Bailey's Vale where Walsh switched off the electric current and showed some of the men the work.

He, Walsh, Angus and other workers went to a spot half a mile away. Walsh took him to a spot and showed him five guango trees which were to be lopped. Walsh instructed him to lop the limbs as small as possible. He did as he was instructed on four trees without any problems. Walsh was present when he cut one limb from the fourth tree but he left before he started to cut the fifth tree. While he was in the process of lopping a limb the limb tore off and hit him to the ground.

He was not provided with any safety belt to hold him on the tree or any safety net to break his fall. The fall rendered him unconscious and when he regained consciousness, he saw Angus holding his head. His body from the waist down could not move. He went to the Kingston Public Hospital and stayed at that institution for two months and two weeks. During that period, he could not use his hands and passed his urine through a catheter. He had to be fed and he developed bed sores.

From the Kingston Public Hospital he was transferred to the Mona Rehabilitation Centre where he stayed for six months and one week. At Mona he was faecally and urinary incontinent.

When he left Mona, he went home. He had to have the services of one Angella Francis to help him day and night. He is now totally disabled and since the accident he has become impotent.

When Mr. Robinson cross-examined the plaintiff he said that at the time of the accident he earned $60.00 per day from Mr. Angus. He also said that he sometimes bushed trees for the first defendant and was paid at a rate of $75.00 per day.

He denied that he was on contract with the second defendant on the 17th July, 1990 and contended that the bushing of the trees on that date was the undertaking of

the first defendant.

Mr. Walsh the first defendant's supervisor instructed him how to cut the trees in order to avoid damage to the electric lines. Walsh de-energised the line and left the work site leaving the second defendant and other workers there. Only the 2nd defendant and those workers were present when he fell to his injuries.

Mr. Mundell cross examined the plaintiff who said that on the 17th July, 1990 he expected to have worked at Rio Nuevo but was taken to Bailey's Vale to do emergency work.

Angella Francis a "practical nurse," evidenced the plaintiff's expenditure for medical care, nursing care dressings, disposables, and cost of transportation consequential on his injuries. Her evidence was supported in some parts by receipts which were agreed as Exhibits 8-12. In her answers to cross-examination by Mr. Robinson the witness said she had no documentary evidence to support the purchases of items such as **gerritol** soap, bed linen and other disposables.

She maintained thatshe was paid wages for the nursing care which she administered to the plaintiff and the wages were paid by plaintiff's father. Although plaintiff has been having physiotherapy two times per month, she is of opinion that he will need nursing care for the rest of his life.

Two other witnesses Othneil Ellis and Leroy Cousins gave evidence as to what a linesman earned. This was in order to support the plaintiff's claim that he aspired to being a skilled linesman and as a consequence his earnings would have increased.

First Defendant's Case

This defendant avers that the second defendant was not that defendant's servant or agent but an independent contractor. The pleadings that the second defendant contracted to enter land over which first defendant enjoyed casement to clear and bush the area over which electric lines were conveyed are denied, also denied are the pleadings that first defendant reserved the right to supervise and inspect the work carried out by the second defendant.

The first defendant did not use workers employed by second defendant for doing work other than that for which was contracted and did not instruct any of second defendant's workers as to their work.

The first defendant's case is also that the plaintiff's claim is not maintainable

because of the provisions of The Public Authorities Act and that no duty was owed to the plaintiff under the Electric Lighting Act.

In addition, the first defendant says the plaintiff's injuries were solely caused or contributed to by the negligence of the second defendant. First defendant's case was evidenced by the testimony of Fitzroy Pedlar, Howard Small, Aston Walsh and Michelle Ledgister who were each cross examined by Mr. Mundell and Mr. Samuels.

Second Defendant's Case

This defendant contends that the first defendant agreed to provide free of costs materials and equipment for the job which second defendant contracted to do. He says that the first defendnat by a term of an agreement should have provided adequate safety equipment for his workmen to bush trees from distribution lines. Furthermore, the first defendant failed to supervise the plaintiff in the performance of his task and negligently allowed him to embark on a inherently dangerous job without proper or even the minimum of safety equipment.

In light of the above, he says he was in no way negligent and is not liable for the injuries sustained by the plaintiff.

The second defendant gave evidence and was cross-examined by Mr. Robinson and Mr. Samuels.

Liability of First Defendant

The plaintiff contends that the first defendant is liable to compensate him for his injuries since at the material time he was the servant of the first defendant thus giving rise to a master and servant relationship. He also says that the first defendant is liable in that he delegated the second defendant to carry out extra hazardous acts without ensuring that adequate safety equipment was provided.

The first defendant in opposition to the plaintiff's contentions says that:

(i) at no time was the plaintiff employed by first defendant.

(ii) first defendant had no supervisor on site on the day of the accident.

(iii) the transportation of second defendant's workers was only because he had no vehicle of his own.

(iv) second defendant was an independent contractor.

(v) under his contract second defendant was obliged to and did secure his own insurance coverage against his liability.

Does a master and servant relationship between first defendant and plaintiff arise in this case?

In general, a relationship of master and servant exists when the master has the right to tell the worker not only what to do but also how to do it. The worker in such a relationship operates under a "contract of service."

Case law has determined the existence or non existence of a master and servant relationship and the criteria to be considered in finding that relationship. In Collins v. Hertfordshire County Council [1947] 1 ALL E.R. 635 at page 638 letter H. Hillberry J. repeated and accepted the "Control Test" as stated by Buckley and Bramwell L. Js. in Simmons v. Heath Laundry Company [1910] 1K.B. 543 and Yewers v. Noakes (1880) 6 Q.B.D. 530 respectively that "a servant is a person subject to the command of his master as to the manner in which he shall do his work."

Hillberry J. emphasised the "Control Test" as the most important criterion. Other cases have resiled from treating the "Control Test" as the most important criterior in finding a master and servant relationship. In Argent v. Ministry of Social Security [1968] 3 ALL E.R. 208 at page 215 E & F & G Roskill J. said:

"If one studies the cases, a number of tests have been propounded --------.

> If one goes back to some cases in the first decade of this century, one sees that that was regarded almost as the conclusive test. It is also clear however, that as one watches the development of the law in the first sixty years this century and particularly the development of the law in the last fifteen or twenty years in this field, the emphasis has shifted and no longer rests so strongly on the question of control."

Further on in his judgment the judge stated the four indicia of a contract of service put forward by Lord Thankerton in Short v. J. and W. Henderson Ltd. (1946) 174 L.T. 417. They are:-

(a) the master's power of selecting the servant;

(b) the payment of wages or other renumeration;

(c) the master's right to control the method of doing the work; and

(d) the master's right of suspension or dismissal.

On my consideration of the dicta from the cases I conclude that the right to control is one of the factors which may give rise to a master or servant relationship.

There is no doubt in my mind that on the evidence (a), (b) and (d) of Lord Thankerton's four indicia of a contract of service are not present in this case.

Only that at (c) could possibly be of any relevance and therefore it needs examination. The plaintiff's attorney advocated (c) which is the control indicium thus:

> "The first defendant actually retained control of the manner in which the work was to be performed e.g. how the trees were to be cut." I do not hold that in the circumstances of the cutting of the trees the mere statement that care should be taken to prevent damage to electric wires was anything but a common sense approach by first defendant's agent.
>
> I cannot find a master and servant relationship between plaintiff and first defendant.
>
> In any event, I would adopt as applicable here the dictum of Lord Denning in Bank Voor Handel en Scheepvaart N.V. v. Slatford [1952] 2 ALL E.R. 956 at 971:-
>
> ".....I would observe that the test of being a servant does not now-a-days rest on submission to orders. It depends on whether the person is part and parcel of the organization."

I make bold to say that by no stretch of imagination could the plaintiff be said to be part and parcel of the first defendants organisation so as to be called a servant. The contention for a master and servant relationship on this ground fails. But Mr. Samuels for the plaintiff in his contention for first defendant's liability had another string to his bow. He recoursed to the general principle as to "extra-hazardous or dangerous operations enunciated by Lord Justice Slesser in Honeywell and Stein Ltd. v. Larkin Bros. Ltd. [1934] 1 K.B. 191. That general principle may be stated thus:- There is a non-delegable duty of care on the part of the ultimate employer whenever an Independent Contractor is employed to perform "extra-hazardous" act.

Mr. Samuel's argument as I understand it is that the first defendant employed the second defendant to perform the act of pruning trees adjacent to electric lines. That act was "extra-hazardous" and the duty to guard against damage consequent on such act rests on the first defendant and could not be delegated. In that circumstance, Honeywell's case is relevant.

Sleesser L.J. in Honeywell's case appreciated and accepted that even an "extra-hazardous" act if carefully done will cause no damage and that it is clear that an ultimate employer is not responsible for the act of an independent contractor merely because his act will involve danger to others if negligently done. A fortiori, the Lord Justice stated that"extra-hazardous" acts were acts which in their very nature, involve in the eyes of the law special danger to others; of such acts the causing of fire and explosion are obvious and established instances.

In the light of Lord Slesser's reasoning and dictum the applicability of Honeywell extends only to operations which involve actions recognised in law to be inherently dangerous. The pruning of trees is not an "extra-hazardous" action. If authority for that is needed, the case of Salsbury v. Woodland [1969] 3 ALL E.R. 864 is of amplitude.

Mr. Samuel's second string therefore breaks when drawn against Lord Slesser's dictum in Honeywell and the decision in the Salsbury's case. The pleadings by the plaintiff as to breaches of the Occupiers Liability Act and the Electric Lighting Act do not assist him in founding liability in the first defendant.

Liability of Second Defendant

The liability of this defendant turns on his status in relation to the first defendant and consequently to the plaintiff.

The evidence from the plaintiff was that he went to work with the second defendant on the relevant date but he was not injured on any job of second defendant. The second defendant and himself were at the work site as co-workers, although second defendant was in charge of him and paid him at the end of bushing operation.

Fitzroy Pedlar for the first defendant gave evidence that second defendant became a contractor with the first defendant by tender (See exhibit 6). He said that when the contractor's tender is accepted the contractor would receive a Purchase Order or Purchase Requisition in the form of Exhibit 2.

That Purchase Requisition includes a schedule with the conditions of the contract.

Condition 7 of the conditions demands that the contractor, at his own expense provide insurance coverage against liability for injury to any work man engaged by him.

Condition 8 renders the contractor liable for any damage or loss sustained by a workman in his employ.

The second defendant did provide the stipulated insurance coverage as can be seen from Agreed Documents in which he was to be the provider of labour and transportation for the bushing of trees from distribution lines.

In a document (Exhibit 13) the second defendant when reporting the accident, accepted that the plaintiff was employed to him in this way "Mr. Lancelot Forbes one of the workmen employed by me was cutting a guange tree limb when he lost his balance and fell from the tree."

From the evidence I make the following findings of fact:

(i) the second defendant was at the material time an independent contractor.

(ii) the plaintiff was in his employ during the bushing of distribution lines and the pruning of trees on 17th July, 1990.

(iii) the second defendant was in a master and servant relationship with the plaintiff and owed him a duty of care which involved the provision of a safe system of work.

(iv) the second defendant negligently failed to provide a safe system of work and that failure resulted in the plaintiff's injuries.

(v) the second defendant is solely liable for the plaintiff's injuries and loss.

General Damages

The plaintiff has suffered serious injuries which have rendered him paraplegic from his 6th and 7th vertebrae with accompanying immobility in both hips. He is also impotent and incontinent consequent on his paraplegic condition. He will be confined to a wheel chair for the rest of his life and has a permanent partial disability of 60% of his whole person. Damages for similar injuries came for consideration in Donald Gray v. Attorney General et al C.L. G008/86 and Josephine Eubanks v. Keith Thorpe C.L. 1988/E002.

In the former case which was decided in 1989 Courtney Orr J. (Acting) as he then was awarded an amount of $352,00 for pain and suffering and loss of amenities. That award, taking into account the present consumer Price Index, Converts to $2,112,000.00.

In the latter case, Cooke J. in 1990 awarded the plaintiff an amount of $300,000.00. That amount, using the praevailing consumer Price Index, converts to $1,174,895.00.

In my opinion, in the circumstnaces of this case, the lower award referred to above does not apply here.

I am minded to award the plaintiff an amount of Two Million Two Hundred and Fifty Thousand Dollars ($2,250,000.00) for pain and suffering and loss of amenities. And I so award.

It is now necessary to consider the elements of (a) future loss of earnings and (b) future expenses.

With regard to loss of future earnings the plaintiff at 20 years of age at the time of his injuries was earning $60.00 per day as a labourer.

Mr. Samuels submitted that in the light of evidence adduced, the plaintiff would have graduated to a grade B linesman with an average weekly wage of $2,150.00 per week.

I am not convinced on the evidence that Mr. Samuels' submission is correct. Neither do I accept the correctness of Mr. Robinson's contention that plaintiff's earnings would remains static at $60.00 per day.

I find that, and this is speculating as I am entitled to do, the plaintiff's daily earning would increase to about $150 per day. At 5 days per week his weekly wage would be $750.00. I am prepared to use a multiplier of 15 years. The plaintiff would have earned an amount $750 x 52 x 15 = $585,000.00 and I award him that amount as loss of future earnings.

I now come to the element of prospective expenses.

Mr. Samuels is quite right when he submitted that the plaintiff can recover expenses reasonably incurred as a consequence of his injury. Those expenses in a case of serious personal injury may form a substantial part of general damages. The court has to consider (a) how long those expenses are likely to last (b) the appropriate discount for plaintiff's receipt of a lump sum.

The former consideration is dependant on the life expectancy of the plaintiff since prospective expenses will last for the period of that expectancy.

In this case, the issue of the plaintiff's life expectancy was raised only by Mr. Samuels in his final address. I hope that in future cases which bear the characteristics of the instant case counsel will give full argument and consideration to the issue of life expectancy.

In the case of Radford v. Jones and Anor. 1973 C.A. No. 122 three points were stated to be important in assessing this aspect of damages. They are:-

(a) the multiplier in respect of matters conistent with a plaintiff's treatment and welfare is not the same as that for his working life, but is for the whole of the balance of his life.

(b) the nature of the assistance which the plaintiff would require for the rest of his life.

(c) the multiplier must run from the date of trial.

The plaintiff in Radford was 31 years old at the date of trial and had a life expectancy of 40-45 years. In those circumstances, the learned trial judge applied

a multiplier of 17 years from the date of trial which was upheld by the Court of Appeal.

In the instant case, the plaintiff at trial is 25 years old. He has suffered very serious injuries and he will need a wheel chair for the rest of his life as a means of locomotion. However, in February 1991 a medical report (Exhibit 9) from Professor John Golding stated that the plaintiff was able to put himself in a wheel chair and was then receiving occupational therapy towards the activities of daily life. In March 1991 in a report (Exhibit 10) from the said Professor Golding, the plaintiff would not need professional nursing care beyond what could be given by a member of his family as far as pressure sores were concerned. Another report dated the 30th March, 1994 showed improvement in his condition as far as pressure sores were concerned. Some were healed and others healing and he had reached maximum medical improvement with a 60% impairment of his whole person.

I have deduced from the certifications referred to, that although the plaintiff suffered serious injuries his situation is not such as is attractive of future professional or even quasi professional nursing care.

It seems however, in the nature of his injuries, that he will need "nursing" care. I am constrained to accept the medical certificate that such care could be provided by a family member. In such a case, the plaintiff can recover damages for the value of the services so rendered as was held in Cunningham v. Harrison [1973] 3 W.L.R. 514.

In my judgment, the provision of that care would value $500 per week. The annual expenses would be $26,000.00 and I apply a multiplier of 10 years so that the plaintiff's expenses for that period would be $260,000.00. It is to be noted that the multiplier of 10 is not to be treated as the plaintiff's life expectancy on which I have made no finding.

The plaintiff is therefore awarded an amount $3,095,000.00 as general damages made up as follows:-

$2,250,000	for pain and suffering and loss of amenities
585,000	for loss of future earnings
260,000	for future "nursing" care
$3,095,000	

The amount of $2,250,000 to bear interest of 3% as of date of service of Statement of Claim.

Special Damages

The plaintiff claims under this head damages from date of accident in 1991 up to October, 1994.

He claims:-

(a) the cost of a wheel chair every 5 years for 50 years at $6,000 each;

(b) the cost of repairs and replacement of parts every 2 years at $1,000 each;

(c) dressings;

(d) soap, detergent and other toilet articles;

(e) medicine and urinal bags;

(f) wages for domestic helper, practical nurse and occupational therapist;

(g) loss of earnings for 225 weeks.

His claim totalled $1,390,818.09.

The claims for damages for domestic helper and occupational therapist have not been proved and no award is made in relation to those claims. The amounts claimed for the "practical nurse" Angella Francis and the cost of the wheel chair are inflated.

In the case of the "practical nurse" Angella Francis on the evidence I hold that she was no more than a domestic helper attracting no more than $500 per week as wages. At the inflated rate, the total claim forher service was $301,080. I would award $121,160 for the services of Angella Forbes thus reducing that claim by $179,820.

Mr. Samuels in the claim for the cost of wheel chairs and the repairs, based his assessment on a 50 year life expectancy for the plaintiff. I do not agree with that life expectancy being used as the multiplier. (See Radford's case where life expectancy was 40-45 years but a multiplier of 17 was used in calculating damages).

I find that a multiplier of 15 would be proper in this case. I therefore award $18000 as the cost of wheel chairs at one every five years for fifteen years at $6,000 each. The cost of repairs at $1,000 every 2 years would be $7,000.00. The total cost for wheel chairs and repairs would therefore be $25,000.00.

I was not given any proof that the plaintiff would have earned any more than

$60 per day or $300 per week to date. I would therefore award the plaintiff an amount of $67,000.00 for loss of earnings.

The plaintiff is awarded a total of $535,696,09 as Special Damages with interest at 3% as of 17th July, 1990.

In conclusion

(a) there will be judgment for the plaintiff against the second defendant with damages assessed as follows:

(i) $3,095,000 as General Damages with interest of 3% on $2,250,000 thereof from date of service of the Statement of Claim;

(ii) $535,696.09 as Special Damages with interest of 3% as of 17th July, 1990.

On the issue of Costs the first defendant is to have costs agreed or taxed payable by the second defendant.

The plaintiff is to have costs against the second defendant to be agreed or taxed.