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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. A002/1974

ADMINISTRATOR GENERAL FOR JAMAICA (As Administrator of estate of Rick Tolan, deceased)

A N D

MARIE HEATH (As Administratrix of estate LORRICK HEATH)

A N D

DANNY DEER

A N D

AITKEN CONSTRUCTION COMPANY LIMITED.

Horace Edwards, Q. C., instructed by A. Lee Hing of Daley Walker & Lee Hing, for the plaintiff.

Norma Van Cork for the first defendant

Dorothy Lightbourne and Andrew Rattray of Livingston, Alexander & Levy for 3rd defendant.

Heard: 14th, 15th and 16th January, 1980 and 15th, 16th and 19th May, 1980.

Morgan J:

On the 6th January, 1973, an accident occurred on the main road at Cheapside, St. Elizabeth, between a motor car driven by Lovick Heath and a motor van driven by one Danny Deer, the second defendant in which Rick Tolan an occupant of the motor car lost his life and Letters of Administration in this deceased's Estate was granted to the plaintiff, the Administrator General for Jamaica. Lovick Heath also met his death as a result of this accident and his wife Marie Heath has raised Letters of Administration in his Estate and is sued as the first defendant. The motor van driven by Danny Deer, the second defendant is owned by Aitken Construction Company who is sued as the third defendant. Five (5) persons in Heath's car lost their lives and the Administrator General on behalf of the dependants of Rick Tolan now seeks to recover damages alleging that the accident was

caused by the negligent driving of both drivers and that the second defendant driver was at all material times the servant or agent of the third defendant's company. The first defendant denies the negligence and says it was the fault of the second defendant the servant or agent of the third defendant. The second defendant has entered no appearance and the third defendant does not admit the negligence and denies that the second defendant was at the material time his servant or agent.

Evidence was led by the plaintiff from one Granville Johnson: who was on the road at the time of the accident and one Eva Neil a social worker, 80 years of age, the sole survivor of the accident. Both saw the van coming very fast and zig-zagging across the road. The car they say was to its extreme left side of road. The van came over on the car's side of the road, mounted on the top of the car, tore off the entire top and as a result killed Rick Tolan among others. The defendant called no witnesses as to the accident and the plaintiff's witnesses were not shaken in cross-examination.

I accept the evidence of the plaintiff as I find that they were speaking the truth. I find that the driver of the motor car - the first defendant was without blame that the driver of the second defendant drove too fast in the circumstances, without any care or attention, failing to maintain any control of his vehicle and was negligent and wholly to blame for the accident.

Having so found the matter for determination is whether at the material time he was driving as the servant or agent of the third defendant.

The plaintiff's witness Mr. Granville Johnson gave evidence a and stated that he knew the driver Danny Deer who helped to drive his father's trucks. He knew him well and had on several occasions before seen him drive this white pick up. He was unable to read or write and could not indicate to the court what if any writing appeared on the side of the van. The defendants in evidence said it was a green van but it finally energed from Mr. Rose the defendant's witness that it was a lime green "whitish" van. Both witnesses for the plaintiff

describe it as white. An illiterate person though unable to identify by writing will prove very capable in visual identification probably better than a literate person who seeks to rely on some written words than on the object as a whole. It was suggested to Johnson that it was another van he saw Deer driving on previous occasions but this he denied. I am satisfied that "white"or "whitish" in this case relates to one and the same vehicle i. e. the vehicle in the accident and which he speaks of as having seen Danny Deer driving on previous occasions. In addition he is supported by Eva Neil the Social worker,with whose evidence I was particularly impressed, who stated that she knew Danny Deer before as she moved from one district to another in connection with her work and had seen him drive that van several times. I find that both witnesses are speaking the truth and that Danny Deer was in the habit of driving the said white van involved in the accident,on previous occasions.

Several cases were cited to me by Counsel for plaintiff and defendant including Rambarran v. Gurrucharran (1980) 1 All E.R. p. 749. I have looked at all the cases and observed that in this case their Lordships analysed several other cases in considering the law. With acknowledgment to the assiduousness of Counsel I feel constrained to say that I need refer only to Rambarran's case as I consider it sufficient for this purpose taking into account the facts of this case. I adopt therefore the principle enunciated by Lord Donovan in his judgment at page 751, letter 'g' which reads:

> " Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership afford some evidence that it was being driven by his servant or agent, but when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence".

So now the evidence of the defendant has to be examined in this manner. The third defendant called their Site Manager a Mr. Mullings who said that Danny Deer was employed to the defendant company as a mill-wright, doing pipe fitting and was not employed as a

driver. He, Mr. Mullings was the person in charge of the operation there and Mr. Rose it was later revealed, was the Store Superintendent in charge of allocation of motor vehicles. He tells of the system, confirmed by Mr. Rose that instructions are left at times for the use of the motor vehicles. Mr. Mullings says that this is put on a board and "the keys are left with the guard". He would then give the guard oral instructions as to who should drive the vehicle out of the compound, and it is only on the authorisation of either Mr. Rose or himself that the guard would deliver the keys to a driver. Mr. Rose says "the keys if required would be handed to the foreman who was going to work", and the guard would get a memo written by him authorising the person to use the motor vehicle. So when Mr. Mullings authorises, the keys are left with the guard with oral instructions and when Mr. Rose does, with the foreman with written instructions to the guard. Mr. Rose asserted that the keys would be had either on instruction from Mr. Mullings, himself or the manager Mr. Parkinson. One thing is clear and that is, as he says, whenever the guard hands the keys to anyone on the site it is either on the authorisation of Mr. Mullings or himself. What is amounts to is that unless Mr. Mullings or Mr. Rose authorises someone to drive a motor vehicle and gives the instructions to the guard, the motor vehicle cannot leave the compound and authority to drive outside the compound is given only in connection with the company's business. This is not only the system but this is what both men who were in charge at the material time have sworn on oath that they do.

Now Mr. Mullings says that he had authorised Danny Deer to get keys to an unlicensed car, to drive it on the compound for the purpose of picking up rubbish. This motor vehicle could not be driven on the road. He says he had on previous occasions given Danny Deer permission to drive the company's vehicles on the compound. Mr. Rose on the other hand said he was not aware that Danny Deer could drive! I find this very difficult to believe and must perforce reject it.

I find that they are not credible witnesses and are in fact anxious to hide something, and that their evidence is unreliable. I find, as the plaintiff's witnesses asserts, that Deer has always driven the company's vehicles. It may be that because of his ability to drive, he was, on occasions used as a driver even though he had been employed as a mill-wright.

It was suggested that instructions were given to the guard but it cannot be said "what the guards will do". In the absence of any evidence to the contrary one is entitled to assume that a system operating in a responsible company and dilligently followed as inferred from Messrs. Mullings and Rose was that which was followed, and was indeed that which was duly authorised. The irrestible inference then is that the guard from whom the keys were received must have been and was authorised to give Danny Deer the keys for Motor Vehicle KY 876.

Lord Donovan in Rambarran's case summed up his judgment by leaving two limbs open to such a defendant. The second at page 753 letter "f" reads:

> " By simply asserting that the car was not being driven for any purpose of the appellant, and proving that assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant choose this way of defeating the respondent's case instead of the other".

The defendant rested on this limb but I am unable to find the evidence tendered as either cogent or credible.

In the result I find the following proved and/or admitted:

1. Authority to use the vehicle could be given only by Mr. Rose, Mr. Mullings or Mr. Parkinson the latter who on a balance of probabilities did not;

2. Such authority could only be given if the vehicle was being used in the company's business;

3. Such instructions as was given was carried out by the guard;

4. Such instructions as the guard carried out were in relation to motor vehicle KY 876 and Danny Deer, i. e. the handing over of the said car keys;

5. That Danny Deer was the driver of the said motor vehicle on the 6th January 1973 which was involved in the accident causing the plaintiff's death;

6. That the presence of car KY 876 on the road at the material time was on the company's business and was being driven with the third defendant's company authority;

7. That the said Danny Deer was at the time the servant and or agent of the third defendant's company.

It is accepted that children's dependency tend to cease or diminish at adulthood and that it is fair in these circumstances to attempt a calculation of the deceased's contribution to their support. Defence counsel argued that the Court ought to look at what the deceased gave the mother for house-keeping and work from that. I cannot accept that, as such a principle would lead to the situation where a man earning $20,000.00 per year, if he contributes $5.00 per month to his child's food the Court would be tied to that figure. My view is that the Court can be guided by that but not tied. Whatever figure is arrived at must be based on his earnings as alongside his support.

From the evidence of Yvonne Welch he received $300.00 per week as a contractor and another $900.00 per week as a farmer being $300.00 each market day for 3 days. His work as a contractor should therefore be an integral part of his livelihood and one would expect that were it so, at the time of instruction and pleading it would have been clearly so stated that the pleadings would have read as it does now after amendment "The deceased at his death was a farmer and a contractor". I find that one half acre of land planted with tomato and escallion, with escallion in 1973 selling at 15 cents per lb. with a minimum time of three weeks in between reaping, and tomatoes selling at 60 cents per lb., could yield no such figure as plaintiff has indicated to this court. The evidence indeed discloses him as a very rich man earning $1,200.00 per week or $4,800.00 per month, all that tax free. It is a pity that plaintiffs try to inflate earnings to the

point where it becomes wholly ridiculous as it is in this case, taking into account the amount actually pleaded as earnings as against the amount proved.

I find that such work as he did as a contractor was minimal at the time of his death and that his chief occupation then was farming. That from both occupations his weekly earnings were no more than $250.00 per week.

On the evidence, what was enjoyed with deceased was a stable common law relationship where the deceased as father and common law husband contributed moneys for shelter, clothes, other amenities and bills as they arose in the household. Miss Welch known as Yvonne Tolan as recited in the statement of claim received $90.00 per week for food for the family of which $20 - $25.00 was spent on deceased leaving a balance of $65.00 for herself and the children. Of this I find she spent $45.00 on the children. She says he bought clothes for them valued $150.00 per month but as I found she tends to inflate and so an amount of $60.00 per month or $15.00 per week is allowed. The benefit of other dependency, rent fuel, medical expenses etc. would amount to $10.00 per week. One accepts that within our society today any child with the ability is able to continue his or her education to University level which would take them up to age 21 years or to learn a trade which would take them up to age 19 or 20. I consider a dependency of 18 years to be average.

The total amount therefore is $60.00 being $30.00 for each child. Rhona born on 26th December 1968 had just had her 4th birthday, and Shereen was just reaching her 3rd. For Rhona there will be a multiplier of 14 and for Shereen one of 15. After taxing down for contingencies, Rhona is awarded $18,840.00 and Shereen $19,400.00.

Funeral Expenses of $600.00 is awarded as Special Damages.

There will be judgment for the plaintiff vs. third defendant in the sum of $38,840.00 under The Fatal Accident's Act being

Special Damages $600 and general damages $38,240.00 apportioned as follows-as to Rhona $18,840.00 and Shereen $19,400.00. Costs to be agreed or taxed.

It is further ordered that the plaintiff be appointed Trustee for the infant dependants that the Trustee shall hold the said sums as awarded the said dependants in Trust with power at his sole discretion to utilise capital and or income for the maintenance education and benefit of the said dependants.

Judgment for first defendant Heath vs. plaintiff with costs to be agreed or taxed. Such costs to be paid by third defendant.