

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. 2002/B-262

BETWEEN	BRUCE BEARDSLEY	CLAIMANT
A N D	THOMAS YOUNG	1 ST DEFENDANT
A N D	DENNIS MORGAN	2 ND DEFENDANT
A N D	ANDERSON HAULAGE LIMITED	3 RD DEFENDANT
A N D	HOPETON DIXON	4 TH DEFENDANT
A N D	JAMAICA TOURS LIMITED	5 TH DEFENDANT
A N D	RIVER RAFT LIMITED	6 TH DEFENDANT

CONSOLIDATED WITH CLAIM NO. C.L. 2002/B-263

BETWEEN	BRUCE BEARDSLEY (Executor of the Estate of Diane Beardsley, deceased)	CLAIMANT
A N D	THOMAS YOUNG	1 ST DEFENDANT
AND	DENNIS MORGAN	2 ND DEFENDANT
AND	ANDERSON HAULAGE LIMITED	3 RD DEFENDANT
A N D	HOPETON DIXON	4 TH DEFENDANT
A N D	JAMAICA TOURS LIMITED	5 TH DEFENDANT
A N D	RIVER RAFT LIMITED	6 TH DEFENDANT

Sherry Ann McGregor instructed by Nunes, Scholefield DeLeon and Company

Linda Wright for 1st and 2nd Defendants

Gillian Mullings for 3rd and 4th Defendants instructed by Patrick Bailey and Company

Kevin Williams for 5th Defendant instructed by Grant Stewart, Phillips and Company

Gregory Lopez for 6th Defendant instructed by Lopez and Lopez

Heard: October 17th, 18th, 19th, 20th, 24th, 26th, 2006 and March 23rd, 2010

Cor: Rattray, J.

1. Bruce and Diane Beardsley were among the many visitors to Jamaica from the United States of America in May, 2000. They had met each other in October, 1995 and were married in July, 1999. Still basking in the joys of married bliss, they vacationed in Jamaica, staying at the Wyndham Rose Hall Hotel, Montego Bay in the parish of St. James.
2. On the 17th May, 2000, the second day of their five day island holiday, the Beardsleys decided to go on a rafting tour on the popular Martha Brae River in the parish of Trelawny. They purchased a tour package for that attraction from a booth operated by Jamaica Tours Limited (“Jamaica Tours”) in the lobby at their hotel, the cost of which included transportation to and from, as well as entry to the attraction.
3. That afternoon, while on their way to that destination, traveling in a van owned by Thomas Young and driven by Dennis Morgan, their feelings of relaxation and happiness were abruptly shattered when the vehicle they were in collided with a trailer coming from the opposite direction.

That trailer was owned by Anderson Haulage Limited and driven at the time by Hopeton Dixon.

4. The air of festivity which the couple had been enjoying was immediately replaced by the gloom of despair as, despite being treated at a hospital in the parish and then airlifted to a hospital in Kingston, Diane Beardsley succumbed to the injuries she sustained as a result of the accident. Her husband Bruce did not emerge unscathed, as it was claimed that he suffered personal injuries, was devastated by the death of his wife and on returning home, had to be treated for post traumatic stress and depression.
5. As a consequence of this tragic accident, two suits were filed by Bruce Beardsley claiming damages on his own behalf and as Executor of his wife's Estate. In both actions, which were subsequently consolidated, Dennis Morgan and Hopeton Dixon, the drivers of the two vehicles involved in the collision were sued as 2nd and 4th Defendants respectively, being the ones responsible for the accident. Thomas Young and Anderson Haulage Limited were sued as 1st and 3rd Defendants respectively as owners of the said vehicles, on the ground of their being vicariously liable for the negligent actions of their drivers, their servants and/or agents at the material time.
6. The claims against Jamaica Tours as 5th Defendant and River Raft Limited ("River Raft") as 6th Defendant sound in contract and/or tort, as it was alleged that these Defendants, or either of them, were in breach of an implied term of the contract to ensure that competent persons were engaged in the transportation aspect of the tour package. Additionally, the Claimants contended that these Defendants were liable in negligence for the actions of their servants and/or agents in

transporting the Beardsleys that fateful day, which led to Diane Beardsleys' death and the injuries sustained by her husband Bruce.

7. When this trial commenced, the parties were urged by the Court to consider whether, even at this late stage, discussions were possible to bring about an amicable resolution of this matter. On the second day of the trial, the Court was asked by the parties to enter Judgment in the following terms;

“By Consent, Judgment for the Claimants against the 1st and 2nd Defendants. The 1st and 2nd Defendants are liable to pay the sum of \$3,000,000.00 only. The claims against the 3rd and 4th Defendants are discontinued. No Order as to costs.”

The trial of the Beardsleys claim then proceeded against the 5th and 6th Defendants.

8. In the Defence filed on behalf of Jamaica Tours, that company denied that at the material time, it had any contractual relationship with the Beardsleys or that it had any relationship, contractual or otherwise with the 1st or 2nd Defendants. It further denied that the owners or drivers of the vehicles involved in the collision were its servants or agents at any time.
9. Jamaica Tours alleged that the Beardsleys contracted the services of River Raft regarding the tour package and it was that entity which organised and directed the arrangements for their transportation to the attraction by the 1st and 2nd Defendants. Further, this Defendant alleged that any fees paid by the Beardsleys were paid to River Raft and not to Jamaica Tours.
10. River Raft in denying liability pointed the finger of blame in the direction of Jamaica Tours. It stated in its Defence that it was engaged in the business of operating an attraction known as “Rafting on the

Martha Brae” and denied providing tour packages. It further stated that the Beardsleys purchased the tour package from Jamaica Tours and that it was that Defendant which was responsible for their transportation to the attraction. It alleged that it was as a result of the request from that company, that it contacted the 1st Defendant, Thomas Young to arrange transportation for hotel guests, as he was in the business of providing transportation for the public as a registered JUTA Operator. In those circumstances, River Raft in the Defence filed on its behalf, alleged that Thomas Young was an independent contractor who owed a duty to the public at large, and claimed an indemnity in respect of any damage caused by the negligent acts of Thomas Young and his driver, Dennis Morgan. However, no Ancillary Claim was ever filed by River Raft against either of those Defendants.

11. In addition, River Raft contended that any fees paid by the Beardsleys entitling them to ground transportation as well as access the rafting attraction were actually paid to Jamaica Tours and not to the 6th Defendant. The rest of the Defence of River Raft mirrors almost exactly that filed on behalf of the Jamaica Tours, insofar as their denials as to contractual and/or tortious liability.
12. Bruce Beardsley in giving evidence as to circumstances leading up to his wife and himself embarking on the journey on the 17th May, 2000, testified that they made arrangements that morning to take the river rafting tour package when they stopped at the booth operated by Jamaica Tours in the lobby of their hotel. They paid the required fee to a representative of the tour operator, which fee covered transportation and entry to the attraction and were told the time to return to meet with the bus. On their return at the designated time, they were directed to the bus in which they would travel by a representative of Jamaica Tours.

He stated that the first time he was aware of the existence of River Raft was during the preparation for this trial, as that company's name was never mentioned when the arrangements were made for the river rafting tour. It should be noted that River Raft was added as a Defendant after these proceedings were commenced. Under cross-examination, Mr. Beardsley denied that he was advised by anyone from Jamaica Tours, that River Raft would be providing transportation to the attraction.

13. The Vice-President of Jamaica Tours, Noel Sloley Jnr. was the sole witness for the 5th Defendant, although he was not personally involved with the particular transaction concerning the Beardsleys. He testified that his company had been selling tour packages for River Raft Limited over a number of years on a continuous basis and that he subsequently became aware of the package sold to the Beardsleys. He gave evidence that the arrangement between his company and the 6th Defendant was that where a tour package was sold for river rafting and the tour group consisted of less than six (6) persons, River Raft would provide the transportation for the tour group to and from the attraction. Where however the group consisted of six (6) or more persons, Jamaica Tours would provide the transportation.
14. On this occasion, as the number of passengers to be picked up was less than six (6) individuals, River Raft made the necessary transportation arrangements for the Beardsley party. The bus which collected the Beardsleys was owned by Thomas Young and driven by Dennis Morgan. Mr. Sloley testified that at no time did Jamaica Tours have any contract with nor did it contact either of those persons to transport passengers to or from any destination. In addition, he maintained that Jamaica Tours had no relationship, contractual or otherwise, with any of the drivers who were involved in the accident in which Diane

Beardsley died and her husband sustained personal injuries. As such, Noel Sloley contended that at no time were Thomas Young or Hopeton Dixon the servants or agents of Jamaica Tours, to swing the pendulum of vicarious liability in its direction.

15. Florence Campbell, the Executive Assistant to the Managing Director of River Raft gave evidence on behalf of the company. She stated that River Raft was in the business of operating a tourist attraction known as “Rafting on the Martha Brae”, on one of the longest rivers in the parish of Trelawny. She further stated that the company did not sell tours or tour packages, but instead utilised the services of several tour operators, including Jamaica Tours. On the issue of transportation, her evidence was that the arrangement with the company was that representatives of Jamaica Tours stationed at the hotel would sell tour packages to guests, which included rafting and transportation to and from the attraction. Jamaica Tours collected the money, issued a voucher in return and were responsible for transporting the tourists to and from the Martha Brae attraction. That voucher was to be presented upon arrival at the destination for the visitors to gain entry to the property and access to the rafting rides. The voucher was also used in the preparation of the bill to Jamaica Tours at the end of each week for the rides.
16. In her testimony, Ms. Campbell advised that on occasions, Jamaica Tours requested her company to facilitate the transfers of tourists from the hotel to the attraction. On receipt of such requests, she would make arrangements with a bus operator to transport those tourists to the location, which is what she did on the 17th May, 2000, having received the request from Jamaica Tours. Florence Campbell agreed that Thomas Young’s bus went to collect the Beardsleys from their hotel as she had called and made the necessary arrangements. She maintained however,

that the bus operators were contractors and not employees nor agents of River Raft. They submitted their invoices at the end of each week to River Raft and the company would prepare its own invoice reflecting the cost of transportation and rafting rides and forward same to Jamaica Tours. Once the invoices of River Raft were settled by the tour operator, River Raft then paid the sums due to the bus operators for transportation.

17. One of the first issues to be determined by this Court is whether or not there was a contractual relationship between the Beardsleys and Jamaica Tours and/or River Raft. Both these Defendants in their pleadings denied any such relationship with the Claimants. Each contended that it acted as agent for the other. Although suggestions were put by Counsel for Jamaica Tours, Mr. Kevin Williams that the Beardsleys were advised by the company's representative that transportation to the attraction was being provided by River Raft, this was denied by Mr. Beardsley. However, no witness was called on that Defendant's behalf to support any such suggestion. I find that Bruce Beardsley's evidence as to the details of the arrangements made in respect of the rafting tour was clear, unequivocal and unshaken by cross-examination. He was a frank and forthright witness and I accept as truthful his evidence in that regard.
18. Mr. Williams submitted that there was no evidence that a contract was established between the Beardsleys and his client, as no evidential foundation had been laid that the parties had any discussions to show a meeting of the minds, which was an essential pre-requisite to the formation of a contract. He further submitted that no details of the alleged contract between the parties were outlined and as such urged the Court to find that the Claimants had failed to establish any contractual

relationship with Jamaica Tours. I do not agree. Having accepted Bruce Beardsley as a witness of truth in respect of his evidence as to the arrangements made for the rafting tour, I am satisfied on the facts before this Court and I so find, that there was a contract between the Beardsleys and Jamaica Tours.

19. The case of **Wong Mee Wan v Kwan Kin Travel Services Ltd.** a decision of the Privy Council on appeal from the Court of Appeal of Hong Kong reported at (1996) 1 WLR 38 was cited and heavily relied on by Counsel for the Beardsleys, Ms McGregor. The factual similarity of that case obliges me to set out in its entirety the headnote which reads:-

“ The first defendant tour operator contracted with the plaintiff’s daughter to provide a package tour to a lake in the People’s Republic of China. The first defendant’s brochure contained the terms of the contract and described the itinerary for the tour, which included transportation across the lake by ferry. The tour group was accompanied while in China by a tour guide employed by the second defendant. When the group reached the lake the ferry had already departed, and the tour guide informed the group that they would have to cross the lake by speedboat. While being driven across the lake by an employee of the third defendant the speedboat hit another vessel and the plaintiff’s daughter was drowned. The plaintiff, as her administratrix, commenced proceedings against the defendants in the High Court of Hong Kong claiming damages for breach of contract and negligence. The judge held that the second and third defendants were liable in negligence and that the first defendant was liable for breach of a contractual duty to the plaintiff’s daughter to take reasonable care for her safety. The Court of Appeal of Hong Kong allowed an appeal by the first defendant.

On the plaintiff’s appeal to the Judicial Committee:-

Held, allowing the appeal, that having regard to the contract as a whole the first defendant had undertaken thereby to provide the plaintiff’s daughter with all the services included in the tour itinerary and not merely to

arrange for their provision, even though it had intended that some of the activities would be carried out by others; that although the first defendant was not under a contractual duty to ensure that the plaintiff's daughter would be reasonably safe whilst on the tour, a term was to be implied into the contract that reasonable skill and care would be used in rendering the services which the first defendant had contracted to provide whether they were carried out by the first defendant or by others; and that, since no measures had been taken to ensure that the driver of the speedboat was reasonably competent and experienced, the crossing of the lake had not been carried out with the requisite skill and care and the first defendant was liable for breach of contract.”

It is to be noted for completeness that Lord Slynn of Hadley in his Judgment pointed out that the second and third Defendants filed Defences contending only that the proceedings ought to have been brought in China and not in Hong Kong. Interlocutory Judgment was entered against them for damages to be assessed, but it appeared that no further steps were taken against them pursuant to those judgments.

20. In his Judgment, the learned Law Lord opined at pages 41 to 42-

“The issue is thus whether in this particular contract the first defendant undertook no more than that they would arrange for services to be provided by others as their agents (where the law would imply a term into the contract that they would use reasonable care and skill in selecting those other persons) or whether they themselves undertook to supply the services when, subject to any exemption clause, there would be implied into the contract a term that they would as suppliers carry out the services with reasonable care and skill:...

There are of course many contracts under which a person agrees to supply services when he may arrange for his obligations to be performed by others, and where it is indeed contemplated that he will do so. As Cockburn C.J. said in *British Wagon Co. v. Lea & Co.* (1880) 5 Q.B.D. 149, 153 – 154:

‘Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim *qui facit per alium facit per se* applies.’

The fact that the supplier of services may under the contract arrange for some or all of them to be performed by others does not absolve the supplier from his contractual obligation. He may be liable if the service is performed without the exercise of due care and skill on the part of the subcontractor just as he would be liable if the subcontractor failed to provide the service or failed to provide it in accordance with the terms of the contract. The obligation undertaken is thus, if the person undertaking to supply the services performs them himself, that he will do so with reasonable skill and care, and that if, where the contract permits him to do so, he arranges for others to supply the services, that they will be supplied with reasonable skill and care: See Chitty on Contracts, 27th ed. (1994), pp. 987 – 989, paras. 19 – 046 and 19 – 047.”

21. The question then to determined is what where the terms of the contract between the Beardsleys and Jamaica Tours. Bruce Beardsley consistently maintained in his evidence that he and his wife, on the way to the beach on the morning of the 17th May 2000, stopped at the Jamaica Tours booth in the lobby of their hotel to enquire about activities. They decided on the rafting tour of the Martha Brae River, made the reservations and paid the required fee, which covered transportation to and from, as well as access to the attraction. Later that day at the appointed time, they were directed to a waiting bus by a representative of Jamaica Tours. His testimony in this regard was not shaken by cross examination.

22. I find on the evidence that under the contract between the parties, Jamaica Tours had undertaken to provide all the tour services to the Beardsleys and not merely to arrange for their provision, even though it may have intended that some aspect, in this case transportation to and from the rafting attraction, was to be provided by a third party. The journey by bus to that destination was an integral part of the tour package which Jamaica Tours had contracted to provide those visitors to Jamaica. I find that a term was to be implied in that contract that Jamaica Tours would use reasonable care and skill in ensuring that the arranged method of transportation, which it had contracted to provide, would be performed by persons of competence and experience, whether, such a service was carried out by Jamaica Tours itself or by someone else. In the present case, the evidence reveals that all the representative of Jamaica Tours' did was to contact River Raft and ask that they send transportation for visitors to the attraction. There is no evidence that any steps were taken to request an experienced or competent driver to undertake the task of transportation. Nor is there any evidence to suggest that steps were taken by the Jamaica Tours representative to enquire whether or to ensure that any driver being sent to collect the tourists had a good driving record.

23. As Lacourciere J.A. said in the Canadian case of **Craven v Strand Holidays (Canada) Ltd.** (19821 40 OR (2d) 186 at page 190-

“If a person agrees to perform some work or services, he cannot escape contractual liability by delegating the performance another. It is his contract.”

I find therefore that Jamaica Tours was in breach of its contract with the Beardsleys.

24. In the event that I am wrong in my finding that Jamaica Tours had undertaken, inter alia, to provide transportation for the Beardsleys, and that in fact what was agreed was that that Defendant would arrange for a third party to provide transportation services, my finding as to the liability of Jamaica Tours would remain unchanged. Lacourciere J.A. at page 190 of the **Craven** case went on to describe the obligation of a party who arranged for services to be provided by others in the following terms:-

“...if the contract is only to provide or arrange for the performance of services then he has fulfilled his contract if he has exercised due care in the selection of a competent contractor. He is not responsible if that contractor is negligent in the performance of the actual work or service, for the performance is not part of his contract.”

There is no evidence before this Court of this Defendant making any attempt, which could be viewed or treated as the exercise of due care in the selection of a competent driver to transport passengers to the rafting attraction. In fact, Counsel for Jamaica Tours, Mr. Kevin Williams in his closing submissions contended that:-

“by calling Florence Campbell (the representative of River Raft) and asking for a driver to be sent to collect the visitors, we have carried out our obligation under the contract and have exercised reasonable care and skill.”

I do not accept this contention. A mere request for transportation in the circumstances of this case could not and would not discharge the requisite duty of care imposed on Jamaica Tours by the contract.

25. It now falls to be considered whether there was a contractual relationship between the Beardsleys and River Raft. No evidence was advanced by Jamaica Tours to support the contention, as alleged in its

Defence that the tour package was purchased from and fees paid to River Raft by the Beardsleys. It is clear from the evidence of Florence Campbell that her company had no direct contact with the Beardsleys and that it did not sell tour packages. Bruce Beardsley was steadfast in his testimony that he was first made aware of the entity River Raft after these legal proceedings had been instituted, at least two (2) years after the purchase of the tour package. I find therefore that no contractual relationship existed between the Beardsleys and River Raft.

26. Another issue to be considered is whether Jamaica Tours in its dealings with the Beardsleys was acting as agent for River Raft. Were such a finding to be made on the evidence before the Court, River Raft could be held liable as principal. In giving his evidence, Noel Sloley, Vice President of Sales and Marketing of the Company admitted that the rafting tour of the Martha Brae River was not the only tour package sold by his company. He was the individual responsible for selecting which tours were to be sold, the prices of such tours after being aware of the 6th Defendant's rafting rates, and for determining how the tours were to be packaged. It is clear from his evidence that the sale of tour packages by Jamaica Tours was a business "in and of itself" as submitted by Counsel Ms. McGregor, and that the company in its dealings with the Beardsleys was pursuing its own enterprise. At no time did Noel Sloley ever allege, indicate or suggest that his company was merely an agent of or for River Raft.

27. The testimony of Noel Sloley and Florence Campbell as to the payment arrangements between Jamaica Tours and River Raft is also instructive. Fees for the tour package were collected by the alleged agent Jamaica Tours, but only paid over to the alleged principal, River Raft after River Raft had submitted its invoice, which included rafting fees and bus

operators' costs. The fees due to Jamaica Tours were then deducted from the funds held by Jamaica Tours and the net amount forwarded to River Raft. Such a payment practice is uncommon in an agency relationship and runs counter to the usual expectation that the agent is to be paid by the principal. In addition, if River Raft was the principal in this 'arrangement', the action of that 'principal' in providing its 'agent' with an invoice outlining its costs before receiving monies due to it, defies logic and common sense. The only sum being retained by Jamaica Tours in this instance was its fee. Why then was there the need for River Raft to send documentation to its 'agent' as to its costs? Whether or not such a business connection as is alleged by Jamaica Tours existed can only be ascertained by an examination of the material before the Court. On the totality of the evidence before me, I am of the view that Jamaica Tours has not satisfied this Court of the existence of any agency relationship between River Raft and itself or that at the material time, it was acting as agent of River Raft.

28. The Claimants have sought on their pleadings and in the submissions of their Counsel to have the Court impose liability for the accident on the 5th and/or 6th Defendants, not only in contract but also in tort. They contend that as the vehicle in which the Beardsleys were traveling was being used to carry out the obligation of the 5th and/or 6th Defendant to transport the Claimants to the attraction, those Defendants or either of them were liable for the negligence of the driver, who was their agent. The evidence discloses however that no representative of Jamaica Tours was ever in contact with the owner or driver of the motor vehicle which transported the Beardsleys, nor had that company contracted with either of those parties. Further, Florence Campbell, the representative of River Raft stated that she was the one who arranged with the owner of

the motor vehicle, Thomas Young, to pick up the Beardsleys from their hotel, allegedly at the request of Jamaica Tours. She went on to frankly admit that having instructed Thomas Young to make the particular trip, if the bus operator was not paid for his transportation services, he would not have been able to directly approach Jamaica Tours for payment for his services, as he was not party to any arrangement made with the tour operator.

29. As Lord Steyn opined in the Privy Counsel decision of **Clinton Bernard v The Attorney General of Jamaica**, Privy Council Appeal No. of 2003 -

“Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on the fault of the employer.”

There is no evidence before the Court to support a finding that the driver of the vehicle in which the Beardsleys were passengers was an employee or agent of Jamaica Tours. In fact, the evidence given runs contrary to any such finding being made. Jamaica Tours then cannot be held vicariously liable for the negligence of the 2nd Defendant.

30. But that is not the end of the matter as regards this Defendant. In the English Court of Appeal case of **Rogers v Night Riders and Others** 1983 RTR 324, the Plaintiff’s mother telephoned the Defendants who operated a minicab service on her daughter’s behalf and asked for a minicab to take the Plaintiff and her father to the railway station. The Defendants contacted an owner-driver of such a car to whom they had rented a car radio and directed him to the destination. On the journey to the railway station, the door on the Plaintiff’s side of the car flew open, hit a stationary vehicle and rebounded injuring the Plaintiff. The trial Judge found that the Defendants had simply put the Plaintiff in touch

with the driver and they were not responsible for his negligence. However, the Court of Appeal reversed that decision and held –

“...that...on the facts, the defendants had held themselves out to the general public as a car-hire firm undertaking to provide a vehicle to convey the plaintiff to her destination; that the defendants could foresee that the plaintiff might be injured if the vehicle provided for her was defective and, accordingly, they owed the plaintiff a duty of care to take reasonable steps to ensure that the vehicle so provided was properly maintained and reasonably fit for that purpose; and that the duty could not be delegated by the defendants to a third party, such as the driver, whether an employee or an independent contractor so as to evade the responsibility for breach of that duty.”

31. The claim filed by the Plaintiff in that case was pleaded in tort, but Dunn L.J. was of the view that her claim could have been brought either in contract or in tort. At page 331 he opined that the Defendants –

“...undertook to provide a hire-car to take the plaintiff to Euston Station. In those circumstances, they owed the plaintiff a duty of care to take reasonable steps to ensure that the car was reasonably fit for that purpose. It matters not whether the duty is put in contract or in tort, either way it is a duty they could not delegate to a third person so as to evade responsibility if the car was not fit for that purpose.”

Everleigh L.J. went on to make the following observation at page 328 of that case –

“In my opinion, this is not a case where we are concerned to consider vicarious liability or whether there is liability for the act of an independent contractor. We are concerned to consider a case of primary duty on the part of the defendants....On the facts of this case, in my opinion, the defendants undertook to provide a car and driver to take the plaintiff to her destination. They did not undertake, and neither did she request them, to put her in touch with someone else who would undertake this obligation. Now in those circumstances of undertaking to provide a car and its driver to take her to her destination the defendants could

foresee that she might be injured if the vehicle were defective, and so they owed a duty arising out of this relationship to take care to see that the vehicle was safe. They relied upon the driver to do this. Whether he was a servant or an independent contractor matters not, he was a third person upon whom they relied to perform their duty arising from their relationship with the plaintiff, and it is well-established law that such a duty cannot be delegated.”

32. I adopt the above cited dicta of the learned Law Lord and I find that by undertaking to provide transportation to take the Beardsleys to their destination, Jamaica Tours could foresee that they or either of them might be injured if the person transporting them drove in a careless or negligent manner. Jamaica Tours therefore owed the Beardsleys a duty of care arising from this relationship to ensure that a competent, proficient and suitably qualified driver was engaged to take on the task of transportation. This was a duty which could not be delegated and in respect of which they were in breach. I find therefore that Jamaica Tours is also liable to the Beardsleys in negligence.
33. With respect to the liability of 6th Defendant, River Raft for the admitted negligence of the driver Dennis Morgan, the evidence of Florence Campbell on behalf of River Raft, unshaken by cross examination is that the bus operator Thomas Young was not an employee of River Raft but an independent contractor. He was not on the Company’s payroll, but instead was paid based on invoices submitted for transportation services rendered. She went on to state that the company acted as agents for the bus operators in collecting sums due to them and in having their invoices settled.
34. It is a generally accepted principle that an employer is not vicariously liable for the negligence of an independent contractor, his servants or agents in the execution of the contract. The dicta of Williams J. in case

of **Pickard v Smith** (1861) 10 CB (N.S.) 1970, although pronounced almost 150 years ago is still as relevant today as it was when he stated:-

“Unquestionably, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.”

I am satisfied on the evidence that River Raft is not liable to the Claimants in negligence.

35. Having found Jamaica Tours in breach of its contract with the Beardsleys and liable also in negligence, the next step is the question of damages. It cannot be too often repeated that a Claimant who institutes legal proceedings against another for damages has the obligation of proving that which he alleges to the standard required by law - in civil proceedings, on the balance of probabilities. Where Special Damages are alleged to have been incurred, such a Claimant must not only plead the alleged loss, but must also specifically prove same in order to obtain an award in his favour.

Special Damages

36. By virtue of an amendment granted at the commencement of this trial, Bruce Beardsley's claim for Special Damages was particularised as follows:-

Medication	-	US\$ 1,511.76
Psychotherapy	-	2,405.00
Loss of Income	-	<u>106,970.00</u>
Total		US\$110,886.76

Medication

37. In support of his claim for this item of expenditure, Bruce Beardsley tendered in evidence a three (3) page computer print out indentifying the drugs purchased and a breakdown of the costs of each item. The five (5) drugs listed were Zocor, Zoloft, Protonix, Prometh and Zithromax. Under cross examination by Counsel Mr. Williams however, Mr. Beardsley admitted that as regards the aforementioned drugs, the first four had nothing to do with his injuries suffered in the accident or his condition for which he had been treated by his psychologist, Dr. Martino. As such, his Counsel conceded that the cost of those items be deducted from his claim, leaving a balance of US\$444.83.
38. In answer to Mr. Williams' query whether the print out relied on could have been generated by anyone with a computer, Mr. Beardsley responded that anyone with a computer could create just about any documents. Emboldened by that 'admission', Mr. Williams argued that no amount ought to be awarded for medication, presumably on the basis that the Claimant had not strictly proven the alleged expense. I have carefully viewed the steady, frank and consistent manner in which Bruce Beardsley gave his evidence and have observed his demeanour in the witness box. I find him to be a candid and reliable witness. I accept his evidence that he did not prepare any of the computer print outs and that the one pertaining to medication was obtained from the pharmacy. I am satisfied that the sum of **US\$444.83** ought to be awarded for this aspect of his claim and I so order.

Psychotherapy

39. The claim in this regard amounts to US\$2,405.00 and is corroborated by a five (5) page computer print out entitled 'Patient Financial History

By DT Service'. Apart from his criticism that that document could have been created by anyone with a computer, Mr. Williams also contended that the alleged cost was not borne out on the evidence. Further, he asserted that Bruce Beardsley failed to prove that he visited a psychotherapist, as the name of that individual was never disclosed on that document nor were any details provided to show the link between the treatment offered and the injuries sustained.

40. The medical report of Dr. Nicholas Martino Jnr, a licensed Psychologist was tendered in evidence in support of Bruce Beardsley's claim. In that report, Dr. Martino indicated that he had met with the Claimant for about two (2) years for approximately forty (40) sessions after the death of his wife, with the last session being on May 14, 2002. An examination of the disputed print out reflects a record of thirty-seven (37) sessions. That document also identified the procedure as "Psychotherapy", which is defined as "the treatment of disease by psychological methods." In tendering this print out into evidence Bruce Beardsley described the document as a computer print out listing charges to the psychologist, Dr. Martino. I find Counsel's complaint on this item without merit, as it appears from the evidence that the print out related to services rendered to the Claimant by Dr. Martino. I am of the view that the sum of **US\$2,405.00** was in fact incurred by the Claimant and that he has proved this item of expenditure.

Loss of Earnings

41. In May, 2000 at the time of the accident, Bruce Beardsley was President and part owner of Richard's Floor Covering, a retail company from which he said he earned US\$85,000.00 per annum. His gave evidence that as a consequence of the tragic accident in which he lost his wife, he became emotionally distressed and had to consult a

psychologist, was unable to work for several months and had difficulty sleeping. He suffered panic attacks in which he felt he could not breathe and was diagnosed as having complicated grief issues due to the circumstances of his wife's death, as well as Post Traumatic stress. He testified that as a result of his emotional state, he was unable to focus on or function productively at his job and by the middle of 2001, he had lost his job with the company. His earnings fell to US\$41,030.00 in 2001 and in 2002, he earned US\$22,000.00 from unemployment compensation. Since then, he has been living off retirement income and investment earnings and has been incurring debts. Bruce Beardsley further testified that he was unable to obtain other employment for over three (3) years after the accident. However in August 2006, he and a partner opened a retail consignment shop, Ritzz Retail, from which no income had been realized up to the date of trial.

42. Under cross examination by Mr. Williams, Bruce Beardsley admitted that both companies to which he was associated since the year 2000, were registered companies which kept records of their income, revenue and financial dealings from which their tax returns were filed. Those records included documents relating to his salary, income and dividends paid to him as part owner those companies. He also admitted that he or an accounting firm filed his personal income tax returns. With respect to unemployment benefits, he stated that he received a cheque every two weeks to which was attached a pay stub. However he candidly agreed with Counsel that he had produced no documentary evidence in support of his claim for lost earnings.
43. Counsel Mr. Williams submitted that Bruce Beardsley failed to prove his claim for loss of earnings, as all he had done was to pluck figures from the air and throw them at the Court. He relied on the often cited

dicta of Lord Goddard C.J. in the case of **Bonham-Carter v Hyde Park Hotel Limited** (1948) 64 TLR 177 at 178 where he stated -

“Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court saying: ‘This is what I have lost; I ask you to give me these damages.’ They have to prove it.”

44. He further submitted that no sum should be awarded for loss of earnings in the circumstances of this case, where the Claimant has had at least four sources from which he could have proven the extent of his income, but has failed to do so. These sources being:-

- (a) Copies of his companies tax returns
- (b) Copies of his personal tax returns
- (c) Copies of pay stubs or invoices accompanying his pay cheques
- (d) Copies of the cheques themselves

45. Counsel Ms. McGregor on behalf of Bruce Beardsley commendably conceded that documentary proof of her client’s loss of income was not before the Court. She urged the Court to find however that despite the lack of such proof, there was still sufficient evidence before the Court based on her client’s testimony for such an award to be made. She asked the Court to consider Bruce Beardsley a forthright witness, who frankly disclosed reductions in his income since the accident, the necessary statutory deductions in the form of various state and federal taxes that reduced his gross income and that his claim for lost earnings did not cover the entire period for which he was unemployed, which would have amounted to over US\$300,000.00. She also pointed out that the fact of his unemployment within nine (9) months of this accident was not challenged and that the reasons for his inability to

maintain continuous employment were outlined in Dr. Martino's medical report.

46. The starting point for any assessment relating to this item of Special Damages must be the evidential material put before the Court by the Claimant. Too many times Courts have warned litigants, not only that they must plead their alleged loss and specifically prove that which they have alleged, but also as to the consequences of such failure. see **Lawford Murphy v Luther Mills** (1976) 14 J.L.R. 119. Judges have on many occasions been faced with the difficulty of making an assessment of damages where Claimants have failed to provide sufficient proof of an alleged loss.

47. In the unreported Court of Appeal decision of **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** SCCA No. 109 of 2002, one of the grounds of appeal was in respect of the award for Special Damages, which included the sum of US\$375.00 per visit to a gynecologist in the United States without there being documentary proof of such expense. Cooke J.A. at pages 12 to 13 of that case made the following comments:-

“I find the absence of evidentiary material more than a little surprising in view of the fact that the plaintiff and her legal advisers would have long known of the date of the trial.”

“... This is unlike the position of ‘a sidewalk or push cart vendor.’ It is impossible to imagine any insuperable difficulty which would preclude the plaintiff from obtaining some record of her payment.”

“... In this case it was not unreasonable to demand of the plaintiff more than her mere assertion.”

48. Nevertheless the learned Judge of Appeal, apparently relying on

the principle that the Court strives to reach a conclusion which is in harmony with the justice of the situation, stated the following:-

“Having decided that the Court below was in error in accepting the sum of US\$375.00 per visit, I am now faced with the most difficult question as to what should have been awarded. I do not accept the appellant’s contention that in the absence of strict proof there should be no award. Justice demands that there should be an award. There had to be visits to gynecologists. I too expect criticism for ‘plucking a figure from the air.’ I may even be regarded as heartless. I would make an award of US\$180.00 per visit.”

49. Thirty nine years ago, similar sentiments were expressed by Edmund Davies L.J. in the case of **Ashcroft v Curtin** [1971] 3 ALL ER 1208. There the Plaintiff was a precision engineer, and the successful operator of a one-man business, which was converted into a limited company in which he and his family held all the shares. He sustained severe injuries in a motor vehicle collision and filed suit claiming damages for financial loss due to his inability to effectively manage his business, as a consequence of injuries suffered in the accident. Although the accounts of the company were rudimentary and unreliable, the trial Judge awarded the sum of £10,500.00, which was reduced on appeal to £2,500.00. In delivering the Judgment of the Court of Appeal, Edmund Davies L.J. said at page 1213;-

“My greatest difficulty is in quantifying the loss. Counsel for the defendant submits that the task cannot be performed and that the failure should result in a ‘nil’ award on this aspect of the case...

That is a conclusion to which I have been frankly loth to arrive, for it does not seem to me to meet the justice of the case.”

50. The opposite outcome was arrived at in **Lawford Murphy v Luther Mills** supra. The Plaintiff in that case was a mason who said he earned

\$120.00 to \$130.00 per month, but had no salary slips to corroborate this income, although he had identified the construction company with which he had worked. Hercules J.A. at page 121 of that case referred to dicta of Lord Goddard C.J. in the **Bonham-Carter** case, mentioned earlier in this Judgment and stated;-

“In this case I feel very much the way Lord Goddard felt and I would disallow any award under the head of loss of earnings.”

51. The circumstances of each case must be carefully considered by the Court and a determination made on the facts of that particular case. While I accept that Bruce Beardsley was a frank witness, I do not believe that the reward for such frankness ought to be a disregard of the rules of evidence and procedure. A Claimant is obliged to prove that which he alleges and mere say-so does not amount to proof to the standard required by law. This Claimant was not a pan chicken vendor or a side walk salesman, who was unlikely to have had or maintained books of accounts reflecting the income and expenses of his daily transactions. Bruce Beardsley was the President and a shareholder in one his companies and a partner in the other. He is a man of intelligence and sophistication, knowledgeable in matters of the business world and familiar with the necessity to keep proper business and financial records. It was more than a little surprising to find that this Claimant was unable to produce any document whatsoever to confirm his alleged earnings, despite the several sources identified by Counsel for the 5th Defendant, from which such information could have been obtained. What was even more surprising was that no explanation was given nor any attempt made to disclose the reason for the Claimant's failure to provide such documents.

52. In the absence of such evidence then, how can this Court properly quantify and arrive at a figure as compensation for loss of earnings? Is this an instance where a sum ought to be “plucked from the air”? And if so, how does the Court determine the range from which that figure is to be “plucked”. I am not prepared to tread blindly down that path.
53. This Court’s difficulty in assessing the figure, if any, to award for loss of earnings in this matter is further heightened by the fact of Bruce Beardsley being an American entrepreneur, resident in Pennsylvania in the United States of America. Rowe P. in the Jamaican case of **Central Soya Jamaica Ltd. v Junior Freeman** (1985) 22 JLR opined at page 158:-

“In casual work cases it is always difficult for the legal advisors to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages the court has to use its own experience in these matters to arrive at what is proved on the evidence.”

This passage exemplifies the extent to which the Court will go to satisfy the demands of Justice, in the absence of strict proof of Special Damages. However even with the latitude reflected in that dicta, this Court without more has only the Claimant’s word, unaccompanied by the requisite proof as to his alleged loss of earnings. The Court is a stranger as to the range of salaries earned by an individual in the position of the Claimant, who resides outside the jurisdiction, and would therefore have no experience on which to rely in attempting to arrive at compensation under this head of damages. Having considered all the circumstances, I find that Bruce Beardsley has failed to provide sufficient proof of his alleged loss of earnings to entitle him to an award under this head of damages.

General Damages

54. The two categories under which a claim has been made on Bruce Beardsley's behalf under this heading are for damages for Nervous Shock and for Loss of his Holiday. Although the Statement of Claim filed on his behalf made reference to minor physical injuries such as scratches, cervical strain and a blow to knee, no evidence, whether medical or otherwise, was ever placed before the Court in support of such allegations. Ms. McGregor in her written submissions identified her client's more significant claim as compensation for "psychiatric injury namely post traumatic stress."
55. Bruce Beardsley's evidence is that the impact from the collision was so severe that his wife was thrown into his lap. He noted that she was bleeding profusely from her head, as the right side of her skull had caved in, and though her eyes were "locked open," she was unresponsive. He was covered with blood but was unable to ascertain at the time, whether it was his wife's or his own. On the journey to the regional hospital, he held his wife's head in his lap and observed her having difficulty breathing and making gurgling sounds. Some hours after the accident, they were airlifted to a hospital in Kingston on arrival at which Diane Beardsley was pronounced dead. Devastated by the tragic loss of his wife, Bruce Beardsley testified that his whole life came crashing down. He returned home to Pennsylvania two (2) days after the accident in a state of despair and emotional distress. A week after his return he started seeing a licensed psychologist, Dr. Nicholas V. Martino Jnr, under whose treatment he remained for almost two years. Dr. Martino's medical report dated November 12, 2004, which was tendered as an exhibit spoke to the focus of treatment being on grieving issues. However Dr. Martino in his report went on to state:-

“... due to the circumstance of his wife’s death, I considered his a complicated grief with added issues of Post Traumatic Stress. He had difficulty concentrating, difficulty sleeping, was often tearful, and was unable to function productively at his job or in his political campaign. One way he attempted to deal with his feelings was through unhealthy relationships...He did progress in treatment and although he has been unable to find employment, he has become very involved in local and state politics with much motivation and energy. He did withdraw from treatment prematurely, but at the time, it was felt prognosis was good.”

Evidence of such behaviour as referred to by Dr. Martino in his report was given by Mr. Beardsley as he described his emotional instability and sporadic personal relationships since his wife’s death.

56. Ms. McGregor contended that Bruce Beardsley was a primary victim, that is to say not a mere spectator, but someone in respect of whom a duty of care was owed and he was therefore entitled to compensation for the psychiatric injury. She further contended that Post Traumatic Stress was a recognised psychiatric illness and that the symptoms of that illness were manifested in her client’s testimony.
57. In response to this aspect of the claim, Mr. Williams’ initial legal salvo decried any entitlement of Bruce Beardsley to General Damages, firstly on the basis that none of the alleged physical injuries or the claim for depression had been proved by evidence and as such ought to be disregarded. This point was implicitly conceded by Counsel for Mr. Beardsley, when she adverted in her written submissions to the fact that no claim was being made for minor injuries, but that the main aspect of her client’s claim in this area was for damages for post traumatic stress.
58. Secondly, Mr. Williams argued that the medical report of Dr. Martino, tendered and relied on by Mr. Beardsley, noted that he was suffering from “complicated grief with added issues of Post traumatic Stress.” He

contended that where a claim is made for compensation for nervous shock or psychological injuries, such an injury must be a recognised psychiatric condition. Counsel further contended that grief per se was not a recognised psychiatric condition for which compensation could be awarded. As such, any compensation to be awarded must be as a result of the Post Traumatic Stress identified by Dr. Martino. However, even on this ground, Mr. Williams asserted that as a matter of law, on the evidence, Bruce Beardsley was not entitled to an award of damages, as the condition of which he complained must have arisen from a situation of sudden shock. He further asserted that there was no evidence as to when Mr. Beardsley's initial condition developed and that Dr. Martino's report did not assist the Court in coming to a finding that the onset of post traumatic stress was instantaneous or contemporaneous with the accident. No award he concluded should be made under this head of damages.

59. In advancing his submissions, Counsel Mr. Williams relied on the case of **Alcock and others v Chief Constable of the South Yorkshire Police** [1991] 4 ALL ER 907. This was a case arising out of the disaster at the Hillsborough Stadium on 15th April, 1989. A football match was arranged to be played at the stadium between the Liverpool and Nottingham Forest football clubs. It was a semi-final of the FA Cup. An excessive number of intending spectators was allowed to enter the ground at an area reserved for Liverpool supporters. They crammed into that limited area and in the resulting crush ninety-five (95) people were killed and over four hundred (400) physically injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster and were broadcast later on television and over the radio as news items. However none of the television

broadcasts depicted the suffering or dying of recognisable individuals. A number of persons, some of whom were at the match but not in the area where the tragedy occurred, brought legal proceedings against the chief constable who was responsible for crowd control, claiming damages for nervous shock resulting in psychiatric illness alleged to have been caused by seeing or hearing news of the disaster. None of the plaintiffs succeeded in their claims for damages. It was held by the House of Lords that:-

“... the plaintiff could only recover if (i) his relationship to the primary victim was sufficiently close that it was reasonably foreseeable that he might sustain nervous shock if he apprehended that the primary victim had been or might be injured, (ii) his proximity to the accident in which the primary victim was involved or its immediate aftermath was sufficiently close both in time and space and (iii) he suffered nervous shock through seeing or hearing the accident or its immediate aftermath.

... It followed that none of the appellants was entitled to succeed because either they were not at the match but had seen the disaster on television or heard radio broadcasts or their relationship to the victim had not been shown to be sufficiently close to enable them to recover.”

60. In the **Alcock case**, the plaintiffs were all secondary victims of the defendant's alleged negligence, that is to say, they were in the position of spectators or bystanders. That case focused on the elements of proof required by a secondary victim who was not directly involved in an accident, but who may have suffered psychiatric illness brought about by witnessing an accident in which a person to whom he was close was injured.
61. An issue for which an early determination has to be made is whether Bruce Beardsley is to be classified as a primary or secondary victim. I am satisfied on the evidence in the present case that this Claimant falls

into the category of both a primary and a secondary victim. He and his wife Diane were passengers directly involved in that traffic accident on the 17th May, 2000. Bruce Beardsley testified that when he became aware of the impending collision, he began screaming as he saw the approaching truck heading towards them. The violent impact threw his wife into his lap where he saw that the right side of her skull had caved in and she was bleeding profusely. I find that the horror and confusion of the moments prior to the accident which led to the death of Diane Beardsley caused her husband Bruce to suffer nervous shock for which he had to seek medical attention. He gave evidence of being emotionally distressed, having difficulty sleeping because of recurring thoughts of the accident and developing a heightened fear of death. Consumed by a feeling of hopelessness, he was unable to work for several months.

62. Additionally, I find that Bruce Beardsley has satisfied the three (3) proximity requirements indicated in the **Alcock** case entitling him to be considered a secondary victim, these being:- a close tie of love and affection with the immediate victim, a sufficient closeness to the accident in time and space and a direct perception of the incident through unaided senses of sight or hearing. Having found Jamaica Tours in breach of its duty of care to the Beardsleys and that the consequences of such breach would be to expose them or either of them to risk of personal injury, it matters not whether the injury in fact sustained was physical or psychological; see **Page v Smith** [1996] AC 155.
63. I accept Mr. Williams' contention that a litigant is not entitled to compensation for grief or distress arising from the loss of a spouse or loved one due to the negligence of a Defendant. This principle is

reflected in the dicta of Lord Lloyd of Berwick in **Page v Smith** at page 189 where he stated:

“Shock by itself is not the subject of compensation, any more than fear or grief or any other human emotion occasioned by the defendant’s negligent conduct. It is only when shock is followed by recognisable psychiatric illness that the defendant may be held liable.”

I find however on the evidence of Dr. Martino that Bruce Beardsley suffered from a recognised psychiatric illness that is, Post Traumatic Stress. This condition was induced by the sudden shock of the accident, Bruce Beardsley’s fear of injury to himself and to his wife, as well as the devastating aftermath, which agitated his mind to the extent that he had to obtain the medical services of a psychologist within days of the incident. I find therefore that Bruce Beardsley is entitled to compensation for nervous shock as a result of the psychiatric illness occasioned by the accident, whether as a primary or secondary victim.

64. In suggesting a figure as reasonable compensation, Counsel for Mr. Beardsley referred to the unreported cases of **Celma Pinnock v The Attorney General for Jamaica** 5 Khan 289 and **Neville and Monique Wilchombe v Princess Margaret Hospital and the Attorney General of the Commonwealth of Bahamas** C.L.S No. 1309 of 1996, an unreported Judgment of the Supreme Court of the Commonwealth of the Bahamas. In the latter mentioned case, Neville Wilchombe and his wife Monique sued to recover damages for psychiatric injury they suffered when they witnessed the death of their four (4) day old infant daughter following the contraction of an infection while in the hospital. They met with a consultant psychiatrist, Dr. Michael Neville, nineteen (19) months after the death of their baby. Mr. Wilchombe described his emotional experiences to the psychiatrist as irritability, constant

insomnia, being short-tempered at home, experiencing panic attacks over a three (3) year period, and reliving the experience of the day his daughter died with a sense of guilt for her death, which led to his venting those feelings to his wife and five (5) year old daughter. Mrs. Wilchombe described her experiences as a lack of energy, periods of extreme anger accompanied by outburst of tears, disinterest, avoidance of emotional issues and the lack of tolerance to deal with learning-disabled and behaviour- disordered children in her chosen field as a school psychologist. Dr. Neville concluded after conducting examinations on them, that they were both suffering from clinical depression.

65. The learned trial Judge found inter alia:-

“.... The plaintiffs were shocked when they saw tubes leading into the baby’s body and medical personnel attempting to resuscitate her and when they learned from the paediatrician she died.

Their condition developed into clinical depression, a psychiatric illness which medical science classifies as a condition that is in a different category to normal bereavement and grief.”

He awarded damages for psychiatric injury to both parents.

66. An important and novel aspect of that Judgment is that a section on Psychiatric Damage from ‘Guidelines For the Assessment of General Damages in Personal Injury Cases (Fifth Edition)’, compiled by the Judicial Studies Board in England and Wales was included as an end note to that Judgment by the learned trial Judge. Under the subhead Psychiatric Damage, it reads:-

“In part A of this chapter some of the brackets contain an element of compensation for post-traumatic stress disorder

(A) Psychiatric Damage Generally

The factors to be taken into account in valuing claims of this nature are as follows:

- (i) The injured person's ability to cope with life and work;
- (ii) The effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;
- (iii) The extent to which treatment would be successful;
- (iv) Future vulnerability;
- (v) Prognosis;
- (vi) Whether medical help has been sought."

67. It goes on to categorise the injuries under the headings, Severe, Moderately Severe, Moderate and Minor and to each category is attached a range of likely awards, depending on the circumstances of each case. In an uncommon but not unexpected show of unanimity, both Counsel agreed that if Bruce Beardsley's condition were to be classified in any of the aforementioned categories, the most appropriate one would be 'Moderate'. That category is described in those Guidelines as follows:-

"While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good."

The range of likely awards was identified as between £3000.00 and £9500.00. Those figures when converted to Jamaican dollars range between \$365,000.00 and \$1,156,000.00

68. The Plaintiff in the **Celma Pinnock** case was a 39 year old businesswoman, an arriving passenger at the Norman Manley International Airport who was returning after her first trip abroad. She was assaulted when she was strip searched and a male official forcibly inserted his fingers into her vagina. As a result of the incident, she suffered severe anxiety, severe depression, loss of libido and severe

phobic responses related to travel and sexual activity. She sued for False Imprisonment, Assault and Battery, Aggravated and Exemplary Damages. The Assessment of Damages was heard by a Judge and Jury and lasted six (6) days. The jury awarded the sum of \$2,500,000.00 as General Damages and although they were of the view that it was an appropriate case for Exemplary Damages, they made no further award as the amount had a sufficiently punitive element.

69. Ms. McGregor readily admitted that the fact scenario there was different from the present case and that those injuries were far more serious. She accepted that a substantial discounting of the award, which at the date of her submissions translated to \$5,200,000.00 was necessary. She however submitted that Mr. Beardsley's injuries were also significant as he watched his wife die in that tragic accident, went through two (2) years of psychotherapy, suffered panic attacks, was unable to work and became reliant on medication. Counsel urged the Court that based on those factors and with the guidance of the cases cited, an award of \$3,000,000.00 would not be unreasonable.
70. Mr. Williams on the other hand submitted that if the Court were minded to make an award of General Damages with respect to the mental condition of Mr. Beardsley, an award of no more than \$1,000,000.00 would suffice. In coming to that sum, he also referred to the **Celma Pinnock** case, while at the same time highlighting the significant material differences in the injuries sustained by that litigant.
71. The other aspect falling under the head of General Damages is Bruce Beardsley's claim for damages for loss of his holiday. Counsel Ms. McGregor relied on the cases of **Jarvis v Swans Tours Ltd** [1993] 1 ALL ER 71 and **Ichard and Another v. Frangoulis** [1997] 1 WLR 556 as authorities for the proposition that her client was entitled to an

award of damages for loss of enjoyment of his holiday. It was held in that latter mentioned case that the loss of enjoyment of a holiday caused by injury to a tourist was a reasonably foreseeable result of a negligent act. She submitted that a sum between \$350,000.00 and \$500,000.00 would be reasonable compensation for this aspect of Bruce Beardsley's loss, bearing in mind that the accident occurred on the second day of the Beardsleys five (5) day Caribbean vacation.

72. In his response, Mr. Williams accepted that an award ought to be made for loss of the holiday in the circumstances of the present case. However, he referred to the **Ichard** case as authority for his contention that loss of enjoyment of holiday is a part of General Damages and that no separate sum ought to be awarded for that specific claim. As Peter Pain J. opined in that case at page 558;-

“I regard it (loss of enjoyment of holiday) not as a separate head of damages but as one of the factors to be taken into account when assessing general damages, and as a factor which would lead me to give rather more by way of general damages than I otherwise would do.”

Mr. Williams recalled the suggested range of awards in the Wilchombe case for a person with a psychiatric injury deemed “moderate” as between £3,000.00 and £9,500.00 with the top end of that scale converted at that time to \$1,150,000.00. He therefore suggested that the total award for General Damages be \$1,150,000.00, which would include compensation for the lost holiday.

73. Having carefully considered the authorities cited, I accept Mr. Williams' submission that although Bruce Beardsley was entitled to be compensated for the vacation lost by the tragic accident, a separate award ought not to be made for this item of damages. Instead, any award to be made for General Damages ought to be upwardly adjusted

to take into account that loss. I am satisfied therefore that the sum of **\$3,250,000.00** would be adequate compensation to Bruce Beardsley as General Damages in this matter.

74. Bruce Beardsley, as a consequence of his wife's sudden and untimely passing, sought as Executor of his late wife's Estate to recover damages pursuant to the Fatal Accidents Act on behalf of her dependants and under the Law Reform (Miscellaneous Provisions) Act for the benefit of her estate. He was the sole witness for the Claimants in this consolidated action. His evidence was that they lived in Pennsylvania with his wife's two children from her previous marriage, Mia Lindquist born on the 3rd March, 1981 and Michael Lindquist born on the 15th June, 1983. At the date of their mother's death, they were nineteen (19) and sixteen (16) years old respectively.

75. Diane Beardsley was born on the 13th April, 1955 and was forty-five (45) years old at the time of her death. She was employed to Breuners Home Furnishing Corporation as a Supervisor in the After Delivery Sales Department and her basic salary at the time of the accident was US\$32,000.00 per annum. This was confirmed by a letter from her employer dated August 11, 2000, which also stated that she would have been eligible for a four percent (4%) increase on her annual base salary, bringing her new salary to US\$33,280.00 as at October, 2000. That correspondence went on to indicate that;

“based on Diane's past history of work performance and merit increases, she would have been eligible for anywhere between three and five percent increases annually and ... again, based on her past performances, she would have also be (sic) eligible for promotion within the company that would have enhanced her income opportunities.”

76. In his testimony, Bruce Beardsley stated that his wife spent approximately twenty per cent (20%) of her income on her personal

expenses, while the balance of her income was spent to maintain the children and their household. The household expenses which included electricity, telephone, internet and grocery bills, as well as the mortgage and a fixed sum for property tax, calculated on a yearly basis amounted to US\$28,944.00. These expenses were shared equally by the Beardsleys, with each paying US\$14,472.00. In addition, Mrs. Beardsley made an annual charitable contribution of US\$200.00.

77. Diane Beardsley's liability for tax amounted to 21.51% of her gross annual salary. That percentage was arrived at as follows:

Federal Income Tax	14%
Social Security Tax	4%
State Unemployment Insurance	.01%
Pennsylvania Income Tax	2.5%
Local County Income Tax	<u>1%</u>
	21.51%

78. For a beneficiary to succeed in a claim for compensation under the Fatal Accidents Act, he must firstly qualify as a near relation pursuant to Section 2 of that Act. Secondly, there must be actual dependency by that near relation on the deceased at or prior to the time of the death, or evidence of a likelihood that the near relation would have been maintained or supported by the deceased had he lived. Thirdly, there must be evidence sufficient to enable the calculation of the amount of and the time frame for such dependence of the near relation, to assist the Court in arriving at an award reflecting such dependence.

79. In the present case, the husband of the deceased in his evidence clearly indicated his late wife's gross annual salary, the deductions to be made for tax purposes and household expenses, as well as a general statement as to that part of her salary spent on herself. No evidence was given

however to show what, if any, expenses were incurred by Diane Beardsley in relation to her children. Nor was there any evidence of the educational level attained by each child at the date of their mother's death to assist the Court in determining the amount of the loss of support and the period of the dependency for each child. Section 4(4) of the Fatal Accidents Act speaks to this issue when it states:-

“If in any such action the court finds for the plaintiff, then, ... the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person...”

If compensation is to be awarded for actual loss of support from the deceased or for reasonably expected pecuniary loss by the near relations, the obligation rests on them to provide the requisite evidence of such dependency or loss. This I find they have failed to do.

80. In the absence of such evidence, it is perhaps not surprising that Counsel Ms. McGregor, in her closing address raised no issue nor advanced any submissions as to the amount of any awards to be made to the children of the deceased or to Bruce Beardsley under the Fatal Accidents Act. She instead focused on the quantum to be awarded as compensation for Loss of Earnings during the lost years under the Law Reform (Miscellaneous Provisions) Act.
81. The claim for Funeral Expenses as well as the cost of obtaining Letters Testamentary in Diane Beardsley's estate in the sum of US\$12,536.00 under the abovementioned Act was never challenged by the Defendants. Similarly, no opposition was raised to the claim of J\$10,000.00 for Loss of Expectation of Life. An award is therefore made in favour of the estate in the amounts of US\$12,536.00 and J\$10,000.00 respectively for those areas of loss.

82. In considering the claim for Loss of Earnings during the period when, were it not for the accident Diane Beardsley would have continued to work and earn, that is the lost years, an appropriate multiplier has to be selected. She was forty-five years old when she died and would probably have retired at age sixty. A reasonable figure to adopt as the multiplier is eight (8) years after taking into account the uncertainties of life. The pre trial period would amount to 6 ½ years with the remaining 1 ½ years reflecting the post trial period.
83. When she died in May 2000, Diane Beardsley was earning a base salary of US\$32,000.00 and was entitled to a four percent (4%) increase in October, 2000. Based on her work related past performances, she would have been eligible for an annual average four percent (4%) increase on her base salary and possible promotion within the company. At the time of the hearing, she would have been entitled to receive a base salary of US\$40,490.21.

Pre trial Period

84. In applying an annual four percent (4%) increase to Diane Beardsley's base salary of US\$32,000.00 from 2000 to the date of trial, the following list reflects her gross annual salary over that period.

2000	US\$32,000.00
2001	33,280.00
2002	34,611.20
2003	35,995.65
2004	37,435.47
2005	38,932.89
2006	<u>40,490.21</u>
	US\$252,745.42

Her gross average annual income would then amount to US\$36,106.46.

From this sum, the deductions set out hereunder have to be made:-

US\$36,106.46 less 21.51% tax (\$7,766.50) = \$28,339.96

US\$28,339.96 less 20% (personal expenses of \$5667.99) =
\$22,671.97

US\$22,671.97 less \$14,672.00 (1/2 household expense and
charitable contribution) = \$7999.97

US\$7999.97 x 6.5 (Pre trial multiplier) = US\$51,999.81

Loss of Earnings in the lost years for the Pre Trial Period would
therefore amount to **US\$51,999.81.**

Post Trial Period

85. At the date of trial, Diane Beardsley's gross annual income would have
been US\$40,490.21. This sum would have to be reduced by the
following deductions;

US\$40,490.21 less 21.51% tax (\$8,709.44) = \$31,780.77

US\$31,780.77 less 20% (personal expenses of \$6,356.15) =
\$25,424.62

US\$25,424.62 less \$14,672.00 (1/2 household expenses and
charitable contribution) = \$10,752.62

US\$10,752.62 x 1.5 (post trial multiplier) = US\$16,128.93

Loss of Earnings in the lost years for the Post Trial Period amounts to
US\$16,128.93.

The total sum awarded for Loss of Earnings in the Lost Years is
US\$68,128.74.

86. As mentioned earlier in this Judgment, the trial of this action proceeded
only against the 5th and 6th Defendants, as the claims against the 3rd and
4th Defendants were discontinued on the second day of the trial in
accordance with the Consent Judgment entered in favour of the

Claimants against the 1st and 2nd Defendants in the sum of J\$3,000,000.00. That sum then has to be deducted from any award made in this matter.

87. There will therefore be Judgment in favour of the Claimants against the 5th Defendant in the amounts of US\$83,514.57 and J\$260,000.00 being made up as follows:-

Re Bruce Beardsley –

Special Damages	US\$2,849.83
-----------------	--------------

General Damages

Post Traumatic Stress and Loss of Holiday (\$3,250,000.00 less Consent Judgment of \$3,000,000.00)	J\$250,000.00
----------------------------------------------------------------------------------------------------------------	---------------

Re Estate Diane Beardsley under the Law Reform

(Miscellaneous Provisions) Act –

Funeral Expenses and Costs of

Letters Testamentary	US\$12,536.00
----------------------	---------------

Loss of Earnings in the

Lost years	US\$68,128.74
------------	---------------

Loss of Expectation of Life	J\$10,000.00
-----------------------------	--------------

Interest is awarded on the sum of US\$2,849.83 at the rate of 3% per annum from the 17th May, 2000 to the date hereof.

Interest is awarded on the sums of US\$12,536.00 and J\$250,000.00 at the rate of 3% per annum from the 7th July, 2003 to the date hereof.

Costs to the Claimants against the 5th Defendant to be taxed if not agreed.

Judgment for the 6th Defendant against the Claimants with costs to be taxed if not agreed, such costs to be paid by the 5th Defendant.