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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

COMMON LAW

SUIT NO.C.L.910 of 1973

BETWEEN	Joyce Maitland (Executrix : estate Headley George Howell, deceased)	Plaintiff
AND	Avis Rent-A-Car Ltd. and Frederick Henry	Defendants

Tried: 1977 - February 28, March 1 and 2

W. B. Frankson for plaintiff

R. M. Millingen for first defendant

May 12, 1977

Parnell, J.

When the trial of this action was concluded a little after mid-day on March 2, I announced that an oral judgment would be delivered on that day at 2 p.m. Mr. Frankson on behalf of the plaintiff urged eloquently that the judgment should be put in writing. His contention is that the point of law involved has not yet, as far as he is aware, been expressly stated or settled in Jamaica.

A matter of great public importance is involved in the decision and it raises a question which is of concern to the ordinary pedestrian on the crowded streets of the island; to the tourist who is on a sightseeing tour of our paranomic view and to those persons who rent cars to be driven by persons not employed by the owners. The question which this case has raised may be put thus: What liability, if any, does a car hiring establishment incur, if it rents a car to an American tourist who by his negligent driving, causes injury to a Jamaican and then leaves the island without any trace of his identity or whereabouts before action is brought? Another way of posing the problem may be stated thus:

> Q. If a car rental firm in the course of its business rents a car to a person and that person negligently injures a third party, can the third party or his personal representative properly enforce his claim against the car rental firm for the negligence of the driver of the hired car?

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That is the question which is contained in the facts which I shall now outline. The matter of the quantum of damages must rest on the solution to the problem of liability.

The first defendant hires a car

Avis Rent-A-Car Ltd. is a world wide organisation. It has a registered office in Jamaica. The company is engaged in the business of renting cars mostly to tourists. An intended hirer of a car must not be under 25 and he should be the holder of a driver's licence for at least three years. A written agreement is drawn up and signed by the hirer and the company. The hirer is given a copy of the document, the company keeps the original.

On the 6th September, 1972, the second defendant (Henry) hired a Volkswagen motor car, licensed and numbered FK 162. The car was then two months and three weeks old and it had done 3,509 miles. Before the company handed the car to the second defendant, it was completely serviced, checked and tested. Brakes, lights, tyres and horn were checked by a competent mechanic. The hiring was open as to time but Henry was told to bring in the car for checking at the end of each week and to satisfy a weekly payment for the hire.

Henry on his own business

It appears that the second defendant Henry went on a mission concerning private detection on behalf of an investigation agency with head office in Kingston. The deceased Headley George Howell was employed to Kane's Investigation and Security Services and went with Henry on his mission. On the 24th September 1972, Henry was driving the hired car along the publicroad in the parish of Trelawny. He was on the road leading from the direction of Montego Bay towards Falmouth. On reaching the district of Wiltshire and while negotiating a left hand corner, the car got out of control, left the road and overturned. Howell died the same day from injuries he received as a result of the incident. But Henry the driver survived. He received injuries and was hospitalised for a period.

What caused the incident?

The plaintiff did not have a witness to prove how or why the car overturned. A police officer (Acting Corporal H. Samuels) of the Trelawny Constabulary went to the scene at about 3:30 p.m. on the day in question. As a result of a report the officer was despatched to investigate. And he

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gave certain facts from which it is argued that negligence on the part of the driver of the car, ought to be inferred. It is said that this is a case where "the thing speaks for itself."

The well worn latin tag " res ipsa loquitur" is summoned to assist the case.

Facts relied on

Acting Corporal Samuels said that at the scene, he observed the following:

(1) A motor car, FK 162 on the left side of the road facing Falmouth. The car was off the road.

(2) The surface of the road is asphalted, it was dry and in good condition.

(3) There was a drag mark on the left side of the road towards Falmouth. The drag mark was 39ft. long and it was below the apex of the corner.

(4) The width of the road in the area of the scene is 22 feet. The car ended up at a distance of 98 feet from the first sign of the drag mark.

(5) The two front tyres were in good condition but the two rear tyres, according to the police witness, were smooth and there was a cut on the side of the outer portion of the left rear tyre. This tyre was deflated. There was a hole on the left rear tyre about 1½" in length.

(6) The car was extensively damaged and was unable to move on its own motion.

When Corporal Samuels returned to Falmouth where he was then stationed he saw the second defendant in hospital. Although suffering from injuries, the driver told Corporal Samuels what happened. The explanation is simple in outline.

> " I was driving from the direction of Montego Bay towards Falmouth and on reaching Wiltshire and while going around a corner, the left rear tyre blew out, the car got out of control and overturned."

Henry was speaking at a time when he knew at least that his passenger was seriously injured, the hired car was extensively damaged and that he at the

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time, was the sole survivor to tell the tale. The damaged car was taken to Falmouth and placed in the custody of the police. When the claims manager of the first defendant saw the car on the following day, it was registering 4,808 miles. The car had, therefore, registered nearly 1,300 miles since it was delivered to Henry pursuant to the written agreement. It had averaged about 70-72 miles per day over the period.

Was the car hired out with any defects at all?

In the statement of claim, the plaintiff relies on this factor as part of the particulars of negligence.

> " Failing to ensure by reasonable and adequate inspection, examination, repairs and maintenance that the said motor car was fit for conveying passengers in safety."

This failure must be attributed to the first defendant. But I find no such failure. The evidence for the defence supported by documents, is that the car FK 162 was new; that it was regularly serviced and that it was examined, checked and inspected before delivery to the second defendant Henry. I find that the tyres on the car when it was delivered were in good condition and road worthy and if the witness Samuels did see smooth tyres on the rear wheels of the car - a piece of evidence which I reject - they were not the tyres which the car had on when Henry took delivery from the first defendant.

Indeed, when faced with the documentary evidence as to the age and servicing of the car, Mr. Frankson very wisely asked no question of the first defendant's Claims Manager or of the mechanic concerning adequate inspection, repairs, maintenance and road worthiness of the ill-fated vehicle.

The proposition relied on against the first defendant as "initial negligence" having been knocked out, Mr. Frankson now relies on the principle of agency as between the first and second defendant. Paragraph 2 of the statement of claim is in these words:

> " At all material times the first named defendant was the owner and the second named defendant the agent of the first named defendant - was the driver of motor vehicle registered FK 162."

The purpose for the hiring of the car was known to the first defendant. The Claims Manager, (Mr. Donald Reddish) has this to say:

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"Henry was employed by Kane's Investigating Service; he was hiring the car for Kane s business."

In September 1972, the first defendant had a fleet of about 240 cars to be rented for reward." If every car was hired out at any one time, the first defendant would have had no driver on the road directly employed as such to manage or operate even one of its motor vehicles.

First defendant's defence

The substance of the defence of the first defendant is to be found in paragraphs 3 and 4 of the defence. They are as follows:

Para.3: "By a contract in writing made on the 6th day of September, 1972, the first defendant let on hire the said motor car vehicle to the second defendant. Pursuant to the said contract the first defendant delivered the said motor vehicle to the second defendant and thereby parted with possession and control of the same."

Para.4: "On the date and at the time of the accident referred to in the statement of claim, the said motor vehicle was still hired to the second defendant and was not in the possession or control of the first defendant and was not being driven for or on behalf of the first defendant. The first defendant disclaims all legal liability for the alleged or any negligence of the second defendant."

Faced with the stark legal problem in the defence, Mr. Frankson moved towards it with cheerful readiness and assurance. He was careful as he walked along the thin edge. In cross examination, he put these questions to the Claims Manager.

Q. "Does your company take precautions as regards the competence and suitability of the person or persons who will drive the car?

A. Yes Sir.

Q. Would this be a true statement of your company s position that in order to ensure the profitability of its operations

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it delegates the duty of driving the car to the person or persons who hire the vehicle from it?"

The last question was not allowed. It is a mixture of law and argument having regard to how the operation of the company's business is maintained.

Liability of second defendant

The second defendant did not appear at the trial. He entered an appearance to the writ of summons but he did nothing further other than to change his attorney about three weeks after his appearance was entered. An interlocutory judgment in default of defence was entered against him in due course.

Where the happening of an incident itself - the res ipsa - points to negligent management as the explanation in preference to any other reasonable explanation which tends to negative negligence, then the presumption of negligence remains alive for the benefit of the plaintiff. On the facts, I find that the second defendant was negligent in the management and operation of the motor car which left the road and caused injuries to the passenger Howell resulting in his death. I reject the suggestion that there was a blow out while the second defendant was driving the car without any negligence on his part.

Can the first defendant escape liability?

It is impossible for the first defendant to operate successfully a fleet of 240 motor cars without a system whereby competent drivers can be found to operate them in the course of business. The condition that a hirer must be at least 25 years old and that he should hold a driver's licence for at least three years, is evidence of the precaution which the company takes, in so far as the use of their motor vehicles is concerned. The more competent and careful the driver is, the more profitable and impressive is the resultant benefit to the owner of the motor vehicles which form the fulcrum of the operation.

Does the clue to the solution of the problem lie in the Motor Vehicles Insurance (Third-Party Risks)Act?

Motor Vehicles Insurance (Third-Party Risks) Act

Section 3(1) of the Act states as follows:

> " Subject to the provisions of this Law, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third - party risks as complies with the requirements of this Law."

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The "requirements" are spelt out in section 4(1) of the Act as follows:

> " In order to comply with the requirements of this Law the policy of insurance must be a policy which" -
>
> (a) is issued by a person who is an insurer and
>
> (b) insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of, the use of the motor vehicle on a road."

Where the policy of insurance has been issued, the liability arising against any person covered by the insurance is given a statutory protection against the insurer if the said liability is not otherwise satisfied. This is what section 4(3) of the Act has to say:

> " Notwithstanding any rule of law or any thing in any enactment, or any other Law to the contrary, a person issuing a policy of insurance under this section shall be liable to indemnify the persons, or classes of persons, specified in the policy, in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

A summary of sections 3(1); 4(1) and 4(3) of the Act aforesaid in so far as they affect the first defendant, suggests that the following propositions may be enunciated. Whether it should be held that the legal position is as shown hereunder will be stated hereafter.

Summary

(1) It was under a statutory duty to effect an insurance against third party risks in the use of its vehicle FK 162 on the public road;

(2) As between itself and a third party, it was under a statutory duty to see that there was a policy of insurance to cover the driving of the second defendant until the car FK 162 was returned pursuant to the contract of hire;

(3) As between itself and the insurer, it has a statutory right to be indemnified, subject to the limit specified in the contract of insurance, against any damage to

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which it is liable to pay a third party arising out of, or on account of the use of motor vehicle FK 162 on the road with its consent and in the course of its business.

Mr. Frankson in a lengthy, interesting and at times emotional final address made certain submissions based on an examination of three English cases. He adopted a form of reasoning which the geometrician calls "forming the proof." The social consequences are too undesirable and inimical to allow a car hiring firm which exists by hiring motor cars to tourist and to any person who will pay the rental to escape liability on the facts of the case. With that theme as his embrocation, he analysed firstly Ormrod v. Crosville Motor Services /1953/ 2 A.E.R. 753 (C.A.). In that case, an arrangement was made between the owner of a car and his friend whereby the friend was to drive the owner's car from Birkenhead to Monte Carlo. The owner was attending the Monte Carlo rally. A suitcase of the owner was to be carried in the car. After the driver had paid a visit to friends, he was to meet the car owner at Monte Carlo before the end of the rally and thereafter both the owner and his friend were to go on holiday in Switzerland. While driving to Dover on the direct route from Birkenhead, the friend was in a collision and he was found partly to blame. The owner of the car was held liable on the ground that on the occasion of the driving, the friend was acting as his agent. Mr. Frankson adopted the following words of Denning, L.J. (as he then was):

> " It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes." ibid, p.754.

Mr. Frankson argued that at the time of the accident, the car was being used wholly or partly for the owner's purposes and it was also being used for the purposes of Henry. There is no doubt that on the facts in Ormrod's case (supra) the owner of the car could not escape. But the facts in this case are so different. Encouragement for relying on this case may have been generated by the fact that under the contract of hire, Henry was required to pay the first defendant a certain sum for mileage done together with the stipulated weekly rental. So long as the car was on the run, there was reward going towards the owner. But would

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this fact make a particular run by Henry a trip "for the owner's purposes" within the meaning of Lord Denning's language in Ormrod's case?

Mr. Frankson turned next to Rambarran v. Gurrucharran /1970/ 1 W.L.R. 556 (P.C.). This was an appeal to the Privy Council from a majority decision of the Court of Appeal, Guyana, which allowed an appeal from the judgment of the High Court dismissing the action brought by the respondent against the appellant. The facts were that one of the nine sons of the appellant drove the family car on a Sunday. There was a collision with a car owned by the respondent. The appellant, a chicken farmer, did not have a licence to drive. Some times the car was used in the business of the appellant. On the Sunday in question, the appellant's son L, took away the car unknown to the appellant; the mission of L had nothing to do with the appellant's business. The respondent sued the appellant for damages but he did not join L as a defendant. And at the trial L was not called by either side.

The trial judge, on the totality of the evidence, found that it was not proved that at the time of the accident, L was the servant or agent of the appellant. On these facts, judgment was entered for the appellant at the trial. It was the reversal of this finding of fact by the Court of Appeal which was restored by the Privy Council. I do not think with respect that this case is of any help in solving the problem which is before me. There was a contested factual situation as to agency. The trial judge made a finding. What is contested here is whether in law, on the uncontested facts giving rise to the rental of the motor car and the happening of the event while the car was in the possession of the hirer (the second defendant), there is any liability attributable to the owner of the car; i.e. to the first defendant.

It was when the third case was examined that Mr. Frankson articulated certain propositions which, according to him, flow from the several speeches of the Law Lords engaged in the debate. The case is Morgans v. Launchbury, /1973/ A.C. 127; /1972/2 A.E.R. 606. A husband and his wife each owned a car. After a while, it was considered more economical to have one car for the use of the family. The husband sold his car; the wife retained hers in her own name. Husband and wife used the car to go to and from work. Occasionally, the husband would go and have a drink with friends after work and before going home. The wife shewing worry about this arrangement, the husband promised his wife that if at any time

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he was unfit to drive, he would get a friend to drive him home. One evening the husband decided to go out drinking and he telephoned his wife to inform her of his plans. The husband visited a number of public houses and had drinks. After the drinking bout, the husband, realising that he was not in a position to drive, asked a friend C to drive. The husband went into the back of the car and fell asleep. While driving, the car was in a collision with a bus owing to the negligence of C. The husband and C were killed. Three other passengers in the car were injured. The question was whether the wife being the registered owner of the ill-fated car, at the time of the driving, C could be said to have been acting as her agent so as to make her liable in damages. Both the trial judge and a majority of the Court of Appeal held that C was the "agent" of the wife because:

(1) When the husband asked C to drive, the husband was doing what the wife had asked him to do if he had too much drink;

(2) C was driving the car in the wife's interest in getting her husband and the car home.

With the greatest of respect, the majority decision opended itself to a concerted attack in a further appeal. Every loving and loyal wife shows an interest in the safety of her husband wherever he is. She has an "interest" in the safe return of any motor car that he drives. But if a husband takes his wife's car and goes on a pub-crawl or sets out on a mission to visit a kept mistress, it is hard to understand how he could be said to be acting on the wife's behalf when he is on either of the expeditions above. The mere fact that he is driving her car or the family car cannot, by this co-incidence, make her liable on an occasion which she would expressly disapprove or where if she has no right to offer an "opposition" at home, - no reasonable woman could be said to have authorised the act leading to the manner of driving complained of.

The judgment of Denning, M.R. in Morgan's case, was put under close scrutiny in the House of Lords. This is what the learned Master of the Rolls had to say:

> " The owner or hirer is at common law responsible for all injury or damage done by his permitted driver in the negligent driving of the car....." (See /1971/ 2 W.L.R. 602 at 608 D.)

But Viscount Dilhorne did not accept this statement as representing the law. This is what he said:

> " With great respect, in my opinion that is not the law now. I cannot find any authority which supports that statement. Whether it should be the law or indeed should have been the law, is a matter for argument on which views may well differ. " (See/1972/ 2 W.L.R. 1217 at p.1224 D)

Lord Pearson also had something to say:

> " Lord Denning M.R., with the object of ensuring that compensation will be available for injured persons, has sought to extend the liability of a car owner for negligent driving of his car by other persons, because the car owner is the person who has or ought to have a motor insurance policy." ibid. p.1227 D - E.

The learned Law Lord continues:

> " Secondly, Lord Denning treats permission by the owner for a person to drive his car as being in most cases sufficient to impose upon the owner liability for that person's negligent driving of the car." ibid 1227 G - H.

But Lord Pearson rejected these "new principles" of Lord Denning as innovations. The final sentence in the speech of Lord Pearson, puts the rejection in these words:

> " It seems to me that if the proposed innovations are desirable, they should be introduced not by judicial decision but by legislation after suitable investigation and full consideration of the questions of policy involved." ibid p.1228.

The other three Law Lords (Lord Wilberforce, Lord Cross of Chelsea and Lord Salmon) uttered sentiments to the same effect. The majority decision of the Court of Appeal was unanimously reversed. It seems, with respect, that on the facts, the criticisms levelled at the reasoning of Lord Denning are justified. One of the broad propositions relied on was this:

> " the owner of a car can only free himself from the liability for the user of it by someone whom he has permitted to use it if he has no interest or concern in the purposes for which it is being used." (See Lord Cross /1972/2 W.L.R. 1217 at p.1230 D.)

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Every owner of a car who lends it to a friend for the friend's own purposes, has an interest in the safe return of his vehicle and in the safe driving of his friend. But this interest and concern could not possibly make the owner liable if his friend should borrow the car to attend a wedding and while under the influence of drink should drive on the return journey and by negligent driving, cause injury to a pedestrian.

In this case the following appear:

(1) The first defendant owns the car and is required to effect a policy of insurance to cover third party risks when the said car is being driven by one of its hirers;

(2) When the car is being driven by a licensed hirer the first defendant for its own purposes, would have elected to adopt this course as part of its business arrangement. Without a driver there would be no use for its fleet of cars. And if the cars are not on the road, the substratum of its object and existence would disappear.

What is the position if a car is used on the public road under a contractual arrangement with the knowledge and consent of its owner as part of its business arrangement? Is the driver then acting on behalf of the owner or is he acting, at least, partly on behalf of the owner and partly on behalf of himself? In deciding this question is it relevant to consider whether the first defendant had any interest in the hired car being used for the purpose for which it was being used? There is no suggestion that Henry was using the car in a way outside the terms of the agreement between himself and the first defendant. And as I have already mentioned, apart from the weekly rental, for every mile registered on the speedometer, the first defendant gained some financial benefit by way of its business.

During his final address, Mr.Millingen was asked this question by the Court:

Q. "Is there any case whatever where your client would be liable for the negligent driving of a hirer after the car has been handed over to the hirer?

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A. In no case whatever. The business of the firm is to hire out cars. A motor car is not per se a dangerous chattel."

I am not sure that Mr. Millingen faced squarely the question which was posed. When the hirer takes a car and drives it, the driving is a task or duty which the car rental firm would have undertaken but for the system devised to allow a hirer of at least 25 years of age and with three years' driving experience to operate the hired vehicle. And this system, on the face of it, appears to be simple and profitable where competent and careful hirers are found. There is nothing wrong for a business man to arrange his affairs in such a way so that he escapes the might of trade unionism, the task of securing and maintaining a work force under his control and generally to make it easier for him to make what profit he can in his business. Where, however, a system is devised whereby a legal or statutory duty or responsibility may be evaded, the technique employed has to be carefully examined to see whether, in law, any success has been attained.

I am inclined to the view -- and I do hold that where a car rental firm hires a car to any person by way of business and under an arrangement as the one proved in this case, the hirer would not be driving merely for his own benefit and for his own concern. The driving of the car is of benefit to the firm renting the car. An innocent third party's claim for damages as a result of the negligent driving of the New York tourist who drove on the right instead of on the left of the road, should not be defeated by the tourist leaving the country within 48 hours of the collision together with the entering of a defence of the kind which is before me when action is brought against the firm. Parliament never intended any such absurdity and injustice in enacting the Motor Vehicles Insurance (Third Party Risks) Act. Under the Act someone must pay a third party compensation for injuries received as a result of negligent driving on the road.

I hold that on the facts as proved and which I have accepted -- as already outlined -- the second defendant Henry was the agent of the first defendant at the time of the driving and as a result, is jointly liable to the personal representative of the deceased for the damages sustained as a result of his death.

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Since the object of bringing the action is to secure compensation for the damage suffered by the third party as a result of negligent driving, consideration may have to be given to the question whether one or both of two defendants should be sued. There is no necessity for me to examine in detail the purport of section 4(3) of the Act which I have already mentioned. The wording of the section indicates that the Legislature intended to enable a person who is not a party to a motor insurance policy and between whom and the insurer there is no privity, to have a right himself to enforce the indemnity which the policy purports to cover. If this view is correct -- and I am not making a considered ruling - it would make it possible subject to such lawful exceptions as are available for action to be taken against the insurer in so far as it concerns the policy which covered Henry while he had the car on hire. So that even if the first defendant is not liable to be sued, as is contended by Mr. Millingen, there is a duty on the first defendant to produce the policy between ~~him~~it self and the insurer which covered the hire when the car was rented to Henry. And under the policy as produced, recourse could be made against the insurer by virtue of section 4(3) of the Act if Henry is unable to satisfy personally what judgment is recoverable against him.

What now remains is for me to assess the damages sustained. The evidence on this aspect of the case is not in a very healthy state. This was readily conceded by Mr. Frankson in his final address.

Assessment of damages

The deceased was 27 years old at the date of his death. He left two children Denise and Patrick, now aged 8 and 7 respectively. As a result of a recent motor car collision Denise suffered severe injuries and has become sickly. The plaintiff Joyce Maitland is the mother of the deceased. She is 63 years old. The deceased was her eldest son and according to her, the best son she had. From early, the deceased showed promise. From Maverley Primary School, he secured entrance to Holmwood Training School. At Holmwood, he won prizes in Athletic prowess. Running and swimming were his hobbies. He was a churchman who sang in the choir; drinking and smoking did not appeal to him. The deceased worked at Sheraton Hotel and thereafter he joined Kane's Investigation and Security Services as a private investigator but with the ~~ambition~~ aim to further his studies.

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Contributions made by the deceased to running of home

The deceased lived at the home of his mother in Waverley. He paid water rates, gave his mother a weekly sum of not less than $12, paid the light bill every two months, purchased cooking gas and "groceries" and in addition, according to the mother -

"At Christmas time I would get up to £100.

At August time, I would get a 'good piece' too."

There is no evidence of the actual weekly or monthly salary of the deceased. The mother could not help the Court in this respect and unfortunately the employer of the deceased apparently gave her no assistance in getting even this bit of evidence to assist her case.

The two children of the deceased have been living with the plaintiff since his death. About three weeks after his death, their mother took them to their grandmother s house and they have been there since. Only once since the deceased's death has the mother been seen by the plaintiff.

I find that the mother of the deceased - a healthy looking and agile woman - would have had at least 12 years of support from her son from the date of his death. The children Denise and Patrick would have lost at least 14 and 13 years support until they were in a position to help themselves.

The item "Funeral expenses of $530.00" was not challenged.
I award $800 as loss of expectation of life. Taking into account the usual hazards under the heading "vicissitudes of life" I award as follows under the Fatal Accidents Act:

Mother	$5,760.00	
Denise	$3,120.00	
Patrick	$3,360.00	
Total award under Fatal Accidents Act		$12,240.00
Less Life expectation $800 (merged in mother's share) - Law Reform		$11,440.00
Add Funeral expenses $530.00		$11,970.

There will be judgment against the first defendant in the sum of $11,970 with costs to be taxed if not agreed.