

W/MS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 2000/W006

BETWEEN	PHILLIP WARD (administrator of the Estate of Damion Phillip Ward, deceased)	1 <sup>ST</sup> PLAINTIFF
AND	CHRISTINE GABBIDON (administrator of the Estate of Damion Phillip Ward, deceased)	2 <sup>ND</sup> PLAINTIFF
AND	JAMAICA PUBLIC SERVICE COMPANY	1 <sup>ST</sup> DEFENDANT
AND	KAISER JAMAICA BAUXITE COMPANY	2 <sup>ND</sup> DEFENDANT
AND	KAISER BAUXITE COMPANY	3 <sup>RD</sup> DEFENDANT
AND	JAMAICA BAUXITE MINING LTD	4 <sup>TH</sup> DEFENDANT

Mr. Humphrey McPherson instructed by Humphrey L. McPherson & Co. for the Plaintiffs.

Ms. S. Powell instructed by DunnCox for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Mr. Ransford Braham instructed by Livingston Alexander & Levy for the 1<sup>st</sup> Defendant.

**Pre-Trial Review: 4<sup>th</sup> and 13<sup>th</sup> November 2003 and 27<sup>th</sup> October 2004**

**Campbell, J.**

The deceased, Damion Ward, a 14 year-old student and temporary handyman of the Kaiser Sports Club, was walking along a footpath on property

controlled by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants companies. He came into contact with high-tension wires, which were slung over the property. He was electrocuted. Phillip Ward and Christine Gabbidon are the parents of Damion. The wires were in the control of the Jamaica Public Service Co. against which Ward and Gabbidon had damages assessed in respect of their son's death.

The suit was commenced by a Writ of Summons on the 27<sup>th</sup> April 2000. The only Defendants then were Jamaica Public Service Co. Ltd. (JPS Co.) and Kaiser Jamaica Bauxite Co. Ltd. (Kaiser).

The Writ of Summons was endorsed with a claim for damages as follows: -

- (a) The Fatal Accident Act for the benefit of the deceased dependents.
- (b) The Law Reform (Miscellaneous Provisions) Act, for the benefit of his estate following his death on the 29<sup>th</sup> November 1997, caused unlawfully by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants or agents and/or by the gross negligence and or breach of statutory duty of the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendants, their servants and agents, at the Berrydale property, Jack's Lodge, Discovery Bay, St. Ann.
- (c) Aggravated Damages,
- (d) Interest
- (e) Further and/or other relief the honourable Court deems just.

The Statement of Claim alleged that JPS Co. was licensed under the provisions of the Electric Lighting Act and/or the Electric Lighting Regulations to supply electricity in the island of Jamaica and under a way-leave Agreement

managed and maintained the overhead high tension electric lines on the land occupied by Kaiser.

It was alleged particularly in respect of Kaiser that that entity, 'failed to warn visitors of the dangers of the presence of low overhead high tension electric lines'.

The Statement of Claim was amended to reflect the fact that Kaiser was not a registered company, but a partnership. As a result, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were added, being members of the Partnership/Agreement.

Similar amendments in the Statement of Claim acknowledged the fact that the land over which the high-tension lines passed were owned, managed and/or controlled by the members of the said partnership. The particulars of breaches alleged in the Statement of Claim, to have been committed by Kaiser were similarly amended to include the other partnership members.

On the 13<sup>th</sup> July 2001, Kaiser filed a Notice of Contribution and Indemnity on JPS Co. contending that by terms of an easement as well as applicable law, the JPS Co. is responsible for and had a duty to maintain the electric wires.

On the 12<sup>th</sup> February 2002, the Claimants filed a Summons for Interlocutory Judgment to be entered in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in default of defence. The 2<sup>nd</sup> Defendant then filed a Summons seeking leave for

extension of time to file Defence out of time. An application was subsequently made to strike out the 2<sup>nd</sup> Defendant's Defence as showing no reasonable Defence.

On the 2<sup>nd</sup> of July 2003, the Claimants applied for an Order that damages be assessed against the JPS Co. On the same day Mr. Justice Daye made orders on a Case Management Conference, as between the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants and the Claimants. It was alleged by the Defendants that an application was made at that Case Management Conference on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the assessment of damages in respect of JPS Co. be conducted as a part of the trial in relation to them, that application was denied.

The Defendants also applied that a timetable of events be established for the management of the case between the Claimants and the Defendants/Applicants. This timetable has not been complied with by the Claimants.

On the 29<sup>th</sup> and 30<sup>th</sup> September 2003 Ms. Justice Smith assessed damages against the JPS Co. as follows;

- (1) General Damages (inclusive of damages for the pre-trial years \$249,600.00: loss of expectation of life \$40,000.00) of \$3,198,724, with interest at the rate of 6% per annum on the sum of \$249,600.00 (pre-trial years) from 29<sup>th</sup> November 1997 to 30<sup>th</sup> September 2003.
- (2) Special Damage of \$121,500.00 with interest at the rate of 6% per annum from 29<sup>th</sup> November 1997 to 30<sup>th</sup> September 2003.
- (3) Costs to the Claimants to be taxed if not agreed.

Consequent on the orders made at case management, for the action between the Claimants and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, this pre-trial review was ordered.

The Claimants are here applying for orders inter alia that;

- a) the Court gives Summary Judgment of the claim against the Defendants and that the Court orders that the Claimants proceed against the Defendants.
- b) There be a criminal investigation of the circumstances of the electrocution of Damion Phillip Ward.

The Defendants, applied here that the matter be struck out as against them.

The Defendants application was grounded by the arguments that,

- i. the Claimants having already recovered the relief that was being sought (i.e. damages assessed by Ms. Justice Smith) should not be allowed to recover damages twice for the same cause of action in the same suit.
- ii. That the Claimants are estopped from bringing any claim in relation to the same cause of action in this suit, as damages due to them have already been assessed and adjudicated upon.
- iii. That the trial against the Defendants would be contrary to the overriding objective of the Civil Procedure Rules 2002, as it would mean engaging the Court and the parties in expensive and time-consuming litigation, which would be of no benefit to the parties.

Counsel for the Claimants argued that the Claimants have neither obtained full and final satisfaction of their claim for compensatory damages from JPS Co. under the Fatal Accidents Act, for the benefit of deceased dependents nor under **The Law Reform (Miscellaneous Provisions) Act**, for the benefit of the

deceased estate. It was further argued that the Defendants had not received aggravated damages for the gross negligence or willful misconduct of the Defendants, therefore, the Claimant can proceed against the Defendants for the aggregate damages *as only damages under the **Fatal Accidents Act**, for the benefit of the deceased dependents have been awarded to the Claimants.* (Emphasis mine)

**Should the Claimants' claim against the Defendants/Applicants be struck out?**

The common law recognized 'joint-tortfeasors as "persons whose separate shares in the commission of the tort are done in furtherance of a common design". Independent acts of tortfeasors which combine to produce a single harm and amongst whom there was no community of interest, were "several" tortfeasors.

The common law position was that a judgment against one joint-tortfeasor was a bar to subsequent action against the others or even the continuance of the same action if the damages remained unsatisfied. Further the release of one was the release of all, this was the result of the action being regarded as one and indivisible. These effects did not apply to "several" tortfeasors.

**The Law Reform (Tortfeasors) Act, 1946** abolished the first rule and provides the applicable principle in relation to the conduct of litigation against multiple tortfeasors. The Claimants are provided by Section 3(1) (a) with the right to claim against as many Defendants as maybe culpable either in one or several actions.

3 (1) (a);

“Judgment recovered against any tortfeasor liable in respect of such damage shall not be a bar to an action against an other person who would if sued have been liable as a joint tortfeasor in respect of the same damage;

Section 3 (1) (b), however, restricts the aggregate sum to the amount awarded in the first action and disentitles the Claimant’s right to an award of costs unless there is reasonable ground for bringing such action.

(b) provides;

“If more than one action is brought in respect of such damage by or on behalf of the person by whom it was suffered or for the benefit of the estate.... against tortfeasors liable in respect of the damage (whether as joint tortfeasors or other-wise) **the sums recoverable under the judgments given in these actions shall not in the aggregate exceed the amount of the damages awarded the judgment first given; and in any of those actions, other than that in which judgment is first given,** the plaintiff shall not be entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action.”

Clearly, although the law does not prevent a subsequent action against the other tortfeasors, it discourages multiplicity of actions based on the same cause of action where one such action would suffice.

The Claimants in the instant case accepts the limitation, which is provided by Section 3 (1) (b), to restrict “the amount recoverable in respect of this action to

the aggregate sum obtained before Ms. Justice Smith, for damages under **The Fatal Accident Act**, for the benefit of the deceased's dependents, but contends that no assessment was done in respect of the other heads claimed, i.e., under **The Law Reform (Miscellaneous Provisions Act)** and for **Aggravated Damages**, because the learned judge erroneously employed a methodology that excluded any award under those heads.

In respect of the Claimant's application to be allowed to proceed against the Defendants, the causes of action, the facts which are relied on and the evidence that would be adduced are the same that could have been adduced before the Court in respect of JPS Co's case.

The Claimants have not demonstrated any new cause of action, or right that was not open to them to be pursued before Ms. Justice Gloria Smith on assessment. Can it be said that damages were assessed and that the court adjudicated on the disputed heads, i.e., the Law Reform (Miscellaneous Provisions Act) and Aggravated Damages, and, therefore, there is a final and conclusive judgment in respect of them.

The answer is, in my view, contained in this excerpt from **Clerk and Lindsell**, on Torts Fourteenth Edition at paragraph 594,

“When an action is brought before a tribunal of competent jurisdiction and proceeds to final judgment the original right of action is in any case destroyed. If the



plaintiff fails, he is stopped from asserting his alleged right in any other form of legal proceedings against the same party. If he succeeds, the original right in respect of which he sued is merged in the higher and better right which he obtains by his judgment, even though it is unsatisfied.”

It is clear that it was open to the learned trial judge not to make an award under the Law Reform (Miscellaneous Provisions Act) Act, if the beneficiaries were one and the same under both Acts.

The principle is of importance to the instant case, despite the fact that S. 31a entitles the Claimant to pursue actions against these Defendants. The Claimant having failed, according to him, to secure an award for the disputed heads of damages, S. 3 (1) (b) of the Act would limit any future award to the award made by Ms. Justice Smith. That would be so even if such an award specifically contain awards under the disputed heads of damages.

Satisfaction of a judgment given by a Court discharges the tort and prevents further action. Tort requires breach of duty damage and loss. There is no loss if somebody has satisfied the loss for the same damage. In Jameson v Central Electricity Generating Board (2000) 1 AC 455. A decision of the House of Lords, which deals with a full and final settlement, in respect of several tortfeasor and the effect of that settlement on another tortfeasor.

Per Lord Hope of Craighead at page 472;

“But the existence of damage is an essential part of the cause of action in any claim for damages. It would seem to follow, as a matter of principle, that once the plaintiff’s claim has been satisfied by any one of several tortfeasors, his cause of action is extinguished against all of them. As Lord Atkin said in Clark v Urquhart (1930) A.C. 28, at 66; ‘Damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors, the cause of action is destroyed.’”

And at page 473;

“I take as my stating point the fact that a claim of damages is a claim for unliquidated damages. It remains unliquidated until the amount has been fixed either by a judgment of the court or by an agreement as to the amount which must be paid to satisfy the claim. It cannot be doubted that once the amount of the damages has been fixed by a judgment against any one of several concurrent tortfeasors, full satisfaction will have been achieved when the judgment is satisfied.”

It follows therefore that although the Defendants are at liberty to pursue the actions pursuant to Section 3(1) (a) of The Law Reform (Tort- Feasors) they are unable to recover any further sums. They have not demonstrated any good reason either for their failure not to pursue all the actions before Ms. Justice Smith. They are therefore unlikely to recover costs.

It falls well within the scope of this Pre-trial Review, in order to promote the expeditious and economic disposition of this claim, to dismiss the plaintiff’s application. The Defendants’ application is granted and the matter is struck out. Cost of this application to the Defendants.