THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

Claim No. CV 2013-00266

BETWEEN

AARIKA MENDOZA

Representative Claimant of the Estate of Guyadeen Loorkoor (Deceased)

First Claimant

AND

AARIKA MENDOZA

The mother and next friend of Darius Mendoza-Loorkoor

Second Claimant

AND

N& S ELECTRICAL COMPANY LIMITED

First Defendant/Ancillary Claimant

TRINIDAD AND TOBAGO ELECTRICITY COMMISSION

Second Defendant/Ancillary Defendant

Oral decision

Background

1. The claimant is the widow of the deceased Guyadeen Loorkoor (the deceased). The deceased was employed with N&S Electrical. That company had a contract with T&TEC to carry out re-conductoring works on certain electricity poles 3 - 16. Work was required at pole 1813 in order to de-energise the low voltage electricity supply from that pole to poles 3-16. However other work was performed at electricity pole 1813. The deceased lost his life by electrocution while he was working on that pole.

2. The claimant claims that both N&S his employer, and T&TEC were responsible for his death. T&TEC denies all responsibility and further contended that the deceased was contributorily negligent. N&S claims that T&TEC bears some responsibility, but also contends that the deceased was contributorily negligent.

Issue

3. At issue is whether:

(1) a. The claimant, and /or

b. N&S, and /or

c. T&TEC

Were negligent and therefore responsible for the death of the deceased, and, if so, to what extent.

(2) Further, if anyone was responsible for the death of the deceased apart from the deceased himself, what would be the measure of damages.

Findings

4. The deceased contributed to his own death to the extent of 50% by failing to take sufficient care for his own safety. He was working in the vicinity of High voltage lines and, as an experienced linesman, must have known that such lines were to be treated as energized unless proven otherwise. He must also have known that contact, particularly with high voltage lines, had to be avoided at all costs as it was likely to be fatal. He had to exercise extreme care with respect to his position on the pole to avoid at all costs **even the possibility** of coming into contact in any way with the high voltage lines. His failure to do so resulted in his death by electrocution.

5. N&S contributed to the death of the deceased by its negligence in inter alia, attempting to repair the cut out and then the hotline connector, even when it was not immediately necessary to do so before beginning the re-conductoring works on poles 3 – 16. The low voltage lines had been de-energized. While it is likely that the hotline connector would have needed repair before re-energizing the low voltage lines at the conclusion of the re-conductoring works, there is no

basis on the evidence for considering that this was an emergency repair that could not wait. In so far as this additional repair involved working in the proximity of high voltage lines there was ample opportunity to call upon and consult with T&TEC for advice and guidance. It is not appropriate to contend, after the event, that T&TEC should have been on site and supervising. The works were at multiple locations. T&TEC had hired an experienced contractor N&S which had its own foremen, including Mr. Roy Gill. If the work required the presence of T&TEC then it was the responsibility of N&S to ensure the presence of T&TEC before embarking on such work. The additional repair work did not need to have been performed instantly.

6. Even if N&S personnel believed that it needed to be done then and there, a tailboard conference should have been held in relation to the extra risks inherent in and specific to the additional work involved in repairing the hotline connector.

7. As its name suggests a hotline connector connects to Hot (high voltage) line. TTEC's safety rules, of which N & S knew, (and in fact annexed to witness statement of Gill), specifically point out that the height of a workman on a pole is critical when working in the vicinity of high voltage lines. Gill knew this.

8. He claims that he pointed this out to the deceased. The deceased allegedly responded by ignoring his request to reposition himself lower on the pole and allegedly even made the remarkable and incredible comment that the high voltage line was dead, (de-energized). This makes no sense as the whole point of opening the fuse at that pole in the first place was to prevent the electricity from the high voltage line flowing to the low voltage line via the transformer, and then feed poles 3-16.

9. What is more important however is if Mr. Gill did observe that the position of the deceased was too high and instructed him to lower himself on the pole, and the deceased ignored him, his duty as supervisor was to insist that the deceased do so. The consequences of not doing so could have been fatal. In fact as it turned out, they were.

10. Alternatively, if Mr. Gill saw that the deceased was in a dangerous location, in too close proximity to the high voltage lines or hotline connector, and failed to say or do anything about it, then Mr. Gill, on behalf of N&S, who had sent the deceased up that pole in the first place, would have equally been negligent.

11. This negligence cannot be absolve by a contention, after the fact, that T&TEC should have been physically on site looking over the shoulders of his men and ensuring that they observed T&TEC's safety rules. That was what N&S had him as supervisor there to do.

12. Either:

i. the additional repair work was within the competence of N & S, not requiring direct physical supervision of T&TEC, and N&S performed it incompetently by failing to take adequate precautions in carrying it out, resulting in the fatal accident, or

ii. the additional repair work was beyond the competence of N&S, requiring direct physical supervision of T&TEC. In that case N&S is equally negligent and culpable in

a. not contacting T&TEC and refraining from carrying it out until it had consulted with T&TEC, and ,

b. in proceeding, in that scenario, to send its employees up that pole to carry out work that they were not competent to perform.

13. In fact the evidence is that the deceased was not certified to perform work of that type in the vicinity of high voltage cables. Though other members of the N&S crew were, they were not the ones chosen to attempt the reconnection of the hotline connector.

14. The case for negligence on the part of T&TEC has not been established. In the context of work being carried out by an experienced contractor, supervised by a foreman, at multiple poles, for work which was within their track record of experience, the need for additional direct physical supervision by T&TEC of the employees of its contractor, who took it upon themselves to embark on additional work without informing and contacting T&TEC, has not been established in the circumstances of this case.

Damages

Under the Supreme Court of Judicature Act

15. The deceased earned $5,304.18 per month – (see witness statement of Mr. Lalsiew). This is equivalent to $63,653.00 per annum, and is rounded to $ 63,000.00.

16. It was contended that 25% must be deducted in respect of income tax and statutory deductions. However, if the personal allowance is $60,000, above which sum tax begins to be paid, the deduction of 25 % would only apply to the extra $3,653.00.

17. A deduction could therefore be made of $**900** per annum. As this is de minimis in this context, (approximately $75 per month) it will be ignored for the purposes of further calculation, save that gross earnings of $63,**653.**00 are rounded to $63,000.00.

18. Accordingly the annual income figure to be used would be $63,000.00 per annum or $**5,250.00** per month.

19. The claimant asserts that $2,500.00 per month was provided to her for herself and her son in respect of their expenses.

The lost years

20. This is a case under the Supreme Court of Judicature Act for damages for the estate of the Deceased. For reasons stated below this is the focus of this assessment and not the claim in respect of a dependency. The Claimant was not married to the deceased. Their child's dependency claim would be subsumed in the claim on behalf of the estate of the deceased, as it would be for a period of no more than 7 years. A calculation must therefore be attempted of the earnings of the deceased for the years that he might have lived, and the earnings for which his estate has been deprived .The method of calculating the award for these "lost years" was considered by Lord Justice O'Connor in the case of ***Harris v. Empress Motors Ltd [1984] 1 W.L.R. 212 at p. 216H, (****all emphasis added):-*

> *"I come now to the main problem in these cases; how should the* ***deduction*** *which has to be made from the net loss of earnings for the lost years be calculated……"*

At the Head Note of this Judgment the approach to this problem was summarized as follows:-

> *...In calculating the sum to be **deducted** for **living expenses** when assessing the net loss of earnings for the lost years, the **ingredients constituting the deceased's living expenses** were the same **irrespective of** the deceased's **age**, **marital status** or **number of dependants**; that the sum to be deducted as those living expenses was **the proportion of net earnings the deceased would have spent to maintain himself** at his standard of living and **did not include savings or sums spent exclusively for the maintenance or benefit of others** but where there were shared living expenses a pro rata proportion should be deducted; that, accordingly, the correct approach to the calculation of the deceased's living expenses was not to make an assessment of those expenses as would be done for the purposes of calculating a dependency under the Fatal Accidents Act 1976, but to assess as a **percentage** the **available surplus** after deducting from the net earnings the cost of maintaining the deceased in his station of life;*
>
> At p. 228, Lord Justice O'Connor stated:
>
> *"I return to the two decisions in the House of Lords. In my judgment three principles emerge: 1: The **ingredients** that go to make up "**living expenses**" are the same **whether the victim be young or old**, **single or married, with or without dependants. 2. The sum to be deducted as living expense**s is the **proportion of the victim's net earnings** that he spends to maintain **himself** at the standard of life appropriate to his case. 3. **Any sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings**.*

21. I am therefore guided by the position in the case of **Harris v Empress Motors Limited**. I note the reference at page 571(b) to the guidance of Lord Salmon in the House of Lords case of **Pickett v British Rail Engineering Limited [1980] AC 136 @ 153-154**:

> *"Damages for the loss of earnings during the lost years should be assessed justly and with moderation."*

22. Also at page 576(d) the case of **White v London Transport Executive [1982] QB 489 at 499** is cited:

> *"Thus for example in this day and age the ordinary working man's life would not be regarded by him as reasonably satisfactory and potentially enjoyable if he cannot afford a **short holiday**, **a modest amount of entertainment and social activity** and, depending on his particular circumstances, **a car**."*

Also at page 500 of the **White v London** case cited at page 576(h) to (j):

> *"The first inference that needs to be drawn as it seems to me, if my definition of the loss in question is correct, is whether, and if so, broadly to what extent, the deceased's prospective earnings match the circumstances into which he had been born and was living. Because if a man born and brought up in very comfortable circumstances is a relatively low earner, his earnings might not even be sufficient to meet his reasonable needs, let alone to exceed them, while, on the other hand, a man with relatively modest demands, earning relatively a lot of money compared with that earned by most men in his circumstances, would be likely to have a large surplus."*

23. I accept the reasoning in the **Harris v Empress** case that the surplus funds approach is to be adopted in preference to the savings only approach for the purpose of calculating the amount of the multiplicand to be used representing the earnings of the Deceased in the lost years.

Finding of fact re the deceased's earnings – net and gross

24. I consider therefore the value of the claim by the Estate. As found above the income of the deceased was $5250.00 per month.

25. From this figure must be deducted the deceased's probable **living expenses** for the lost years.

Deductions

I note that in the **White** case the Judge deducted two-thirds of net income for the first five years until the Deceased would have left home. However, I note the reason for this at page 577(c) in **Harris v Empress** as follows:

*"The reason for supporting this high rate of deduction in cases such as **White**, **Gammell** and **Furness**, is that the future is speculative and allowance has to be made for the fact that a man may never marry, may never save a farthing, may never support anybody; but when one is faced with the position in **Pickett** or in the present two cases, the position is entirely different. That which is speculative in **Gammell** to a very high degree is not speculative at all; that which is not to be deducted can be seen with reasonable clarity and, as one would expect, a very much smaller part of the net earnings will fall to be deducted."*

At pages 577(d) to (e):

*"We were asked by counsel for the defendants in the **Cole** case and by counsel for the defendants in the **Harris** case to give guidance, if we could, as to **what proportion of the net earnings in the lost years should be deducted** for the purpose of the Law Reform Act claim. Regretfully, **I find it impossible to do this** because **so much depends on the amount of the joint expenditure** and the **number of persons among whom it is to be divided**; that in general, according to the circumstances, it seems to me that **the proportion** will be **greater** than the percentage used for calculating the dependency under the Fatal Accidents Act."*

26. I also note that under the Fatal Accidents Act (**not** the Law Reform Act), the amount of living expenses is conventionally assessed at no more than one-third of net earnings.

Living Expenses

27. Applying those principles to the instant case, I find as follows:

From the deceased's net income must be deducted the Deceased's living expenses. I take into account the fact that the Deceased had one child.

I also take into account that the deceased allegedly gave to the claimant the sum of $2,500.00 per month. This is not in dispute.

I take into account that:-

(1) Each matter is fact specific.

(2) I find that on a balance of probabilities it is likely that the Deceased's net monthly earnings would be as set out above, approximately **$5250.00**.

(3) I consider the following matters would be relevant to the deductions to be applied in respect of the instant Deceased. I find it is likely on a balance of probability that the Deceased would have had the expenses of a motor vehicle, maintaining, and insuring such a vehicle, and providing it with fuel. In the alternative he would have had equivalent transportation expenses.

(4) I accept in accordance with **Harris v Empress** (ibid) that the sum to be deducted as **living expenses** is the proportion of the Deceased's net earnings that he would have spent **exclusively** on himself to maintain himself at the standard of life appropriate to his situation.

28. I accept that the sum that he allegedly expended on others is not to be taken into account in calculating the personal living expenses of the deceased, save where those sums are for joint expenses.

29. It is likely that of the $2500.00 that the claimant claims that the deceased gave to her each month, that some of that sum would have been used for household expenses from which the deceased would have benefitted. A deduction of one third is accordingly to be made from this sum, representing expenses for the benefit of the deceased from the sum of $2500.00 given to her. This would fall within the definition of "living expenses" of the deceased. This would leave, out of the sum of $2500.00 given to her, the sum of $**1667.00** which, being spent by the deceased to benefit others, would not form part of his own living expenses.

30. Further, after giving to the claimant the monthly sum of $2500.00 he would have left over the sum of **$3750.00.**

31. It would be necessary to assess the estimated monthly cost of the Deceased's enjoying a standard of living which would include:

(i) A short holiday,

(ii) A modest amount of entertainment and social activity,

(iii) A car, or alternatively, transportation.

32. I assume that the deceased was of moderate habits, as I have no evidence to the contrary. Taking those matters into account, I consider it hardly conceivable that the Deceased would have spent any less than 1/3 of his net monthly income up to the time of assessment on himself. But that is **a starting point**, and **must be considered in the context of actual earnings**. It is self-evident, and in any event a matter of logic, that the smaller the monthly salary of a deceased the greater the proportion of it that would be taken up by the necessary and unavoidable personal **living** expenses of the deceased.

33. In ***Alice Lee Poy*** **v Securiserve Limited; Sagicor General Insurance Inc. (co-defendant CV.2008-01892 Delivered July 2nd 2010** for example, the following expenditures totaling $**5300.0**0 per month were considered to be not unreasonable. For example expenses in respect of a car **-$1,500.00**; clothing, food, and miscellaneous expenditure $**1,800.00**; travel **$1,000.00**; entertainment **$1,000.00**. These figures were considered highly conservative and a minimum of expenditure that could reasonably be anticipated in respect of someone enjoying the level of earnings of that deceased.

Surplus

34. In the case of **Tewary Tota-Maharaj Administrator Ad Litem of the Estate of Arvind Tota-Maharaj Deceased v Auto Center Limited and others, HCA No. 46 of 2003**, estimated expenses of the deceased were in respect of:

i. A car $**1,500.00**;
ii. Clothing and miscellaneous $**1,000.00**;
iii. Travel $**1,000.00**;
iv. Entertainment $**1,000.00**

35. In the instant case I take into account that the instant deceased was a person of moderate habits according to the claimant, and that his earnings were modest.

36. His expenses for **transportation** could have been no less than $**1000.00** – vehicle, maintenance, fuel, and insurance could not possibly be less than this amount and would in all probability be more. If he had no vehicle the cost of acquiring one, or alternatively the cost of alternative transport would also be no less than this sum.

i. Personal entertainment – $**500.00**
ii. Travel – $**750.00**
iii. Clothing - $**750.00**
iv. Miscellaneous – $**500.00**

37. It can therefore be appreciated that even if provision for basic expenses is assessed on a more moderate basis than in ***Lee Poy***, and no account is taken of a provision for monthly cost of his food / groceries, (assuming this to be included in the joint expenses paid for out of the sum that he gave to the claimant each month), those expenses, sums that the deceased would reasonably have paid for his own benefit, which constitute his living expenses, exceed the sum of $**3250.00** that he would have left over after giving to the claimant $2500.00.

38. Accordingly the sum available for the estate of the deceased, after deduction of his living expenses, would be the sum of **$1667.00** (the sum left over from the sum of $2500.00 that he gave to the claimant, after deducting there from the portion attributable to the deceased in respect of joint expenses for his benefit). This sum**,** being spent by the deceased to benefit others, would not form part of his own living expenses.

Multiplier

39. The deceased would have been 50 at the date of assessment. A post assessment multiplier of 8 would be appropriate where the deceased would have had a working life of 15 more years.

Pre assessment loss- lost years

40. Approximately 4 years have elapsed since his death on August 18th 2012. A pre assessment multiplier of 4 would be appropriate in those circumstances.

$**1667**.00 for 12 months for 4 years would produce a figure of **$80,016.00** in respect of crystallized **pre assessment loss**.

Interest

41. Usually Interest on this sum may be awarded. An appropriate interest rate taking into account inflation and the cost of being deprived of this money, which would have been payable over the **extended** period from the date of service of the writ January 29th 2013 to trial and judgment, would be 6% per annum.

42. Interest so calculated from the date of service of the writ January 29th 2013, to present would be 3.5 by 6% by $80,000.00 –$**16,800.00**.

Post assessment loss – lost years

43. $**1667.00** per month for 12 months for 8 years produces a figure of $**160,032.00** in respect of the value of the lost years for his estate. No interest is payable on that sum.

44. No argument was raised as to the effect, if any, of the deposit of workman's compensation on the award in respect of the lost years.

Loss of expectation of life

45. **Loss of expectation of life** is now conventionally assessed at $**20,000.00.** I award the sum of $20,000.00 for loss of expectation of life – See **Tewary Tota-Maharaj Administrator Ad Litem of the Estate of Arvind Tota-Maharaj Deceased v Auto Center Limited and others, HCA No. 46 of 2003**.

i. With **interest** on this amount **at 6% per annum for 3.5 years** from the date of service of the claim form January 29th 2013 to present – **$4200.00.**

Damages for the estate

46. The award based on the claim on behalf of the Estate in respect of the Lost years would be as follows:-

i. **Pre assessment** loss of earnings, **-$80,016.00** as well as.

ii. **Interest -$16,800.00.**

iii. The sum of **$160,032.00**-being future loss of earnings.

iv. **Loss of expectation of life – $20,000.00.**

v. **Interest – $4,200.00.**

This produces the net figure of $**281,048.00.**

47. The first defendant is liable to pay half of this given the deceased's contribution of 50 % to this accident--$**140,524.00.**

The dependency action

Dependency of son

48. The son of the deceased would have a dependency, at $833.00 per month or $10,000 per year from age 11 to age 18 - would be $70,000 - this is less than the amount that he would have received from the estate, (before deduction for contributory negligence) as indicated above. His claim as dependent would therefore be subsumed by his share under the estate claim. He is alleged to be the sole beneficiary of the estate as the claimant is the common law spouse.

49. However provided that the claimant obtains an order under s. 25(3) of the Administration of Estates Act Ch. 9:01 she could be entitled to half of the award to the estate**.**

Special damages

50. The claim is for $18,000.00 for funeral expenses**.** However, the first named defendant paid the funeral expenses (as indicated by Mr. Lal Siew in his witness statement. Further, the invoices for those and for the tent rental were addressed to the first defendant**).**

Order

51. It is ordered as follows:-

i. That there be judgment in favour of the claimants for **50%** of their claim for damages as assessed hereunder against the first defendant N&S.

ii. That the claimant's claim against the second defendant is dismissed.

iii. That the ancillary claim of the first defendant against the second defendant is dismissed.

iv. Damages are assessed as set out hereunder, and the first defendant is to pay the following sums:

The sum of **$140,524.00 t**o the Registrar of the Supreme Court to be deposited in an interest bearing account, in a financial institution **to be agreed** between attorneys at law for the claimant and the first named defendant **in respect of the minor Darius Mendoza-Loorkoor,** and the Claimant Aarika Mendoza, provided that the Claimant Aarika Mendoza obtain and produce an order under s. 25(3) of the Administration of Estates Act within 12 months from the date hereof, in default of which the said sum is to be held exclusively for the benefit of the minor **Darius Mendoza-Loorkoor.**

v. In default of agreement, a suitable financial institution is to be approved by the Registrar of the Supreme Court.

vi. Upon the minor child attaining his age of majority that child's share of the principal sum and any accrued interest thereon is to be paid out to him upon application made on his behalf.

vii. Upon the Claimant Aarika Mendoza obtaining and producing to the Registrar of the Supreme Court an order under s. 25(3) of the Administration of Estates Act within 12 months from the date hereof, 50% of the above sum of **$140,524.00** with accrued interest on that portion, is to be payable to her on application to the Registrar of the Supreme Court.

viii. The first defendant is to pay the costs of the claimant and of the second defendant on the basis prescribed by the Civil Proceedings Rules for a claim in the amount of the damages assessed in the sum of $**281,048.00** against the first defendant.

ix. Liberty to apply.

Dated the 12th day of July 2016

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Peter A. Rajkumar

Judge