

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Claim No. CV2008-01078
C.A. No. 126 of 2010**

BETWEEN

**LATCHMAN RAMOUTAR
C.L. SINGH TRANSPORT SERVICES LTD.**

Appellants

AND

**LENORE DUNCAN
(in her own right and as Administrator as litem
of the estate of Horace Clive Anderson
also called Horace Anderson Deceased)**

Respondent

Panel:

P. Weekes J.A.

A. Yorke -Soo Hon J.A.

R. Narine J.A.

Appearances: Mr. A. Hosein for the Appellant
Mr. A. Manwah for the Respondent

DATE DELIVERED: 25th July, 2013

I have read the judgment of Narine J.A. and agree with it.

P. Weekes
Justice of Appeal.

I too, agree.

A. Yorke-Soo Hon
Justice of Appeal.

JUDGMENT

Delivered by R. Narine J.A.

1. On 27th March 2004, Horace Anderson (the deceased) was a passenger in PBM 8656 which was being driven on the left lane of the north bound side of the Sir Solomon Hochoy Highway. At about 6:40 p.m. in the vicinity of Francis Engineering, TBH 1171 (which was travelling, on the southbound side of the highway) crossed the median unto the northbound side of the highway and collided with PBM 8656. The deceased died on the same day. At the time of his death, the deceased was 41 years old and worked as a Branch Manager of Security Watch in Baltimore, Maryland, United States of America.

2. The Respondent is the widow of the deceased and the Administrator ad litem of the deceased's estate. On 26th March 2008, she filed an action for the benefit of the deceased's estate, herself and the children of the deceased pursuant to **Compensation for Injuries Act** Ch. 8:05.

3. On 22nd June 2010, the trial judge assessed damages and made an award of \$1,400,750.00 in favour of the Respondent. The Appellants have filed five grounds of appeal:

GROUNDS OF APPEAL:

- a. The learned judge erred in law and in fact in awarding excessive damages.
- b. The learned judge wrongfully awarded damages under the Supreme Court of Judicature Act.
- c. The learned judge wrongfully awarded excessive damages to be paid under the Compensation for Injuries Act.
- d. The learned judge misdirected herself in law and awarded damages without the hearing of an assessment of damages and without any evidence being led.
- e. The learned judge misdirected herself in law by allowing the Respondents case to proceed to judgment without an order for assessment.

The First Ground

4. The first ground concerns the quantum of damages awarded to the Respondent. The court made an award for loss of expectation of life, funeral expenses, and the lost years. Counsel for the Appellants contends that there was no evidence before the court and therefore no basis for the judge to make any award. I will deal with each award separately.

Loss of expectation of life

5. In the submissions on quantum below, both parties submitted that a conventional award is made under this head of damage. The figure ranged between \$7500.00 and \$10,000.00, but within recent times, judges have increased this amount to \$20,000.00 to take account of inflation over the years. The court accepted those submissions and made an award of \$20,000.00 under this head. There is no basis for disturbing this award.

Funeral expenses

6. The trial judge made an award for funeral expenses based on the Respondent's oral evidence and the documents she produced. The documents produced were receipts from Belgroves Funeral Home, JB Johnson Funeral Home and Farouk Khan

Travel Service. These were used to quantify the funeral expenses. It is well settled that special damages must be specifically pleaded and proved: **British Transport Comission v Gourley** [1956] AC 185, and to justify an award of special damages the claimant must satisfy the court both as to the fact of damage and its amount: **Grant v Motilal Moonan Limited and Rampersad** Civ. App. No. 162 of 1985. However this is not a case of an award being made without any documentary evidence to assess quantum because the judge considered the receipts provided by the Respondent to quantify the loss.

7. Part 30.8 of the CPR provides:

Power of court to allow statement to be given in evidence

30.8 The court may permit a party to adduce hearsay evidence falling within sections 37, 39 and 40 of the Act even though the party seeking to adduce that evidence has -

(a) failed to serve a hearsay notice;

The court therefore has discretion to admit hearsay evidence even if the formalities were not complied with.

8. The receipts provided by the Respondent falls within s 37 (1)of the **Evidence Act** chap. 7:02 that is, the information contained in the receipts would be admissible as evidence of any fact stated therein because direct oral evidence by the maker of the contents would be admissible as evidence. Section 41 (3) of the **Evidence Act** also outlines the considerations to be taken into account when deciding what weight should be attached to the statement. The considerations are whether or not the statement was made contemporaneously with the occurrence or existence of the fact stated and whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

9. On the face of the receipts they were made in sufficient proximity to the date of death of the deceased by persons unrelated to the Respondent who would have no incentive to conceal or misrepresent the facts. In addition the judge clearly accepted the Respondent's evidence with respect to the funeral expenses. In Civil Appeal No. 121 of 2008, **The Great Northern Insurance Company Ltd v Johnson Ansola**, the Court referred to **Ratcliffe v Evans** (1892) 2 QB 524, 532-533 and indicated that the degree of strictness of proof that is required depends on the particular circumstances of each case. The court went on to review Civil Appeal 41 of 1980 **Guinness and Another v Lallbeharry**, Civil Appeal 162 of 1985 **Uris Grant v Motilal Moonan Ltd. v Frank Rampersad**, and Civil Appeal 239 of 1998, **Harrinanan v Parriag and others** on the issue of proof of special damages and said,

From these cases it seems clear that the absence of evidence to support a plaintiff's viva voce evidence of special damage is not necessarily conclusive against him. While the absence of supporting evidence is a factor to be considered by the trial judge, he can support the plaintiff's claim on viva voce evidence only. This is particularly so where the evidence is unchallenged and which, but for supporting evidence, the judge was prepared to accept. Indeed in such cases, the Court should be slow to reject the unchallenged evidence, simply and only on the basis of the absence of supporting evidence. There should be some other cogent reason.

10. As noted above, in this case the oral evidence of the Respondent was supported by contemporaneous documentary evidence attesting to the funeral expenses. In my view, the trial judge was correct in making the award for funeral expenses.

The lost years

11. In assessing the deceased's earnings the judge relied on an income tax form submitted by Respondent as the basis for making the award. No hearsay notice was

filed to have the income tax form admitted into evidence. As discussed above, the court has a discretion to admit hearsay evidence pursuant to Part 30 of the CPR even though a hearsay notice has not been filed. However, while this discretion is designed to enable the court to do justice in the particular circumstances of the case, it should not be exercised in favour of the defaulting party where there is a risk of material prejudice or injustice to the other party. In Civil Appeal No. 20 of 2002, **Anand Rampersad v Willie's Ice Cream Limited** the court said,

Accordingly, the correct approach is to examine whether there is any ground for supposing that the Defendant / Appellant may have been prejudiced in any way by the admission of this evidence...The discretion given by the Rule is not to be exercised in a manner that would afford the Plaintiff/Respondent a tactical advantage. It should not be placed in any better position than it would have been if it had complied with the Rule.

12. The income tax form in question is not a straightforward document. There is no indication on the form submitted as to who completed the form or whether the information contained therein is accurate. In order to prove the accuracy of the contents of an income tax form, supporting documents must be annexed for verification. For example, in this jurisdiction when one claims a tax deduction from an annuity or from the payment of tertiary expenses, supporting documents in the form of an insurance policy for the former and receipts of fees paid for the latter must be annexed to the income tax form before the information is accepted as accurate.

13. In this matter, no other documentation was submitted with the income tax form to be able to support the accuracy of the figures contained therein. The form in question is also from a different jurisdiction with a tax different regime to ours. In addition, the judge found that the evidence produced by the claimant of the tax regime and the explanation of what appeared on the tax form was far from satisfactory.

14. In the circumstances, I find that the information contained in the tax form to be an unreliable basis for an award of damages for the lost years especially since the judge had some difficulty in accepting the Respondent's evidence in this regard. I find that the form was insufficient to discharge the burden of proof required of the Respondent and the judge wrongly exercised her discretion to admit it into evidence.

15. At the hearing of the appeal Attorney for the respondent was forced to concede that the award for the lost years was based on inadmissible evidence. I agree. It follows that the award for the lost years is set aside.

The other grounds

16. In paragraph 1 of her Statement of Case the Respondent stated that she brings the action for the benefit of the estate and herself and the children of the deceased pursuant to the **Compensation for Injuries Act** counsel for the appellant contends that the judge ought not to have made an award of damages under the **Supreme Court of Judicature Act**. Counsel argues that the respondent's case as pleaded specifically asked for relief pursuant to the **Compensation for Injuries Act** and claimed no relief under the **Supreme Court of Judicature Act**. In her statement of case the Respondent claims the following relief:

- i. Damages;
- ii. Damages under the **Compensation for Injuries Act** for herself and the children of the deceased;
- iii. Interest thereon;
- iv. Further and / or other relief; and
- v. Costs

While the claim form does not expressly state damages pursuant to the **Supreme Court of Judicature Act**, damages are nonetheless claimed separately from damages under the **Compensation for Injuries Act**.

17. In any event, the Respondent's pleaded case is that the action filed is for the benefit of the estate of the deceased, herself and the children of the deceased. Even

though the dependency claim under the Compensation for Injuries Act failed, it was open to the court to grant relief for the benefit of the estate of the deceased for which the court derives its jurisdiction from the Supreme Court of Judicature Act. Accordingly there is no merit in this ground.

18. Counsel for the Appellants contends that the judge awarded damages to the Respondent without hearing any evidence and without an assessment of damages. The record of the court speaks for itself on this issue. In the Reasons for the decision, the judge sets out the course of the matter. At paragraph 8 of the Reasons the judge states:

On three of the last four occasions when the matter was fixed for hearing, there was no appearance by counsel for the defendants...After the clearest notice was given that I proposed to assess the damages in accordance with the advice on quantum on the adjourned date, I proceeded to hear evidence, then adjourned the matter for the production of certain documents. On the adjourned date the evidence concluded.

Further, at paragraph 12 of the Reasons, the judge states that the sole witness was the claimant and on the basis of her oral evidence and documents she produced, the court made certain findings. Paragraph 16 states,

Had the defendants been represented, it may be that the court would have been less generous if the claimant's evidence had been tested or if any other assistance on the law had been provided...where parties chose not to assist the court when every opportunity is afforded without excuse or apology, then they run the risk of having matters dealt with ex parte and of a court approaching matters as if they are undefended.

19. From the reasons, it is clear that there was an Assessment of Damages and evidence was heard, albeit only from the Respondent. I do not think that counsel for the Appellants is in a position to say that the matter did not follow a particular course since he was absent for most of the proceedings. Aside from the initial opinion on quantum, there was no other input from defence counsel and as such the court was constrained to deal with the matter as best it could. I am therefore of the view that counsel can hardly complain about the manner in which the matter was disposed of in the face of his persistent failure to assist the court. Accordingly, there is no basis for this ground of appeal. The court notes as well that the Appellants have failed to include the notes of evidence taken in the assessment, which places this court at a disadvantage in assessing the merits of this appeal. From the grounds that were filed, it appears that the Appellants' Attorney was himself unaware as to precisely what transpired before the judge. This resulted in erroneous and unfounded criticisms being made of the trial judge, and baseless grounds being argued. Accordingly I find no merit in grounds (b), (c), (d) and (e).

DISPOSTITION:

20. In the result this appeal is allowed. The order of the trial judge is varied so as to deduct the sum of \$1,275,750.00 from the damages awarded. The prescribed costs must also be adjusted accordingly.

21. Of the five grounds that have been advanced by the Appellants, they succeeded only on one ground that is that the damages awarded were excessive. Accordingly I order that the Respondent should pay the Appellants' costs of the appeal assessed as 20% of the prescribed costs awarded below.

Dated the 25th day of July, 2013.

Rajendra Narine
Justice of Appeal.