[2015] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 98/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**REGINALD BROWN (Father and near relation of Demory Brown, deceased)**	**1st APPELLANT**
AND	**ALBERTA TUGMAN (Mother and near relation of Demory Brown, deceased)**	**2nd APPELLANT**
AND	**BALFORD DOUGLAS**	**1st RESPONDENT**
AND	**ANDRE DOUGLAS**	**2nd RESPONDENT**
AND	**DEBORAH DOUGLAS**	**3rd RESPONDENT**

Jeffrey Daley instructed by Betton-Small Daley & Co for the appellants

Ms Racquel Dunbar and Ms Lorraine Moore instructed by Dunbar & Co for the respondents

10 and 13 March 2015

PANTON P

[1] I have read, in draft, the reasons given by my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] Demory Brown, a 16 year old high school student, fell from a moving bus on 25 April 2009. He was crushed by the wheels of the bus and died instantly. Demory's mother and father respectively, Ms Alberta Tugman and Mr Reginald Brown (together referred to hereafter as "the appellants") filed a claim under the Fatal Accidents Act (The Act) in respect of his death. On 15 November 2013, after hearing submissions on a preliminary point, the learned judge, before whom the trial of the claim came on for hearing, dismissed it as having no "realistic prospect of success". The essence of the learned judge's reason for his decision is that the appellants had failed to show that they were dependants of Demory. The learned judge decided that, having failed to show that they were dependants, they were not even entitled to recover the expenses that were incurred for Demory's funeral.

[3] The learned judge granted permission to appeal. The appellants have acted upon that permission and filed the present appeal.

[4] The appellants have complained that the learned judge breached rules of procedure when he raised, without notice, the preliminary point of dependency. They also complain that the learned judge erred in finding that they had failed to show that they had suffered any loss as a result of Demory's death. They ask in this appeal that the learned judge's decision be set aside and that the claim be remitted to the Supreme Court for trial. Before analysing these issues, it is necessary, however, to give a background to the appeal.

The background to the raising of the preliminary point

[5] Demory was a full-time student at Vere Technical High School. He was living with his mother, as his parents did not live together. Demory was, according to Mr Brown, "learning tiling" from a tradesman tiler. He would sometimes earn, what could at best be described, as "pocket money" from this endeavour, namely $4000.00 per month for work done on weekends.

[6] Mr Brown filed the initial claim under the Act on 23 November 2009. The defendants to the claim and respondents in this appeal are Messrs Balford and Andre Douglas and Ms Deborah Douglas, co-owners of the bus. They will together, hereafter be referred to as "the respondents". Mr Balford Douglas and Mr Andre Douglas admit to being the driver and conductor, respectively, for the bus at the time of the incident.

[7] The particulars of claim were incorporated in the claim form. After naming the parties and asserting that Demory died as a result of Mr Balford Douglas' negligence, the claims were set out in the amended claim form as follows:

> "AND THE CLAIMANTS CLAIMS [sic]:-
>
> i. Damages for wrongful death of DEMORY BROWN under the provisions of the Fatal Accidents Act;
>
> ii. Damages for Loss of Expectation of Life;
>
> iii. Earnings for lost years;
>
> iv. Special Damages of $ 321,000.00;
>
> v. Costs; and [sic]

vi. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act; and

vii. Such further or other relief as this Honourable Court deems just." (Underlining as in original)

[8] On 20 June 2012 Ms Tugman was added as a claimant. The learned judge, in his written reasons for judgment, noted that this addition was made over three years after Demory's death and that it had not had the prior permission of the court. That aspect is not material to this appeal. The learned judge also noted a number of defects in the claim, namely:

a. There were claims for loss of expectation of life and earnings during lost years, which claims were not sustainable in a claim under the Act.

b. There were no particulars of dependency set out in the particulars of claim.

In addition to those defects it is also noted that the particulars of the dependency, as is required by section 5 of the Act, were apparently not delivered with the claim form.

[9] The case proceeded through case management and was set for trial on 30 and 31 July 2012. It was not heard at that time as the judge, before whom it was set, was of the view that the time allocated for the hearing was insufficient. The claim was therefore adjourned to 11, 12 and 13 November 2013.

[10] It was when the parties attended to proceed with the trial on 11 November, that the preliminary point was raised. The learned judge's written judgment seems to

suggest that the point was raised by counsel for the respondents. In paragraph [32] of his judgment he recorded what had occurred thus:

> "The claimants' claim never proceeded to trial. The case was disposed of on a preliminary point which was raised by the defendants' counsel. The defendant's counsel in her submission submitted that the claimants do not have *locus standi* to bring the claim under the **Fatal Accidents Act**. In essence, what the defendants submitted was that the claimants were not dependants of the deceased and as such the claim as pleaded cannot be maintained. This court took that point made by the claimant and decided at a preliminary stage of the proceedings that the claimants were in fact not dependants of the deceased and as such their claim had no realistic prospect of success. The court in making such a decision summarily decided the case and entered judgment for the defendants...." (Emphasis as in original)

[11] He allowed counsel, then appearing, time to prepare written submissions, and the trial was adjourned to 13 November for the submissions to be made. He heard the submissions on 13 November and he gave his decision on 15 November 2013.

The complaint against the procedure used

[12] The first issue to be decided is whether the procedure adopted by the learned judge was fatally flawed. There is somewhat of a divergence between what the learned judge recorded as having occurred and what counsel before us seem to suggest. Both Mr Daley, for the appellants, and Ms Dunbar for the respondents seem to suggest in their submissions that the preliminary point was raised on the learned judge's own initiative. Because of the view taken of the appeal, that divergence will not be assessed

below. It is uncontroversial, however, that there was a preliminary point taken at the time when the trial was scheduled to begin.

[13] Mr Daley submitted that the learned judge made reference to witness statements when they had not yet been put in evidence. Mr Daley argued that having decided to take the step on the preliminary point that he did, the learned judge should have put the respondents on their election whether to adduce evidence or to rest on their submissions. These errors, learned counsel submitted meant that the procedure was fatally flawed and the claim ought to be remitted to the Supreme Court for a trial on the merits.

[14] Mr Daley cited a number of decided cases in which judges had been admonished that the curtailing of trials for arguments and decisions on preliminary points should be reserved for exceptional cases. These included, **Boyce v Wyatt Engineering** [2001] EWCA Civ 692, **Benham Ltd v Kythira Investments Ltd and Another** [2003] EWCA Civ 1794 and **Neina Graham v Chorley Borough Council** [2006] EWCA Civ 92. The present case, learned counsel submitted, was not an exceptional case, deserving of that approach.

[15] Ms Dunbar, for the respondents, submitted that the learned judge was entitled to adopt the procedure that he did. She submitted that in the particular circumstances of this case, the learned judge's approach did not result in prejudice to the parties. This is because, she argued, they had come prepared for trial and so would have had to deal with any issue which arose with respect to the case. In any event, learned counsel

submitted, the learned judge gave the parties two days in which to prepare their written submissions on the point.

[16] Ms Dunbar further submitted that the approach of the learned judge was in accordance with the overriding objective, which, in part, requires the court to deal with cases expeditiously and fairly and to save expense, where possible. She relied in part on the decision of the House of Lords in **Allen v Gulf Oil Refining Ltd** [1981] AC 1001.

[17] Strictly speaking, Ms Dunbar is correct. The issue of their dependency and their standing to bring the claim is one that the appellants would have had to face at some point in the trial. The trial had been fixed for three days. The learned judge gave the parties time to prepare submissions on the point that concerned him. Learned counsel made their submissions on the third day, as they would have been obliged to do, in any event, if the trial had been conducted. The parties could not reasonably complain that they had been put at a disadvantage by the procedure used by the learned trial judge.

[18] Further, it is to be noted that rule 39.9 of the Civil Procedure Rules, 2002 (CPR) stipulates that the court may, after considering a preliminary issue, dismiss a claim or give such other judgment as may be just in the circumstances. The rule states:

> "Where the court considers that a decision made on an issue substantially disposes of the claim or makes a trial unnecessary, it may dismiss the claim or give such other judgment or make such other order as may be just."

[19] Whether or not this was an appropriate case for that procedure or whether the learned judge was correct in his conclusion is, however, a separate issue.

The proof of loss

[20] The second issue to be assessed is whether the learned judge was correct in ruling that the appellants had not proved that they were entitled to any damages and therefore could not succeed on the claim. On this point Mr Daley submitted that the learned judge was in "error by first considering the question of the issue of dependency of the [appellants] on the deceased before the Respondents' liability had been determined" (page 6 of the written submissions). In addition, learned counsel submitted, the learned judge erred in deciding that "the evidence expected to be presented at trial by the [appellants], as to reasonably expected future dependency, is too speculative" (paragraph 26 of the reasons for judgment).

[21] On Mr Daley's submission, had the learned judge allowed the matter to proceed to trial, as slated, Mr Brown would have been able to put the evidence of Demory's "future earning capacity as a skilled tradesman (Tiler)" (page 8 of the written submissions). The learned judge's approach, according to Mr Daley, "placed the Appellants at a disadvantage and denied them a fair trial" (page 8 of the submissions).

[22] Mr Daley relied for support, in part, on the decisions in **Taff Vale Railway Co v Jenkins** [1913] AC 1, **Tilling v Whiteman** [1979] 1 All ER 737, **Wensley Johnson v Selvin Graham and Roy Jones** Suit No CL 1981/J011, delivered on 15 July 1983 (an

unreported decision of Ellis J (Ag) (as he then was) in the Supreme Court of Judicature of Jamaica) and **Marson v Fattah** [2010] EWCA Civ 266.

[23] With respect to the funeral expenses, Mr Daley submitted that the learned judge erred in finding that Mr Brown, not having proved himself as potentially dependent on Demory, was not entitled to be heard in respect of the funeral expenses that he had incurred in respect of Demory's death. Learned counsel submitted that that approach was not consistent with the tenor of the Act.

[24] Ms Dunbar argued that the complaints about the learned judge's approach in this regard are not well founded. Learned counsel pointed out that the witness statements that the appellants had filed, in preparation for trial, like the particulars of claim filed on their behalf, made no mention of Demory's future prospects of earning. She argued that those witness statements would have placed the appellants' evidence in chief, on which their case would be viewed, at its highest. Ms Dunbar questioned whether the appellants had hoped to prove the aspects of future earning capacity through cross-examination by counsel for the respondents.

[25] She reminded this court that the matter of a claim for damages for wrongful death had nothing to do with sympathy or sentiment but was a plain matter of money. The appellants, having failed to provide any material concerning earning, it was inconceivable that the learned judge was wrong in ruling as he did.

[26] Learned counsel agreed with the learned judge's approach that dependency not having been proved, there was no basis on which the funeral expenses could have been awarded. She submitted that the tenor of the Act was to provide compensation for dependants. She argued that there was a need to prove dependency in order to be able to claim under the Act.

[27] It is almost axiomatic to say that unless there is pecuniary damage or loss arising from a negligent act, resulting in death, there is no basis for a successful claim against the perpetrator of the tort. Pollock CB stated that principle in **Duckworth v Johnson** (1859) 4 H &N 653; 157 ER 997,:

> "My opinion is that, looking at the act of parliament, if there was no damage the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs. That disposes of the question as to reducing the damages to a nominal amount."

It is, therefore, critical in any claim in negligence, for the claimant to state in his statement of case that he has suffered loss, and to prove that loss in his evidence to the court.

[28] Although Mr Daley criticised the learned judge for having made use of the witness statements before they were placed in evidence, Ms Dunbar is correct in saying that, if the claim had been tried, the statements would normally have constituted the appellants' evidence in proof of liability as well as the loss that they had suffered. Mr Brown's witness statement, detailing Demory's prospects of earnings, did say that

Demory had been earning "as much as $4,000.00 per month some months for weekend work" as a trainee tiler (paragraph 5 of his witness statement). These were matters which a tribunal of fact (in this case a judge sitting alone, in exercise of his jury mind), would have been required to wrestle with, to determine if the case falls within the context of cases such as **Taff Vale Railway Co v Jenkins**, **Duckworth v Johnson,** and **Johnson v Graham and Another**.

[29] The tribunal of fact would have to decide whether the evidence was sufficient to show Demory's prospective earnings or the likelihood that Demory would have been inclined or been in a position to assist his parent in their "senior years...with [their] daily living expenses" (paragraph 6 of Mr Brown's witness statement). The claim was, however, not restricted to whether there was proof of actual or potential dependency. There was the issue of the funeral expenses.

[30] On the issue of the funeral expenses the learned judge ruled that Mr Brown, although he incurred the funeral expenses, could not recover them. The pith of the reasoning appears at paragraph [31] of the reasons for judgment:

> "To put it simply, one cannot recover as a 'near relation' of the deceased, for funeral expenses incurred in relation to the deceased, unless that 'near relation' is otherwise entitled to recover damages under the [Act], which in turn depends on whether that 'near relation' was dependent on the deceased at the time of the deceased's death, or could reasonably have been expected to have been dependent on him or her (the deceased), in the future, if the deceased had continued living for a longer period of time."

The learned judge arrived at that position based on his interpretation of subsections (4) and (5) of section 4 of the Act.

[31] It is necessary to quote these provisions in order to assess the learned judge's reasoning. The relevant provisions of section 4 state as follows:

> "4.-(1) Any action brought in pursuance of the provisions of this Act shall be brought-
>
> (a) by and in the name of the personal representative of the deceased person; or
>
> (b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person,
>
> and in either case any such action shall be for the benefit of the near relations of the deceased person.
>
> (4) **If in any such action the court finds for the plaintiff, then, subject to the provisions of subsection (5), 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 and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations.
>
> (5) In the assessment of damage under subsection (4) the court-
>
> (a) **may take into account the funeral expenses in respect of the deceased person, if such expenses have been incurred by the near relations of the deceased person**;

(b) shall not take into account any insurance money, benefit, pension, or gratuity which has been or will or may be paid as a result of the death;

(c) shall not take into account the remarriage or prospects of remarriage of the widow of the deceased person." (Emphasis supplied)

It is also important to note the definition of the term "near relations" as it is used in the Act. The definition appears in section 2(1) of the Act:

> "'near relations' in relation to a deceased person, means the wife, husband, parent, child, brother, sister, nephew or niece of the deceased person;"

[32] It appears that the learned judge was of the view that, the appellants, having failed to show, on their case, on paper, a reasonable prospect of future dependency on Demory, the court would not have been able to "find for the plaintiff" and therefore the question of loss could not be considered. A fair reading of the sections quoted above reveals that the learned judge erred in his interpretation of the section.

[33] The scheme of the Act is to secure compensation for near relations for "actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person" (section 4(4)). The section is not restricted to securing compensation for "dependants". A near relation who has incurred expenditure, such as funeral expenses, has incurred "actual…pecuniary loss…by reason of the death of the deceased person". Funeral expenses are specifically included by subsection (5) as recoverable expenses upon an assessment of damages.

[34] The term "the court finds for the plaintiff" as used in subsection 4 does not mean that the court finds that the plaintiff is a dependant, as the learned judge seems to have suggested, but instead speaks to the issue of liability for the death of the deceased person. The issue of liability is a mixed question of law and fact that would fall for determination after the taking of evidence, where liability is not admitted. It is after liability has been determined that the issue of "damages to each of the near relations of the deceased person as the court considers appropriate" becomes live. The learned judge, therefore, erred when he ruled that the funeral expenses could not be secured by these claimants in this claim.

[35] Ms Dunbar's submissions in this regard are flawed. She seems to equate the term "loss", as used in subsection (4), with "dependency". Loss is clearly a wider concept. On this reasoning the question of liability ought to have been tried.

Conclusion

[36] When a case has been through the process of case management, with the parties having had the opportunities afforded by the CPR to raise all the preliminary issues that they consider appropriate, the judge, before whom the claim comes on for trial, should be very reluctant to accommodate or invite preliminary points. There have been a plethora of warnings against such a procedure. From as far back as 1979, the House of Lords gave a warning about deciding a case on hypothetical facts rather than evidence. In **Tilling v Whiteman**, Lord Scarman said at page 744:

> "Had an extra half hour or so been used to hear the evidence, one of two consequences would have ensued.

> Either Mrs Tilling would have been believed when she said she required the house as a residence, or she would not. If the latter, that would have been the end of the case. If the former, your Lordships' decision allowing the appeal would now be final. As it is, the case has to go back to the county court to be tried. **Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety and expense.**" (Emphasis supplied)

[37] Similarly, in a related concept, Brown LJ, in **Benham v Kythira**, said at paragraph 32:

> "Let me state my central conclusion as emphatically as I can. Rarely, if ever, should a judge trying a civil action without a jury entertain a submission of no case to answer. That clearly was this court's conclusion in **Alexander v Rayson** [[1936] 1 KB 169, 178] and I see no reason to take a different view today, the CPR notwithstanding. **Almost without exception the dangers and difficulties involved will outweigh any supposed advantages**…." (Emphasis supplied)

[38] These warnings have been ignored in this case. It is necessary, therefore, having regard to the learned judge's error, that the claim be remitted to the Supreme Court for trial.

McDONALD-BISHOP JA (Ag)

[39] I too have read the draft judgment of Brooks JA. I entirely agree with his reasoning and conclusion and there is nothing useful that I could add.

PANTON P

ORDER:

(1) The appeal is allowed.

(2) The judgment and orders of the Supreme Court made herein on 15 November 2013 are set aside.

(3) The claim is remitted to the Supreme Court for trial before a different judge.

(4) Costs of the appeal to the appellants to be taxed if not agreed.

(5) Costs of the previous proceedings in the court below are to abide the outcome of the trial.