

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. C.L. 2002/B-262

BETWEEN	BRUCE BEARDSLEY	CLAIMANT
A N D	THOMAS YOUNG	1 ST DEFENDANT
A N D	DENNIS MORGAN	2 ND DEFENDANT
A N D	ANDERSON HAULAGE LIMITED	3 RD DEFENDANT
A N D	HOPETON DIXON	4 TH DEFENDANT
A N D	JAMAICA TOURS LIMITED	5 TH DEFENDANT
A N D	RIVER RAFT LIMITED	6 TH DEFENDANT

CONSOLIDATED WITH CLAIM NO. C.L. 2002/B-263

BETWEEN	BRUCE BEARDSLEY (Executor of the Estate of Diane Beardsley, deceased)	CLAIMANT
A N D	THOMAS YOUNG	1 ST DEFENDANT
AND	DENNIS MORGAN	2 ND DEFENDANT
AND	ANDERSON HAULAGE LIMITED	3 RD DEFENDANT
A N D	HOPETON DIXON	4 TH DEFENDANT
A N D	JAMAICA TOURS LIMITED	5 TH DEFENDANT
A N D	RIVER RAFT LIMITED	6 TH DEFENDANT

Sherry Ann McGregor instructed by Nunes, Scholefield DeLeon and Company

Linda Wright for 1st and 2nd Defendants

Gillian Mullings for 3rd and 4th Defendants instructed by Patrick Bailey and Company

Kevin Williams for 5th Defendant instructed by Grant Stewart, Phillips and Company

Gregory Lopez for 6th Defendant instructed by Lopez and Lopez

Heard: October 17th, 18th, 19th, 20th, 24th, 26th, 2006 and March 23rd, 2010

Cor: Rattray, J.

1. Bruce and Diane Beardsley were among the many visitors to Jamaica from the United States of America in May, 2000. They had met each other in October, 1995 and were married in July, 1999. Still basking in the joys of married bliss, they vacationed in Jamaica, staying at the Wyndham Rose Hall Hotel, Montego Bay in the parish of St. James.
2. On the 17th May, 2000, the second day of their five day island holiday, the Beardsleys decided to go on a rafting tour on the popular Martha Brae River in the parish of Trelawny. They purchased a tour package for that attraction from a booth operated by Jamaica Tours Limited ("Jamaica Tours") in the lobby at their hotel, the cost of which included transportation to and from, as well as entry to the attraction.
3. That afternoon, while on their way to that destination, traveling in a van owned by Thomas Young and driven by Dennis Morgan, their feelings of relaxation and happiness were abruptly shattered when the vehicle they were in collided with a trailer coming from the opposite direction.

That trailer was owned by Anderson Haulage Limited and driven at the time by Hopeton Dixon.

4. The air of festivity which the couple had been enjoying was immediately replaced by the gloom of despair as, despite being treated at a hospital in the parish and then airlifted to a hospital in Kingston, Diane Beardsley succumbed to the injuries she sustained as a result of the accident. Her husband Bruce did not emerge unscathed, as it was claimed that he suffered personal injuries, was devastated by the death of his wife and on returning home, had to be treated for post traumatic stress and depression.
5. As a consequence of this tragic accident, two suits were filed by Bruce Beardsley claiming damages on his own behalf and as Executor of his wife's Estate. In both actions, which were subsequently consolidated, Dennis Morgan and Hopeton Dixon, the drivers of the two vehicles involved in the collision were sued as 2nd and 4th Defendants respectively, being the ones responsible for the accident. Thomas Young and Anderson Haulage Limited were sued as 1st and 3rd Defendants respectively as owners of the said vehicles, on the ground of their being vicariously liable for the negligent actions of their drivers, their servants and/or agents at the material time.
6. The claims against Jamaica Tours as 5th Defendant and River Raft Limited ("River Raft") as 6th Defendant sound in contract and/or tort, as it was alleged that these Defendants, or either of them, were in breach of an implied term of the contract to ensure that competent persons were engaged in the transportation aspect of the tour package. Additionally, the Claimants contended that these Defendants were liable in negligence for the actions of their servants and/or agents in

transporting the Beardsleys that fateful day, which led to Diane Beardsleys' death and the injuries sustained by her husband Bruce.

7. When this trial commenced, the parties were urged by the Court to consider whether, even at this late stage, discussions were possible to bring about an amicable resolution of this matter. On the second day of the trial, the Court was asked by the parties to enter Judgment in the following terms;

“By Consent, Judgment for the Claimants against the 1st and 2nd Defendants. The 1st and 2nd Defendants are liable to pay the sum of \$3,000,000.00 only. The claims against the 3rd and 4th Defendants are discontinued. No Order as to costs.”

The trial of the Beardsleys claim then proceeded against the 5th and 6th Defendants.

8. In the Defence filed on behalf of Jamaica Tours, that company denied that at the material time, it had any contractual relationship with the Beardsleys or that it had any relationship, contractual or otherwise with the 1st or 2nd Defendants. It further denied that the owners or drivers of the vehicles involved in the collision were its servants or agents at any time.
9. Jamaica Tours alleged that the Beardsleys contracted the services of River Raft regarding the tour package and it was that entity which organised and directed the arrangements for their transportation to the attraction by the 1st and 2nd Defendants. Further, this Defendant alleged that any fees paid by the Beardsleys were paid to River Raft and not to Jamaica Tours.
10. River Raft in denying liability pointed the finger of blame in the direction of Jamaica Tours. It stated in its Defence that it was engaged in the business of operating an attraction known as “Rafting on the

Martha Brae” and denied providing tour packages. It further stated that the Beardsleys purchased the tour package from Jamaica Tours and that it was that Defendant which was responsible for their transportation to the attraction. It alleged that it was as a result of the request from that company, that it contacted the 1st Defendant, Thomas Young to arrange transportation for hotel guests, as he was in the business of providing transportation for the public as a registered JUTA Operator. In those circumstances, River Raft in the Defence filed on its behalf, alleged that Thomas Young was an independent contractor who owed a duty to the public at large, and claimed an indemnity in respect of any damage caused by the negligent acts of Thomas Young and his driver, Dennis Morgan. However, no Ancillary Claim was ever filed by River Raft against either of those Defendants.

11. In addition, River Raft contended that any fees paid by the Beardsleys entitling them to ground transportation as well as access the rafting attraction were actually paid to Jamaica Tours and not to the 6th Defendant. The rest of the Defence of River Raft mirrors almost exactly that filed on behalf of the Jamaica Tours, insofar as their denials as to contractual and/or tortious liability.
12. Bruce Beardsley in giving evidence as to circumstances leading up to his wife and himself embarking on the journey on the 17th May, 2000, testified that they made arrangements that morning to take the river rafting tour package when they stopped at the booth operated by Jamaica Tours in the lobby of their hotel. They paid the required fee to a representative of the tour operator, which fee covered transportation and entry to the attraction and were told the time to return to meet with the bus. On their return at the designated time, they were directed to the bus in which they would travel by a representative of Jamaica Tours.

He stated that the first time he was aware of the existence of River Raft was during the preparation for this trial, as that company's name was never mentioned when the arrangements were made for the river rafting tour. It should be noted that River Raft was added as a Defendant after these proceedings were commenced. Under cross-examination, Mr. Beardsley denied that he was advised by anyone from Jamaica Tours, that River Raft would be providing transportation to the attraction.

13. The Vice-President of Jamaica Tours, Noel Sloley Jnr. was the sole witness for the 5th Defendant, although he was not personally involved with the particular transaction concerning the Beardsleys. He testified that his company had been selling tour packages for River Raft Limited over a number of years on a continuous basis and that he subsequently became aware of the package sold to the Beardsleys. He gave evidence that the arrangement between his company and the 6th Defendant was that where a tour package was sold for river rafting and the tour group consisted of less than six (6) persons, River Raft would provide the transportation for the tour group to and from the attraction. Where however the group consisted of six (6) or more persons, Jamaica Tours would provide the transportation.
14. On this occasion, as the number of passengers to be picked up was less than six (6) individuals, River Raft made the necessary transportation arrangements for the Beardsley party. The bus which collected the Beardsleys was owned by Thomas Young and driven by Dennis Morgan. Mr. Sloley testified that at no time did Jamaica Tours have any contract with nor did it contact either of those persons to transport passengers to or from any destination. In addition, he maintained that Jamaica Tours had no relationship, contractual or otherwise, with any of the drivers who were involved in the accident in which Diane

Beardsley died and her husband sustained personal injuries. As such, Noel Sloley contended that at no time were Thomas Young or Hopeton Dixon the servants or agents of Jamaica Tours, to swing the pendulum of vicarious liability in its direction.

15. Florence Campbell, the Executive Assistant to the Managing Director of River Raft gave evidence on behalf of the company. She stated that River Raft was in the business of operating a tourist attraction known as "Rafting on the Martha Brae", on one of the longest rivers in the parish of Trelawny. She further stated that the company did not sell tours or tour packages, but instead utilised the services of several tour operators, including Jamaica Tours. On the issue of transportation, her evidence was that the arrangement with the company was that representatives of Jamaica Tours stationed at the hotel would sell tour packages to guests, which included rafting and transportation to and from the attraction. Jamaica Tours collected the money, issued a voucher in return and were responsible for transporting the tourists to and from the Martha Brae attraction. That voucher was to be presented upon arrival at the destination for the visitors to gain entry to the property and access to the rafting rides. The voucher was also used in the preparation of the bill to Jamaica Tours at the end of each week for the rides.

16. In her testimony, Ms. Campbell advised that on occasions, Jamaica Tours requested her company to facilitate the transfers of tourists from the hotel to the attraction. On receipt of such requests, she would make arrangements with a bus operator to transport those tourists to the location, which is what she did on the 17th May, 2000, having received the request from Jamaica Tours. Florence Campbell agreed that Thomas Young's bus went to collect the Beardsleys from their hotel as she had called and made the necessary arrangements. She maintained however,

that the bus operators were contractors and not employees nor agents of River Raft. They submitted their invoices at the end of each week to River Raft and the company would prepare its own invoice reflecting the cost of transportation and rafting rides and forward same to Jamaica Tours. Once the invoices of River Raft were settled by the tour operator, River Raft then paid the sums due to the bus operators for transportation.

17. One of the first issues to be determined by this Court is whether or not there was a contractual relationship between the Beardsleys and Jamaica Tours and/or River Raft. Both these Defendants in their pleadings denied any such relationship with the Claimants. Each contended that it acted as agent for the other. Although suggestions were put by Counsel for Jamaica Tours, Mr. Kevin Williams that the Beardsleys were advised by the company's representative that transportation to the attraction was being provided by River Raft, this was denied by Mr. Beardsley. However, no witness was called on that Defendant's behalf to support any such suggestion. I find that Bruce Beardsley's evidence as to the details of the arrangements made in respect of the rafting tour was clear, unequivocal and unshaken by cross-examination. He was a frank and forthright witness and I accept as truthful his evidence in that regard.

18. Mr. Williams submitted that there was no evidence that a contract was established between the Beardsleys and his client, as no evidential foundation had been laid that the parties had any discussions to show a meeting of the minds, which was an essential pre-requisite to the formation of a contract. He further submitted that no details of the alleged contract between the parties were outlined and as such urged the Court to find that the Claimants had failed to establish any contractual

relationship with Jamaica Tours. I do not agree. Having accepted Bruce Beardsley as a witness of truth in respect of his evidence as to the arrangements made for the rafting tour, I am satisfied on the facts before this Court and I so find, that there was a contract between the Beardsleys and Jamaica Tours.

19. The case of Wong Mee Wan v Kwan Kin Travel Services Ltd. a decision of the Privy Council on appeal from the Court of Appeal of Hong Kong reported at (1996) 1 WLR 38 was cited and heavily relied on by Counsel for the Beardsleys, Ms McGregor. The factual similarity of that case obliges me to set out in its entirety the headnote which reads:-

“ The first defendant tour operator contracted with the plaintiff’s daughter to provide a package tour to a lake in the People’s Republic of China. The first defendant’s brochure contained the terms of the contract and described the itinerary for the tour, which included transportation across the lake by ferry. The tour group was accompanied while in China by a tour guide employed by the second defendant. When the group reached the lake the ferry had already departed, and the tour guide informed the group that they would have to cross the lake by speedboat. While being driven across the lake by an employee of the third defendant the speedboat hit another vessel and the plaintiff’s daughter was drowned. The plaintiff, as her administratrix, commenced proceedings against the defendants in the High Court of Hong Kong claiming damages for breach of contract and negligence. The judge held that the second and third defendants were liable in negligence and that the first defendant was liable for breach of a contractual duty to the plaintiff’s daughter to take reasonable care for her safety. The Court of Appeal of Hong Kong allowed an appeal by the first defendant.

On the plaintiff’s appeal to the Judicial Committee:-

Held, allowing the appeal, that having regard to the contract as a whole the first defendant had undertaken thereby to provide the plaintiff’s daughter with all the services included in the tour itinerary and not merely to

arrange for their provision, even though it had intended that some of the activities would be carried out by others; that although the first defendant was not under a contractual duty to ensure that the plaintiff's daughter would be reasonably safe whilst on the tour, a term was to be implied into the contract that reasonable skill and care would be used in rendering the services which the first defendant had contracted to provide whether they were carried out by the first defendant or by others; and that, since no measures had been taken to ensure that the driver of the speedboat was reasonably competent and experienced, the crossing of the lake had not been carried out with the requisite skill and care and the first defendant was liable for breach of contract."

It is to be noted for completeness that Lord Slynn of Hadley in his Judgment pointed out that the second and third Defendants filed Defences contending only that the proceedings ought to have been brought in China and not in Hong Kong. Interlocutory Judgment was entered against them for damages to be assessed, but it appeared that no further steps were taken against them pursuant to those judgments.

20. In his Judgment, the learned Law Lord opined at pages 41 to 42-

"The issue is thus whether in this particular contract the first defendant undertook no more than that they would arrange for services to be provided by others as their agents (where the law would imply a term into the contract that they would use reasonable care and skill in selecting those other persons) or whether they themselves undertook to supply the services when, subject to any exemption clause, there would be implied into the contract a term that they would as suppliers carry out the services with reasonable care and skill:...

There are of course many contracts under which a person agrees to supply services when he may arrange for his obligations to be performed by others, and where it is indeed contemplated that he will do so. As Cockburn C.J. said in *British Wagon Co. v. Lea & Co.* (1880) 5 Q.B.D. 149, 153 – 154:

‘Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim qui facit per alium facit per se applies.’

The fact that the supplier of services may under the contract arrange for some or all of them to be performed by others does not absolve the supplier from his contractual obligation. He may be liable if the service is performed without the exercise of due care and skill on the part of the subcontractor just as he would be liable if the subcontractor failed to provide the service or failed to provide it in accordance with the terms of the contract. The obligation undertaken is thus, if the person undertaking to supply the services performs them himself, that he will do so with reasonable skill and care, and that if, where the contract permits him to do so, he arranges for others to supply the services, that they will be supplied with reasonable skill and care: See Chitty on Contracts, 27th ed. (1994), pp. 987 – 989, paras. 19 – 046 and 19 – 047.”

21. The question then to determined is what where the terms of the contract between the Beardsleys and Jamaica Tours. Bruce Beardsley consistently maintained in his evidence that he and his wife, on the way to the beach on the morning of the 17th May 2000, stopped at the Jamaica Tours booth in the lobby of their hotel to enquire about activities. They decided on the rafting tour of the Martha Brae River, made the reservations and paid the required fee, which covered transportation to and from, as well as access to the attraction. Later that day at the appointed time, they were directed to a waiting bus by a representative of Jamaica Tours. His testimony in this regard was not shaken by cross examination.

