

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2019/0022

BETWEEN:

[1] SYLVESTER SPENCER

[2] HONORA THOMAS

(As the Administrators of the Estate of Jadianne Spencer, Deceased)

Appellants

and

REGINO NICHOLAS

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellants

No appearance for the Respondent

2021: May 18 & 21;

2021: October 22.

Interlocutory appeal – Statutory Interpretation - Fatal Accidents Act – Section 4 of the Fatal Accidents Act – Assessment of damages – Assessment of damages by a jury in fatal accident claims - Eastern Caribbean Supreme Court (Antigua and Barbuda) Act - Section 23 of the Supreme Court Act – Discretion of a judge to appoint a jury in a civil claim - Whether the learned master erred in her interpretation and application of section 4 of the Fatal Accidents Act and section 23 of the Supreme Court Act - Plain ordinary meaning of section 4 – Whether the express mention of ‘jury’ in section 4 excluded an assessment of damages by a court or judge - Expressio unius est exclusio alterius – Presumption against implied repeal - Whether section 23 of the later Supreme Court Act impliedly repealed section 4 of the earlier Fatal Accidents Act - Whether the general provision in a later Act derogates a specific provision in an earlier Act - Generalia specialibus non derogant – Whether the

absence of an enabling provision to apply for a jury in section 4 meant that a party could not apply for a jury to consider the issue of damages in a fatal accident claim – Section 16(3) of the Interpretation Act

The appellants are the administrators of the estate of their deceased daughter, Jadianne Spencer, who was killed in a road accident involving Regino Nicholas (“the respondent”). On 3rd August 2018, the appellants filed a claim against the respondent seeking damages under the Fatal Accidents Act. At case management, the respondent admitted liability and the master gave directions for an assessment of damages. On 19th June 2019, the appellants applied for an order to have the determination of damages put to a jury as per section 4(2) of the Fatal Accidents Act. The master heard the application on 30th September 2019 and denied the application reasoning that the Fatal Accidents Act did not vest a party with the power to apply to the court for a jury to consider the issue of damages, that section 4 of the Fatal Accidents Act ought to be read in conjunction with section 23 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act (“the Supreme Court Act”) which provides that the granting of a jury is discretionary; that the nature of the action was not of the kind as had been specifically identified in section 23 of the Supreme Court Act requiring trial by jury; and that the nature of the matter was not fact based and therefore better placed before a judge.

The appellants, being dissatisfied with the decision of the learned master, appealed. The appellants contend that the learned master erred in her interpretation and application of the relevant sections of the legislations. They assert that effect ought to be given to the clear wording of section 4(2) of the Fatal Accidents Act. They contend that on a proper construction of the legislation, the general provision in section 23 of the Supreme Court Act, conferring a discretion on the judge to appoint a jury in a civil claim does not derogate from the special provision in section 4 of the earlier Fatal Accidents Act which specifies a jury as the authority to determine the assessment of damages in fatal accident claims. Further, the express mention of ‘jury’ in section 4 necessarily excluded an assessment by the court.

Held: allowing the appeal; setting aside the order of the learned master dated 30th September 2019 and ordering that the damages in claim ANUHCV2018/0370 be assessed by a jury with no order for costs in this Court or the court below:

1. When construing and applying legislation, the court must first give effect to the natural and ordinary meaning of the words used by the drafter. The court may only depart from the natural and ordinary meaning of the words used when they lead to some result which cannot reasonably be supposed to have been the intention of the drafter. Section 4 of the Fatal Accidents Act is clear and unambiguous. In its plain and ordinary meaning, the section identifies a jury as the authority to assess and apportion damages among relatives of the deceased in fatal accident claims. There is no absurdity in section 4 and the language used is mandatory and not discretionary. The general rule of statutory construction *expressio unius est exclusio alterius* (express mention of one thing excludes all others) also aids in the interpretation of the plain meaning of the words in section 4. The express mention of ‘jury’ indicates the exclusion of all other forms of tribunals for assessing damages in fatal accident claims.

Joseph Cadette v The St. Lucia Motor & General Insurance Company Limited [2021] ECSCJ No. 472 followed; **Williams v Central Bank of Nigeria** [2014] UKSC 10 applied; **Attorney General of the Turks and Caicos Islands v Misick and others** [2020] UKPC 30 applied; **Leonart Matthias v Antigua Commercial Bank** [2020] ECSCJ No. 173 followed.

2. Section 2 of the United Kingdom Fatal Accidents Act 1846, upon which section 4 is based, specifically referenced a jury as the authority for the assessment of damages in fatal accident claims. Section 3 of the United Kingdom Fatal Accidents Act 1976 repealed section 2 of the 1846 Act and omitted the use of the word 'jury'. The Antiguan Fatal Accidents Act deliberately retains the use of the term jury. If it were Parliament's intention to make the use of a jury optional or to make the Court or judge an alternative authority for the assessment of damages in fatal accident claims, an equally deliberate approach to the wording of section 4 would have been adopted to achieve this.

O'Loughlin v Cape Distribution Ltd. [2001] EWCA Civ 178 applied.

3. Where the provisions of an Act are inconsistent with the provisions of an earlier Act, the earlier provisions may be impliedly repealed by the later. However, there is a general presumption against implied repeal embodied in the latin maxim '*generalia specialibus non derogant*' (meaning a general provision does not derogate from a special one). The plain reading of section 4 of the Fatal Accidents Act conflicts with section 23 of the Supreme Court Act since section 4(2) specifies a jury as the sole authority for the assessment of damages in fatal accident claims and section 23(2) stipulates that the granting of a jury shall in every case be discretionary. Section 4 predates section 23 and creates a special procedure for damages to be assessed and apportioned by a jury in fatal accident claims. This special procedure which was deliberately created by Parliament has not been derogated from by section 23. There has not been any express revocation under section 23 of what has been specially provided for under section 4. Further, there is nothing in section 23 which specially declares an intention to include fatal accident claims as being part of the general provision that the granting of a jury shall in every case be discretionary. Thus, both section 4 and section 23 can stand together and effect may be given to both.

Diggory Bailey and Luke Norbury: **Bennion on Statutory Interpretation** (7th edition, LexisNexis Butterworths UK, 2017) applied; **Seward v the Vera Cruz (owners)** (1884) 10 App Cas 59 applied; **Blackpool Corp v Starr Estate Co Ltd** [1922] 1 AC 27 applied.

4. Where a statute empowers an authority to do an act, it is deemed to include all such powers as are incidental to the exercise of that power. Whilst section 4 of the Fatal Accidents Act did not have an enabling provision to apply for a jury, the Act confers

authority on the jury to assess damages in fatal accident claims. Consequently, an enabling provision in the Act is not necessary.

Section 16(3) of the **Interpretation Act 1982** Cap. 224, Laws of Antigua and Barbuda applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the decision of the learned master dated 30th September 2019 by which she refused an application by Sylvester Spencer and Honora Thomas (“the appellants”) for an assessment of damages under the **Fatal Accidents Act**¹ to be considered by a jury.

Background

- [2] The appellants are administrators of the estate of their deceased daughter, Jadianne Spencer, who was killed in an accident involving Regino Nicholas (“the respondent”). On 3rd August 2018, the appellants filed a claim against the respondent seeking damages under the **Fatal Accidents Act**. At case management, the respondent admitted liability and the master gave directions for an assessment of damages.
- [3] On 19th June 2019, the appellants applied for an order to have the determination of damages be put to a jury in accordance with section 4(2) of the **Fatal Accidents Act**. The application for damages to be assessed by a jury was heard by the master on 30th September 2019. She denied the application and in summary reasoned as follows:
- i. The **Fatal Accidents Act** does not vest a party with the power to apply to the court for a jury to consider the issue of damages;
 - ii. Section 4 of the **Fatal Accidents Act** must be read in conjunction with section 23 of the **Eastern Caribbean Supreme Court**

¹ Cap 166, Laws of Antigua and Barbuda.

(Antigua and Barbuda) Act² (“the Supreme Court Act”), which provides that the granting of a jury is discretionary;

- iii. The nature of the action before the court is not one of fraud, libel, malicious prosecution or the like which have been specifically identified in section 23 of the Supreme Court Act as requiring trial by a jury; and
- iv. The nature of the matter is not one that is fact based but one based on an examination of technical evidence and legal submissions and is better placed before a judge and not a jury.

- [4] The appellants were dissatisfied with the decision of the learned master and appealed to this Court.

The Appeal

- [5] The appellants filed a notice of appeal with one ground of appeal, namely, that the learned master erred in law in failing to apply the legal principle that a general provision does not derogate from a special one (in interpreting and applying the relevant legislation). Accordingly, they asked this Court to set aside the decision of the master and order the respondent to pay their costs of the appeal. No submissions in opposition to this appeal were filed by the respondent. Accordingly, only the submissions by the appellants were heard and considered by the Court.

Issues on appeal

- [6] The main issues arising for consideration in this appeal are as follows:
- (i) whether the construction of section 4 of the Fatal Accidents Act mandates that damages in a fatal accident claim should be assessed by a jury;
 - (ii) whether the general provision in section 23 of the Supreme Court Act derogates from the special provision in section 4 of the **Fatal Accidents Act**; and
 - (iii) reconciling the inconsistency between section 4 and section 23.

² Cap 143, Laws of Antigua and Barbuda.

Appellants' submissions

- [7] The main argument of counsel for the appellants, Dr. David Dorsett, was that it is implied in the learned master's reasoning that section 23 of the Supreme Court Act has effectively repealed section 4 of the **Fatal Accidents Act**. He asserted that this finding is contrary to authority and established rules of statutory construction. He submitted further that, in the circumstances, the applicable rule of statutory construction is the maxim *generalia specialibus non derogant*, that is, a general provision does not derogate from a special one.
- [8] Based on this principle, Dr. Dorsett stated that the general provision in section 23 of the Supreme Court Act, conferring a discretion on the judge whether to appoint a jury in a civil claim, does not derogate from the special provision in section 4 of the earlier **Fatal Accidents Act** which specifies a jury as the authority to determine the assessment of damages in a fatal accident claim. He argued that, were the repeal of section 4 the intention, Parliament would have made its will manifestly clear by including a provision under section 23 that, notwithstanding any other law, the mode of a trial shall be in accordance with section 23. However, Parliament did not do so and therefore, section 23 cannot be said to interfere with what it has specifically enacted in the **Fatal Accidents Act**. Dr. Dorsett urged that **Bennion on Statutory Interpretation**³ is instructive on this point, as it states that the presumption against implied repeal is particularly strong where a general provision in an Act covers a situation for which specific provision is made in an earlier Act. He also relied on the authorities of **R (Newhaven Port & Properties Ltd) v East Sussex County Council**,⁴ **Blackpool Corp v Starr Estate Co Ltd**⁵ and **Barker v Edger**⁶ in support of this submission.
- [9] In further support of his submissions on the construction of section 4, Dr. Dorsett relied on the general rule of statutory construction *expressio unius est exclusio*

³ 7th Edition, section 6.10 page 206-209.

⁴ [2015] AC 1547 at paragraph [93].

⁵ [1922] 1 AC 27.

⁶ [1898] AC 748.

alterius, that is, express mention of one thing excludes all others. He submitted that the express mention of 'jury' in section 4 excludes assessment by the court and therefore, there can be no presumption that the court is an alternative authority to assess damages. He relied on the Privy Council case of **Blackburn v Flavelle**⁷ in support of this submission. By way of comparison with the Antiguan **Fatal Accidents Act**, Dr. Dorsett drew this Court's attention to the Fatal Accidents Act 1885 of India in his oral submissions, noting that section 1A of the Indian Act, which corresponds to sections 3 and 4 of its Antiguan counterpart, specifies 'the court' as the authority empowered to assess damages in a fatal accident claim. Therefore, he submitted that where Antigua's **Fatal Accidents Act** indicates 'the jury' as the assessing authority for damages, effect must be given to this very clear and deliberate distinction.

[10] He also argued that the learned judge's reasoning that there is no enabling section in the Fatal Accidents Act that vests a party with the power to apply to the court to have a jury consider the issue of damages is spurious since in its plain terms, the language of section 4(2) provides that the assessment of damages in a fatal accident claim falls within the province of a jury. He submitted that consistent with the principles established in cases such as **Campbell v Peter Gordon Joiners Ltd**⁸ and **Roodal v State of Trinidad and Tobago**,⁹ the court must, in interpreting statutory text, pay due respect to the language and structure used by Parliament, rather than to preconceptions of what its objectives could or should have been.

[11] Dr. Dorsett insisted that the clear words apparent on the face of section 4(2) must be given effect. He stated further that there is no wording in section 4(2) that suggests that the use of a jury in the assessment of damages in a fatal accident claim is optional or discretionary. With this in mind, he maintained that it would be improper for another entity to assume such a role where it is already established on a statutory basis to be within the jurisdiction of a jury. In the circumstances, Dr.

⁷ (1881) 6 App. Cas. 628 at page 634.

⁸ [2016] UKSC 38.

⁹ [2003] UKPC 78.

Dorsett implored this Court to allow the appeal by finding that the decision and order of the learned master fails to give effect to the clear meaning of section 4. He also asked for an award of costs of the appeal.

Discussion

The Fatal Accidents Act and the Supreme Court Act

[12] This appeal brings into sharp focus the interpretation of section 4 of the **Fatal Accidents Act** as well as section 23 of the Supreme Court Act. Therefore, it is necessary to set out the relevant provisions of both Acts.

[13] Section 4 of the **Fatal Accidents Act** reads:

“4. (1) Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death is so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

(2) The jury in any such action may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought.

(3) The amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the aforesaid persons in such shares as the jury by their verdict shall find and direct.”
(Emphasis supplied)

[14] Section 23 of the Supreme Court Act states:

“23. (1) Subject as hereinafter provided, any action to be tried before the High Court, may in the discretion of the court or a judge, be ordered to be tried with or without a jury:

Provided that the mode of trial shall be by a judge without a jury unless upon the application of any party to the action, a trial with a jury is ordered.

(2) Any party to the action may within ten days after the action has been set down for trial apply to have the action tried with a jury, and if the court or a judge is satisfied that –

(a) a charge of fraud against the party; or

(b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage,

is in issue, the action shall be ordered to be tried with a jury unless the court or a judge is of the opinion that the trial thereof requires any prolonged examination of documents or accounts or any specific or local investigation which cannot conveniently be made with a jury; but, save as aforesaid, the granting of a jury shall in every case be discretionary,

(3) The provisions of this section shall be without prejudice to the power of the High Court or a judge to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial, and where any such order is made the provisions of this section requiring trial with a jury in certain cases shall have effect only as respects questions relating to any such charges or claim as aforesaid.

(4) For the purposes of this section the expression 'action' means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court but does not include a criminal proceeding by the Crown."

[15] The general scheme of the **Fatal Accidents Act** is to compensate the families of persons killed by accidents. It has been enacted in much the same form in several jurisdictions throughout the Eastern Caribbean and the wider English speaking Commonwealth, and is based on the United Kingdom Fatal Accidents Act of 1846. Like section 4 of the Antiguan **Fatal Accidents Act**, the equivalent provision, section 2 of the 1846 Act, also provides that 'the jury may give such damages as they may think proportioned to the injury' and that 'the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct'.

[16] While the **Fatal Accidents Acts** in jurisdictions such as Saint Christopher and Nevis and Montserrat continue to mirror the wording of section 2 of the 1846 Act,¹⁰ it is noteworthy that there are other jurisdictions in the Caribbean and the Commonwealth that have replaced the word 'jury' with 'court' in similar provisions. For example, it is the court that is specified as the authority for assessing damages

¹⁰ See section 4 of the Fatal Accidents Acts of Saint Christopher and Nevis and Montserrat respectively.

in section 4 and section 5 of the Jamaican and Bahamian Fatal Accidents Acts respectively. Further, in the wider English Commonwealth, section 1A of the Fatal Accidents Act of India has also placed the responsibility for assessment of damages with the court. Indeed, these versions of the Fatal Accidents Act were enacted after their 1846 English progenitor, which suggests that either the retention of the word 'jury' or its substitution with the word 'court', in the assessment of damages provisions, was intentional on the part of the respective legislatures.

- [17] In the context of Antigua, the later enactment of section 23 of the Supreme Court Act has created a general discretion for the court or a judge to order that an action in a civil proceeding be tried with or without a jury upon the application of any party to the action. Section 23 further mandates in specific terms that where the court or judge is satisfied that a charge of fraud or a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage is in issue, the court or judge must order that the action be tried by a jury. This is required to be done 'unless the court or a judge is of the opinion that the trial thereof requires any prolonged examination of documents or accounts or any specific or local investigation which cannot conveniently be made with a jury'. Importantly, section 23 also provides that except for the abovementioned cases 'the granting of a jury shall in every case be discretionary'.
- [18] In this appeal, the general discretion in section 23 raises the question of how section 4 of the **Fatal Accidents Act** should be interpreted. Accordingly, the central focus is one of statutory construction in circumstances where (i) section 23 does not list fatal accident claims as one of the claims where the court or a judge must appoint a jury upon application by a party, and (ii) the **Fatal Accidents Act** does not vest a party with the power to apply to the court for a jury to consider the issue of damages. Therefore, it is necessary to determine whether the master properly construed and applied section 4 of the **Fatal Accidents Act** and section 23 of the Supreme Court Act in arriving at her decision.

Construction of section 4 and section 23 – the plain meaning

- [19] The principles relating to the court's approach to statutory interpretation are well-known and have been previously recognised by this Court several times. When construing and applying legislation, the court must first give effect to the natural and ordinary meaning of words used by the drafter. Recently, in **Joseph Cadette v The St. Lucia Motor & General Insurance Company Limited**,¹¹ Blenman JA, delivering judgment on behalf of this Court, stated at paragraphs 43 and 44:

"[43] It is settled law that this Court must give primacy to the natural ordinary meaning of words used in the context of the legislation, from which the court may only depart where the natural and ordinary meaning of the words give rise to an undesirable end result. This principle was given judicial recognition by this Court in *The Labour Tribunal v St. Lucia Electricity Services Limited*. This was recently affirmed in the Board in *Attorney General of the Turks and Caicos Islands v Misick and others* where the Board stated that '...the first question is what is the natural or ordinary meaning of the particular words or phrases in their context...'. The Board in *Misick* further affirmed that:

'It is only when that [natural or ordinary] meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some other possible meaning of the word or phrase...'

[44] Along similar lines, the learned President of the Caribbean Court of Justice ('the CCJ') Sir Dennis Byron PCCJ (as he then was) enunciated as follows in **Smith v Selby**:

'[9] The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge's view of what is just and expedient.'

- [20] Further guidance may be taken from the pronouncements of Lord Neuberger in **Williams v Central Bank of Nigeria**,¹² where he stated at paragraph 72 of his judgment that:

"...When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretative role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating

¹¹ [2021] ECSCJ No. 472.

¹² [2014] UKSC 10.

the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, [1975] 1 All ER 810, [1975] 2 WLR 513, 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

- [21] Critically, the pronouncements of the Board in **Attorney General of the Turks and Caicos Islands v Misick and others**,¹³ that were adopted in **Cadette**, specifically state that '*the first question is what is the natural or ordinary meaning of the particular words or phrases in their context*' and further that the court only looks for other possible meanings where the natural and ordinary meaning '*leads to some result which cannot reasonably be supposed to have been the intention*'.
- [22] In this appeal, the natural and ordinary meaning of section 4 of the **Fatal Accidents Act** is clear and unambiguous. In their ordinary sense, the words of section 4 identify a jury as the authority to assess damages in a fatal accident claim, and further that the amount recovered in that claim is to be apportioned among the relatives for whose benefit the claim is brought in a manner as the jury by their verdict finds and directs. The mechanism for awarding compensation to the relatives of the deceased in a fatal accident claim therefore appears twofold, assessment of damages and apportionment of those damages among the relatives of the deceased. Section 4 has unambiguously stipulated the jury as having conduct of both limbs for the mechanism of compensation and I find no absurdity in this interpretation. The language is mandatory, not discretionary. Therefore, I agree with Dr. Dorsett's submission that on a proper reading of section 4, there is no wording that suggests that the use of a jury in the assessment of damages is optional or discretionary. Neither does any provision in the **Fatal Accidents Act** allow the court or a judge to have conduct of the assessment or apportionment of damages in a fatal accident claim as an alternative.

¹³ [2020] UKPC 30.

[23] I also agree with Dr. Dorsett that the general rule of statutory construction *expressio unius est exclusio alterius* applies in the circumstances of this case and thereby, the express mention of ‘jury’ in section 4 indicates the exclusion of all other forms of tribunals for assessing damages in a fatal accident claim. This Court has previously adopted *expressio unius est exclusio alterius* as an aid to statutory construction of the plain reading of words used in legislation. In **Leonart Matthias v Antigua Commercial Bank**,¹⁴ the Court considered the meaning of provisions under section 17 of the **Industrial Court Act** that concerned the right of appeal to the Court of Appeal from decisions of the Industrial Court. At paragraph 12 of its judgment the Court opined:

“...Having listed the grounds on which a decision of the Industrial Court can be challenged on appeal, it follows that the right to appeal only lies in the limited circumstances listed in the section. This interpretation follows from a plain reading of the words in the section including the fact that the list of appealable matters is preceded by the words ‘and no others’. It follows that the non-inclusion of a right to appeal against findings of fact by the Industrial Court means there is no right of appeal on that ground. The section is a classic illustration of the Latin maxim often used in the interpretation of statutory provisions, ‘*expressio unius est exclusio alterius*’; that is to say, when one or more things of a class are expressly mentioned, others of the same class are excluded.”

The historical context

[24] There is a dearth of authorities on the interpretation of section 4. However, I find the pronouncements of the English Court of Appeal concerning the interpretation of the English equivalent to section 4 to be helpful. For context, it is worth mentioning that while originally section 2 of the 1846 Act referenced the jury as the assessing body for damages, as it is presently for Antigua, that provision was later repealed and replaced by section 3 of the Fatal Accidents Act 1976 which now governs English fatal accident claims. Section 3 of the 1976 Act, in so far as it is relevant, now reads:

“3. Assessment of damages.

(1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

¹⁴ [2020] ECSCJ No. 173.

(2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.”

[25] With this in mind, I now turn to the approach adopted by the English Court of Appeal in its construction of section 3 of the 1976 Act and its predecessor, section 2 of the 1846 Act. In **O’Loughlin v Cape Distribution Ltd**,¹⁵ the court considered an appeal challenging a judge’s findings upon which he based his assessment of an award of damages in a fatal accident claim. At paragraph 11 of his judgment, Latham LJ stated:

“[11] The starting point must be the terms of the relevant provision in the Fatal Accidents Act 1976. S 3(1) provides:

‘In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.’

This provision replicates, though not in precisely the same words, the basis upon which damages have been assessed since the passing of the Fatal Accidents Act 1846. The task of the court, in answering this question was originally the province of the jury.” (Emphasis supplied)

[26] In light of the rules of construction discussed in this judgment and fortified by the dictum of Latham LJ in the **O’Loughlin case**, I come to the inescapable conclusion that section 4 should be interpreted as designating a jury as the authority for the assessment and apportionment of damages in fatal accident claims. The plain reading of section 4 as well as the historical interpretation of its wording can lend themselves to no other suitable conclusion.

Conflict with section 23 of the Supreme Court Act — implied repeal

[27] Having established what in my opinion is the plain and ordinary meaning of section 4, the further question arises as to the impact of section 23 of the Supreme Court Act which gives the court or a judge a general discretion to appoint a jury in civil proceedings. Dr. Dorsett argued that part of the reasoning of the learned master for denying the application to appoint a jury seems to be that section 4 of the Fatal

¹⁵ [2001] EWCA Civ 178.

Accidents Act (in whole or in part) has been impliedly repealed by section 23 of the Supreme Court Act. I do not agree that this can be implied from the learned master's reasoning. In the reasons set out in the order, the master stated:

“AND CONSIDERING that section 4 of the [Fatal Accidents Act] notes that a presumption is made that a jury should consider the issue of damages. However [on] a thorough review of the [A]ct it is pellucid that there is no enabling section or otherwise that vests a party with the power to apply to the court to have a jury consider the issue of damages in these circumstances.

This being the case it is the considered opinion that in the circumstances section 4 of the Fatal Accident[s] Act must be read in conjunction with the Eastern Caribbean Supreme Court Act section 23 of which provides that the granting of a jury is discretionary.”

[28] It is clear from this part of the order that the master did not conclude that section 23 has impliedly repealed section 4. Instead, she reasoned that both sections should be read together for the proper determination of the application to appoint a jury in the appellants' claim. However, despite there being no mention of implied repeal by the learned master, one cannot ignore the obvious conflict between section 23 and the plain reading of section 4. Section 23(2) stipulates that ‘the granting of a jury shall in every case be discretionary’. This conflicts with section 4 of the **Fatal Accidents Act** which provides that the assessment and apportionment of damages is by a jury, with no alternative or discretion to use another method.

[29] How then is this Court to reconcile the above conflict? **Bennion on Statutory Interpretation**¹⁶ at section 6.10 states that ‘[w]here the provisions of an Act are inconsistent with the provisions of an earlier Act, the earlier provisions may be impliedly repealed by the later’. Section 6.10 goes on to state as follows:

“There is a general presumption against implied repeal or implied revocation of a common law rule. The effect of the presumption is that courts should where possible, interpret the provisions of a later Act in a way that is compatible with the earlier one.

...

The presumption in this context is sometimes expressed in terms of the maxim *generalia specialibus non derogant* (a general provision does not

¹⁶ 7th Edition, section 6.10 page 206-209.

derogate from a special one), which is in Jenkins' Exchequer Reports. Although it is sometimes treated as an exception to implied repeal it is really just one example of circumstances in which the presumption against implied repeal is particularly strong.

The explanation of the rule by Earl of Selborne LC in **Seward v The Vera Cruz (owners), The Vera Cruz** is often cited:

'... where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without an indication of a particular intention to do so.'

Similarly in *Blackpool Corp v Starr Estate Co Ltd* Viscount Haldane said:

'... wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject-matter appropriate to a class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest.'"

[30] I consider the above passage to be an apt description of the principle of implied repeal and the presumptions against it within the context of a special provision in an earlier Act conflicting with a general provision in a later Act. It is worth repeating that section 4 predates and would have operated prior to section 23 of the Supreme Court Act. Based on the authorities adopted by the learned editors of **Bennion**, I am satisfied that the presumption against implied repeal embodied in the maxim *generalalia specialibus non derogant* applies in this case.

[31] I do not consider that the general discretion provided under section 23 is so inconsistent with or repugnant to the special provision under section 4 that the two cannot stand together and effect cannot be given to both at the same time. Section 4 creates a special procedure for damages, and not liability, to be both assessed

and apportioned by a jury in fatal accident claims. This is a special procedure deliberately created by Parliament and it has not been derogated from by the provision in section 23 for the appointment of juries to be a discretionary exercise in civil proceedings generally. Guided by the authorities cited by the learned editors of **Bennion, Seward v The Vera Cruz (owners)**¹⁷ and **Blackpool Corp v Starr Estate Co Ltd Viscount Haldane**,¹⁸ there is nothing under section 23 which specially declares an intention to include the assessment and apportionment of damages in fatal accident claims as being part of the general provision that ‘the granting of a jury shall in every case be discretionary’. Neither has there been any express revocation under section 23 of what has been specially provided for under section 4. Therefore, I am satisfied that the two provisions can peaceably coexist without any violence being done by one to the other. Section 23 is capable of reasonable and sensible application to civil proceedings generally without extending to the specific case of the assessment and apportionment of damages in fatal accident claims for which provision is made under section 4.

No enabling provision in section 23

- [32] In paragraph 27 above, I reproduced the section of the master’s order where she found as a part of her reasoning that section 4 does not have an enabling provision to apply for a jury and therefore must be read with section 23 which has a provision for applying for a jury. I do not agree with this finding by the master. Section 4 exists independently of section 23 and was not impliedly repealed or otherwise affected by the later enactment of section 23. The **Fatal Accidents Act** confers authority on the jury to assess damages. Generally, where a statute empowers any authority to do any act it is deemed to include all such powers as are incidental to the exercise of that power.¹⁹ Therefore, an enabling provision in the Act is not necessary. Were it so, a person making a claim under the **Fatal Accidents Act** before 1970 when section 23 was enacted, would not have been able to get a trial by jury, as he is entitled to. That could not be correct.

¹⁷ (1884) 10 App Cas 59.

¹⁸ [1922] 1 AC 27.

¹⁹ Section 16(3) of the Interpretation Act 1982, Cap 224, Laws of Antigua and Barbuda.

No absurdity

[33] I would add that in keeping with the principles of interpretation and the authorities cited above it cannot be sustained that the plain language of section 4 leads to some undesirable or absurd result that cannot reasonably be supposed to have been the intention of Parliament. Conversely, the interpretation that the court or a judge may replace the jury in light of the general discretion in section 23 of the Supreme Court Act would appear counter to the intention of Parliament in circumstances where section 4 of the Antiguan **Fatal Accidents Act** deliberately retained the use of the term 'jury' as seen in the 1846 Act, while other jurisdictions revised the wording of the parallel provision in their respective Fatal Accidents Acts to substitute 'court' in its place. I consider that if it were the intention of Parliament to make the use of a jury optional or discretionary, or to make the court or a judge an alternative authority for the assessment and apportionment of damages, an equally deliberate approach to the wording of section 4 would have been adopted to achieve this, as was done in the other jurisdictions referenced in paragraph 16.

[34] My final comment is that the retention of section 4 in the **Fatal Accidents Act** in its present form seems somewhat out of step with how damages are assessed and apportioned in the High Court in civil trials. If the procedure for assessing damages in fatal accident claims is to align with that of civil trials generally, it would be for the lawmakers in Antigua and Barbuda to revise this section to bring it into line with other Caribbean and Commonwealth countries.

Conclusion

[35] When taken in their totality, the above authorities and circumstances lead to the ineluctable conclusion that the learned master erred in not granting the appellants' application for the assessment of damages to be done by a jury and the appeal should be allowed. There was no appeal against the master's order that the parties bear their own costs and, although the appellants have been successful in the appeal, I would make a similar order. The issues in the appeal are novel and the respondent did not appear or oppose the appeal.

Order

- [36] (i) The appeal is allowed and the order of the learned master dated 30th September 2019 is set aside.
- (ii) The damages in claim ANUHCV2018/0370 shall be assessed by a jury.
- (iii) No order for the costs in this Court or in the court below.
- (iv) The Chief Registrar is directed to serve copies of the judgment and order on the respondent.

I concur
Davidson Kelvin Baptiste
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar