[2014] JMSC Civ 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV2863

BETWEEN	**AINSWORTH BLACKWOOD, Snr. (Administrator of Estate: Ainsworth Blackwood Jnr. deceased)**	**CLAIMANT**
A N D	**NAUDIA CROSSKILL**	**1ST DEFENDANT**
AND	**GLENMORE WAUL**	**2ND DEFENDANT**

Ms. Marion Rose-Green instructed by Marion Rose-Green & Co. for the claimant

Mr. Joseph Jarrett instructed by Joseph Jarrett & Co. for the defendants

November 7,8,9, 2011 and February 25, 2014

Motor vehicle accident – Determination of Liability – Contributory Negligence must be specifically pleaded for defendants to benefit from it as a defence – Assessment of Damages

D. FRASER J

INTRODUCTION

[1] On the 13th day of January 2007 Ainsworth Blackwood Jnr. while riding his bicycle along the Heartease main road in the parish of Saint Thomas was fatally injured in an accident with a motor car registered 3991EF being driven by the 2nd defendant Glenmore Waul. After this accident the deceased was placed in the car being driven by the 2nd defendant. The deceased was being rushed to the Princess Margaret Hospital when the 2nd defendant was involved in another accident. There is however no indication that the deceased suffered any injuries in that second accident and the case proceeded throughout with a focus on the first accident.

[2] The claimant the father of the deceased, as administrator of his son's estate sought damages under the Fatal Accidents Act and the Law

Reform (Miscellaneous Provisions) Act for negligence, interest, costs and attorneys costs alleging that the 2nd defendant negligently caused the death of his son the deceased. The 1st defendant was sued by virtue of the fact that she was the owner of the car being driven by the 2nd defendant at the time of the fatal accident.

[3] The Acknowledgment of Service of the defendants filed June 19, 2009 indicates the Claim Form and Particulars of Claim were served on them on June 16, 2009. The defendants in their Defence allege that it was the deceased who was 100% responsible for the accident caused by his reckless and dangerous riding.

[4] At the start of this matter there was some debate and submissions concerning whether or not based on the rule in ***Smith v Selwyn*** [1914] 3 KB 98 this matter should proceed since there was a coroner's inquest pending. The rule, in the words of Swinfen Eady LJ at page 105 is that,

> [W]here injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution.

[5] However, it has been conclusively held by the Judicial Committee of the Privy Council in ***Panton & Ors v. Financial Institutions Services Ltd*** [2004] 2 LRC 768 that the rule is no longer a part of Jamaican law. The trial therefore proceeded.

THE QUESTION OF LIABILITY

The Claimants' Case

[6] The main witness for the claimant concerning how the accident occurred was Mr. Earl Wilson. In his witness statement dated September 16, 2011 received as his evidence in chief, he stated that on January 13, 2007 he

was riding his bicycle along the Heartease main road in the parish of St. Thomas in the company of the deceased Ainsworth Blackwood Jnr. and Desjean Noble who were also riding bicycles. Having gone to a wholesale they were riding on their way back home.

[7] Desjean and Ainsworth were ahead of him. Desjean pulled over to the side walk. Ainsworth was passing Desjean when a motor vehicle driven by the 2nd defendant coming from the opposite direction, came over onto their side of the road and hit Ainsworth's bicycle. Ainsworth fell off the bicycle onto the ground. Earl stated that it appeared that the 2nd defendant was going into his yard as he came over onto their side of the road in front of his gate where he hit Ainsworth. He Earl was about 20-30 feet away from where the accident happened. He and Desjean jumped off their bicycles and rushed towards Ainsworth. They called out his name but he did not respond. He was bleeding from his nose and mouth. A young man named Troy Wilson picked up Ainsworth and placed him in the 2nd defendant's vehicle. Troy Wilson and the 2nd defendant than drove off with Ainsworth in the direction of the Princess Margaret Hospital.

[8] When he was cross-examined he stated that he was related to the deceased as a cousin whom he knew as Kayon, but he was not sure on which parental side. He also stated that he was 17 years old at the time of the accident. It emerged that on October 21, 2011 when he attended the Coroner's court in relation to the Inquest to be held into the death of Ainsworth Blackwood Jnr, he was requested by the investigating officer in the matter, Cpl. Osbourne Barnes, to sign a typed statement which was supposed to be a reproduction of the original handwritten statement he had given to the investigating officer on the same day of the incident.

[9] These two statements given by the witness to Cpl. Barnes sparked significant controversy. Only a copy of the first page of this original statement and a copy of the signed typed statement were served on

counsel for the claimant. The originals were never accounted for and presumably would be on the Coroner's court file or have been mislaid. In relation to the original handwritten statement the witness stated that he had been in shock when he gave it, that he had made an unfulfilled request to Cpl. Barnes to make some changes to some parts of it which were not accurate and that he could not recall signing it. Counsel for the claimant also raised the issue of whether or not Mr. Wilson had a parent with him at the time he was giving the statement since he was under the age of 18 on the day of the incident. Cpl. Barnes when he testified at first said he could not remember, then later in his evidence, said Mr. Wilson's mother Margaret was present at the taking of the statement. Though I do not on a balance of probability find that Mr. Wilson's mother was present, he was not a suspect giving a statement. The absence of parental support I therefore do not find would prevent his statement being used in his cross-examination in a civil matter. I will however take into account the circumstances under which I find the statement was given in determining how it should be treated especially in light of section 31 I (1) (a) of the Evidence Act which I shall address in due course.

[10] With regard to the typed copy he stated that on October 21, 2011 when he went to Coroner's court he was called by the investigating officer to sign a typed statement, which he did in three places, though he never read it. He was not told that it was a reproduction of the statement he had given on the day of the accident.

[11] The contents of the previous statement, (both the copy of the original and the typed version alleged to be a reproduction of the original), are of significant moment in this matter. Mr. Wilson in his evidence admitted that he had spoken to the deceased and Desjean when they were en route to the wholesale and told them that he didn't want any informal riding meaning "zigzag" because it was it main road. He however denied that on the return journey when the accident happened the deceased and

Desjean had been racing and zigzagging and that it appeared that the deceased had touched the back wheel of Desjean and fell off his bicycle. He thus denied having given a particular account of how the incident occurred in the statement he gave to Cpl. Barnes on the day of the incident, which was at variance with the account he had given in his statement received as his evidence in chief. When he was shown the incomplete copy of the original statement with a signature at the bottom of that page he said to be honest some of the letters in the signature look like his, but there was a fault in the signature and he could not say it was his. As indicated before however, he admitted to signing a typed statement on October 21, 2011 and identified his signature in court in three places on the copy that was shown to him.

[12] Based on his denial of having said what was recorded in the copy statements (handwritten and typed) dated January 13, 2007 the following exhibits were tendered and received in evidence as proof of previous inconsistent statements relating to how the accident occurred on the return journey:

(a) *Desjean was in front and Kayon behind riding zig zag across the road and go close to Desjean back wheel* (Exhibit 7).

(b) *I told him repeatedly to stop but he continued and started to laugh* (Exhibit 8).

(c) *I said to myself that Kayon wanted to kill himself* (Exhibit 9). It is noted that the witness stoutly proclaimed he definitely did not say that.

(d) *On reaching a section of the heartease main road I saw when Kayon again rode the bicycle in a zig zag manner and lost control* (Exhibit 10).

It should be noted here that the handwritten copy of the statement included up to the words “zig zag” in Exhibit 10. Up to that point the typed and handwritten copies contain exactly the same content.

(e) *I saw Kayon trembling as if he was dying* (Exhibit 11). He admitted saying this but was not sure if he had said it to Cpl. Barnes. As he did not distinctly admit saying it to Cpl. Barnes it was admitted as an exhibit.

[13] Interestingly, he stated that after he gave his statement to Cpl. Barnes he was not on speaking terms with Mr Blackwood Snr. for quite a while. This was interpreted by counsel for the defendants as supporting the fact that Mr. Wilson had at first given a statement which was unfavourable to the deceased.

[14] He also stated that he was not sure that the car hit Ainsworth but he was sure that he saw the bicycle collide with the car on Ainsworth’s side of the road. He said he remembered passing the bicycle after the accident and seeing a scratch on the tip of the bicycle which was from the asphalt. He also saw a whitish mark on the bicycle in the same vicinity as well. He had not examined the wheel of the bicycle so he could not say if it was twisted.

[15] He reiterated that he saw marks of head injury on his face but he couldn’t say if it was the road or the car that had caused it. The deceased was bleeding from his mouth and nose. A lot of blood was on the ground.

[16] After the accident the deceased was lying on the left side of the road beside his bicycle right near the embankment and near the gate of the 2nd defendant. Mr. Wilson said that he the witness was 5 feet 8 inches tall and the deceased was less than that distance from the embankment. This in a context where in his statement which formed his evidence in chief he stated that road was 20 – 22 feet wide and in cross examination that there were no white line markings in the road.

[17] Mr Blackwood Snr. in his evidence relevant to the question of liability said that his son was riding the bicycle from a long time and that when he got back the bicycle it was in good condition but the tire was cut.

[18] Mr. Troy Wilson who came on the scene after the accident said he saw the deceased lying at the gate where the 2nd defendant lives. Blood was running down his face and he was about 2 feet in the road from the embankment. He said he was in shock so he couldn't really look at the bicycle but he did not recall seeing any damage to it.

[19] Just before the start of the defence case the following were received in evidence by agreement.

(a) Four pictures of the scene of the accident in front of the 2nd defendant's gate (Exhibits12 A-D)

(b) Post Mortem Examination of Ainsworth Blackwood Jnr performed by Dr. Kadiyala Prasad dated January 23, 2007 (Exhibit 13)

(c) Certificate of Coroner dated January 14, 2009 (Exhibit 14)

[20] The 1st defendant Naudia Crosskill in her witness statement received as her evidence in chief indicated that she was the owner of motor car registered 3991EF which at the time of the accident was being driven with her permission by the 2nd defendant her cousin. She also indicated that the car was insured.

[21] In his defence the 2nd defendant in his statement received as his evidence in chief stated that at the time of the incident he was travelling no more than 25 miles per hour. He saw three cyclists coming towards him from the opposite direction who appeared to be in some kind of race with each other. The road was straight and the conditions were sunny and dry. The cyclists were in front of each other in very close proximity riding in zig zag pattern. As he got nearer, one of them appeared to have lost control of his

bicycle, lost his balance and fell into the direct path of his vehicle. He couldn't avoid hitting him.

[22] Cross-examined he stated that he saw the cyclists from approximately 225 feet away but he was looking at them from the time he saw them until the accident. To use his words, "They were in my glimpse but I was not really looking at them. I was looking straight up the road". He said when he almost reached to where they were, he didn't know what happened to the deceased bicycle but he saw like the deceased dive towards the car and he the 2nd defendant swerved to his left side banking. The deceased hit his head on the bumper. He stated that the accident happened a little bit from his gate and that if he didn't swerve the whole of the deceased would have mashed up. He denied that he was not driving on his side of the road.

[23] He denied that he was turning into his gate. He said he had no reason to go to his yard at that time. He agreed that exhibit 12A showed the accident scene and his gate and that the blood stains in exhibit 12A was where the accident occurred. He further agreed that in exhibits 12A and C the blood stains were on his right hand side, but he denied that he had been driving on the right hand side of the road.

[24] He accepted the evidence of Cpl. Barnes that the road was 18 feet wide. He however did not agree with him that the accident happened on his right hand side of the road. He stated that the blood is almost in the middle of the road. When the car hit the deceased he bounced back and rolled. He get a "shake off". He maintained that in the exhibit 12A where the 1st blood stain was in the centre of the road. He was shown exhibit 12C and it was suggested to him that both blood stains were on the right hand side of the road. He however said he couldn't see the small blood stain as the bicycle in the picture was there. He said that at the time of the incident he braked, swerved and tooted his horn; that though those things were not in his

statement he was not just making them up, but he had not been asked about them before.

[25] He agreed that the deceased was on his correct side of the road, but he said that was until he lost control. This loss of control he said took place just as the deceased was going to pass him. He said he was driving to the extreme left of the road and the deceased dived right at the corner of the bumper right near the corner light at the front wheel on his right side. At no time did he hit the bicycle.

[26] Cpl. Osbourne Barnes in his evidence stated that on January 13, 2007 he went to the scene of the accident accompanied by the 2nd defendant who pointed out an area to him. He measured the roadway at the point of the accident and found it to be 18 feet wide. From the blood mark to the left embankment, (heading in the direction the deceased was riding), was 7 feet and it was 11 feet from the right embankment. This Cpl. Barnes said indicated the accident occurred on the right side of the road (coming from the direction the 2nd defendant was driving from). In reexamination however he critically noted that there were two blood spots in his estimation 3-4 feet apart. He indicated he took a statement from Mr. Earl Wilson whom he pointed out in court, about eight hours after the accident had occurred at the Yallahs police station.

SUBMISSIONS AND ANALYSIS

[27] Counsel for the claimant submitted that the 2nd defendant would be liable as based on the outer blood stain the accident would have occurred 2 feet in the lane of the deceased. The fact that there was not significant damage to the bicycle did not mean that the accident could not have occurred the way in which Mr. Earl Wilson said it did. However even if the deceased fell from his bicycle as maintained by the 2nd defendant, as there was no restriction as to what a cyclist could do in his lane, the 2nd defendant would be liable if the deceased got hit in his lane. Further,

counsel submitted there was a special rule concerning children and contributory negligence. As children would normally be expected to be less careful than adults the behaviour of the deceased even if not as careful as that as an adult should not attract a finding of contributory negligence on the part of the deceased. She cited ***Gough v Thorne*** [1966] 3 All E.R. 398. Counsel also contended that if the 2nd defendant had noticed the deceased and his friends riding erratically it was his duty to keep his eyes on them. However he was not taking notice. She submitted based on the case of ***O'Connell v Jackson*** [1971] W.L.R. 463 that the deceased would have been about 15% contributorily negligent as he was not wearing a helmet.

[28] Counsel for the defendants on the other hand maintained that the evidence that the bicycle was largely undamaged showed that the deceased was not hit from the bicycle as suggested by the claimant. Further that the initial statement of Earl Wilson showed what truly happened. That the deceased was riding recklessly and fell off the bicycle onto the bonnet of the car being driven by the 2nd defendant. He submitted that even if the first blood spot was a couple of feet to the right that would not make the 2nd defendant liable as cyclists need much less space than a car, plus one had to contend with the "bounce back" factor. He submitted the version of the evidence given by the 2nd defendant was far more credible. It made more sense that the accident occurred as the 1st cyclist passed the 2nd defendant and the 2nd cyclist, the deceased lost his balance and fell hitting his head on the car being driven by the 2nd defendant.

[29] I have carefully considered the evidence and the submissions made in this matter. The first observation I would make is that the independent evidence though useful is not conclusive. The roadway where the accident took place is unmarked. The width of the roadway where the accident occurred is 18 feet as measured by Cpl. Barnes. The corporal also at first

indicated that the blood stains were 7 feet from the left embankment (on the deceased side of the road and 11 feet from the right embankment. However in re-examination he stated that there were two blood spots on the road in his estimation 3-4 feet apart. It was not made clear in his testimony which of these two spots he was saying was 7 feet from the left embankment. Further, while the court is well aware that photographs have to be carefully viewed as angles and aspect ratios may create false impressions, these are four simple photographs. When both exhibits 12A and in particular 12C are viewed, it is clear that the outer blood stain which is where a bicycle rider is standing astride his bicycle in 12C, is approximately in the centre of the road.

[30] The combination of the absence of damage to the bicycle and the previous inconsistent statements of the witness Earl Wilson admitted in evidence as exhibits, support the conclusion that the accident took place largely as indicated by the 2nd defendant. Though Mr. Earl Wilson sought to disavow the handwritten copy of the first page of his statement by saying he did not recognise his signature, he did admit to signing the typed written statement on October 21, 2011. Apart from the fact that when compared with the first page of the handwritten statement the typed copy to that point is the same, even if it was not the same or entirely the same as the statement he signed on January 13, 2007, it would still be a statement given previously to his giving evidence and amenable to being used to contradict him. The fact is he signed it making it his own. Whether or not he read it over first goes only to weight not admissibility.

[31] Section 31 I (1) (a) of the Evidence Act has changed the legal position in relation to previous inconsistent statements in civil matters. Proven previous inconsistent statements now do not go to credit – to assist the tribunal of fact to determine if the evidence given at trial should be believed. The proven previous inconsistent statement may now be treated as evidence of the facts stated therein, subject of course to the tribunal's

ability to reject or accept evidence having assessed it. Having assessed the previous inconsistent statements proven to have been made I accept them as what he told Cpl. Barnes and the truth concerning what happened. They represent the spontaneous truth. I do not find that any shock affected his initial account. The deceased was riding in a zig zag fashion. He and Desjean were riding recklessly and the deceased fell off the bicycle.

[32] That conclusion however does not mean the defendants have escaped liability. I accept the evidence of Earl Wilson that the 2nd defendant was turning into his gate. I reject the 2nd defendant's evidence that he was not going to his yard at that time. It is by no means impossible that he would be driving past his gate and the accident occurred. But I find he was going as slowly as he was as he was preparing to turn into his gate and that it is not merely coincidental that the accident happened right there. Further I agree with counsel for the claimant that having noticed the reckless riding of the cyclists the 2nd defendant should have kept them in his watchful gaze. On his own admission he was not watching them.

[33] From the evidence including the pictures exhibits 12A-D, even allowing for any "bounce back factor" as testified to by the 2nd defendant and advanced by his counsel, the impact would have occurred either in the middle of the road or approximately two feet into the deceased's lane. The fact that a bicycle does not need as much space as a car to travel would not justify any unnecessary encroachment into the proper lane of the bicycle. Ordinarily therefore it would seem that these circumstances might be tailor-made for a finding of some sharing of liability between the deceased and the 2nd defendant. What therefore is the position in relation to the question of contributory negligence?

[34] In ***Gough's*** case cited by counsel for the claimant, a 13½ year old girl waiting to cross the road was beckoned to by a lorry driver to cross the

road. He had stopped for her to do so. She relied totally on the lorry driver and did not stop to look if the way was clear as she passed the front of the lorry. She was hit by a car whose driver did not see the lorry driver's outstretched hand. It was held by the English Court of Appeal that she being a child and not an adult was not negligent in relying totally on the lorry driver's signal to her to cross the road. The deceased having been born March 16, 1993 was also 13 years old but slightly older than the plaintiff in ***Gough*** being just two months shy of his 14th birthday. The case of ***Gough*** is however I find distinguishable from the facts in the instant case. In ***Gough*** the plaintiff was not doing anything which was inherently reckless or dangerous and was relying on the direction of an adult. In the instant case the deceased I have found was riding recklessly on a main road, ignoring the express warnings of the witness Earl Wilson. In those circumstances on the face of it there would be a basis for a finding of some contributory negligence.

[35] Counsel for the claimant also cited two cases on the point that when the court is unable to decide which party is to blame the court has an obligation to find both equally to blame. In ***Davidson v Leggett*** 1969 SJ Vol. 113 page 409 two drivers travelling in opposite directions in the process of overtaking other vehicles collided into each other. It was held on appeal that where there was a collision in the middle lane and one could not decide who was to blame the blame must be equal.

[36] In ***W. & M. Wood (Haulage) Ltd v Redpath*** [1966] 3 W.L.R. 526 a lorry and a car travelling in opposite directions collided. The only evidence as to what happened was the inquest depositions and photographs taken shortly after the collision, a sketch plan made by a police officer and an expert on accidents. At the hearing it was conceded that both drivers were at fault. The issue was whether one was more to blame that the other. It was held that as there was no cogent evidence suggesting that one driver was more to blame than the other, both drivers must be held equally to

blame. These two cases would appear to be relevant given the observation made earlier that on one view of the evidence, especially the testimony of the 2nd defendant and exhibits 12A and C, the point of impact could have been in the middle of the road.

[37] Counsel for the claimant also cited the case of ***O'Connell v Jackson***. In that matter the plaintiff who was riding a moped was involved in an accident which was the fault of the defendant. The plaintiff suffered severe head injuries which would probably have been lessened had he been wearing a crash helmet in accordance with the requirements of the Highway Code. It was held on appeal that the plaintiff was 15% contributorily negligent.

[38] There exists in Jamaica as in the ***O'Connell*** case, the requirement for motor cyclists to wear helmets. This requirement is in section 43D (1) of the Road Traffic Act. There does not however appear to be a similar requirement contained in any enactment for pedal cyclists whose cycles are not motorised. However I will not finally decide the point in light of the decision I have arrived at regarding contributory negligence.

[39] The discussion on the factors which should contribute to any finding of contributory negligence and the proportion in which any such finding could be divided is academic for the following reason. The court is not able to make a finding of contributory negligence when that defence has not been pleaded by the defendants. The **Law Reform (Contributory Negligence) Act** permits the court to apportion liability between claimants and defendants. However case law has made it clear that the defence needs to be pleaded before defendants can reap its benefit. In ***Fookes v Slator*** [1978] 1 W.L.R. 1293 the plaintiff, while driving at night, came into collision with the unlighted trailer of an articulated vehicle parked by the side of the road as a result of which he suffered personal injuries. He brought an action for damages for negligence against the driver and owners of the

articulated vehicle. After the owners had delivered a defence alleging that the driver was not acting as their servant or agent, the action against them was discontinued. The driver did not serve a defence. On the plaintiff's application he was ordered to deliver a defence within a stated time, failing which he would be debarred from defending. He failed to deliver a defence and although he was informed of the date and time of the hearing in the county court, he did not appear and was not represented. The plaintiff gave evidence of the accident. The judge found that the defendant had been negligent but that the plaintiff's own negligence had contributed to the accident and he reduced the amount of damages by one third. On appeal by the plaintiff it was held allowing the appeal, that contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence; that, since there had been no such plea, the judge had erred in law in finding that the plaintiff's negligence had contributed to the accident. The principle has been followed in subsequent cases including ***Dziennik v CTO Gesellschaft fur Containertransport MBH and Co*** also ***known as CTO Gesellschaft fur Containertransport MBH and Co v Dziennik*** [2006] EWCA Civ 1456 and ***The Estate of Arthur John Lenton Deceased v Sidney Anthony George Abrahams (Administrator of the Estate of Mrs Gurmit Kaur Deceased), Mrs Jaspal Kaur*** [2003] EWHC 1104 (QB).

[40] The Defence of the defendants specifically stated in paragraph 9 that *"...the deceased was 100% responsible for the accident along with his male friends. The deceased was racing his bicycle in a reckless and dangerous manner without regard for his own safety and that of other road users."* Neither in their pleadings nor in the arguments put forward by their counsel did the defendants suggest that there may be contributory negligence. To make such arguments the pleadings would in any event have had to be amended. Accordingly there is no basis on which the court can make a finding of contributory negligence in this matter. Accordingly I

find the defendants liable for the death of the deceased and required to pay the appropriate damages as assessed.

THE QUANTUM OF DAMAGES

[41] As indicated earlier the claimant Ainsworth Blackwood Snr. farmer and electrician gave evidence. His statement stood as his evidence in chief. Several exhibits were tendered into evidence through him as follows:

(a) Birth Certificate of Ainsworth Blackwood Snr. (Exhibit 1)

(b) Birth Certificate of Ainsworth Blackwood Jnr. (Exhibit 2)

(c) Burial Order for Ainsworth Blackwood Jnr. (Exhibit 3)

(d) Copy of Death Cert of deceased's mother Marjorie Bogle (Exhibit 4)

(e) Receipt from Carol's Funeral Supplies in the sum of $157,000 (Exhibit 5)

(f) Grant of Letters of Administration by the Supreme Court in the estate of Ainsworth Blackwood Jnr. (Exhibit 6)

[42] Mr. Blackwood Snr. testified that his son the deceased was 14 years old when he died. However from his birth certificate referred to above (exhibit 2) he would have been two months shy of being 14. The deceased was in grade 8 when he died and he had spent 2 years at the Yallahs Comprehensive High School. His favourite subjects were Math, English and Art and Craft. Mr. Blackwood Snr. however was unable to say what his son's grades were in any subjects. Further he indicated that at one time he could neither read nor write but by grade 8 he was reading better.

[43] In his statement he indicated that the deceased always expressed a desire to attend a university to study and to be a police officer. Also that

he had expressed his intention to take care of his mother and the witness his father.

Special Damages

[44] The claimant produced receipts for the cost of burial from Carol's Funeral Supplies. He also produced the Grant of Letters of Administration the cost for obtaining which he stated was still owing to his counsel. He however did not obtain any receipts for any of the grocery items he purchased for the "nine night wake". I will not allow the cost of these grocery items. At least some items purchased from stores should have been evidenced by receipts. In respect of transportation costs I find the amount claimed for trips to the morgue and to the Yallahs police station to be reasonable. I however find the 15 trips to the Morant Bay Police station excessive. I will allow recovery for 6 trips. Accordingly the sum I will allow for special damages is **$260,840.00.**

The Claim under the Fatal Accidents Act

[45] A claim under the Fatal Accidents Act is for the benefit of the dependants of the deceased. Therefore assessment of damages under this Act seeks to ascertain the actual or reasonably expected pecuniary loss to each of the near relations of the deceased by reason of the death of the deceased (Section 4(4)). In order to ascertain the loss therefore, the dependents must satisfy the court that they have lost some benefit as a result of the death of the deceased.

[46] The deceased was a child and so there is no actual pecuniary loss to his surviving parent arising from his death since he was not working and making a contribution to him. As a result, the claimant has not been deprived of any pecuniary benefit by reason of the deceased's death. In addition, there is no evidence to indicate that the claimant had a reasonable expectation of some pecuniary benefit had the deceased lived. The portion of the claimant's statement referring to the deceased which

indicates that, *"He had always in my presence and other persons including family members expressed his intention of taking care of his mother and myself"*, is not sufficient to establish a pecuniary loss under the Act. There is therefore no basis on which an award can be made under this Act.

General Damages

The Claim under the Law Reform (Miscellaneous Provisions) Act

[47] Under this Act, by section 2, the deceased's cause of action survives for the benefit of the deceased's estate. Accordingly, any claim under this Act is for the benefit of the estate.

[48] By virtue of section 2(2)(c), where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

[49] The deceased's estate therefore can only recover damages for all the losses which the deceased had sustained prior to his death and for which compensation could have been recovered had the deceased survived to pursue the action.

[50] The damages recoverable are therefore usually for prospective loss of earnings – "the lost years", pain and suffering borne by the deceased up to the time of death, loss of expectation of life and funeral expenses. The funeral expenses have however already been accounted for as a part of special damages.

Loss of Expectation of Life

[51] Recently in ***Tyler Horatio Wedderburn (Personal Representative of Estate Amanie Dominic Wedderburn) v The Attorney General and Police Constable Vernon Ellis*** [2013] JMSC Civ 153, I reviewed in detail the basis on which awards under this head are made. I quoted from Lord Morris of Borth-y-Gest in ***Yorkshire Electricity Board v Naylor*** [1968] AC 529 at page 545 where he stated:

> It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L.C. in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of a 'positive measure of happiness' or of a 'predominantly happy life'.

[52] As I noted in ***Wedderburn*** where the circumstances are very similar to those in the instant case, the sum awarded is a conventional one therefore the age of the deceased is not to be used as a basis for the making of the award. Having reviewed a number of authorities and allowing for the significant devaluation of the Jamaican dollar which had occurred between the time of some of the cases reviewed and the ***Wedderburn*** case I awarded the sum of $180,000.00. Though there has been some further slippage of the currency since that decision it is not at this point significant, and I would therefore make the same award of **$180,000** in this case.

"The Lost Years"

[53] It is under this head that the similarity with ***Wedderburn*** is most telling. In ***Wedderburn*** the deceased was 14 years old and in the instant case he was almost 14. The principle to be gleaned from the leading case under this head of damages ***Gammell v Wilson*** [1981] 1 All ER 578 is as stated at page 593; *"…there is no room for a conventional award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it*

must be shown, on the facts found to be at least capable of being estimated."

[54] I adopt what I stated in ***Wedderburn*** as the basis on which I found no basis to make an award under this head in that case and on which in this case I hold a similar view. At paragraph 26 I sated, *"At fourteen and in second form there is nothing to indicate…the career path he would have taken and what would have been his fortunes in any career".* In the instant case as in ***Wedderburn*** there was no evidence of any present earning nor even any promising scholastic achievement or aptitude for a particular career. The case of ***Cassel v Hammersmith and Fulham Health Authority*** [1992] P.I.Q.R. Q.1 and Q.168 cited by counsel for the claimant to assist the court in calculating a mulitiplicand therefore does not apply. In any event it would not have been of assistance as ***Cassel*** dealt with severe personal injury that required ongoing care rather than death.

DISPOSITION

[55] I therefore make the following order:

ORDER

(a) **Special Damages** awarded in the sum of **$260,840** with interest thereon at the rate of 3% per annum from January 13, 2007 to February 25, 2014;

(b) **General Damages** for loss of expectation of life awarded in the sum of **$180,000** with interest thereon at the rate of 3% per annum from June 16, 2009 to February 25, 2014;

(c) **Costs** to the claimant to be agreed or taxed.