



[2017] JMSC Civ. 155

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV05298

BETWEEN	NOEL JUNIOR MAIS (Administrator in the Estate of Khajeesh Dushawn Mais also known as Khajeel Mais, deceased)	1ST CLAIMANT
AND	ALLANA FIONA MAIS (Administrator in the Estate of Khajeesh Dushawn Mais also known as Khajeel Mais, deceased)	2ND CLAIMANT
AND	PATRICK POWELL	DEFENDANT

IN CHAMBERS

Ms. Nyoka Junor instructed by Knight, Junor & Samuels for the Claimant

Defendant absent and unrepresented

Heard: October 10 and November 11, 2017

Assessment of Damages - Wrongful Death - Claim for Damages under the Law Reform (Miscellaneous Provisions) Act

STEPHANE JACKSON-HAISLEY, J. (AG.)

BACKGROUND

[1] On July 1, 2011 Khajeesh Dushawn Mais, also known as Khajeel Mais, a minor was travelling as a passenger in a taxicab along Fairfax Avenue, Havendale in the parish of St. Andrew when he was shot and killed. On May 11, 2015 his parents Noel Junior Mais and Allana Fiona Mais obtained a Grant of Letters of

Administration in relation to his estate. On November 10, 2015, in their capacity as Administrators in their son's estate, they filed a Claim Form accompanied by Particulars of Claim in which Noel Junior Mais was named as the 1st Claimant and Allana Fiona Mais as the 2nd Claimant. The Defendant was named as Patrick Powell.

[2] On November 28, 2015 the Defendant was served with the Claim Form and Particulars of Claim. He neither acknowledged service nor filed a Defence. On February 22, 2016 a Judgment in Default of Acknowledgment of Service was entered against the Defendant and the matter set for hearing of the Assessment of Damages.

[3] The matter came before the Court for the hearing of the Assessment of Damages on October 10, 2017. On that date an oral judgment was delivered. I now provide reasons for judgment.

THE CLAIM

[4] The Claimants in their Claim Form requested the following:

- (a) Damages under the Law Reform (Miscellaneous Provisions) Act for the benefit of the estate of the deceased;
- (b) Loss of Expectation of life;
- (c) Damages;
- (d) Costs,
- (e) Attorneys-at-law Cost (sic);
- (f) Such other and/or further relief as this Honourable Court deems fit.

[5] In the Particulars of Claim it was averred that:-

1. The Claimants were at all material times the father and mother both residing at and are also the Administrators of the Estate of Khajeel Dushawn also known as Khajeel Mais, deceased.
2. The Defendant was at all material time a businessman residing at ...

3. On or about the 1st day of July 2011 at approximately 7p.m., the deceased Khajeel Mais, a minor, was lawfully travelling as a passenger in a taxi cab along Fairfax Avenue, Havendale in the Parish of St. Andrew, when the Defendant while driving an unidentified motor vehicle along Fairfax Avenue, Havendale in the Parish of Saint Andrew, stopped alongside the taxicab which the deceased was lawfully travelling in, and negligently and without lawful excuse discharged his firearm and shot the deceased who later succumbed to his injuries.
4. Alternatively, the Defendant assaulted and shot and killed the deceased without reasonable or probable cause.

PARTICULARS OF ASSAULT, NEGLIGENCE AND BATTERY

- a) Failing to take all reasonable and necessary measures to avoid discharging their firearm in the presence and or direction of the deceased;
- b) Failing to carry out any or any sufficient enquiries before resorting to the use of lethal force in firing on the deceased who was at the relevant time unarmed and posed no threat;
- c) Discharging his firearm without reasonable or probable cause;
- d) Firing recklessly and indiscriminately at the deceased with the intent to kill;
- e) Res Ipsa Loquitor.

[6] It was further asserted that by reason of these matters the estate of the deceased has suffered loss. The particulars of Special Damages were itemized as follows;

(a) Funeral Expenses

(b) Letters of Administration

[7] At the hearing, the sole witness who was called to give evidence was the 2nd Claimant. Her witness statement was allowed to stand as her evidence in chief. Needless to say there was no cross-examination. I have set out in full the evidence presented to the Court save for the place of residence of the witness:

Witness Statement dated February 20, 2017

“ Allana Fiona Mais state (sic),

- 1) *I live at ...*
- 2) *I am the mother of the late Khajeeh Dushan Mais and also one of the Administrators for the Estate of Khajeeh Dushawn Mais also known as Khajeel Mais, deceased. I receive that Grant of Administration of the 11th May 2015.*
- 3) *At about 7:30pm, I got a telephone call from a gentleman, Mr. Richards that the taxi in which Khajeel was a passenger was shot up in Havendale and the driver is gone with him.*
- 4) *I immediately woke up my sleeping daughter and immediately called my husband who was on Mannings Hill Road and I told him what Mr. Richards had said to me. Within 5 minutes after receiving the call from Mr. Richards, my daughter and I then set out to the police station.*
- 5) *On our way to the Constant Spring Police Station we were joined by my husband and we proceeded to the Constant Spring Police Station.*
- 6) *When we got to the Constant Spring Police Station I ran inside and identified myself to the male police officer who was standing in the guardroom, as Khajeel Mais's mom. I am however unable to recall the name of that officer.*
- 7) *I then told the officer I heard that Khajeel was shot in a shooting incident in Havendale, Kingston 19 in the parish of Saint Andrew, shortly around half of an hour before I got there. He said something to me, which caused all three of us, to drive to the Kingston Public Hospital, North Street in the city and parish of Kingston.*
- 8) *We rushed to the accident and emergency area and upon identifying myself I was ushered into the emergency area where I saw my son laying in a curtained cubicle on a bed. There were doctors and nurses around him performing CPR. After that I stood there and watched them trying in vain until he the doctor pronounced him dead.*
- 9) *I was sedated by the doctors and I was released to my sister, Gaudia Chevannes in the morning of the following day. Then I stayed at my sister's house for a few days. During, my stay I got a call from the taxi driver, the man who was driving, said something to me that I understood as meaning that Mr. Patrick Powell shot and killed my son.*
- 10) *My husband and I then started to make preparations for the funeral arrangements for my late son. I called Mr. Tommy Thompson at Bright Light Funeral Services & Supplies which is situated at 44 Barry Street, in the city and parish of Kingston to get her an idea of the cost for the funeral cost arrangements. We received an invoice for the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000.00).*

[8] She gave further evidence by way of amplification as follows:

I received an original receipt from Bright Light Funeral Home which I am unable to locate so I went back to the Funeral Home for a copy which I gave to counsel. (Document shown to witness) This is a copy receipt. (Receipt dated July 11, 2011 tendered and admitted into evidence as Exhibit 1). My husband and I were appointed administrators. I received a Grant of Administration. (Grant of Administration dated May 11, 2015 tendered and admitted into evidence as Exhibit 2).

[9] Although under Special Damages there was a claim with respect to the Letters of Administration, no evidence was led as to any cost incurred. I enquired of counsel whether she intended to rely on any material to substantiate this item and she indicated that they did not intend to pursue this any further.

SUBMISSIONS ON BEHALF OF COUNSEL FOR THE CLAIMANT

[10] I have also set out in full the submissions advanced by counsel who appeared for the Claimant:

[11] Counsel indicated that she is seeking Special Damages in the sum of \$1,700,000.00 which had been proven by the receipt, the subject of Exhibit 1. In respect of General Damages, counsel relied on the case of **Ainsworth Blackwood Snr. (Administrator of Estate: Ainsworth Blackwood Jr. Deceased) v Naudia Crosskill and Glenmore Waul** [2014] JMSC Civ. 28, and urged the Court to make an award in keeping with the judgment. She asked that the Court review paragraphs 51 and 52, in which Fraser J examined the basis for an award for loss of expectation of life and then went on to make a conventional award of \$180,000.00. On that basis she asked the Court to find that that amount is an appropriate figure for loss of expectation of life, which when converted to present day value amounts to \$206,000.00. She therefore asked the Court to make an award in that sum for General Damages.

DISCUSSION

[12] A claim brought pursuant to the Law Reform (Miscellaneous Provisions) Act (LRMPA) is essentially for the benefit of the estate of a deceased person. The personal representatives of a deceased person are vested with the right to bring such a claim seeking damages for the benefit of the estate of the deceased. This is evident in section 2(1) of the LRMPA which provides as follows:

“Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Section 2 subsection (2)(c) of the LRMPA also provides:

“Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(c) 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.”

[13] The significance of these provisions was examined in **Vinston Miller (Administrator of the Estate of Weston Miller, the deceased) v Caribbean Producers Jamaica Limited and Kirk Hillary** [2015] JMSC Civ. 250 where Campbell J examined the background to the LRMPA and at paragraph 7 noted the following:

*“At common law, the death of either the tortfeasor or his victim would normally extinguish the possibility of an action. **The Law Reform (Miscellaneous Provisions) Act, 1955**, changed the common law by providing that; on the death of any person, all causes of action (with few exceptions) subsisting or vested in him should survive for the benefit of his estate.”*

[14] Under the LRMPA the trend is to make an award for funeral expenses, any other special damages, pain and suffering, loss of expectation of life and the lost years.

[15] Fraser J in the **Ainsworth Blackwood** case after reviewing section 2 of the LRMPA pointed out the following at paragraphs 49 and 50 of the judgment:

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...."

[16] In determining the appropriate awards to make I took into account the **Ainsworth Blackwood** case as well as a case relied on therein namely **Tyler Horatio Wedderburn (Personal Representative of Estate Amanie Dominic Wedderburn) v The Attorney General and Police Constable Vernon Ellis** [2013] JMSC Civ. 153. A brief recital of the facts in both the **Ainsworth Blackwood** case and the **Wedderburn** case is necessary to understand the basis of the awards made therein.

[17] On February 13, 2007 Ainsworth Blackwood Jr. was riding his bicycle along the Heartease main road in the parish of St. Thomas when he was fatally injured. This resulted from being hit by a motorcar driven by one defendant and owned by the other. At trial, his father Ainsworth Blackwood Snr. testified that his son was fourteen years old when he died, although his birth certificate reflected that he would have been two months' shy of being fourteen. Further, that at the time of his death he was in grade 8 and was attending the Yallahs Comprehensive High School. His favourite subjects were Mathematics, 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. He also indicated that the deceased always expressed a desire to attend university and that his ambition was to become a police officer and further that he had also expressed an intention to take care of his mother and father.

[18] On May 2, 2003 fourteen year old Amanie Dominic Wedderburn was standing in the vicinity of MX-III along the West End main road in the parish of Westmoreland when he was unlawfully shot by a member of the Constabulary Force which resulted in his death. At the trial of the matter, his birth certificate was tendered into evidence in proof of his age. Evidence was led that Amanie was a second form student attending Green Island High School in the parish of Hanover. Further, that he was performing well in his school work and had discussed with his father, his desire to pursue tertiary education at a teacher's college or university as his goal was to become a teacher. Evidence was also led that Amanie had always in his presence and in the presence of other family members expressed his intention to take care of his father and his mother Trezel Maud Evans.

[19] In both cases the Court examined the principles governing awards under the LRMPA looking specifically at damages for loss of expectation of life and damages for "the lost years". The Court did not delve into the basis of an award for pain and suffering however, in the instant case I find it necessary to consider it briefly.

PAIN AND SUFFERING

[20] Under section 2 of the LRMPA, it was possible for the Claimant to pursue a claim for damages with respect to pain and suffering endured by the deceased however, this is usually awarded only where there is a time lapse between the pain and suffering and death. The dicta of Sinclair Haynes J in the case of **Elizabeth Morgan v Enid Forman and Owen Moss** (unreported), Supreme Court, Jamaica, Claim No. HCV 0427/2003 judgment delivered October 15, 2004 supports this position. In that case an award was made for pain and suffering where the deceased died the morning after he was injured. Sinclair-Haynes J found that only nominal damages could be awarded as his pain and suffering would have lasted less than two days. It is noted that in that case was detailed evidence was led as to the nature of the injuries sustained by the deceased

which included severe head injury as well as evidence that he had a limited degree of consciousness.

[21] In the instant case there was no attempt to substantiate an award under this head. There was no evidence as to the nature of the injuries received or even where on the body the fatal wound was located. In addition, there was no evidence from a post mortem report or any other means indicating how soon after sustaining the injuries the deceased succumbed to them. There was no evidence as to whether or not he was even in a conscious state. No evidence was led or submissions advanced in support of a sum under this head and accordingly, no sum was awarded for pain and suffering.

LOSS OF EXPECTATION OF LIFE

[22] In the **Ainsworth Blackwood** case, Fraser J after examining his earlier decision in the **Wedderburn** case made an award of \$180,000.00 under this head. I have set out in full the two paragraphs that counsel asked that I take into account in making an award which are paragraphs 51 and 52 of the judgment which appear under the head 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 \$180,000.00 in this case.”

[23] It should be noted that the **Wedderburn** case was decided some four months earlier than the **Ainsworth Blackwood** case, and that the same award of \$180,000.00 was made because although there was some devaluation in the Jamaican dollar, it was not of a significant nature.

[24] There is also support for the award of a moderate conventional figure in the Court of Appeal decision of **The Attorney General of Jamaica v Devon Bryan (Administrator of Estate of Ian Bryan)** [2013] JMCA Civ. 3 where at first instance an award of \$250,000.00 was made for loss of expectation of life. On appeal it was found that this figure was too generous and the Court instead imposed an award of \$120,000.00. In reversing the decision under this head the Court of Appeal accepted the submissions of counsel for the appellant that only a very moderate figure or sum should be awarded under this head.

[25] In a more recent case **Angela Diana Brooks-Grant (Administrator of the Estate of Michael Grant, deceased) v Western Regional Health Authority and The Attorney General of Jamaica** [2016] JMCA Civ. 240 Brown-Beckford J pointed out at paragraph 19 of the judgment that:

“it is settled that a conventional sum is to be awarded and that although there has been some controversy as to what a conventional sum is, it appears that this sum is to be considered on a case by case basis and is calculated at the discretion of the court”.

After conducting a review of relevant authorities Brown-Beckford J proceeded to make an award of \$200,000.00 for damages under this head.

[26] In all the circumstances, I accepted the submissions advanced and found that the sum of \$206,000.00 was representative of a moderate and conventional sum and so was an appropriate figure to award for loss of expectation of life.

LOSS OF FUTURE EARNINGS OR “LOST YEARS”

- [27] Under this head counsel did not advance any submissions and accordingly did not ask the Court to make any award for the lost years. This was consistent with the nature of the evidence presented. I observe that the evidence was devoid of any reference to any of the usual features in cases of this nature such as age, school attended, how the deceased was doing in school, what his ambition was or his career prospects or whether he had ever worked by way of a summer job or otherwise. The evidence was devoid of any reference to any information that a court could use to make an award under this head.
- [28] In any event it has been observed that even in cases where there has been an attempt to show reasonable prospects on the part of a deceased who was a child the Court made no award for the lost years. This was evident in the **Ainsworth Blackwood** case as well as the **Wedderburn** case. In both those cases there was some attempt on behalf of the fathers of the deceased to show what the likely prospects of their sons would be, yet no award was made.
- [29] At paragraph 26 of the **Wedderburn** case Fraser J in placing reliance on an earlier similar case of **Rhona Hibbert (Administrator of the estate of Matthew Maxe Morgan, Dec'd) v The Attorney-General for Jamaica** (1988) 25 JLR 429 set out the basis under which he made no award despite the evidence presented with respect to the deceased.

*“The facts of the instant case are in material respects similar to those in **Rhona Hibbert**. Amanie like the deceased in that case, was a student who had not begun earning a living. In addition, there is no indication that Amanie showed any real prospects of employment in a particular field despite the indication that he was doing well in school and expressed a desire to become a teacher. At fourteen and in second form there is nothing to indicate that this is the career path he would have taken and of what would have been his fortunes in any career. Damages for “lost years” as outlined in **Gammell v Wilson** are for pecuniary loss. “...it must be shown, on the facts found, to be at least capable of being estimated.” It is noteworthy that in **Beverly Radcliffe**, the award was based on actual earnings of the deceased; not on any suggested prospects linked to a career she might have pursued in the future. In the instant case on the other hand, any attempt to quantify loss would involve bald speculation.*

Accordingly, there is no basis on which an award can be made under this head.”

[30] Similarly, In the **Ainsworth Blackwood** case at paragraphs 53 and 54 Fraser J said this:

[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 stated, “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.”*

[31] Fraser J in coming to his decisions placed reliance on the dicta of Lord Scarman in **Gammell v Wilson** [1981] 1 All ER 578 which is one of the leading English cases in this area. Lord Scarman was at pains to point out that there must be evidence on which an estimation can be made. Further, that in the case of a young child the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. He pointed out that there will be exceptions such as in the case of a child television star. From his dicta it is patently clear that where no estimate is possible, no award, not even a conventional award, should be made. He also highlighted that in all cases it is a matter of evidence and a reasonable estimate based on the evidence.

[32] It is noted that in the instant case it was the mother of the deceased who testified yet she gave no evidence from which an estimation could be made. The evidence that was led revolved around the day her son died, the day he was buried and the funeral expenses that were incurred as a result. Save for the Claim Form and the Particulars of Claim there was no indication as to anything in

particular about the deceased except that he lived, was shot and injured, died as a result and was thereafter buried. In the absence of any evidence to substantiate an award for the lost years, I made no award under this head.

[33] I made the following orders:

- I. Special Damages in the sum of \$1,700,000.00 with interest at a rate of 3% from July 1, 2015 to today's date, October 10, 2017.
- II. General Damages in the sum of \$206,000.00 with interest at a rate of 3% from February 18, 2016 to today's date October 10, 2017.
- III. Cost to the Claimant to be taxed if not agreed
- IV. Claimant's attorney to prepare file and serve the Order herein.