



[2016] JMSC CIV. 240

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 05202

BETWEEN	ANGELA DIANA BROOKS-GRANT (Administrator of the Estate of Michael Grant, Deceased)	CLAIMANT
AND	WESTERN REGIONAL HEALTH AUTHORITY	1 st DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2 nd DEFENDANT

IN CHAMBERS

Ms. Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co for the Claimant

Ms. Faith Hall instructed by the Director of State Proceedings for the Defendants.

Heard: 31st May 2016 Delivered:

**Assessment of Damages – Damages under Law Reform (Miscellaneous Provisions)
Act- Damages Under Fatal Accidents Act.**

BROWN BECKFORD, J

BACKGROUND

[1] Michael Grant, his wife, Angela Brooks-Grant and their two children, Janay Grant and Micah Grant, all British citizens, were vacationing in Jamaica on the 13th of August, 2009 when he fell ill and was taken to the Cornwall Regional Hospital. Mr. Grant was diagnosed with Type 2 Diabetes and was given medication and discharged. On the 18th of August, 2009, after taking the medication prescribed,

he had to be taken back to the Hospital as he was still unwell. Mr. Grant was examined on the 19th of August, 2009 and admitted into the hospital where he was made to undergo a series of tests and scans. Thereafter, the doctors diagnosed him with a strangulated hernia; a complication which could be rectified with surgery.

[2] Surgery was scheduled for the 19th of August 2009 but despite being admitted, the surgery was not done. The surgery not being done up to the 22nd August, 2009 and believing that he was not receiving adequate care, Mr. Grant discharged himself and travelled on the same day accompanied by his wife and children back to the United Kingdom. He died en route.

[3] Mrs. Brooks-Grant, as administrator of her husband's estate, brought an action against the hospital management, the Western Regional Health Authority and the Attorney General for the benefit of the deceased estate, herself and their children for negligence in the treatment of Mr. Grant leading to his death. Having not defended the claim, judgment in default was entered against the Defendants and the matter has now come up for Assessment of Damages.

THE CLAIM

[4] The Claimant claims the following relief:

- (a) Special Damages;
- (b) Damages for Negligence;
- (c) Damages under the Fatal Accidents Act;
- (d) Damages under the Law Reform (Miscellaneous Provisions) Act; and
- (e) Interest and Cost

THE ASSESSMENT AND SUBMISSIONS

[5] The only evidence for the court's consideration came from Mrs. Brooks-Grant. She gave evidence that her husband was in good health before coming to Jamaica. He was a Play Leader employed by the London Borough Council. His responsibilities included the constructing playground structure and overseeing children until they were picked up. She also said that he supervised between 4-5 persons and would work from 8:30am until the children were picked up by their parents after work. The age of retirement in England is 75 years of age for males and 65 years of age for females.

[6] Mrs. Brooks-Grant also sought to explain a few issues:

(a) That rent varied because her family lived on an estate.

(b) The expenses were shared between the couple with Mr. Grant assuming responsibility for the greater share.

[7] Ms. Minto, counsel for the Claimant argued that having not defended the claim the Defendants were not entitled to dispute the claim that Mr. Grant was misdiagnosed and was not provided with adequate care at the hospital. In the case of ***The Administrator General of Jamaica (Administrator of the estate Eric David Black, deceased, also known as David E.A. Black) v The Attorney General of Jamaica Suit No. Cl. 2001/A073***, Brooks J (as he then was) said

"In allowing a judgment in default of defence to be entered against him the Attorney General is deemed to have admitted the contents of the paragraph of the Statement of Claim, which deal with liability, including those quoted above."

[8] She further submits that the Claimant ought to be able to recoup moneys spent on medical and funeral expenses that she would not have incurred had the Defendants' agents not caused her husband's death. In addition, she argues that the Claimant is able to lay a claim under the Fatal Accidents Act (hereinafter called FAA) as it allows dependants to lay claim for dependency. Further, it was submitted that the Claimant was also entitled to make claims on behalf of Mr.

Grant's estate pursuant to the Law Reform (Miscellaneous Provisions) Act (hereinafter called LRMPA). This act would permit a claim for damages for pain and suffering, loss of future earnings, loss of expectation of life and special damages.

[9] Counsel for the Claimant submits that in accordance with the provisions of FAA, the Claimant would be entitled to £71,145.54 while under the LRMPA she would be entitled to \$1,600,000.00 and £198,045.76. Special damages were calculated in the sum of £8001.17

[10] On the contrary, Counsel Ms. Hall for the Defendant submits that sums claimed by the Claimant are excessive. She contends that the evidence presented was not sufficient nor was it at a standard that the court could properly and rightly act upon and properly calculate any damages for lost years. In all, the Defendants submit that all the Claimant is entitled to is \$120,000.00 for Loss of Expectation of Life and special damages in the sum of £2,147.00.

DAMAGES UNDER LAW REFORM (MISCELLANEOUS PROVISIONS) ACT

[11] Actions brought under the Law Reform (Miscellaneous Provisions) Act (hereinafter called LRMPA) are for the benefit of the deceased's estate. Section 2 states that:

2.---(1) 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:

Provided that this subsection shall not apply to causes of action for defamation.

From this section, it is clear that the law will allow damages claimed for (1) special damages, (2) loss of expectation of life, (3) funeral expenses and (4) lost years/ loss of future earnings. I will address each head in turn. It should be noted that funeral expenses can be recovered under this head or under the section 4(5) of

FAA. However, I will deal with these expenses here as they have been claimed special damages.

A. *Special Damages*

[12] It is trite that special damages must be specifically proven. Mrs. Brooks-Grant says she paid the following expenses in relation to Mr. Grant's death and funeral:

<i>Hospital</i>	-	<i>£3 146.17</i>
<i>Refreshments</i>	-	<i>£1 200.00</i>
<i>Funeral Expenses</i>	-	<i>£3 476.00</i>
<i>Reception Hall</i>	-	<i>£ 185.00</i>

[13] The Claimant provided documentary evidence, with the consent of the defence, for all of the above expenses which have satisfied me on a balance of probabilities that these were expenses incurred. It is to be noted that the sum labelled 'Hospital' was a compilation of medical expenses being £947.00 and a cost of £2,199.17 for transportation back to the United Kingdom when Mr. Grant discharged himself out of hospital. I accept that these costs were incurred. Further, I find that Mr. Grant could not be liable for the consequences associated with discharging himself given his symptoms and the failure of the hospital to treat him promptly. In the circumstances, his action in so doing could not be regarded as unreasonable. There is no evidence that the expenses of refreshments for the repast as well as booking for the venue and services relating to the preservation and burial of the body, usually associated with funerals, were unreasonable. As such, I will award special damages in the sum of £8,007.17.

B. *Pain and suffering*

[14] By virtue of section 2 of LRMPA, Mrs. Brooks-Grant can claim damages for pain and suffering and loss of amenities on Mr. Grant's behalf provided that there is a

gap between his suffering and death. This was reaffirmed in the case of ***Elizabeth Morgan v Enid Forman and Owen Moss*** *Cl. HCV 0427/2003*.

- [15] The symptoms being experienced by Mr. Grant were not abated by the visit to the hospital. Indeed it was the evidence of Mrs. Brooks-Grant that they worsened. There is no evidence that the second diagnosis is related to the first or that the first was a misdiagnosis. The visits to the hospital having been occasioned by these symptoms, the hospital cannot be said to be responsible for all of his pain and suffering. There is no evidence from which the court can determine the extent to which they worsened. The maxim “*equality is equity*” is therefore appropriate.
- [16] In ***Attorney General v Devon Bryan*** [2013] JMCA Civ. 3 the deceased died within three to four hours of being shot. The award made for pain and suffering was \$65,000.00. I agree that this would update to \$141,627.02, that being for 3 hours of suffering. The illness suffered by Mr. Grant and the deceased in Bryan are different however. Mr. Bryan whose injury was a shot to the head, is seemingly more severe. Taking this into mind, I find that Mr. Grant ought to be awarded \$100,000.00 for each day from his second visit to the hospital to the date of death. The figure however would be discounted by 50% for reasons above stated.
- [17] In the circumstances, I find that Claimant is entitled to \$250,000.00 for Mr. Grant’s pain and suffering.

C. *Loss of expectation of life*

- [18] In the case of ***Yorkshire Electricity Board v Naylor*** [1968] AC 529 Lord Morris of Borth-y-Gest expressed the governing principle of this area of damages. He said:

“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'."

The law is clear that in assessing damages under this head, there is no need for statistical information as this head of damages takes into account the prospects of having a happy and normal life.

[19] As, expressed in the case of **Benham v Gambling** [1942] AC 157, the court ought to consider the '*slide in the value of the local currency*' and a '*moderate figure is to be chosen*.' It is settled that a conventional sum is to be awarded. However, 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.

[20] It is to be noted that the age of the deceased is not a factor to be considered in granting this award: **Tyler Horatio Wedderburn (Personal Representative of Estate Amanie Dominic Wedderburn) v The Attorney General and Police Constable Vernon Ellis** [2013] JMSC Civ. 153.

[21] In the case of **AG v Bryan** [2013] JMCA Civ. 3, the court awarded a conventional sum of \$120,000.00 for loss of expectation of life. In the case of **Ainsworth Blackwood SNR (Administrator of Estate: Ainsworth Blackwood Jnr. Deceased) v Naudia Crosskill and Glenmore Waul** [2014] JMSC Civ. 28, Fraser J, awarded the sum of \$180,000.00 for this head of damages.

[22] The Claimant has asked that a sum of \$250,000.00 be awarded. Having regard to the cases cited and the updated figures using the Consumer Price Index for December 2016, I believe the sum of \$200,000.00 is reasonable for loss of expectation of life.

D. *Lost Years/ Loss of future earnings*

[23] In the case of **Dyer and Dyer v Stone** (1990) 27 JLR 269 it was said that in order to calculate damages under LRMPA and FAA, a multiplier and multiplicand must

be determined with use of critical information about the deceased. Particularly, the court considered, his income, expenses and health at the time of his death.

[24] In applying *Dyer*, Anderson J, in the case of ***Administrator General of Jamaica (On behalf of the near relations of dependents and dependents and as Administrator Ad Litem of the estate of Clive Brown, Deceased) v Jamaica Pre-Mix Limited etal*** [2013] JMSC Civ. 149, stated that lost years is the determination of the loss to the estate brought about by the loss of earning of the deceased during those years; these being the years between retirement and death. This is calculated at the time of death and is done by finding the multiplicand and multiplier appropriate based on the circumstances of the case.

(1) Multiplier

[25] At the time of death, the deceased was 55 years old and was employed by the Lambeth Council in London as a youth/play leader. It appears that apart from being diagnosed with Asthma and receiving treatment for Jaundice, Mr. Grant was in good health before all his complications began in Jamaica. The court is presented with the task of speculating what would occur in the life of the deceased in the future. All possibilities must be considered. Whether he would have worked up to the age of retirement, whether this would be affected by illness or injury or even death. There is no evidence that these ailments would have affected his capacity to work until retirement.

[26] As noted the multiplier takes into account those years between death and retirement. In the deceased case, his wife in her witness statement said that he would have retired by 65 years of age or 70 years the most. It is also noted that in viva voce evidence she states that the age of retirement in England is 75 years for males and 65 years for females. I find that this latter evidence was general in nature while in her witness statement she states the year specific to her husband and his job. Having regard to the evidence in relation to the specific age of Mr. Grant's retirement, I considered that it would be more efficacious to use the lowest

of the years given; that being 65 years. Based on this evidence, I find that Mr. Grant would have retired by 65 years.

[27] In *Raymond Reid v Dalton Wilson* Cl. No. 2004 HCV 0889 (*Khans Volume 6*), the court applied a multiplier of 7 having regard to the fact that Mr. Reid was 49 years of age and employed as a Security Guard. In *Oswald Hyde v The Attorney General for Jamaica* Cl. No. CL 1998 H 055 (*Khans Volume 6*), the court applied a multiplier of 5. Mr Hyde was a retired sprayman and 61 years of age. In the circumstances, I agree with the Claimant that the appropriate starting point is 6. The Claimant had used a multiplier of 11 based on a retirement age of 75 years.

[28] As at the time of death, Janay would have had 3 years dependency left and Michal 6. The usual period of dependency for the children will be applied, which in the UK is the age of 23 years of age. At the time of Mr. Grant's death, Janay was 20 years of age and in university while Micah was 16 years of age. At the time of his death, one could say that they were on the edge of independence and therefore there would be no obligation on Mr. Grant to provide for them thereafter, certainly not up to his age of retirement.

[29] Therefore, the multiplier of 6 then ought to be discounted in order to account for the dependency of the children as stated in *Dyer*. Therefore, I find that the multiplier that is appropriate in these circumstances is 5.

(2) Multiplicand

[30] In *Dyer* it was submitted that in order to find the Multiplicand, the court should focus on the deceased's annual expenditure. It was proffered that the annual income would act as a guideline to assist the court in tailoring the annual expenditure to a figure that was reasonable in the circumstances.

[31] Having regard to the formula outlined in *Dyer*, in order to find the multiplicand, the court must deduct the annual personal expenses and Mr. Grant's share of joint household expenses from his annual expenditure. Thereafter, the court must

determine what percentage of the expenditure would be regarded as the dependency of the family. This is done by determining what percentage of his expenditure would be regarded as personal expenses. The difference would be the amount attributable to the dependency of the family.

[32] Counsel for the Claimant submitted that Mr. Grant's total annual expenditure was £24,405.54. It was also submitted that Mr. Grant's net income was £1866.24 monthly as testified to by Mrs. Brooks-Grant. This has been corroborated by the Mr. Grant's bank statement which shows the said sum being credited to the account by the London Borough LAM; the entity which was his employer.

[33] In *Dyer* it was made clear that where the annual expenditure, as in this case, appears to be greater than the annual income then the expenditure should be brought in line with the annual income. The Claimant submitted a direct debit statement which detailed sums that were taken from Mr. Grant's account directly. Based on these figures, it would appear that he had regular monthly expenses of between £766.85 - £1233.74. By using the average of these two figures, he would have spent £1000.30 monthly on these expenses which would have left him just about £865.94 additionally to be spent on the home and himself. This amount would not cover what the Claimant has given in evidence to be all the expenses paid by Mr. Grant. Therefore, I find that the Claimant is not credible on this issue and her evidence as to the expenses paid exclusively by Mr. Grant cannot be relied upon.

[34] It was submitted by Counsel for the Claimant that Mr. Grant spent at least £100 on each child each month thereby amounting to an annual sum of £1,200 each. I do not accept his evidence as in her evidence Mrs. Brooks-Grant says that she provided most of the expenses for the children.

[35] It was further submitted that Mr. Grant had a credit card which he used to supplement his income. However, I do not accept that this could be treated as

additional income as it would have required of Mr. Grant to repay the sums used. Thus, the credit card was an advance not an income generator.

- [36]** Based on the Claimant's evidence, I have accepted that Mr. Grant's income was spent in its entirety each month so that his annual expenditure could be calculated from his monthly income. Therefore, I find that his annual expenditure would have been £22,394.88.
- [37]** Having read Mr. Grant's bank statement in conjunction with the Claimant's submission as to his expenditure on joint household expenses, I have found that his personal expenditure (sums spent on himself only) would amount to £754.03. This would mean that his annual personal expenditure would be £9,048.36
- [38]** Since I have accepted that his entire income was spent, when we deduct his annual personal expenses from his annual expenditure the sum arrived at would be the remainder which is spent on the household. Thus, £13,346.52 will be considered as the joint living expenses.
- [39]** In ascertaining Mr Grant's share of personal expense when all four persons lived together, the sum apportioned for joint household expenses would be divided by 4. Therefore, $£13,346.52 \div 4 = £3,336.63$. Also, it is noted that his personal expenses are £9,048.36. Thus, his total personal expenses would total $£3,336.63 + £9,048.36 = £12,384.99$. This would be 55.3% of his annual expenditure leaving 44.7% as the dependency of his family.
- [40]** Therefore, in order to ascertain damages under LRMPA, we must find 44.7% of Mr. Grant's expenditure as this would represent the dependency of his family. This will then be multiplied by the multiplier of 5 and then the sum will be divided in keeping with the Intestate Estate and Property Charges Act as Mr. Grant died intestate.
- [41]** The formula would then be (annual expenditure) x (percentage of dependency) x (multiplier). Therefore, $£22,394.88 \times 44.7\% \times 5 = £50,052.56$. In all, the damages

to be recovered under the LRMPA would total £50,052.56. This would be divided as seen below:

Mrs. A. Brooks-Grant	-	£ 25,026.28
Ms. J. Grant	-	£ 12,513.14
Mr. M. Grant	-	£ 12,513.14

DAMAGES UNDER FATAL ACCIDENT ACT

[42] Based on section 4 of the Fatal Accidents Act, dependants of a deceased person can lay a claim for losses they would have incurred as a result of his death.

[43] Section 4(4) provides that:

(4) If in any such action the court finds for the plaintiff, then, subject to the provisions of subsection (5), the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations.

[44] Further, Section 4(5) provides that:

(5) In the assessment of damage under subsection (4) the court-

(a) may take into account the funeral expenses in respect of the deceased person, if such expenses have been incurred by the near relations of the deceased person;

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

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

The funeral expenses could be claimed here. However, I have dealt with them under the LRMPA based on the claim.

E. *Dependency Calculation*

[45] It was said in ***Administrator General for Jamaica (On behalf of the near relations and dependants and as Administrator Ad Litem of the Estate of Clive Brown, Deceased) V Jamaica Pre-Mix Limited and Rohan Reid*** [2013] JMSC Civ. 149 that:

A significant difference between calculation under the LR(MP)A and the FAA, is that the FAA does not take into account the deceased's portion of the living expenses in arriving at the multiplicand, whereas the LR(MP)A takes this into account.

[46] Since I have accepted that Mr. Grant's annual expenditure was £22,394.88, I will utilize this figure to ascertain the Multiplicand under the FAA. This can be done by simply deducting Mr. Grant's personal expenses from the annual expenses. Therefore, using the figure actualized above for personal expenses, the multiplicand would be (annual expenditure) – (personal expenses); 22,394.88 – £9,048.36 = £13,346.52.

[47] In order to ascertain the percentage of dependency, the court must then put the the multiplicand above over the total annual expenditure and multiply it by 100. Therefore, $£13,346.52 \div 22,394.88 \times 100 = 59.6\%$. I therefore find that the dependants were 59.6% dependent on Mr. Grant.

[48] In order to determine the level of dependency, I must find 59.6% of the multiplicand. Therefore, $£13,346.52 \times 59.6\% = £7,954.53$. Thus, in order to find damages for the pre-assessment years, I must multiply £7,954.53 by the total number of years; these being 7 years (2009 - 2016). This would be £55,681.71.

[49] In relation to the post assessment years, I have used the multiplier 3, this being the balance of working years Mr. Grant would have left to retirement. Thus, damages for this period would be (dependency sum) x (Multiplier) = $£7,954.53 \times 3$

= £ 23,863.59. Therefore, post assessment damages would amount to £ 23,863.59.

[50] The total claim under FAA would be the (pre-assessment loss) + (post assessment loss) which is £ 55,681.71 + £ 23,863.59 = £ 79,545.30. Thus the dependants would benefit as follows:

(a) Mrs. A. Brooks-Grant	-	£ 26,515.10
(b) Ms. J. Grant	-	£ 26,515.10
(c) Mr. M. Grant	-	£ 26,515.10

[51] Dependants are only able to benefit under the FAA if their dependency under this head exceeds that of the LRMPA. In these circumstances, the dependants would only be able to benefit from the difference between their allotment under each head. Therefore, the dependant's allotment under both acts warrants examination. Under LRMPA the allotment were as follows:

(a) Mrs. A. Brooks-Grant	-	£ 25,026.28
(b) Ms. J. Grant	-	£ 12,513.14
(c) Mr. M. Grant	-	£ 12,513.14

[52] Based on these figures, the dependants would benefit as follows under the FAA:

(a) Mrs. A. Brooks-Grant	-	£ 1,488.82
(b) Ms. J. Grant	-	£ 14,001.96
(c) Mr. M. Grant	-	£ 14,001.96

ORDERS

[53] The Defendants are jointly and severally liable to pay to the Claimant:

1) General Damages as follows:

(a) Under the Law Reform (Miscellaneous Provisions) Act:

I.	Special Damages	-	£ 8,007.17	
II.	Pain and suffering	-	JA\$ 250,000.00	
III.	Loss of Expectation of Life	-	JA\$ 200,000.00	
IV.	Lost Years (LRMPA)	-	£ 50,052.56	
	i.	Mrs. A. Brooks-Grant	-	£ 25,026.28
	ii.	Ms. J. Grant	-	£ 12,513.14
	iii.	Mr. M. Grant	-	£ 12,513.14

(b) Interest on special damages from the date of Mr. Grant's death to the date of judgment at rate of 3% per annum

(c) Interest on pain and suffering, loss of expectation of life and lost years from the date of filing of the claim to the date of judgment at a rate of 3% per annum.

(d) Under the Fatal Accidents Act:

I.	FAA Claim	-	£ 29,492.74	
	i.	Mrs. A. Brooks-Grant	-	£ 1,488.82
	ii.	Ms. J. Grant	-	£ 14,001.96

iii. Mr. M. Grant - £ 14,001.96

2) Cost to the Claimant to be taxed if not agreed.

.....
Justice Cresencia Brown Beckford