

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 01878

BETWEEN	TEMARD GORDON	1 <sup>ST</sup> CLAIMANT
AND	CHRISTOPHER GAYLE	2 <sup>ND</sup> CLAIMANT
AND	MERVAN GORDON	3 <sup>RD</sup> CLAIMANT
AND	ADMINISTRATOR GENERAL (Estate Burnette Gordon, Deceased)	DEFENDANT

Ms. Christine Husdson instructed by K. Churchill Neita & Co. for the Claimants.

Mr. David Henry instructed by Ms. Winsome Marsh for the Defendant.

**Heard: 15<sup>th</sup> July, 28<sup>th</sup> August 2010 and 6<sup>th</sup> January 2011.**

**G. Brown, J.**

On the 21<sup>st</sup> May, 2004 at about mid-night Burnette Gordon deceased, was fatally injured as a result of a motor vehicle accident along the Southfield Main Road in the parish of St. Elizabeth. He was driving a Toyota Pick- up registered 3527 DG towards Treasure Beach. He was alone in the vehicle.

The 1<sup>st</sup> claimant was the driver of a white Toyota Hiace bus registered 9771 DZ and owned by the 3<sup>rd</sup> claimant that was involved in the collision. He was travelling towards Southfield. The 2<sup>nd</sup> claimant was a passenger in the vehicle.

The claimants brought an action against Burnette Gordon's estate in negligence for the damages they suffered. The defendant filed a counter-claim on behalf of his estate under the Fatal Accident Act and the Law Reform (Miscellaneous Provisions) Act.

The claimants' version was that Temard Gordon was driving at about 50 m.p.h. when they observed the deceased motor vehicle overtook a stationary bus and collided with their vehicle which was on its correct side of the road.

The 1<sup>st</sup> claimant in his witness statement said:

*"on reaching the vicinity of Parchment Block Factory along the said Southfield Main Road, I observed a bus parked on the right side of way.*

*I also observed, a bright light of a vehicle coming from the opposite direction, behind the parked bus, immediately thereafter I observed this vehicle came on to my left side of the road and collided head on with my vehicle.*

*When I saw the vehicle, I immediately applied my brakes and swerved to my extreme left notwithstanding the vehicle came over to my side and collided head on with my vehicle."*

The 2<sup>nd</sup> claimant in his witness statement sought to corroborate their account of the collision. He said:

*"while Temard was travelling on his left side along the said road and on reaching the vicinity of Parchment Block Factory, I observed a bus which was parked on the opposite side of the road. I then saw a bright light of a vehicle."*

The defendant denied that the accident occurred in the manner alleged by the claimants and contended that the 1<sup>st</sup> claimant had encroached on the deceased's side of the road. He was driving at an excessive speed and on the right hand side of the road when it collided with the deceased's vehicle. The driver, Burnet Gordon, died as a result of the collision. He was travelling alone in his vehicle at the time.

The thrust of the defendant's case was based solely on the evidence of a police accident reconstruction expert who visited the accident scene the following day. The motor vehicles involved in the collision had already been removed to the Bull Savannah Police Station.

Woman Constable Carlene Samuels described herself as a certified Accident Investigation Officer stationed at the Accident and Reconstruction Unit at Area 3 Headquarters gave evidence on behalf of the defendant.

She observed a single skid mark on the right hand side of the road 35.6 meters. She also observed on the said right side gouge marks consisting of deep indentations, also debris consisting of pieces of broken glass. The light post on the left hand side of the road was broken.

She then examined both vehicles which was at the police station and measured their wheels to determine which vehicle had caused the skid mark. The width of the skid mark and the tyres on the claimants' vehicle both measured 8 inches. It was her opinion that the skid mark was made by the right front tyre of that vehicle which she said had bright patches or irritations on it.

As a result her of observations and examination she concluded that the collision between the two vehicles occurred on the defendant's (deceased's) side of the road and the claimants' then went to left and collided with the light pole.

She also concluded that the claimants' vehicle was driving at a minimum speed of 83 km/h or 52 mph. The speed limit was said to be a 50 km/h or 30 mph zone.

Counsel for the claimants submitted that the evidence of W/Cpl. Samuels must be treated with the greatest degree of scrutiny. The Court should attach no weight to her findings and ought to reject her opinions and instead accept the claimants' account.

It was her contention that Cpl. Samuels went to the accident scene more than 12 hours after the accident and without the assistance of the investigating officer. The scene was not preserved and

therefore traffic was traversing on it. This would have interfered with debris on the road surface and adversely affect her finding as to the point of impact.

It was also the claimants counsel's contention that Cpl Samuels did not produce any photographs to verify her findings. The absence of photograph she submitted was fatal to her credibility as a witness. She admitted that photographs were taken of the scene and the two motor vehicles.

Miss Hudson was particularly severe in her criticism of Cpl. Samuels as an expert as she was unable to point out in court 117 feet 5 inches i.e. the length of the skid mark she had measured. She was therefore of the view that based on her ignorance regarding measurements her expert opinion cannot be relied on.

Counsel for the defendant on the other hand submitted that the Court should accept W/Cpl Samuels as an expert and an independent witness. She was trained in the area of accident and reconstruction and indicated her credential to the Court.

It is settled law that the Court is not bound to accept the evidence of an expert. He is just another witness and his evidence, or his opinion, may be rejected if the Court is satisfied that he is not properly qualified to express an opinion, or if for any reason, it does not agree with the opinion he has expressed.

It was evidently clear that when the witness visited the scene and took the measurements she was not relying on her judgment. She gave precise figures and not estimations. She was subjected to cross examination and was never asked what was used to carry out the physical measurement. It was therefore obvious that she used a tape measure to determine the various measurements.

In the instant case there was no dispute that the accident took place along the Southfield Main Road. However the primary issue to be determined was the point of impact as each party claimed that it occurred on their correct side of the road.

The claimants maintained that the deceased was in the process of overtaking a bus at the material time and was alongside it when the collision occurred. He was driving about 50 mph when he saw the latter. He applied his brakes suddenly and steered further to his left to avoid the collision. Notwithstanding this maneuver both vehicles collided but were able to avoid the parked bus.

The defendant on the hand urged the Court to accept W/Cpl Samuels' opinion that it was the claimants' vehicle that was on the incorrect side at the time of collision and then went to the left where it collided with the light pole. She blamed the 1<sup>st</sup> claimant.

W/Cpl Samuel is a member of the Jamaica Constabulary Force Accident and Reconstruction Unit since 2002, which is responsible for the specialist investigation of all fatal and potentially fatal road traffic accidents on the island. She is the holder of a certificate in Forensic Road Traffic Collision and Reconstruction Techniques and has carried out several investigations.

As a part of her duties she went to Southfield Main Road along with the investigation officer on the 22<sup>nd</sup> May, 2004 to determine the cause of the accident. The 1<sup>st</sup> and 2<sup>nd</sup> claimants were at the time in the hospital and Burnet Gordon had died. They were therefore unable to assist, dispute or interfere with her as she carried out her investigation. In addition the motor vehicles had been removed to the police station.

Counsel for the defendant submitted that there was no evidence before the court that there were any other accidents along that road at the material time. The observations by the expert witness would therefore be consistent with the accident scene involving the parties.

The court accepts her as a credible, competent and qualified witness and on whose testimony it may rely on.

The debris of broken glass she saw came from the broken windshields of the vehicles and would still be on the road surface within the period she went there.

The gouge marks which she described as deep indentations in the road (asphalted) surface would be not affected by traffic driving on it.

She further saw the damaged light pole which the 1<sup>st</sup> claimant admitted was replaced. These would have assisted her in concluding that this was the fatal accident scene.

There was only one skid mark that was at the end of the gouge mark. She measured the width to match the tyre size. She later examined the tyres on both vehicles. She was of the opinion that the skid mark was made by the claimants' vehicle right front tyre.

As a result of the length of the skid mark she calculated the speed the vehicle was travelling to be in excess of the permissible rate of 50 km/h.

She came to the conclusion that the 1<sup>st</sup> claimant failed to keep to the left of the road, went to the right and collided head on with the deceased.

On the claimants' version the 1<sup>st</sup> claimant he was driving at an excessive speed above the speed limit and applied his brakes suddenly right before the impact. This action could certainly have left a skid mark on the side of the road surface he was driving that night.

W/Cpl Samuels observed only one skid mark and it was not on the claimants' correct side. In cross examination the 1<sup>st</sup> claimant agreed that his right front tyre caused drag marks 35.5 metres long. This strengthened the defendant's case that the deceased was driving on his correct side and also the witness' credibility.

I therefore accepted W/Cpl Samuels' opinion that the point of impact was on the deceased correct side of the road and not on the claimants. Thus, on the totality of the evidence, it is my view that on the preponderance of probability the version of the defendant is to be accepted.

The 1<sup>st</sup> claimant is therefore solely to be blamed for the collision.

### **Damages**

#### **Special Damage**

This was agreed as follows:

a).	funeral expenses:	\$327,352.50
b).	motor vehicle:	\$180,000.00
	Total	\$507,352.50

#### **Loss of Expectation of Life**

Counsel for the defendant submitted that recent awards have ranged from \$50,000.00 to \$175,000.00 and suggested that an award of \$150,000.00 should be made.

Counsel for the claimants recommended \$50,000.00 and relied on the judgment of Brooks J. in *The Administrator General of Jamaica v The A.G.* (Suit No. C.L.2001/A073) unreported.

An award under this head amounts to a "moderate conventional sum" which have varied in the recent Supreme Court decisions. This is due primarily to the massive devaluation of the Jamaican dollar. It is not settled as what can be considered a "moderate figure." I therefore consider the sum of \$150,000.00 as reasonable.

### **Loss of Earnings (Loss Years)**

The defendant sought to assess damages under the Law Reform (Miscellaneous Provisions) Act.

Paragraph 12 of the Amended Defence and Counterclaim states that "the deceased was 40 years of age and immediately prior to his death was a successful farmer..... He was self employed earning \$80,000.00 per week with prospects for increased as his business grew...."

Diana Gayle who was his common law spouse in her witness statement stated that at the time of his death the deceased "was a successful businessman who purchased produce from farmers and in turn sold them to hotels. I was also aware that he sold produce to at least one restaurant.....After all his expenses Burnett would take home an average of \$84,000.00 per month." She exhibited 2 invoices from Beaches Sandy Bay and another from Negril Gardens to establish his monthly income.

In cross examination she stated that the deceased had kept records and that she assisted in writing up the books. These records were not exhibited. She also indicated that sometimes he would take home \$50,000.00 odd monthly.

It was therefore suggested that his average monthly earnings would be approximately \$67,000.00 which should be discounted by 25% representing what the deceased would have spent exclusively on himself. The loss of expectation of life should be calculated as follows:

12 months at \$50,000.00 = \$3,000,000.00

12 months at \$70,000.00 = \$5,040,000.00

In *Godfrey Dyer & Derrick Dyer v Gloria Stone* (1990) 27 J.L.R. 268 at p.276 Campbell J.A. stated the principles applicable to the assessment of damages for loss years as follows:

“The principle established for assessing the loss of future earnings for the loss years is firstly to ascertain from credible evidence what the net income of the deceased was at the time of death.”

Counsel for the claimants has taken issue with the evidence as it relates to the deceased earnings. They have failed to provide adequate documentary proof and were merely relying on 3 invoices over a 7 months period to establish his income.

The Court must agree with him that it is settled law that litigants are not entitled to throw up figures to the Court, without bringing some tangible and credible proof.

In the instant case the evidence was that he purchased the food from farmers and resold it to the hotels and restaurant. The purchase price must be deducted from the selling price (profit) in addition to the transportation cost and the 2 workers salaries.

It was clear that Ms. Gayle did not know the details of his income and the defendant failed to adduce credible evidence to prove the annual earnings. The accident occurred on Friday the 21<sup>st</sup> day of May i.e. the 3<sup>rd</sup> week of the month. The invoice showed that he had only supplied \$74,645.75 worth of produce up to that date. In the previous month the invoice was \$63,800.00. There was only one other invoice to support their claim. This could mean that the invoices represented his gross monthly earnings i.e. approximately \$80,000.00. I would then reduce this by 50% or \$40,000.00 as costs to determine his net income. An additional 30% (\$12,000.00)

should be deducted as representing as representing the sum expended exclusively on the deceased. The multiplicand would then be \$336,000.00.

Counsel for the claimants had submitted that in the circumstances and average of the 3 pay slips over a 7 months period and find the average sum which was calculated to be \$34,602.73. The annual income then would be \$415,224.00. This sum should further be reduced by 25% for income tax and 30% for the expenditure on him. The multiplicand would be \$217,993.

### **The Multiplier**

Counsel for the defendant submitted that a multiplier of 11 should be used to calculate the award. On the other hand the claimants' counsel recommended 9 years given the deceased age at the time of 41 at the date of death. This would be more appropriate in keeping with the Jamaican authorities as discussed in *Dyer & Dyer v Stone*.

I therefore assessed the damages as follows:

(Multiplicand) \$336,000.00 x (multiplier) 9 = \$3,024,000.00

Judgment to be entered for the defendant as follows

Special Damages	\$507,352.50 with interest at 6% p.a. from the 21 <sup>st</sup> March 2004 to the 22 <sup>nd</sup> June 2006 and at 3% from the 23 <sup>rd</sup> June 2006 to the 6 <sup>th</sup> January 2011.
Loss of Expectation of Life	\$150,000.00
Damages for loss years	\$3,024,000.00

Costs to be agreed or taxed.