



[2014] JMSC Civ. 217

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012HCV 00138

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|----------------|---|--------------------------------|
| BETWEEN | BRENDA HILL | 1st CLAIMANT |
| AND | ADMINISTRATOR GENERAL OF JAMAICA | 2nd CLAIMANT |
| AND | THE ATTORNEY GENERAL OF JAMAICA | DEFENDANT |

Mrs. S Mayhew for the 1st Claimant

Miss C. Bolton instructed by the Director of State Proceedings for the Defendant

Mrs. G. Bradford watching on behalf of the 2nd Claimant

Heard: July 23 and December 19, 2014

Assessment of damages – Fatal Accident – Damages under the Law Reform (Miscellaneous Provisions) Act

Lindo J. (Ag.)

[1] This is a claim brought by the 1st claimant on her own behalf and on behalf of the near relations of the deceased Fredrick Malcolm Hill, and by the 2nd defendant on behalf of the estate of the deceased against the defendant, pursuant to the Fatal Accidents Act (FAA) and the Law Reform (Miscellaneous Provisions) Act. They claim that on November 4, 2010 Sergeant Malica Reid, an officer of the Crown, in the course of his employment, without reasonable and probable cause, shot and killed Fredrick Malcolm Hill.

[2] On August 26, 2013, the defendant filed an amended defence limited to quantum and judgment on admission was entered on October 3, 2013 for damages to be assessed.

[3] The matter came on for assessment of damages on July 23, 2014 and the claimants elected to recover damages under the Law reform (Miscellaneous Provisions) Act, (LRMPA) only, as both claimants and the near relations of the deceased on whose behalf the claim was brought under the FAA, also stand to share in any damages assessed under the LRMPA.

[4] The following documents were agreed and tendered in evidence:

1. Certified copy birth certificate No. A 0166216 issued September 21, 2001
2. Certified copy marriage certificate No. A 4170808, Marriage No 1726, Book No 1, issued March 8, 2008
3. Copy of burial order, No 0047679
4. Copy of wage and tax statement, Form 5201, No 41-0852411
5. Copy US Tax Return 2006 for the deceased, prepared by Bender & Co. CPAs, PC, (Employees Social Security No 498-21-9219)
6. Certified copy receipt prepared by the Administrator General's Department, No 35770 dated March 15, 2011 in the sum of \$5,000.00
7. Copy receipt by Honeyghan's Funeral Services, dated November 17, 2010 in the sum of \$359,087.50
8. Copy receipt from Negril Hardware & Haberdashery No.629773, dated November 25, 2010 in amount \$13,624.00
9. Copy receipt from Negril Hardware & Haberdashery No. 329772 in sum of \$3,595.00
10. Copy receipt from Negril Hardware & Haberdashery No. 329777 in the sum of \$676.00
11. Copy of cheque No 3143401, dated November 3, 2010 in the sum of \$22,500.00 prepared by Barefeet Limited

12. Copy of Immigrant Petition for relative Fianc(e) or Orphan of the USA Form I-797C (Rev.01/35/05) N, prepared by the Department of Homeland Security, US Citizenship and Immigration Services. No WAC-08 -241 -10349, dated May 30, 2008..
13. Maritime Authority of Jamaica, Certificate of Registry re glass bottom vessel Hustler
14. Western Union Customer Receipt dated February 18, 2007, prepared by Western Union, 200Euros.
15. Western Union Customer Receipt dated June 10, 2007 in the amount 286.55Euros.

[5] The 1st claimant Brenda Hill was sworn and her witness statement dated July 3, 2014 was allowed to stand as her evidence in chief after it was identified by her.

[6] Her evidence is that she is the widow of Fredrick (Mikey) Malcolm Hill who died on November 4, 2010 after being shot by a member of the Jamaica Constabulary Force, and that her husband was 48 years old at the time of his death and the Administrator General of Jamaica is the administrator of his estate.

[7] She states that she met the deceased in 2002 when he was working in the construction industry in Missouri, they were married in March 2008 and that he was well respected and “had a good work ethic”. She also states that about May 30, 2008, she petitioned the Department of Homeland Security seeking permanent residency status for her husband, as based on his previous earnings in Missouri, they were of opinion that he could make more money in the USA in the construction industry.

[8] She indicates that the application was approved in September 2010 and they were awaiting the final paper work when he was killed. She notes her husband had to remain in Jamaica until the process was completed and that he worked as a boat captain and for the period May 2010 to October 2010 was paid approximately \$92,000.00 per month and made approximately US\$500.00 per month in tips.

[9] In amplification of her witness statement, where she stated at paragraph 10 that if the deceased had lived, on his return to live and work in the USA he would now be making at least US\$60,000.00 in the construction industry, she gave evidence that there is a large construction programme in St Louis and “they employ people of colour so the deceased would have been readily sought out”.

[10] In cross examination, the claimant did not agree with Miss Bolton that the visa approval does not grant immigrant status and neither did she agree that approval of visa petition does not guarantee a visa. However, she agreed that the visa petition, a step in the process, was the last step.

[11] Mrs Mayhew, Counsel for the claimant submitted that it is well known that calculation of damages for death arising from a fatal accident or other wrongful causes is by nature a very speculative exercise. She referred to the case of **Cookson v Knowles [1978] 2 All ER 604** where at page 608 Lord Diplock discussed the degree of speculation on which a court must embark thus:

“This kind of assessment artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow’s death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing in work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill-health? Would they have increased and if so, when and by how much? To what extent if any would he have passed on the benefit of any increases to his wife and dependent children?”

[12] Counsel also cited the case of **Doris Fuller (Administratrix Agana Barrett deceased) v Attorney General** (1998) 56 WIR 337, where Harrison J (as he then was) said:

“...In the Jamaican context I would say that assessment of damages under these Acts is a hard matter of dollars and cents subject to future reasonable probabilities”.

She indicated that a claimant under the LRMPA may not be able to provide actual proof of every relevant issue but that the court should rely on the evidence presented especially as to the future prospects had the deceased lived, once it is credible.

[13] Counsel noted that the deceased was 48 years old at the time of his death and was employed as a boat captain and that formerly he worked in the construction industry in the US and that the evidence is that at the time of his death he was earning \$92,000.00 per month net from his employment and made US\$500.00 in tips. She added that while tips are discretionary, they are recoverable as lost income.

[14] In support of that submission, Mrs. Mayhew quoted the following excerpt from “The Assessment of Damages for Personal Injury and Death” - Harold Luntz 4th Edition at 5.2.3:

“there need not have been a contractual right to receive payment as long as there was a reasonable chance that the claimant would have earned the money. Thus a waiter may claim tips he would have received”.

[15] Mrs Mayhew also referred to the Australian decision of **Tsekouras v Government Insurance Office of New South Wales** – [1992] NSWCA 324 where Meagher JA said

“... The third concerns the question of tips, Mr Tsekouras, in his evidence said that in his occupation he was paid tips. He estimated

them at \$100.00 per week. If he worked as a waiter at a club, it is entirely probable that he would have been paid tips. The court can, I think, take judicial notice of that.”

She submitted that the sum of US\$500.00 is not unreasonable in the circumstances.

[16] In relation to the court’s approach to the assessment of damages for post trial loss of earnings, Counsel for the 1st Claimant noted that this calculation is usually guided by what the deceased made in the past. She relied on the House of Lords decision of **Taff Vale Railway Co. v Jenkins** [1913] AC 1, where she said it was held that it was not necessary for the plaintiff to show that the deceased had been earning money and had contributed to the support of the plaintiff before death, provided that there was reasonable expectation of future pecuniary advantage to the plaintiff had the deceased lived.

[17] Counsel further submitted that the evidence of Mrs Hill that she believed if her husband had lived he would have obtained employment in the construction industry when he joined her in the USA are based on her knowledge of her husband’s personality while he was alive and the evidence that he had previously worked in the construction industry in the USA. She therefore invited the court to make an award for post trial losses based on the testimony of the 1st claimant that the deceased would earn approximately US\$60,000.00 per annum from his employment in the construction industry in the USA.

[18] Ms. Bolton submitted on behalf of the defendant that as special damages must be proved, the claimant having proved the cost of funeral expenses, death registration and a cost to the Administrator General, the sum of \$422,062.50 ought to be allowed. She further submitted that as there was no proof of payment for the plane ticket for the 1st claimant, the cost of obtaining Letters of Administration and the police report, these should not be allowed.

[19] She indicated that on the claimant's evidence the approximate annual salary of the deceased amount to \$1,048,220.00 and that tips of US\$500.00 monthly said to be received by the deceased ought not to be considered as it is the claimant's estimation of how much tips the deceased would have earned and it is purely speculative.

[20] Counsel for the defendant further noted that the 1st Claimant's evidence is that the visa petition had been approved so the deceased would have returned to the USA and would earn US\$60,000.00 per annum in the construction industry but that the Notice of Action exhibited by the 1st Claimant states that "... approval of visa petition does not in itself grant any immigration status and does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa." She therefore submitted that the court should not make an award based on that evidence as it is a mere assertion and "is speculative at best".

[21] Miss Bolton invited the court to disregard the claimant's estimation as it is based on the claimant's "inexperience in the construction industry" and there was lack of documentary proof. She then expressed the view that the evidence before the court was not sufficient to ascertain the deceased's income at trial or post trial.

[22] Under the LRMPA, the estate of the deceased is entitled to benefit from any claim to which the deceased would have been entitled. One is for loss of expectation of life and another is loss of earnings.

[23] The case of **Rose v Ford** [1937] AC 826 provides settled law that a claim for loss of expectation of life is maintainable on behalf of the estate of the deceased. A conventional sum is usually awarded under this head of damages as such a loss is incapable of quantification using any known arithmetical formula.

[24] I have considered the cases cited by Counsel (**Gordon & Others v The Administrator General** 2006HCV1878, unreported, delivered January 6, 2011, in which the sum of \$150,000.00 was awarded and **The Attorney General of Jamaica v.**

Devon Bryan (Administrator for the estate of Ian Bryan) 2013 JMCA Civ 3 where the Court of Appeal reduced an award of \$250,000.00 made in 2007 to \$120,000.00).

[25] The court notes that the life expectancy in Jamaica is now pegged at about 70.57 years, for men, and the deceased was 48 years at the time of his death, so still had a number of years to live had it not been for the wrongful death, and would probably have been employed up to the age of retirement which is 65 years.

[26] Using the Court of Appeal decision in **The Attorney General v Devon Bryan (Administrator for the estate of Ian Bryan)** as the preferred guide and making an adjustment to take into account devaluation in the Jamaican dollar, I believe the sum of **\$150,000.00** is a reasonable award for loss of expectation of life.

[27] In considering the award to be made for loss of earnings, I am guided by the case of **Davies v Powell Duffryn & Associated Colliers Ltd. [1942] 1 All ER 657** where Lord Wright said:

“the starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of employment. Then there is an estimate of how much was required or expended for his personal and living expenses. The balance will give a datum of basic figure which will generally be turned in a lump sum by taking a certain number of years purchase”.

[28] At page 665 of that judgment, Lord Wright stipulated in respect of the question of compensation to the deceased’s estate for loss of earnings that:

“there is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence...”

[29] The Jamaican Court of Appeal in **G. Dyer & D. Dyer v Stone** (1990) 27 JLR 268 at 276 outlined the method of ascertaining the loss of earnings to the estate of the deceased. The first guideline is to *“ascertain from credible evidence what the net income of the deceased was at the date of death... secondly,.. to estimate the deceased’s net income being earned at the date of trial by persons in a position corresponding to that the deceased held at the time of his death or by persons in a position to which the deceased might reasonably have attained. The average of these two levels of net income may fairly be considered as the average annual net income of the deceased for the pre-trial years... from the two, deducting living expenses and arriving at the multiplicand.”*

[30] In the landmark decision of **Cookson v Knowles**, cited by Counsel for the 1st Claimant, Lord Diplock (at page 569 letter E) stated: *“ ... as a general rule, in fatal accident cases the damages should be assessed in two parts, the first and the less speculative component being an estimate of the loss sustained up to the date of trial, and the second component being an estimate of the loss to be sustained thereafter.”*

[31] There are different methods of assessment of the multiplicand. These are:

- a. the “item by item approach”, which is used when specific amounts can be attributed to what the deceased contributed to each dependant and to this other losses such as perks from employment is added
- b. Earnings minus living expenses which is used where it is difficult or impossible to ascertain the expenditure on each dependant, and
- c. The percentage approach where the court may assess the dependency as a per cent of the net earnings of the deceased in the case of a widow and children or where the widow is the only dependant: (Harris v Empress Motors Ltd [1983] 3 All ER 361

[32] The percentage approach was rejected by the Court of Appeal in **Jamaica Public Service Co. v Elsada Morgan, (1986) 44 WIR 310** as it was thought that economic conditions in Jamaica are not as sophisticated as in England to ensure that such mathematical calculations would be reflective of current social realities and it was noted that the court should not be bound by a fixed formula and that the court reserves the right to vary the method used to suit the needs of each case.

[33] According to Lord Scarman in **Gammell v Wilson [1982] AC.27** at p.78, the loss to the estate which an award for loss of earnings seeks to compensate, will be “what the deceased would have been likely to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of his death would suggest he was reasonably likely to achieve.”

[34] I find it difficult if not impossible to ascertain the expenditure on the widow, and due to the fluctuation of the dollar it is also difficult to ascertain the expenditure on the son of the deceased. I find that the item by item approach and the per centage approach are not suitable in the circumstances. It is therefore my considered view that the best approach is to assess the surplus to the deceased after deduction of his living expenses to arrive at a multiplicand, as the evidence is clear as to what his living expenses were.

[35] It has been shown on the evidence, which I accept as true, that between May and October 2010, the deceased earned on average \$87,351.00, per month. I am therefore inclined to accept that figure as his net monthly income from his employment.

[36] I also accept on a balance of probabilities, that the deceased also earned US\$500.00 by way of tips. I have taken judicial notice of the fact that in the hospitality industry, tipping is very popular and that the recipient would not be able to provide documentary proof of this. In this regard I am persuaded by the decision in the case of **Tsekouras**. I accept that although tips are discretionary, they are recoverable as lost income, so I am prepared to make an award to include an amount for tips.

[37] I am therefore inclined to use the figure of \$87,351.00 per month as the average monthly income of the deceased to which will be added the sum collected as tips.

[38] The extent of the pre trial loss suffered by the estate of the deceased would be his net earnings minus his living expenses multiplied by the number of years between the date of death and the date of the assessment of damages.

[39] The claimant in her witness statement indicated that \$13,000 is what the deceased spent for his personal expenses in that he spent approximately \$3,000.00 on utilities which formed his contribution to shared expenses and \$10,000.00 on food for himself. No issue was raised in cross examination in respect of the amount the claimant said were the personal expenses of the deceased. I therefore find that the deceased spent \$13,000.00 for personal expenses.

[40] I find that at the date of death the net income of the deceased would be \$87,351.00+ US\$500.00 (calculated using the average exchange rate of JA\$87.38:US\$1 as at November 2010 which is \$43,690.00) = \$131,041.00 per month

[41] At the date of the death of the deceased, the monthly income was therefore approximately \$131,041.00 while as at the date of trial, the net income would likely be \$143,766.00 per month ie. \$87,351.00 plus US\$500.00 converted at the rate of Ja\$112.83 to US\$1 as at July 2014. Deducting the living expenses (\$13,000 per month) from the average of the net income at the date of death (\$131,041.00) and the estimated net income at the date of trial (\$143,766.00) ie (\$137,403.50) the multiplicand arrived at would therefore be (\$124,403.50.x 12) ie \$1,492,842.00 per annum. I therefore fix the multiplicand at (\$1,492,842.00) up to the date of trial.

[42] The time between the date of death and trial is three years and eight months. The pre trial loss from the date of death to the trial is therefore \$5,473,754.00.

[43] It is well known that the permanence of jobs in the construction industry is unusual, globally. The claimant, in my view would have had to prove the level of permanence of the job, in the construction industry, so that the court could be satisfied as to the likelihood of the deceased being so employed. There is nothing in the evidence to show that the deceased had an offer or a contract from any construction company in Missouri so I find that the income projected from this job is far too speculative.

[44] It bears noting at this point, therefore, that I do not find, on a balance of probabilities, that the deceased would have been granted the visa and even if granted the visa, that he would have found employment in the construction industry and earn the sum of US\$60,000.00 per annum. The Notice of Action, (exhibit re-numbered 12, dated April 29, 2010,) states that it "... does not in itself grant any immigration status and does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa, for admission to the United States..." Although the claimant expressed the view that the 'Notice of Action' was the final step in the process, that part of her evidence is based on hearsay, so I have rejected it.

[45] For the post trial loss, I am constrained to use the figures representing the income of the deceased as at the date of death as the appropriate figure. This is based on my view that it is more probable that the deceased would have remained in Jamaica and continue in his employment as a boat captain.

[46] Counsel for the 1st claimant, relying on the decision of **Victor Campbell v Samuel Johnson, Khan, Vol. 4, page 89**, submitted that an appropriate multiplier is 7 as the court in that case used a multiplier of 7 to assess damages for future loss of earnings for a 48 year old farmer.

[47] Counsel for the defendant submitted that the multiplier is the number of years between death and trial, deducted from post trial, which is the duration of the lost benefit

after trial. Noting that the age of retirement for a man is 65 years, Ms Bolton submitted that the lost benefit after trial would be 17 years and that the multiplier would be 11.67.

[48] The court in its duty to make an estimate of the multiplier, is really undertaking the onerous task of determining what will happen in the future. To determine the estimate of the number of years that a dependency would last, the court has to consider the number of years between the date of the death of the deceased, and the date at which he would have reached the normal age of retirement. In this case it would be seventeen years. The court is to make a decision on future events and it has not been surprisingly said, that in most cases the exercise is “a matter of speculation and may be conjecture:” (see *Kassam v. Kampala Aerated Water Co. Ltd. [1965] 1 W.L.R. 668 at page 672.*)

[49] It falls within the ambit of speculation because, not only is there the possibility that the deceased might not have lived to retirement age, but also because injury or illness may have prevented him from engaging in gainful employment. Moreover, there is no certainty that the dependants themselves would live throughout whatever period of dependency is estimated by the court.

[50] The court has to consider all the possibilities that may occur in the future before deciding on the period of dependency. It is therefore helpful to consider, for comparative purposes, multipliers approved by the Jamaican Court of Appeal in fatal accident and other cases.

[51] In *Jamaica Public Service Co. Ltd. v Elsada Morgan*, the Court of Appeal approved a multiplier of 14 in the case of a 25 year old man who was in excellent health at the time of his death. In *Samuel Barrett v Clinton Thomas & V. W. Lee & Sons* SCCA 14/80 (unreported), delivered October 8, 1981 and in *Dyer & Dyer v Stone* (1990) 27 JLR 268 the court reduced a multiplier of 15 to 11 in cases where the injured claimant and the deceased were 35 years old, and in *Cecil Wong McDonald v Winston Williams* SCCA 83/81, (unreported) delivered October 14, 1982, it approved a

multiplier of 10 for a 37 year old man. The Court of Appeal in **The Administrator General (Administrator estate Louis Kelly) v Dr. Randolph Edwards** SCCA 20/90 (unreported), delivered March 18, 1991 applied a multiplier of 8 in the case where the deceased was 45 years old.

[52] The case of Victor Campbell referred to by counsel for the 1st claimant, although one in relation to a personal injury claim, I find is still instructive on the issue of loss of earnings. There the claimant was 48 years old, as the deceased in the case at bar at the time of his death, and the court used a multiplier of seven to determine his loss of earnings.

[53] Using that case as a guide, and noting the trend in the cases in the Court of Appeal and taking into account the uncertainties of life, I believe that a reasonable figure to adopt as the multiplier is 7.

[54] Having accepted that it is more probable that the deceased would have remained in Jamaica and continue in his employment as a boat captain rather than be employed in the construction industry in Missouri, the figure used to calculate the pre trial loss would be used to calculate the future loss. I have also taken into consideration the question of taxes and other statutory deductions which are usually taken from earnings, and as the figures were based on the net earnings of the deceased I will not make any deductions for such taxes. The post trial losses would therefore be \$1,492,842.00 (multiplicand) x 7(multiplier) which amounts to **\$10,449,894.00**.

[55] The claimants have specifically pleaded the following in the amended particulars of claim:

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| Cost of funeral expenses | \$458,007.50 |
| Death registration costs | \$2,750.00 |
| Plane ticket for widow | US\$602.82 |
| Cost to obtain Letters of administration | \$100,000.00 |
| Police report | \$1,000.00 |

The total special damages pleaded is JA\$561,757.50 and US\$602.82.

[56] In **Bonham-Carter v Hyde Park Hotel (1948) 64 TLR at 178** Lord Goddard CJ, said: *'Plaintiffs must understand that if they bring an action for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying "this is what I have lost, I ask you to give me these damages". They have to prove it.'*

[57] On the evidence before me, the claimant has proved the following: funeral expenses in the amount of \$376,982.50, death registration costs of \$2,750.00 and payment to the Administrator General of \$5,000.00.

[58] I am not prepared to make an award for the plane ticket as there is no proof as to when the 1st claimant travelled at that cost neither is there any proof of the sum said to be paid in that regard. This item in my view is one for which documentary evidence should be provided.

[59] In relation to the costs to obtain Letters of administration and Police report, no proof has been shown in relation to these expenditures so no award will be made in respect of those items. Special damages will therefore be awarded in the sum of \$384,732.50.

[60] Damages are therefore assessed and awarded as follows:

Special damages awarded in the sum of \$384,732.50 with interest at 3% per annum from November 4, 2010 to December 19, 2014

Pre trial loss of earnings: \$5,573,754.00 with interest of 3% per annum from the date of service of the claim form to December 19, 2014

Post trial loss of earnings: \$10,449,894.00 (no interest)

Loss of expectation of life: \$150,000.00

The claimant is entitled to costs to be taxed if not agreed.