



[2015] JMSC Civ 250

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2012 HCV 00345

BETWEEN	VINSTON MILLER (Administrator of the Estate of Weston Miller, the deceased)	CLAIMANT
AND	CARIBBEAN PRODUCERS JAMAICA LIMITED	1st DEFENDANT
AND	KIRK HILLARY	2nd DEFENDANT

IN OPEN COURT

Mr. Ewan Thompson, Attorney-at-Law for the Claimant

Mrs. Tashia H. Madourie and Mrs. Arlene A. Williams instructed by Nunes, Scholefield, DeLeon & Co. for the 1st Defendant.

The 2nd Defendant is unrepresented.

Heard: 13th June 2012, 14th June 2012 & 18th December, 2015.

**Negligence – Motor Vehicle Collision – Manslaughter Charge – Dangerous Driving
- Fatal Accident – Damages – Loss of Earnings – Special Damages – Funeral
Expenses - Fatal Accidents Act – Law Reform (Miscellaneous Provisions) Act.**

Campbell J:

Background

[1] Weston Miller, a building contractor and carpenter, was twenty-five (25) years of age when he died in a motor vehicle collision, on the 1st February 2007. The 1st Defendant's International motor truck was being driven, by the 2nd Defendant when it collided into the Suzuki motor car owned and driven by the Claimant.

[2] The deceased died intestate, unmarried and without children. He is survived by his father, Mr. Vinston Miller, sisters, niece and nephews. On the 2nd October 2009, Letters of Administration were given to Mr. Vinston Miller.

[3] By way of a Claim Form filed on the 26th January, 2010, an action was commenced by the Administrator to recover damages under the **Fatal Accidents Act, 1845** for the benefit of the dependents of the deceased as well as under the **Law Reform (Miscellaneous Provisions) Act, 1955** for the benefit of the estate of the deceased. The negligent operation of the 1st Defendant's motor truck was alleged and particularized. It was alleged that the 2nd Defendant was charged with manslaughter, as a result of the death of the deceased. That on or about the 26th June 2008, the 2nd Defendant pleaded guilty in the Circuit Court, for causing the death of the deceased by Dangerous Driving.

[4] On the 19th April 2010, a Defence was filed on behalf of the 1st Defendant, denying the allegations of negligence pleaded in the Particulars of Claim. The Claimant was put to strict proof to prove the allegations that the 2nd Defendant had pleaded guilty to the offence of Dangerous Driving, in relation to the death of the deceased.

[5] In the pre-trial memorandum, dated 3rd April 2012, counsel for the 1st Defendant stated, that the 1st Defendant is prepared to admit that its servant and/or agent, the 2nd Defendant, was negligent in his operation of the motor vehicle thereby causing the collision which resulted in the death of the deceased.

[6] The issues before the court are the quantum of damages that the estate of Weston Miller is entitled to recover under the **Fatal Accidents Act** and/or the **Law Reform (Miscellaneous Provisions) Act**, and also the amount of special damages that the estate is likely to recover under plus costs.

Law Reform (Miscellaneous Provisions) Act, 1955

[7] 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.

[8] Section 2(1) of the **Law Reform (Miscellaneous Provision) Act** provides:

“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.”

Further, Section 2(2)(c) of the **Law Reform (Miscellaneous Provisions) Act** provides;

“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.”

As such under the **Law Reform (Miscellaneous Provisions) Act** award is usually made for loss of expectation of life, funeral expenses, other special damages and the “lost of years” for the benefit of the deceased estate.

[9] The approach of the Court in the assessment of damages under the **Law Reform (Miscellaneous Provisions) Act** is a practical approach, there is no room for sentimental agonizing, it’s a hard matter of “*dollars and cents subject to the element of reasonable future probabilities*” (Per Harrison J (Ag), **Doris Fuller (Ad. Estate Agana Barrett, dec’d) v Attorney General** CL 1993/F152 delivered on 5th July 1993.

Lost years

[10] In **Administrator General of Jamaica (On behalf of the Near Relations and Dependents and Dependents and as Administrator Ad Litem of the Estate of Clive Brown, Deceased) v Jamaica Pre-Mix Limited et al** [2013] JMSC Civ 149, Anderson J, noted that lost years, is a calculation of the loss to the estate by virtue of the loss of earnings of the deceased during the lost years, being years between retirement and death. It is the loss arising from the death of the deceased and is calculated as at the time of death of the deceased.

Multiplier

[11] The deceased died at age twenty (26), he was born on the 24th May 1980. In the case of **Jamaica Public Service Co. Ltd. v Elsada Morgan** (1986) 23 J.L.R. 138, the Claimant was age twenty-five (25) years at the time of death. The Court of Appeal approved a multiplier of fourteen (14). In **Alicia Dixon (Administrix of the Estate Christopher Dixon) v Harris and the Attorney General**, delivered on February 25th, 1993, Harrison J.(Ag), approved a multiplier of fourteen (14) which was used in respect of the deceased, an Air Pilot, who was twenty-seven (27) years at the time of death. In the matter of **Doris Fuller (Ad. Estate Agana Barrett ,dec'd) v Attorney General** C.L.1993/F152, delivered 5th July 1995, Harrison J. (Ag), used a high multiplier of sixteen (16), in respect of the twenty-one (21) year old deceased. I am of the view that a multiplier of fourteen (14) would be appropriate in this case.

Multiplicand

[12] At the time of his death the deceased was driving his motor vehicle home from a construction project he was involved in, for one Mr. Smith. His father's witness statement, which was admitted as his evidence-in-chief said he was working as a Supervisor of building sites, also as a building contractor who installed roofs, does general carpentry, carry-out general repairs to houses and buildings and was also engaged in general construction. He had started learning the trade from age fifteen (15), serving a period of apprenticeship with a building contractor.

[13] His father testified that he earned a weekly salary of \$25,000.00 - \$30,000.00. That a few months before he died; the deceased earned \$180,000.00 for a particular job. He lived in his own home which consisted of two (2) bedrooms, hall, bathroom, kitchen and verandah. Counsel for the 1st Defendant, complained that there was a lack of documentary support, or evidence of statutory deductions from the deceased's earnings. A not inconsequential part of the Jamaican business is conducted outside the formal economy. Similar complaints were raised by Crown Counsel in the **Agana Barrett case**, (See; page 6 of the judgment) which failed to move the court.

Deceased's annual income

[15] Mr. Courtney Lewis, builder and contractor, with twenty-two (22) years of experience, with whom the deceased had worked on occasions, attested to the period of “apprenticeship” served by the deceased and subsequent work experience, and of the reputation the deceased had gained as a “skilled tradesman”. He opined that he would easily earn on average between \$120,000.00 to \$130,000.00 monthly. The evidence of Mr. Lewis is that the basic salary for a site supervisor in 2007 was \$4,000.00 per day or \$20,000.00 per week, which would constitute his average net earnings at death, annualized would be \$960,000.00. It was clear that some of his jobs were not of the same duration, and there would be periods when he did not work. I find Mr. Lewis to be a truthful witness; his credit has not been impugned. I accept his evidence despite the absence of documentary support. I would therefore discount the annual earnings of \$960,000.00 by 10 %, for periods when he would not work, for a total of \$864,000.00. Statutory deductions inclusive of income tax, NHT, NIS, would amount to 29%; that is \$250,560.00. The average annual net earnings at death is \$613,440.00.

[16] According to Mr. Lewis, the applicable daily rate for a site supervisor at the time of the trial had moved to \$5,000 per day. As a demonstration of the movement of labour cost in the building industry, the evidence, that the labour cost to install a roof for a three (3) bedroom house had moved from \$180,000.00, a few months before the deceased death to between \$250,000.00 - \$260,000.00 at the time of trial. The figure of \$5,000.00 per day, I accept as what the deceased would have been earning at the time of trial. The trial earnings should be accepted as \$25,000.00 weekly, the annualized would be \$1,200,000.00 per annum, discounted by 10%, \$1,080,000.00, and deduct 29%, \$313,200.00. The trial earnings annualized at \$766,800.00.

[17] In accordance with the guidelines in **Godfrey Dyer and Anor. Derrick Dyer v Gloria Stone (Executrix, Estate Edward Joslyn Stone, Dec'd)**, SCCA (unreported) delivered on the 9th July, 1990. I make the following calculations -

Calculations for Pre-Trial

The net annual income of the deceased at time of death - \$613,440.00

The net annual income at the time of trial - + \$766,800.00
\$1,380,240.00

The average annual net income for the pre trial period - $\frac{\$1,380,240.00}{2} = \$690,120.00$

Expenditure at time of death on himself, \$26,700.00 monthly expenditure, annualized \$320,400.00.

Multiplicand = \$690,120.00 - \$320,400.00 = \$369,720.00

Expenditure as a % of net income at time of death - $\frac{\$320,400.00}{\$613,440.00} = 0.52$

Loss earnings for pre-trial years = $(\$690,120.00 - \$320,400.00) \times 5.4 \text{ years} =$
 $= (\$369,720) \times 5.4 = \$1,971,840.00$

Calculations for Post Trial

Loss Earnings for post trial years = (multiplicand x multiplier)

$= \$369,720.00 \times 14 = \$5,176,080.00$

Damages under the Fatal Accident Act

[18] A dependent is one who can satisfy a court that at that time of the death of the deceased, he was in receipt of a benefit from the deceased and the death has deprived him of that benefit. I am satisfied that Mr. Vinston Miller and the named niece and nephews are dependents. The father is sixty-five (65) years of age. In determining the multiplier I take into contemplation the prospects of the deceased, had he lived, marrying or his relationship creating a dependence which would have the effect of either extinguishing or reducing the level of contribution. (See; **Dolby v Goodwin** [1955] 2 All E. R 166, at page 9 of the judgment, which this court applied in **Agana Barrett**.)

[19] The father testified that he was dependent on the deceased for support as was his niece, Tashana Tomlinson, and nephews, Christopher Miller and Javian Smith, for whom the deceased assumed the responsibility for sending to school and the provision of their everyday needs. In respect of the multiplicand, the net contribution to his dependents, is the datum figure, but any likelihood of increased earnings must be taken into account, and the datum figure be increased accordingly. The estimate of the net contribution to the dependents is a question of pure fact to be determined according to evidence.

[20] In his evidence-in-chief, Winston Miller, attested that 3,000.00 per week, was contributed by the deceased, to assist the niece and nephews with lunch and bus fare to school per week. The expenditure on lunch money, among other things, would not be for the entire year; there would be a three (3) months vacation for summer, Easter and Christmas. The annual expenditure on lunch money for his dependency would be $\$15,000.00 \times 9 = \$135,000.00$. Miscellaneous expenditure of \$ 2,000.00, I find refers to the “*everyday needs*” of his dependent nephews and niece for which he had assumed responsibility at the time of his death. That would constitute a dependency of \$2,000.00 weekly or \$8,000.00 monthly and annualized sum of \$96,000.00. The total dependency at the time of death for his minor dependents would be $\$135,000.00 + \$96,000.00 = \$231,000.00$. There is no evidence of any apportionment of the sum of \$231,000.00 amongst these children, each minor dependent being apportionment, an annualized dependency of \$77,000.00.

[21] The evidence is that the deceased supported his father, the pleadings particularized spending \$2,000.00 - \$2,500.00, for the family-home, this is separate and apart from expenditure on himself. I find that he supported his father with the sum of \$2,000.00 per week or \$8,000.00 monthly, the annual dependency for his father would be \$96,000.00 at the time of death, and \$120,000.00 at the time of trial.

Computation of Dependency

Annual average contribution - (5 years 4 months) x \$96,000.00 = \$512,000.00

Post Trial

The remainder of the years of purchase - (1 year 8 months) x \$96,000.00 = \$160,000.

Total = \$672,000.00.

[22] Javian Smith, born 5th September 1999, was age seven (7) when the deceased died. He would last to his majority, that is, eleven (11) years. Therefore he has 11 years of purchase. The evidence was that \$3,000.00 was spent on his dependent niece and nephews. In addition, Mr. Miller states that there was a miscellaneous expenditure of \$2,000.00. This is a sum which appears to be used for the “*everyday needs*” of these minor dependents.

1st February 2007 – June 2012 = (5 years 4 months).

Annual average contribution each, annualized dependency – (5 years 4 months) x \$77,000.00 = \$410,667.00.

Post trial

The remainder of the years of purchase - (5 years 8 months) x \$77,000.00 = \$436,333.00

Total - \$410,667.00 + \$436,333.00 = \$847,000.00.

[23] Christopher Miller, born 23rd October 2002, was age five (5), when his uncle died, would have 13 years purchase.

Annual average contribution – (5 years 4 months) x \$77,000.00 = \$410,667.00.

Remainder of purchase – (7 years 8 months) x \$77,000.00 = \$590,333.00.

Total - \$410,667.00+ \$590,333.00 = \$1,001,000.00.

[24] Tashana Tomlinson, born 22nd December 2000 was age six (6), at time of her uncle’s death. She has twelve (12) years of purchase.

Annual average contribution - (5 years 4 months) x \$77,000 = \$410,667.00.

Post trial, remainder of purchase – (6 years 8 months) x \$77,000.00 = \$513,333.00

Total - \$410,667.00 + \$513,333.00 = \$924,000.00

Grand total - \$3,444,000.00

Special Damages

[25] The Claimant has made a claim for special damages, save an except that for funeral expenses that was paid out by the 1st Defendant. A sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) was claimed for legal fees for obtaining the grant of Letters of Administration. In addition, a sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) was claimed for the loss to the Claimant's motor car.

[26] In terms of the loss of the motor car, the police report conveys that the car was completely wrecked. There was also proof of ownership of the said motor vehicle by way of a Motor Vehicle Certificate of Title. However, there is no evidence before the court stipulating the cost or value of the said motor car. The Defendant's Attorney-at-Law contended that the receipts in relation to the amount, to obtain a grant of administration of the estate have been short served. Further, the receipts cannot be relied on at the trial pursuant to Rule 28.14(1) of the Civil Procedure Rules which provides;

“A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.”

[27] It is trite law that pleaded particulars, must, as a general rule, be strictly proven. As such, the court cannot award the sums claimed in relation to the loss of the motor vehicle as there was no evidence to the cost of the motor vehicle. A Notice of Intention to Tender into Evidence Hearsay Statement Contained in a Document was filed on 7th June 2012 by the Claimant's Attorney-at-Law. Receipts for the legal fee for Administration of the Estate of Weston Miller were exhibited bearing the name of the Attorney-at-Law and the address of the firm. The sum of \$150,000.00 was specifically pleaded in the Claim Form and I accept that the sum has been proven. Thus, the court,

awards the sum of \$150,000.00 for legal fees in obtaining the grant of Letters of administration.

Loss of Expectation of Life

[28] Damages for the loss of expectation of life are in respect of loss of life and not of loss of future pecuniary prospects, no regard being had to financial losses or gains during the period which the victim has been deprived (See; **Benham v Gambling** [1941] 1 All E.R. 7).

[29] In **Hill v Administrator General Jamaica and The Attorney General**, [2014] JMSC Civ. 217, delivered on 19th December 2014, Lindo J (Ag), as she was then, cited the case of **Rose v Ford** [1937] AC 826, wherein the court stated;

*“...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. 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).”*

[30] In **Bryan v. AG (unreported)** – CL 2001 B 088, Sinclair-Haynes J. stated that the figure under this head of damages, should be a conventional or moderate figure. There has been controversy with regard to this sum. Sinclair-Haynes J. also stated that the massive devaluation of the Jamaican dollar required that the figure be adjusted proportionate to the change in the dollar value. Brown J., took a similar approach in **Gordon et al. v. Administrator General (Gordon, deceased) (unreported)** – 2006 HCV 01878. In that case, both claimants and defendants presented recent awards granted by the Supreme Court that ranged from \$50,000 to \$175,000. Brown, J. having acknowledged the variance resulted from the devaluing Jamaican dollar, considered the

claimant's proposed sum of \$150,000.00 to be reasonable. The loss of expectation award should therefore be updated to match the devaluation of the dollar

[31] Given the recent Court of Appeal judgment in **AG v. Bryan** – [2013] JMCA Civ 3, the conventional sum for a loss of expectation award appears to now be \$125,000.00. The claimant submitted that the sum of \$150,000.00 should be accepted and the court agreed and awarded that sum. I therefore accept that the sum of \$150,000.00 is a reasonable sum to be awarded in this case for the loss of expectancy of life.

The court makes the following orders;

Damages under the Law Reform (Miscellaneous) Provisions Act

Special damages (Letters of Administration) - \$150,000.00 with interest at 3% per annum from 1st February 2007 to 18th December 2015.

Pre-trial loss of earnings - \$1,971,840.00 with interest of 3% per annum from the date of service of the claim form to 18th December 2015.

Post-trial loss of earnings - \$5,176,080.00 (no interest).

Loss of expectation of life - \$150,000.00

Damages under the Fatal Accidents Act

Loss of Dependency - \$3,444,000.00

The apportionment is as follows:

Vinston Miller - \$672,000.00

Javian Smith - \$847,000.00

Christopher Miller - \$1,001,000.00

Tashana Tomlinson - \$924,000.00

Costs to the Claimant to be agreed or taxed.