



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION**

CLAIM NO. 2007 HCV 00799

BETWEEN	LEEVON PHILLIPS OPAL PHILLIPS (In the estate of Lloyd Phillips. deceased)	CLAIMANTS
AND	IVY SHAW	1st DEFENDANT
AND	CLYDE BYLES SHAW	2nd DEFENDANT

Mr. Ainsworth Campbell and Mr. Andrew Campbell for Claimant.

Ms. KerryAnn Sewell instructed by Messrs. Nunes, Schofield, Deleon and Company for the Defendant.

Heard: 29th June, 2010, 2nd July, 2010 and 12th December, 2014

Claim for damages under the Law 2014 Reform Miscellaneous Provisions Act and the Fatal Accidents Act.

MARSH, J.

[1] The Claimants Leevon and Opal Phillips are administrators of the estate of Leevon Phillips who died intestate, having met an untimely death when he succumbed on the 8th of April, 2004 the result of an accident in which he sustained injuries. This accident occurred on the 7th April 2004 on Marcus Garvey Drive, St. Andrew. He was hit by a motor vehicle driven by Clyde Byles Shaw, the 2nd Defendant and owned by the 1st Defendant Ivy Shaw.

[2] The Claimants sought damages, as a result,

- (i) Under the Fatal Accidents Act;
- (ii) Under the Law Reform (Miscellaneous provisions) Act,
- (iii) special damages
- (iv) interests and costs

- [3] Liability having been admitted the matter was set down for assessment of damages on the 29th June, 2010.
- [4] The first witness presented by the Claimants was Leevon Phillips, the 1st Claimant. He testified that his father Lloyd Phillips had died on the 8th day of April 2004 having been injured the previous day in an accident on Marcus Garvey Drive, St. Andrew. When seen at the Kingston Public Hospital before he died, Lloyd Phillips had been groaning and "seemed to have been in great pain." Leevon Phillips had played "a leading role in making the funeral arrangements for the burial at Dovecot Memorial Park".
- [5] He itemized the expenditure incurred because of his father's death. The total amount claimed for special damages was \$6,505,226.59. Besides the 1st Claimant, the deceased was survived by a son Marlon and three daughters Opal, Nicole and Natalie. The 1st Claimant also testified that it was also necessary to obtain the services of an attorney at law to apply for Grant of Letters of Administration and this cost \$100,000.00. For the pain, suffering and loss of amenities that the deceased underwent the 1st Claimant claimed a compensation of \$250,000.00.
- [6] Denesta Dacosta also testified for the Claimants that he had grown up with the deceased since he Dacosta was about five years old. He indicated that the deceased had been a fork lift operator who retired "when he was about 59 years old", the deceased while employed as a forklift operator, had been engaged in purchasing, processing and selling fish, but this fully after his retirement. He helped the deceased in his fish business on Thursdays, Fridays and Saturdays from 1 pm to about midnight on these days.

- [7] The deceased, on these nights sold an average of 43 lbs. of fish to a “large clientele” which he had long established. He concluded that the deceased’s income for those nights amounted to \$60,000.00 per week.
- [8] Dianna Anderson described the deceased as a businessman and a pensioner, known to her prior to his death. She denied that he was working as a forklift operator and sold fish, but after his retirement he went into the business of buying and selling fish fulltime. The deceased bought about 20 weights of fish each week, a weigh being equal to about 11 lbs. of fish. He sold, fry, steam and roast fish. She would help to sell fish sometimes “when the crowd was heavy”. For his efforts, the deceased would pay her “\$900 per week” for salary. However, in cross examination by counsel for the Defendants, she testified that the deceased paid her \$3,500 per week, on Saturday nights for her working on Thursdays, Friday and Saturday.

SUBMISSIONS

- [9] Mr. Andrew Campbell for the Claimants noted that there was discrepancy between the evidence of witnesses Dacosta and Anderson. Dacosta’s account of \$900 per week being paid to worker should be multiplied by 2 to be \$1,800.00 as there were 2 workers. The court is to accept the evidence of the Claimant Leevon Phillips and all the expenses alluded to by him. Based on Dacosta’s evidence the deceased had a net income of \$19,200 .00 per week an annual income of \$998,400 per annum; no more than \$6,000.00 per week for his personal expenses and upkeep - \$72,000.00 per annum. The remainder is \$926,000 per annum.
- [10] Mr. Campbell continued his submissions and urged the Court to assess damages on a multiplier of 8 – based on the age 61 as indicated in the Amended Particulars of Claim. This would amount to the sum of \$7,41,200.00.

[11] He argued that the deceased suffered Pain and suffering at the time he died and submitted that an award should be made to deceased's estate of \$250,000.00 for Pain and Suffering. The total claim is to include Special damages as on the Statement of Special damages – an amount of \$6,505,226.29, loss of earnings up to the time of trial to now be \$7,411,200.00. The total damages sought, Mr. Campbell submitted are:

\$7,141,200.00
250,000.00
6,501,505.226.59

[12] Mr. Campbell now adjusted the multiplier suggested to 5 and asked that the General Damages be a sum of \$4,832,000.00; Special damages to be \$525,226.59.

[13] Ms. Sewell for the Defendants pointed to the Amended Particulars of Claim as setting out the basis on which compensation is being sought by the Claimants –

- (a) Claim under the Fatal Accident Act for the benefit of dependents.
- (b) Claim under the Land Reform (Miscellaneous Provisions) Act for the benefit of the estate.

[14] The Particulars pursuant to the Fatal Accidents Act named several persons listed with their respective ages as "persons for whom this action has been brought. None of these named persons is below the age of 18 years old. The submission is that persons claiming under this Act must satisfy the Court that he or she was in receipt of a benefit from the deceased and that his death had deprived him or her of receiving that benefit. She relied on the case ***The Administrator General for Jamaica Administrator Estate Gladstone Richardson deceased v. Thomas et al*** Suit No. A181. Here Wolfe J. (as he then was) stated

"Under the Fatal Accidents Act the action enures for the benefit of the dependents of the deceased at the time of his death. A dependant, referred to as a near relative, is one who can satisfy a Court that at the time of the death of the deceased he was in receipt of a benefit from the deceased and that the death has deprived him of such a benefit."

- [15] Leevon Phillips is the only witness whose name appears on the list of persons for whom this action has been brought and he has given no evidence of any person being dependant at the time the deceased died and that the death deprived any person of a benefit. Miss Sewell submitted that no award can therefore be made under the Fatal Accidents Act.
- [16] Re the Claim under the Law Reform (Miscellaneous Provisions) Act. Miss Sewell for the Defendants further submitted that Wolfe J (as he then was) set out quite clearly the steps to be taken in ascertaining the loss of Future Earnings for the "Lost years", he was himself following Campbell, J.A. who clearly had set out these steps in ***Godfrey Dyer and Derrick Dyer v. Gloria Stone Executrix Estate Edward Joslyn Stone SCCA 7/88*** dated 9th July 1990 (unreported).
- [17] It is the Claimant who is put to proof – of the age of the deceased at the time of death – the health and general vitality of the Claimant when he did. There was no evidence as to the deceased's age at the time of death. One witness Denista DaCosta opined that the deceased had reached the age of about 59 years old when he retired - this is crucial to the multiplier. He was older than 59. Miss Sewell suggested that a multiplier of 3 should be used.
- [18] The evidence of witnesses DaCosta and Anderson conflicts in many ways and are not credible. The Claimants' Attorney has pulled figures out of the air and asked Court to accept it. The Court is not assisted by the Claimants to make any estimate of the reasonable expenses incurred by the deceased.
- [19] This Court is not provided with any evidence with which to arrive at Multiplicand in this case. No award should be made in respect of that. See the ***Administrator General for Jamaica (Administrator of Estate Eric David Black*** deceased also known as ***David E. A. Black***) ***Suit no. C.L. 2001/A073*** 30th May, 2005.

- [20] Re the Claim for Pain, Suffering and Loss of Amenities – there was no medical evidence provided only that of witness Leevon Phillips' Evidence that "When I saw the deceased at the Kingston Public Hospital ... "he was groaning heavily and seemed to have been in great pain." (See para. 2 of the Witness Statement).
- [21] Re Claim for Special Damages –
There is nothing from which Court could make an award. There was no evidence to support loss of earnings - none to support what deceased was earning. The Statement of Special Damages is inaccurate – does not comply with formulation outlined by Wolfe J. and the authorities.
- [22] The items charged in Special Damages have no proof – no receipts put into evidence through any witness - special damages must be specially pleaded and specially proven. The calculations relied on were incorrect.
- [23] On 18th January, 210 at a Case Management Conference by consent, it was .. inter alia that there be judgment for the Claimant with liability apportioned 70% in favour of the Claimant and 30% for the Defendants. The matter was to have proceeded to Assessment.
- [24] The above consent judgment having been arrived at what remained to be decided was what was the proper measure of damages-
- a) The Claimant's Particulars pursuant to the Fatal Accident Act:-
Listed here are five persons, each over the age of 18 years old, including the first Claimant Leevon Phillips who gave evidence in this matter. He alluded to no dependency either of himself or any other of the listed persons. There was no evidence that any one of those persons "for whom this action is brought" was a dependent who had been receiving a benefit which has been made to end on the death of the deceased.

[25] Wolfe J (as he then was) has put it in this way in ***The Administrator General for Jamaica, Executor Estate Gladstone Keith Richardson deceased) Fitzroy Thomas et al (Supra)***

Fatal Accidents Act the action enures for the benefit of the dependents of the deceased at the time of his death, a dependent referred to as a near relative, who can satisfy a court that at the time of the death of the deceased he was in receipt of a benefit from the deceased and that the death has deprived him of such a benefit.”

[26] The Claimants' claim under the Fatal Accident Act is bereft of any evidence that the persons listed as those for whom the action is brought are dependents whose benefits have been brought to an end by the deceased's death. I therefore find that no award can be made by this Court under the said Fatal Accident Act. as Morrison J. A. puts it in precise terms, which I cannot better, in his article in the ***West Indian Law Journal Vol. 35 (1) 20***

“The assessment of Damages in Wrongful Death claims in Jamaica Journal Vol. 35(1) 20 The action is based upon financial loss and nothing else and no sums can be awarded to relations under the act for their own neutral distress or for loss of the society of the deceased.”

[27] **Law Reform (Miscellaneous) Provisions Act.**

What evidence has been adduced by the Claimant to prove the age of deceased at the time of his death?

- I. Denista Dacosta opined that the deceased had worked as a forklift operator until his retirement “when he was about 59 years old.
- II. There is no other attempt made to prove deceased's age. However Mr. Andrew Campbell for the Defendants had, in his submissions, referred the Court to paragraph 2 of the Amended Particulars of Claim as proof of age of the deceased. Here, the deceased was

described as “a healthy, happy and ambitious 61 years old pedal cyclist.”

- [28] Miss Sewell submitted that this case should use a multiplier of 3. She referred to ***Khan's Volume 5 at P. 313 Oswald Hyde CL H 055/98***. Here the accused was a retired spray man 61 years old. The multiplier in this case was set at 5. She further submitted that for a deceased older than 59 the multiplier should be usefully set at 3. She also referred Court to ***Khan's Vol. 3 p. 251***. Here Carmen Mason, a 56 years old male minibus driver had a multiplier of 4.2 years.
- [29] Ms. Sewell submitted that in the instant case the Claimants had not produced credible evidence as to the income of the deceased at the time of his death. Denista Dacosta placed deceased's weekly income to be \$60,000.00 by selling of fish on Thursdays, Fridays and Saturdays. Deceased's expenditure would amount to \$40,800.00 for fish, seasoning, staff, shop rental etc. The net figure would be \$19,800.00. She contended that when the evidence of Denista DaCosta is compared with that of Dianna Anderson the Court should find that the direct evidence of earnings should not be accepted as credible.
- [30] No evidence has been led as to average net income. No evidence was led as to Deceased's expenditure on self or expenses shared with others in his household. Claimants' attorney has pulled a figure from the air and is asking Court to accept it as proven. The Court is not assisted by the Claimants to make that estimate. There is no evidence provided to the Court as to how to arrive at the multiplicand. No award should be made in respect of this.
- [31] **Re Claim for Special Damages** - There is nothing from which Court could be asked to make an award. There is no evidence to support what the deceased was earning. The calculation of loss of earnings stated in the Statement of Special Damages is inaccurate. It does not comply with the formula outlined by Wolfe, J. in ***The Administrator General for Jamaica (Administrator in Estate***

Gladstone Keith Richardson deceased vs. Fitzroy Thomas et al (Supra) and other authorities).

[32] The items of Special Damages outlined have not been proven as pleaded. Receipts were not tendered in evidence through any witness.

[33] Conclusions:-

1. Under the **Fatal Accidents Act** – the action enures for the benefit of the dependents of the deceased at the time of his demise. A dependent referred to as a near relative, is one who can satisfy a court that “at the time of the death of the deceased he was in receipt of a benefit from the deceased and that the death has deprived him of such a benefit.”

[34] The evidence adduced before me relevant to the listed dependents all of whom range in ages from 46 to 21 years of age, does not disclose any dependency of any of the persons listed. The only one who gave evidence was Leevon Phillips and his evidence is silent on any fact which would point to his own or the dependency of any other of the persons listed at the time the deceased died.

[35] **Law Reform (Miscellaneous) Provisions Act.**

The age of the deceased at the time of his death was not specifically proven. The deceased was referred to as being 61 years old, in paragraph 2 of the Amended Particulars of claim. Denista Dacosta in evidence stated that the deceased had retired when he was about 59 years old and had worked as a forklift operator up to this time. The Claimants' Attorney at law in a submission regarding deceased's age at time of his death had referred to the age stated on the Amended Particulars of claim.

[36] Rowe P. in ***Central Saga of Jamaica Ltd. v. Junior Freeman (1985) 22 JLR at p. 158***, G, in delivering the Court's judgment said

In casual work cases it is always difficult for legal advisors to obtain an exact figure for loss of earnings, and although the loss falls to be dealt with under

Special Damages, the Court has to use its own experience in these matters to arrive at what is placed as evidence.”

Accepting Rowe P’s guidance as to a Court using its experience in arriving at what is proved, I will put the age of the deceased at 61 years, accepting that there is no contest that the deceased had retired as forklift operator and in an ordinary circumstance would have done so at the age of 60. This is this Court’s effort ***“to reach a conclusion which is in harmony with the justice of the situation: See Ashcroft v Curtin 1971 3 All ER 120 8 Bonhyam – Carter v Hyde Park Hotel Ltd. (1948) 64 JLR 177.***

- [37] The evidence provided to this Court with regards to the multiplier is virtually nil. Claimants’ attorney has submitted, quite without a proven basis, that the Court should use a multiplier of 8 years. Since I have set the deceased’s age at the time of his death to be 61 years, I shall find guidance from ***Donald Hyde (Sprayman) CL H055/98 (See Khan’s Vol. 5 at p. 313.*** Here the multiplier for a man of 61 years was set at 5.

Like Edmond Davies LJ in ***Ashcroft v Curtin (1971) 3 All ER 1208***

“My greatest difficulty is in quantifying the loss:

As in the case supra, Defendants’ counsel had submitted that this Court should make no award. She relied on the case ***The Administrator for Jamaica Administrator Estate Eric David Black, deceased, also Jamaica Administrator Estate Eric David Black, deceased also known as David E. A. Black v. the Attorney General of Jamaica. Suit CL 2001/A073.*** Here Brooks J (as he then was) stated that ***“I find it impossible to calculate annual earnings on that evidence.”***

- [38] The effort of the Claimants to prove the pre-trial earnings of the deceased is contained in the evidence of Denesta Dacosta and Dianna Harrison. The weekly

earnings have been identified as being a gross income of \$60,000.00. Denesta Dacosta also testified as to the amount expended per week by the deceased to be \$40,800.00. There is no other evidence of the personal expenses incurred by the deceased per week. It is only in his submissions that Counsel for the Claimants, Mr. Andrew Campbell referred to a sum of \$6,000.00 as being the weekly sum for the expenses and upkeep of the deceased. There is absolutely no evidence from any source for this figure.

[39] It is obvious that the deceased must have had expenses for his own personal upkeep the usual expenses incurred in daily living. But like Lord Goddard CJ, I will endeavour to arrive at a conclusion despite the unsatisfactory nature of the evidence as to damages. However like Goddard CJ, I realize that "I am rendering myself liable to be attacked for simplify plucking a figure from the air." I think that a proper sum for deceased's weekly personal expenditure should be \$7,500.00, he being "well known and very well regarded in his circle of friends...."

[40] I will accept the evidence on a balance of probabilities of Denesta Dacosta as to the weekly earnings of the deceased and his weekly expenditure in his first business. His earnings per week at time of death is set out at \$60,000.00; his expenditure is put by Denesta Dacosta at \$40,000.00. If his weekly earning is \$60,000.00 from his sale of fish and his outlay is \$40,000 and the personal expense amounts to \$7,500.00 his earning per week is $\$60,000.00 - \$40,000.00 - \$7,500 = \$11,700.00$. The annual net income of the deceased is $\$11,700.00 \times 52 = \$608,400$ - the years 2004 – 2005. The amount allowed annually before income tax is \$144,000.00. Income Tax of 25% is therefore payable on the sum of \$464,400.00. The multiplicand is therefore \$348,000.00.

[41] For the year 2005 – 2006 the annual net income of the deceased is $\$60,000.00 - \$40,800 - \$7,500 = \$11,700 \times 52 = \$608,400.00$. The amount allowed before income tax is \$193,440.00. Income tax of 25% is therefore payable on the sum \$414,960.00. The multiplicand is therefore \$311,470.00.

[42] The annual net earnings of the deceased in 2007 – 2008 is \$60,000 - \$40,800 - \$7,500 = \$11,700.00 = \$608,400.00. The amount allowed before income tax is \$200,000. Income tax of 25% is therefore payable on the sum of \$408,400. The multiplicand is therefore \$305,900.

[43] The date of death of the deceased is the 8th day of April 2004 and the trial date was 8th July 2010. the multiplier having been set at 5, the pretrial period is five years and would run from 8th April 2004 to 8th April, 2009.

[44] The multiplicand is as follows:-

	\$
2004 – 2005	348,000.00
2004 – 2005	311,470.00
2004 – 2005	311,470.00
2004 – 2005	305,900.00
2004 – 2005	<u>305,900.00</u>
	1,582,740.00

[45] The multiplier is 5 so the total amount due to the deceased's estate is \$1,582,740.00 x 5 less 30% = \$5,539,950.00

[46] Judgment for the Claimants as follows:

- i. Under the Law Reform (Miscellaneous Provisions) Act \$5,539,950.00.
- ii. Interest of 6% per annum from the 8th April 2004 to 8th July 2010.
- iii. Costs to the Claimant at 70% to be taxed if not agreed