



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

**CLAIM NO. 2009HCV02331**

<b>BETWEEN</b>	<b>TYLER HORATIO WEDDERBURN (Personal Representative of Estate Amanie Dominic Wedderburn)</b>	<b>CLAIMANT</b>
<b>A N D</b>	<b>THE ATTORNEY GENERAL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>POLICE CONSTABLE VERNON ELLIS</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Miss. T. Mott instructed by Marion Rose-Green & Co. for the Claimant

Mrs. M. Shand-Forbes instructed by The Director of State Proceedings for the Defendants

February 16, 2011 and October 25, 2013

**Assessment of Damages – Claimant’s son unlawfully shot and killed by police – Claim for Damages under the Law Reform (Miscellaneous Provisions) Act, the Fatal Accidents Act, for General Damages, Exemplary Damages and for Constitutional redress**

**FRASER J**

**BACKGROUND**

[1] May 2, 2003 is a day the family of Amanie Dominic Wedderburn, deceased, will likely never forget. That is the day when fourteen year old Amanie met a tragic and untimely end. The evidence as to his death and relevant antecedents comes from the claimant Mr. Tyler Horatio Wedderburn who is Amanie’s father and the personal representative of Amanie’s estate. Mr. Wedderburn’s witness statement was allowed to stand as his evidence in chief at the hearing. By consent Amanie’s birth

and death certificates were tendered and admitted in evidence as exhibits 1 and 2 respectively.

- [2] On the day in question, the deceased was lawfully standing in the vicinity of MX-III along the West End main road in the parish of Westmoreland. Whilst the deceased was standing there, the second named defendant Constable Vernon Ellis during the course of his duty, negligently, carelessly, unlawfully and without reasonable or probable cause discharged his firearm causing fatal injuries to the deceased.
- [3] The claimant's evidence is that at the time of his death Amanie was a second form student attending Green Island High School in the parish of Hanover. Further, that Amanie was performing well in his school work and had discussed with the claimant his desire to pursue tertiary education at a Teacher's College or University. Amanie's goal was to become a Teacher. The claimant also stated that Amanie had always in the claimant's presence and in the presence of other family members expressed his intention to take care of the claimant, his father and his mother Trezel Maud Evans.

#### **THE CLAIM**

- [4] On May 1, 2009 the claimant filed a claim seeking the following:
- (a) Damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act;
  - (b) Damages for breaches of sections 13 – 14 of the Constitution of Jamaica;
  - (c) Special Damages;
  - (d) General damages;
  - (e) Exemplary damages;

- (f) Loss of Expectation of life
- (g) Costs and Attorneys Costs
- (h) Interest.

[5] It should be stated at the outset that there was no evidence of the claimant's dependency on the deceased and the claim for damages under the Fatal Accidents Act was not pursued.

[6] On May 18, 2009 an Acknowledgment of Service was filed indicating that the Claim Form and Particulars of Claim were received on May 6, 2009. Pursuant to a court order on December 16, 2009, the defendants filed a Defence limited to quantum in which liability was admitted. On January 28, 2010 Judgment on Admission of Liability was filed by the claimant. That judgment is entered in Judgment Binder 748 Folio 495.

#### **SPECIAL DAMAGES**

[7] At the commencement of the hearing the parties indicated that Special Damages were agreed in the sum of \$337,000. I will therefore make the award under this head in the sum agreed.

#### **GENERAL DAMAGES**

##### **Damages under the Law Reform (Miscellaneous Provisions) Act (LRMPA)**

[8] The submissions of counsel for the defendants contained a useful summary of the effect of the LRMPA. Under section 2 the deceased's cause of action survives for the benefit of the deceased's estate. Pursuant to section 2(2) (c) where a cause of action survives for the benefit of the deceased's estate, the damages recoverable for the benefit of that estate, where the deceased's death has been caused by the act or omission which gives rise to the cause of action, are 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.

- [9] The deceased's estate therefore can only recover damages for the losses which the deceased sustained prior to his death and for which compensation could have been recovered had the deceased survived to pursue the action. The damages recoverable are therefore usually for funeral expenses, pain and suffering borne by the deceased up to the time of death, loss of expectation of life and prospective loss of earnings during "the lost years".

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

- [10] The guiding principle in awarding damages under his head was succinctly stated by Lord Morris of Borth-y-Gest in ***Yorkshire Electricity Board v Naylor*** [1968] AC 529. At page 545 he stated:

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'."

- [11] Counsel for the claimant relied on the cases of ***Elizabeth Foreman and Enid Foreman v Owen Moss*** 2003HCV0247 (October 15, 2004) and ***Maudi Simms (Administratrix of Estate: George Edward Simms, deceased) v Peter Lecky*** 2006HCV489 (October 4, 2010). In ***Elizabeth Morgan*** the deceased was a sixteen year old boy. Sinclair Haynes J (Ag) (as she then was), at page 5 of her judgment stated that, "A conventional sum is awarded." relying on the principle in ***Benham v Gambling*** 1941 AC 157 at 166 that, "a moderate figure is to be chosen." The learned judge after reviewing a number of English and local cases and observing

- that there had been a massive devaluation in the Jamaican dollar stated at page 6, *“It should be remembered that the conventional figure should be moderate, as opposed to nominal and it ought to take devaluation into consideration.”* The sum of \$150,000 was awarded. That sum updated is \$307,169.11 (February 2011) and \$369,303.47 (July 2013).
- [12] In ***Maudi Simms***, G. Smith J, relying on ***Elizabeth Morgan*** and the submissions of counsel for the claimant who sought the same sum as in ***Elizabeth Morgan***, awarded \$150,000 in the case of a sixty-nine year old deceased. That sum updated is \$152,835.36 (February 2011) and \$183,750 (July 2013).
- [13] Counsel submitted that the case of ***Elizabeth Morgan*** was more “on point” because the ages of the deceased in that case and in the instant case were similar and asked the court to award the sum of \$315,000 which updates to \$378,716.33 (July 2013).
- [14] Counsel for the defendants noted that in both the cases of ***Rhona Hibbert (Administrator of the estate of Matthew Maxe Morgan, Dec'd) v The Attorney-General for Jamaica*** (1988) 25 JLR 429 and ***Clarendon Parish Council and Stanley Ewan v Junie Gouldbourne (Administratrix of the Estate of Earnold Gouldbourne)*** (1990) 27 JLR 430 the sum of \$3,000 was awarded.
- [15] Counsel further submitted that in ***The Administrator General for Jamaica (Administrator of the Estate Eric David Black, deceased) v The Attorney General of Jamaica Suit No C.L. 2001/A073*** (May 30, 2005) Brooks J (as he then was) after examining the movement in awards under this head over the years found at page 9 that the sum of \$50,000.00 was *“more in line with the established principles since it reflects the devaluation of the currency while maintaining moderation.”* He expressly declined to follow ***Elizabeth Morgan*** where an award of \$150,000 was made.

[16] Finally counsel cited ***Temard Gordon, Christopher Gayle and Mervan Gordon v Administrator General (Estate Burnette Gordon, deceased) Claim No. 2006HCV01878*** (January 6, 2011) where G. Brown J found the sum of \$150,000.00 to be reasonable. At page 8 he stated as follows:

An award under this head amounts to a “moderate conventional sum” which have [*sic*] 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.

[17] Having cited those cases counsel for the defendants submitted the court should make an award in the sum of \$150,000. Updated that sum is \$180,341.11(July 2013).

[18] In the two most recent cases cited by counsel ***Maudi Simms*** (2010) and ***Temard Gordon*** (2011) the sum of \$150,000 was awarded under this head. The sum being a conventional one the age of the deceased is not a factor used to influence awards. The similarity in age between the deceased in ***Elizabeth Morgan*** and in the instant case cannot therefore be used as a basis for making the award. In any event a comparison with other cases shows that the award in ***Elizabeth Morgan*** under this head was, at the time, out of step with other awards. In light of ***Maudi Simms*** and ***Temard Gordon*** the ***Elizabeth Morgan*** level of award was perhaps six to seven years ahead of its time. At this point given the further significant devaluation of the Jamaican dollar since the awards in ***Maudi Simms*** and ***Temard Gordon*** were made and to ensure that the award though conventional does not slide into the realm of the nominal, I find the appropriate sum to be \$180,000.

### ***“The Lost Years”***

[19] ***Gammell v Wilson*** [1981] 1 All ER 578, perhaps the leading case under this head of damages, was relied on by counsel for the defendants. In that

case the Plaintiff's 15 year old son who had started working and had a career planned, was killed in a road accident. The Plaintiff claimed damages under the Fatal Accidents Act (FAA) and the LRMPA. Included in the sum awarded was damages for the son's loss of future earnings during the years of life lost to him because of the defendants' negligence, ('the lost years'), on the basis that the son would have earned a net sum of £416 a year after deduction of living expenses, to which the learned judge applied a multiplier of 16 years. Of particular significance are the principles outlined by Lord Scarman when the matter went on appeal to the House of Lords. At page 593 the learned Law Lord stated:

[T]here is no room for a conventional award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated....In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence. A teenage boy or girl however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim.

- [20] Counsel for the claimant advanced the argument that there was sufficient evidence on the basis of which an award should be made under this head. Learned counsel pointed to the evidence from the claimant in his witness statement already outlined, as to Amanie's good performance in school, and his stated desire to become a Teacher and care for his parents.
- [21] Counsel further submitted that in the absence of any earnings from Amanie, the net weekly earnings of his father the claimant of \$14,000, should be used as the basis to arrive at a multiplicand. Counsel suggested starting with a figure of \$55,000.00 monthly. Then, assuming Amanie would have spent  $\frac{2}{3}$ <sup>rd</sup> of his income on himself and  $\frac{1}{3}$ <sup>rd</sup> on his parents,

the relevant monthly sum would be  $\frac{1}{3}^{\text{rd}}$  of \$55,000 which yields \$18,150. With the expectation that he would have lived to 65, and taking into account contingencies, counsel suggested that a multiplier of 20 years should be used. The sum claimed was therefore  $(18,150 \times 12) \text{ multiplicand} \times 20 \text{ (multiplier)} = \$4,356,000$ .

[22] Counsel relied on the case of *The Attorney General v Maurice Francis* SCCA 13/95 (March 26, 1999) in which a multiplier of 15 was used to calculate loss of future earnings for a 22 year old tailor who had been 17 years old at the time of the unlawful police shooting which injured him. As Amanie in the instant case is younger, counsel submitted an increased multiplier should be used.

[23] Counsel in her submissions also pointed to the alternate method of using the life tables and the expected time of commencement of employment and retirement to calculate the sum to be awarded. She however noted that the courts seemed to prefer the multiplier/multiplicand method rather than the use of life tables.

[24] The award under this head was opposed by counsel for the defendants. Relying on the principles in *Gammell v Wilson* and their application in Jamaican authorities, counsel for the defendant submitted there was insufficient evidence to ground an award. Counsel cited a number of cases in support. Firstly *Rhona Hibbert* in which Gordon J declined to make an award for the lost years under the LRMPA. The deceased was 13, had not yet begun to earn a living and there was no evidence which showed, "actual employment or real prospects".

[25] Counsel contrasted the facts in *Rhona Hibbert* with those in *Beverly Radcliffe (Administratrix of the Estate of Deon Murray Dec'd) v Ralph Smith and Leroy Russell* (1988) 25 JLR 516 (SC). In *Beverly Radcliffe* the deceased was 13  $\frac{1}{2}$  years old at the time of her death. There was evidence that the deceased worked most Fridays after school and most



Saturdays for which she earned \$45 for these two days. Panton J made an award for the “lost years” using the sum of \$25 per weekend he estimated as the surplus which was not spent on the deceased as the multiplicand. He found that “*the case involves no speculation as there is clearly an assessable claim. The evidence...shows that the deceased was steadily employed on weekends.*”

[26] The facts of the instant case are in material respects similar to those in ***Rhona Hibbert***. Amanie like the deceased in that case, was a student who had not begun earning a living. In addition, there is no indication that Amanie showed any real prospects of employment in a particular field despite the indication that he was doing well in school and expressed a desire to become a teacher. At fourteen and in second form there is nothing to indicate that this is the career path he would have taken and of what would have been his fortunes in any career. Damages for “lost years” as outlined in ***Gammell v Wilson*** are for pecuniary loss. “*...it must be shown, on the facts found, to be at least capable of being estimated.*” It is noteworthy that in ***Beverly Radcliffe***, the award was based on actual earnings of the deceased; not on any suggested prospects linked to a career she might have pursued in the future. In the instant case on the other hand, any attempt to quantify loss would involve bald speculation. Accordingly there is no basis on which an award can be made under this head.

### **Damages for breaches of sections 13 – 14 of the Constitution of Jamaica**

[27] Counsel for the claimant submitted that the deceased’s right to life guaranteed by section 14(1) of the Constitution was infringed and accordingly damages should be awarded pursuant to section 25(1)<sup>1</sup>.

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<sup>1</sup> The facts of this case occurred before the amendment to the Constitution to include the new Charter of Rights. The new Charter replaced Part III of the Constitution which contained sections

Counsel emphasized that the deceased while lawfully standing by the roadside was shot and killed through the negligence of the second defendant.

[28] Counsel advanced that the compensation due under this head should not be included under the head of “lost years” as it was a totally different damage. The proviso contained in section 25(2)<sup>2</sup> of the Constitution which stipulates that the Supreme Court should not grant constitutional relief if other adequate means of redress exist was no bar, counsel argued, as the sum for loss of expectation of life was inadequate. Counsel suggested a sum of \$2M would be adequate.

[29] Counsel for the defendant while in no way seeking to discount the value of the deceased’s life, submitted that constitutional damages should not be awarded. Counsel relied on **Fuller (Doris) v Attorney-General** (1998) 56 WIR 337 where the court by majority decision declined to grant constitutional damages for the death of the deceased, on the basis that the actions that led to his death were not deliberate or intentional. Section 14(1) of the Constitution then read, “*No person shall intentionally be deprived of his life save in execution of sentence of a court in respect of a criminal offence of which he has been convicted.*” In **Fuller** writing as a part of the majority, Harrison JA stated at page 419, “*There was no evidence, either direct or inferential, of the state of mind of the police officers to indicate an intention to kill or to cause grievous bodily harm.*” Accordingly the majority held no damages could be awarded under section 14(1). Damages were however awarded pursuant to section 17(1)

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13-25. The corresponding section to section 14(1) with some changes is now section 13(3) (a), while section 25(1) has been replaced by section 19.

<sup>2</sup> Under the new Charter of Rights, section 19(4) which replaced the proviso to section 25(2) is more permissive allowing the court to award damages for constitutional breaches even if there are other adequate means of redress.

of the Constitution<sup>3</sup> based on the inhuman and degrading treatment to which the deceased had been subjected prior to his death.

[30] Counsel for the defendant also cited by way of contrast ***The Administrator General for Jamaica (Administrator of the Estate Eric David Black, deceased) v The Attorney General of Jamaica*** where the deceased was detained and murdered by being beaten by police officers. It was deemed conceded by the crown that there had been constitutional breaches of the deceased's right to life (section 14(1)); protection from arbitrary arrest and detention (section 15)<sup>4</sup>; and protection from torture or inhuman or degrading punishment or other treatment (section 17). In rejecting the submission of counsel for the crown that the constitutional remedy should not be granted as there was other adequate means of redress, Brooks J reviewed ***Fuller*** and stated at pages 13-14:

[C]ompensation for the act of a police officer wrongfully arresting or indeed beating a person, is the subject of frequent civil litigation before our courts. A claim for constitutional redress in those fact situations would therefore require specific evidence to show that the wrongful action of the agents of the State was such that a particular case fell outside of the categories afforded by the law of tort and of the damages that flow from a tortuous act. ***I find however that the same reasoning does not apply to the unlawful deprivation of life, where the cause of death is not some inadvertence and indifference and lacking in duty of care but is in fact a calculated and deliberate act.***" (Emphasis added).

[31] I agree with counsel for the defendant that the reasoning in the cases of ***Fuller*** and ***The Administrator General for Jamaica (Administrator of the Estate Eric David Black, deceased) v The Attorney General of Jamaica*** may be applied to the instant case. Harrison JA in ***Fuller*** on the same page 419 as cited before, stated that the conduct of the police

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<sup>3</sup> The corresponding sections are now section 13(3) (o), (6) & (7).

<sup>4</sup> Now section 14(1).

officers in **Fuller** “is best described as inadvertence and indifference and lacking in a duty of care, as opposed to a calculated and deliberate act”. Those words capture the conduct of the second defendant in the instant case. There being no allegation or proof of intentional deprivation of the deceased’s life the test in section 14(1) is not met. No damages can therefore be awarded for breach of the deceased’s constitutional right to life.

### **Exemplary Damages**

[32] Counsel for the claimant also sought exemplary damages on the basis that there must have been negligence in carrying out of Constable Ellis’ duties. She relied on the case of **The Attorney General and Cons. Christopher Burton v Leeman Anderson** SCCA 76/2004 (March 17, 2006), which involved a claim for damages for assault and battery.

[33] Without even considering the nature of Constable Ellis’ actions the claim under this head must however fail. As pointed out by Brooks J in **The Administrator General for Jamaica (Administrator of the Estate Eric David Black, deceased) v The Attorney General of Jamaica** at page 17 and relied on by counsel for the defendant, “Section 2(2) of the Law Reform Miscellaneous Provisions Act stipulates that the survival action does not extend to claims for exemplary damages.”

### **DISPOSITION**

[34] I therefore make the following order:

### **ORDER**

- (a) **Special Damages** awarded in the sum of \$337,000.00 with interest thereon at the rate of 6% per annum from May 2, 2003 to

June 21, 2006 and at the rate of 3% per annum from June 22, 2006 to October 25, 2013;

- (b) **General Damages** for loss of expectation of life awarded in the sum of \$180,000.00 with interest thereon at the rate of 3% per annum from May 6, 2009 to October 25, 2013.
- (c) **Costs** to the claimant to be agreed or taxed.