



[2013] JMSC Civ. 205

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 06124

BETWEEN	REGINALD BROWN (FATHER AND NEAR RELATION OF DEMORY BROWN, DECEASED)	FIRST CLAIMANT
AND	ALBERTA TUGMAN (MOTHER AND NEAR RELATION OF DEMORY BROWN, DECEASED)	SECOND CLAIMANT
AND	BALFORD DOUGLAS	FIRST DEFENDANT
AND	ANDRE DOUGLAS	SECOND DEFENDANT
AND	DEBORAH DOUGLAS	THIRD DEFENDANT

Jeffrey Daley, instructed by Betton-Small, Daley & Company appearing for the claimants

Racquel A.S. Dunbar instructed by Dunbar & Company for the defendants

Heard: November 13 and 15, 2013

CLAIM FOR ACTUAL AND/OR REASONABLY EXPECTED PECUNIARY LOSS, LOSS OF EXPECTATION OF LIFE, LOSS OF YEARS AND FUNERAL EXPENSES UNDER THE FATAL ACCIDENTS ACT

Anderson, K., J.

FACTS

[1] This claim pertains to a regrettable situation in which, as is undisputed, Demory Brown, had while travelling on abroad a Toyota Coaster Bus, registered at PB 9423 and

owned by the defendants, on April 25, 2009, fallen through that bus' open door as a result of which, one of the bus' wheels ran over Demory's head, crushing same and thereby killing Demory. At the time of his unfortunate death, Demory brown was then sixteen years old.

[2] This claim when initially filed on November 23, 2009 had only one claimant, that being the deceased's father, Reginald Brown, who filed the claim in his capacity as one of the deceased's 'near relations.' The defendants, as was admitted, are all joint owners of the relevant bus and also as is not disputed, at the material time, the first and second defendants respectively, were functioning on that bus as the driver and conductor thereof.

[3] An amended claim form was filed on June 20, 2009, in which the second claimant, Alberta Tugman, who is the deceased's mother, was added as a party to the claim. In their amended particulars of claim the claimants have, inter alia, alleged as follows: 'that Demory Brown was born on August 18, 1992, and was sixteen at the time of his death and was a 10th grade student at the Vere Technical high school at the time of his death. They also alleged that the claimants would have had a dependency in the future on the income of Demory Brown for his maintenance, income and support and that Demory would have contributed at least one third of his income to the claimants' maintenance and that Demory was a trainee tiler and would have earned an income in the future as a skilled tradesman.'

[4] This claim was brought by the claimants solely pursuant to the provisions of the **Fatal Accidents Act**. There was reference in the claimants' particulars of claim, to a claim for interest under the **Law Reform (Miscellaneous Provisions) Act**, but on the first day of trial, the claimants' counsel – Mr. Daley, had made it clear that this was a typographical error and that the claim was in fact being pursued, in all respects, solely pursuant to the provisions of the **Fatal Accidents Act**. The claimants brought this claim as parents ('near relations') and alleged dependants of Demory Brown, who is now deceased. The claimants' claim was one for damages for negligence, against the defendants. They claimed for loss of reasonably expected financial dependency and damages for loss of expectation of Demory Brown's life, loss of years and special

damages in the sum of \$321,000.00 for funeral expenses, wake, vault for burial, death certificate and police report. They also claimed interest pursuant to the **Law Reform (Miscellaneous Provisions) Act**.

[5] The claimants' counsel submitted that the claimants' claim contained all of the elements necessary to establish a claim under the **Fatal Accidents Act**. Counsel submitted that this is so because the claimants are the parents or near relations of the deceased. Counsel for the claimant also submitted that the claimants are both entitled to an award of future expected dependency as a result of the fact that they were dependants of the deceased. The claimants have relied heavily on **Taff Vale Railway Co. v Jenkins** [1913] AC 1, to support their position that they are entitled to damages for reasonably expected pecuniary loss. The claimants' counsel in his submission relied on the following quote, taken from the said case, to support that position:

'It is not a condition precedent to the maintenance of an action under the FAA 1846 that the deceased should have been actually earning money or moneys worth or contributing to the support of the Plaintiff.'

[6] The claimant continued to cite from Lord Atkinson's judgment in the said case at page 7 as follows:

'I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact- there must be a basis of fact from which the inference can be reasonably drawn...'

[7] Counsel for the claimants said that **Taff Vale Railway Co. v Jenkins** (*op. cit*) remains good law and as such the claimants are entitled to pursue their claim as pleaded.

[8] However, the Defendants submitted that the claimants are not entitled to damages for actual or reasonably expected pecuniary loss under the **Fatal Accidents Act** because they were not dependants of Demory Brown before or at the time of his death. They also submitted that the second claimant's claim should fail in its entirety

because no evidence was brought before the court to support the claim for damages for reasonably expected pecuniary loss. Counsel for the defendants also submitted that the case of **Taff Vale Railway Co. v Jenkins** (*op. cit*) did not support the claimants' position because the principle laid down in that case does not apply to Jamaica and is only the state of law in the United Kingdom. The defendants' counsel however said that even if the principle in that case were to be applied in Jamaica, the claimants have failed to meet the high threshold that they had '*a reasonable expectation of a pecuniary benefit from the continuance of Demory's life.*'

ISSUES:

- i. The main issue in this case is whether the Claimants are dependants of Demory Brown under **the Fatal Accidents Act**.

Other issues are:

- ii. Whether either or both claimants would be able to establish at trial, by means of the evidence which it is expected that they will lead on their behalf at trial, any actual or reasonably expected future pecuniary loss suffered by either or both of them, as a consequence of the deceased's death.
- iii. Whether a claim for funeral expenses, loss of expectation of life and lost years can be maintained by the claimants under the **Fatal Accidents Act**.
- iv. Whether summary judgment in respect of this claim, ought to be awarded in favour of the defendants, pursuant to the provisions of **Rule 39.9, 26.2 and 15.2** of the **Civil Procedure Rules**.

THE LAW

[9] The relevant statutes are the **Fatal Accidents Act** and the **Law Reform (Miscellaneous Provisions) Act**. The object of the **Fatal Accidents Act** is to provide a right of action to dependants of a deceased person against the person liable in law for his death and the object of the **Law Reform (Miscellaneous Provisions) Act** is to provide a right of action to the personal representatives of a deceased person for the benefit of the deceased's estate, in circumstances wherein, the deceased had died due to the unlawful actions of another. While these two statutes are inter-related and dependent on the manner in which a claim has been particularized, it may be necessary

in some cases to apply these two statutes conjunctively, in ascertaining what award of damages is to be made in any particular case. It is nonetheless important to note, that not only are different principles of law applicable to the assessment by a court of damages under each of these statutes, but further, a claimant will never be permitted to recover as damages, more than is meet and just in any particular case. As such, no over-compensation of a claimant should ensue, even in circumstances wherein one has claimed for damages pursuant to both of these statutes and the court is making an award of damages pursuant to both of same.

ISSUES I AND II:
THE FATAL ACCIDENTS ACT –
WHO MAY CLAIM:

[10] **Section 3** of the **Fatal Accidents Act** allows an action for damages to be maintained against a person who tortiously caused the death of another, in the same manner as the person would have been entitled to do, if he had not died. **Section 3** states:

‘Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.’

[11] **Section 4(1)** provides as follows:

4.-(1) ‘Any action brought in pursuance of the provisions of this Act shall be brought-

(a) by and in the name of the personal representative of the deceased person; or

(b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six months of the date

of death of the deceased person, by or in the name of all or any of the near relations of the deceased person, and in either case any such action shall be for the benefit of the near relations of the deceased person.'

[12] **Section 2(1)** provides:

'near relations' in relation to a deceased person, means the wife, husband, parent, child, brother, sister nephew or niece of the deceased person.'

[13] **Section 4(4)** provides:

'If in any such action the court finds for the plaintiff, then, subject to the provisions of subsection 5, the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations.'

[14] **Section 4(2) of the Fatal Accidents Act** now provides for the action to be commenced within three years of the death or such longer period as the Court in the interest of justice thinks fit. The issue of limitation period insofar as the second claimant's claim is concerned was not a matter which was raised by either the claimants' or defendants' counsel. This court though, as a matter of its own motion, will briefly address the issue herein, solely for the purpose of potentially providing future guidance to litigants and legal practitioners alike. There is a limited period of time in which a claim under the **Fatal Accidents Act** can be instituted and that is a period of three years after the death of the deceased person or within such longer period as a court may, if satisfied, that the interests of justice so require, allow. In this regard, see **section 4(2) of the Fatal Accidents Act**. This claim when initially filed on November 23, 2009, had one claimant, that being the deceased's father, Reginald Brown, who filed the claim in his capacity as one of the deceased's near relations. An amended claim form was filed on June 20, 2012, and by virtue of that 'amendment,' Alberta Tugman-the deceased's mother, was then named, for the first time, as one of the claimants in

the 'amended claim.' Alberta Tugman, who is now the second claimant, has also claimed against the defendants in her capacity as one of the deceased's near relations. The second claimant's claim was filed outside the limitation period of the **Fatal Accidents Act**. There has been no application to this court for an extension of time within which to file a claim by the second claimant. In the case of **Shaun Baker v O'Brien Brown and Angella Scott Smith**, claim no. 2009 HCV 5631; heard April 19th and May 3, 2010, the claimant's claim, in that case, was made pursuant to the **Fatal Accidents Act**, but was filed out of time. Counsel for the claimant submitted that the court should exercise its discretion to allow the claim to proceed outside the limitation period if it is equitable to do so. Counsel for the claimant said that the court in exercising its discretion must consider the length of the delay, the reason(s) for the delay, whether the passage of time had significantly diminished the defendant's ability and opportunity to defend the claim and whether there is the existence of some other remedy. However it was held in relation to counsel's submission that although **section 4(2)** of the **Fatal Accidents Act** does grant the court power to enlarge time, it does not dictate how the court should determine or what factors the court is to apply in determining whether or not to extend time. The court also held that a claim should be issued within the limitation period and if it is not issued within the relevant limitation period then the claim could be struck out. The court though, also held that where the claimant has a good claim, then the court should exercise its discretion and allow the claimant to file his claim outside of the limitation period. However, the court in the **Baker** case, ruled otherwise for reasons which are not applicable to the present claim.

[15] In the case at hand, as earlier stated, the fact that the second claimant did not file a claim within the limitation period under the **Fatal Accidents Act** was never before this court. What is apparent though, at this stage, is that the second claimant had never applied for this court's permission to file her claim outside of the limitation period which is applicable thereto. Having never applied for same, no such permission has been granted by this court. As such, the second claimant's claim could not properly have been pursued at trial. Suffice it to state for present purposes also though, that it may very well be that the law as it now stands, precludes a claim under the **Fatal Accidents Act** being pursued at all, in circumstances wherein, no application for an extension of

time within which to pursue the claim was made prior to the limitation period having expired. This court though, makes no binding, or even persuasive pronouncement in that regard.

DAMAGES FOR ACTUAL OR REASONABLY EXPECTED FUTURE PECUNIARY LOSS UNDER THE FATAL ACCIDENTS ACT:

[16] **Section 2(1)** of the **Fatal Accidents Act** provides that a near relation of the deceased can pursue a claim under the **Fatal Accidents Act**. What is equally clear though, is that one of two possible bases for the pursuit of a claim under the **Fatal Accidents Act** must be applicable. This being either, that the near relations must be dependent on the deceased before or at the time of death of the deceased, such that there exists actual dependency by the person on the deceased. In the case of **The Administrator General for Jamaica (Administrator estate Gladstone Keith Richardson, deceased) v Fitzroy Thomas, Clarissa Simpson & Richard Clemetson** – Suit no.1988/A181 (unreported), Supreme Court of Jamaica, October 9,1990, Wolfe J. (as he then was) at page 3 of his judgment stated that, ‘a dependant referred to as near relation, 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.’

[17] Therefore, one of two possible bases for a claim such as this, is that sufficient evidence must be brought before the court to show that the ‘near relation’ was a dependant of the deceased, at or before the date of the deceased’s death. This is what is known as ‘actual dependency’. In the present case, the claimants were not dependants of the deceased at the time of the deceased’s death. The deceased was attending school at the time of his death and there was no evidence to show that the deceased was involved in anything other than part-time employment and was in any way contributing towards the claimants’ maintenance. It must be borne in mind in that regard, that the deceased, prior to his death, was being housed and fed by the second claimant, who is the parent that he lived with. In addition, school fees would have had to have been paid for him. This court can and would have been entitled if this matter had actually proceeded to trial, to draw reasonable inferences in that regard. The

deceased's parents were separated at the time of the deceased's death, but by law they would each have been required to contribute sufficiently towards his reasonable maintenance.

[18] The other possible basis for a claim under the **Fatal Accidents Act**, is that the claimants can prove, on a balance of probabilities at trial, that they would be entitled to recover damages for reasonably expected future pecuniary loss under the **Fatal Accidents Act**. In the case at hand, the claimants were intending, at trial, to succeed on their claim, on this basis, if they could not succeed in proving said claim on the ground of actual loss. As was stated in the case – **Jestina Baxter Fisher & Anor v Enid Foreman & Owen Moss** claim no. 2003 HCV 0427 heard 11 and 15/10/04, per Clarke J. at page 24 of his judgment – *‘the pecuniary loss in question means the actual financial benefit of which they have been deprived and which it is reasonably probable they would have received if the deceased had remained alive.’* In **Shaun Baker v O'Brien Brown and Angella Scott Smith** (*op. cit*), the facts were that the deceased died at age 6 years old in a motor vehicle accident in which he was hit down by a bus. A claim was brought by the father of the deceased, for damages under the **Law Reform (Miscellaneous Provisions) Act** and the **Fatal Accidents Act**. There was though, no evidence that the claimant in that case was dependent on the 6 year old, or that he had been deprived of any benefit by his death. The court in reaching the conclusion that the claim could not properly be maintained, reasoned at paragraphs 104 and 105 that:

*‘An action under **the Fatal Accidents Act** inures to the benefit of the deceased's dependants at the time of his death. A dependant is a near relative who is able to satisfy the court that at the 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...*

*Loss of support to some degree is essential to success under this cause of action. No near relative can succeed unless they can prove actual dependence on the deceased at or before the time of his death or a probability that they would have received some support from him in the future if he had lived. The mere possibility that a child when grown would have maintained his parents is not enough.’ **Barnett v Cohen** [1921] 2 KB 461.*

[19] In reaching its conclusion, the court obtained assistance from the House of Lords decision in the case of **Taff Vale Railway Co. v Jenkins** (*op. cit.*), where 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. The deceased in that case was 16 years of age and it was proved that at the time of her death, the deceased who lived with her parents, was near completion of her apprenticeship as a dressmaker and was likely in the near future to earn a remuneration which might quickly have become substantial. It was held that there was evidence of loss, based on reasonably expected future dependency, upon which the jury could reasonably act. Viscount Haldane in the **Taff Vale Railway** case in speaking about the rationale for the award under the **Fatal Accidents Act** stated:

'The basis is not what has been called solatium-, that is to say damage given for injured feelings, or on the ground of sentiment- but damages based on compensation for a pecuniary loss. But then loss maybe prospective and it is quite clear that prospective loss may be taken into account...it has been said that this is qualified for the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in statute or in any doctrine of law which is applicable, nor do I think that it is really established by the authorities when they are examined.'

[20] In a case where the child is very young, there would be no clear evidence of any desire to assist the parents in later years. In **Barnett v Cohen** (*op. cit.*), the claim of a father who was earning income but was in poor health, for damages resulting from the death of his four year old son was dismissed. The court found that there was no reasonable probability of pecuniary benefit, only a speculative possibility. In **Beverley Radcliffe v Ralph Smith and Leroy Russell** [1988] 25 JLR 516, the child was thirteen and a half years old and there was no evidence of any dependency and no award was made under **the Fatal Accidents Act**. Panton J, as he then was, in referring to the lack

of evidence stated, *'Indeed I would be surprised if such evidence was available considering the age of the child.'*

[21] Additionally, in the case of **Wensley Johnson v Selvin Graham and another** Suit No. C.L. 1981/J011; a nineteen year old girl was killed by the defendants in a motor truck incident. It was alleged that the dependants were the deceased's mother and her six year old brother. It was further alleged that the deceased worked on Saturdays for 39 weeks and for 13 full weeks during school holidays. Her total earnings for the year was \$1,430. Of that amount she contributed \$476.66 to her mother and \$476.66 to her brother and the balance she used personally. The deceased at the time of her death was in fifth form at the Marymount High School and had taken subjects in the Jamaica Certificate Examination. She wished to become a bilingual-secretary. Evidence was led to say that a bilingual –secretary could earn between \$1,200 and \$1,600 per month. In the circumstances, it was the contention that the deceased had good prospects of high future earnings. The court in deciding the issue of whether the mother and brother were dependants held that only the mother was a dependant of the deceased and not the brother. The court reasoned that the deceased was a school girl who did part time work at a store. Her father was an inspector of police and they all lived in one household. The father contributed to her maintenance but this however was not detrimental to the dependency claim. The court asked the question as to whether a girl in the circumstances would reasonably be expected to contribute one third of her earnings to the upkeep of her brother. The Court in applying a common sense approach, answered the question in the negative. The court rejected the contention that the brother was a dependant of the deceased and the mother was held to be a dependant to the extent that since the deceased lived at home, it is reasonable to say that she received as her keep, a portion of what the deceased had, prior to her death, contributed to the family fund.

[22] The facts of the **Johnson** case are very different from the facts of this case. The deceased in the present case and in **Wensley Johnson v Selvin Graham and another** (*op. cit*) were both attending high schools. The deceased though, in **Wensley Johnson v Selvin Graham and another** (*op. cit*) had part time work of sufficient hours. The

deceased in the present case only did tiling work occasionally which would enable him to contribute to the family expense on those occasions. The deceased's mother in the present case was a teacher and both his mother and father lived in separate dwellings. In applying common sense and reason, it is highly unlikely that a sixteen year old who is a full-time student at the secondary level and who is unemployed, was actually maintaining two parents who lived in two separate households. To my mind, this is not a reasonable inference that can be drawn by this court, even if all of the evidence as was expected to have been led at trial on behalf of the claimants, were to have been determined by this court as having been properly proven as being truthful and accurate.

[23] The claimants in the present case though, have also relied on the principle cited above in the **Taff Vale Railway Co. v Jenkins** (*op. cit.*) in support of their position that they are entitled to damages for actual or reasonably expected pecuniary loss. It was strongly submitted on behalf of the defendants herein, that the near relations must establish a 'dependency'. The mere possibility that a child may contribute to his parents' maintenance is not enough: See **Barnett v Cohen** (*op. cit.*). It is too speculative. What has to be established is that the dependants were actually dependent on the deceased at the time of death or that they had a reasonable expectation of pecuniary benefit in the future: **Taff Vale Railway Co. v Jenkins** (*op. cit.*). In the Jamaican case of **Elizabeth Morgan v Enid Foreman and another**, claim no. HCV 0427/2003, Sinclair-Haynes J. applied the principle laid down in **Taff Vale Railway Co. v Jenkins** (*op. cit.*) as the law in Jamaica. The facts were that the deceased was a lad of sixteen years who died in a truck incident. The claimant claimed for damages under the **Fatal Accidents Act** for three dependants namely herself, the deceased's father and her daughter, the sister of the deceased. The main question the Court had to decide was whether they were dependants. In answering that question the court cited the case of **Taff Vale Railway Co. v Jenkins** (*op. cit.*):

'It is not a condition precedent to the maintenance of an action under the Fatal Accident Act 1846 that the deceased should have been actually earning money or money's worth or contributing to the support of the Plaintiff at or before death of the deceased, provided that the Plaintiff had a

reasonable expectation of a pecuniary benefit from the continuance of his life.'

[24] The Court held that there was no evidence that the deceased's sister had a reasonable expectation of a pecuniary benefit. There was no evidence that his sister who was seventeen years of age at the time of his death had any such expectation. There was no evidence that the sister, who was older than the deceased, was dependent on the deceased before his death. Nor was there any evidence of the probability that she would receive some support from him in the future.

[25] The court also had to decide the question of whether the parents had sustained any prospective loss. There was no evidence in the case of **Elizabeth Morgan v Enid Foreman and another** (*op. cit.*), that the deceased's parents had a reasonable expectation of pecuniary benefit from the continuance of his life. The evidence was that the deceased assisted his mother at her stall. There was no evidence that he was paid or that he derived any income from selling his own goods. There was no evidence that he would have helped in the future as the deceased was just a dutiful boy merely performing his chores.

[26] Each case must be decided on its particular facts. The deceased in the present case was only sixteen years old at the date of his death and was attending school. He was not employed and there was no evidence expected to be forthcoming at trial, that he was maintaining the claimants before or at the time of his death. No evidence was expected to have been led at trial by the second claimant to support her allegations that she was dependent on the deceased at the time of death. However, evidence was given by the first claimant that the deceased would have secured employment in a tiling trade and that when he was involved in employment he would have earned \$4,000.00 and that he used to contribute towards payment of household expenses. His mother was a teacher but there was no evidence as to the employment of the father. Both the mother and father live in separate dwellings and it would be strikingly odd to this court that the deceased who was only 16 years old at the time of his death was maintaining two households, one of his mother and that of his father. I would hold that a mere contribution by the deceased is not maintenance as there was no evidence that he

actually maintained the claimants. Clearly, this court is entitled to and does draw the inference that the deceased was being fed prior to his death and also that his school fees were being paid for prior to his death. The difference with this case and that of **Taff Vale Railway Co. v Jenkins** (*op. cit*) is that the deceased in that case was near to employment. It was a sure possibility that the deceased would be employed as a dressmaker. But in this particular case, the evidence expected to be presented at trial by the claimants, as to reasonably expected future dependency, is too speculative as it is not certain whether the child would eventually maintain the claimants after he leaves school or whether he will actually be involved in a tile trade in the future. This is too speculative and the court should not dwell upon it. In giving consideration to the English position laid down in the **Taff Vale Railway Co. v Jenkins** (*op. cit.*), there would still be mere speculation, because it is uncertain whether the deceased would have obtained employment, or actually pursued a tiling trade or even have begun to pursue his education at the tertiary level. It is entirely speculative and this court should not interpret the legislation so widely to give effect to a claim that has no backbone. In other words, this court cannot act on sympathy for a party, in interpreting and applying that interpretation, to legislative provisions.

ISSUE III:

CAN A CLAIM FOR DAMAGES FOR LOST YEARS, LOSS OF EXPECTATION OF LIFE OR FOR FUNERAL EXPENSES PROPERLY BE PURSUED BY THE CLAIMANTS UNDER THE FATAL ACCIDENT ACT:

[27] The claimants also claim for damages for loss of expectation of life and lost years under the **Fatal Accidents Act**. These actions cannot be maintained under the **Fatal Accidents Act** and would have to be brought by a representative of the deceased's estate under the **Law Reform (Miscellaneous Provisions) Act** for the benefit of the deceased's estate.

[28] An action brought under the **Law Reform (Miscellaneous Provisions) Act** is brought for the benefit of the deceased's estate. **Section 2 of the Act** provides:

'...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 so as the case may be, for the benefit of his estate...'

[29] A claimant, in a claim brought under the **Fatal Accidents Act**, is entitled only to recover damages equivalent to actual loss, or reasonably expected future loss. A claim for damages for lost years/loss of expectation of life, ought not to equated in law, with either a claim for damages for actual or reasonably expected future pecuniary loss. The former is merely a means towards the calculation of the latter, this particularly in circumstances wherein, immediately prior to his death, the person who thereafter died due to the unlawful actions of another, was not expected to have lived until retirement age.

FUNERAL EXPENSES

[30] A claim for funeral expenses can be recovered either under the **Fatal Accidents Act** or the **Law Reform (Miscellaneous Provisions) Act**. If funeral expenses were incurred by the near relations of the deceased, then a claim for recovery of such funeral expenses can be brought under **section 4(5)(a)** of the **Fatal Accidents Act**. If the funeral expenses were incurred by the estate of the deceased then recovery for such funeral expenses would have to be brought under the **Law Reform (Miscellaneous Provisions) Act**, by the personal representative of the deceased, on behalf of the deceased's estate. **Section 4(5)(a) and section 4(4)** of the **Fatal Accidents Act** must be read together. This is so because, if it is that the near relation is entitled to damages for reasonably expected future pecuniary loss and that near relation has personally incurred funeral expenses then the court in assessing such damages must take into account an award for funeral expenses. However, because the claimants' claim in the present case, cannot be maintained under **section 4(4)** of the **Fatal Accidents Act**, the first claimant, who is the only person as a 'near relation' of the deceased, who incurred funeral expenses related to the deceased's death will not be entitled to an award under **section 4(5)(a)** of the **Fatal Accidents Act**. **Section 4(4)** provides:

'If in any such action the court finds for the plaintiff, then, subject to the provisions of subsection (5) the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the

actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations.'

[31] **Section 4(5)(a)** provides:

'In the assessment of damage under subsection (4) the court-

may take into account the funeral expenses in respect of the deceased person, if such expenses have been incurred by the near relations of the deceased person.'

This court agrees with the submission which was made to it by defence counsel, in that regard. To put it simply, one cannot recover as a 'near relation' of the deceased, for funeral expenses incurred in relation to the deceased, unless that 'near relation' is otherwise entitled to recover damages under the **Fatal Accidents Act**, which in turn, depends on whether that 'near relation' was dependent on the deceased at the time of the deceased's death, or could reasonably have been expected to have been dependent on him or her (the deceased), in the future, if the deceased had continued living for a longer period of time.

ISSUE IV:

[32] The claimants' claim never proceeded to trial. The case was disposed of on a preliminary point which was raised by the defendants' counsel. The defendant's counsel in her submission submitted that the claimants do not have *locus standi* to bring the claim under the **Fatal Accidents Act**. In essence, what the defendants submitted was that the claimants were not dependants of the deceased and as such the claim as pleaded cannot be maintained. This court took that point made by the claimant and decided at a preliminary stage of the proceedings that the claimants were in fact not dependants of the deceased and as such their claim had no realistic prospect of success. The court in making such a decision summarily decided the case and entered judgment for the defendants. **Rule 39.9 of the Civil Procedure Rules, 2002, (CPR)**,

gives this court the power to dismiss a claim after a decision is made on a preliminary issue. **Rule 39.9** provides:

“Where the court considers that a decision made on an issue substantially disposes of the claim or makes a trial unnecessary, it may dismiss the claim or give other such judgment or make such other order as may be just.”

[33] In order to dispose of this case on such preliminary point, the court did in fact pursuant to **rule 26.2 of the CPR**, allowed the parties to this claim to make representation in relation to the issue raised by the defendants above. **Rule 26. 2** provides:

2.6.2 (1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.

(3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means the court considers reasonable.

(4) Where the court proposes-

(a) to make an order on its own initiative; and

(b) to hold a hearing to decide whether to do so,

The registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing.

[34] This court had given two days' notice to the parties when they had appeared before the court on the first day of trial, of the court's intention to hold a hearing pursuant to **rule 39.9 of the Civil Procedure Rules (hereinafter referred to as 'the CPR')** in order to assist the court in determining whether the claim should or should not proceed to trial as being a claim which either or has, or does not have, any realistic

prospect of success. Thus, an oral hearing was held on a date which was scheduled to have been the third day of trial and counsel for claimants and defendants made both oral and written representations to the court. It is to be noted that two days notice instead of the seven was given to the parties to make representation. **Rule 26.1(2) (c)** gives the court the discretion to shorten the time for compliance with any rule under the **CPR. Rule 26.1(2) (c)** provides that the court may:

‘Extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.’

[35] The parties to the claim did not object to the short notice given but instead complied with the orders given by this court.

[36] Also, **rule 15.1** gives the court the discretion to dispose of a claim without trial. **Rule 15.1** provides:

‘This part sets out a procedure by which the court may decide a claim or a particular issue without trial.’

[37] This was what the court had done in keeping with the **rules of the CPR** and considering the overriding objective so as to save the parties’ time and costs. As was alluded to earlier, the claimants’ case had no realistic prospect of success and as such the court disposed of this claim at a preliminary stage of the proceedings. **Rule 15.2(a) of the CPR** provides:

15.2 *‘The court may give summary judgment on the claim or on a particular issue if it considers that-*

(a) The claimant has no realistic prospect of succeeding on the claim or issue.’

[38] The court in considering whether the claimants’ claim had any realistic prospect of success, did not conduct anything resembling a mini-trial. In **Eureka Medical Limited v Life of Jamaica Ltd** [2005] Supreme Court of Jamaica No HCV 1268/2003 (unrep), Mangatal J. in that judgment, stated that summary judgment is really designed to deal

with cases that do not merit trial at all and as such a mini-trial should not be conducted. In **Swain v Hillman** [2001] 1 ALL ER 91, Lord Woolf, M.R. said that the test to applied in summary judgment cases is a real prospect of success as opposed to a fanciful prospect of success.

[39] In deciding whether the claimants' claim had any real prospect of success, what this court had done was firstly, assessed each claimant's claim separately, since they are separate claims, although joined in one claim. Next, this court applied the legal principle that a claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based: See **Three Rivers District v Bank of England (No.3)** [2003] 2 AC 1. This court has also taken into account the filed witness statements of the respective parties to the claim and has considered the issue as to whether the case is capable of being supplemented by evidence at trial. Thus, in **ED & F Man Liquid Products Ltd. v Patel** [2003] CPLR 384, a defence which, on its particulars, appeared to have had a real prospect of success, was destroyed by clear written admissions made by the defendant. As such, in that case, summary judgment was properly awarded against the defendant, by the court. In **United Bank Ltd v Asif**, [2000] LTL 11/2/00/ (CA), the court considered the defence put forward and decided it was fanciful and no more than a sham, and so, summary judgment was entered. As a point to note, the principles in the above cases will apply mutatis mutandis, whether or not the court is considering whether it is a claim or defence, which has a realistic prospect of success. In applying those principles above, this court has come to the conclusion that the claimants' claim has no realistic prospect of success and summary judgment should be entered in favour of the defendants to this claim.

CONCLUSION

- i. The claimants are not dependants as they were not dependent on Demory Brown before or at the time of death and so their claim under the **Fatal Accidents Act** cannot be maintained.
- ii. That neither claimants would be able to establish at trial, by means of the evidence which it is expected that they will lead on their behalf at trial, that they are entitled to damages for any actual or reasonably expected future

pecuniary loss suffered by either or both of them, as a consequence of the deceased's death.

- iii. Whilst, in some case funeral expenses are recoverable under **section 4(5) (a)** of the **Fatal Accidents Act**, in this case, since the first claimant was not a dependant of the deceased, then such assessment for funeral expenses cannot properly be made by this court and therefore, the first claimant will not be able to recover for such funeral expenses.
- iv. The claim for damages for loss of expectation of life and lost years cannot be maintained by the claimants as they are not acting as representatives of the estate of the deceased and so that part of the claim must fail. Such claim should have been brought by the estate of the deceased under the **Law Reform (Miscellaneous Provisions) Act** and not by the claimants under the **Fatal Accidents Act**.
- v. The claimants' claim has no realistic prospect of success and as such their claim must fail. This claim is one which could have and perhaps should have been pursued, under the **Law Reform (Miscellaneous Provision) Act**, rather than the **Fatal Accidents Act** – as it was.

ORDER

[40] It is this court's order that the claimants' claim cannot be pursued any further and such claim must fail in its entirety. Costs of the claim are awarded to the defendants and such costs should be taxed if not agreed. The defendants shall file and serve this order. Oral judgment was already rendered in respect of this claim, on November 15, 2013 and as promised, these are my reasons for judgment having been awarded in the defendant's favour, in respect of this claim.

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Hon. K. Anderson, J.