



[2023] JMSC Civ. 105

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

**CIVIL DIVISION**

**CLAIM NO. 2014HCV02050**

<b>BETWEEN</b>	<b>HUGH COLLINS</b> (Near relation and Spouse of Dianne Gordon)	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>THE ADMINISTRATOR GENERAL OF JAMAICA</b> (Administrator for the Estate of Dianne Gordon)	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>SERGEANT VASSELL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

**Miss Carleen McFarlane instructed by McNeil & McFarlane appeared for the 1<sup>st</sup> Claimant**

**Miss Elece Campbell watching on behalf of the 2<sup>nd</sup> Claimant**

**Mrs. Gail Mitchell and Miss Celia Middleton instructed by the Director of State Proceedings appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**Heard: 6<sup>th</sup> December 2017**

**Delivered: 7<sup>th</sup> July 2023**

**Negligence – Fatal Accident – Assessment of Damages – Constitutional Breach – Aggravated Damages – Exemplary Damages – Damages under the Fatal Accident Act – Damages under the Law Reform (Miscellaneous Provisions) Act**

**L. PUSEY J**

**[1]** Unforeseen circumstances created challenges which prevented the timely delivery of this judgement. The Court regrets this inordinate delay and sincerely apologizes for their part in this delay.

- [2] Reference may be made, from time to time, of the parties in the Claim by their first name out of convenience. No disrespect is intended towards the parties by employing this approach.

## **BACKGROUND**

- [3] On or about the 16<sup>th</sup> day of March 2012 at Constant Spring Road in the parish of Saint Andrew at approximately 1:00 a.m., the deceased, Miss Dianne Gordon, was at her home when Sergeant Vassell, the 1<sup>st</sup> Defendant, in the company of several other members of the Jamaica Constabulary Force (JCF) stationed at Constant Spring Police Station and/or other Police Stations in the Corporate Area entered upon the deceased's family home and/or in its immediate environs with high-powered weapons.
- [4] The 1<sup>st</sup> Defendant and the other accompanying Police Officers unleashed a barrage of gunshots in the deceased community. Several of the shots fired entered the body of the deceased while she was walking from her home to a nearby "dead yard". The injuries were fatal. The deceased was shot approximately nine (9) times, in close range, in her head, chest, forearm, and thighs. The deceased died on that same day. There is no evidence to suggest that, at the time of the deceased's death, the 1<sup>st</sup> Defendant and the other accompanying Police Officers were acting in lawful self defence or were under any attack from any members of the deceased's community.
- [5] The deceased died leaving behind her spouse, Mr. Hugh Collins, the 1<sup>st</sup> Claimant herein, and her two (2) daughters, Cameshia Collins and Christina Collins – all of whom were her dependents. Consequently, a claim was brought against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by way of Claim Form and Particulars of Claim filed on the 30<sup>th</sup> day of April 2014 by the 1<sup>st</sup> Claimant which was later amended to include the 2<sup>nd</sup> Claimant, on the 19<sup>th</sup> day of September 2016, as the deceased's personal representative and because the initial Claim included a minor dependent. The Court wishes to clarify that the 2<sup>nd</sup> Defendant was named a party in these proceedings by virtue of section 3 of the Crown Proceedings Act and not on the basis of any wrong doing.

[6] The Claimants allege that the injuries subsequent to the death of the deceased are as a result of the negligent and/or wrongful shooting by the 1<sup>st</sup> Defendant and other member of the JCF which has caused the deceased's dependents to suffer injury, loss, damage and incurred expenses.

[7] The following relief are sought –

(a) Damages under the Fatal Accidents Act and/or under the Law Reform (Miscellaneous Provision) Act;

(b) General Damages for Negligence;

(c) Exemplary and/or in the alternative Aggravated Damages;

(d) Constitutional/Vindicatory Damages;

(e) Special Damages in the amount of **Four Hundred and Twenty-Two Thousand Dollars** (\$422,000.00);

(f) Interest on the said Damages pursuant to the Fatal Accidents Act; and

(g) Costs

[8] The Defendants filed a Defence Limited to the Quantum of Damages to be Awarded on the 3<sup>rd</sup> day of February 2015 and judgement was entered against the 2<sup>nd</sup> Defendant on their admission of liability on the 11<sup>th</sup> day of September 2015 for damages to be assessed and costs to be taxed.

## **THE EVIDENCE**

[9] The evidence for the Court's consideration came from the dependents of the deceased, Hugh Collins, Christina Collins and Cameshia Collins and is summarised as follows:

*Evidence of Hugh Collins*

- [10] The deceased, Dianne Gordon was born on 1<sup>st</sup> day of September 1966 and was healthy up to the time of her death. Further, up to the time of her death, she was employed at Duggan Consulting Limited (“DCL”) as an Office Attendant and operate a shop at Constant Spring Road.
- [11] The 1<sup>st</sup> Claimant states that Dianne earned approximately **Ten Thousand Dollars** (\$10,000.00) weekly as an Office Attendant and from operating the shop she earned approximately **Ten Thousand Dollars** (\$10,000.00) to **Fifteen Thousand Dollars** (\$15,000.00) per week. Dianne used approximately 80% of her total weekly earnings to care for her 2 daughters and the 1<sup>st</sup> Claimant, her spouse.
- [12] The 1<sup>st</sup> Claimant further states that he spent **Three Hundred and Twenty-Two Thousand Dollars** (\$322,000.00) at Sam Issacs, Sons Limited for the funeral expenses and a total **One Hundred Thousand Dollars** (\$100,000.00) for the deceased’s wake and for travelling expenses.
- [13] The 1<sup>st</sup> Claimant indicates that he is the only now responsible for Cameisha Collins whom he provides **Five Thousand Dollars** (\$5,000.00) weekly to for her bus fare and lunch money. He explains that Dianne habitually prepared meals for the family and that he has cried constantly since her death.
- [14] He recalls that on the night of her death, March 16, 2012, he saw Dianne laying on the ground between his home and bicycle and when he held her parts of her head started to fall apart and that was how he realized she was deceased. He remembers that she had blood all over her and her arm was almost torn off. Shortly after, he says, the police came and he watched them pick up the spent shells that were on the ground.
- [15] He states that sometime after that, INDECOM came and took statements and the police took Dianne’s body away. He covered Dianne’s blood with dirt, but he cannot recall what happened after doing that for a few days as he was numb. He also states that he cannot remember the details about planning the funeral and having the funeral as he was traumatized. He remembers his children being around and

crying a lot after Dianne's death, but he does not remember what happened to them.

- [16] He states he was with Dianne for twenty-five (25) years and that since Dianne's death he has been sad, nervous, suffered a lot of emotional pain and trauma, that he constantly has nightmares about seeing her body torn up and lying on the ground and his children appeared broken down.

*Evidence of Christina Collins*

- [17] Christina states that Dianne was her mother and though she was an adult at the time of her death, she was attending a tertiary institution which Dianne paid for and that she has now completed. She said that Dianne worked as an Office Attendant at DCL and operated a shop with her father, the 1<sup>st</sup> Claimant. Dianne gave her lunch money, bus fare, prepared meals, purchased clothes for her and attend all school activities. She said her father tried to operate the shop and take on the financial responsibilities usually carried by Dianne, but was not able to "manage."
- [18] She said that on the date and time of Dianne's death, she got a phone call from her younger sister Cameisha that their mother had died. She ran to the scene where she saw Dianne lying on the ground covered in blood with a part of her head blown off and started to immediately scream at the sight of this. She remembers seeing men in "dark blue suits" who appeared to be police taking up objects which looked like bullets from the ground and an argument ensued between these men and members of the community. She then recalls that INDECOM came and took statements and her mother's body was removed from the scene.
- [19] Christina stated that she and her sister left their father alone in the house to go stay by their Aunt. Since that night, she says, that she constantly cries and remembers seeing her mother's body torn up. She could not eat or sleep for days and as such lost a lot of weight. She says that she still has trouble sleeping, has been anxious, nervous, lonely and has a feeling that "something is going to happen" since her mother's death.

**[20]** She recalls that before her mother was buried she viewed her body at the funeral home which left her traumatised. She remembers that after the funeral she came home and had the realization that her mother was not home and she cried. She remembers her father crying a lot and spacing out and her little sister constantly looking at pictures of their mother's body and acting strange.

*Evidence of Cameisha Collins*

**[21]** Cameisha stated that up to the time of Dianne's (her mother) death she was a child living in a happy family and was attending the Dunrobin Preparatory School. She indicated that her mother worked at DCL and operated a shop with her father, the 1<sup>st</sup> Claimant, where they sold mostly food items.

**[22]** She states that financially, her family was not coping as her mother and father used to work together to provide for the family. Her mother's death caused her father to be stretched thin as he had to work longer hours to be able to maintain the family.

**[23]** She said that at the date and time of her mother's death she accompanied her father outside and when her father shone his flashlight she saw her mother lying on the ground covered in blood with half of her head gone and her brain looking like liquid running out of her forehead. She remembers that her mother had bullet holes in her leg and arm and a piece of her foot was gone. At this sight she began to scream and cry for "murder" and she called her older sister, Christina, and told her that their mother had died.

**[24]** She remembers sitting in a car shortly afterwards and crying until she was tired and there were no more tears. She does not recall much after that but she remembers that her family was broken. The next day she went to live with her mother's sister who was overtaken by grief and died shortly after.

**[25]** She could not sleep for weeks and had recurring nightmares for two (2) weeks straight where she would hear gunshots and go outside to see her mother's mutilated body. She remembers being in denial about her mother's death and would constantly look at pictures to try and remember her mother's whole body and not

the mutilated version she saw. She saw her mother's body at the funeral parlor and broke down in tears, but does not remember much about the funeral as she was numb, as if she did not exist in her own body.

[26] She said her mother died two (2) weeks before her GSAT examinations and had such did not get to fulfil the promise to tutor her. She says she had to do everything for herself such as cooking meals and ironing her own clothes as her mother was not there to do it anymore. Her sister tried to help, but was too broken to fill that gap.

[27] She details all the happy memories with her mother and that her life has changed drastically, in a way she is unable to put into words since her death, all that she feels is emptiness. She could express happiness when she passed for the St. Andrew High School for Girls and her mother was not there to share this milestone with her.

[28] To this day she says, she still has the image of her mother's mutilated body in her head and would have nightmares about it. She felt lost all through high school without her mother and at her recent graduation from high school felt incomplete as she was have yet another milestone without her mother.

[29] She is unable to go back to the house where her mother died, and all her family members have moved from the home because it was too painful. She said she is still unable to go anywhere on her own as she is constantly afraid something bad will happen.

## **SUBMISSIONS**

[30] The Parties made oral and written submissions which the Court has duly considered in delivering this judgement. Their submissions will only be referred to as is necessary to explain the position of the Court on a particular issue.

## LAW AND ANALYSIS

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

[31] Section 2 of the **Law Reform (Miscellaneous Provisions) Act** (“LRMPA”) provides that –

2.---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:

Provided that this subsection shall not apply to causes of action for defamation.

[32] Therefore, a claim under the LRMPA is properly brought by the personal representative of the deceased’s estate. In these circumstances, the 1<sup>st</sup> Claimant does not have standing to bring a claim under the LRMPA. Therefore, the 2<sup>nd</sup> Claimant is properly joined as a party to the claim and is empowered to bring a claim under the statute for an award of special damages, loss of life, funeral expenses and loss of future earnings for the benefit of the deceased’s estate, despite being joined as a party because of the then minor dependent. At this juncture, the Court will only discuss an award to be made for loss of life and loss of future earnings. The award for special damages including funeral expenses will be addressed in the latter portion of the judgement to deal with issues of law which arises in relation to its claim.

#### (a) Loss of Life

[33] The sum to be awarded for the loss of life is to be conventional on the prevailing authorities. The principle for awarding damages under this heading is established in the case of **Yorkshire Electricity Board v Naylor** [1968] AC 529 where it was stated that –

“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."

[34] In the case of **Benham v Gambling** [1914] 1 All ER, it was established that the award of damages for loss of life should not be calculated in an actuarial or statistical way and the Court is to "*give what is fair and moderate and to use common-sense.*" The dictum of Lord Scarman in the case of **Lim Poh Choo v Camden and Islington Area Health Authority** [1979] 2 All E.R 910 (at p 920) states –

"An award for pain, suffering and loss of amenities is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment. It is, therefore, dependant only in the most general way on the movement in money values. Like awards for loss of expectation of life, there will be a tendency in times of inflation for awards to increase, if only to prevent the conventional becoming the contemptible."

[35] The amount of the conventional sum was considered in the Court of Appeal case of **The Attorney General v Devon Bryan** [2013] JMCA Civ.3. The sum of **Two Hundred and Fifty Thousand Dollars** (\$250,000.00) was awarded by the Court at first instance. On appeal, the Court discussed the applicable principles concerning damages for loss of expectation of life and pointed out that an award under this head should be a very moderate sum. They found this award to be too generous in view of decided cases and stated that the award should not have exceeded **One Hundred and Twenty Thousand Dollars** (\$120,000.00).

[36] The Court in **Landis Blake v Ewan Chang and Wayne Lewis** [2020] JMCA Civ 116 awarded **One Hundred and Seventy Thousand Dollars** (\$170,000.00) as a reasonable sum for loss of expectation of life based on the ruling in **Devon Bryan**.

[37] The life expectancy of women in Jamaica at the time of the deceased's death was estimated to be 73.43 years and is now estimated at 71.87 years. The deceased was 46 years at the time of her death and was, from all indications, healthy. The Court is satisfied that she would have had a number of years to live had it not been for her untimely death at the hands of the 1<sup>st</sup> Defendant and other members of the JCF. Considering the authorities mentioned herein, in particular the case of **Devon**

**Bryan**, and having regard to inflation, the Court awards the sum of **Two Hundred and Fifty Thousand Dollars** (\$250,000.00) as a reasonable sum for loss of expectation of life.

*(b) Loss of Future Earning*

[38] The LRMPA entitles the estate of the deceased to benefit from any claim which the deceased themselves would have been entitled. Loss of future earnings is one such claim which the deceased and by extension their estate would have been entitled.

[39] In the case of **Administrator General of Jamaica (on behalf of the Near Relations and Dependants 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, as he then was, described and explained lost years by stating that it is a computation –

"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."

In light of this, the Court must determine whether the deceased was employed and what her earnings were at the time of her death.

*(i) Whether Dianne was employed*

[40] There is no dispute that Dianne was employed to DCL as an Office Attendant and was engaged in the joint operation of a shop with the 1<sup>st</sup> Claimant. The evidence from Dianne's dependents along with letters and tax document from DCL supports this assertion and the Defendants have conceded on this point. Therefore, the Court is satisfied, on a balance of probabilities, that Dianne was employed at the time of her death as an Office Attendant at DCL and as a shop operator in her community.

*(ii) Earnings at the time of death*

[41] In **Landis Blake v Ewan Chang and Wayne Lewis** supra the court had this to say in relation estimating the earnings at the time of death at paragraph 35 –

“In the case of **Gammell v Wilson** [1982] A.C 27, p 78, the Court stated that “*there is no room for a "conventional" award in a case of alleged loss of earnings of the lost years.*” It must be shown on the facts to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid speculation, then the court must make the best estimate it can.”

[42] The Defendants have not challenged the evidence put forward in relation to Dianne’s earnings as an Office Attendant at DCL. Therefore, the Court accepts that Dianne made **Three Hundred Fifty-Six Thousand Seven Hundred and Twenty Dollars** (\$356,720.00) as her gross salary per year as an Office Attendant. However, the Defendants have challenged the evidence from Hugh that Dianne made **Ten Thousand Dollars** (\$10,000.00) to **Twelve Thousand Dollars** (\$12,000.00) per week as a shop operator as they believe she was making approximately **Four Thousand Dollars** (\$4,000.00) per month.

[43] In support of their assertion that Dianne made approximately **Ten Thousand Dollars** (\$10,000.00) to **Twelve Thousand Dollars** (\$12,000.00) per week as a shop operator, the Claimants submitted invoices which details a list of goods in the shop, the prices they were purchased for and sold at and the profit made. Conversely, the Defendants provided no evidence or support to their assertions on Dianne’s earnings as a shop operator.

[44] The case of **Desmond Walters v Carlene Mitchell** (unreported) Court of Appeal of Jamaica, SCCA No. 64/91 (delivered June 2, 1992), speaks about assessing incoming of a self-employed person. In this case the Respondent was a vendor who had testified that she earned **Nine Hundred and Fifty Dollars** (\$950.00) weekly from a partnership carried on by her common law husband and her. She testified that her share of the profit was **Three Hundred and Seventy-Five Dollars** (\$375.00) per week. The Respondent contended that she was required to strictly prove this. Wolfe JA (Ag), as he then was, concluded that one cannot expect that a

vendor would be able to prove his or her loss of earnings with mathematical precision.

- [45] In the case at bar, there is no dispute that Dianne was earning income as a shop operator, the Court thinks it reasonable that a middle ground between the figures, submitted by the Parties as the income be used. The Court is satisfied that on a balance of probabilities, at the time of her death, Dianne was earning approximately **Seven Thousand Dollars** (\$7,000.00) per week from the shop. This is the median between **One Thousand Dollars** (\$1,000.00) weekly and **Twelve Thousand Dollars** (\$12,000.00) weekly. Further, this is also an assessment which is made in view of the likely profit/losses which the shop would have made as evidenced from the invoices. The Court does not ignore that the evidence suggests that this would be joint income, as the shop was operated by both Dianne and Hugh. There was no evidence to suggest how the profits, once made, were apportioned. Therefore, the Court employs a 50/50 approach. This means that approximately 50% of the money earned from the shop was Hugh's and the remaining 50% was Dianne's. Considering this, Dianne's weekly income from the shop would be **Three Thousand Five Hundred Dollars** (\$3,500.00) which amounts to **One Hundred and Eighty-Two Thousand Dollars** (\$182,000.00) per annum.

*Formula for Calculations*

- [46] The formula for calculating lost earnings was highlighted by **Lord Wright in Davies v Powell Duffryn Associate Colliers Ltd** [1942] 1 All ER 657. It was stated that “... *the starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of employment ...*” This is the “*multiplicand*.” He continued to say that there is also “... *an estimate of how much was required or expended for his personal and living expenses ...*” which is the “*multiplier*”. Lord Wright further said that “... *the balance will give a datum of basic figure which will generally be turned in a lump sum by taking a certain number of years purchase.*”

*The Multiplicand*

[47] The Court in **Landis Blake v Ewan Chang and Wayne Lewis** (supra) in applying **Godfrey Dyer & Derrick Dyer v Gloria Stone** (1990) 27 JLR 268 stated that –

[38] ... The first step is to establish from credible evidence what the net income of the deceased was at the date of death. Secondly, the court should estimate the deceased's net income being earned at the date of trial from evidence from persons in a position analogous to that which the deceased held at the time of his death or by persons in a position to which the deceased might reasonably have risen to. The average of these two levels of net income may then be considered as the average annual net income of the deceased for the pre-trial years. This formula is recommended when there is a long time between the date of death of the deceased and the trial as in this case. Thirdly, the expenditures which are exclusively incurred by the deceased for his maintenance, consistent with his status in life, are to be totalled. Added to this sum is the deceased portion of joint living expenses, in this case, Lamar's contribution to the household. The total expenses are deducted from the average income to determine the multiplicand.

[39] Lindo J (Ag) (as she then was) set out the different methods of computing the multiplicand in **Brenda Hill vs Administrator-General of Jamaica and The Attorney General of Jamaica** [2014] JMSC CIV.217 At paragraph 31 she states:

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

[48] In applying these principles, the Court must first find the net income at the time of death. It was accepted that Dianne made **Three Hundred and Fifty-Six Thousand, Seven Hundred and Twenty Dollars** (\$356,720.00) as her gross income per annum from working at DCL and **One Hundred and Eighty-Two Thousand Dollars** (\$182,000.00) as her gross income per annum for operating the shop. This means that Dianne's gross income per annum at her time of death was **Five Hundred and Thirty Thousand, Seven Hundred and Twenty Dollars** (\$530,720.00). The Court accepts Counsel for the Defendants' submission that the

total annual statutory deductions for the gross income made at DCL at the time of death would be **Forty-Four Thousand, Eighty-Nine Dollars and Seventy-Seven Cents** (\$44,089.77). This means that the total net income at the time of death would be **Four Hundred Eighty-Six Thousand, Six Hundred and Thirty Dollars and Twenty-Three Cents** (\$486,630.23). There were no submissions advanced on behalf of the Defendants which warranted, in these circumstances, any further deductions to be made from the net income of the deceased at the time of death.

[49] The Court accepts Counsel for the Defendants' submissions that there was an average annual increase of **Twenty-Four Thousand, Five Hundred and Seventy-Seven Dollars and Twenty-Nine Cents** (\$24,577.29) to the salary based on the Employers Annual Returns of DCL for the years of 2008 – 2011. This means that the annual income at trial from DCL would be **Five Hundred and Four Thousand, One Hundred and Eighty-Three Dollars and Seventy-Two Cents** (\$504,183.72) and in addition to the yearly income from the shop, the total gross income at trial in 2017 would be **Six Hundred and Eighty-Six Thousand, One Hundred and Eighty-Three Dollars and Seventy-Two Cents** (\$686,183.72). Additionally, the Court accepts Counsel for the Defendants' submission that the total annual statutory deductions for the gross income from DCL at trial would be **Sixty Thousand, Nine Hundred and Eighty-Seven Dollars and Seventy-Three Cents** (\$60,987.73). This means that the total net income at the time of trial would be **Six Hundred and Twenty-Five Thousand, One Hundred and Ninety-Five Dollars and Ninety-Nine Cents** (\$625,195.99).

[50] The evidence from Hugh and the submissions from Counsel for the Claimants suggests that the Dianne's personal expenditure was approximately 80% of her annual net income at the time of death and thus, the remainder of 20% she would spend on herself. Counsel for the Defendants has neither rejected these submissions nor offered any recalculation as to the personal expenditure of Dianne. Counsel for the Defendants submitted that they have no basis to do so. The Court, in the absence of anything to the contrary, is minded to accept these submissions most specifically because Counsel for the Defendants do not oppose and it aligns

with the “percentage principle” established in the case of **Attorney General of Jamaica v Devon Bryan** (supra) where there was no evidence as to the deceased’s expenses and the Court felt “*forced to assume that the deceased would have spent about one-third of his income on himself and two-thirds on his estate*” and utilized the percentage approach.

[51] The Court in **Landis Blake v Ewan Chang and Wayne Lewis** (supra) noted at paragraph 49 –

“...in Devon Bryan that there was not as yet any compilation of data which would guide the applicable percentage. We are left to continue to use “intelligent extrapolation” and precedents to determine a fair estimate.”

[52] The Court has accepted the cases reviewed and utilized in **Landis Blake v Ewan Chang and Wayne Lewis** (supra) regarding personal expenditure of the deceased. The Court summarizes those cases as follows –

- (1) In **Temard Gordon et al v the Administrator General** (unreported) Supreme Court of Jamaica, Claim No 2006HCV01878 (delivered January 6, 2011) Brown J ruled that 30% of the deceased income was spent exclusively on the deceased. The deceased was 40 years old and had a common law spouse.
- (2) In **Leevon Phillips v Ivy Shaw Claim** [2014] JMSC Civ 199, the deceased was 61 years of age with five (5) adult children. Marsh J indicated that \$7,500 from a net income of \$20,000 was a reasonable for personal expenditure.
- (3) In **Administrator General of Jamaica v People’s Favourite Baking Company Ltd. & Romaine Henry** [2017] JMSC Civ 11, the deceased was a police constable with four children. The evidence suggested that he was the sole breadwinner. Fraser J indicated that the percentage principle of ascertaining the multiplicand was appropriate in such circumstances where the deceased had a spouse and children.

[53] In the case at bar, the deceased had a common-law spouse and two (2) children. The evidence suggested, that though the 1<sup>st</sup> Claimant had some income as a shoemaker and from his joint operation of the shop with the deceased, the deceased was the primary breadwinner of the household. The Court is therefore satisfied that in the circumstances, on a balance of probabilities, the deceased spent approximately 20% of her income on herself with the remaining 80% going towards her expenses. Therefore, the Court finds that the deceased spent approximately **One Hundred Thousand Dollars** (\$100,000.00) per year from her annual net income exclusively on herself at the time of death.

*The Multiplier*

[54] In **Cookson v Knowles** [1979] AC 556 it was said that the multiplier is “*related primarily to the deceased person’s age and hence to the probable length of his working life at the date of death.*” Therefore, the Court has to make a decision on the future events which in most cases would be based on “*speculation*” and “*conjecture*” as stated by the Court in **Kassam v Kampla Aerated Water Co. Ltd** [1965] 1 WLR 668 at page 672. The Court finds it helpful in these circumstances, to rely on a cases in this Court and the Appeal Court which outlines multipliers used in fatal accidents and in other cases.

[55] Counsel for the Claimants submits that an appropriate multiplier in this case is 10 as the deceased was 45 years old at the time of death, in good health and was engaged in a reasonable safe business. In the case of **Brenda Hill and Administrator General of Jamaica v Attorney General of Jamaica** [2014] JMSC Civ. 217 which was relied on by Counsel for the Defendants, the Court used a multiplier of 7 as being appropriate. This case is similar to the one at bar as the deceased were unlawfully killed by a Police Officer, the deceased were healthy, gainfully employed and in their mid 40s at the time of death. Further, the aforesaid case relied on **Victor Campbell v Samuel Johnson**, Khan, Vol.4, page 89 where the Court held that an appropriate multiplier is 7 to assess the future loss of earnings for a 48-year-old farmer.

[56] The Court further considers the case of **The Administrator General v Dr. Randolph Edwards** (unreported) Court of Appeal, SCCA No. 20/90 (delivered March 18, 1991) where the Court of Appeal believed that a multiplier of 8 was appropriate for a deceased who was 45 years old. Additionally, in the case of **Cecil Wong McDonald v Winston Williams** (unreported) Court of Appeal, SCCA No. 83/81 (delivered October 14, 1982), the Court of Appeal affirmed a multiplier of 10 for a 37-year-old man being appropriate in the circumstances of his case.

[57] The Court has considered the authorities and their varying circumstances. Nevertheless, this Court finds that on a balance of probabilities the appropriate multiplier in this case is 8. This decision was based upon the trend of the cases and taking into account the uncertainties of life.

*Calculations*

[58] Pre-Trial Years –

- (i) The Net Annual Income of the deceased at the date of death is **Four Hundred and Eighty-Six Thousand, Six Hundred and Thirty Dollars and Twenty-Three Cents** (\$486,630.23);
- (ii) The Net Annual Income at the time of trial is **Six Hundred and Twenty-Five Thousand, One Hundred and Ninety-Five Dollars and Ninety-Nine Cents** (\$625,195.99);
- (iii) Average annual net income is **Five Hundred and Fifty-Five Thousand, Nine Hundred and Thirteen Dollars and Eleven Cents** (\$555,913.11);
- (iv) Personal expenditure of the deceased at the time of death is annualized to **One Hundred Thousand Dollars** (\$100,000.00);
- (v) Multiplicand (Average annual net income minus personal expenditure of the deceased) is **Four Hundred and Ninety-Five Thousand, Nine Hundred and Thirteen Dollars and Eleven Cents** (\$455,913.11);

(vi) The loss of earnings for pre-trial years (multiplier multiplied by multiplicand) is **Three Million Six Hundred and Forty-Seven Thousand, Three Hundred and Four Dollars and Eighty-Eight Cents** (\$3,647,304.88)

Therefore, the Court awards **Three Million Six Hundred Forty-Seven Thousand Three Hundred and Four Dollars and Eighty-Eight Cents** (\$3,647,304.88) for the loss of earnings for pre-trial years.

[59] Neither Party made any submissions in relation to a claim for Post-Trial Years under the LRMPA. Therefore, the Court will not make an award or ruling in relation to same.

### **Damages under the Fatal Accidents Act**

[60] Section 3 of the **Fatal Accidents Act** (“FAA”) states that:

‘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.’

[61] Section 4(1) of the FAA outlines those persons who have standing to bring a claim for damages under the FAA. It provides that:

‘Any action brought in pursuance of the provisions of his 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.

*Near Relations Entitled to Damages.*

- [62] In these circumstances, the 1<sup>st</sup> Claimant has sought to bring an action by and on behalf of the near relations, including himself, based on the 2<sup>nd</sup> Claimant's failure to bring the action within six (6) months of the death of the deceased. The 1<sup>st</sup> Claimant brought the Claim in 2014, approximately two (2) years after Dianne's death and the 2<sup>nd</sup> Claimant was made a party to the Claim in 2016 some four (4) years after Dianne's death. Therefore, the Court is satisfied that the Claim is brought by virtue of section 4(1)(b) of the FAA. It falls to be determined, however, whether the 1<sup>st</sup> Claimant is a near relation.
- [63] The Defendants submitted that the 1<sup>st</sup> Claimant is not a near relation under the FAA and that a declaration of spouse-ship is no longer sufficient to substitute as near relation since the case of **Winsome Bennett v Ministry of Finance et al** [2015] JMSC Civ 245 which permitted this was overturned by the Court of Appeal. At the time of these submissions, the Court of Appeal judgement for the aforesaid case was not ready. The judgment has since been published and will be duly considered by the Court on this point.
- [64] The Court is mindful that at this stage disputes should only arise in relation to the quantum of damages to be awarded. The submissions of Counsel for the Defendants indicates that they are requesting the Court's assistance in determining whether the 1<sup>st</sup> Claimant would be considered a near relation who is entitled to get damages by virtue of section 4(4) of the FAA. The resolution of this issue, is therefore important to determine the quantum of damages to be awarded in this regard.
- [65] Section 2(1) of the FAA describes a near relation as being a wife, husband, parent, child, brother, sister, nephew or niece of the deceased person. Further, Section 4(4) of the FAA declares that:

'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 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.'

[66] Counsel for the Defendants submitted that the list of near relation under the FAA is exhaustive and that the exception, in relation to a declaration of spouse-ship, no longer exists. Counsel for the Defendants is correct in saying that the definition for near relation as given in the FAA is exhaustive. However, the case of **Ministry of Finance et al v Winsome Bennett** [2018] JMCA Civ 9 makes no determination on the definition of "near relation." In the aforesaid case, the Court of Appeal ruled on the correctness of the learned trial judge in his decision that a declaration of spouse-ship was sufficient in law to prove that the Respondent is a "widower" who was entitled to, by virtue of the Jamaica Constabulary Force Act ("JCFA"), pension payments. The Court of Appeal ruled that the JCFA, at the time of the adjudication of the matter, had specifically defined what a "widower" was and it did not include the circumstances which allowed the Respondent to be declared a spouse – these circumstances mirroring the definition of a "spouse" under the Property Rights of Spouses Act ("PROSA"). Section 2 of the PROSA defines a spouse in this way:

"spouse" includes –

- (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;
- (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years,

immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be.

(2) The terms "single woman" and "single man" used with reference to the definition of "spouse" include widow or widower, as the case may be, or a divorcee

- [67] The learned Justices of Appeal in **Ministry of Finance et al v Winsome Bennett** (supra) opined that, had the JCFA been silent on the definition to be applied to “widower”, perhaps the declaration of spouse-ship would have been sufficient proof that the Respondent is a widower. Therefore, the aforesaid case is distinguishable from and inapplicable to the case at bar. The argument advanced by the Defendants’ Counsel fails. The Court of Appeal did not consider the definition of “near relation” and whether a spouse, as defined under the PROSA, was included in the definition of “near relation”.
- [68] The FAA does not provide a definition for husband/wife and as such, in applying the principles from **Ministry of Finance et al v Winsome Bennett** (supra), this Court can exercise their discretion to determine whether a spouse can be considered as a near relation for the purposes of the FAA.
- [69] The legal definition of spouse in the Jurisdiction is as defined in section 2 of the PROSA. This definition considers that a spouse is similar to that of a husband/wife in law. Further, the Court is of the view that husband/wife and spouse are used interchangeably. Therefore, considering that there is an absence of a definition for husband/wife, the Court disagrees with Counsel for the Defendants that a spouse is not a near relation for the purposes of the FAA. The Court finds further, that the 1<sup>st</sup> Claimant being declared as a spouse is sufficient proof of near relation and this finding is premised upon the FAA’s silence as to who is considered as a husband/wife.
- [70] There was no dispute as to the children of the deceased, Cameshia and Christina, being near relations. Further, the children’s birth certificates were tendered and accepted into evidence to prove their relation to the deceased. Therefore, the 1<sup>st</sup> Claimant and the children are all near relations who would be entitled to damages under the FAA.

## DEPENDANTS

[71] In **Landis Blake v Ewan Chang and Wayne Lewis** (supra) the Court at paragraph 62 stated that:

“It becomes apparent that at or before the date of the death of the deceased, the named dependants ought to have been reliant on the deceased for a particular benefit that they are now deprived of due to his death.”

[72] There was no dispute or challenge of the evidence that Cameisha and Christina were dependants of Dianne. The witness statements of Cameisha and Christine do not indicate the amount of money spent by Dianne for their maintenance. Their witness statements indicate the ways in which Dianne cared for them financially. However, the witness statement of the 1<sup>st</sup> Claimant, though not indicating the amount of money spent exclusively on him or the children by Dianne, indicated that Dianne spent approximately 80% of her income on the family’s maintenance and the Court has accepted same as being true.

[73] There was no explicit dispute to or challenge of the evidence which indicated that the 1<sup>st</sup> Claimant was a dependant of Dianne, the Court believes that the evidence in relation to the 1<sup>st</sup> Claimant being a dependant should be assessed. The 1<sup>st</sup> Claimant and all the named dependants resided together in the same household with Dianne. The 1<sup>st</sup> Claimant jointly operated the shop with Dianne and was a shoe maker which seemingly did not provide steady income to the him or the home. Therefore, the Court is satisfied on a balance of probability that neither the 1<sup>st</sup> Claimant nor the children were gainfully employed at the time of Dianne’s death. Therefore, they were mainly dependent on Dianne’s income and their evidence supports this.

### *Calculations*

[74] The Court believes that the multiplicand as calculated previously would remain the same at **Four Hundred and Fifty-Five Thousand, Nine Hundred and Thirteen Dollars and Eleven Cents** (\$455,913.11) which already takes into account and

subtracts Dianne's personal expenditure. This amount is then multiplied by the multiplier of 8 which equals **Three Million Six Hundred and Forty-Seven Thousand, Three Hundred and Four Dollars and Eighty-Eight Cents** (\$3,647,304.88).

[75] The Court acknowledges the submission of Counsel for the Defendants in seeking an appropriate discount to the amount to be awarded under this head as the Defendants believed that the 1<sup>st</sup> Claimant had some income. The appropriate discount to this amount is 25%. The Court, though satisfied that the 1<sup>st</sup> Claimant was not gainfully employed and was dependent on the deceased, believes that he had some income for which he could use to his and the household's benefit.

[76] Considering the 25% discount, the total amount to be awarded under the FAA is **Two Million, Seven Hundred and Thirty-Five Thousand, Four Hundred and Seventy-Eight Dollars and Sixty-Six Cents** (\$2,735,478.66). Consequently, the amount to be awarded under FAA is less than the amount awarded to the dependants under the LRMPA. Given that only sums in excess of the amount awarded under the LRMPA are recoverable in these circumstances, no award is made for damages under the FAA.

### **Special Damages**

[77] The general rule in relation to special damages is that it must be specifically pleaded and proven as it represents the actual quantifiable loss suffered or likely to be suffered by the Claimant as a result of the tort which was committed. In this case, the Claimants particularize the special damages as follows –

(a) **Three Hundred and Twenty-Two Thousand Dollars** (\$322,000.00) for Funeral Expenses; and

(b) **One Hundred Thousand Dollars** (\$100,000.00) for the wake of Dianne

this totals an amount of **Four Hundred and Twenty-Two Thousand Dollars** (\$422,000.00) being plead for special damages.

*Funeral Expenses*

[78] The position as explained by the Court in the case **Dorris Fuller v Attorney General** (unreported) Supreme Court of Jamaica, Suit No. CL 1993/F152 (delivered July 5, 1995), is that the cost for the wake should be considered as a part of the funeral expenses. The Court at page 11 stated that:

“...The legal position is that a “set up” may properly be considered as part of the funeral expenses if it is a reasonable expenditure for the persons in the position of the deceased and of his relatives who are responsible for the actual cost of providing drinks and foo. But, so far as it is done to show love and affection for the deceased, the Court should be extremely careful how it makes its award...”

[79] The Court is of the view that **One Hundred Thousand Dollars** (\$100,000) for a wake is a reasonable expense to plead in this regard. Therefore, the cost for the wake will be considered as part of the funeral expenses.

[80] In the case of **Reginald Brown & Anor v Balford Douglas et al** [2013] JMSC Civ. 205, the Court stated that:

[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.

[81] Since the funeral expenses were incurred by Hugh, the near relation and 1<sup>st</sup> Claimant, then special damages will be considered under the FAA. Further, having previously indicated that the 1<sup>st</sup> Claimant could claim as a dependent under the FAA, the conditions as laid out at paragraph 31 of **Reginald Brown & Anor v Balford Douglas et al** supra has been satisfied.

[82] The 1<sup>st</sup> Claimant has provided a receipt for the payment of the Funeral Expenses. However, he has not provided a receipt nor any other documentary proof in relation to monies spent for the wake. The Defendants' Counsel in their submissions have not challenged the particulars of special damages and the Claimants' Counsel has not put forward any evidence to account for the lack of evidentiary proof of the wake.

[83] The Court relies on the discussion in the case of **Edwards v Jamaica Beverages Limited** [2017] JMSC Civ 76 where it was stated that –

[95] It is well settled law that a claimant is entitled to recover losses and expenses incurred arising directly from the negligent conduct of the tortfeasor. It is equally a well-established principle of law that a claim for special damages must be pleaded and proved strictly. In **Walters v Mitchell**, supra, the Court of Appeal of Jamaica adjusted the principle to take account of the fact that in Jamaica, some claimants, by virtue of their station in life, do not keep records at all. In these instances, the trial court uses its best judgment and makes an award. However the court has to be satisfied that the claimant incurred or suffered the loss or incurred the expense.

[96] In the case of **Myrtle Daley & Anor. v The Attorney General & Anor**, the trial judge, Mangatal, J considered previous decisions on the issue of proof of special damages including **Hepburn Harris v Carlton Walker** and **Murphy v. Mills**. In doing so Her Ladyship noted that “special damages must be specifically proved”, and that “there must be some reasonable evidentiary basis on which the court can act.”

[97] In **Attorney General of Jamaica v. Tanya Clarke (nee Tyrell)**, the Court of Appeal relaxed the principle that special damages must be specifically proved and accepted that in certain circumstances where there is the absence of strict proof, justice demands that an award should be made.

[84] In light of this, the Court is satisfied that there was a wake in keeping with the traditions of Jamaica. However, the 1<sup>st</sup> Claimant has provided no evidence as to costs incurred for the wake neither in the witness statements relied on nor in the form of documents. Therefore, the Court must consider whether the particularization without more is sufficient for the 1<sup>st</sup> Claimant to discharge his burden of proof in this regard. The non-challenge to the sum claimed for the wake by the 1<sup>st</sup> Defendant is only a consideration as to whether the burden of proof has been discharged. Further, the Court is not mandated to accept any unchallenged evidence in all the circumstances.

[85] While, the amount claimed for the wake is not substantial and is reasonable in the circumstances, the Court is not in the habit of speculating. Hence, without documentary evidence to prove the loss, one may deem that an award made for this amount would be premised upon speculation. However, this is a case where

the Court may utilize its experience to determine whether the amount claimed is acceptable.

[86] The Court is no stranger to the usual costs of a wake or “set up” in Jamaica and is not oblivious to realities of the country (see: **Attorney General of Jamaica v Tanya Clarke nee Tyrell** (unreported) Court of Appeal of Jamaica, SCCA No. 109/2002 (delivered December 20, 2004)). Therefore, the Court awards the 1<sup>st</sup> Claimant the full amount of **One Hundred Thousand Dollars** (\$100,000.00) claimed for the wake as it believes that in all the circumstances the sum is a reasonable amount to be claimed for a wake.

[87] Consequently, special damages are awarded in the sum of **Four Hundred and Twenty-Two Thousand Dollars** (\$422,000.00), to which the 1<sup>st</sup> Claimant is entitled to under the FAA.

### **General Damages for Negligence**

[88] The purposes of damages, in relation to the tort of negligence, is to put the successful party in the position that they would have been in, as far as money can do, as if the tort of negligence did not occur. The Defendants have accepted that there was a duty of care owed and that this duty was breached. Similarly, the Court is satisfied in the circumstances that a duty of care existed which was breached. The contention here is whether the damage is attributable to the actions of the Defendants as they have put the Claimants to proof of same. Based on the evidence provided, the Claimants are bringing an action for negligence against the Defendants for the death of Dianne and further for the psychiatric injuries of Dianne’s dependents as pleaded in the Amended Particulars of Claim and in their Witness Statements.

#### *Damages for Dianne’s Injuries*

[89] The Defendants have admitted liability for the death of Dianne. However, they have, in their Defence Limited to the Quantum of Damages, put the Claimants to proof of the injuries sustained by Dianne which resulted in her death. To this end, the 1<sup>st</sup>

Claimant has submitted the Post Mortem Examination Report of the deceased dated the 21<sup>st</sup> day of March 2012. The report indicates that the deceased had received ten (10) wounds from gunshots which resulted in fatal injuries consistent with those pleaded and admitted into evidence by way of the dependents' witness statements. Further, the report concluded that these injuries were likely to have been inflicted by high-powered weapons. The Court is satisfied that these injuries have been proven on a balance of probabilities.

**[90]** The injuries as particularized in the Post Mortem Examination Report are as follows–

1. Perforating gunshot wound at the front of the thigh margin of the wounds had contusion and there were tears in the muscles and vessels.
2. Two (2) penetrating gunshot wound to the left forearm which had blackening and burning along with lacerations with lacerations around or near the wounds.
3. Two (2) penetrating gunshot wound to the left middle of the abdomen with lacerations around one wound.
4. Perforating gunshot wound to the right middle of the chest.
5. Perforating gunshot wound to the right forearm with two lacerated wounds around the entrance of the wound.
6. Penetrating gunshot wound to the left shoulder which made it way downwards through the left 2<sup>nd</sup> and 3<sup>rd</sup> ribs.
7. Penetrating gunshot wound across the forehead with four splits in different direction and brain pieces oozing out.

**[91]** The Dr. Dinesh Rao, Director ad Chief Forensic Pathologist, further stated in the Post Mortem Examination Report that –

“... the pattern and severity of the injury indicates the use of high powered rifled firearms, the retrieval of fragments confirms the same. the presence of blackening over the left forearm confirms the shot fired from a close range... The deceased died instantaneously after the head shot. The retrieval of the fibre fragments and paint flakes from the depth of wounds indicates the bullets hitting similar intervening objects before it struck the body.”

[92] The Court is satisfied, on a balance of probabilities, that the breach of duty by the Defendants resulted in the death of Dianne. Therefore, damages will be assessed in relation to these injuries which resulted in the Dianne’s death. The headings of damages developed by Wooding CJ in **Corniliac v St. Louis** [1965] 7 WIR 791 remains relevant and will be used particularly, the nature and extent of the injuries suffered and pain and suffering endured.

[93] In **Devon Bryan** (supra) the Court of Appeal upheld the Supreme Court’s decision to award a sum of **One Hundred and Thirty Thousand Dollars** (\$130,000.00) for general damages for the deceased who succumbed to a stab and a gunshot wound to the chest a few hours after they were inflicted. The Court of Appeal found that the learned trial judge was correct to speak to the length of time the deceased survived after being injured. The learned trial judge relied on the Privy Council case of **Inez Brown (near relation of Paul Andrew Reid, deceased) v David Robinson and Sentry Service Co. Ltd.** (PC No 27/2004), delivered on 14 December 2004 and **Elizabeth Morgan v Enid Foreman and Owen Moss** (unreported) Supreme Court of Jamaica, Claim No. 2003HCV04271 (delivered on October 15, 2004).

[94] In **Inez Brown (near relation of Paul Andrew Reid, deceased) v David Robinson and Sentry Service Co. Ltd.** (supra) the 1<sup>st</sup> Respondent shot the deceased at close range. This resulted in paraplegia with loss of sensation at the level of the ninth thoracic vertebra and the deceased died three (3) months after the incident. The Court awarded **Two Million Dollars** (\$2,000,000.00) under the heading of pain and suffering. Counsel for the Appellant challenged the award of damages before the Privy Council. The Privy Council held that damages for pain and suffering and loss of amenities should be limited to an amount appropriate for

the length of time that the deceased had survived after the injury and had set aside the award for damages. In keeping with their established practice, their Lordships deferred to the experience of the Jamaican courts in assessing such damages. However, they made what they described as an interim award of **Five Hundred Thousand Dollars** (\$500,000.00), pending final assessment by the Court of Appeal. The final sum, said the Privy Council, would be such as *“the court thinks proper to reflect the circumstances of the assault, the public indignity inflicted upon the deceased and the fear which he may have felt when the assault took place.”*

[95] In **Elizabeth Morgan v Enid Foreman and Owen Moss** (supra) the deceased died approximately twenty-four (24) hours after sustaining injuries in a motor vehicle accident. The learned trial judge in awarding a sum of **Fifty Thousand Dollars** (\$50,000.00), stated at page 4:

It is indubitably settled that the personal representatives can recover damages that the Deceased could have recovered and which were a liability on the wrongdoer at the date of death (see **Rose v Ford** (1935) 1 K.B. 99 per Greer L.J.)

In both cases relied upon by Miss Powell, the victims survived and were condemned to a life of suffering. In the instant case however, the injured person died the following morning. Had he lived he would have been entitled to recover damages for the injuries he sustained. His personal representatives are now entitled. However they are only entitled to recover nominal damages since he only survived for less than two days.

In **Rose v Ford** the judge had awarded the sum of 500 shillings which sum included damages for pain and suffering and damages for the loss of the deceased's leg. The damages for pain and suffering were confined to the four days that the deceased lived. Of that figure, the Court of Appeal quantified the damages attributable to pain and suffering at a nominal sum of 20 shillings. The Court of Appeal felt that the learned judge estimated the damages (the remaining 480 shillings) upon the assumption that the deceased would have lived as a one legged woman for the rest of her natural life. The Court, however, was of the view that she was only entitled to damages in respect of the loss of her legs for two days in addition to her pain and suffering. However it as clearly stated that the figure 'cannot be more than a nominal amount'. According the Court reduced the figure from 480 shillings to 40 shillings...

[96] The Court has duly considered the authorities and is of the opinion that in these circumstances, the pain and suffering is limited to the moment at which the injuries were inflicted upon the deceased. Therefore, the sum awarded in **Elizabeth Morgan v Enid Foreman and Owen Moss** supra which updates to **Two Hundred and Four Thousand One Hundred Seven Hundred and Ninety-Two Dollars and Thirty-Two Cents** (\$204,792.32), using the CPI of 128.2 for May 2023, is deemed appropriate for damages. However, considering that the Dianne died almost immediately upon the infliction of her injuries, this amount is to be discounted by 50%. Therefore, the Court awards **One Hundred Two Thousand, Four Hundred Dollars** (\$102,400.00) for the pain and suffering of the deceased.

*Damages for the Dependent's Injuries*

[97] The Defendants also put the Claimants to proof of the psychiatric injuries pleaded for the dependents. The dependents, however, failed to provide any medical report for the psychiatric injuries as pleaded in their Particulars of Claim filed the 30<sup>th</sup> day of April 2014 and their Amended Particulars of Claim filed on the 19<sup>th</sup> day of September 2016. The alleged injuries were highlighted as being:

- a. Post-Traumatic Stress Disorder (PTSD)
- b. Anxiety Attacks;
- c. Undue and Unusual Stress; and
- d. Other mental and psychological damage which they were allegedly being treated for.

[98] Counsel for the Claimants had indicated that once the medical report for the dependents became available, the Claim would have been amended to include the further injuries and the medical report would have been exhibited – as the dependents were, at the time of filing, still undergoing treatment for the mental and psychological damages. It is important to mention that to date, the Claimants still

have not provided a medical report for same nor any of the injuries plead and no further injury has been pleaded.

[99] In the tort of negligence, a party may recover damages solely for emotional distress even if it did not arise from any physical injury or economic loss for which that party may claim redress. In **Natoya Swaby & Anor v Southern Regional Health Authority & Anor** [2012] JMSC Civ 151, the Court relied on **Winfield and Jolowicz on Tort**, 14<sup>th</sup> Edition (1994) to make this same point. In this, at page 6, the Court further stated that:

... this terminology has the advantage of serving as a reminder that this head of liability requires something in the nature of a traumatic response to an event. The learned authors also state on that same page that – **‘The sensations of fear or mental distress or grief suffered as a result of negligence do not themselves give rise to a cause of action and this was held to be so even where the victims of a disaster were trapped, fully conscious, for some time, before they suffered a swift death from asphyxia’** – **Hicks v Chief Constable of South Yorkshire – (1992) 2 ALL E.R. 65.** Continuing the extract from **Winfield and Jolowicz on Tort**, 14<sup>th</sup> Edition at page 119 – **‘Where a Claim alleged negligence in the conduct of a police disciplinary investigation, the submission that actionable damage had occurred in the form of anxiety and vexation was described in the House of Lords as unsustainable – Calveley v Chief Constable of Merseyside (1989) A.C. 1228.** Where, however, there is some other tangible injury, damages may be awarded for mental distress, usually as part of general damages for pain and suffering, or in the case of intentional torts, as aggravated damages. Putting those cases aside, what is required is some **‘recognizable psychiatric illness.’** **Hinz v Berry (1970) 2 Q.B. 40**, at page 42 and **Alcock v Chief Constable of South Yorkshire [1992] 1 A.C. 310**, at pages 399 and 406.

[100] The discussion in **Natoya Swaby & Anor v Southern Regional Health Authority & Anor** (supra) indicates that post-traumatic stress disorder is recognized as being an injury for which parties can recover damages without having received any physical injuries. It is important to note, however, that damages are not awarded for emotional reactions, such as grief, sorrow, anxiety or distress (see: **Joan Thompson v Jamaica Health Security Network Limited and Clinton Sewell** [2022] JMSC Civ 18 at paragraph 46; and **Alcock v Chief Constable of South**

Yorkshire [1992] 1 A.C. 310). **Alcock v Chief Constable of South Yorkshire** supra sets out three (3) limitations which must be considered for a Claimant to claim for damages in this regard, those are:

- (i) **The class of persons whose claims should be recognized** – here, the test of reasonable foreseeability is to be applied. This test is subject to requirement that a *“sufficiently close relationship of affection will be readily presumed in the case of close relatives and the claims of remoter relatives will be scrutinized with care”* (see: **Natoya Swaby & Anor v Southern Regional Health Authority & Anor** (supra)).
- (ii) **The proximity of such persons to the negligent act or acts about which legal complaint is made** – this requires the existence of *“sufficient proximity of time and place to the event leading to the psychiatric trauma.”* This proximity is understood in law to mean ‘immediate aftermath’ (see: **McCloughlin v O’Brian** [1983] 1 A.C. 410).
- (iii) **The means by which the psychiatric disorder was caused** – in relation to psychiatric injury caused by the death of a loved one, this limitation refers to whether the trauma was caused by the viewing of the death of a loved one or of learning of such person or persons death, by means of one’s own unaided perceptions (see: **Alcock v Chief Constable of South Yorkshire** supra and **Natoya Swaby & Anor v Southern Regional Health Authority & Anor** supra).

**[101]** The evidence in the present case is indicative that the dependents have overcome the limitations as set out in the above. There was no evidence put forward which rebutted the presumption that the dependents were close relatives. Further, from their own evidence, it is identified that the dependents saw Dianne lifeless immediately after the unfortunate events which lead to her death. Therefore, the

Court is satisfied that the conditions are met for a claim for psychiatric injuries to be brought against the Defendants.

[102] Even though the Court is moving forward with this judgement on admission by the 1<sup>st</sup> Defendant, the Court must still find on a balance of probabilities that the dependents have suffered psychiatric injuries due to the death of Dianne as caused by the 1<sup>st</sup> Defendant and the other members of the JCF. Additionally, the Court must consider whether the statements of the dependents, without more, is sufficient to convince the Court that, on a balance of probabilities, they suffered the injuries they have alleged.

[103] In the instant case, the Court may only assess damages in relation to PTSD as the Claimants failed to plead and prove the further psychiatric injuries and the case law suggests that damages may not be awarded for emotional responses such as anxiety attacks and undue stress. There is no doubt that seeing a close relative lifeless and in the manner that the dependents of Dianne saw her, may cause PTSD. However, the Court is mindful that the dependents are not qualified to make these assessments themselves. The Court is unable to give the evidence of the dependents in relation to the PTSD much weight because it is likely that these behaviours being described may be reactions based on the grief of losing a loved one. Therefore, the Court is not able to make a finding of fact in relation to the PTSD of the dependents. In light of this, the burden of proof has not been discharged by the Claimants to prove the alleged psychiatric injuries. It is important that, in cases where these particular injuries are being pleaded, there is also expert evidence which supports the evidence of the witnesses. Does this mean therefore, that damages will not be awarded for the alleged PTSD suffered by the dependents?

[104] K. Anderson J in **Natoya Swaby & Anor v Southern Regional Health Authority & Anor** supra explained at paragraph 10 that –

“... [T]he court must always be guided by the law and must always ensure that, in assessing damages for the tort of negligence, it concludes in terms thereof, on an award which constitutes compensation to the Claimant for the loss suffered by that Claimant,

so as to put that Claimant in the same position as if the 'wrong' had not occurred. Thus, if there has been no 'wrong' in terms of liability, then even though there exists either a Judgment on default or on admission, must it not always be appropriate for this Court, on an assessment of damages hearing, to appropriately compensate each Claimant who has been awarded Judgment, no more than such a Claimant should properly be compensated for such?"

[105] Nourse LJ in **Stoke-on-Trent City Council v W & J Wass Ltd** [1988] 3 All ER 394 explained that -

"The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages."

[106] In the instant case, the Court is unable to award more than nominal damages for the dependents. The Court is of this view because of the Claimants' failure to discharge their burden of proof in relation to the psychiatric injury of PTSD pleaded for the dependents. The Court would therefore award to –

- (i) Hugh Collins – **One Hundred Thousand Dollars** (\$100,000.00) as nominal damages;
- (ii) Christina Collins – **One Hundred Thousand Dollars** (\$100,000.00) as nominal damages; and
- (iii) Cameshia Collins – **One Hundred Thousand Dollars** (\$100,000.00) as nominal damages.

### **AGGRAVATED DAMAGES**

[107] An action for aggravated damages will not be awarded for the alleged PTSD suffered by the dependents since it was not proven. Therefore, aggravated damages were only considered in relation to Dianne. The Claimants submitted that the instant matter is one which warrants an award of aggravated damage. They relied on **Rookes v Barnard** [1964] AC 1129. In this case, Lord Devlin pointed out elements required for a claim for aggravated damages to succeed. He said:

“It is very well established that in cases where the damages are at large the ... judge ... can take into account the motives and conduct of the defendant where they aggravate the injury to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s pride and dignity...”

[108] Therefore, the Court must consider the motives and conduct of the 1<sup>st</sup> Defendant and other members of the JCF which has aggravated the injury to the deceased. Further, the Court must also consider whether the behaviour of the 1<sup>st</sup> Defendant and the other members of the JCF who were purported to be involved in the raid was “*highhanded and oppressive and characterized by arrogance, malevolence and persistence in the wrongs complained of...*” (see: **Cassell v Broome** supra).

[109] In the instant case, the Court’s view is that an award for aggravated damages would not be appropriate. Though the actions of the 1<sup>st</sup> Defendant and the other members of the JCF could be high-handed and oppressive, there is nothing which indicates that their conduct or behaviour was arrogant, spiteful, or malevolent.

## EXEMPLARY DAMAGES

[110] The Claimants claim damages on the “footing” of exemplary damages and relied on the case of **Rookes v Barnard** supra. In that case, Lord Devlin sets out the circumstances under which an award for exemplary damages should be made and opined at page 1226 that: -

“... [W]here one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the others, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.”

[111] In the Jamaican decision of **The Attorney General v Maurice Francis** (unreported) Court of Appeal of Jamaica, SCCA No. 13/95 delivered (March 26, 1999) at page 17, Rattray, P. in discussing the basis for an award for exemplary damages

indicated that the conduct of the defendant must merit punishment. He explained further that, the conduct should go beyond mere want of jurisdiction and should be accompanied by arrogance, insolence, humiliation and brutality. The purpose of exemplary damages is to punish and deter conduct which could be classified as being “*oppressive, arbitrary or unconstitutional*”.

[112] The Claimants made similar submissions in that they submitted that the award for exemplary damage must be made on the basis of the oppressive, arbitrary and unconstitutional action of the 1<sup>st</sup> Defendant and other members of the JCF. It was their submission that the killing of Dianne without any legal justification required an award of exemplary damages to deter other servants of the state from taking a similar course of conduct.

[113] The Court is not unmindful that there are other damages at play, which though compensatory in nature may also, often times, be adequate to punish/deter (see: **Attorney General v Parchment et al** (unreported), Court of Appeal of Jamaica, SCCA No. 7/2003 (delivered on July 30, 2004)). Therefore, no award for exemplary damages should be made unless the awards for compensatory damages are inadequate and if such award is made, it should be moderate (see: **Attorney General for Jamaica et al v Roderick Cunningham** [2020] JMCA Civ 34). However, can the Claimants claim for exemplary damages considering that the cause action survived the deceased?

[114] It is established law that the Claimant has to be the victim of the behaviour that the Court seeks to punish (see: **Rookes v Barnard** supra and **McGregor on Damages** 17<sup>th</sup> edn paragraph 11-033 on page 384). The dependents would not be considered victims in this matter since the Court was unable to prove the damage against them. Hence, exemplary damages may only be awarded in relation to the 1<sup>st</sup> Defendant and other members of the JCF using high-powered weapons to kill the deceased without legal justification and not for any alleged resulting injuries of the deceased’s dependents by virtue of them witnessing same or its aftermath. However, section 2(2)(a) of the LRMPA states that where a cause of action survives for the benefit of

a deceased's estate, exemplary damages are not recoverable. Considering this, the Court is unable to make an award for exemplary damages.

### **CONSTITUTIONAL/VINDICATORY DAMAGES**

[115] The Claimants' claim that the 1<sup>st</sup> Defendant and other members of the JCF breached the following rights of the deceased when they entered the vicinity of her home and shot her ten (10) times with high-powered weapons:

- (i) Right to Life;
- (ii) Right to Protection of Privacy of One's Home & Family Life; and
- (iii) Right to Protection from Inhumane and Degrading Treatment

[116] Counsel for the Claimants, Miss McFarlane submitted that the Claimants are entitled to redress for the breach of the constitutional rights of the deceased. Miss McFarlane argued that as a result of the breach of the rights guaranteed under the Charter of Fundamental Rights and Freedoms ("the Charter"), the Claimants are entitled to vindicatory damages in the amount of **Seven Million Dollars** (\$7,000,000.00). She indicated that the purpose of this award is to vindicate the right and reflect the sense of public outrage among other things. Counsel relied on several cases to assist the Court is making an award under this head of damage. However, only those cases which were useful will be considered.

[117] Counsel for the Defendants made no substantive submissions in relation to an award of vindicatory damages. However, in their Defence Limited to Quantum of Damages filed on the 3<sup>rd</sup> day of February 2015, the Defendants denied the Claimants' Particulars of Constitutional Breach. The Defendants aver that while the 1<sup>st</sup> Defendant and the other members of the JCF were negligent there was no breach of constitutional rights because the 1<sup>st</sup> Defendant and other members of the JCF were acting in the lawful execution of their duties in seeking to apprehend culprits in the deceased's community.

[118] Section 19 of the Charter gives an aggrieved person the right to apply to the Court for redress and grants the Court jurisdiction to make an award of damages to enforce the infringed fundamental rights and freedoms. Laing JA (Ag) in **The Attorney General of Jamaica v Clifford James** [2023] JMCA Civ 6 stated at paragraph 50 that:

“... [W]hat is important in determining whether an award of vindictory damages is appropriate is the nature of the breach and the circumstances related thereto. Each case must, therefore, be considered on its own unique facts and be viewed relative to the range of ways in which the particular constitutional right involved may be infringed.”

[119] Patterson JA in the case of **Doris Fuller v Attorney General of Jamaica** (unreported) Court of Appeal of Jamaica, SCCA No. 91/95 (delivered on October 16, 1998) at page 89 said:

“The Court may only exercise its powers of enforcement of the provision if it is satisfied that no other law provides adequate means of redress for such contravention.”

[120] Although liability is admitted, the Court wishes to indicate that an award of vindictory damages is discretionary and that there is no right to such damages (see: **Mervin Cameron v Attorney General of Jamaica** [2018] JMFC FULL 4). The Claimants' Attorney-at-Law relied on the cases of **Sharon-Greenwood Henry v The Attorney General of Jamaica** (unreported) Supreme Court of Jamaica, Claim No. CL G 116 of 1999 (delivered on October 26, 2005) and **Denise Kean-Madden v The Attorney General of Jamaica and Corporal T. Webster-Lawrence** [2014] JMSC Civ 23, to persuade the Court that an award under this head should be made. However, those cases are distinguishable from the matter at bar. In the cases relied upon by Miss McFarlane, the Claimants' claim was vested in assault and battery, false imprisonment and malicious prosecution. Most importantly, the injured/aggrieved persons were still alive. The Court is of the considered opinion that, in those cases relied upon by Miss McFarlane, there was no redress under the causes of action for the breach of rights which flowed directly

from those torts. Whereas in this matter, the claims for the rights breached is vested in the relief for the causes of action brought.

[121] Therefore, the Court will not exercise its discretion to make a vindictory award in this regard. The Court is satisfied that the redress available – a claim for loss of life and loss of future earnings under the LRMPA and damages for the negligent actions resulting in loss of life, which were taken advantage of by the Claimants are adequate and appropriate in the circumstances for the breach of these rights. Further, the case is progressing on the basis that there is an admission to the tort of negligence which does not meet the threshold for intention. Therefore, it cannot be said that the 1<sup>st</sup> Defendant and other members of the JCF embarked upon a course of action which intentionally deprived the deceased and her dependents of any constitutional rights. Subsequently, the Court is of the opinion that this not a case where there was a “*deplorable abuse of power*” which warrants an additional award to “*reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches*” (see: **The Attorney General v Ramanooop** [2005] 2 WLR 1324). As such, no award is made for constitutional/vindictory damages in relation to the rights mentioned in this paragraph.

## CONCLUSION

[122] In light of the above, the Court now orders as follows:

1. Under the Law Reform (Miscellaneous Provisions) Act, damages are awarded to the 2<sup>nd</sup> Claimant for:
  - (a) Loss of Life in the amount of **Two Hundred and Fifty Thousand Dollars** (\$250,000.00) with interest thereon at a rate of 3% per annum from March 16, 2012 to the date of this judgment (July 7, 2023); and
  - (b) Loss of Future Earnings in the amount of **Three Million Six Hundred and Forty-Seven Thousand, Three Hundred and Four Dollars and Eighty-Eight**

- Cents** (\$3,647,304.88) with interest thereon at a rate of 3% per annum from March 16, 2012 to the date of this judgment (July 7, 2023);
2. Under the Fatal Accidents Act, special damages are awarded to the 1<sup>st</sup> Claimant in the amount of **Four Hundred and Twenty-Two Thousand Dollars** (\$422,000.00) with interest thereon at a rate of 3% per annum from March 30, 2012 to the date of this judgment (July 7, 2023);
  3. General Damages are awarded to the 1<sup>st</sup> Claimant in the amount of **One Hundred and Two Thousand, Four Hundred Dollars** (\$102,400.00) for Negligence resulting in the deceased's death with interest thereon at a rate of 3% from March 16, 2012 to the date of this judgment (July 7, 2023);
  4. Nominal Damages are awarded in the amount of **Three Hundred Thousand Dollars** (\$300,000.00) for Negligence to the dependents of the deceased which is to be apportioned amongst them equally with no interest thereon;
  5. The Claimants' claim for exemplary damages, aggravated damages and vindicatory damages fails; and
  6. Cost awarded to the Claimants to be taxed if not agreed.