



[2017] JMSC. Civ. 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2010 HCV05159

BETWEEN

MARGARITA DAVIS

(near relation – mother of Andre Davis, deceased) CLAIMANT

AND

THE ATTORNEY GENERAL OF JAMAICA

DEFENDANT

Miss Olivia Derrett instructed by O Senior-Smith & Co for the Claimant

Mr Andre Moulton instructed by the Director of State Proceedings for the Defendant

Damages – Assessment – Fatal Accidents Act – Claim for funeral expenses

Law Reform (Miscellaneous Provisions) Act - Deceased 16 years old – Whether Claimant is personal representative of estate of deceased

Heard: May 12 &19, 2016 and January 26, 2017

LINDO J

[1] The claimant, Margarita Davis, claims as the mother and near relation of Andre Davis, a 16 year old student of Iona High School, who died by drowning while on a school outing and under the supervision of teachers of the said school. She claims damages for negligence under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act

- [2] The claim form and particulars of claim were filed on October 26, 2010 and they were subsequently amended to name the Attorney General of Jamaica as the defendant.
- [3] Liability is not in issue as a Defence limited to quantum and dated March 13, 2013 was filed and judgment on admission was entered on February 19, 2014 against the defendant for damages to be assessed.
- [4] The matter came on for assessment of damages on May 12, 2016 at which time an application for permission to amend the Particulars of claim made and granted.
- [5] The claimant's witness statement dated September 28, 2015 and her supplemental witness statement dated May 10, 2016 stood as her examination in chief. Her evidence is that she is the mother of the deceased and that she gave permission for him to attend a school outing to Columbus Heights on January 21, 2009 where students would be "properly supervised" and that he died by drowning "as a result of negligence while in the care of teachers"
- [6] She states further that Andre was a humble and dedicated child who was very involved in activities at his school and "his grades were bordering the excellent and very good range at the time of his death". She also states that he worked during a summer period at the Saint Ann Parish Library where he earned a stipend of \$8,000.00 and worked at Rexo Supermarket in Saint Ann's Bay every second and fourth Saturday and earned \$1,500.00 per Saturday.
- [7] Her evidence also is that the sum of \$232,599.50 was paid to Roberts Funeral Home by the defendants and that she incurred expenses totalling \$61,650.00 in respect of other funeral expenses.
- [8] When cross examined, she explained that the deceased worked for only one summer at the Library and that he started working at the supermarket when he was in first form at Iona High School but that he did not work constantly from first

to fifth form, did not have a set period within which he worked but worked “like 2 Saturdays out of two month.”

[9] The following were tendered in evidence:

1. Post mortem examination report dated January 28, 2009
2. Letter from Parry Town Primary School(To Whom It May Concern) dated June 15, 2009
3. Death registration form re Andre Davis
4. Burial order in respect of Andre Davis dated January 30, 2009
5. Undated Certificate of Coroner re Andre Davis
6. Iona High School report form for Christmas term 2007 re Andre Davis
7. Iona High School report for Summer term 2008 re Andre Davis

[10] Counsel for the Claimant, Ms Derrett, submitted that pursuant to Section 2(1) of the Fatal Accidents Act, the Claimant, as mother, qualifies as near relation of the deceased, and that by virtue of Section 3 of the Law Reform Miscellaneous Provisions Act, she is entitled to recover damages where her son’s death was caused by neglect or wrongful act of another party and that had he not succumbed to his injuries he would have been entitled to commence an action to recover damages.

[11] Counsel pointed out that the claimant did not provide receipts to substantiate her claim as she did not think it material at the time to save the receipts she had, or to request receipts, in respect of payments she had made, for which no receipts were given. She indicated that as there was no challenge to the sums claimed, it was up to the court to make a determination based on the evidence, whether on a balance of probabilities, it is factual.

[12] Counsel submitted that the governing principle in relation to general damages for loss of expectation of life, is that a moderate figure must be chosen.

[13] She referred to the case of **Elizabeth Morgan v Enid Foreman & Owen Moss**, Claim No. 2003HCV 00427, unreported, delivered October 15, 2004, where an

award for loss of expectation of life of \$150,000.00 (CPI 81.63) was made in respect of a 16 year old male who was enrolled in a technical high school at the time of his death, with high prospects of becoming a building technician. She submitted that the award in the case of Morgan be applied, having regard to the similarities.

- [14] With regard to the claim in respect of lost years, Counsel noted that the authority of **Taff Vale Railway Co. v Jenkins** [1913] AC 1 has settled that:

“it is not a condition precedent to the maintenance of an action under the FAA that the deceased should have actually been earning money or money’s worth or contributing to the support of the plaintiff at or before the date of death, provided that the plaintiff had a reasonable expectation of a pecuniary benefit from the continuance of his life”

- [15] On behalf of the defendant it was submitted that under the FAA, dependants are able to bring a claim for their loss of dependency. Counsel referred to Harrison’s Assessment of Damages, Cases on personal Injury and Fatal Accident Claims, 2nd Ed.(2011) where at page 605, the learned authors quote Lord Diplock, in the case of **Mallet v Monagle** (1969) 2WIR 767 at 773, who said:

“The starting point in any estimate of the dependency is the annual value of material benefits provided for the dependants out of the earnings at the date of death.”

- [16] Counsel pointed out that the claimant has provided no evidence regarding how she might have been materially dependent on her son, noting that this was not surprising given his age. In this regard he made reference to **Beverly Radcliffe (Administrator of the estate of Deon Murray, Dec’d v Ralph Smith and Leroy Russell** (1988) 25 JLR 517, where he notes that Panton J, as he then was, commented that he would have been surprised if the plaintiff was able to provide evidence supporting a claim for dependence, given the child was 13 ½ years at the time of death.

[17] Counsel also pointed out that the claimant has not provided any evidence to suggest that she was not solely responsible for the care and maintenance of her son and that despite providing evidence that her son earned income, she has not provided evidence to suggest that he did not spend this income on himself, as would be likely of teenage boys. He therefore submitted that the claimant has not proven that it is more likely than not that she has suffered a material loss of dependency due to her son's death and cannot recover under the FAA.

[18] He also submitted that the claimant cannot recover under the LRMPA because she brought the claim before being appointed an administrator of the estate of her son. He noted that the pleadings speak to the claimant as a 'near relation', which is a requirement of the FAA but not of the LRMPA

Analysis and Findings

[19] The **Fatal Accidents Act (FAA)** provides a right of action to 'near relations' of a deceased person against the person liable in law for his death, while the **Law Reform (Miscellaneous Provisions) Act (LRMPA)** provides a right of action to the personal representatives of a deceased person for the benefit of the estate of the deceased, in circumstances where the deceased died due to the unlawful actions of another.

The claim under the FAA

[20] 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.'

[21] 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.'*

[22] 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.'

[23] Section 4 (5) provides as follows:

"In the assessment of damages under subsection (4) the court –

(a) 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:

[24] The claimant states that she is the mother of the deceased. There is no documentary proof of this, save and except that the copy of Burial Order (Ex. 4) indicates that the document was given to Margarita Davis. However, it appears that it has been accepted by the parties that the claimant is the mother of the deceased, and under Section 4(1) (b) of the FAA, as a near relation of the deceased, she is entitled to bring an action, as any sum to be recovered on the claim under the FAA would be for the near relations. I find Mrs. Davis to be a

truthful witness. Her credibility has not been impugned. I accept her evidence despite the absence of documentary evidence.

[25] As Bingham J said in **Kathleen Fakhourie v Linden Green and the Attorney General of Jamaica** (1985) 22 JLR 353, a claim under this Act is:

“For what has been commonly referred to as the claim for the deceased’s “lost years”.

[26] Damages under the FAA seek to compensate the near relations of the deceased for the “actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person”. (See Sec 4(4))

[27] The Court has to calculate the annual dependency on the deceased by the near relations and then determine the estimated years that the deceased would have supported that dependency (the multiplier). In determining the damages under this Act, the earnings of the deceased less his personal and living expenses (multiplicand) are multiplied by the multiplier.

[28] In considering the award to be made, the case of **Davies v Powell Duffryn Associated Colliers Ltd.** [1942] AC 601 provides guidance. There Lord Wright said :

“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. Then there is the estimate of how much was required or expended for his personal and living expenses. The balance will give a datum of basic figure which will generally be turned into a lump sum by taking a certain number of years purchase”

[29] The deceased was attending school at the time of his death and there was no evidence to show that he was involved in anything other than part-time employment or that he was contributing towards the claimant’s maintenance. Additionally, no evidence has been led as to his state of health or to his likely vocation on leaving high school.

[30] The obvious difficulty in this case is that the deceased, although he did one holiday job and worked at a supermarket on some weekends, had not really entered the working world which would have an implication on his earning capacity and as a consequence, on the dependency on him by the claimant. Additionally, it is well known that the calculation of damages arising from fatal accidents or other wrongful causes is by nature a very speculative exercise.

[31] Lord Diplock, in **Cookson v Knowles** [1978] 2 All ER 604 at page 608 discussed the degree of speculation on which a court must embark thus:

“This kind of assessment, artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow’s death, but also as to the hypothetical degree of likelihood that all sort of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing to work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill-health? Would they have increased and if so, when and by how much? To what extent if any would he have passed on the benefit of any increase to his wife and dependent children?”

[32] In the case of **Jestina Baxter Fisher & Anor v Enid Foreman & Owen Moss** Claim No. 2003 HCV 0427, unreported, delivered October 15, 2004, Clarke J. at page 24 of his judgment said:

‘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.’

[33] The House of Lords decision in **Taff Vale Railway Co., v Jenkins** [1913] AC 1, 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.

- [34] The deceased in that case was 16 years old at the time of her death, as was the deceased in the case at bar. It was proved that she lived with her parents and 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.
- [35] The court is therefore mindful that the claimant may not be able to provide actual proof in relation to the issues and has to rely on the evidence presented, especially as to the future prospects had the deceased lived, once it is credible. The mere possibility that a child when grown would maintain his parent is, however, not sufficient.
- [36] Counsel for the claimant had submitted that the deceased had aspired to become a psychiatrist and based on his subject choice it is very likely that he would have gone on to achieve his goals in the medical field , as his teachers recognized his potential. The evidence however has not disclosed this. The evidence is that the deceased was “a humble and dedicated child...very involved in activities at his school... an avid student with his grades bordering the excellent and very good range...”.
- [37] The court therefore has to determine if this case falls within the context of cases such as **Taff Vale** and find if the evidence presented is sufficient to show the prospective earnings of the deceased or the likelihood that he would have been inclined or been in a position to assist her during her later years.
- [38] There is no evidence that he had indicated what he hoped to be and neither is there any evidence that he contributed anything from his part time income to his mother. The claimant has also failed to provide any evidence to show that had he survived, it is probable that he would have been in some particular form of employment from which it is likely that he would have earned a living and the likely earnings that would come from such employment.

[39] I agree with Counsel for the defendant that the claimant has not proven that it is more likely than not that she has suffered a material loss of dependency due to her son's death. No evidence has been placed before the court to show that the claimant had a reasonable expectation of any pecuniary benefit from the continuance of the life of the deceased and neither is there any evidence to show that he gave any of his earnings from the holiday job at the Library or from his part time employment at the supermarket to his mother or that it is likely that he would have assisted her in the future. There is therefore no evidential basis on which an award for loss of dependency can be made.

[40] In relation to the claim for special damages, the claimant has specifically pleaded the sum of \$61,650.00, in the particulars of claim. .

[41] Counsel for the defendant expressed the view that the claimant has not proven that she is a dependant for the purposes of the FAA so she could not claim for expenses incurred and pointed out that although she has strictly pleaded her particulars, she has not provided any documentary proof of expenses incurred at the funeral, the cost of procuring the death certificate and the Post Mortem Report and transportation costs to the funeral.

[42] I am guided by the Court of Appeal decision in the case of **Reginald Brown (father and near relation of Demory Brown, deceased) & Alberta Tugman (mother and near relation of Demory Brown, deceased) v Balford Douglas & Ors**, [2015]JMCA Civ 18, delivered march 13, 2015, where Demory, a 16 year old student fell from a moving bus, was crushed by the wheels and died instantly, and Brooks JA at paragraph [33] of the judgment in relation to the FAA said:

“The scheme of the Act is to secure compensation for near relations for “actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person” Section 4(4). The section is not restricted to securing compensation for “dependants”. A near relation who has incurred expenditure, such as funeral expenses, has incurred “actual...pecuniary loss...by reason of the death of the deceased person.”

- [43] This court accepts that the claimant is a near relation of the deceased as required under the FAA, and therefore finds that she can recover such expenses as a claim for funeral expenses may be allowed by s. 4(5) of the FAA
- [44] I find that it was necessary in the circumstances for the claimant to incur transportation costs as a result of the death of the deceased. The absence of evidence as to the mode of travel or of receipts in my view is not a bar to her claim as this court is of the view that based on the circumstances of this case and bearing in mind her evidence that she did not consider it important at the time to request receipts where none was given or to keep those she got, I find that this is a fit case for the court to relax the general principle and not insist on strict proof of payment of the sums claimed. The sum of \$11,200.00 claimed appears to be reasonable and as such the court is inclined to allow same.
- [45] The claimant has also claimed \$3,200.00 for procuring the Post Mortem report and the sum of \$47,250.00 which she states were for food and other items relating to the preparation for the funeral of the deceased. She has not provided any receipts or documentary evidence to substantiate these claims. In view of my earlier finding, I am inclined to allow the sum claimed as I find that it was necessary for these sums to be expended in the circumstances and find that sums claimed are reasonable.

The Claim under the LRMPA

- [46] 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. Under the Act, the estate of the deceased is therefore entitled to benefit from any claim to which the deceased would have been entitled.
- [47] The personal representative of the estate of the deceased, may file a claim for damages in the tort of negligence in the same manner as that person could have done if he or she were alive.

[48] The case of **Ingall v Moran** [1944] KB 160, referred to by Counsel for the defendant, sets out some of the principles which I find are relevant to this matter. There it was held that the proceedings brought by the plaintiff were a nullity. The court held that:

“the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of relation back of an administrator’s title, on obtaining a grant of Letters of Administration, to the date of the intestate’s death could not be invoked so as to render the action competent”

[49] In her amended particulars of Claim, the claimant indicated that she has applied to be the personal representative of the estate of the deceased but has not shown that at the time of filing the claim she was appointed as the administrator.

[50] The authorities show that it is the grant of Letters of Administration in the estate of the deceased which clothe the personal representative to act, for example, to bring a claim. The claimant has not shown on the evidence placed before the court that she is the personal representative of the deceased or that she was appointed as administrator of his estate. As such, her claim under the LR(MP)A fails.

[51] In view of the foregoing, damages are assessed and awarded as follows:

Special damages awarded in the sum of \$61,650.00 with interest at 3% from January 21, 2009 to the date hereof.

Costs to the claimant to be agreed or taxed.