

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1981/J011

BETWEEN

WENSLEY JOHNSON
(Administrator of the Estate
of ELIZABETH ARLEEN JOHNSON
deceased).

PLAINTIFF

AND

SELVIN GRAHAM

AND

ROY JONES

DEFENDANTS

R. S. Pershadsingh Q.C. and A. Mundell for Plaintiff.
Mr. D. Scharschmidt instructed by Miss Yvonne Brett of Messrs.
Robinson, Phillips and Whitehorne for Defendants.

Heard: 30th June, 1982; 7th October, 1982; 8th October, 1982;
14th and 15th February, 1983.
Delivered: 15th July, 1983.

ELLIS J. (AG.)

The Claim

The Plaintiff claims under -

- (i) The Fatal Accidents Act damages for two dependants of the deceased.
- (ii) The Law Reform (Miscellaneous Provisions) Act damages for the benefit of the deceased's Estate.
- (iii) Special Damages incurred as a result of the death of the deceased.

The Facts as to death of Deceased.

On the 15th of February, 1980 Elizabeth Johnson was on the sidewalk at Siding Main Road in Highgate, St. Mary. A motor truck E6155 owned by the first Defendant and driven by the second Defendant struck her. She was seriously injured and died as a result of the injuries she received. She was aged nearly 19 years at the time of her death. It was alleged that the acts which fatally injured the deceased were negligent and that allegation was not challenged.

The Dependants and Dependency

It was alleged that the Dependants were (a) the deceased's mother, Mrs. Barbara Johnson and (b) her 6 year old brother Edward Johnson. It was further alleged that the deceased worked on Saturdays for 39 weeks and for 13 full weeks during school holidays. She earned

2.

\$15 per Saturday and \$65 per week for 13 weeks. Her total earnings for the year was therefore \$1,430. Of that amount, she contributed \$476.66 to her mother and \$476.66 to her brother Edward and the balance of \$476.66 she used personally.

Future prospects of higher earning by the Deceased.

The deceased at time of death was nearly 19 years old and was in fifth form at Marymount High School and had taken subjects in the Jamaica School Certificate Examination. She wished to become a bi-lingual secretary. Evidence was led to say that a bi-lingual secretary could earn between \$1,200 - \$1,600 per month. In the circumstances it was the contention that the deceased had good prospects of high future earnings.

On the above, I have been asked to assess the Damages. Mr. Pershadsingh submitted arguments on behalf of the Plaintiff on the following points:

1. The Special Damages of \$3,382 as claimed.
2. Damages for Loss of Life.
3. Damages for loss of future earnings and the multiplier - "Damages for the Lost Years".

In relation to the Special Damages of \$3,382, he said that there was no contest. Mr. Scharschmidt did not dispute that statement.

On the point of damages for Loss of Expectation of Life, he cited the case of Benham v. Gambling (1941) 1 A.E.R. 7. In that case, the House of Lords awarded an amount of £200 as damages for Loss of Expectation of Life. Although the present tendency is to award moderate sums as damages under this head, Mr. Pershadsingh invited me to take into account the depreciation in the value of money when making an award and in that respect he cited the case of Gammell v. Wilson 1981 2 W.L.R. 248. He argued that there is no doubt or any serious contention that the deceased was working at the time of her death and that she contributed a total of \$953.32 to her mother and brother. He asked the court to find that at some stage the deceased would cease working part time and work full time at a minimum of \$65 per week or \$3,380 annually. Such a change would as a consequence, result in an increase in the

3.

contribution to each dependant from \$476.66 - \$1,126.

He submitted that the court could speculate as to what the deceased's earnings would be and that it would not be unreasonable to assume earnings of more than \$65 per week in keeping with deceased's potential increase in earning capacity. In all the circumstances, he said, a multiplier of 20 would be a proper figure.

Mr. Scharschmidt submitted that no dependency has been established. He argued that dependency is a question of fact and in this case the Plaintiff Johnson stated that the deceased was dependent on him and that it took more than \$10 per week to take care of the deceased. In support of this contention, he cited Paragraph 4264 of English and Empire Digest and the case of Simmonds v. White 1899 1 Q.B. 1005. He argued that the evidence led in respect of earnings of a bi-lingual secretary is hearsay and should be ignored. He challenged the suggested period of 20 years purchase as being inordinately high and argued that it should be no more than between $4\frac{1}{2}$ - 8 as was awarded in Lynch v. Moreland, Times March 14, 1969 (P. 329, Kemp and Kemp Vol. 1, 4th Edition).

On the subject of Damages for "Lost Years", Mr. Scharschmidt submitted that there must be a factual situation which warrants an application of the "Lost Years Principle". He said that if the principle applies the whole circumstances of the deceased are relevant. The court must find what would have been the "living expenses" of the deceased. The amount which remained should be the multiplicand in computing damages for "Lost Years". He argued that in this case there is no evidence given as to what the deceased's "living expenses" would have been.

I have stated the arguments of the Plaintiff and Defendant as I understand them. Both attorneys cited several cases and principles which I have not stated in the arguments. That omission is only in keeping with my attempt to be brief as possible and is not to be viewed as any disrespect to the Attorneys.

4.

Was there a dependency in this case?

From the evidence, the deceased was earning wages at the time of her death; and from those earnings it is alleged that she gave 2/3 to her mother and brother in equal share. The mother and brother by the definition in the Fatal Accidents Act are "near relations".

Section 4(4) of the Fatal Accidents Act is as follows -

"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 by reason of the death of the deceased person and the amount so recovered (.....) shall be divided accordingly among the near relations".

I read the subsection to afford a competence to a court to award damages appropriate to actual or reasonably expected pecuniary loss to a near relation.

To my mind, actual or reasonably expected pecuniary benefit must of necessity create a dependency. But according to the Defendant's attorney, in this case there can be no dependency since

- (a) The deceased's father stated that he gave her in excess of \$10 per week.
- (b) The deceased contributed less than what it took to maintain her, she was herself a dependant.
- (c) The plaintiff has pleaded that there was a dependency, not the possibility of a dependency, the principle stated in Taff Vale Railway vs. Jenkins 1913 A.C. is not applicable.

I do not hold that the case of Simmonds 1899 1 Q.B. 1005 is supportive of what is a dependency under the Fatal Accidents Act. When the case is read, it is clear that the definition propounded there is peculiarly referable to matters under Workmens Compensation Acts and cannot be adopted to define dependency under the Fatal Accident Act.

The fact that the deceased received money weekly from her father in my view, is not fatal to or inconsistent with a situation of dependency in the present case. My view as stated is fortified by the case of Kandalla v. British Airways Board (1980) 1 All E.R. 345.

In that case, in which claims for the death of deceased persons were made under the Fatal Accident Act and The Law Reform (Miscellaneous Provisions)

5.

Act, evidence was given that the father of the deceased persons gave them substantial amounts even while the deceased were earning good salaries as doctors. That fact appears not to have inhibited the court from finding the existence of a dependency on the deceased by their father and mother. In any event, the father in this case - the person who gave money to his daughter weekly, does not claim as a dependant but as her Personal Representative. On the face of it, the argument that where a deceased contributed less than what it took to maintain him there can be no dependency on the part of the recipient of that contribution, looks attractive. However, it is with respect, fallacious. A dependency cannot rest solely on the existence of a surplus of contribution over what the contributor receives from the household. The case of Lynch v. Moreland at Kemp and Kemp 4th Edition Volume 1 at page 330 bears this out. In that case the deceased gave £4 per week to her mother. Her mother said that the deceased keep cost £1.10 per week. Brabin J. considered that £1.10 as keep for the deceased was a rather ambitious amount even assuming that she ate very little. The judge gave no indication that contribution should exceed cost of keep and found that there was a dependency.

I am, in all the circumstances, concluded that there was a dependency on the contribution of the deceased.

Who benefits from that Dependency?

The allegation is that the deceased contributed two thirds of what she earned to her mother and brother in equal shares. It is not unusual for a sister to contribute to a brother's maintenance. However, in this case, the allegation that the deceased contributed one third of her earnings to her brother should be carefully examined. The deceased was a school girl who did part time work at a store in Highgate. Her father was and still is an Inspector of Police and they all lived in one household.

Would a girl in the circumstances reasonably be expected to contribute one third of her meagre earnings to the upkeep of her brother?

On a common sense approach, I answer that question in the negative. Having done so, I must reject the brother as being a

6.

dependant of the deceased. The mother is a dependant and the question is, to what monetary extent was she a dependant?

Since the deceased lived at home, it is reasonable to say that she received as her keep a portion of what she contributed to the family fund. I am of the opinion that the deceased received at least two thirds of what she contributed to the family fund as her keep. In that case, from the \$476.66 which she contributed an amount of \$317.76 has to be deducted. The balance of \$158.90 is the amount of the dependancy. Having stated that \$158.90 is the annual dependancy, I have now to determine the period of its liability. The deceased was nearly 19 years old at the time of her death. Two of her sisters were already married and were married at ages 23 and 22/ ^{respectively.} Evidence was led to say that the deceased was an attractive girl. It is therefore reasonable to say that had she lived she would have married at an age between 22 - 24 years old. Using the extreme figure of 24, the period that would elapse before marriage would be five years. Five years is therefore the multiplier in the circumstances. I have so concluded bearing in mind that a court can only estimate a time in proceedings such as this.

I therefore assess the damages under the Fatal Accident Act to be $\$158.90 \times 5 = \794.50 with interest at 8% from the date of service of the Writ to date hereof.

Damages under the Law Reform (Miscellaneous Provisions) Act.

Under this statute, the following heads of damages are recoverable:-

- (a) Special Damages including funeral and testamentary expenses.
- (b) Damages for Loss of Expectation of Life.
- (c) Damages for Lost years.

In this case the Special Damages claimed are \$3,382 and there has been no dispute as to those damages. The Plaintiff is awarded \$3,382 as Special Damages with interest at 4% as of the 15th of February, 1980.

Loss of Expectation of Life

Under this head, the tendency is to award a conventional sum

7.

of moderate amount. In England, a sum of £750 was the standard figure awarded up to the decision in Kandalla v. British Airways Board (1980) 1 All E. R. 341. However, that figure has been increased to £1,750 and £1,250 in Gammell v. Wilson (1981) 2 W.L.R. 248 and White v. L.T.E. (1982) 2 W.L.R. 791. The average award in England based on the decided cases, would seem to be £1,500 for Loss of Expectation of Life.

Compensation for loss of Life Expectancy, ought to be the same universally and perhaps, since we follow English cases, a similar award should be made in Jamaica as in England. I am of the view, however, that damages should be reflective of what a country's economy can bear. The Jamaican economy is not as strong as the English economy and I would therefore assess the damage under this head to be an amount of \$2,750. This would be £1,000 at the official rate of exchange for the English Pound.

Damages for Lost Years.

The decision of The House of Lords in Gammell v. Wilson (1981) 2 W.L.R., 248 has confirmed the principle that damages can be awarded for the future loss of earnings of a deceased under the Law Reform (Miscellaneous Provisions) Act 1934. The House in arriving at its decision considered and interpreted Section 1 (2)(c) of the 1934 Act and concluded that the subsection does not preclude an award for damages.

The Jamaican Statute contains a similar provision at section 2(2)(c) and to which the interpretation of the House of Lords in the Gammell's case may be applied. Although Gammell is of persuasive authority only, the similarity of the section, which was considered there, with the Jamaican provision constrains me to accept the decision in Gammell as a good authority in Jamaica.

In Jamaica therefore, damages are assessable for future loss of earnings or the "lost years".

Assessment of the Damages.

In the Gammell's case cited above Lord Scarman at page 265 at letter E said as follows:-

"There is no room for a "conventional" award in a case for alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least

8.

capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation, it is the balance of probabilities which matters A teenage boy or girl as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situations there will be an assessable claim But in all cases, it is a matter of evidence and a reasonable estimate based on it."

Lord Scarman then went on to admit that the problem which has troubled judges in these cases has been the calculation of the annual loss before applying a multiplier. He said:-

"The principle has been settled in the speeches in this House in Picketts case (1980) A.C. 136. The loss to the estate is what the deceased would have been likely to have available to save, spend, or distribute after the cost of living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live, are out of place. The judge must make the best estimate based on the known facts and his prospects at the time of death."

My understanding of the cited portions of Lord Scarman's speech is that a judge in assessing damages for "lost years" is entitled to speculate as to the earnings of a deceased person, and that from the earnings there must be deducted an amount which the deceased would have used for his maintenance during the "lost years".

Although a judge is entitled to speculate, his speculation must be reasonable and should be shown to hang on some evidence of earnings. A judge's speculation should not take him into the realms of unreality.

In the instant case, the deceased at the time of her death was earning \$1,430 annually. I was invited by Mr. Pershadsingh to find that she would have qualified to be a bi-lingual secretary with the consequence that the alleged \$350 per week earned by a bi-lingual secretary should be a factor in assessing damages for the "lost years". The deceased was nearly 19 years at time of death but her academic achievements reflected only 2 passes at the Jamaica School Certificate Examination. Her age and academic qualification do not indicate a

9.

reasonable likelihood that she would have achieved a qualification of a bi-lingual secretary. Any such finding would not be reasonable and would be contrary to the principles stated in the Pickett's case and which was adopted as correct in Gammell's case.

What I apprehend from the evidence, is that had the deceased lived she would have been a moderate wage earner earning \$65 per week for 52 weeks or \$3,380 per year. I have arrived at \$3,380 by reasoning that at age nearly 19, the deceased would soon have embarked on full time work instead of working for only 39 weeks per year. It is my finding that the deceased would have expended $\frac{3}{5}$ or \$2,028 of her earnings on her personal maintenance and would therefore have a "surplus" of \$1,352 annually. Having found the surplus, the next factor is the number of lost years - the multiplier.

I am not convinced that 20 years multiplier would be reasonable. I find that a multiplier of 16 years is in keeping with the decided cases. In the circumstances, I assess the damages for "lost years" to be $\$1,352 \times 16 = \$21,632$. It will be noted that no deduction has been made of any amount which the deceased would have spent on her dependant. This is in keeping with the decisions in Pickett's case (1980) A.C. 136 and White v. L.T.E. (1982) 2 W.L.R. 791 at 799.

In summary, my assessments are as follows:-

1. Under the Fatal Accidents Act

\$774.50 with interest at 8% from the date of service of the Writ to date hereof.

2. Under the Law Reform (Miscellaneous Provisions) Act

(a) Special Damages of \$3,382.

(b) Damages for loss of Expectation of Life = \$2,750.

(c) Damages for future earnings \$21,632.

The total damages under this statute being \$27,764 with \$3,382 thereof to bear interest at the rate of 4% from 15th February, 1980.

10.

There is to be no set off as between the damages under the two statutes as the dependant is not the beneficiary of the deceased's estate.

The Plaintiff is to have his costs to be agreed or taxed.

LLOYD B. ELLIS
J. (AG.)