[2017] JMSC Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HVC 07139

BETWEEN	**ADMINISTRATOR GENERAL FOR JAMAICA (Administrator – Estate of David Benloss, deceased)**	**CLAIMANT**
AND	**PEOPLE'S FAVOURITE BAKING COMPANY LIMITED**	**1ST DEFENDANT**
AND	**ROMAINE HENRY**	**2ND DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 03013

BETWEEN	**LYNCENT SMITH**	**CLAIMANT**
AND	**ROMAINE HENRY**	**1ST DEFENDANT**
AND	**PEOPLE'S FAVOURITE BAKING COMPANY LIMITED**	**2ND DEFENDANT**

Mr. Manley Nicholson: instructed by Nicholson Phillips for the 1st Claimant

Mr. Marcus Greenwood: instructed by Lettman Greenwood & Co. for the 2nd Claimant

Mr. John Graham and Miss Peta-Gaye Manderson: instructed by John G. Graham & Co. for the Defendant.

Wrongful death and Injury – Multiplier/multiplicand – Loss of expectation of life – Pain and Suffering - Funeral and Testamentary Expenses – The Fatal Accidents Act - The Law Reform (Miscellaneous Provisions) Act. Driver acting as servant or agent - onus of rebutting presumption of agency

17th, 18th, 19th & 27th January 2017

IN OPEN COURT

CORAM: G. FRASER, J.

INTRODUCTION

[1] Where a person is injured as a result of the wrongful act, neglect or default of another, the common law allows the injured party to sue the person who has committed the wrong and to obtain damages. If an injured person expires as a result of those injuries wrongfully inflicted; at common law an action in tort for personal injuries also expires. Since 1955 however, statute law has provided that the claim against the person who caused the injury survives the death of the injured person. Section 2(1) of ***the Law Reform (Miscellaneous Provisions) Act*** provides that:

> ***"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, for the benefit of, his estate."***

[2] Section 3 of ***the Fatal Accidents Act***; additionally makes provisions in similar terms. If the injured person dies, his personal representatives can maintain an action for the benefit of his estate and claim damages on behalf of his dependants to recover any balance of loss which it can be proved that they have sustained.

[3] The rights conferred by the ***Fatal Accidents Act*** on the dependants of the deceased person shall be in addition to and not in derogation of any rights conferred for the benefit of the estate of the deceased. The effect of the statute is such that a sum recovered under ***Law Reform (Miscellaneous Provisions) Act*** shall be taken into account in assessing damages under the ***Fatal Accidents Acts***. It is, therefore, right, in assessing damages under the ***Fatal Accidents Acts***, to take into consideration and deduct any pecuniary advantage which has resulted to the beneficiaries.

[4] Two such claims have arisen in this case following events occurring on the 22nd December 2009. Constable David Benloss, then forty-six (46) years old, was a passenger in a marked "Highway Patrol" motor car, registered No. 203290 being driven by Sgt. Lyncent Smith along the Goshen Main Road in the parish of St. Elizabeth. One Mr. Romaine Henry who was driving a green Urvan Nissan motor truck registered CG7409 owned by People's Favourite Baking Company Limited; allegedly lost control of the vehicle whilst over taking a line of traffic, veered into the path of the oncoming service vehicle and thereby collided with it.

[5] Both policemen were eventually taken to the Mandeville Public hospital, Sgt. Smith was admitted for treatment as also Mr. Henry, sadly Con Benloss succumbed to his injuries and was pronounced dead on arrival.

THE CLAIMS

[6] A claim for wrongful death was filed on 20th December 2012 by the Administrator General of Jamaica. The claim is made pursuant to a ***Grant of Letters of Administration*** from the Supreme Court of Judicature of Jamaica issued on 28th August 2013; and is made on behalf of the deceased's estate and for the benefit of his near relatives; pursuant to the ***Law Reform (Miscellaneous Provisions) Act*** and ***Fatal Accidents Act*** respectively.

[7] Initially Sgt. Lyncent Smith was sued as a 5th Defendant being the driver of the motor vehicle in which David Benloss was travelling, so too the Commissioner of

Police was made a 4th Defendant to the suit for reason that the Claimant alleged he was the owner of the service vehicle and that Sgt. Smith was at all material times a member of the Jamaica Constabulary Force (JCF) and as such was acting or purportedly acting as servant and or agent of the Commissioner of Police/State. It is also in this vein that the Attorney General was joined in the claim as a 3rd Defendant; by virtue of the provisions of th***e Crown Proceedings Act***.

[8] Following myriad developments and applications in Claim 2012HCV 07139; proceedings were discontinued against the 3rd, 4th and 5th Defendants by way of notice of discontinuance filed on 2nd May 2016. The 5th Defendant had by then brought proceedings against Mr. Henry and People's Favourite Baking Co. Ltd; in a suit filed on 11th June 2015. Both Claims were ordered consolidated on 22nd February 2016 by Master Yvonne Brown as the issue to be determined and also the Defendants in both instances are the same.

[9] The essence of both claims against Mr. Romaine Henry is that he had operated a Nissan Urvan motor truck negligently; by driving at an excess or improper speed, failing to keep to his proper side of the roadway; overtaking without due regard for the safety of other road users and failing to take steps so as to avoid a collision. The Defendant, People's Favourite Baking Company Limited, a limited liability company is the owner of the Urvan Nissan motor truck that Mr. Henry was driving at the material time. The Claimants further aver, that the Defendant is the master or principal of Mr. Henry and as such the company is vicariously liable for the harmful acts, death and damages caused by Mr. Henry's negligent driving.

THE DEFENCE

[10] Initially when the Defence was filed in 2013; the Defendant, People's Favourite Baking Co. Ltd in its defence was content to say it did not admit the averment made by the Claimants as to the driver of its vehicle and his status as servant or agent. Subsequently in 2014, more than a year later the Defendant was allowed

to amend its defence and for the first time positively asserted that Mr. Henry "was **not** employed to the First Defendant and was not authorized to drive the Defendant's Nissan Urvan motor truck registered CG 7409". They are therefore seeking to avoid liability by distancing themselves from the actions of Mr. Henry and denying the existence of either master/servant or agent/principal relationship.

[11] The 2nd Defendant was served with the claim as initiated by the Administrator General in Claim No 2012 HCV 07139, but there was no acknowledgement of service or defence filed by that Defendant. An application was filed for default judgement on 18th September 2013 but there is no indication that the process was pursued or indeed granted. In respect of the Claim NO. 2015 HCV 03013 Mr. Henry although named as the 1st Defendant was never served and at this time any action against him is now statute barred. So the current trial seems to have proceeded solely against the Defendant People's Favourite Baking Company Limited.

UNDISPUTED OR AGREED FACTS

[12] There are not many points of disagreement where it concerns the events of the collision itself and the parties either agree to the following facts or they remained undisputed at the close of the evidence.

(a) *The First Defendant, People's Favourite was at all material time the owner of the Urvan Nissan Motor truck registered CG 7409*

(b) *That on the relevant date of 22nd December 2009 there was a collision between the Defendant's vehicle and a police patrol motor car registered 203920 and owned by the Commissioner of Police.*

(c) *That Mr. Romaine Henry was operating the Defendant's truck at all material times.*

(d) *That Sgt. Lyncent Smith was operating the police service vehicle at all material times*

(e) *That the collision occurred along the Goshen main road in the parish of St. Elizabeth, which is a roadway accommodating vehicular traffic in two lanes going in opposite directions.*

(f) *That the collision happened in the left lane as one faces the direction of Santa Cruz*

(g) *That Sgt. Lyncent Smith was maintaining his proper side of road and that Mr. Henry who was driving from the opposite direction failed to keep to his proper side of the road and came over into Sgt. Smith's path resulting in a collision of both vehicles.*

ISSUES

[13] The Defendant having denied that it is vicariously liable has sought to put "the claimant to strict proof" of liability. The issues for the Court's determination are three fold. Firstly is the 2nd Defendant, Mr. Henry negligent; If the answer to the first question is yes, then I must secondly determine whether the 1st Defendant was at the material time the master or principal of Mr. Henry. If this second question is answered in the affirmative, then a third question follows; that is, to what extent has the Claimants established the quantum of their damages? These are questions to be answered from the facts proven on the evidence.

[14] I am of the view that in considering the first issue, it is necessary to undergo a brief analysis of the law in relation to a motorist's duties to other road users while driving along a road; having regard to the conduct of both drivers in the particular circumstances of this case. In so doing, the question as to the liability of Mr. Henry will be answered from the facts that I find proved.

THE LAW

Duty of Care for Motorist

[15] There is no contention that a motorist owes a duty of care to all other users of the road to the extent that while driving he is expected to take care, and avoid damage and or injury to persons that are reasonably within his contemplation as

users of the road; this of course includes other drivers and passenger in other motor vehicles. A determination as to whether or not such duty is discharged will involve an examination of all the factual circumstances of each case and must involve but is not limited to an examination of factors such as:

(i) The speed at which the motorist was travelling; and whether he was observing any statutory limits
(ii) The nature of the location
(iii) The usage of the road
(iv) Contemplation of other road users, etc.

[16] I am also mindful of the provisions of section 51(1) (g) and 51 (2) of the ***Road Traffic Act,*** which to my mind cast a statutory obligation on motorist to ensure the safety of fellow road users; I now quote the sections as follows:

> ***51 (1) The driver of a motor vehicle shall observe the following rules – a motor vehicle***
> ***(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead;"***
>
> ***AND***
>
> ***"51 (2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection"***

[17] What is instructive in all the authorities is; whether a Defendant is negligent will turn on the particular circumstances of each case. In this case the decisive factor is whether Mr. Henry did or ought to have anticipated the presence of other vehicles driving on the opposite site of the road in the direction he was

proceeding. My view is that he ought to have been so able. Mr. Henry had a duty to ensure that it was safe to do so before executing his overtaking manoeuvre and he has breached that duty. Furthermore there is no evidence that indicates that he tried to avoid a collision.

[18] I accept and chose to act upon the account given by Sgt. Smith as to how the collision occurred; in any event his account is not disputed by any other evidence in this case. I find therefore that Sgt. Smith the other driver involved in the collision at all material times had maintained his proper side of road, did all he could to avoid a collision and was not negligent in all the circumstances.

[19] Taking all the evidence into account and having within my contemplation the statutory duty of care; I am of the view that Mr. Henry was not exhibiting the requisite care and skill required of him in all the circumstances of the case. I am also of the view that his negligent operation of the Urvan Nissan truck, was the sole cause of the collision and the consequent wrongful death of Con. David Benloss and the bodily injury suffered by Sgt. Smith. Mr. Henry has been criminally prosecuted and convicted for the death of Con. Benloss but he appears to be a man of straw and there is no monetary gratification that the Claimants are likely to realize from that Defendant.

VICARIOUS LIABILITY

[20] This brings me now to a contemplation of the hotly contested issue of vicarious liability. Vicarious liability is a form of strict, secondary liability that arises under the common law doctrine of agency (respondeat superior); the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the right, ability or duty to control the activities of a violator. What is required to ground liability; is that the violator stands in a particular relationship to the defendant and the tort is referable in a certain manner to that relationship**.** The relationships falling within this category include master/servant and principal/agent.

[21] In this case the Defendant seeks to deny liability by denying that any relationship of the required kind existed between the Defendant Company and Romaine Henry, at the material time. The Defence and Amended Defence in Claim 2012 HCV 07139 that were filed in 2013 and 2014 respectively assert a bare denial of the requisite relationship. Additionally the Defence filed in relation to Claim 2015 HCV 03013 avers that at the material time Romaine Henry "was **not** employed to the 2nd Defendant and was not authorized to drive the 2nd Defendant's Nissan Urvan motor truck registered CG7409".

[22] Whilst there is an admission that the 2nd Defendant's truck was indeed involved in the collision here is however no indication by the Defendant as to who was driving it at the material time; or if indeed Mr. Romaine Henry was driving how the truck came into his possession and control. The only evidence that speaks to the identity of the driver of the Nissan Urvan motor truck is that of Sgt. Rowan Atkinson who investigated and initiated the criminal prosecution against Mr. Romaine Henry for motor manslaughter.

Master/Servant Relationship

[23] Mrs. Pauline Ferron who is the Manager of the Defendant Company; testified that as far as she was "aware" Romaine Henry was not employed to the Company as driver and was not authorized to drive the motor truck in question. My impression of this bald assertion contained in her witness statement, is that these are not matters within her knowledge. The basis of my supposition is her evidence that her husband who is the GM was responsible for hiring staff. Additionally the assertion seems to be a marked departure from the averments in the Defence filed in 2015 which had categorically denied the relationship of master/servant vis a vis the Defendant Company and Mr. Henry in any capacity whatsoever; by asserting that Mr. Henry "was **not** employed to the 2nd Defendant". In her evidence in chief as contained in the witness statement; it appears that Mrs. Ferron is no longer disputing Romaine Henry's employment or status as servant, but rather seeking to denounce that he was authorized to drive

[24] In relation to the above inconsistent stance of the Defendant Company, I regard this to be a fundamentally serious issue and a challenge to the credibility and sincerity of the Defendant as it seeks to deny vicarious liability. As was adumbrated in the case o***f Dare v Pulham*** (1982) 148 CLR 658 at 664;

> ***"Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it … they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial …".***

Parties are bound by their pleadings and regard must be had to the certificate of truth that is endorsed on the several documents. In light of my above observations, I reject Mrs. Ferron's evidence and the Defendant's denial and find as a matter of fact that Romaine Henry was an employee of the Defendant, People's Favourite Baking Company Ltd.

[25] I must now then make a determination as to whether Mr. Henry was acting within the sphere or scope of his employment. Firstly, for the act of an employee to be considered within the scope of employment it must either be authorized or be so connected with an authorized act that it can be considered a mode, though an improper mode, of performing it. Or it can be stated in this other way; there are two ways of frequent occurrence in which a workman might go outside the sphere of his employment - the first, when he does work which he was not engaged to perform, and the second, when he goes into a territory with which he has nothing to do.

[26] Sgt. Rowan Atkinson testified that during the course of his investigations he had spoken to both Romaine Henry and his father. Both had informed him that they were both employed to the Defendant Company; the father as the designated driver and Romaine as his assistant. Both father and son also informed Atkinson that Mr. Henry (the father) was not well and whenever he was unable to drive Romaine would drive. The 22nd of December was one such occasion and Romaine "was sent to make the delivery to western Jamaica".

[27] Mrs. Pauline Ferron, Manager of the Defendant company has not indicated what Romaine's duties were as employee, neither has she indicated what if any limits were imposed on his employment; nor has she indicated that he was at any time expressedly forbidden to drive the truck whilst assisting his father or that he was acting in contravention of the Defendant Company's express policy and instructions to him, when he drove the truck on way to make deliveries of the Company's baked goods. I therefore find that in this case there is no evidence of a prohibition, the sphere or scope of employment must then be determined upon a general view of the nature of the employment and its duties.

[28] I ask myself the question what would be the duties of an Assistant who is employed to aid the Driver in the delivery of baked goods? To my mind and on these facts he must be assisting with the driving which is the core and essential duty of the driver and to ensure that the goods were delivered to the clients of the Defendant Company. If my assessment is correct; then the driving he does imprudently is not different in kind from anything he was required or expected to do and also is within the scope of his service.

[29] The test to be utilized and for the determination of vicarious liability of an employer is fulfilled if a man is doing what he was employed to do, though in a careless and dangerous manner exactly applies to this case (***Richard Evans & Co. v. Astley***, per Earl Loreburn L.C.). Mere prohibition of a particular act will not exempt the employer from liability if the driver's actions are so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. When an act is done by a servant for his employer's business, it is usually done in the course of his employment even though it is a prohibited act (***Zepherin v Gros Islet Village Council And Aurelien Augustin*** (1978) 26 WIR 56, ***Hamlet Bryan v George Lindo*** (1986) 23 JLR 127 (CA)). Further there are circumstances where the employer will be held liable for the tortious acts of an employee where a servant disobeyed an express direction (**Rose v Plenty** [1976] 1 W.L.R 141); An employer can also remain vicariously liable

notwithstanding the willful wrong of the servant (**Limpus v London General Omnibus Co**. 1862)

Presumption of Agency

[30] Vicarious liability is not peculiar to the relationship of master/servant but applies on similar principles to the relationship of principal/agent. As such the owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the motor vehicle has been loaned, as if the owner was a principal and the driver his or her agent (***Ormrod v Crosville Motor services Ltd.*** [1953] 1 W.L.R 1120; ***Morgans v Launchbury*** [1973] A.C 127)

[31] The principles relating to a presumption of agency was enunciated by the Privy Council in ***Rambarran v Gurrucharran***, [1970] 1 All ER 749; that:

> ***Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact. Additionally the onus of displacing the presumption is on the registered owner and if he fails to discharge that onus, the prima facie case remains and the plaintiff succeeds against him.***

[32] That these principles of law are applicable in this jurisdiction cannot be doubted, here I refer to the judgement of Clark, J. in ***Mattheson v Go Soltau and WT Soltau*** (1933) 1 JLR 72 where he said:

> ***"It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary, this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him."***

[33] In the Court of Appeal decision of ***Lena Hamilton v Ryan Miller*** [2016] JMCA Civ 59 at para. 31; whilst recognising that there is a presumption of agency that

arises from the fact of ownership; McDonald-Bishop JA nonetheless admonished that:

> ***"In the totality of the evidence" and further that "It is not sufficient, therefore, to simply base the fact of agency on the mere fact that someone is the registered owner of a vehicle, when there is evidence establishing other facts that would throw light on the issue".***

[34] Another precedent referred to by the learned Judge of Appeal is the case of ***Morgans v Launchbury*** [1973] AC 127, which she regarded as "another important case on this subject". In that case Lord Wilberforce posited at page 135 the following:

> ***"For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability".***

[35] One principle of law I have gleaned from the above authorities is that once there is evidence to rebut the presumption, evidence which raises a strong inference to the contrary, the court must decide the issue on the totality of the evidence. In this case however the evidence which I accept and the findings that I made are that Romaine Henry was an employee of the Defendant and at the material time was operating the truck not for his own use and benefit but the use and benefit of the Defendant's business. More importantly the Defendant has led no evidence which counterbalances the inference to be drawn from the ownership of the vehicle. It is therefore my finding of fact that the relationship of agent and principal existed at the material time between The Defendant Company and Mr.

Romaine Henry and in all the circumstances of the case the issue of vicarious liability prevails.

ASSESSMENT OF DAMAGES

[36] Having successfully overcome the hurdles of establishing liability the claimants are therefore entitled to an assessment of damages as are pertinent in the circumstances, and I will firstly deal with the case in Claim NO. 2015 HCV 03013 for the Claimant Lyncent Smith since it is less calculations are fairly straightforward

CLAIM BY LYNCENT SMITH

[37] The Claimant in the consolidated claim, Mr Smith's gave evidence on his own behalf. His evidence in chief comprised of the contents of two (2) witness statements dated the 17th February 2016 and 21st March 2016 respectively. He spoke of his ordeal arising from the events of 22nd December and said that he had lost consciousness consequent to the collision. Thereafter he was taken to the Mandeville Public Hospital where he was kept overnight for observations.

[38] The treatment received at that time included suturing to face and both legs. From this I infer that he had sustained a separation of skin or wounds in these areas of his body that required stitching. The witness also testified that he was feeling severe pain to leg and lower back and consequently sought medical treatment from Dr. Lincoln Little in Santa Cruz and was given painkillers.

[39] The witness spoke of abdominal pains and emergency surgery performed on the 31st December 2009 which resulted in a hospital stay of 12 days. There is no medical evidence to support that this was a consequence of the motor vehicle collision in which he was involved. By extension therefore the Claimant has not provided any evidence from which the Court can infer that this injury is a result of the negligence of Mr. Romaine Henry and for which the Defendant is vicariously liable.

[40] The witness spoke of visits to several doctors and specialists and that he underwent physiotherapy through the years up until 2015, however no supporting medical evidence has been provided to the Court. The particulars of injuries as indicated in the Claim are as follows:

(a) Pain in the neck
(b) Pain in the back
(c) Pain in the right hand
(d) Whiplash injury to the cervical spine
(e) Lower lumbar strain
(f) Right carpal tunnel syndrome
(g) Severe abdominal pain

[41] I make the observation that in relation to injuries listed at (e) – (g), there is no medical evidence to support them and the Claimant is not a medical expert with the necessary expertise to self diagnose such injuries. In particular, the Court does not know what caused the abdominal pain, nor the reason for the resulting surgical procedure.

[42] In the absence of supporting medical evidence, I cannot assume that the Claimant's confinement to a desk job is as a result of injuries received in the accident. I cannot assume that his pain to date is as a result of the accident. I cannot assume that the loss of amenities and restriction of physical activities are as a result of the accident. The Claimant has a duty to prove all these allegations albeit on a balance of probabilities and the Court is not to speculate or make an educated guess in any event.

[43] I do however accept the Claimant's evidence that he was feeling pain following the accident and in the areas indicated at (a) – (d) above. He was fitted with a cervical collar or in his words "I was given a cast to support my neck". It is reasonable to infer that the pain would have continued for a period of time and the witness testified that he was feeling pain in his right arm and back up to January 2010 and sought medical treatment for the same. I therefore find that the

Claimant had experienced pain and suffering as a result of the negligence of Romaine Henry for which the Defendant is vicariously liable. I also find that there is evidence that he was feeling resulting pain up to six (6) weeks after the accident.

[44] My task now is to determine a fair monetary award in respect of the pain suffered by Mr. Smith. This is not easily quantifiable; but Judges in this jurisdiction have sought to base their award on precedent. I am however mindful that such precedents are only a working guide and any award made will depend on the individual circumstances of the claimant. It is in this spirit that I view the case submitted by Mr. Greenwood for the court's consideration:

[45] Counsel Mr. Greenwood proffered as a comparable precedent the case of ***Irene Byfield v Ralph Anderson and Others, Suit*** N0. 1996 B 093, reported in Khan's Volume 5. In that case the Claimant had sustained injuries as a result of a motor vehicle collision. Her resulting complaints were:

I. Injuries to chest back and neck
II. Trauma to back resulting in lumbar strain
III. Severe back pains
IV. Abrasions to lower leg and stomach
V. Headaches

An award of $300,000 for pain and suffering was made at the time of assessment on the 18th September 1997 and which updates to $1,570,795 using the CPI of of 236.3 November 2016. Counsel is asking for a similar award or an award that is greater.

[46] Counsel Mr. Graham did not offer any precedents for the Court's consideration but he decried the ***Irene Byfield*** precedent. Counsel submitted that the claimant in the precedent would have presented supporting medical evidence on which that Court could make a proper assessment whereas in this case there was no such evidence. Counsel further submitted that in any event, Miss Byfield's injuries were far more serious that the Claimant at bar and the Court would have

to make a downward adjustment in the award. Counsel submitted that a suitable sum would be $500,000 - $700,000 having regard to the evidence elicited.

[47] The injuries detailed in the above precedent are somewhat analogous to the injuries suffered by the claimant herein, but to my mind with some marked variations. I will therefore make a comparison of the two cases and to say if the circumstances are sufficiently analogous so that this claimant should receive a similar award. At the outset it is my observation that Ms. Byfield's injuries in some instances seemed to have been far more serious than those sustained by the instant claimant and I also take into account the following:

i. Ms. Byfield suffered severe back pain and trauma to the back resulting in lumbar strain. Mr. Smith also allege lower lumbar strain and whiplash injury of the cervical spine and was fitted with a collar, but this was not deemed to be severe by any medical opinion.

ii. Ms. Byfield suffered from headaches, and had abrasions to lower leg and stomach. Smith had no headaches did not plead in his particulars of injury that he sustained wounds but made mention in his witness statement of suturing to face and legs.

iii. Ms. Byfield was treated for pain and so too was Mr. Smith. The marked difference in both claimant's condition is the medical evidence that indicated that Ms. Byfield after 4 years was still suffering severely and her condition had not improved. Her condition had impaired her ability to care for herself. The claimant at Bar was also given pain medication, but it appears that this was a one-time event on his visit to Dr. Little.

[48] I have examined the case cited and have compared it with the instant case, ever mindful it is not on all fours with the instant case. In my estimation this claimant is deserving of no more than 80% of the amount awarded to Miss Byfield taking into account the differences in both cases and the graver injuries sustained by Miss Byfield.

CLAIM BY THE ADMINISTRATOR GENERAL

[49] The pertinent evidence in relation to the deceased was led by the Claimant through a sole witness Mrs. Eulette Benloss, the widow of the deceased. The deceased David Benloss at the time of death was 46 years old. He was a police constable who was gainfully and steadily employed up to the time of his death. He was the sole bread winner for the family and would expend on his family 75% of his net salary. It appears that his sole source of income was the salary paid to him by the JCF. I have accepted this evidence to be truthful and will rely upon it as far as it can assist the court in its computations.

[50] Constable Benloss is survived by his spouse and four children, Akeem, Kersha, Mayo and Mikhail whom at the time of his death were all minors according to the four (4) birth certificates tendered as exhibits. There is no challenge by the Defendant as to the familial relationship of the spouse and children or that they were indeed dependents. The Defendant's counsel has however pointedly submitted that two of the children have attained the age of 18 years old since 2015.

Gross Earnings

[51] The deceased's last pay advisory which is dated November 2009 indicates a gross monthly earning of $124,205 and which includes an amount for extra hours or overtime pay in the sum of $13,270. There is no evidence elicited by the Claimant that the overtime is other than a one-time sum nor is there any evidence that establishes that overtime was guaranteed or likely to have continued for any appreciable length of time; so in my view it ought properly to be deducted so as to ascertain a true picture of the deceased's earnings. On making the deduction of the overtime I calculate that at the time of death the deceased's gross monthly earnings were $110,935.

[52] Had Con. Benloss survived and if he were currently employed at the same rank or was promoted; no doubt there would have been an increase in his income as

is expected of a member of the JCF. There was however no evidence presented to this Court as to any likely promotion or what increased earnings were attained by persons of the JCF since Constable Benloss' passing. There is therefore no evidence other than the pay advice from 2009 to assist the Court as to his gross earnings would presently be.

[53] Counsel Mr. Nicholson has asked me to assume and apply a 10% salary increase per annum; but was unable to support his submission by any authority and in the end had to abandon that submission. I have nonetheless given due consideration to the submission and am of the view that any award that the court makes as to lost earnings must be calculated on the admitted evidence of the deceased's known earnings at the time of death and since then. I cannot embark upon calculations based on speculations; notwithstanding my belief that the elements of an estimate should be weighed sympathetically; but they must also be weighed fairly, reasonably and with a sense of proportion. I am fortified in my opinion by the views expressed by Lord Fraser in the case of ***Cookson v Knowles*** [1979] AC 556 at 575, where he opined that:

> ***"The court has to make the best estimates that it can having regard to the deceased's age and state of health and to his actual earnings immediately before his death, as well as to the prospects of any increases in his earnings due to promotion or other reasons. But it has always been recognised, and is clearly sensible, that when events have occurred, between the date of death and the date of trial, which enable the court to rely on ascertained facts rather than on mere estimates, they should be taken into account in assessing damages."***

Funeral Expenses

[54] There was no objection taken in relation to the receipts tendered into evidence by the claimant and neither is the defendant taking any issue with them. I therefore find that these expenses have been satisfactorily proven and will be awarded in the proven amount of $226,000.

Administration Expenses

[55] As seems to be the norm in this case, there was no evidence led by the Claimant as to the cost of obtaining the Letters of Administration from the St. Elizabeth Resident Magistrate's Court. Counsel nonetheless is asking me to award the ost of $200,000 without more. It is not within the Court's competence to do so as these type of expenses are akin to special damages, and the law requires a Claimant to specifically plead and prove the same. This is not an expense that the Court can assume and award as reasonable, notwithstanding the relaxed stance taken by the Courts in recent times as it relates to some informal costs such as transportation. In the circumstances I decline to make an award under this heading as the same has not been proven.

Loss of Expectation of Life

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

> ***"It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L.C. in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of a 'positive measure of happiness' or of a 'predominantly happy life'."***

[57] The authorities in this jurisdiction also indicate that it is a conventional sum which is awarded under this heading; and Counsel for the defendant submits that the sum of $100,000 is appropriate as was pleaded. Counsel for the Claimant however is asking the court to award a greater sum having regard to the ravages of inflation, Counsel is not however relying on any stated authority that supports such an approach being followed by the Court. While I am aware that in the case of ***Temard Gordon*** (unreported, Claim No. 2006 HCV 01878, delivered 6th January 2011), a sum of $150,000 was awarded under this head; I choose to follow the Court of appeal decision of ***Attorney General of Jamaica v Devon Bryan***([2013] JMCA Civ. 3, delivered 8th February 2013) ; for reasons that it is a

decision of a superior court as also it is later in time being a 2013 decision, and I would therefore make a similar award of $120,000.

Loss of Earnings – "the lost years"

[58] The Multiplier-Multiplicand Approach under ***the Law Reform (Miscellaneous Provisions) Act;*** is an attempt to calculate the loss of income to the deceased estate during the lost years; (this refers to the years the deceased would have lived but for the act of the Defendant). In calculating this formula, account must be taken of not only the amount which the deceased spent exclusively on himself but also his contribution to shared family expenses. This is as it were a three (3) stage process as follows:

(v) Determining the multiplier – This is the period or number of years for which earnings have been lost
(vi) Working out the amount of the loss in weekly, monthly or annual terms
(vii) Working out the present capital value of that future loss

The Multiplier

[59] The age of the deceased at death was 46 years as gleaned from the evidence of his widow and also the death certificate tendered into evidence as an exhibit. Based on his industry and known state of health it is expected that David Benloss would have continued to be a part of the labour force for a few more years at least until retirement at 65. In seeking to determine an appropriate multiplier; the Attorney for the Claimant has cited two cases namely ***Carlton Brown v Manchester Beverage Ltd. and Administrator General v Thomas and Others*** and has asked the Court to give favourable consideration to those authorities; On the other hand Counsel for the Defendant has not presented any precedents for consideration on its behalf.

[60] It is my observation that what is reasonable varies from case to case and further the authorities relied upon by Mr. Nicholson still qualify as good law since they have not been overturned or doubted by a Court of superior jurisdiction. I have

considered all of these variables and bearing in mind also that this is not an exact science I find that a multiplier of "8" is not outside the acceptable parameters of reasonableness. I also note that the Loss of Estate using the multiplier of 8 years, save for one year would almost in its entirety be in the pre –Trial period, dating from date of death on 22nd December 2009.

The Multiplicand

[61] The net Income of the deceased is to be calculated arithmetically, that is to say the net income is derived after deduction of income tax and other statutory deductions. Thereafter the amount should be further adjusted by subtracting an amount representing what the deceased would have spent exclusively on himself, the balance would represent the multiplicand. In this case there is a dearth of evidence as to what the deceased's personal and exclusive expenses were or indeed what the provisions he would have made for his family.

[62] Counsel Mr. Nicholson submitted that the Court could apply the percentage approach having regard to the evidence of Mrs. Benloss that the deceased had spent 75% of his net income on the family and I could therefore assume that he would have spent the remaining 25% on himself exclusively. This approach he submitted had been commended in the case of ***Brenda Hill & Administrator General of Jamaica v The Attorney General of Jamaica***, [2014] JMSC Civ. 217 (judgement delivered on 19th December 2014). In that case a claim was brought both under the ***Fatal Accidents Act and Law Reform (Miscellaneous Provisions) Act*** where the deceased was shot and killed by agents of the state.

[63] I must hasten to point out that Lindo, J had recognised that the percentage approach had been rejected by the Jamaican Court of Appeal in the case of ***Jamaica Public Service Co. v Elsada Morgan***, (1986) 44 WIR 310. The learned Judge had also taken note that the Court of Appeal had nonetheless appreciated that the Court reserved the right to vary the method used to suit the needs of each case. Although Lindo, J. In that case had declined to adopt the percentage approach, and instead determined that the "best approach is to

assess the surplus to the deceased after deduction of his living expenses to arrive at a multiplicand". The Court had utilized that approach because she had clear evidence which enabled her to determine the living expenses of the deceased.

[64] In the instant case the court has no such evidence of what the deceased's living expenses were and unlike Lindo, J; who found "it difficult if not impossible to ascertain the expenditure on the widow... and the expenditure on the child"; I am able to determine this. The evidence of Mrs. Benloss is that 75% of the deceased net income was devoted to the support of his spouse and children during the deceased's life time. Perhaps then the time has come for this Court to be guided by the wisdom of the Court of Appeal and take that bold step in exercising reservation of right to vary the method used, in applying a percentage approach so as to suit the needs of this case.

[65] The ***Elsada Morgan*** case concerns a claim brought on behalf of the defendants under the ***Fatal Accidents Act***, and on behalf of the estate under the ***Law Reform (Miscellaneous Provisions) Act*** by the mother of the deceased workman against the Jamaica Public Service Company Limited and one Mr. Jackson. It is worthy of note that in the ***Elsada Morgan*** Carey, JA (of blessed memory) noted that the estate of a deceased plaintiff was not precluded by the Law Reform (Miscellaneous Provisions) Act from recovering damages for the deceased's loss of earnings during the 'lost years' in a claim under that Act. He found the opinion of Lord Scarman in ***Gammel v Wilson & Ors. and Furness and Another v B. and S. Massey Ltd*** [1982] AC 27; particularly helpful as he sought to lay down guidelines for the rational assessment of damages under this head (at page 78) Lord Scarman expressed himself in the following terms:

> ***"The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime... The loss is pecuniary. As such, it must be shown, on the facts found, to be at least 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...But in all cases it is a matter of evidence and a reasonable estimate based on it."

[66] I have given consideration to the percentage methodology and ultimately have accepted that this is a case where a different method of assessment of the multiplicand can be utilized and where the Court can assess the dependency as a percent of the net earnings of the deceased in a case of a widow and four (4) children.

[67] In assessing the value of the dependency, the courts in the UK have tended, in the absence of evidence to the contrary, to express the annual dependency as a percentage of the deceased's earnings. Thus, in the case of the death of a husband where there are no children, the widow's dependency is 66.6% of his earnings. Where there are children, the widow and children's dependency would be 75% of his earnings. The basis for this approach was well explained by O'Connor LJ in ***Harris v Empress Motors Ltd*** [1984] 1 WLR 212 at 216–7 where he adumbrated:

"In the course of time the courts have worked out a simple solution to the … problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependants are wife and children. In times past the calculation called for a tedious inquiry into how much housekeeping money was paid to the wife, who paid how much for the children's shoes, etc. This has all been swept away and the modern practice is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentages have become conventional in the sense that they are used unless there is striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided on its own facts. Where the family unit was husband and wife the conventional figure is 33% and the rationale of this is that broadly speaking the net income was spent as to one-third for the benefit of each and one third for their joint benefit … Where there are children the deduction falls to 25%."

[68] Armed with the guidelines as provided in the foregoing cases I make the following calculations:

Law Reform (Miscellaneous Provisions) Act

I.	Gross Annual Income at death (110,935 x 12)	$1,331,220.00
II.	Net Annual Income at death (after statutory deductions)	$1,118,672.76
III.	Self-expenditure at time of death (25% of net income)	$ 279,668.19
IV.	Multiplicand	$839,004.57
V.	Loss earnings for pre-trial years ($839,004.57 x 7)	$5,873,031.99
VI.	Loss earnings for post-trial years ($839,004.57 x 1)	$839,004.57

Total award to the estate = $6,712,036.56

Fatal Accidents Act

[69] At the risk of sounding like a broken tape recorder, this Court has very little evidence on which to make its computations. Having however accepted that the deceased spent 75% of his net pay on his family then I will use this evidence to the best of my ability. The annual average contribution is for 7 years pre-trial and one year post similar to what obtains under the ***Law Reform Miscellaneous Provisions) Act***. Since the Court has taken the approach that a percentage is more appropriate than the use of specific line items, I will simply allot each dependent a 15% share of the total dependency which translates to the sum of $167,800.91 per annum.

[70] Mrs Benloss as the widow is entitled to the benefit of the full eight (8) years purchase as a dependent and since there is no difference in respect of the pre-trial and post-trial net income of the deceased the calculations I make are in the sum of $1,342,407.28

[71] The two children Mayo and Mikail were 8 and 6 years old respectively at the time of the deceased death so they too would be entitled to the full 8 years purchase as dependents and a like award is made to each in the sum of $1,342,407.28.

[72] In respect of Akiem and Kersha, at the time of their father's death they were 12 years old and have attained their majority since 2015. They would therefore only benefit from 7 years purchase as dependents. The award made in respect of each is $1,174,606.37.

[73] The total dependency for the widow and 4 children is $6,376,434.58

DISPOSITION ON CLAIM NO. 2012 HCV 07139

[74] Judgement is given in favour of the Claimant and damages are assessed as follows:

Pursuant to the Law Reform (miscellaneous Provision) Act

I.	Funeral Expenses	$226,000
II.	Loss of expectation of life	$120,000
III.	Pre-trial loss of earnings	$5,873,031.99
IV.	Post-trial loss of earnings	$839,004.57

V. Interest on items at I & II at a rate of 3% per annum for 22nd December 2009 until today

VI. Interest on item III at a rate of 3% per annum from the 5th February 2013 until today

Pursuant to the Fatal Accidents Act

VII. Loss of dependency ($6,376,434.58 less award under ***Law Reform (Miscellaneous Provisions) Act*** $6,712,036.56) = $335,601.98

VIII. Cost to be agreed or taxed

DISPOSITION ON CLAIM NO. 2015 HCV 03013

[75] Judgement is given in favour of the Claimant and damages are assessed as follows:

I. General Damages for pain and suffering in the sum of $1,226,636, Interest to be applied at a rate of 3% per annum from 25th June 2015 until date of judgement

II. Costs to be agreed or taxed

III. There shall be a stay of execution for 4 weeks following the time when the written judgement is made available to the parties.