

Sup Ct - Action under Fatal Accidents Act and Law Reform (Miscellaneous Provisions) Act - whether negligence/breach of statutory duty whether contributory negligence - Aircraft crash - deceased pilot.
Da. niages - Quantum - Approach of Court in assessing - Apportionment

Cases referred to. See p15 (end)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1985/D239

BETWEEN

ALICIA DIXON
(Administratrix Estate
Christopher Dixon deceased)

PLAINTIFF

A N D

KENNETH HARRIS

FIRST DEFENDANT

A N D

THE ATTORNEY GENERAL

SECOND DEFENDANT

Mr. Dennis Goffe Q.C. and Mrs. Sandra Minott-Phillips for the Plaintiff.

Messrs. David Johnson and Leighton Pusey for Second Defendant.

First Defendant not appearing and not represented.

HEARD: June 29, 30, 1992, July 1, 2, 3, 20, 21, 22, 23, 24, 1992
and February 25, 1993.

CORAM: HARRISON J. (AG.)

JUDGMENT

On the 24th July, 1992, I completed hearing evidence in this case, reserved judgment and promised to deliver a written judgment. I do so now.

On the 26th November 1984, Christopher Dixon was a pilot flying a Cessna 206 aircraft from Boscobel, St. Mary to Kingston when it crashed at Middleton Mountain, St. Andrew. As a result, the deceased came to a rather tragic and untimely death. He was twenty-seven (27) years old at the date of death.

The plaintiff, as administratrix of the deceased's estate and his widow, brings this action for the benefit of the dependents of the deceased under the Fatal Accidents Act and for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act.

At the material time, the first defendant was an air traffic controller at Norman Manley Airport but the action was discontinued against him as he was not served with the Writ of Summons. The second defendant is sued by virtue of the Crown Proceedings Act.

The pleadings in the Statement of Claim seek to make the defendants responsible in Negligence and/or Breach of Statutory Duty for the death of Christopher Dixon.

**PARTICULARS OF NEGLIGENCE AND OF BREACH
OF STATUTORY DUTY OF FIRST DEFENDANT**

- (a) Failing to give the deceased proper air traffic control instructions.
- (b) Failing to observe the proper and accepted rules of Air Traffic Control.
- (c) Failing to pay due regard to the requirement of safe Air Traffic Control.
- (d) Giving the deceased an un-necessarily restrictive clearance.
- (e) Failing to ascertain, or attempting to ascertain most accurate information as to the height, speed, bearing and location of the aircraft being flown by the deceased.
- (f) Requiring the deceased to fly under special visual flight rules conditions before ensuring it was safe to do so.
- (g) Giving the deceased a special visual flight rules clearance instead of instrument flight rules clearance he had requested.
- (h) Giving the deceased a special visual flight rules clearance, although he had not requested same in breach of Air Traffic Control services.

**PARTICULARS OF STATUTORY DUTY BY THE
CIVIL AVIATION DEPARTMENT**

- (a) Failing to ensure proper supervision for the First Defendant.
- (b) Permitting a junior and inexperienced Controller to operate without supervision.
- (c) The plaintiff repeats the particulars at (g) to (h) above.

The Defence denied liability and has contended that the accident was caused or contributed to by the negligence and/or breach of statutory duty of the deceased.

**PARTICULARS OF NEGLIGENCE AND BREACH
OF STATUTORY DUTY**

- (a) Departing from Boscobel during the night without run way edge lights.
- (b) Departing from Boscobel outside the prescribed hours of operation of the aerodrome.
- (c) Failing to comply with Air Traffic Control instructions.
- (d) Failing to ensure that conditions enable him to remain clear of clouds.
- (e) Failing to determine his flight path with reference to the surface.
- (f) Failing to keep clear of obstructions.
- (g) Failing to comply with low flying rules.
- (h) Deviated from the intended track between Boscobel and Tinson Pen.
- (i) Continued the flight in meteorological conditions in which reference to the surface was lost.
- (j) Failing to maintain flight visibility.
- (k) Colliding with the terrain.

PARTICULARS ADDED BY AMENDMENT

- (l) Failing to observe the proper and accepted rules of the Air and Air Traffic Control.
- (m) Failing to comply with the rules governing special visual flight rules flight.

The parties agreed to the undermentioned documents being admitted as exhibits:

1. Aeronautical chart
2. Details of Aeronautical chart
3. Aircraft accident report

4. Tape transcript
5. Extract of verbatim notes from Enquiry into accident.
6. Copy certified copy of Letters of Administration in the Estate of Christopher Dixon.
7. Marriage Certificate of the deceased and plaintiff, Birth Certificate of plaintiff and Birth Certificates in respect of their children.
8. Extracts from Manual of Air Traffic Services.

As regards Exhibit 3, the parties further agreed.

(a) That the position of the aircraft referred to on page 1 of the document, should read "north of Highgate".

(b) That the words "he did not receive the fourth transmission from aircraft" on page 7, paragraph 1: 9 was not a finding of fact, but rather a recording of the contention of the controller.

(c) That at page 15 under the caption "Conclusions" and sub-caption "Findings", it is accepted that the first five findings are accurate. These findings were:

1. The commander was properly licensed
2. The Air Traffic Controller held the appropriate ratings.
3. The aircraft was properly certified and maintained according to the approved procedures.
4. The final departure from Boscobel was during the night without run way edge lights.
5. The departure was outside the prescribed hours of operation of the aerodrome.

The Colonial Air Navigation Order, 1961, published in P.R.O. of the 11th October 1962 prescribes the relevant rules for aircrafts flying in accordance with visual Flight Rules and Instrument Flight Rules.

Rule No. 23(1) (6) defines a special visual flight clearance as:-

"A flight in Instrument Meteorological conditions or at night which is not an I.F.R. flight and which is made with the permission of the air traffic controller". (emphasis is mine.)

Rule No. 25 requires an aircraft flying under Instrument Flight Rules to fly at a height not less than 1000 feet above the highest obstacle with a distance of five nautical miles of the aircraft unless the commander of the aircraft is authorised by a competent authority or unless it is necessary to do so in order to take off or land.

If the plaintiff is to succeed in this case, she must so far as breaches of statutory duty and negligence are concerned, establish the alleged breaches and in addition must prove that such breach(es) caused or materially contributed to the death of Christopher Dixon. It is therefore incumbent on the plaintiff to establish on a balance of probabilities, that the cause of death was due to the act or default of the defendants. This principle was clearly settled by the House of Lords in Bonnigton Castings Limited v Wardlaw [1956] All E.R. 615 and quite recently applied in Wilsher v Essex Area Health Authority [1988] 1 All E.R. 871. Of course, an onus is on the defendant to prove contributory negligence where it is relied upon.

What then is the factual situation whether by proof or by admission, showing how Christopher Dixon came to his death. There is no eye witness account of what transpired after the brief conversation between the air traffic controller and the deceased whilst he was air-bourne. Exhibit 4, the tape transcript, is of considerable importance. The relevant portions read as follows:

From

6 HW.

Manley

6 HW.

Recorded Intelligence.

Manley Six Hotel Whiskey.

Hotel Whiskey Manley go ahead.

Alright sir, we're ah off Boscobel for Tinson ah estimating Tinson at two two just met inadvertent I.F.R. by north of Highgate sir, we'd like a clearance to the V.O.R.

- 6 -

Manley O.K. understand you are requesting
an I.F.R. clearance to the V.O.R.
6 HW That's affirmative sir.
Manley Jamaica Zero Two Four whats your
level (unreadable)
JM 024 Jamaica twenty-four is out of twenty-
one hundred by Kingston V.O.R.
Manley Register zero Two Four report final
two nine.
JM 024 Twenty four.
Manley Hotel Whiskey you're cleared special
V.F.R. not above four thousand feet
within the O.K. you're cleared
to the V.O.R. special V.F.R. not above
four thousand feet.

Franklyn Smith was the pilot on board Air Jamaica flight 024 and was called as a witness for the plaintiff. He said during the course of his evidence, "I was puzzled when the controller gave the clearance with a restriction of 4000 feet and a small seed of concern was sown in my mind".

Smith's evidence is that he understood from the above transcript that the deceased had encountered a condition in flight which made it difficult if not impossible to continue flying by visual flight rules. In his view an Instrument Flight Rule clearance would have assisted the deceased in that he would be given a specific route to fly and an altitude or sufficient terrain clearance. He maintained that an altitude clearance of 6000 feet would have been expected since the deceased was north of Highgate.

Further evidence from Smith revealed that since the controller did not have an exact location of the aircraft, a clearance of 9000 feet would have been appropriate should the deceased have to go further to the east.

It is common ground that a special visual flight rule clearance will be issued only when specifically requested by a pilot. Once the request is made and permission is given by the controller, the pilot is responsible for ensuring that conditions enable him to remain clear of clouds and obstructions and to determine his flight path with reference to the surface.

Milton Watson, an air traffic controller and a defence witness admitted under cross-examination that at no time did the deceased request a special visual flight rule clearance and that it was reasonable to assume from Exhibit 4 that the deceased was asking for an instrument flight rule clearance. Frankly, I see no reason for this assumption as the evidence shows the controller to be saying "O.K. understand you are requesting an I.F.R. clearance to the V.O.R." and the deceased replied "that's affirmative sir". Watson maintained however that if the controller used his own initiative and gave a special V.F.R. clearance and it could not be complied with the pilot must notify the controller that he cannot adhere. Smith admitted that the pilot should say something in circumstances where weather conditions affected his flight.

Further evidence from Watson indicated that he had expected the clearance not above 4000 feet to have been complied with. He would have expected the deceased to select the Kingston V.O.R., pick up a radial from V.O.R. and fly directly to it. He concluded that a clearance not to fly above 4000 feet to the V.O.R. was safe under special visual flight rules.

I now turn to the question of liability. In determining this question a number of issues come to mind. There is evidence from the witness Franklyn Smith that the controller could not have known the exact position of the deceased's aircraft when the clearance was given. Furthermore, even if he were to assume that the deceased would have taken a direct path over Cooper's Hill from north of Highgate, a minimum clearance of 4057 feet was expected. This evidence has remained uncontradicted at the end of the day.

There is evidence that the deceased had requested a flight by Instrument Flight Rules. The controller on the other hand cleared him to a special visual flight which he had clearly not requested. The evidence in this case shows that weather conditions had developed hence the deceased's request for an instrument flight clearance. There is no evidence to support the conclusion reached by the defence witness Milton Watson, that the deceased went deliberately into clouds and that he could have avoided it. The question, to be resolved then, is whether or not the deceased knowing the prevailing weather conditions should have refused the clearance or say something to the controller indicating his concern.

Evidence has been adduced that it is the normal practice for a pilot to obey the controller otherwise, according to the witness John Blair "there would be chaos in the sky". Under special visual flight rules, the pilot must remain clear of clouds and obstructions and to determine his flight path with reference to the surface. The evidence in this case discloses that the impact occurred at a height of 3800 feet in the side of Middleton Mountain. It is quite probable therefore in my view that the deceased in complying with the clearance, deviated from his intended path to the Kingston V.O.R. The probabilities are also that time did not permit him to make further contact with the controller before the impact.

I find therefore that the clearance of 4000 feet was restrictive in light of the un-contradicted evidence of Franklyn Smith that at least 4057 feet was required to be given if the deceased were to have flown across Cooper's Hill. I accept the evidence led that the deceased ought to have been instructed to climb and maintain a height of not less than 9000 feet since the controller did not ascertain the exact location of the aircraft.

Further, I find that even if the controller had used his own initiative to issue the special visual flight clearance, he was under a duty to ascertain information as to height, speed, bearing

and location of the aircraft before issuing it. The controller's failure to ascertain or even to attempt ascertaining this vital bit of information was in my view a breach of safe air traffic control. The clearance was therefore inappropriate and definitely in breach of flight rules.

This Court therefore holds that on a balance of probabilities, the allegations in the statement of claim have been proved. The second defendant is therefore liable for the acts of the first defendant who at the material time was acting as a servant or agent of the Crown.

On the issue of contributory negligence I hold that it has remained no more than a mere allegation. The burden of proof which rests upon the defendant has not been discharged.

I now move on to consider the question of damages. In dealing with the problems posed by the evidence and in an attempt to arrive at a broad estimate of the financial loss involved, I have borne in mind the practical approach adumbrated by Lord Wright in Davies v Powell Duffryn and Associated Collieries (No.2) [1942] 1 All E.R. at page 665 where he states inter alia:

"There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities

The deceased was twenty-seven years old at the time of his death. Surviving him are his wife and three children. He died intestate. The children are Christina Alicia Dixon born December 6, 1979, Jennifer Anne Dixon, born July 29, 1982 and Christopher Luke Dixon born March 8, 1985. It will be observed that Christopher was born after the deceased had died.

By section 4(4) of the Fatal Accidents Act the Court is empowered to "award such damages to each of the near relations 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". In computing this loss the Court should

approach the matter thus:

1. Find the multiplier
2. Find the probable net earnings over the period between death and trial.
3. For the future years, assess a multiplicand, that is, the net salary and apply to it the balance of the multiplier.
4. Calculate the level of dependency of the near relations.
5. Add interest to the amount the near relations would have lost between death and the date of judgment.

So far as the Law Reform (Miscellaneous Provisions) Act is concerned, an award is usually made for the loss of expectation of life, funeral expenses, other special damages and the "lost years". The multiplier used under the Fatal Accidents Act is the same for the purpose of the Law Reform (Miscellaneous Provisions) Act.

The evidence revealed that the deceased was a pilot earning a gross monthly salary of \$3503.20 at death. His other income amounted to \$600 monthly. The annual net income for the deceased totalled \$45,711.60. The combined net annual income of deceased and plaintiff was \$67,311.60.

At this stage I propose to look at and determine the level of the dependency of the near relations. The total annual expenditure at death amounted to \$46,500 which included expenses for rent, motor car, school fees, clothing, doctor bills, dentist, electricity, water, telephone and food. It is quite obvious that the deceased's salary alone could not meet these expenses and was therefore supplemented by his wife. Of the \$46,500.00 I shall deduct \$5,200.00, an expenditure exclusively on the deceased. The total dependency at the time of death is therefore \$41,300.00 per year. This amount represents the amount spent exclusively on the dependents and on shared services which would be 90.3% of the deceased's net earnings or 61.35% of the joint earnings. The

difference in the percentages would be 28.68%. Reduce this percentage by 14.34%. Therefore, the dependency as a percentage of the deceased's net earning at death would be 75.09% or \$34,599.11.

Having determined the earnings and the amount of dependency, I shall now make an award under the Fatal Accident Act.

FATAL ACCIDENT ACT

My next task is to fix a multiplier. Learned Counsel for the plaintiff submitted that a multiplier of 14 or 16 should be used. Counsel for the Defence on the other hand submitted that one of ten (10) would be appropriate.

The deceased was only 27 years old at death and in apparently good health. He held a good job though risky. One could reasonably assume that he would have retired at age 60 years. In Jamaica Public Service Company Limited v Elsada Morgan, the plaintiff was 25 years at time of death. He was in excellent health. The Court of Appeal approved a multiplier of 14 years. I therefore accept the submission of Counsel for the plaintiff that 14 would be an appropriate multiplier.

My next task is to calculate the net earnings over the period 1984 to the present. It is quite possible that the deceased could have looked forward to an increase in earnings. He could also have been faced with increasing expenditure as the children grew older. On the other hand I have considered the possibility of a reduced income and also that of a fairly constant income. In the particular circumstances before me evidence of the career path of the deceased was projected. I am inclined to accept the submissions of Learned Counsel for the Defence that the Court would be wrong to conclude that the deceased would naturally progressed to have been employed by Air Jamaica. The witness, Mrs. Foster, a payroll officer at Air Jamaica was not in a position to state categorically the employment policy of that institution. No other witness was called by the plaintiff to indicate whether or not there was a policy whereby the deceased could have moved on to join Air Jamaica.

There is evidence however from Mr. Reid of Airways International, the company which had employed the deceased that the deceased was not only interested in flying but had an interest in management. No evidence was led however as to the salary of persons at that level with Airways International. He did say however that if the deceased was still employed by the company he would be receiving between \$300,000 to \$425,000 annually. I hold therefore that in due course, had the deceased continued his career path with the company he would in my view have been at least a senior pilot. I therefore estimate that the earnings of the deceased during this period would have been \$425,000.00 less tax, resulting in a balance of \$284,000.00. I have resolved therefore that this figure should be \$284,000.00. Therefore, 75.69% (that is, the level of dependency) of \$284,000.00 equals \$214,959.60. The median dependency in the years between death and trial would therefore be \$34,599.11 plus \$214,959.60 divided by 2 = \$124,779.35. This figure would represent the pre-trial multiplicand.

PRE-TRIAL:

The dependency for eight (8) pre-trial years would therefore be \$998,234.90.

POST TRIAL:

The length of post trial years would be 6 because of the multiplier of 14 years. The post trial loss would be \$1,289,757.60.

LAW REFORM (MISCELLANEOUS PROVISIONS) ACT:

Under the Law reform (Miscellaneous Provisions) Act would comprise loss of expectation of life, and loss of earnings to the estate of the deceased.

In Godfrey Dyer and Derrick Dyer v Gloria Stone (Ex Estate Edward Joslyn Stone) Campbell J.A. set out in clear language the steps which must be followed in ascertaining

the loss of future earnings for the "lost years". These steps are:

1. Ascertain from credible evidence the net income of the deceased at the date of death.
2. Where a relatively long period has elapsed between the date of death and trial of the action the deceased's net income at the date of trial must be restricted by reference to the net income being earned at the date of trial by persons in a corresponding position to that held by the deceased at the time of his death or by persons in a position to which the deceased might reasonably have attained. The average of the net income at 1 and 2 is considered to be the average annual net income of the deceased for the pre-trial period.
3. (a) Total of expenditures at the time of death which are exclusively incurred by the deceased to maintain himself reasonably consistent with his status in life.
(b) Add to (a) a portion of the joint living expenses like rent and electricity which under the Fatal Accidents Act would have been treated as wholly for the benefit of the dependants.
(c) Calculate the total of (a) and (b) as a percentage of the net income at the date of death.
4. Reduce the average net income for each of the pre-trial years by the percentage at (c). The remaining balances constitute lost earnings for these years.
5. The exercise is repeated for the post trial years but instead of deducting the living expenses which were computed as a percentage of the net income at the date of death from the average net income they are deducted from the actual estimated income at the date of trial.

CALCULATIONS:

PRE-TRIAL:

Net annual income at date of death	-	\$45,711.60
net annual income at date of trial	-	284,000.00
	Total	\$329,711.60
Average annual net income for pre-trial period	-	329,711.60 ÷ 2
		164,855.80
Total expenditure		46,500.00
Expenditure as a % of net income at time of death	-	$\frac{11,000.00}{\$45,711.60} = 24\%$
24% of \$164,855.80		= \$39,565.00
Loss earnings for pre-trial years	=	\$164,855.80 - 39,565
	x 8 =	\$1,002,326.40

POST TRIAL:

Lost earnings for post trial years
= \$164,855 - 46,500 x 6 = \$710,130.00.

In light of the above calculations I am expected at this stage to finally decide under which of the two Acts, that is, the Fatal Accidents and Law Reform (Miscellaneous Provisions), the beneficiaries would be entitled to their award. The principle established from the cases seem to suggest that a beneficiary who benefits under the Law Reform (Miscellaneous Provisions) Act cannot benefit under the Fatal Accidents Act except and to the extent that his/her dependency under the latter exceeds this amount. Of course, where the award under the Law Reform (Miscellaneous Provisions) Act is greater than the award under the Fatal Accidents Act, the award under the latter is completely extinguished.

In this case, the results which have been achieved from the various computations above indicate quite clearly that the beneficiaries would benefit entirely from the award under the Fatal Accidents Act.

Counsel for the plaintiff has requested the Court to apportion the award among the dependents. This apportionment

is as follows:

Christina	- 14%	= \$320, 318.93
Jennifer	- 16%	= \$366, 078.78
Christopher	- 20%	= \$457, 598.48
Widow	- 50%	= \$1,143,996.20

I would make the following awards:

1. Under the Fatal Accidents Act the sum of \$2,287.992.40 being the award to the widow and children.

2. Under the Law Reform (Miscellaneous Provisions) Act as follows:

(a) Funeral Expenses	- \$5,000.00
(b) Loss of expectation of life	- \$10,000.00

Final judgment will therefore be for \$2,302,992.40 with interest at 3% on the sum of \$998,234.90 being the pre-trial portion of the award under the Fatal Accidents Act from the 26th November, 1984 to the 25th February 1993. Interest at 3% is also awarded on the Funeral expenses of \$5,000.00 from the date of service of the Writ.

Cases referred to

- ① Bonnington Castings Limited v Wardlaw (1956) ALLER 615
- ② Wilsher v Essex Area Health Authority (1988) 1 All ER 871
- ③ Davies v Powell Duffryn and Associated Collieries (No 2) (1942) 1 ALLER 665
- ④ Jamaica Public Service Co Ltd v Elzada Morgan (?)
- ⑤ Geoffrey Dyer and Derrick Dyer v Gloria Stone (Ex Estate Joslyn Stone)