

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F.010 OF 1982

BETWEEN KATHLEEN FAKHOURIE PLAINTIFF
(Executrix of the Estate
of PETER GEORGE FAKHOURIE,
Deceased)

A N D LINDEN GREEN FIRST DEFENDANT

A N D THE ATTORNEY GENERAL SECOND DEFENDANT

Dr. L.G. Barnett instructed by Dorothy Lightbourne for the Plaintiff.

E.H. Oness instructed by the Director of State Proceedings for Second Defendant.

Heard on: March 27, 1985;
Delivered on: June 20, 1985.

JUDGMENT

BINGHAM, J:

Peter George Fakhourie died on 26th February 1981 as a result of a motor vehicle collision between a police motor truck driven by the first named defendant Linden Green and a Mercedes Benz motor car owned and driven by the deceased along the main road leading from Moneague to Faiths Pen in the parish of St. Ann.

The deceased was 51 years of age at the time of his death, married and a supermarket operator living at Claremont St. Ann. He has been described by his widow Kathleen Fakhourie as being in very good health before the accident which claimed his life. He was also described by her as being "a very good father to his children, a considerate husband as well as kind, upright, enterprising and hard-working." Prior to going into the supermarket business in 1979, the deceased, who was a Cost Accountant as well as trained in Management and had held a number of responsible positions with various businesses culminating finally in 1977 when he worked as Financial Controller/Administrative Manager with the Jamaica Biscuit Company. The letter of appointment issued to him on taking up this position in December 1977 fixed his total package for salary which included the use of a full maintained company car at a figure in the region of \$33,000.

It was this last salaried job which the deceased left in 1979 to go into business on his own as a supermarket operator at Claremont in St. Ann.

Although the deceased's wife testimony would tend to suggest that huge profits were realised during the years 1979 and 1980, she actually quoted a figure of \$40,000 profit for each of these years, I would not be minded to attach much weight to her evidence in this regard. There was no effort made by her to produce the Audited Balance Sheet showing the Profit and Loss Account of the operation of the business over the period that the deceased was alive and managing the Supermarket. Had this been done, one would get a more realistic picture of how well the Supermarket had fared over this period. Moreover, unless the deceased had accumulated a large amount of savings prior to going into business on his own, he would of necessity, and this is more probable than not, have had to borrow the Venture Capital required to launch the business from some financial Institution and such capital would of necessity have had to be repaid during the early years of the operation of the Supermarket. One need hardly add that on the evidence of Mrs. Fakhourie with two children, Peter Jnr. and Paul, both away at Institutions of higher learning, in these days a very mammoth task to say the least, and a business in a stage of relative infancy, it is highly unlikely that the deceased, to borrow Mrs. Fakhourie's own words, would have been able to spend between \$10,000 to \$15,000 per year on jewellery and expensive gifts for her during the years 1979 and upwards to his death. As Dr. Barnett has quite rightly submitted in my opinion, such a period would call for sacrifice to be made to cope with the extra effort which such an undertaking required on the part of both Mrs. Fakhourie and the deceased.

On the question therefore as to what figure ought to be resorted to in attempting to arrive at a reasonable sum as being the potential earning capacity of the deceased for the purposes of arriving at a datum in ascertaining the dependency under the Fatal Accidents Act, I would be minded to fall back on the salary that the deceased was earning in 1979 at the Jamaica Biscuit Company marked up by say ten percent to allow for a reasonable adjustment as to what the likely earnings of the deceased would have been, had he still been with that company at the time of his death

in February 1981. This would produce a gross annual income before tax of \$36,300. I have been lead along this path not only due to the fact that the deceased had not been long established in the supermarket business after a series of other jobs, but also from the fact that the general prospects of continuing profitability were uncertain. This is now bourne out ~~by~~ the evidence of Mrs. Fakhourie that since her husband's death, the business has now fallen on hard times and creditors are now pressing for payments of debts.

It is against this background that the plaintiff Mrs. Kathleen Fakhourie as Executor of the deceased estate by means of this representative action claimed on behalf of the Estate and the dependents under:-

- (1) The Fatal Accidents Acts damages for herself as the widow and her two children Peter Jnr. and Paul Fakhourie, as dependents;
- (2) Under the Law Reform (Miscellaneous Provisions) Act damages for the benefit of Estate of the deceased;
- (3) Special damages incurred as a result of the death of the deceased.

In the case of the first head claimed this is in respect of the "Lost Years" the deceased having been the bread-winner and the claim here is concerned with the actual loss of pecuniary benefit which would have accrued to the widow and the dependents but for the deceased's death. It is the deceased's ~~death~~ ~~due~~ to the tortious act of the defendants as a result of the negligent driving of the first named defendant that this head of the claim is concerned with.

The other two heads are concerned with claims which also survive for the benefit of the deceased Estate.

No appearance having been entered or defence filed on behalf of the defendants and Interlocutory Judgment having been in due course entered in favour of the ~~pl~~aintiff, leave was subsequently obtained for the matter to proceed to this stage and for damages to be assessed accordingly.

Liability therefore is not in issue. The sole question is what damages ought to be awarded under the three heads referred to.

It was alleged in the particulars as set out in the statement of claim and not controverted that the dependents were:-

- (1) The Plaintiff and widow now aged 54 years;
- (2) Peter Fakhourie, born on the 14th of July 1957, son;
- (3) Paul Fakhourie born on 26th January 1960, son.

Although the two sons were twenty-three years and twenty years respectively and both adults at the date of the filing of the Claim they qualified as dependents under the broad interpretation given to that term under the Fatal Accidents Act as they were being wholly maintained by the deceased while attending College abroad in Florida, United States of America. Peter Jnr. was studying to be a Commercial Pilot and Paul was specialising in Music and Public Relations.

The last two heads referred to may be conveniently dealt with at this stage as no serious challenge was made to most of the ~~sums claimed~~ by Mr. Oness who appeared for the 2nd defendants.

- (1) The Claim under the Law Reform (Miscellaneous Provisions) Act.

In so far as this head was concerned, Dr. Barnett has submitted that an amount of \$3,000 ought to be awarded under the Benham vs. Gambling principle for Loss of Expectation of Life. This figure ought to take into consideration the continuing slide in the value of the local currency.

Mr. Oness on the other hand has relied for support on the recent local case of Wensley Johnson vs. Graham and Jones CL. 1983 J O 11 an unreported Judgment of Mr. Justice Ellis. In that case Mr. Justice Ellis following Benham vs. Gambling made an award of \$2,700. That judgment was delivered in 1983. There has been an even more drastic fall in the currency since then of such an extent as to make Dr. Barnett's submission appear most reasonable in the circumstances.

I therefore make an award of \$3,000 under this head for Loss of Expectation of Life.

Under the head of Special Damages the sum of \$5,765 claimed for funeral expenses has not been challenged, was proved, and is allowed.

The next matter relates to a claim of \$24,000 being the value of the Mercedes Benz motor car which was wrecked in the collision which claimed the deceased's life. This sum has been challenged in its entirety by Mr. Oness on the basis that no evidence was adduced from an assessor as to the pre-accident value of the car and the value of the wreck. For this reason

he contends no award ought to be made to the Estate for the car. The evidence in relation to the car is that it was bought by the deceased in 1979 for \$27,000 and had been kept in good condition up to the time of the collision. Being a prestige car, a Mercedes Benz, it is common knowledge that such cars, properly maintained usually appreciate in value and would be worth more than ~~the~~ purchase price at the time of disposal by way of sale. Assuming that such was the situation in the case of this car, its pre-accident value would have been in excess of the price of \$27,000 which it was purchased for. One ought to take the figure of \$24,000 claimed therefore as allowing for such a lesser sum as being due to the amount taken into consideration as being the value of the wreck which would therefore vary between \$3,000 and such higher figure based upon the appreciated pre-accident value of the car at the time of the collision.

Although there has been no evidence adduced to show what has become of the wreck, as to whether it was sold or repaired, and if sold, for how much. I am minded to allow the amount of \$24,000 claimed as being reasonable in all the circumstances.

This leaves the sum of \$1,000 per month as a continuing claim calculated up to the date of the hearing as being salary paid to the deceased's daughter who was brought back home to assist in the management of the Supermarket. This sum is not allowed. Her presence if it was an asset to the business would result in greater profits accruing with the result that this sum would have to be absorbed out of the profits rather than been passed on as a liability to the party at fault, and therefore, a sum which is recoverable. This sum is to be seen in any event as part and parcel of the ordinary operating expenses of the business.

Under the Law Reform (Miscellaneous Provisions) Act the sums recoverable therefore, are as follows:-

(1) Loss of Expectation of Life	<u>\$ 3,000</u>
<u>Special Damages</u>	
(a) Funeral Expenses	\$ 5,765
(b) Value of Motor car	<u>\$24,000</u>
TOTAL	<u>\$32,765</u>
(2) <u>The Fatal Accidents Act</u>	

I now turn to the sum which ought to be recovered under the

Fatal Accidents Act and made available for distribution among the widow and the two children, Peter Jnr. and Paul as dependents, for what has been commonly referred to as the claim for the deceased "lost years".

The Multiplier

The deceased was fifty one years of age at the time of his death and was as been already stated described as being in good health up to the time of his death. Had he survived there is every probability that he would have continued working up to at least sixty five years of age. The "lost years" amount therefore to fourteen years but allowing for the uncertainties of life, I would reduce this figure to eleven years and this is the multiplier to be used and applied to the sum of \$36,300 which I have already determined as being the estimated gross annual income of the deceased at the time of his death in February 1981. When this calculation is done, this would produce a datum of \$399,300. This grand total has now to be scaled down by $2/5$ for tax purposes which would leave a sum of \$239,580.

The next step is to further reduce this sum by $1/3$ to allow for the deceased personal and living expenses or such sums as he during his lifetime would expend on himself as distinct from his household. When this exercise is carried out there remains a balance of \$159,720 and this amount is now the sum available for distribution among those who qualify as dependents under the Act. Dr. Barnett has submitted that the amount ought to be distributed in the following proportions:-

- (1) One-third ($1/3$) to the widow, Kathleen Fakhourie.
- (2) The remainder to be divided equally between the two children. Peter Jnr. and Paul Fakhourie.

I am minded to allow one-half ($1/2$) to the widow as based on her evidence she continued to maintain the younger son, Paul in college in Miami, following the deceased death, and to this extent she should now receive an extra benefit.

The end result will be that the manner of distribution of the fund of \$159,720 available under the Fatal Accidents Act will be as follows:-

(1) Widow Kathleen Fakhourie	<u>\$ 79,860</u>
(2) Son Peter Fakhourie Jnr.	<u>\$ 39,930</u>
(3) Son Paul Fakhourie	<u>\$ 39,930</u>
TOTAL	<u><u>\$159,720</u></u>

In my summary therefore my assessments are as follows:-

(1) Under the Law Reform (Miscellaneous Provisions) Act	
(a) Special Damages	\$ 29,765
(b) Loss of Expectation of Life	\$ 3,000
(2) Under the Fatal Accidents Act, apportioned in the manner as set out above.	<u>\$159,720</u>
TOTAL	<u><u>\$172,485</u></u>

Costs to the plaintiff to be agreed or taxed.

Interest on the Special Damages calculated at 3% as from the 26th of February, 1981 to today and on General Damages awarded under both Acts at 3% from the 29th of January 1982 to today.

D.O. Bingham
Puisne Judge