IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.G. 240/1983

BETWEEN	JUNIE GOULBOURNE (ADMINISTRATRIX OF ESTATE EARNOLD GOULBOURNE.)	PLAINTIFF
A N D	CLARENDON PARISH COUNCIL	FIRST DEFENDANT
A N D	STANLEY EWAN	SECOND DEFENDANT

John Vassell instructed by Dunn, Cox and Orrett for the Plaintiff.

Gordon Robinson, with him Patrick Brooks instructed by Nunes, Scholfield, DeLeon and Company for the defendant.

December 7th & 8th, 1988, June 6th, & July 6th, 1989.

CLARKE, J.

Reverend Earnold Goulbourne died on October 16, 1982 from injuries received in a collision the previous day between a motor vehicle driven by him and a motor vehicle owned by the first defendant and driven by its servant or agent, the second defendant, along the Bustamante Highway in the parish of Clarendon.

A past student of Holmwood Technical High School the deceased trained as a teacher at Mico College. In 1973 he graduated from the University of the West Indies with a B.A. degree in Theology. Shortly afterwards he was ordained as a Minister of the United Church of Jamaica and Grand Cayman. Up to the time of his untimely death he had the pastoral care of the North Street United Church in Kingston and was a teacher at St. Jago High school in Spanish Town.

His prospects in the Church were good. He was expected to be one of its outstanding Ministers. But for his death he would have gone on study leave in 1983 to read for the Master of Theology degree at the Columbia Theological Seminary in the United States of America.

A capable teacher of Mathematics and Religious Studies he was very interested in his work. However, had he embarked on postgraduate studies abroad for the year 1983, his teaching for that year would have been interrupted. Yet, on the basis of the evidence the probability would be that on his return he would have been re-employed in that area. In this connection the evidence

...../

shows that (a) there was a dearth of teachers of Mathematics, (b) that he liked to teach and (c) that his family needed the money from teaching.

Mr. Robinson's submission that on a balance of probabilities the deceased teaching career would have ended had he left Jamaica in 1983 to pursue further religious studies is not borne out by the weight of the evidence. Rather, it is plain that on a preponderance of probability teaching as a second job could and would have been pursued by the deceased without compromising his ability to function as a Minister even with one with growing responsibilities as Rev. Smellie, the Church's General Secretary, said would have been the case with the deceased. Rev. Smellie deposed that, except in the case of a Minister elected in the course of time as the Moderator or General Secretary of the United Church, with proper scheduling of his time a Minister could discharge his functions qua Minister while maintaining a second job such as teaching. On a review of Rev. Smellie's evidence as a whole I hold that it is probable that the deceased would have resumed and maintained his job as a teacher upon his return from postgraduate studies abroad without any adverse interference with his growing responsibilities as a Minister.

The deceased died intestate and his widow as administratrix of his estate claims damages for her benefit as a near relation of the deceased under the Fatal Accidents Act and on behalf of his estate under the Law Reform (Miscellaneous Provisions)Act. The Plaintiff has entered judgment against both defendants in default of defence. There is no issue as to liability in negligence. What falls to be determined is the quantum of damages to be assessed.

The marriage, solemnised in 1976, produced no children. The deceased was predeceased by his mother. His father survived him but died in December, 1982. The deceased died aged 33 years. His widow is now 36 years of age but when he died she was 29 years old. Up to the time of his death they were living together at the manse provided by the church and she was his sole dependant. That dependency would probably have continued had the deceased not died.

In approaching the computation of the dependency under the Fatal Accidents Act I adopt the method stated by Lord Wright in the well-known passage from his speech in Davies v Powell Duffryn Associated Colleries Ltd [1942] A.C. 601 at 617:

> " The starting point is the amount of wages which the deceased was earning ... Then there is an estimate of how much was required or expended on his own personal or living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years purchase."

On the basis of the relevant criteria the number of years purchase as the appropriate mulitplier to be taken into account in the instant case, will be greater than the six and two thirds years that have elapsed since the death and the date of assessment. In arriving at the capital award it is therefore necessary to calculate the dependency in two parts, namely, (a) from the date of death to the date of assessment (the pre-trial less) and (b) from the date of assessment until the end of the rest of the years' purchase (the future loss.) The reason for this is that unlike a personal injuries case where the injured person has survived the trial, in this a fatal accident case "the multiplier must be selected once and for all as at the date of death because everything that might have happened to the deceased after that remains uncertain" - per Lord Fraser in Cookson v Knowles [1979] AC 556 at 576, and also because there would otherwise be the undesirable anomaly that a dependant would recover more merely by delaying the date of trial.

In arriving at the pre-trial loss the best approach, I think, is to calculate the notional annual income including perquisites since death up to now and add them up. The agreed amount of 37% of annual salary from the church and teaching as representing the deceased's own personal living expenses per year is then to be deducted from the notional total net salary from both sources for that period. The future loss will then be assessed by multiplying the multiplicand by the rest of the multiplier.

I now go on to examine the evidence in order to arrive at the income the deceased would have earned during the pre-trial period had he lived.

The deceased's income came from two sources, namely:

(1) income from the Church which comprised a basic salary provision of a free furnished residence and the payment on his behalf of the utility bills in respect of the occupation of the residence;

(2) income as a teacher at St. Jago High School.

His net basic salary from the church for the pre-trial period of six and two thirds years has been agreed at $81,636 made up as follows: November and December 1982 it was $1012, $6074 for the year 1983, $7876 for 1984, $9551 for 1985, $13,298 for 1986, $13870 for 1987, $19970 for 1988 and $9985 for 1st January 1989 to 30th June, 1989.

The value of the provision of rent free furnished accomodation as well as the value of the provision of free utilities must also be taken into account. The value of the provision of free utilities has been agreed on both sides to amount to $4920 per year. So the value of the utilities for six (6) years, 1983 to 1988 inclusive would be $29520. The value for November and December 1982, having regard to the concessionary payment by the widow for those two months is $600. The value for 1st January to 30th June 1989 works out at $2460. The total value of the utilities for the pre-trial period therefore amounts to $32580.

An issue for resolution is whether the value of the provision of the free manse should, as Mr. Vassell contends, be the assessed market value over the years between death and now or whether, as Mr. Robinson asserts, the value over the period should be determined by having regard to the provisions of the Rent Restriction Act. In my view, once there is reliable evidence of the market value of the benefit, it is the loss of it to the dependant by the death of the deceased that falls to be assessed. In this way the Court essays to compensate the plaintiff for her actual loss, the provisions of the Rent Restriction Act being of no assistance in that regard.

The evidence shows that the rental of $300 per month which the plaintiff was paying in the two months immediately following her husband's death was entirely concessionary, plainly related, as it was, to the tragedy that occured. By not invoking the provisions of the Act the court is not condoning illegality or unlawful conduct but looks at the actuality of the widow's loss.

On the question of the market rental of the manse which was situate at 8 Hopefield Avenue, Kingston 6, I accept the evidence of Othniel Hall, an accountant. He is chairman of The Property Committee of the North Street United Church which provided the manse as a home rent free for the deceased as Minister of that Church. Although Mr. Hall has no academic training in the valuation of real estate he is trained by experience in that field. He has learnt from experienced realtors in his Church and has been managing, including renting, residences in the Kingston 8, 10 and 20 areas for some eleven years. In determining the rental of properties he takes into account criteria including the location of the property, its condition and the amenities provided. I am satisfied about his competence to depose as he did about the marked rental in the year 1982 as well as about the present range of increase over 1982 values of residences in the Kingston 8, 10 and 20 areas that he has been managing for clients. His evidence is that in 1982, based on the relevant criteria, the market rental of the manse would be $2500 per month furnished. Having regard to the burden of Mr. Hall's evidence that property values and rental have increased over 1982 ones I would regard the notional increase in the market value of the rent-free residence, now lost as a result of the deceased's death, as of the same order as increases in the rental values of the residences comprising Mr. Hall's portfolio at the time. Such increases, he deposed, range from 180% to 300% on the 1982 rentals of those properties.

My approach to the difficulty as to how to assign the increase is to take the bottom of the range of the rate of increase which is 180% and apply it from, and only from, the year 1988, that being the year the witness Othniel Hall testified of the range of increase over 1982 values. On that basis the value of the benefit lost by the widow up to now would be as follows: in respect of the months of November and December 1982 it would be $600 bearing in mind the concessionary rental then paid by her, $30,000 for each of the years 1983 to 1987, $54,000 for the year 1988 and $27,000 for January up to the present time. All these amounts total $231,600.

I agree with Mr. Vassel that in providing the furnished residence and paying for the utilities the act of the Church is no different than if it had given in cash to the deceased the market value of those benefits and the deceased expended that cash in renting premises of that kind and paying for

...../

utilities to that amount. These expenditures would be for the joint benefit of the deceased and his dependant and as such would not in order to establish the dependency, be deductible from his net earnings.

In so far as income from teaching is concerned the deceased would have earned nothing in 1983 because he would have been on the one year course of study. However, as I said earlier, it would be more probable than not that on his return he would have gone back into teaching and would have been earning in the same circumstances and on the same scale as he was earning up to the date of his death. Increases that would be applicable to a teacher would therefore apply. He was classified as a trained graduate teacher and the evidence shows what his net earnings would be as such a teacher from the year 1984 down to the present time. In 1984 it would be $10,460, in 1985 $11,202, in 1986 $16054, in 1987 $17,607, in 1988 $19997 and in 1989 (January 1st to June 30th) it would be $10,800. All those sums I calculate to total $87,608 together with the net salary of $1488 for the months of November and December 1982 following his death.

I calculate that the total pre-trial income from the Church and teaching would be $433,424 broken down as follows: $81,636 (net salary from the Church) $32580 (the value of the free utilities) $231,6000 (the value of the rent free furnished residence) and $87,608 (net salary from teaching.) I deduct from the sum of his net salary from the Church and teaching ($169,244) the agreed proportion of 37% ($62,620) representing the deceased's own personal or living expenses. That works out to $106,624. To that figure I add the value of the free utilities ($32,580) and the value of the free furnished residence (231,600) and in this way I arrive at the figure for damages under the Fatal Accidents Act to the date of assessment amounting to $370,804 plus funeral expenses of $2766 giving a total of $373,570.

I turn to the question of future dependency. Six and two thirds years have elapsed since the death. What is the appropriate multiplier to apply? Although there are many imponderables in cases such as this, I bear in mind that the deceased was 33 years old at death, that though, as Rev. Smellie said, the retirement age for Ministers is 65 years they often go on beyond that age, that the deceased was in good health and that as he was a capable

...../

Mathematics teacher and promising Minister he was not likely to be unemployed. I also take into account the fact that the widow, the sole dependant, was 29 years of age when he died and that the dependency was likely to last for the rest of his natural life. Therefore in all the circumstances including the age and what would have been the likely remaining working life of the deceased, the possibility (I put it no higher than that) of him becoming over time, out of a complement of 50 to 53 Ministers, the Moderator or General Secretary of the Church, the age of the sole dependant, the probable duration of her dependency and the fact that a lump sum is being paid now rather than payment by instalments, I consider that it is reasonable that I should take a multiplier of a further eight and one thirds years (making it 15 in all) and a multiplicand of $84100 in round figures (the dependency for the year 1988, ie 63% of the total net salary from both sources for that year ($25,179.21) plus the value of the manse and the utilities for that year ($58920).

So I arrive at a figure of $700,833. To that sum I now add the pre-trial loss assessed at $373,570 and arrive at the sum of $1,074403 which is the total damages I assess under the Fatal Accidents Act.

I now turn to the claim under the Law Reform (Miscellaneous Provisions) Act for the benefit of the deceased's estate. For loss of expectation of life I award the sum of $5000. I go on to assess the damages recoverable by the deceased's estate for the deceased's loss of earnings in the "lost years", ie the years in which he would have been earning had he lived. As Lord Wilberforce observed in Pickett v British Rail Engineering Ltd.[1979] 1 All E.R. 774 at 782, the basis for recovery is the interest which the deceased has in making provision for his dependant and others and this he would do out of his surplus. So the recoverable amount in respect of earnings in the lost years is the sum remaining after deduction of an estimated proportion representing the deceased's probable living expenses during those years. Therefore in computing the annual loss before applying the multiplier, I bear in mind that "the loss of the estate is what the deceased would have been likely to have available to save, spend, or distribute after meeting the cost of his 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" - per Lord Scarman in Gammell v Wilson and Ors. [1982] A C 22 at p.78.

That approach of Lord Scarman's found favour with our Court of Appeal in Jamaica Public Service Co. Ltd. v Elsada Morgan and Anor. (unreported S.C.C.A no. 12/85). There the Court was unwilling to accept the precise mathematical formula set out in Harris v Empress Motors Ltd [1983] 3 All E.R. 561 (C.A.) as the basis on which the Court might arrive at the sum to be regarded as the deceased's living expenses in determining the lost years earnings under the Law Reform (Miscellaneous Provisions) Act. That unwillingness was justified by Carey J.A. in Elsada Morgan on the ground that unlike the United Kingdom where the experience there has led courts in that domain to accept a precise mathematical formula we have no relevant statistical accumulation of data in this country to allow for this.

Based on the factual realities in Elsada Morgan the court in that case approved a sum of $30 out of a weekly wage of $50 as being the surplus for the calculation of the lost years earnings. In the present state of our law what I am required to do in assessing damages in this highly speculative area is to discover on the available evidence what proportion of his net income the deceased would spend exclusively on himself to meet the cost of his living at the standard of life appropriate to his situation. On the factual realities of the case as borne out by the evidence I hold that the deceased's living expenses should be regarded as 45% to all emoluments including the value of the free manse and utilities.

On that basis let me first of all add up the total emoluments from November 1982 to now. For November and December 1982 the figure is $3,700, for the year 1983 it is $40994, for 1984 $53256, for 1985 $55673, for 1986 $64272, for 1987 $66397, for 1988 $98,887 and 1989 (1st January to 30th June) $50245 all of which add up to $433,424. After deducting 45% for living expenses the figure comes out to $238,383 which would be the sum that would go to the deceased's estate for lost years earnings from death up to the date of assessment.

To arrive at the lost years earnings beyond the date of assessment I multiply the multiplicand of $98,887 by eight and one third which is the balance of the multiplier and then deduct 45% for living expenses. The sum I arrive at is $453,232.

The total lost years earnings is therefore $691,615 and adding the sum of $5000 awarded for loss of expectation of life, the award under the Law Reform (Miscellaneous Provisions Act) is $696,615.

As already recounted, the deceased died intestate without issue pre-deceased by his mother but survived by his wife and father who has since died. By virtue of Section 4 of the Intestate Estates and Property Charges Act the widow takes a life interest in the entirety of the award under the Law Reform (Miscellaneous Provision)Act. The estate of the deceased's father is entitled to the full value of the reversion which I regard as comparatively small, for in estimating the value of the widow's life interest I take into account the probability that she would, having regard to her age, be in receipt of the income from the fund for a considerable number of years. I therefore put the value of the reversion at 20% of this award of $696,615. This means that what the widow is to get from the deceased's estate is $557,292, and the balance of $139323 is to go to the father's estate.

Subject to statutory exceptions which do not apply here, the rule is that the court in awarding damages to a dependant of a deceased person under the Fatal Accidents Act must take into account any net pecuniary benefit accruing to that dependant in consequence of the deceased's death. So the sum of $557,292 receivable by the widow under the Law Reform (Miscellaneous Provisions) Act will be deducted from the award under the Fatal Accidents Act to the widow as the sole dependent of the deceased.

In summary the awards are as follows:

(a) Under the Fatal Accidents Act the sum of $1,074403 Minus $557,292 = $517,111

(b) Under the Law Reform (miscellaneous Provisions) Act:

(i)	Loss of expectation of life	$ 5000.00
(ii)	Damages in respect of the deceased's loss of earnings in the lost years.	$691,615.00
	TOTAL	$696,615.00

Of the Law Reform Act award the amount to go to the widow is $357,292 and the amount to go to the estate of the deceased's father is $139,323 ($696,615 minus $557,292.)

I award interest on the pre-trial lost years earnings of $238,383 at 3% from 16th October, 1982 to the 6th July 1989.

The plaintiff is to have her costs which are to be taxed if not agreed.