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Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 12/85

COR: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

BETWEEN JAMAICA PUBLIC SERVICE CO. LTD.

AND ELSADA MORGAN
[Administratrix Estate
GLADSTONE MORGAN deceased]

AND CECIL JACKSON

Dennis Goffe for appellant (instructed by Messrs. Myers, Fletcher & Gordon, Manton & Hart).

Mrs. Monica Earl-Brown for defendant/respondent (instructed by Crafton Miller & Co.)

C.U. Hines for Administratrix (instructed by Hines, Hines & Co.).

MARCH 10, 11 & MAY 5, 1986

CAREY, J.A.:

Gladstone Morgan, an electrician, died tragically on 30th March 1977, when he fell from a pole on which he was removing electric wires and which had not been properly rooted. He was in the employment of a Firm called J & G Electrical Contractors which were under contract to the Jamaica Public Service Company Limited to relocate their poles and had as his supervisor, the second defendant Mr. Jackson, who acknowledged that he was the "J" of J & G Electrical Contractors.

In an action brought on behalf of the dependents 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 Cecil Jackson, Orr, J., gave judgment for the plaintiff solely against the Jamaica Public Service Company Limited. However, he dismissed the claim somewhat illogically against Jackson although he found that "the Jamaica Public Service Co. is liable for the negligence of J & G Electrical Contractors Ltd., the independent contractor". In entering judgment, he did so under the following heads for the amounts stated:

The Fatal Accidents Act	$3,954.00
The Law Reform (Miscellaneous Provisions) Act	
Funeral Expenses	1,000.00
Loss of Expectation of life	2,000.00
Loss of future earnings	21,840.00

The appellants challenge this judgment both as to the apportionment of liability and as to damages. As to the first, they say that judgment should have been entered against the co-defendant Mr. Jackson on the basis of the learned judge's finding of negligence on his part. This is plainly right. The ineluctable consequence of that finding was a judgment against the co-defendant, and accordingly, we set aside that part of the judgment and entered judgment for the plaintiff against that defendant with costs. It is right to point out that this argument by the appellants was intended to buttress their prayer for apportionment of liability as between the two defendants in such proportion as the Court should determine. Seeing that the appellants never took the necessary proceedings to secure contribution from their co-defendant in the Court below, it is difficult to see how such a prayer could be successfully maintained in this Court. Learned counsel conceded this, did not press the matter and I need say no more about it.

The second matter canvassed before us related to the award of $21,840.00 under the Law Reform (Miscellaneous Provisions) Act in

respect of 'the lost years'. So far as I am aware, this is the very first opportunity this Court has been offered to consider such an award. No one has sought to challenge the validity of the principle of such an award in this appeal and we are therefore concerned with the question of quantum or more specifically, the principles of assessment under this head. It would not be amiss to call attention to some observation of Windeyer, J., in Skelton v. Collins [1966] 115 C.L.R. 94 at page 129, cited with evident approval by Lord Salmon in Pickett v. British Rail Engineering Ltd. [1980] AC 136 at page 158, [1979] 1 All E.R. 774 at page 788. Windeyer, J., had this to say:

> "The next rule that, as I see the matter, flows from the principle of compensation is that anything having a money value which the plaintiff has lost should be made good in money. This applies to that element in damages for personal injuries which is commonly called 'loss of earnings'. The destruction or diminution of a man's capacity to earn money can be made good in money. It can be measured by having regard to the money that he might have been able to earn had the capacity not been destroyed or diminished ... what is to be compensated for is the destruction or diminution of something having a monetary equivalent ... I cannot see that damages that flow from the destruction or diminution of his capacity [to earn money] are any the less when the period during which the capacity might have been exercised is curtailed because the tort cut short his expected span of life. We should not, I think, follow the English decisions in which in assessing the loss of earnings the 'lost years' are not taken into account".

It is necessary to emphasize the nature of the claim under this head of damages and to recognize that that element in the claim is assessable in monetary terms. Oliver v. Ashman [1961] 3 All E.R. 323, [1962] 2 Q.B. 210, had decided that such a claim was not maintainable because to 'enquire what would have been the value to a person in the position of the plaintiff of any earnings which he might have made after the date when ex hypothesi he will be dead strikes me as hopeless'

per Willmer, L.J., at page 338 (240 A.C.) or because 'what is lost is an expectation, not the thing itself' per Holyroyd Pearce, L.J., at page 332 (230 A.C.).

The House of Lords took the opportunity in Pickett v. British Rail Engineering Ltd. (supra) to overrule Oliver v. Ashman (supra) and decided that where the plaintiff's life expectancy was diminished as the result of the defendant's negligence, the plaintiff's future earnings were an asset of value of which he had been deprived and which could be assessed in money terms, and were not merely an intangible expectation or prospect to be disregarded in the assessment of damages, since what he had been deprived of was the money over and above that which he would have spent on himself and which he would have been free to dispose of as he wished, and not merely something which was of no value to him if he was not there to use it. The damages awarded to a plaintiff whose life expectancy was diminished were to include damages for economic loss resulting from his diminished earning capacity for the whole period of the plaintiff's pre-accident expectancy of earning life and not merely the period of his likely survival. The damages were to be assessed objectively and after deducting the plaintiff's own living expenses which he would have expended during the 'lost years'. In the result, the House recognized that where the plaintiff's life expectancy was diminished as a result of the defendant's negligence, the plaintiff's loss of future earnings were an asset of value of which he had been deprived and which could be assessed in money terms and therefore survived as a head of damage under the Law Reform (Miscellaneous Provisions) Act. Nevertheless, it was not until 1981 that the House was called upon to consider two actions brought by the parents of young men killed in accidents as a result of the respective defendant's negligence, under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act in

Gammell v. Wilson & Ors. and Furness & Anor. v. B. & S. Massey Ltd. [1982] A.C. 27, [1981] 1 All E.R. 578. Lord Scarman at page 591 (p. 75 AC) puts the matter in its proper perspective when he observed:

> "The appeals are a natural, even an inevitable, consequence of the House's decision in Pickett v. British Rail Engineering Ltd. [1979] 1 All E.R. 774: [1980] AC 136. Ruling that a living plaintiff is entitled to such damages, the House was not called on in Pickett's case to construe S 1(2)(c) of the Law Reform Act. Nor was the House faced with any very difficult problem in the assessment of damages, for Mr. Pickett was 53 years of age at the time of trial, a family man whose expectations for the future, had not his injuries supervened, were reasonably clear. But in these two appeals the facts are very different. In the Gammell case a boy aged 15 was killed in a road accident, suit being brought by his father under the Fatal Accidents Act 1976 for his and his mother's benefit as his dependents, and under the Law Reform (Miscellaneous Provisions) Act 1934 for the benefit of the boy's estate. In the Furness case a young man, aged 22 unmarried, was killed at work, suit being brought by his parents under the 1976 Act for their benefit as dependents and under the 1934 Act for his estate".

These cases established definitively 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.

For the purposes of the present appeal, the opinion of Lord Scarman is particularly helpful as he sought to lay down guidelines for the rational assessment of damages under this head. At pages 593, 594, (p. 78 A.C.) he expressed himself thus:

> "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 appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for

> "a 'conventional' award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least 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. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence. A teenager boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man, well-established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it".

I understand from these observations that an endeavour must be made to assess as damages from such evidence as is available the loss the victim has suffered during the lost years, and the figure arrived at must bear a realistic relationship to the factual realities. Thus there can be no question of a nominal award because the evidence was exiguous. Then Lord Scarman became specific and observed (at p. 78 A.C.; p. 593 All E.R.)

> "The problem in these cases, which has troubled the judges since the decision in Pickett's case [1980] A.C. 136 has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in this House in Pickett's case. The loss to 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 time of death. The principle was stated by Lord Wilberforce in

> "Pickett's case at pp. 150-151, [1979] 1 All E.R. 774 at 781-782:
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> 'The judgments, further, bring out an important ingredient, which I would accept, namely that the amount to be recovered in respect of earnings in the 'lost' years should be after deduction of an estimated sum to represent the victim's probable living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others, and this he would do out of his surplus. There is the additional merit of bringing awards under this head into line with what could be recovered under the Fatal Accidents Acts".

The Court of Appeal, Civil Division in Harris v. Empress Motors Limited [1983] 3 All E.R. 561 spelt out in some detail the principles which should inform assessment of damages with respect to this element in damages. I cite from the headnote which, in my view, accurately reflects the relevant principles to be extracted from the judgment of O'Connor, L.J., with which the other Lords Justices agreed:

> "In assessing the damages recoverable by a deceased's estate under s 1(1)[a] of the Law Reform (Miscellaneous Provisions) Act 1934 for the deceased's loss of earnings in the 'lost years', i.e. the years in which he would have been earning had he lived, the following principles are to be applied in calculating the living expenses to be deducted from his net earnings in the lost years in order to reach the amount of recoverable damages: (i) the ingredients that go to make up 'living expenses' are the same whether the deceased was young or old, single or married, or with or without dependants; (ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of his life appropriate to his situation; (iii) accordingly, any sums that he would have expended exclusively to maintain or benefit others will not form part of his living expenses and will not be deductible from his net earnings for the purposes of the 1934 Act. However, where the deceased expended the whole or part of his net earnings on living expenses (such as rent, mortgage, interest, rates, heating, electricity, gas, telephone etc. and the cost of running a car) for the joint benefit of himself and his dependents, a proportion of that expenditure (the exact proportion being dependent on the

> "number of dependants) should be treated as expenditure exclusively attributable to his living expenses and thus deductible from his net earnings in making the assessment under the 1934 Act; for example, where the only dependant is the deceased's wife one-half of the expenditure for their joint benefit should be deducted from his net earnings, but where there is a wife and two dependent children one-quarter of the expenditure for the family's benefit should be deducted from his net earnings. It follows that the calculation of the deceased's deductible living expenses for the purpose of assessing damages is different under the 1934 Act on the one hand and the Fatal Accidents Act 1976 on the other, because any part of the estimated expenditure for the joint benefit of the deceased and his dependants is excluded from the calculation of his living expenses under the 1976 Act. It also follows that the amount of living expenses deductible from the deceased's net earnings for the purposes of the 1934 Act will generally be greater than the amount of the living expenses deductible under the 1976 Act, because under the latter Act the amount of his living expenses is conventionally assessed at no more than one-third of his net earnings."

In the present appeal, the learned judge allowed an amount of $21,840.00 for the deceased's loss of earnings in the lost year. He gave his reasons for this assessment - He said:

> "The decision of the House of Lords in Gammell v. Wilson (1981) 1 All E.R. 578 has been followed by other judges. I see no reason to differ from my brethren. On the principles enunciated therein, I assess the surplus available to the deceased after deduction from his living expenses at $30.00 per week or $1,560 per annum. I apply a multiplier of 14. $1560 X 14 = $21,840."

The learned judge assessed the deceased worker's weekly wage at $50.00. There was also evidence that he lived at home with his parents and contributed $10.00 weekly for his food and $20.00 to assist in the running of the house, and a further $10.00 to maintain a child he had by his girlfriend, Carmen Hudson. His mother also testified that he spent his money on clothes and shoes because he liked to dress well.

It was argued that his living expenses should be assessed at no more than one-third of his net earnings. Accordingly, the surplus which the judge should have assessed as living expenses, should be $17.00 per week, and using his multiplier of 14, the calculation would be $884 p.a. X 14 = $12,376.00. The basis for this argument rests on a judgment of Webster, J., in White & Anor v. London Transport Executive [1982] 1 All E.R. 410, [1982] 1 Q.B. 489 a case which does bear some similarity to the instant appeal. In that case the deceased was killed in an accident at work due to his employer's negligence. At the date of his death, he was aged 25, was unmarried and lived with his mother and step-father. He gave his mother between £15. and £25. per week. He spent most of his earnings on clothes and other items for himself and on girlfriends. The learned judge determined that the award to the estate for the deceased's lost earnings in the lost years would be one-third of his net earnings for the first 5 years of the 15 years purchase and one-quarter of those earnings for the remaining 10 years.

Although the case was decided before the decision of the Court of Appeal in Harris v. Empress Motors Ltd (supra), the approach of Webster, J., did receive the approval of the Court. Both in White's case and Harris' case, a percentage formula representing the proportion of the dead man's net earnings that he would have spent exclusively on himself, was used. The reason for a resort to percentage is suggested by O'Connor, L.J., in Harris v. Empress Motors Limited (supra) at page 565:

> "In the course of time the courts have worked out a simple solution to the similar problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependents 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."

The experience in the United Kingdom has plainly led the Courts to adopt this mathematical formula. But we are not dealing with English conditions in this jurisdiction and I would be slow until we had gained more experience in this field to adopt a formula suited to English conditions but not yet tested in the Jamaican milieu.

We have no statistical accumulation of data in this Country to show what percentage of salary or wages, young apprentices spend on themselves, or for that matter settled married men with families. Plainly we have not yet arrived at a percentage to which the Courts may resort as is suggested in the case cited.

The question for a trial judge required to assess damages in this highly speculative area, is to discover on the available evidence what proportion of his net earnings a (deceased) workman spends exclusively of himself to maintain himself at the standard of life appropriate to his situation. Since we are dealing in this case with a young man a trainee, electrician, we are in the realm of intelligent extrapolation. What would be the deceased's prospects? Would he get married and have a family? The percentages of 33½ or 25 were doubtless fair estimates in White v. London Transport Executive (supra), but there is no rule to be extracted from the cases prescribing these percentages as inevitable formula to be inflexibly applied to any or all situations. Each case must depend on its peculiar circumstances.

The global sum to be awarded is to be moderate, not a conventional figure. The deceased in this case was in receipt of paltry wages and it was not to be assumed that he would not as time went by, improve in skill and accordingly, receive higher wages. Where the judge is concerned with a young workman at the bottom of the scale in terms of salary, regard should be had to the principle that damage for loss of earnings in the lost years should be fair compensation for the loss suffered by the deceased in his life-time, and not any formula of 33⅓% or 25%. For to do otherwise would result not in

moderate but in derisory awards, and would be compelling the judge to engage in the subtle mathematical calculations which Lord Scarman in Gammell v. Wilson, counselled, should be eschewed.

Viewed in this way, I do not think that the learned judge's award was perverse nor was it arrived at on an incorrect principle. It was moderate. I would not, therefore, disturb the award.

For these reasons the appeal was allowed in part. The judgment of the Court below varied in part. The Order of the Court below that judgment be entered for the second defendant was set aside and judgment entered against the second defendant. Costs of appeal to the appellant to be paid by the second defendant and to be taxed if not agreed. Plaintiff's costs of appeal to be paid by the appellant.

KERR J.A.

I agree.

CARBERRY J.A.

I agree.