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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 36/68

BEFORE:- The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Smith J.A.
The Hon. Mr. Justice Hercules J.A.(Ag.).

L.C. McKENZIE)
and)
ASTON DAVIS) DEFENDANTS/APPELLANTS

v.

DAPHNE ELAINE TYRELL)
(Administratrix of the Estate) PLAINTIFF/RESPONDENT
of Lauriston Leroy Tyrell,)
deceased))

Emile George Q.C. and W.K. Chin See for Defendants/Appellants.

R.N.A. Henriques for Plaintiff/Respondent.

17th, 18th June and 16th July 1971

HERCULES J.A.(Ag.):-

The assessment of damages under the Fatal Accidents Law, Chapter 125, is often difficult and complicated, but the Court has to do the best it can in the circumstances of each case. In this case, moreover, the Master did not have the advantage of any submissions on behalf of the Defendants/Appellants(hereinafter referred to as the Appellants), since Counsel was not in attendance. The Master appears to have allowed himself to be guided purely by the submissions made on behalf of the Plaintiff/ Respondent (hereinafter referred to as the Respondent).

Accordingly, damages were assessed as follows:

£ 832 for the mother of the deceased,
£4332 for the widow,
£6500 to be divided equally between the children

making a total award of £11664.

This appeal is now based on the following grounds:-

(i) The award of £11664 was manifestly excessive in the circumstances;

(ii) The Master erred in awarding £4332 to the Respondent widow, bearing in mind her prospects of future marriage and her admitted eligibility in the marriage market,

(iii) The Master was in error when he awarded £6500 to be divided equally between the two children of the marriage bearing in mind that on the evidence the deceased father's contribution to the children's maintenance did not warrant such an award,

(iv) The Master appears to have failed to take into account the various eventualities that might have occurred to reduce the life span of the deceased bearing in mind that he was employed in fairly hazardous work.

Counsel for the Appellants, Mr. George, indicated that he would not include the award of £832 to the mother of the deceased in his argument against the total award as being manifestly excessive. He confined his argument to the remaining sums of £4332 for the widow and £6500 for the children.

The facts briefly are that Lauriston Leroy Tyrell died on or about 24th August, 1963, at age 26, leaving the Respondent Daphne Elaine Tyrell, then 22 years of age and two children: Leroy Anthony aged 2 years and 8 months and Andrea Patricia aged 1 year 2 months, also mother Violet Henry - 48 years.

The deceased earned £20. 3. 4 per week with prospects of an increase of 8% per annum. It was conceded by Mr. George and it therefore became common ground that the deceased, on the evidence, had created a dependency of £12 per week in favour of Respondent and the two children. This was the dependency figure used by the Master.

But Mr. George complained about the multiplier of 27 years of purchase as adopted by the Master, although in arriving at the first figure of £16248, the Master taxed down by 1/3 for the purpose of "subtracting all contingencies" and leaving a net figure of £10832 for the Respondent and the two children. After the Master had taxed down his original multiplier of 27 by 1/3 it meant that he ended by using a multiplier of 18 years of purchase.

Even the 18 years multiplier, Mr. George submitted, was too high and he added that it was not clear that the Master had taken the Respondent's prospects of remarriage into consideration - notwithstanding that it was submitted by Respondent's Counsel and adopted by the Master that the

deduction of 1/3 of the first figure was intended to subtract for all contingencies.

Mr. George cited the case of Goodburn v. Thomas Cotton, Ltd. [1968] 1 All E.R. 518. In that case Willmer L.J. at page 522 described a multiplier of eleven as unreal and the Court of Appeal reduced an award made by Willis J. under the Fatal Accidents Acts because of the strong probability that the widow would have remarried by the time she was 30 years old, i.e., within 6 years of the accident which resulted in her husband's death. The Court held that a multiplier of 11 years was therefore unreal and reduced the award to a sum which represented approximately 6 years' purchase of the widow's dependency.

In the Goodburn case (supra) the widow was 25 years old with two young children of the marriage. She was attractive and admitted that she had been going out with a young man - a Mr. Walker; that he had asked her to marry him and she had seriously thought of doing so; that she had met his parents and he had spent a night with her at what had been her matrimonial home; that there had been a discussion at the home of her parents-in-law of the effects of such a marriage on her two children; and that, although there was no longer any question of her marrying him owing to frequent arguments, she would remarry if the right person came along. The widow, in giving evidence, tried at first to conceal her association with Mr. Walker, causing Willmer L.J. to comment at p.521 "reading the evidence .... one cannot fail to receive the impression that the plaintiff was being somewhat less than candid in the evidence which she was giving". There appeared a strong probability - that the widow would marry Mr. Walker 'in the quite near future' which made the Court of Appeal treat the matter as one almost of certainty that she would remarry by the time she was 30 years old. Willmer L.J. also said at p.522: "To my mind .... it would be a matter for surprise if the Plaintiff has not remarried by the time she is 30 years old."

The instant case is easily distinguishable from the Goodburn case (supra). This is what the Respondent herein had to say:-

> "I am 27 years of age. I agree I am still young and I know I am attractive. I have been told so recently. I wouldn't say I haven't got admirers. I go out occasionally with male

friends since my husband's death. I wouldn't marry again.
I was happy with my husband. I don't think I will ever marry again."

An entirely different situation to what obtained in the Goodburn case (supra).

Moreover, one must not overemphasize the contingency of remarriage. In the case of Nunn v. Cocksedge, Ltd., (1956) C.A. No. 242, Oliver J. in making an award stated: "This is an extremely attractive young widow, who if she wants to get married again will obviously have no difficulty in doing so." The Court of Appeal increased the award. Per Denning L.J. "........ it seems to me that the judge must have reduced his figure far too much on that account. After all, she has not remarried. She is not even engaged to be married. Two years have passed since the accident, and it is entirely an element of chance whether she will remarry or not. How sad it would be if, as the years passed by, she did not remarry, and yet her compensation would have been cut down by the court so drastically on the footing that she would! In my view the judge must have given too much weight to the chances of the widow's remarriage, attractive though she was ...."

Mr. George suggested 11 years purchase for the widow, 13 years for the elder child and 15 years for the younger child - making an average of 13 years instead of 18 as adopted by the Master. He cited the case of Mallett v. McMonagle (1969) 2 All E.R. 178. There, Lord Diplock in the House of Lords, said at page 191:

"In cases such as the present where the deceased was aged 25 and the appellant, his widow, about the same age, Courts have not infrequently awarded 16 years' purchase. It is seldom that this number of years' purchase is exceeded". He went on to describe it as a reasonable maximum where the deceased died in his twenties.

I do not understand Lord Diplock to have stated that the figure of 16 years' purchase has never been exceeded and ought never to be exceeded. He merely observed that that figure has been frequently awarded and is seldom exceeded. In point of fact however several cases are to be found where multipliers exceeding 16 have been used - See Kemp & Kemp 2nd Edition Volume 2 pages 35, 38, 42 & 43. Indeed, there is no formula laid down anywhere for the use of judges in assessing damages under the Fatal Accidents Law.

I agree at any rate that 16 years represents a reasonable maximum number of years' purchase where the deceased died in his twenties and am willing to be guided thereby. But without any specific norm upon which to work, does the use of a multiplier of 18 years - 2 years in excess of 16, produce a result so hopelessly wrong that it becomes the duty of this Court to interfere? As Denning L.J. stated in McCarthy v. Coldair, Ltd. (1951) C.A. No. 271 p. 470 "............. this Court would interfere if it said to itself 'good gracious me - as high as that'. One of the classical statements on this matter was propounded by Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601 at p. 617:
"In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency."

If Lord Diplock's maximum multiplier of 16 were used, the figure in this case would be £9984 and if 18 were used, as the Master did, the figure would be £11232 - a difference of £1248. In my view the Master took all the contingencies mentioned in the grounds of appeal into consideration and the award of damages does appear to be within the reasonable range of possible awards. It certainly cannot be categorised as a wholly erroneous estimate. On general principles there is no discrepancy as would justify any interference with his judgment. (See Taylor v. O'Connor [1970] 1 All E.R. 365).

But it emerged during the course of the argument that the Master fell into arithmetical error in calculating the duration of the Respondent's dependency. The age of the deceased taken by the Master was 27 years. He was given a life up to 65 years and the difference was mistakenly stated as 48 years instead of 38 years. Then there was a further mistake in finding in consequence that 41 years of purchase for the Respondent was reasonable. Next, in fixing the duration of the dependency for the children till age 21, the 3 year old child was given 18 years and the 1 year old 20 years, but again these were made 40 years instead of 38 years.

41 years were added in respect of the Respondent to the 40 years in respect of the two children, making eighty-one years, which, when divided by three gave the 27 years purchase which was found. When this was taxed down by 1/3, the 18 years at £624 per year gave a figure of £10832 which was awarded to the wife and two children.

As indicated above, however, the figure should have been 38 years in respect of the Respondent and 38 years in respect of the two children, making a total of 76 years, which, when divided by three would give 25 years purchase instead of 27. 25 years at £624 per year comes to £15600 and when taxed down by 1/3 will be £10400. On the Master's errors the excess of £432 which he awarded falls to be deducted.

It also emerged during the course of the argument that there was evidence of the Respondent before the Master as follows:-

"On the death of my husband I received from his employers £1200 under the Retirement Income Insurance Plan and £358 under a Pension Scheme."

There is no law in Jamaica as there is in England to prevent this sum being deducted from the dependents' benefit. The Master made no such deduction. This is an error of omission. Mr. Henriques for the Respondent intimated to the Court that of the total sum of £1558, disbursements were:-

To mother of deceased	£400
Funeral Expenses	£100
Debts	£308

which totalled .... £808, leaving a balance of £750. I would accept Mr. Henriques' intimation.

Mr. George submitted that the £358 under a Pension Scheme should not be taken into account but of the remaining £1200, £900 should be deducted, leaving the Respondent £300 which presumably she would have received from him if her husband had lived till age 65.

On Mr. Henriques' statement however there is a balance of £750 and of that I would refrain from taking £300 into account for the reason advanced by Mr. George, and leave the sum of £450 to be deducted from the award to the Respondent and children.

Therefore, to the excess of £432 arising out of the arithmetical errors referred to above, I would add the sum of £450 and subtract the total

of £882 from the Master's award of £10832, leaving the award at £9950 - £3980 to the Respondent and £5970 to be divided equally between the two children. The award of £832 to the mother stands - making a total award of £10782 to be substituted for £11664 ordered by the Master.

The two corrections made do not mean that the appellants have succeeded in their appeal. They never included these matters in their grounds of appeal and indeed from the printed record these errors emerged from the submissions made by Respondent's counsel. These submissions were accepted by the Master in toto. In view of the unhappy history of the case I would make no order as to costs.

SMITH J.A.:-

I agree.

FOX J.A.:-

I also agree. The award is on the high side, but it is not so inordinately high as to be a wholly erroneous estimate of the pecuniary loss which the wife and children are likely to suffer as a consequence of the fatal accident to the deceased. Neither am I convinced that the learned trial judge acted upon a wrong principle of law by using a multiplier which was in excess of 16 years purchase. At the time of his death, the deceased was 26 years old, and Lord Diplock did indeed say that, "Having regard to the uncertainties to be taken into account 16 years would appear to represent a reasonable maximum number of years purchase where the deceased died in his twenties." (Mallet v McMonagle /1969/ 2 All E.R. 178 at 191). But in saying this I do not understand Lord Diplock to be laying down a rigid rule. The statement does no more than identify a safe guide line in the determination of a question which is asked in terms of numerous imponderables and chances. 16 years represent 'a reasonable maximum', and if this number of years purchase is not exceeded in the case of a deceased who died in his twenties the estimate of the "multiplier" is unimpeachable. It does not necessarily follow, that an estimate in excess of 16 years is unsound and erroneous in principle. I also agree with the manner in which the two errors in the record were discussed by Hercules J.A. with the amendments in the award which he has proposed as a consequence, and with his suggestion as to costs. In respect of the awards to the widow and the children, the appeal is allowed. The award to the widow is reduced from £4,332 to £3,980, and that to the children from £6,500 to £5,970.

The damages are therefore finally assessed as follows -

£832 for the mother of the deceased
£3,980 for the widow
£5,970 to be divided equally between the two children.

£10,782

There is no order as to the costs of the appeal.