IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 0427/2003

BETWEEN	ELIZABETH MORGAN	CLAIMANT
AND	ENID FOREMAN	1ST DEFENDANT
AND	OWEN MOSS	2ND DEFENDANT

Miss Deidre Powell for the Claimant.

Miss Lascine Wisdom-Barnett instructed by **Thomas and Thomas** for the Defendants

Heard on the 11th and 15th of October 2004

Sinclair-Haynes J. (Ag)

The accident happened at about 10 a.m. on the 22nd of July 2002 on the Mandela Highway. The deceased was a lad of sixteen years. He was returning from a wholesale in Duhaney Park where his mother had sent him on an errand. As he rode his bicycle with about nine packs of biscuits in a small box in front of him, a truck driven by the defendant, Mr. Owen Moss, struck him. He was flung from the bicycle and sustained severe head and other injuries. He seemed to have had a very limited degree of consciousness. He died the following morning.

The defendant was found wholly liable for the accident. There is no appeal from that aspect of the decision. In the circumstances it is not necessary to repeat those findings.

The Claimant's claim

The Claimant's claim is for the following:

- Damages under the Fatal Accident's Act (F.A.A.) for three dependant's namely herself, the father of the Deceased and her daughter, the sister of the Deceased;
- Damages under the Law Reform (Miscellaneous Provision) Act (L.R. (M.P.) A.);
- Special Damages incurred as a result of the Deceased's death.

Miss Deidre Powell submitted that the claimant was entitled to the following:

- general damages (pain and suffering and loss of amenities)- $3,000,000.00;

  special damages- $306,620.00;
- damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act $3,166,800.00;
- loss of expectation of life-$100,000.00;

  interest and costs.

Submissions re: Pain and suffering

The Deceased sustained the following injuries:

abrasion to his right forehead

abrasion to his left lateral cheek and side of mouth

two lacerations to the scalp

5cm laceration to the frontal area of the vertex in the midline;

1cm laceration in left parietal

multiple abrasions on the body involving the right elbow, lateral left buttocks and posteriolateral left chest

severe head injury

In support of the claim for pain and suffering and loss of amenities she relied on the case of **Errol Cunningham v Stanley Mackenzie and Anthony Campbell** suit no. C.L. 1985 C447. In that case a 78-year-old man was injured in a motor vehicle accident. He sustained severe head injuries, damage to his pituitary gland, upper motor neurone facial paralysis, anosmia (failure to recognize fragrance and flavours) and dyspepsia among other serious injuries. He was assessed at 50% disability from which the doctor said it was unlikely he would recover. He was awarded general damages in the sum of $400,000 in June 1990. Today that award translates to $5,253,448.00

She also relied on the case of **Karen Brown (b.n.f. Cynthia McLaughlin) and Cynthia McLaughlin v Richard English and Alfred Jones** cited in **Ursula Khan's Recent Personal Injuries Awards** made in the Supreme Court volume 4 page 190 in which a 14 year old student was injured. She suffered head injuries with probable basal skull fracture, cerebral concussion with loss of consciousness for 2 days, laceration below right ear, injury to left leg causing swelling and tenderness along lateral upper thigh lasting more than 12 months, bleeding from the right ear among other things. She was assessed at 60% brain damage. She had a keloidial scar below the right ear producing cosmetic disability and causing emotional problem. She had difficulty coping with her schoolwork. She was awarded $385,000.00 for general damages that now values $4,125,773.00

Entitlements under the L.R. (M.P.) A.

Pain and Suffering

Section 2-(1) states;

'Subject to the provisions of this Section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:'

It is indubitably settled that the personal representatives can recover damages that the Deceased could have recovered and which were a liability on the wrongdoer at the date of death (see **Rose v Ford** (1935) 1 K.B. 99 per Greer L.J).

In both cases relied upon by Miss Powell, the victims survived and were condemned to a life of suffering. In the instant case however, the injured person died the following morning. Had he lived he would have been entitled to recover damages for the injuries he sustained. His personal representatives are now entitled. However they are only entitled to recover nominal damages since he only survived for less than two days.

In **Rose v Ford** the judge had awarded the sum of 500 shillings which sum included damages for pain and suffering and damages for the loss of the deceased's leg. The damages for pain and suffering were confined to the four days that the deceased lived. Of that figure, the Court of Appeal quantified the damages attributable to pain and suffering at a nominal sum of 20 shillings. The Court of Appeal felt that the learned judge estimated the damages (the remaining 480 shillings) upon the assumption that the deceased would have lived as a one legged woman for the rest of her natural life. The Court, however, was of the view that she was only entitled to damages in respect of the loss of her legs for two days in addition to her pain and suffering. However it was clearly stated that the figure 'cannot be more than a nominal amount'. Accordingly, the Court reduced the figure from

480 shillings to 40 shillings. In the circumstances, I will award the sum of $50, 000 for pain and suffering.

Loss of Expectation of Life

Lord Morris of Borth-Y-Gest- made the principle limpid in **Yorkshire Electricity Board v Naylor** (1968) AC 529, at page 545, he said:

> 'It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L.C in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of 'a positive measure of happiness' or of 'a predominantly happy life.'

How are such damages quantified?

A conventional sum is awarded. The principle exhorted in **Benham v Gambling** 1941 AC 157 at 166 is that a moderate figure is to be chosen. Indeed the figure awarded in **Benham v Gambling** in 1941was £200 for a child of two and a half years where his circumstances were very favourable.

In 1966 that figure was increased considerably to £500 to compensate for the subsequent drop in the value of the dollar. (See **Andrews v Freeborough (1967) Q.B.D. 1 and Yorkshire Electricity Board v Naylor.**

Some Jamaican awards

In the case of the **Administrator General for Jamaica (Administrator for the estate of Dereck Grant deceased) v The Shipping Association and Jeffery Gentles and Edgar Morris Brown** an award of $2,000 was made on the 11th November 1983. Applying a Consumer Price Index of 51.3 for November 1983 and a consumer price index (C.P.I.) of 1909.2 for September 2004 that figure translates to $74,443 today. On the 30th June 1985 in **Fakhourie (Kathleen) v Linden Green and Attorney General** 22 JLR 353 at page 356 Bingham J. as he then was applied the

Benham and Gambling principle and noted that this figure ought to take into consideration the continuing 'slide in the value of the local currency'. He increased the sum of $2,700 awarded by Ellis J. in **Wensley Johnson v Selvin Graham and another** (1983) 20 J.L.R. 124 to $3000. In **Rhona Hibbert** v **Attorney General** that was decided on the 17th of November 1988 an award of $3,000 was made. In 1990 the Court of Appeal, in **Clarendon Parish Council and Stanley Ewan v Junie Gouldbourne (Administratrix of the estate of Earnold Gouldbourne)** (1990) 27 JLR 430 the Court of Appeal regarded the sum of $3000 as being the conventional figure. Today that sum values $37,718 using a C.P.I of 147 for October 1990 and a C.P.I. of 1909.2 for September 2004. In February 2002 Dukharan J., in **Odemay Bartley v Errol Walters and another,** unreported, C.L. 1999-B-226 awarded the sum of $70,000 which sum today amounts to $91,1381 applying the C.P.I of 1909.2 for September 2004 and a C.P.I. of 1468.01 for February 2002.

In England, however, a perusal of the authorities cited in **Kemp and Kemp the Quantum of Damages** volume 3 covering a period 1983 to 1991 the British Courts considered the sum of £1500 as the conventional sum for Loss of Expectation of life. A Conversion reveals an amount of $150,000 at an exchange rate of $100 to £1.

It is now almost fifteen years since the Court of Appeal stated that the sum of $3000 was the appropriate conventional figure. I am of the view that the sum of $150,000 is today a very moderate award in light of the massive devaluation in the dollar. It should be remembered that the conventional figure ought to be moderate, as opposed to nominal and it ought to take devaluation into consideration.

The Lost Years

The deceased was sixteen years old and a student in the ninth grade at Jose Marti Technical School. According to his principal his performance was average but he had the ability to do better. In the tenth grade he would have pursued studies in building technology. She was of the opinion that he would have done well in his studies as students demonstrated their true aptitude for specialization upon entering Grade 10 where they concentrate on practical courses. She felt he would have found employment easily as have other students from the school that pursued similar studies because of the nature of the construction industry. Both his parents testified that he was industrious. His mother's evidence is that he assisted her with her selling at her stall. Indeed on the fateful day he was returning from an errand on which she had sent him to purchase packs of biscuits for her. His mother's testimony is that he was keen on building technology. His father said he often spoke of his dream of becoming a building contractor. There is every indication that on a balance of probabilities, had he lived he would have been a useful young man.

The Law

Lord Scarman in the case of **Gammell v Wilson** (1981) 1 ALL.E.R. 578, said:

> "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 that 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 teenage 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..., one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, ...will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it."

Kemar Watson was sixteen and had real prospects of gaining employment in the area of studies he would have embarked on the following year in school. The industry he displayed by assisting his mother is an indication that he would have gone about his business in a similar manner. In the circumstances, the loss is capable of being estimated although with no mathematical certainty.

The Multiplier

The deceased was born on the 3rd day of June 1986. His mother was born on the 28th April 1967 whereas his father was born on the 25th November 1959. His parents are relatively young people. His father would have lived another thirty years whilst his mother for another forty years. They no doubt expected support for the rest of their lives. He was expected to graduate at age eighteen. Had he survived, it is quite probable he would have at least worked up to age sixty-five. No evidence as to the state of his health has been led. However in considering life's uncertainties e.g. illness and possible accidents, he might have been rendered incapable of working at an earlier age. The vagaries of human of life make the task of calculating the multiplier very difficult indeed. De la Bastide, J. in **Hubah v Ramjass**

(1961) 3 W.I.R.330, at 333 cited the following comment made by Birkett, J., in **Austin v Condon Transport Executive** (1951 Unreported)

> 'Some of the matters that the learned judge is asked to take into account seem beyond the wit or wisdom of men to take into account in any sure or certain way... Whatever wisdom he may have he cannot do that. He can only do the best he can'

Both counsel have agreed that the estimated number of lost working years that is reasonable in this case is sixteen. Reliance was placed on a number of cases. In **Maurice Francis** referred to in **Ursula Khan's Recent Personal Injuries Awards made in the Supreme Court Volume 5** a multiplier of 15 was affirmed by the Court of Appeal for a 22-year-old apprentice tailor. In the instant case, the intended occupation of the deceased was that of construction, which is more hazardous than tailoring. In **Gammell v Wilson** the deceased was fifteen at the time of the accident and a multiplier of sixteen was considered appropriate.

The Multiplicand

The calculation of the annual loss was settled in **Pickett v British Rail** Engineering **Ltd** (1979) 1ALL.ER 774. Lord Scarman had this to say in **Gammell v Wilson** at page 593;

> '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 that 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. The principle was stated by Lord Wilberforce in Pickett's case ....

> *"The judgment, 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."*

Miss Powell adduced no evidence as to the earnings of a builder. In the absence of such evidence I resorted to the minimum wage, which is presently $1800 per week. I considered that the deceased would have had some training and might have started at a higher rate. A figure of $3000 net in the absence of any evidence is reasonable. However given the inability to arrive at a precise mathematical calculation, and considering the contingencies of life, e.g. he might have received an increase in wages; he might have been unemployed for sometime for a number of reasons including ill health, unavailability of jobs, he could have died or become disabled. His career is likely to be subject to 'a number of factors both positive and negative'. The whole calculation is based on uncertainty.

In **Gammell v Wilson** a substantial body of evidence as to the deceased's way of life was presented to Mr. Hytner Q.C., the trial judge, from which he could assess the deceased 'probable living expenses both for the immediate future and in the longer term.' Mr. Hytner was of the view that the deceased (who was fifteen years old at the time of his death) would have spent two thirds of his income when at home and three quarters after he left home. This was not disturbed by the House of Lords. In that case the deceased was already working and therefore some evidence was available.

In **Wensley Johnson v Selvin Graham and another** (1983) 20 J.L.R.124, the deceased was a nineteen year old student. She worked on Saturdays and during the school holidays. Evidence was led that she contributed two-thirds of her earnings to her mother and brother in equal shares. Ellis, J. adopted a commonsense approach and found that the deceased received a portion of what she contributed to the family fund for her keep. There was evidence that she was an attractive girl. In the circumstances Ellis, J. felt that it was likely that she would have married by age 22-24. In the circumstances he used a multiplier of five years.

The Jamaica Court of Appeal in **Jamaica Public Service Co. Ltd. v Elsada Morgan** (1986) 23 J.L.R.138 was unanimously of the following view expressed by Carey, J.A.;

> '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 experienced 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.'

I am heedful of the view of the Court of Appeal; however, the circumstances of the instant case, Kemar had not begun working. Therefore there is no actual evidence of what proportion of his earnings he would have spent on himself. I therefore am forced to, on the facts of this case, to estimate a sum to represent his probable living expenses.

I am of the view that in the immediate future after graduation, the deceased would have spent two thirds of his income on himself for example,

clothes, transportation, lunch money and entertainment. Upon graduation he would have been eighteen years. I surmise that he would have remained at home for another four years. Thereafter, on a balance of probabilities he would have left home and would probably spend five sixth of his earnings on himself.

The multiplicand for the first four years is therefore $3,000 multiplied by 52 weeks multiplied by 4 years that is equal to $624,000. This figure divided by 1\3 amounts to $208,000. The multiplicand for the remaining twelve years is $3,000 multiplied by 52 weeks multiplied by 12 years which sum amounts to $1,872,000. Divided by 1/6 the sum is $312,000. The total damages awarded for the lost years are the rounded figure of $520,000. General Damages are awarded in the sum of $520,000 plus $50,000 for pain and suffering which amounts to $570,000.

Costs of the Letters of Administration

The sum $30,000 was awarded.

The Dependants Entitlements under the F.A.A.

Miss Powell submitted as follows:

1) I ought to make an award for the pre-trial years;

2) I must take into account what he would have given to a wife.

The Law

Section 2 (1) of the F.A.A. states that the 'near relations' of the Deceased are wife, husband' parent, child, brother, sister, nephew, or niece of the deceased person.

The Claimant, the Deceased's father and his sister are therefore near relations of the Deceased.

The question is, were they his dependants?

The law is succinctly stated in the head note of **Taff Vale Railway Co. v Jenkins** 1913 AC 1:

> 'It is not a condition precedent to the maintenance of an action under the FAA 1846 that the Deceased should have been actually earning money or money's worth or contributing to the support of the Plaintiff at or before the date of the death, provided that the plaintiff had a reasonable expectation of a pecuniary benefit from the continuance of his life.'

In that case a sixteen-year-old girl was killed by the negligence of the defendants. She had lived with her parents. It was proved that at the time of her death she was soon to complete her apprenticeship as a dressmaker. Evidence was also adduced, which the jury accepted, that she might have helped her aging parents in their shop obviating the need to hire assistance.

In the instant case, is there any evidence that the Deceased's sister had a reasonable expectation of a pecuniary benefit from the continuance of his life?

There is no evidence that his sister who was seventeen years old at the time of his death had any such expectation. There is no evidence that his sister who was older than he was dependent on him before his death. Nor is there any evidence of the probability that she would receive some support from him in the future if he lived.

In **Wensley Johnson v Selwin Graham and another** the deceased during her life time made some contribution to the support of her brother from her part-time and summer jobs. Even in that case Ellis J. rejected the brother as being a dependant of the Deceased.

Lord Wright's dictum in **Davies v Powell Duffryn Associated Collieries No 2**) (1942) A.C. 601, clarifies the law;

> "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."

Have the parents of this unfortunate boy sustained any prospective loss?

There is no evidence in the instant case that the Deceased's parents had a reasonable expectation of pecuniary benefit from the continuance of his life.

The evidence is that the Deceased assisted his mother selling at her stall. There is no evidence that he was paid or that he derived any income from selling his own goods. No evidence that he would have helped her in the future. Nor was any evidence adduced that because of his assistance she did not hire an assistant. In the absence of evidence to the contrary it seems to me he was a dutiful boy merely performing his chore.

The principle explained by Campbell J.A., for assessing the Lost Years under the F. A. A. with regards living expenses (exclusive and joint) cannot be applied here.

With regards Miss Powell's submission that I ought to make an award for the pre- trial years, had they been entitled to an award under the F.A.A., the deceased would have been a student during those years. He would have graduated in July 2004. The trial of this matter is in October 2004 He might not have found employment the months immediately following graduation, 2004. There would be no basis for making any award for the pre-trial years.

Funeral Expenses

Counsel agreed the funeral expenses in the sum of $198,500 with interest at 6% from (the date of the interim payment) to

Accordingly, judgment for the claimant as follows:

General Damages awarded in the sum of $570,000; (with interests of 6% on the sum of $50,000 for Pain and Suffering award from the 27th March, 2003 to 16th October, 2004)

Damages for Loss of Expectation of Life in the sum of $150,000;

Special Damages in the sum of $228,500;

Interest at 6% from the (date of the interim payment) 22nd July 2002 to the 15th November, 2004;

Costs $88,000.