[2013] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2007

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**THE ATTORNEY-GENERAL OF JAMAICA**	**APPELLANT**
AND	**DEVON BRYAN (Administrator of Estate of Ian Bryan)**	**RESPONDENT**

Miss Hazel Edwards instructed by the Director of State Proceedings for the appellant

Respondent absent and unrepresented

10 December 2012, 25 January and 8 February 2013

PANTON P

[1] On 25 January 2013, we ordered as follows:

> "The appeal is allowed in part. The award for loss of expectation of life is reduced from $250,000.00 to $120,000.00. The order of Sinclair-Haynes J is affirmed in all other respects. The appellant is to have one quarter of his costs of the appeal to be agreed or taxed."

At that time we indicated that our written reasons would be handed down today.

[2] This appeal was from the judgment of Sinclair-Haynes J, wherein on 29 June 2007 she entered judgment in favour of the respondent in this action for negligence and awarded damages as follows:

> "1. **General damages**
>
> (a) In the sum of $480,768.75 in respect of lost earnings with interest at 6% per annum in respect of the pre-trial years from the 4th December 2001 to the 21st June 2006 and thereafter at 3% to 29th June 2007; and
>
> (b) in the sum of $65,000.00 which represents the award for pain and suffering with interest at 6% per annum from the 4th December 2001 to the 21st of June 2006 and thereafter at 3% to the 29th of June 2007.
>
> 2. **Loss of Expectation of Life**
> $125,000.00
>
> 3. **Special Damages**
> $28,000.00 with interest at 6% per annum from the 4th of December 2001 to the 21st of June 2006 and thereafter at 3% to the 29th of June 2007.
>
> 4. Costs to be agreed or taxed."

[3] The appeal was in respect of the sums listed at items 1(a) and (b) and 2 above. The Attorney-General and an unnamed party were found by the learned judge to be blameworthy in respect of the death of the deceased. Accordingly, she apportioned damages equally between the Attorney-General and that party. The damages set out in paragraph one are the Attorney-General's half share of the damages awarded.

[4] The circumstances giving rise to this suit are most unfortunate. The deceased was at a dance on 6 July 1996 at the Donald Quarrie High School in St Andrew, when he and another man had an altercation which resulted in him being stabbed in the back by the man. He, while suffering from the stab injury, and with a walking stick in hand, chased the man. While running, he came upon a police officer who shot him in the chest. The finding of the learned judge was that there was no reasonable and probable cause for the shooting. According to the medical evidence, death was due to hypovolemic shock as a result of gunshot and stab wounds to the chest.

[5] At the commencement of the trial on 5 April 2007, counsel for the respondent applied for leave to call as a witness Mr Devrell Dwyer the owner of Dwyer's Trucking and Construction, to give evidence as to the earnings of the deceased. Mr Kevin Powell, counsel for the appellant, objected on the ground that the application should have been made at the case management conference which had been held on 31 July 2006. He pointed to rule 29.11 of the Civil Procedure Rules (CPR) which states that where a witness statement had not been served, a witness may not be called unless there is a good reason for the failure to seek relief from the sanction. Counsel for the respondent indicated that the information that the deceased, who was unmarried, worked at Dwyer's Trucking, was not known by his mother until two years after his death. However, that information was not communicated to counsel until after the case management conference. In December 2006, counsel was acting on the basis that the deceased worked at the Jamaica Public Service Company as a notice of intention to tender in evidence statements made in a hearsay document, dated and

filed on 8 December 2006, in respect of the income of the deceased at the Jamaica Public Service Company was served on the appellant. As it turned out, there was nothing forthcoming on this matter from the Jamaica Public Service Company. On 10 January 2007, counsel received a letter from Mr Dwyer; hence the late application.

[6] The learned judge ruled that the reasons outlined by counsel for the respondent were good reasons. She saw no prejudice to the appellant.

[7] The evidence given by Mr Dwyer was that the deceased was employed to him from late 1995. He started as a watchman, then he became an assistant steel man. He was paid approximately $20,000.00 per month, working five days each week. If he worked on a Saturday or Sunday, he received more. The witness was cross-examined by Mr Powell. During cross-examination, the witness said that he did not deduct tax from the salary of the deceased.

[8] In making the award for pain and suffering, the learned judge said:

> "Ian Bryan succumbed to his injuries shortly after they were inflicted. After the infliction of the gun shot wound he spoke to the officer. Both Shawn and Damain testified that he was alive up to the point he arrived at the hospital. Damages for pain and suffering must be confined to the few hours he remained alive. The sum awarded cannot be more than a nominal amount ..."

Having made a comparison with a 2004 award by the Supreme Court, and having applied the consumer price index, she assessed the sum of $130,000.00 as being a reasonable figure.

[9] In respect of the award for loss of expectation of life, the learned judge referred to several decisions of our courts as well as to cases discussed in ***Kemp & Kemp:*** "The Quantum of Damages." She noted that, historically, the award under this head of damages has been of a conventional sum and that moderation is to be exercised in fixing the amount. In the circumstances, she determined that the sum of $250,000.00 was appropriate.

[10] As regards the award for the "lost years", the judge accepted the submission of counsel for the appellant that a multiplier of 14 was appropriate. She gave due consideration to the oft-cited cases of ***Gammell v Wilson*** [1981] 1 All ER 578 and ***JPS Co Ltd v Morgan & Jackson*** [1986] 23 JLR 138. She noted that the evidence was not very helpful, but felt obliged to estimate a sum that would have represented the living expenses of the deceased. The learned judge said she was forced to assume that the deceased would have spent about one-third of his income on himself and two-thirds on his estate. In the end, she ruled that the amount that would have remained for the benefit of the estate was one-third, and that was calculated at $961,537.50; hence the award of a half of that sum to be paid by the appellant.

Grounds of appeal

[11] The appellant relied on the following grounds of appeal:

> "i. That the learned Judge erred in law in exercising her discretion to allow the Claimant to call a witness without a witness statement or witness summary for that witness.

ii. The learned Judge erred in law in making an award for Lost Years without sufficient evidence on which to do so.

iii. The learned Judge erred in law in making an award of $250,000.00 for Loss of Expectation of Life which is not a moderate or conventional sum.

iv. The learned Judge erred in finding that the sum of $130,000.00 is a nominal sum for damages for pain and suffering in the circumstances where the deceased died within four hours of his injuries."

[12] Miss Hazel Edwards, for the appellant, submitted that the learned trial judge wrongly exercised her discretion in respect of permitting the witness Dwyer to be called without a witness statement having been served. She said that the appellant was taken by surprise by this development and was not afforded an opportunity to prepare a response to the new evidence. She suggested that a more just result would have been for the trial to be adjourned to allow the respondent to file and serve a witness statement for the said witness. This would have allowed the appellant time to respond and would have avoided the possibility of prejudice to the appellant. She submitted that a judicial statement is necessary on the issue to prevent judges from repeating the approach taken by Sinclair-Haynes J in this case.

[13] It should be mentioned that we did not have the benefit of hearing submissions on behalf of the respondent. He was present at the case management conference at which the date for hearing this appeal was fixed. Although he was reminded by the Registry of today's hearing, he was absent when the case was called on. There being

no indication of the reason for his absence and given the age of the matter, the court proceeded with the hearing of the appeal.

[14] Rule 26.8 (2) of the CPR gives the court the power to grant relief if it is satisfied that the failure to comply was not intentional and there is a good explanation for the failure. There is nothing to indicate that the failure here was intentional, and the learned judge considered the explanation to be a good one. In considering whether to grant relief, the learned judge was required, by rule 26.8 (3) to have regard to, among other things, the interests of the administration of justice, whether the failure to comply has been or could have been remedied within a reasonable time, whether the trial date could still be met, and the effect which the granting of relief or not would have had on each party. There is nothing in the record to indicate how the learned judge regarded these matters.

[15] It is obvious that the trial date would have had to be abandoned if there was to be a postponement to allow for the serving of a witness statement, seeing that the application was being made on the date scheduled for trial. This might not have been in the interests of the administration of justice given the fact that the writ had been filed from as long ago as April 2001. Further, in considering the nature of the evidence, it might have been viewed that the evidence was such that there really was no need for an adjournment. The cross-examination of the witness suggests that no issue was being taken as to the fact of the employment of the deceased, and the figures quoted as wages did not seem outrageous requiring investigation by the appellant. It cannot be said therefore that the appellant was prejudiced in any way.

[16] The fear of the appellant that other judges may be minded to follow the example of Sinclair-Haynes J, in this case is not well-founded. Judges are aware that each case has to be dealt with on its own facts. This case is not one that is to be regarded as setting any kind of precedence. Judges are expected to follow the rules using their discretion as permitted in individual cases. Each case stands on its own facts. Given the circumstances herein, it cannot be justifiably said that the learned judge exercised her discretion improperly. Ground one therefore failed.

The lost years

[17] Miss Edwards submitted that there was "no valid, legal or evidential basis" on which the learned judge could have made the award that was made, or any award at all, under this head. She said that the judge was in error, to the detriment of the appellant, in assuming that the deceased would have spent any of his net income on his household. She accepted the methodology used by the judge in her calculations, but said that the absence of the necessary evidence made the award incorrect or flawed.

[18] The learned judge had evidence that the deceased earned $20,000.00 each month tax free. It was from this base that she made the award. In England, in the absence of specific evidence, judges have used a formula to determine the award to be made in circumstances such as the instant one. The Jamaican approach is exemplified in ***JPS Co Ltd v Morgan & Jackson***. In that case, Carey JA said:

> "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 on 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 33 ½ or 25 were doubtless fair estimates in ***White v London Transport Executive*** [1982] 1 All ER 410 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 lifetime, and not any formula of 33 ½ % 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." [pp. 143F-144B]

[19] It is not unlikely that since Carey JA spoke those words, the gathering of data has improved in Jamaica to the point where we may now have data on the areas in question. Legal practitioners may wish to make note of this possibility and explore same for use in relevant situations. In ***JPS Co Ltd v Morgan & Jackson***, the factual situation was not markedly different from the instant case in respect of the dearth of evidence as regards the amount that would have been available for the estate. The Court of Appeal upheld the judge's award saying that it had not been arrived at on an incorrect principle and was moderate. The same may be said in the instant case. The award should therefore not be disturbed. Ground two failed.

Loss of expectation of life

[20] As said earlier, the learned judge awarded $250,000.00 for loss of expectation of life. Miss Edwards submitted that the applicable principle is that only a very moderate figure or sum should be awarded for this head of damages. She referred to ***Rose v Ford*** [1937] 3 All ER 359 and ***Benham v Gambling*** [1941] AC 157 as authorities in this regard. Miss Edwards complained that although the learned judge referred to some Jamaican cases that demonstrated how the award should be made, she did not follow them in making her final decision. She submitted that the judge ought to have followed the unreported judgment of Brooks J (as he then was) in ***The Administrator - General for Jamaica v The Attorney-General for Jamaica*** (2001 CLA-073 delivered on 20 May 2005). In that case, in making an award of $50,000.00, Brooks J

said that the sum was more in line with the established principles and the other relatively recent decisions. It reflected, he said, the devaluation of the currency while maintaining moderation.

[21] The submission of Miss Edwards on this point is well made. It seems that the award in this respect has been too generous. Accepting the approach of Brooks J (as he then was) and also of Dukharan J (as he then was) in ***Odemay Bartley v Errol Walters and Another*** (CL 1999 B226, unreported) a judgment referred to by the learned judge, the sum that ought to have been awarded should not exceed $120,000.00. This ground of appeal succeeded.

Pain and suffering

[22] Section 2(1) of the Law Reform (Miscellaneous Provisions) Act states:

> "Subject to the provisions of this section, upon 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."

In view of that provision, the learned judge observed that it was "axiomatic that the personal representative of the deceased is entitled to recover damages that the deceased could have recovered and which were a liability on the wrongdoer at the date of death". As regards the relevant facts, she noted that the deceased succumbed "shortly after" the infliction of the injuries. The written submissions filed by the appellant indicate that death had occurred approximately three to four hours after the infliction of the injuries. In her written judgment, the learned judge also noted that the

deceased spoke to the officer who had shot him and he remained alive up to the time of admission at the hospital. In her view, the sum awarded ought not to be more than a nominal amount. In that context she awarded $130,000.00.

[23] The appellant submitted that no award should have been made in this category. It was argued that the length of time during which the deceased endured pain and suffering in this instance was brief, hence there was no basis for an award. The judgment of the Privy Council in ***Inez Brown (near relation of Paul Andrew Reid, deceased) v David Robinson and Sentry Service Co. Ltd.*** (PC No 27/2004), delivered on 14 December 2004, was relied on by the appellant. In that case, the first respondent who was employed as a security guard by the second respondent was on gate duty on 8 October 1985, at a football match at Jamaica's famous cricket ground, Sabina Park. The first respondent had a scuffle with the deceased during which the deceased was shot at close range. The deceased sustained a gunshot wound to the left axilla. This injury resulted in paraplegia with loss of sensation at the level of the ninth thoracic vertebra. Death occurred three months after the incident. Courtenay Orr J, found both respondents liable. Among the awards he made was one of $2,000,000.00 under the heading of pain and suffering. The company appealed to this court which, "applying the traditional basic Salmond test of acts which were authorized or unauthorized modes of performing authorized acts", allowed the appeal on the basis that the first respondent had been acting outside the scope of his employment. Since the court found in favour of the company, it did not deal with the issue of damages, although it had been argued "that the damages awarded by the judge were wrong in

principle and excessive". The Privy Council, applying the principles that had been revised and authoritatively laid down by the House of Lords in ***Lister v Hesley Hall Ltd*** [2002] 1 AC 215, [2001] UKHL 22 and ***Dubai Aluminium Co Ltd v Salaam*** [2003] 2 AC 366, and by the Privy Council itself in ***Bernard v Attorney-General of Jamaica*** [2004] UKPC 47, found that the first respondent's acts were closely connected with his employment. In so finding, their Lordships reversed the judgment of this court, and held (as Courtenay Orr, J had done) that the employer was vicariously liable for the shooting.

[24] Counsel for the appellant before the Privy Council repeated the challenge in respect of the award of damages. The learned trial judge had awarded a sum for assault and battery separate and apart from the award mentioned above for pain and suffering and loss of amenities. This, counsel argued, was wrong in principle. The Privy Council agreed that the sum for assault and battery "should be brought under the general head of compensatory damages for the assault, which will comprise a sum for the pain and suffering and loss of amenities suffered by the deceased during the rest of his lifetime, to which may be added whatever sum may be appropriate to reflect the circumstances of the assault and the public indignity inflicted by Robinson upon him and the fear which he felt when the assault took place". The Privy Council saw nothing on the record to indicate that the learned judge had applied the principle that the damages for pain and suffering and loss of amenities should be limited to an amount appropriate for the length of time that the deceased had survived after the injury. In the circumstances, their Lordships concluded that the award of damages under those heads

required reconsideration and so had to be set aside. The Privy Council was urged to make the assessment, given the length of time that had elapsed since the incident. In keeping with their established practice, their Lordships deferred to the experience of the Jamaican courts in assessing such damages. However, they made what they described as an interim award of $500,000.00, pending final assessment by the Court of Appeal. The final sum, said the Privy Council, would be such as "the court thinks proper to reflect the circumstances of the assault, the public indignity inflicted upon the deceased and the fear which he may have felt when the assault took place".

[25] In the instant case, the learned judge was careful to address the question of the length of time that the deceased survived after the injuries were inflicted on him. She referred to this decision of the Privy Council as well as to an unreported decision of the Supreme Court in ***Elizabeth Morgan v Enid Foreman and Owen Moss*** (HCV 0427/2003 - delivered in October 2004), where the victim had survived for only a day. In the circumstances, as indicated earlier, she awarded the sum of $130,000.00.

[26] We cannot say that the sum awarded is excessive in any way. The learned judge applied the correct principles and made an appropriate award. This ground failed.

[27] The foregoing are the reasons for our decision.