IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO HCA S-1297 of 2003

BETWEEN

HUNTER SAMLAL
(Administrator of the Estate of KIRSTEN SAMLAL)

Plaintiff

AND

JAIRAM AJODHA
PREVIN BISHEN AJODHA

Defendants

B&L INSURANCE COMPANY LIMITED

Co-Defendant

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Before: Master Alexander

Appearances:
For the Plaintiff: **Ms Lisa Francis**
For the Defendants
and Co-Defendant: **Mr Shawn Roopnarine instructed by Mrs Wendy Ramnath-Panday**

DECISION

INTRODUCTION

1. The plaintiff's son, Kirsten Samlal (hereinafter referred to as "the deceased") was on 8th January, 2000 travelling as a passenger in motor vehicle PJ 4857 driven by the second defendant, the servant and/or agent of the first defendant, along Cipero Road, San Fernando, in a westerly direction, in the vicinity of Southern Sales and Services Ltd when it was involved in an accident. The deceased died on the same day of the accident. The plaintiff brought this action in his capacity as legal personal representative of the estate of the deceased, pursuant to Letters of Administration issued by the Probate Registry on 4th

October, 2002. By writ and statement of claim filed on 16th July, 2003 as amended on 30th October, 2003 the plaintiff sought to recover damages for the death of the deceased under the **Supreme Court of Judicature Act No. 12 of 1962** for the benefit of the estate of the deceased for the loss of expectation of life and consequential loss caused to the deceased by the negligent driving of the second defendant.

2. The defendants and co-defendant (hereinafter "the defendants") filed a defence on 9th September, 2003. Subsequently, Stollmeyer J (as he then was) on 5th December, 2008, entered judgment by consent against the defendants, with costs to be taxed and damages to be assessed by a master. Pursuant to the above order, this court was charged with the assessment of the plaintiff's damages.

THE EVIDENCE

3. At this assessment, the plaintiff gave evidence via his witness statement and under cross examination. His evidence, in the main, was unchallenged with the critical points as summarized below:

(i) The deceased was 22 years and an unemployed student when he died on 8th January, 2000, as a result of the motor vehicular accident.

(ii) The deceased attended TML San Fernando Primary School from the years 1982 to 1988. He attended the San Fernando East Junior Secondary School for one year from 1988 to 1989. He was then transferred to St Benedict's College, San Fernando in 1990, which he attended for 5 years until he wrote CXC O' Level Examinations in 1995 passing 6 subjects, receiving 1 grade I, 4 IIs and 1 III on completion of his pupilage there. The deceased then attended the Sir Oliver Mowat College in Canada for 2 years from 1995 to 1997, graduating on completing his High School education.

(iii) The deceased's goal was to become a corporate lawyer and he obtained admittance to York University of Ontario, Canada in 1997. He pursued a Bachelor of Arts, Honours Coordinated Business in the Faculty of Arts at this university for the

academic year 1997-1998, where he failed one course. This course of studies was not completed.

(iv) The deceased returned to Trinidad in 1998 and continued his studies by enrolling into the School of Business and Computer Science (SBCS), Champs Fleurs, pursuing a 2 year Diploma in Computing and Information Systems. He completed one year of his studies at SBCS but did not sit the examinations at the end of the academic year, around May 1999.

(v) Up to the time of his death, the deceased continued to pursue this course at SBCS.

SUBMISSIONS BY PARTIES

4. Counsel for the plaintiff asked that the unchallenged evidence of the academic pursuits of the deceased be accepted by the court. In his submissions, the plaintiff reproduced statements made by the tutors/teachers at the Sir Oliver Mowat College on the deceased's Student Progress Report. These statements pointed to an academic performance that was consistent, positive and progressive. Counsel submitted that they were the best persons to give the court an insight into the deceased's ambition and attitude towards his education. She argued that the acceptance of the deceased into York University was evidence of his outstanding performance at the Canadian college. Counsel concluded that it is reasonable that the deceased would have continued in his quest of academic pursuits, as consistently shown throughout his short life, and that he would have at least acquired a first degree. She concluded that the net salary of the deceased would have been an average of $8,000.00 per month, which would reasonably have been expected to increase.

5. Counsel for the defendant submitted that no evidence was provided as to the regularity of attendance at SBCS nor was evidence provided as to the type of student that the deceased was at this institution. It was noted that when the deceased returned to Trinidad, he lived with his mother, yet his mother was not called as a witness. Counsel further pointed out that the deceased was not employed at the time of his death and had never worked before, whether in a part-time or vacation job. He concluded that the plaintiff has failed to lead

evidence as to the prospects for employment of the deceased, which it was suggested was detrimental to his case, and asked the court to consider an award of nominal damages. Counsel for the defendant further submitted that it is to be noted that no evidence was led by the plaintiff of the character of the deceased or his propensity for hard work or work at all. Further that, based on the unsatisfactory state of the evidence, the court cannot speculate on the deceased's future occupation or any salary. The court was asked to note that the law is concerned with specific matters when an estate claim is made as stated by Lord Wright in ***Davies* v *Powell Duffryn Associated Collieries Ltd***,[1] "*[T]here 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. The starting point is the amount of wages which the deceased was earning…*" It was submitted by the defendants that, in these circumstances, an award should be made under the head of nominal damages[2] or alternatively consideration should be given to a lump sum award, as the plaintiff did indeed suffer the loss of his son. Counsel was unable to provide any authority for this alternative submission.

THE LAW

6. Under **section 27 of the Supreme Court of Judicature Act, Chapter 4:01** (hereinafter "**Judicature Act**") damages can be awarded for loss of expectation of life and for loss of earnings for the lost years. There is no claim in respect of a dependency in this matter. I, therefore, note the guidance of Lord Salmon in the House of Lords case of ***Pickett* v *British Rail Engineering Limited***[3] that, "*[D]amages for the loss of earnings during the lost years should be assessed justly and with moderation.*" I will now proceed to deal with the relevant heads of damages.

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[1] *Davies* v *Powell Duffryn Associated Collieries Ltd* (No 2) [1942] 1 AER 657 at page 665

[2] Nominal damages may be awarded where the fact of loss is accepted but its quantum is uncertain. The court was referred to *Munroe Thomas* v *Malachi Ford* and the Court of Appeal's judgment (unreported) on loss of future earnings, where because of the poor quality of evidence and the imponderables the court adopted a lump sum approach.

[3] *Pickett* v *British Rail Engineering Limited* [1980] AC 136 at 153-154

(i) Loss of Expectation of Life

7. This is a conventional award to mark the fact that some loss has been incurred. As a rule, this award is not subject to inflation, the status or age of the deceased while still living. In this jurisdiction, as agreed by both sides, the 'conventional sum' of $20,000.00 has been awarded in fatal accident claims since the judgment of Rajkumar J on 20th June, 2008 in ***Tawari Tota-Maharaj (Administrator of the Estate of Arvind Tota-Maharaj)*** **v** ***Autocenter Ltd & Ors***[4]***.*** The sum of $20,000.00 is, therefore, awarded under this limb.

(ii) Loss of Earnings for the Lost Years

8. This is an award made as damages for the deceased's loss of earnings in the 'lost years' that is the years in which the deceased would be earning if he was living. In other words, it aims to compensate the deceased's estate for the lost portion of the deceased's earnings. The basic principle is that a claim for 'lost years' survives for the benefit of the deceased's estate. The principle was first enunciated by the English Court of Appeal in ***Kandalia*** **v** ***British Airways Board***[5] and approved by the House of Lords in ***Gammell*** **v** ***Wilson & Ors***[6]. It was subsequently accepted by and is followed in this jurisdiction. Such damages for future loss of earnings are assessed locally by the application of the multiplier/multiplicand method. There must be some evidence upon which an assessing court can arrive at a datum figure. Counsel for the defendants submitted that in the instant case, there is a dearth of evidence produced by the plaintiff to help determine the multiplicand, as what is required is clear and cogent evidence of which there was none. This court will proceed below to look at this issue.

9. This court notes that, up to the time of his death, the deceased had never worked. This does not mean that in fatal accident claims, students/unemployed persons pursuing higher education are precluded from being compensated for their future loss of earnings. See ***Tawari Tota-Maharaj*** (supra). However, the submissions and conclusions of counsel for the plaintiff that it is only reasonable to assume that the deceased would have continued in

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[4] *Tawari Tota-Maharaj (Administrator of the Estate of Arvind Tota-Maharaj* v *Autocenter Ltd & Ors Tawari Tota-Maharaj (Administrator of the Estate of Arvind Tota-Maharaj* v *Autocenter Ltd & Ors* HCA No 46 of 2003

[5] *Kandalia* v *British Airways Board* [1980] 1 AER 341

[6] *Gammell* v *Wilson & Ors* [1981] 1 AER 578

his quest of academic pursuits, as consistently shown throughout his short life, and would have at least acquired a first degree, eventually earning a net salary of on average of $8,000.00 per month, which would reasonably have been expected to increase are not accepted, without more or at least some form of tangible evidence that would lead this court to so conclude.

10. I agree with counsel for the defendants that the relevant evidence must be placed before the court to assist with this process. As noted by counsel for the defendants, "*[O]ne would expect he would have been able to work in some capacity, one would expect but how is a court to quantify that; this is not a crystal ball situation and that is unfortunately the problem that the claimant has now. The claimant has the responsibility to define the evidence; the claimant is responsible for bringing to the court the evidence upon which a court can fairly and justly make an award.*"

11. In the instant matter, the evidence points to the deceased having successfully obtained a full certificate at O' Levels as attested to in the viva voce evidence of Principal Earle Alcide. Apart from the 6 subjects at CXC O' Level Examinations, he also successfully completed a course of studies at Sir Oliver Mowat College, Ontario, Canada and this evidence has not been refuted by the defendants. This court also notes the statements from his tutors/teachers at the Mowat College on the deceased's academic performance and consistency. This, however, does not without more substantial evidence prove that he would eventually have earned a first degree as counsel for the plaintiff sought to have this court believe. It is to be noted further that although subsequently the deceased was enrolled at York University, he did not complete his studies there and thus did not receive any tertiary level qualification. The same situation arose in the deceased's enrollment at SBCS in Trinidad, as he had not sat his first year examinations and was repeating that year at the time of his death. Little weight, if any, is given to the submissions of counsel for the plaintiff that the net salary of the deceased would have been an average of $8,000.00 per month, which would reasonably have been expected to increase as it is an unsubstantiated conclusion.

12. In the view of this court, the plaintiff has not provided sufficient evidence that the deceased intended to complete his studies at SBCS or anywhere else for that matter and/or as to his likely earnings should he have lived. In this regard, Lord Reid's comments in ***Davies* v**

Taylor[7] are noted, "*[Y]ou can prove that a past event happened, but you cannot prove that a future event will happen and I do not think the law is so foolish as to suppose that you can. All you can do is to evaluate the chance. Sometimes it is virtually 100 per cent: sometimes virtually nil. But often it is somewhere in between...*"

13. Counsel for the defendants have suggested nominal damages, this, however, is not a case which calls for an award of nominal damages. Guidance is sought from the Court of Appeal decision of ***Thomas* v *Ford et al***[8] where Smith JA noted at paragraph 30:

> *With respect to pecuniary loss, there are two methods of assessing this loss. Firstly, there is the multiplier/multiplicand approach. …. Secondly, courts sometimes give a lump sum award as compensation for an estimated loss of earnings. This second method is used where it is difficult or impossible to ascertain with any certainty the loss of earnings which a claimant would suffer as a result of the defendant's actions (see generally Moeliker v Reyrolle [1977] 1 All ER 9).*

Smith JA went on to explain, "*Given the great difficulty in ascertaining the appellant's loss of earnings, the Master properly applied the lump sum method. The actual award of $40,000.00 is within the range of accepted awards in Trinidad and Tobago for this loss, namely $10,000.00 - $50,000.00. See The Lawyer Volume 7 No. 6 pages 43-49 and see Reshma Choon v Industrial Plant Services Ltd CV 2006-00574 at paragraph 20.*"

14. This court notes, however, that in ***Octon (an infant by his next friend Hamlett, Sylvia); Hamlett* v *Orr, Trinidad and Tobago Insurance Limited,***[9] Smith J (as he then was) awarded a lump sum for future earnings in the sum $150,000.00 to an 11 year old explaining:

> *In calculating this loss, a Court is making a guess as to what the Plaintiff's loss of future remuneration would be, taking into account the "imponderables" and vicissitudes of life. In arriving at a figure for this loss the courts use two approaches:*

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[7] *Davies* v *Taylor* [1974] AC 207 at 213
[8] *Thomas* v *Ford et al* Civil App 25 of 2007
[9] *Octon (an infant by his next friend Hamlett, Sylvia); Hamlett* v *Orr, Trinidad and Tobago Insurance Limited* HCA3278/1999

(i) a lump sum award based on similar cases (see Joyce v Yeomans (1981) 2 All E.R. 21)

(ii) A multiplier/multiplicand approach ...

In the present matter, Counsel for the Defendant asked the court to use the lump sum method since the Plaintiff at the time of the accident was only 11 years old and to estimate his future earnings or earning capacity was too much guesswork here…. Counsel went on to submit that based on the trends in recent cases, a sum in the range of $150,000.00 would be adequate compensation for this category of loss.

I agreed with the submissions of Counsel for the Defendants especially since this Plaintiff was only 11 years old at the time of the accident, and while he was performing well at school at the time, he had been kept back for 1 year. He had not even written his 11 plus exams to be placed in a Secondary School and to guess what trade, profession or vocation he would have pursued seemed to me to be too speculative.

15. This is such a case where the evidentiary difficulties justify a departure from the traditional multiplier/multiplicand method to assess the quantum of loss. Given the insufficiency of the plaintiff's evidence and in a bid to assess 'justly and with moderation', this court bears in mind the age of the deceased at the time of his death, that he had never worked before and the evidence, although limited, was that he had begun pursuing tertiary education. Thus, I accept the sum of $175,000.00 as an appropriate lump sum award under this head.

SPECIAL DAMAGES

16. In ***Gammell*** (supra) it was held that the cost of obtaining a grant of letters of administration is not recoverable. It is noted that in this jurisdiction, the practice has been to award such expenses as seen in ***Deosahai Bedaisee (Administartor of the Estate of Indra Bidaisee, deceased)* v *Ramdial Transport Ltd*.**[10] Counsel for the defendants submitted that no special damages have been proven and thus, no award should be made.

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[10] *Deosahai Bedaisee (Administartor of the Estate of Indra Bidaisee, deceased)* v *Ramdial Transport Ltd* HCA No 2541 of 2002

17. The following items of special damages were claimed in the plaintiff's statement of case:

Funeral expenses	=	$10,000.00
Testamentary expenses	=	$5,000.00

18. Counsel for the plaintiff submitted that it cannot be disputed that there would have been a funeral. This is accepted. Further, she states that the grant of letters of administration was evidence of the testamentary expenses incurred. This too is conceded. While it is understood that these expenses would have been incurred, no evidence was provided to the court as to the amount spent. In addition, no receipts were annexed in support of either claim. It must be borne in mind that in this jurisdiction the law on special damages dictates that some form of documentary proof be supplied where these claims are made. In the mind of this court, such bills, receipts, invoices or other documentary proof could have been made available and in their absence, these claims will not be entertained. The claim for special damages is thus disallowed.

INTEREST

19. The governing principle is that interest should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him/her. In ***Harbutt's* v *Wayne Tank Company***[11] it was stated that, "*[t]he basis of an award of interest is that the defendant has kept the plaintiff out of his money: and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.*" Generally, interest is not awarded on future loss. See ***Jefford* v *Gee***[12].

20. Also, as a rule, interest is awarded at the discretion of the judge. Lord Salmon MR in ***Jefford*** (supra) stated that when dealing with fatal accident cases, damages are awarded in a lump sum and it is treated as damage inflicted once and for all at the time of the accident. If such a case is not settled out of court, then the plaintiff's advisers should issue and serve the writ and the defendants should make payment. From that time onwards, it can be said that the

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11 *Harbutt's* v *Wayne Tank Company* [1970] 2 WLR 212
12 *Jefford* v *Gee* [1970] 1 AER 1202

dependants are kept out of their money and in these circumstances interest should be awarded from the date of service of the writ. Bearing in mind the discretionary nature of the award of interest, I am minded to award interest at the rate of 3% in this matter.

CONCLUSION

21. In the circumstances, this court is minded to order the defendants to pay to the plaintiff damages in the conventional sum for loss of expectation of life and damages for the lost years in the sum of $175,000.00 with interest at the rate of 3% per annum from 16th July, 2003 to 29th June, 2012.

THE ORDER

22. It is ordered that the defendants and co-defendant do pay to the plaintiff:

i. Damages for the lost years in the sum of $175,000.00, with interest at the rate of 3% per annum from 16th July, 2003 to 29th June, 2012.
ii. Loss of expectation of life of $20,000.00.
iii. Costs to be taxed by the Registrar in default of agreement.

Dated 29th June, 2012

Martha Alexander
Master (Ag)

Judicial Research Assistant: Kimberly Romany