

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV 2008-01892

BETWEEN

ALICE LEE POY JOHN

(Administratrix of the Estate of CURTIS JOHN)

Claimant

AND

SECURISERVE LIMITED

Defendant

AND

SAGICOR GENERAL INSURANCE INC.

Co-Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. H. Seunath S.C. for the Claimant.

Mr. R. Persad for the Defendants.

Judgment

Background and Context

1. The deceased was a Customs and Excise Officer. In August 2006 he was killed in a motor vehicle accident when the defendant's vehicle crossed the median of the Solomon Hochoy Highway. He was then 43 years old. The claimant claims damages as Administratrix of the estate of the deceased.

2. I am asked to assess the quantum of damages payable to the claimant under the Supreme Court of Judicature Act.^[1]

3. Sums are awardable in respect of the estate of the Deceased under the following heads:

(1) Loss of expectation of life.

(2) Earnings in respect of the lost years.

Under this heading, what is relevant is:

(i) The appropriate multiplier to be applied in respect of the Deceased's earnings; and

(ii) The appropriate multiplicand.

^[1] . It is accepted that the sum payable under the Compensation for Injuries Act being based on a pleaded contribution of \$5000 per month toward dependency of the claimant and her three children, would be outweighed by their entitlement to their share under an intestacy. This can be illustrated as follows - if the claimant is the same age as the deceased and her portion of the dependency is assumed to be \$2,000, (twice that of each child), her annual dependency would be valued at \$24,000 and even a multiplier as high as 18 would produce a lifetime dependency valued at \$432,000.00. The dependency of each child would be significantly less than this being \$12,000 per year for a maximum of 13 years. (As his youngest child was born in 2001, being 5 years old at date of the deceased's death the dependency would not exceed 13 years).

Disposition

4. The award is as follows:

Special Damages

- Wrecking Service \$1,200.00
- Administration Expenses \$9,628.96
- Funeral expenses to be assessed in default of agreement
- Loss of motor vehicle \$24,000.00

General Damages

- Loss of Expectation of Life \$20,000.00
- Pre assessment loss of earnings- In respect of the 3 and 11/12 years from August 2 2006 to July 2 2010 $\$9000.00 \times 12 \times 3^{11/12} = \$423,000.00$.
- Post-assessment loss of earnings: $\$9,000.00 \times 12 \times 11 = \$1,188,000.00$.
- Funeral expenses when determined by assessment or agreement to carry interest at 6% per annum from dates of receipts to the date of judgment.
- Interest on the pre-assessment portion of the loss of earnings (\$423,000.00) at the rate of 3 % per annum from August 2 2006 to the date of judgment.

Payment

- On an intestacy the estate is to be divided between the deceased's widow as to half, with the remaining half being divided equally among the deceased's three children.
- It is directed therefore that the defendant do pay to the claimant 50 % of the above assessed sums in respect of her share of the estate, and the further total sum of \$100,000.00 to be divided equally in respect of the care and maintenance of each minor child of the deceased.

- The remaining 50 % of the above assessed sums in respect of the estate of the deceased, less the sum of \$100,000 paid as aforesaid in respect of the care and maintenance of each minor child of the deceased, (the principal sum), is to be paid to the Registrar of the Supreme court, to be deposited in an interest bearing account, in a financial institution to be agreed between attorneys at law for the claimant and the defendant.
- In default of agreement, a suitable financial institution is to be approved by the Registrar of the Supreme Court.
- Upon each minor child attaining his respective age of majority that child's share of the principal sum and any accrued interest thereon is to be paid out to him/her upon application made on his behalf.
- In the interim interest accruing thereon is to be paid to the claimant for the benefit, use and upkeep of the minor children.
- Liberty to apply

Loss of expectation of life

5. I award the sum of \$20,000.00 for loss of expectation of life - See previous decision of this court in **Tewary Tota-Maharaj Administrator Ad Litem of the Estate of Arvind Tota-Maharaj Deceased v Auto Center Limited and others, HCA No. 46 of 2003.**

Principles – The lost years

6. This is a case under the Supreme Court of Judicature Act for damages for the estate of the Deceased. For reasons stated above this is the focus of this assessment and not the claim in respect of a dependency. A calculation must therefore be attempted of the earnings of the deceased for the years that he might have lived, and the earnings for which his estate has been deprived .The method of calculating the award for these “lost

years” was considered by Lord Justice O’Connor in the case of *Harris v. Empress Motors Ltd* [1984] 1 W.L.R. 212 at p. 216H,

“I come now to the main problem in these cases; how should the deduction which has to be made from the net loss of earnings for the lost years be calculated.....”

At the Head Note of this Judgment the approach to this problem was summarized as follows:-

*...In calculating the sum to be deducted for living expenses when assessing the net loss of earnings for the lost years, the ingredients constituting the deceased’s living expenses were the same irrespective of the deceased’s age, marital status or number of dependants; that the sum to be deducted as those living expenses was the proportion of net earnings the deceased would have spent to maintain himself at his standard of living and did not include savings or sums spent exclusively for the maintenance or benefit of others but where there were shared living expenses a pro rata proportion should be deducted; that, accordingly, the correct approach to the calculation of the deceased’s living expenses was not to make an assessment of those expenses as would be done for the purposes of calculating a dependency under the Fatal Accidents Act 1976, but to assess as a **percentage** the available surplus after deducting from the net earnings the cost of maintaining the deceased in his station of life;*

At p. 228, Lord Justice O’Connor stated:

“I return to the two decisions in the House of Lords. In my judgment three principles emerge: 1: The ingredients that go to make up “living expenses” are the same whether the victim be young or old, single or married, with or without dependants. 2. The sum to be deducted as living expenses is the proportion of the victim’s net earnings that he spends to maintain himself at the standard of life appropriate to his case. 3. Any

sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings.

7. I am therefore guided by the position in the case of **Harris v Empress Motors Limited**. I note the reference at page 571(b) to the guidance of Lord Salmon in the House of Lords case of **Pickett v British Rail Engineering Limited [1980] AC 136 @ 153-154**:

"Damages for the loss of earnings during the lost years should be assessed justly and with moderation."

Also at page 576(d) the case of **White v London Transport Executive [1982] QB 489 at 499** is cited:

"Thus for example in this day and age the ordinary working man's life would not be regarded by him as reasonably satisfactory and potentially enjoyable if he cannot afford a short holiday, a modest amount of entertainment and social activity and, depending on his particular circumstances, a car."

Also at page 500 of the **White v London** case cited at page 576(h) to (j):

"The first inference that needs to be drawn as it seems to me, if my definition of the loss in question is correct, is whether, and if so, broadly to what extent, the deceased's prospective earnings match the circumstances into which he had been born and was living. Because if a man born and brought up in very comfortable circumstances is a relatively low earner, his earnings might not even be sufficient to meet his reasonable needs, let alone to exceed them, while, on the other hand, a man with relatively modest demands, earning relatively a lot of money compared with that earned by most men in his circumstances, would be likely to have a large surplus."

8. I accept the reasoning in the **Harris v Empress** case that the surplus funds approach is to be adopted in preference to the savings only approach for the purpose of calculating the amount of the multiplicand to be used representing the earnings of the Deceased in the lost years.

Finding of fact re the deceased's earnings – net and gross

9. I consider therefore the value of the claim by the Estate. The income pleaded is an average of \$19,335.00 per month. There has been neither amendment to the pleadings nor any application to so amend. This appears however, from the documents attached in support, to be his gross earnings.

10. Having heard the evidence of Dianne Shim on behalf of his former employer I find as follows:-

His Net overtime in 2004 was \$55,970.00.

His Net overtime in 2005 was \$117,351.00.

His Net overtime in 2006 was \$76,615.00 - I note this is overtime for 7 months (he died in August) - If projected for 12 months, overtime would be approximately \$132,000.00

His net salary for 2005 was \$50,883.32.

11. Accordingly I use as his total net earnings the figures for net salary and net overtime of his last complete year of work (**2005**) and approximate this at \$168,000.00. Including other miscellaneous allowances of approximately \$4,000.00 per annum this gives a net annual figure of \$172,000.00 and a net monthly figure of approximately \$14,300.00.

From this figure must be deducted the deceased's probable living expenses for the lost years.

Deductions

12. I was invited to make a deduction of two-thirds of the Deceased's earnings. I decline to do so. I note that in the **White** case the Judge deducted two-thirds of net income for the first five years until the Deceased would have left home. However, I note the reason for this at page 577(c) in **Harris v Empress** as follows:

*“The reason for supporting this high rate of deduction in cases such as **White**, **Gammell** and **Furness**, is that the future is speculative and allowance has to be made for the fact that a man may never marry, may never save a farthing, may never support anybody; but when one is faced with the position in **Pickett** or in the present two cases, the position is entirely different. That which is speculative in **Gammell** to a very high degree is not speculative at all; that which is not to be deducted can be seen with reasonable clarity and, as one would expect, a very much smaller part of the net earnings will fall to be deducted.”*

At pages 577(d) to (e):

*“We were asked by counsel for the defendants in the **Cole** case and by counsel for the defendants in the **Harris** case to give guidance, if we could, as to what proportion of the net earnings in the lost years should be deducted for the purpose of the Law Reform Act claim. Regretfully, I find it impossible to do this because so much depends on the amount of the joint expenditure and the number of persons among whom it is to be divided; that in general, according to the circumstances, it seems to me that the proportion will be greater than the percentage used for calculating the dependency under the Fatal Accidents Act.”*

13. I also note that under the Fatal Accidents Act, the amount of living expenses is conventionally assessed at no more than one-third of net earnings.

Living Expenses

14. Applying those principles to the instant case, I find as follows:

From the deceased's net income must be deducted the Deceased's living expenses. I take into account the fact that the Deceased was married with 3 children.

(1) Each matter is fact specific.

(2) I find that on a balance of probabilities it is likely that the Deceased's net monthly earnings would be as I have set out above, that is approximately \$14,300.00.

(3) I consider the following matters would be relevant to the deductions to be applied in respect of the instant Deceased:

(i) I find it is likely on a balance of probability that the Deceased would have had the expenses of replacing a motor vehicle, maintaining such a vehicle, and providing it with fuel.

(ii) I find it is also likely that the Deceased would have been required to pay the insurance on such a vehicle.

(4) I accept in accordance with **Harris v Empress** (ibid) that 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 life appropriate to his situation.

(5) I therefore propose to assess the monthly cost of the Deceased's enjoying a standard of living which would include:

(i) A short holiday,

(ii) A modest amount of entertainment and social activity,

(iii) A car.

15. I assume that the deceased was of moderate habits, as I have no evidence to the contrary. Taking those matters into account, I consider it hardly conceivable that the Deceased would have spent any less than 1/3 of his net monthly income up to the time of assessment on himself. I consider the following expenditures totaling \$5300.00 per month to be not unreasonable - - For example expenses in respect of his car -\$1,500.00; clothing, food, and miscellaneous expenditure \$1,800.00; travel \$1,000.00; entertainment \$1,000.00. I consider these figures highly conservative and a minimum of expenditure that can reasonably be anticipated in respect of someone enjoying the level of earnings of the deceased.

Surplus

16. Accordingly, I find that the surplus that would have been available to the Deceased up to the date of assessment would have been higher than that in the **White** case. A higher proportion of expenditure would have been required for his personal living expenses than, for example, a single newly qualified professional because he would have had to support himself in accordance with his station and stage of life.

Pre-assessment loss

17. The monthly surplus for the deceased's estate **pre-assessment** I find would be \$14,300.00 less \$5300.00. That gives a figure of \$9000.00 per month for 3 ^{11/12} years or \$423,000.00.

Multiplier

18. I note again the injunction referred to in **Harris v Empress** from the case of **Pickett** that damages for loss of earnings during the lost years be assessed justly and with moderation.

19. I note the case of **Young v Percival [1974] 3 All ER 677 at 681** referred to in **Harris v Empress** at page 565(c) where the Court assessed the right multiplier to be 14 in respect of the Deceased aged 29 and considered a multiplier of 16 was too high. I note also the case of **Mallett v McMonagle [1970] AC 166 at 177** per Lord Diplock at page 565(b):

“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 ... of dependency. It is seldom that this number of years purchase is exceeded.”

20. As at the date of assessment the Deceased would have been 47 years old. In respect of a Deceased who was 47 years old at the date of assessment, his working life, were he to have worked to age 65, would be 18 years. However, that period of working life is discounted to take into account the contingencies of life.

21. In respect of pre-trial loss, I take into account the fact that 3 ^{11/12} years have elapsed since the date of the Deceased's death. In doing so, I take into account the fact that:

(1) The award is not susceptible to precise mathematical calculation but constitutes a Court's best effort at projecting from the evidence into the future and estimating as best as it can what the Deceased's prospects would have been. It is a process, however, that is necessarily uncertain. Those uncertainties for example include:

(i) The possibility that the Deceased may have fallen ill or may have passed away, were it not for the accident, well before he came to the end of his working life.

(ii) The possibility that the Deceased may have been unemployed.

These are just a subset of possibilities that are encompassed in the uncertainties inherent in predicting the future.

A multiplier of 12 is sought by the claimant. A total multiplier of 11 is sought on behalf of the Second and Third Defendants.

22. In the case of **Peter Seepersad & Theophilus Seepersad v Capital Insurance Limited**, Privy Council Appeal delivered on 1st April 2004, the appellant who suffered personal injuries was 37 years old at the date of trial. I note that at paragraph 18 the Privy Council took into account the then current discount rate on treasury bills in Trinidad and Tobago as being between 5% and 6% and assessed a multiplier of 16 years in order to provide proper compensation to the appellant taking into account interest rates in Trinidad and Tobago and making some allowance for the contingencies of life. I take into account that in the **Seepersad** case the multiplier used was 16 for a plaintiff 37 years old at the date of trial. I therefore note the following:

(1) The Deceased in the instant case would have been 47 years old at the date of assessment.

(2) The multiplier of 16 in the **Peter Seepersad** case was for future loss of earnings, loss of earnings pre-assessment having been quantified.

(3) I note also that interest rates in Trinidad and Tobago have been on the decline.

(4) I consider that the earning capacity of the Deceased would not be speculative.

(5) I also consider that the **Peter Seepersad** case is one of personal injuries whereas this is a fatal accident case. However, I find that there is no reason in principle why, as the multiplier in respect of loss of future earning capacity for the lost years, the lost years being the same period of earning capacity as under consideration in respect of personal injuries, that guidance should not be obtained from the above case.

23. Accordingly, I find that the multiplier that I am prepared to use for post-assessment loss would be 11 on the basis that the Deceased would be 47 years, plus or minus a few weeks, at the date of assessment with a working life of 22 years at the time of death and 18 years from date of assessment.

Post-assessment loss

24. In respect of **post-assessment loss**, I award the sum of \$9,000.00 multiplied by 12 multiplied by 11. That gives a figure of \$1,188,000.00.

25. The award is as follows:

Special Damages

- Wrecking Service \$1,200.00
- Administration Expenses \$9,628.96
- Funeral expenses to be assessed in default of agreement
- Loss of motor vehicle \$24,000.00

General Damages

- Loss of Expectation of Life \$20,000.00
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Payment

- On an intestacy the estate is to be divided between the deceased's widow as to half, with the remaining half being divided equally among the deceased's three children.
- It is directed therefore that the defendant do pay to the claimant 50 % of the above assessed sums in respect of her share of the estate, and the further total sum of

\$100,000.00 to be divided equally in respect of the care and maintenance of each minor child of the deceased.

- The remaining 50 % of the above assessed sums in respect of the estate of the deceased, less the sum of \$100.000 paid as aforesaid in respect of the care and maintenance of each minor child of the deceased, (the principal sum), is to be paid to the Registrar of the Supreme court, to be deposited in an interest bearing account, in a financial institution to be agreed between attorneys at law for the claimant and the defendant.
- In default of agreement, a suitable financial institution is to be approved by the Registrar of the Supreme Court.
- Upon each minor child attaining his respective age of majority that child's share of the principal sum and any accrued interest thereon is to be paid out to him/her upon application made on his behalf.
- In the interim interest accruing thereon is to be paid to the claimant for the benefit, use and upkeep of the minor children

Liberty to apply

Dated this 2nd day of July 2010

.....

Peter A. Rajkumar

Judge.