

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2020/0006

BETWEEN:

**[1] ELDON WILSON
[2] DONNY CAMILLE
[3] MIRIAM HOLT**

Appellants

and

**LANCE WILLIE
(Qua Administrator of the Estate of George Willie)**

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Made. Vicki Ann Ellis	Justice of Appeal

Appearances:

Ms. Cleopatra McDonald and Ms. Diana Thomas for the appellants
Mr. Dexter Theodore, KC for the Respondent

2022: December 7;
2023: July 24.

Civil Appeal – Motor vehicular accident – Assessment of damages – Special damages – Loss of income from date of death to date of judgment – Future loss of income – Jurisdiction of an appellate court to interfere with an award of damages – Jurisdiction of an appellate court to allow new points to be taken on appeal – Whether the master erred when he failed to make any deduction for expenses from the deceased's income – Whether the master erred by finding an agreement between the parties on the multiplier of 4 years and award damages for future loss of earnings in the lost years – Whether the master misdirected himself given his findings on the award for loss of earnings from the date of the accident to the date of judgment – Whether the master erred in his calculation of the multiplier and multiplicand in his assessment of damages for loss of income – Interest – Costs

Lance Willie, the respondent (the claimant in the court below) instituted proceedings in the capacity of administrator of the estate of his deceased father who passed away on 9th June 2016 at the age of 62, as a result of injuries sustained in a motor vehicular accident said to be caused by the negligence of the appellants (defendants in the court below). The respondent sought statutory damages under Articles 602 and 998 of the Civil Code on behalf of the estate of the deceased and on behalf of the wife of the deceased respectively. The respondent was awarded: (i) special damages in the sum of \$10,371.20 representing the funeral expenses and the costs of the grant of letters of administration; (ii) interest on the special damages at a rate of 3% from the date of filing the claim to the date of judgment; (iii) general damages in the sum of \$3,500.00 for loss of expectation of life; (iv) \$79,380.00 for loss of income from the date of death to the date of judgment; (v) \$90,720.00 for future loss of income; (vi) interest at a rate of 6% per annum from the date of judgment until the judgment debt is paid in full; and (vii) prescribed costs in the sum of \$31,125.00.

Dissatisfied with the result, the appellants appealed the orders made in respect of: (1) special damages; (2) loss of income from the date of death to the date of judgment; (3) future loss of income; and (4) costs. They also asked that this Court assess the damages and costs payable.

Held: allowing the appeal in part and making the orders at paragraph 98 of this judgment, that:

1. Generally, an appellate court will not interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. Special damages however must be specifically pleaded and strictly proved. An appellate court is therefore free to interfere with or set aside any award of special damages for an amount which has not been specifically pleaded and proved.

Flint v Lovell [1935] 1 KB 354 applied; **Nance v British Columbia Electric Railway Co Ltd** [1951] AC 601 applied; **Alphonso v Deodat Ramnauth** Civil Appeal No. 1 of 1996 BVI (delivered 21st July 1997, unreported) followed.

2. An appellate court has a general discretion on whether to allow new points to be taken on appeal. The decision of whether to permit the new point will ultimately depend upon the analysis of all the relevant factors, including the nature of the proceedings in the lower court, the nature of the new point and any prejudice that would be caused to the opposing party if the new point is allowed. The appellants advanced a new point under the head of special damages but provided no exceptional reasons which would justify the Court in exercising its discretion. Therefore, public policy arguments in favour of finality in litigation demand that these grounds of appeal not be entertained.

Pittalis v Grant [1989] QB 605 applied; **Singh v Dass** [2019] EWCA Civ 360 followed.

3. Where a living claimant's expectation of life has been reduced due to the defendant's negligence, the claimant is entitled to recover damages for loss of

earnings throughout both the period that they are likely to remain alive and for the 'lost years' during which they would have lived but for their injuries. The damages are assessed after deducting the claimant's own living expenses which they would have spent during the lost years. Here, the Master failed to make any deductions to account for the deceased's personal expenses when he was obliged to do so. Therefore, the grounds of appeal on this general issue succeed.

Pickett v British Rail Engineering Ltd [1980] AC 136 applied; **Gammell v Wilson; Furness v B&S Massey Ltd** [1982] AC 27 applied.

4. The sum to be deducted as living expenses in a 'lost years' claim is the proportion of the deceased's net earnings that he spends to maintain himself at the standard of life appropriate to his case. Any sums expended to maintain or benefit others do not form part of the deceased's living expenses and are not to be deducted from the net earnings. There are different approaches to the assessment of the multiplicand depending on the state of the evidence before the court. These are: (a) the item-by-item approach; and (b) the percentage approach. It follows that, although the courts have employed a modern practice of deducting a percentage for what the deceased would have spent exclusively on himself, where there is striking evidence which would make the conventional figure (50%) inappropriate, the Court will depart from it. While there was no specific evidence as to the deceased's living expenses, after deducting his contributions to his wife's expenses from his net monthly income (\$1,250.00 - \$1,000), the maximum available for his own personal maintenance was \$250.00. In these circumstances, the deduction of 20% should apply resulting in a multiplicand of \$1,000 per month or \$12,000 per year.

Harris v Empress Motors [1984] 1 WLR 212 followed; **Phipps v Brooks Dry Cleaning Service Ltd** [1996] EWCA Civ J0711-12 considered; **Shanks v Swan Hunter Group Plc** [2007] EWHC 1807 (QB) considered.

5. The division of an award into a pre-trial and post-trial assessment or the **Cookson v Knowles** approach has continued to be applied by the courts in this region despite the pronouncement in **Knauer v Ministry of Defence**. The starting point in the calculation of the multiplier is the number of years that is anticipated that the dependency would have lasted had the deceased not passed away. The learned Master was therefore correct in concluding that the dependency must be considered from the date of the accident (presumably the date of death) to the date of assessment i.e., 3.62 years. Applying the multiplicand, the total pre-trial loss would be \$43,440.00 (12,000.00 X 3.62 years).

Cookson v Knowles [1979] AC 556 applied; **Knauer v Ministry of Defence** [2016] UKSC 9 considered; **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4 applied; **Scott v Attorney General** [2017] UKPC 15 applied.

6. The multiplier is related primarily to the deceased person's age and the probable length of his working life at the date of death. In that regard the courts in this region have generally taken the view that the working life of a person in the respondent's

sphere of work ends at 65. Applying that ratio, there should be no award made with respect to the post-trial (pre-retirement) loss. In proceeding on the basis that the parties had agreed that a multiplier of 4 years was appropriate, the Master failed to apply the relevant legal principles in determining what if any is the appropriate multiplier for the post-trial loss. Had the learned Master carried out that analysis, he would have considered that there was in fact no agreement between the parties on this issue and that at the point of trial, the deceased would have been 66 years 5 months and 11 days old. It is therefore clear that the award of \$90,720.00 for loss of future income is wholly unsupported and must be set aside.

Alphonso v Deodat Ramnauth Civil Appeal No. 1 of 1996 BVI (delivered 21st July 1997, unreported) followed.

7. Where an award of damages has been adjusted, costs payable must also be adjusted and quantified on the basis of the revised award. The circumstances of this case warrant the value of the claim to be decided based on the amount ordered to be paid. The total value of the claim would therefore involve the sums of the special damages plus the interest, general damages, and the amount substituted by this Court for pre-trial loss of earnings.

Rule 65 of the **Civil Procedure Rules 2000** considered; **Cleveland Donald v The Attorney General** Civil Appeal No. 32 of 2003 Grenada (delivered 26th July 2004, unreported) followed.

JUDGMENT

[1] **ELLIS JA:** This is an appeal by the appellants (the defendants in the court below) in respect of a claim brought by the respondent (the claimant in the court below) under Articles 602 and 988 of the **Civil Code of Saint Lucia**¹ for damages arising from the death of his father who passed away on 9th June 2016 at the age of 62 (“the deceased”) as a result of injuries sustained in a motor vehicular accident said to be caused by the negligence of the appellants.

[2] The respondent brought this claim in the capacity of administrator of the estate of his deceased father, and in his statement of claim, sought statutory damages under Article 602 of the **Civil Code** on behalf of the estate of the deceased, and under

¹ Cap 4.01, Revised Laws of Saint Lucia 2008

Article 988 of the **Civil Code** on behalf of the wife of the deceased (“the dependent”).

He claimed the following:

- (i) special damages which include the death and burial expenses totaling \$10,171. 20 and traffic accident report in the sum of \$200.00;
- (ii) damages for loss of expectation of life;
- (iii) damages under Article 609 of the Civil Code;
- (iv) damages under Article 988 of the Civil Code;
- (v) further and other relief.

[3] A default judgment was entered on 26th July 2019 which was later revised following agreement between the parties.

[4] Following an assessment of damages hearing, in a written judgment delivered to the parties, Master Sandcroft (“the Master”), ordered the appellants to pay:

- (i) special damages in the sum of \$10,371.20 representing the funeral expenses and the costs of the grant of letters of administration;
- (ii) interest on the special damages at a rate of 3% from the date of filing the claim to the date of judgment;
- (iii) general damages in the sum of \$3,500.00 for loss of expectation of life;
- (iv) \$79,380.00 for loss of income from the date of death to the date of judgment;
- (v) \$90,720.00 for future loss of income;
- (vi) interest at a rate of 6% per annum from the date of judgment until the judgment debt is paid in full;
- (vii) prescribed costs in the sum of \$31,125.00.

- [5] The appellants have appealed the orders made in respect of: (1) special damages; (2) loss of income from the date of death to the date of judgment; (3) future loss of income; and (4) costs. They also ask that this Court assess the damages and costs payable.

The Appellants' Submissions

- [6] The appellants' grounds of appeal are myriad but can be categorised as follows:

Grounds 1 and 2 - Special Damages

- [7] The appellants submitted that the learned Master erred in making an award of special damages which included an award for grant of letters of administration when there was no claim pleaded or prayed in the statement of claim.
- [8] The appellants further contended that the Master misdirected himself in failing to consider what constituted reasonable compensation for funeral expenses in all the circumstances. Counsel for the appellants submitted that a court ought to take into account the deceased's station in life and occupation and the factual circumstances of the case and ought not to allow as a funeral expense, anything which is beyond the reasonable and proper limits.²
- [9] Counsel noted that in relation to the special damages award (which fully allows the respondent's claim for burial expenses), the respondent relied on documents exhibited as "LW 2" to the affidavit filed on 13th November 2019, which show that a two-chamber tomb was purchased to bury the deceased.
- [10] The appellants submitted that the cost of the two-chamber tomb detailed in Exhibit "LW 2" is an unreasonable expense because an individual does not require a two-chamber tomb to be buried. Having failed to provide details or proper proof of the burial expenses for the deceased, counsel for the appellants submitted that this

² Gammell v Wilson [1982] AC 27 at 43 and Goldstein v Salvation Army Assurance Society [1917] 2 K.B. 291 at 295 and 297

expense should either be disallowed or a reasonable sum ought to be deducted from the amount to take into account the second chamber. Counsel submitted that the cost of a single tomb should be \$2,559.38 (being 50% of \$4,550.00 plus VAT). To this would be added the cost of the coffin alone, (\$5,062.50 being \$5,000.00 less the 10% discount of the vendor, plus VAT) as obituaries are not a necessary cost of burial. Accordingly, he concluded that the total award for special damages should be \$7,621.88.

Grounds 3 and 4 – Loss of Income

- [11] The appellants submitted that the learned Master erred when he confused the revenue earned from the respondent's farming business with income. This led the Master to arrive at an inflated multiplicand of \$1,890.00 when he treated the amount paid to the deceased for the sale of bananas and other produce as income, and not as revenue. Counsel for the appellants submitted that a reasonable sum should have been deducted on account of the cost of farming inputs and on account of applicable statutory deductions such as national insurance contributions and tax.
- [12] According to counsel for the appellants, in the court below, the respondent gave evidence of a sum of \$640.00 representing inputs/operational expenses at paragraphs 13 and 15 of the respondent's Affidavit filed on 13th November 2019, and cited this figure as operational expenses at paragraph 4(2)(d) of his submissions filed on 13th November 2019, and at paragraph 6(1)(j) of his submissions filed on 22nd January 2020. Counsel therefore submitted that the Master ought to have allowed this deduction at the very least which would mean that the maximum sum which should have been allowed for the deceased's net earnings would be \$1,250.00.

Grounds 5 and 6 – Loss of Earnings for Lost Years (The Multiplicand)

- [13] In these grounds of appeal, the appellants took issue with the methodology employed by the court to arrive at the multiplicand to calculate loss of earnings in

the lost years, consequent on the deceased's premature death. In respect of this claim, counsel for the appellant submitted that 'the loss which is recoverable is a notional surplus representing the difference between the deceased's estimated net earnings during the lost years of life on the one hand and the cost of maintaining himself during the period on the other.'³ The appellants concluded that the net income was \$1250.00 monthly, being the difference between his gross income (\$1890.00) and operational expenses (\$640.00).

[14] Counsel for the appellants referenced the judicial decisions in **Bertha Compton nee Blaize v Dr. Christiana Nathaniel et al**,⁴ and **Owen Williams v Kenyan Frederick**⁵ which provide authority for the position that a sum is to be deducted for expenses which a deceased would have expended on himself during his lifetime.

[15] Counsel submitted that when considering the multiplicand, the learned Master made no deduction for sums which the deceased would have expended on himself against the weight of these authorities. Counsel submitted that applying the judgment in **Owen Williams**, a deduction of 30% against a net income of \$1,250.00 would be reasonable in circumstances as there was no documentary evidence given of the deceased's living expenses. In the premises, counsel concluded that the monthly amount after deduction of living expenses is \$875.00 making the appropriate multiplicand \$10,500.00.

Grounds 7-10 – Loss of Earning in the Lost Years (The Multiplier)

[16] Given *inter alia* the age of the deceased at the date of his death, the appellants submitted that the learned Master misdirected himself in fact and law in assessing

³ Plummer et al v Conway Bay Ltd. et al Claim SLUHCV2000/1041 (delivered 8th July 2003, unreported) cited at paragraph 10 of Owen Williams v Kenyan Frederick Claim SLUHCV2009/0825 (delivered 20th May 2013, unreported).

⁴ Claim No. SLUHCV2000/0031 (delivered August 20th 2010, unreported).

⁵ Claim No. SLUHCV2009/0825 (delivered May 20th 2013, unreported) and see: Harris v Empress Motors Ltd [1983] 3 All ER 561 and Peter Cherry and others v Trevor Trim and Another Claim No: SLUHCV2011/0073 (delivered 31st October 2013, unreported).

the multiplier. He noted that the judgment reveals that the learned Master adopted a multiplier of 3.5 instead of 3, without providing his reasons for so doing. Counsel for the appellants posited that the Master appeared to rely on the respondent's submission that 3.5 years had elapsed between the date of the accident (9th June 2016) to the date of assessment of damages (21st January 2020).

[17] Counsel argued that this is not a legal basis for assessing the multiplier which is essentially a notional figure representing the number of years for which a claimant would suffer loss. That figure ought to take into account the accelerated receipt of the lump sum and mortality risks (vicissitudes of life).

[18] The appellants submitted that the respondent not having submitted any authority for the proposition of a multiplier which would have effect beyond the normal age of retirement, the court erred in law in applying a multiplier of 3.5 for making the award for loss of earnings for the lost years. In the circumstances, the appellants invited the Court to adopt a multiplier of 3 and to vary the award for loss of earnings from \$79,380.00 to \$31,500.00.

[19] The court also appears to have accepted 69 years as the age at which the deceased would have stopped working, by adopting a multiplier of 4 to make an award for 'loss of future earnings in the lost years' or 'future loss of income', after having granted loss of earnings for 3.5 years from the date of the accident. Counsel concluded that the court applied a total multiplier of 7.5 years for a 62 year old man.

[20] The appellants placed great reliance on the judgment in **Cookson v Knowles**⁶ in advancing their submissions that the Master made an error of law when he granted an award for loss of future earnings in the lost years. The appellants submitted that it is not open to the court to make this award because such a claim was not advanced in the court below. In the alternative, counsel argued that had he been alive at the date of the trial, the deceased would have already reached the normal

⁶ [1979] AC 556.

retirement age of 65 and so no claim could be maintainable and no award granted for future loss of income in any event.

- [21] Finally, counsel for the appellants noted that the respondent advanced a claim for loss of earnings in the sum of \$60,100.00, whereas the Master made an award which was far in excess of that sum. Counsel argued that it was not legally open to the Master to do so and relied on Articles 23 and 24 of the **Code of Civil Procedure**⁷ which he submitted circumscribes the power of the court to make awards in excess of that claimed. Under Article 23 - the court cannot adjudicate beyond the conclusions of a suit, but may grant them only in part; whereas under Article 24 – a party who brings a suit for less than he or she is entitled to, upon the same cause of action, may remedy the omission by a supplementary demand in the same suit before judgment is rendered.

Ground 11- Costs

- [22] The appellants contend that the learned Master erred in fact and in law when he ordered that the appellants pay the respondent prescribed costs in the sum of \$31,125.00. Given the adjustments in the award of damages, the appellants submitted that the costs payable would be \$5,868.22 up to the point of trial and \$3,520.96 up to the assessment of damages.

The Respondent's Submissions

Grounds 1 and 2 - Special Damages

- [23] In legal submissions filed in this appeal, the respondent conceded that no claim for letters of administration was pleaded in the statement of claim so in accordance with **Civil Procedure Rules 2000** Part 8.7A, the Master was precluded from awarding compensation for the grant.
- [24] However, the respondent says that the alternative basis of the appellants' challenge also has no merit. First, he points out that the appellants have subtly deviated from

⁷ Cap. 243, Revised Laws of Saint Lucia 2015

the original position advanced in their submissions before the learned Master, where they focused on the contention that the deceased's station in life did not permit him to afford a tomb burial. The appellants, in the court below, had submitted that a considerably cheaper grave burial was what befitted the deceased,⁸ the appellants' witnesses and legal submissions disclosed no concerns about the capacity of the tomb. However, on appeal the appellants now purport to shift the focus to precisely this issue.

- [25] Counsel submitted that this new proposition cannot be entertained on appeal because it was not advanced in the High Court, where the respondent would have an opportunity to rebut it. As it is, it is impossible to know whether there were any single chamber tombs available at the relevant date or whether it was in fact more economical to purchase a two-chamber tomb at that time. Counsel submitted that these questions cannot be addressed on an appeal.

Grounds 3 and 4 – Loss of Income

- [26] The respondent agrees that the multiplicand in this case should be the net income that the deceased would have earned and not his gross income. This means that the sum of \$1,890.00 should have been reduced by the sum of \$640.00 which sum represents deductions for farm expenses leaving the net sum of \$1,250.00.
- [27] However, the respondent takes issue with the appellants' attempt to also raise the issue of statutory deductions for the first time on appeal. Counsel for the respondent submitted that this matter was not mentioned before in the court below and was not argued and ought not to be ventilated on appeal.
- [28] Counsel for the respondent nevertheless invited this Court to take judicial notice of the fact that farmers in Saint Lucia are exempt from income tax payments and the fact that the deceased's net earnings placed him below the statutory threshold of taxable income in any event. Counsel also asked this Court to take judicial notice of

⁸ Paragraphs 9,10 and 11 at page 17 of the Record of Appeal.

the fact that self-employed persons are not statutorily mandated to pay national insurance.

Grounds 5 and 6 – Loss of Earnings for Lost Years (The Multiplicand)

- [29] The respondent also agrees that the learned Master ought to have applied a deduction from the deceased's net income to account for his personal expenses. However, the respondent disagrees that the rate of such deduction should be 30%. Instead, he submitted that this is a case which should be resolved on its own peculiar facts. Counsel for the respondent relied on the judgment in **Brad Pitt v Mario Wilson**⁹ where at paragraph 23, the court cited the following dictum from the judgment in **Harris v Empress Motors Ltd**¹⁰ at page 575:

"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."

- [30] Counsel noted that the affidavits of Lance Willie provide adequate detail as to how the deceased's household operated at the time of his death and the Court should be guided by that evidence. Based on that evidence (which was uncontroverted), the deceased spent the sum of \$250.00 on himself representing 20% of his net income. The evidence further shows that the deceased's children were the ones who maintained him and his wife and took care of their household.¹¹

- [31] The respondent urged the Court to find that the multiplicand in this case was \$1,000.00 per month or \$12,000.00 per year, after the deduction of \$250.00 (or 20%) for the personal expenses of the deceased.

⁹ Claim SVGHCV2020/0030A (delivered 24th May 2022, unreported).

¹⁰ [1983] 3 All ER 561.

¹¹ See affidavit of Lance Willie at pages 104 to 106 of the Record of Appeal.

Grounds 7 and 10 – Loss of Earnings for the Lost Years (The Multiplier)

- [32] Counsel submitted that the appellants have no legal basis to say that the multiplier of 3.5 must be reduced because (following the principle espoused in **Cookson v Knowles**), it is the actual number of years that had elapsed between the date of death and the date of the trial. This multiplier has nothing to do with the age of the deceased. Counsel posited that the deceased died on 9th June 2016, and the hearing took place on the 21st day of January 2020. This period is exactly 3 years, 7 months, and 12 days from the date of the death. The Master therefore in using the multiplier of 3.5 slightly decreased the award that the estate was entitled to for the pre-trial period.
- [33] In regard to the post-trial loss of earnings, the gravamen of this ground stems from the way in which the learned Master applied the deceased's retirement age in assessing the appropriate multiplier. The respondent submitted that whereas the age of retirement is an essential checkpoint in capping the multiplier in fatal accident cases, a court ought to apply it on a case-by-case basis and consider the prevailing circumstances in the job or trade in which the deceased was involved in determining the most probable age by which that deceased would retire. 65 years ought only to be a guide.
- [34] Counsel pointed out that in the case at bar, the deceased was a self-employed banana farmer who was ostensibly in good health. He noted that there is no compulsory age of retirement established by law in the case of persons who are self-employed and who generally work for as long as they have the capacity to do so, since they are not in receipt of monthly pension and must fend for themselves.
- [35] The Master applied a multiplier of 4 as the period during which it was considered that the deceased would have continued to work on his farm in the future. This period started from the date of the trial when the deceased would have been 65 years old. As a self-employed person, and considering that he owned the farm, the

multiplier of 4 took the deceased 4 years over the 'normal age of retirement'. Counsel submitted that in the circumstances, this multiplier is not unreasonable, and the Court is invited to so find.

[36] Counsel further submitted that the suggestion that the Court awarded a total multiplier of 7.5 years to the deceased is incorrect. He reiterated that the only multiplier in this case contingent upon the age of the deceased, is the post-trial multiplier of 4. This multiplier runs from the date of the trial when the deceased would have been 65 years old, to four years later.

[37] Finally, counsel for the respondent submitted that the appellants cannot logically conclude that if the deceased had died at age 65 no claim for future loss would have been obtained. He argued that this must be incorrect since there is no absolute law in that regard. In such a case, a court would be obliged to conduct an enquiry as to all the circumstances of the case in order to determine how long after age 65 the deceased would likely have maintained his self-employment.

[38] The respondent contended that Articles 23 and 24 of the **Code of Civil Procedure** are not applicable in this case because the respondent's statement of claim prayed for: a. special damages; b. damages for loss of expectation of life; c. damages under Article 609 of the **Civil Code**; d. damages under Article 988 of the **Civil Code**; any further or other relief that the court deems the [respondent] to be entitled to and as disclosed on the statement of claim. Counsel submitted that it is therefore incorrect for the appellants to say that the "court awarded loss of earnings greater than what was 'claimed'" since no actual sum was 'claimed' in the statement for claim for loss of earnings. Instead, the respondent claimed unquantified losses under Articles 609 and 988 of the **Civil Code** which the Master would be left to assess in furtherance of the exercise of his discretion. In so doing he should make the appropriate award if the foundation has been set in the pleadings.

- [39] Counsel reminded the Court that the award of damages is discretionary, and an appellate court would not normally interfere unless the resulting award was plainly wrong or unless the judge exceeded the generous ambit within which reasonable disagreement is possible.¹² Counsel argued that this is not a case where the decision of the judge was plainly wrong.

Discussion

- [40] Generally, appellate courts will not interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. In **Flint v Lovell**¹³ the power of an appellate court to reverse a decision on quantum of damages is set out in the following terms:

“... this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

- [41] Similarly, in **Nance v British Columbia Electric Railway Co Ltd**¹⁴ the Board observed:

“... before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell* [1935] 1 KB 354, approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601).”

¹² *Michel Dufour et al v Helenair Corporation Ltd et al*, wherein the Right Honourable Sir Vincent Floissac, in delivering the judgment of the Court quoted Lord Asquith in *Bellenden (formerly Satterthwaite) v Satterthwaite* (1948) All ER, 343 at 345.

¹³ [1935] 1 KB 354 Greer LJ referred (at p. 360).

¹⁴ [1951] AC 601 at pp. 613-614.

[42] A similar statement of principle has been adumbrated by this Court in **Alphonso v Deodat Ramnauth**.¹⁵ In that case, this Court crystallised the law as follows at p. 11 of the said judgment:

“In appeals, comparable in nature to the present one, it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial Judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses especially the injured person a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge’s award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award. But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This Court will also interfere if the Judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge’s discretion and unless we can say that the judge’s award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere. [See the judgment of this court in *Bernard Nicholas v. Kertist Augustus* Civil Appeal No. 3 of 1994 Dominica dated April 15, 1996.]”

[43] In reviewing an award made in respect of special damages it is also important to bear in mind that special damages must be specifically pleaded and strictly proved. An appellate court is therefore free to interfere with or set aside any award of special damages for an item or an amount which has not been specifically pleaded and strictly proved.¹⁶

¹⁵ Civil Appeal No. 1 of 1996 BVI (delivered 21st July 1997, unreported).

¹⁶ *Steadroy Matthews v Garna O’Neal* BVIHC VAP2015/0019 (delivered 16th January 2018, unreported) Michel JA at paragraphs 30 and 36.

**Special Damages
Grounds 1 and 2**

- [44] In the assessment hearing before the learned Master, the appellants relied on the evidence of Miriam Holt ("Ms. Holt") who considered the respondent's exhibited receipts and invoices and (presumably after consultation) determined that the sum of \$4,550.00 quoted on the said invoice comprised:
- (i) tomb spot - \$1000.00;
 - (ii) backhoe to dig grave - \$500.00; and
 - (iii) labour and materials to construct the 2 chamber tomb - \$3050.00.
- [45] Ms. Holt's evidence then detailed the basis of her concern. She stated that the cost of a grave burial (i.e. without a tomb) is \$450.00 comprising the cost of a burial spot - \$100.00 and labour - \$350.00.
- [46] In the court below, the appellants submitted that the sum \$4,550.00 claimed for the tomb burial is not reasonable given that the lion's share of the costs is for the labour and materials input for the construction of a two-chamber tomb taking into account the respondent's means during his lifetime. They submitted that the sum of \$1450.00 plus interest represents a reasonable sum for burial costs representing the cost of a grave burial plus a sum equivalent to the cost of the tomb spot.
- [47] The appellants' position in regard to this aspect of the claim has therefore pivoted in this appeal. The respondent has taken issue with this and has urged the Court to decline to entertain this ground of appeal, as it was not advanced in the proceedings before the Master and the respondent would not have had an opportunity to rebut it with evidence and/or submissions.
- [48] There is no dispute that an appellate court has a general discretion on whether to allow new points to be taken on appeal. In seeking to identify how the court should approach this exercise of discretion, the most authoritative and frequently applied

statement is set out in the judgment in **Pittalis v Grant**¹⁷ where, at page 611, Nourse LJ stated:

“The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *Macdougall v. Knight* (1889) 14 App. Cas. 194 and *The Tasmania* (1890) 15 App. Cas. 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch.D. 419, 429, per Sir George Jessel M.R.:

“the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.”

Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it.”

[49] In **Singh v Dass**¹⁸ Haddon-Cave LJ restated the relevant principles in the following terms:

“15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier

¹⁷ [1989] QB 605.

¹⁸ [2019] EWCA Civ 360 at [15]-[18].

omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] R.T.R 22 at [29]).”

[50] It follows that whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

[51] Applying this approach, it cannot be ignored that the Master’s findings followed a full hearing. There is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. The potential prejudice to the opposing party is obvious. The reasonableness of the relevant expense clearly demands a fact-sensitive analysis which this Court is unable to engage. Counsel for the respondent submitted a number of relevant questions which a court must consider in making a determination on this issue. Given the obvious evidential lacuna, it is hard to see how it could be just to permit the appellants to take this point on appeal in such circumstances.

[52] The appellants have advanced no exceptional reasons which would justify the Court in exercising its discretion in this case and on the way in which this ground of appeal has been framed, I am satisfied that the public policy arguments in favour of finality in litigation, demand that this Court not entertain these grounds of appeal.

Loss of Income Grounds 3 and 4

[53] Given the commendable concession offered by the respondent on the critical issue which arises from these grounds, the Court finds that these grounds have been made out. The parties’ agreed position is consistent with now settled judicial

authorities and accordingly, I find that the maximum sum which should have been allowed for the deceased's net earnings is \$1250.00. These grounds of appeal therefore succeed.

Loss of Future Earnings (Lost Years)

[54] Where a living claimant's expectation of life has been reduced due to the defendant's negligence, the claimant is entitled to recover damages for their financial losses e.g., loss of earnings throughout both the period that they are likely to remain alive and also for the 'lost years' during which they would have lived but for their injuries. The phrase 'lost years' refers to the period after death in which the claimant would have received earnings, pension or other financial benefits.

[55] The damages are assessed after deducting the claimant's own living expenses which they would have spent during the lost years. The sum to be deducted as living expenses is the proportion of the claimant's net earnings that they would have spent exclusively on themselves to maintain their standard of living. The court will assess the claimant's living expenses on a case-by-case basis.

[56] In **Pickett v British Rail Engineering Ltd.**¹⁹ Lord Salmon agreed with the principle of recovery for the 'lost years' at 152G:

"In the overwhelming majority of cases a man works not only for his personal enjoyment but also to provide for the present and future needs of his dependants. It follows that it would be grossly unjust to the plaintiff and his dependants were the law to deprive him from recovering any damages for the loss of remuneration which the defendant's negligence has prevented him from earning during the "lost years". There is, in my view, no principle of the common law that requires such an injustice to be perpetrated".

[57] Lord Salmon's view, expressed at 153F, was that those damages for lost years '*should be assessed justly and with moderation*'. He agreed, at 154C, that the

¹⁹ [1980] AC 136.

plaintiff's own living expenses should be deducted from any award *'because these clearly can never constitute any part of his estate'*.

[58] In **Gammell v Wilson; Furness v B&S Massey Ltd.**²⁰ the principles to be applied in the assessment of damages in lost years cases were considered in the House of Lords. Lord Scarman said at page 78:

"The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellant in Gammell's case was disposed to argue by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. 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 that it can. In civil litigation it is the balance of probabilities which matters... in all cases it is a matter of evidence and a reasonable estimate based upon it."

Grounds 5 and 6 – The Multiplicand

[59] The respondent has offered significant concessions in respect of the issues which arise under these grounds of appeal. In further written submissions filed following the hearing of this appeal and pursuant to this Court's order, counsel for the respondent stated:

"5. From the figure of \$1250.00 which represents the net monthly income of the deceased, must be deducted a sum to represent the monthly sum that he would have spent on his personal maintenance.

6. The uncontroverted evidence is that he contributed \$1000.00 monthly towards his wife's medical and nutritional needs.

7. Logically therefore the maximum that he has available to devote to his own personal maintenance was therefore \$250.00."

²⁰ [1982] AC 27.

[60] These submissions quite rightly acknowledge that the learned Master failed to make any deductions to account for the deceased's personal expenses when he was obliged to do so. As regards this general principle, the law is quite settled²¹ and so the grounds of appeal on this issue succeed.

[61] However, the parties disagree on the appropriate rate of the deduction which is to be applied. The appellants submit that a deduction of 30% against the net income of \$1250.00 is reasonable in circumstances where there was no documentary evidence given as to the deceased's living expenses. This would leave a monthly amount of \$875.00 resulting in a multiplicand of \$10,500.00., At paragraphs 3.5 – 3.7 and 3.9 of the legal submissions they contend as follows:

“3.5...At the hearing of the appeal, the Appellants erroneously accepted \$1000.00 as the Deceased's disposable income however the Respondent's/Claimant's evidence and submissions in the court below states that this sum was expenses on the medical expenses of the wife of the Deceased.

3.6. The disposable income (after expenses not available to the Estate) is therefore \$250.00.

3.7. Amount of deductible proposed by Appellants from disposable income for the Deceased living expenses – 30 % of \$250. 00 or \$75.00, leaving the sum of \$175.00 per month.

3.9. Multiplicand – Monthly sum retained after deduction of expenses on which of the Deceased and on himself multiplied by 12 = \$2100.00.”

[62] The respondent on the other hand has maintained that the affidavits of Lance Willie provide adequate detail as to how the deceased's household operated at the time of his death. He submitted that the Court should be guided by that evidence. Based on this uncontroverted evidence, he submitted that the multiplicand in this case would be \$1,000.00 or \$12,000.00 per year after applying a deduction of \$250.00 or 20% for the personal expenses of the deceased.

²¹ See *Bertha Compton (nee Blaize) v Dr Christiana Nathaniel et al* Claim No. SLUHCv2000/0031 (delivered 20th August 2010, unreported); *Owen Williams v Kenyan Frederick* Claim No. SLUHCv2009/0825 (delivered 20th May 2013, unreported); and *Brad Pitt v Mario Wilson* Claim No.SVGHCv2020/0030A (delivered May 24th 2022, unreported).

[63] An award under this head of damage is solely compensatory in nature and aims to reimburse the estate for the loss of the portion of the deceased's earnings of which the estate is now deprived. The first step to recover under this head is for the claimants to show actual employment or prospective employment of the deceased and provide the quantum of the appropriate income. In **Davies and Another v Powell Duffryn Associated Collieries Ltd**²² at 617 Lord Wright stated:

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

[64] That 'datum or basic figure' is therefore arrived at by deducting from the deceased's net earnings, that portion which went not towards the support of the dependents, but that which was allocated exclusively to the deceased himself. It is not, as had been suggested by the appellants, based on the deceased's disposable income.

[65] The relevant principles for establishing the living expenses deduction for a 'lost years' claim can be found in the judgment of O'Connor LJ in **Harris v Empress Motors**:²³

"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... 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... I think one can say in relation to a man's net earnings that any proportion thereof that he saves or spends exclusively for the maintenance or benefit of others does not form part of his living expenses. Any proportion that he spends exclusively upon himself does. In cases where there is a proportion of the earnings expended on what may

²² [1942] AC 601.

²³ [1984] 1 WLR 212 at 228G.

conveniently be called shared living expenses, a pro rata part of that proportion should be allocated for deduction...”

[66] The relevant case law reveals that there are different approaches to the assessment of the multiplicand depending on the state of the evidence before the court. These are: (a) the ‘item by item approach’, which is used for specific amounts for living expenses; and (b) the percentage approach. In **Harris v Empress Motors**, for example, the English Court of Appeal adopted a conventional 50% discount for living expenses. However, courts have not been reluctant to depart from this where the particular facts of the case warrant it.²⁴

[67] It follows that, although the courts have employed a modern practice of deducting a percentage for what the deceased would have spent exclusively on himself where there is striking evidence which would make the conventional figure inappropriate, the Court will depart from it. Each case must ultimately be decided on its own facts.

[68] In the case at bar, there is uncontroverted evidence that the deceased was largely provided for by his adult children and that he made a significant contribution to his wife’s expenses. While there was no specific evidence as to his living expenses, logically, the maximum that he has available to devote to his own personal maintenance was therefore \$250.00. This is evidence which cannot be ignored. The respondent has suggested a reduction of 20%. The appellants have advanced no legitimate basis why this uncontroverted evidence should yield to the conventional figure. In the premises, I agree that the deduction of 20% should apply. The Court therefore accepts a multiplicand of \$1,000 per month or \$12,000.00 per year as appropriate.

²⁴ See: *Phipps v Brooks Dry Cleaning Services Ltd* [1996] EWCA Civ J0711-12 and see also *Shanks v Swan Hunter Group Plc* [2007] EWHC 1807 (QB)

Ground 7 and 8 – The Multiplier

What is the correct approach to calculating the multiplier?

- [69] The learned Master's judgment clearly reflects that he was guided by the dictum in **Cookson v Knowles**. Although it was not brought to the Master's attention, counsel for the respondent now relies on the English Supreme Court judgment in **Knauer v Ministry of Defence**²⁵ which was handed down in 2016, and provided guidance as to the correct approach in calculating future losses in fatal accident claims.
- [70] In that case, Lord Neuberger and Lady Hale, delivering a joint judgment, with which the other five Justices agreed, said that the previous House of Lords decision of **Cookson v Knowles** was 'illogical' in the current legal climate and that it would result in 'unfair outcomes'. The Supreme Court held that the correct date at which to assess the multiplier when fixing damages for future loss in claims under the Fatal Accident Act 1976 should be the date of trial, not the date of death. They found that the current approach in fatal accident cases 'mixed up a calculation based on properly considered actuarial principles with an arbitrary arithmetical deduction' and that **Cookson** had been decided when the calculation of damages for personal injury and death was not as sophisticated and the use of actuarial evidence or tables was discouraged.
- [71] In **Knauer**, the widower's wife had died from mesothelioma at age 46, having contracted it from being exposed to asbestos during her employment by the respondent ministry. The ministry admitted liability in the widower's claim brought under the Fatal Accidents Act 1976. The parties agreed on the annual figure, or multiplicand, for the value of the income and services lost as a result of Mrs. Knauer's death, but the parties disagreed as to whether the 'multiplier' should be calculated from the date of death or from the date of trial. Bean J at first instance held that that he was bound to follow the approach adopted by the House of Lords in the cases of **Cookson v Knowles** and to calculate the multiplier from the date

²⁵ [2016] UKSC 9.

of death. Bean J made it clear that had he not been bound by the previous House of Lords decisions he would have calculated the multiplier from the date of trial.

[72] Although this judgment was handed down in 2016, it has not been considered, applied or approved by any court in the Eastern Caribbean. I find this to be surprising. What is clear is that the position is not as straightforward as indicated by counsel for the respondent. For years, our courts have followed the dictum in **Cookson v Knowles** without demur and this has persisted even after it was ostensibly overruled by **Knauer**. What is clear is that the English Supreme Court's decision noted that there had been a material change in the relevant legal landscape. It found that the current approach in fatal accident cases 'mixed up a calculation based on properly considered actuarial principles with an arbitrary arithmetical deduction' and that **Cookson v Knowles and Graham v Dodds**²⁶ had been decided when the calculation of damages for personal injury and death was not as sophisticated and when the use of actuarial evidence or tables was discouraged.

[73] It was further noted that the **Ogden Tables**²⁷ have long included guidance on fatal accident calculations, had by then been adopted as the accepted approach following the Law Commission's recommended approach. The decision therefore followed the Law Commission's recommendations in its report "Claims for Wrongful Death" (1999) (Law Com No 263) that, as in personal injury cases, multipliers should be used in calculating future losses in fatal accident cases from the **date of trial**.

[74] Counsel for the respondent has commended this judgment to this Court in much the same way that he commended the **Ogden Tables** as a basis for calculating the award for future loss. Counsel made substantial supplemental submissions which specifically addressed calculations based on the **Ogden Tables**. This

²⁶ [1983] 1 WLR 808

²⁷ Eighth Edition

presented a fundamental deviation from the case advanced before the learned Master.

[75] The courts in the Eastern Caribbean have generally demonstrated a distinct reluctance to follow this basis of assessment.²⁸ In **Cadet's Car Rentals and another v Pinder**²⁹ the Judicial Committee provided a sound rationale for such reluctance. At paragraphs 8-9 the Board noted:

"In the courts below and on this appeal the parties have been content that, if an award for loss of future income is to be made (as opposed to a Smith v Manchester Corporation award) it should be assessed on the basis of the Ogden Tables. **These actuarial tables are designed to assist in the calculation of lump sum damages for future losses in personal injury and fatal accident cases in the United Kingdom. They provide a multiplier which can be applied to an annual loss in order to produce a capitalised sum, taking into account accelerated receipt, mortality risks and, in relation to claims for loss of earnings and pension, discounts for contingencies other than mortality. ...**

Neither party to the present appeal has suggested that the use of the Ogden Tables for the quantification of future loss of earnings was inappropriate in this case. Accordingly, the Board, in deciding this appeal, will seek guidance from those Tables. **The Board notes, however, that the Tables are intended to reflect the particular conditions prevailing in the United Kingdom which are likely to differ considerably from those in The Bahamas. The courts of The Bahamas may, therefore, wish to consider on some future occasion whether it is appropriate to refer to the Ogden Tables for guidance or whether it may be preferable to seek the assistance of actuarial tables designed to reflect the conditions prevailing in The Bahamas.** In this regard the Board draws attention to the observations of Lord Kerr in Scott v Attorney General [2017] UKPC 15 (at paras 25-29) concerning the application in The Bahamas of the United Kingdom Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases." Emphasis added.

[76] In **Scott v Attorney General**³⁰ the Board considered the question whether it was legitimate for the Bahamian courts to assess general damages in personal injury

²⁸ Martin Willie v Chervy Oliviere SLUHCv2016/0622 (delivered 25th February 2019, unreported).

²⁹ [2019] UKPC 4.

³⁰ [2017] UKPC 15.

actions by reference to the Judicial Studies Board (JSB) guidelines in England and Wales. Lord Kerr in his judgment noted:

“25. The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the backdrop to the examination of how those changes can be accommodated but they cannot, of themselves, provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts’ own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.

26. Cost of living indices are not a reliable means of comparing the two jurisdictions even if one is attempting to achieve approximate parity of value in both. Cost of living varies geographically and may well do so between various sectors of the population. The incidence of tax, social benefits and health provision (among others) would be relevant to such a comparison.”
Emphasis added

[77] I find much wisdom in the Board’s expression of caution in both **Cadet’s Car Rentals and another v Pinder** and **Scott v Attorney General**. When I take into account these cautionary words and when I consider that these submissions (advocating the application of the **Ogden Tables**) were not advanced by the respondent in the court below nor indeed were they initially advanced in this appeal, I am satisfied that this should not be the basis of argument or assessment on appeal.

[78] Given this conclusion and bearing in mind that St. Lucia has not developed its own actuarial tables which are designed to reflect the conditions prevailing locally, it begs the question – what is the appropriate basis for identifying the multiplier?

[79] Clearly, in the absence of an actuarial study, there is no fixed or settled formula. However, courts dealing with assessments under the fatal accident legislation, ordinarily reference judicial trends or principles emanating from common law. It is also clear that the division of the award into a pre-trial and post-trial assessment or the **Cookson v Knowles** approach has continued to be applied by courts in this region despite the pronouncements in **Knauer**. This approach was applied in the present case in the court below.

The Pre-trial Loss

[80] The starting point in the calculation of the multiplier is the number of years that it is anticipated the dependency would have lasted had the deceased not passed away. At paragraph 13 of his judgment, the learned Master found that calculation for loss of dependency must be considered from the date of the accident (presumably the date of death) to the date of assessment – 3.5 years.³¹ This approach appears to be consistent with the respondent's supplemental submissions, although counsel calculated the period between the accident and trial as 3.62 years.

[81] At paragraph 3.8 and footnote 4 of their supplemental submissions, the appellants now accept this figure. Counsel states as follows:

“3.8: The amount of time elapsed from date of death to date of trial 3.62 years.⁴

fn 4: Date of Death – 9th June 2016, Date of Trial – 21st January 2020. Counsel for the Respondents proposed 3.62 years to the date of trial during oral argument on appeal. There are 3 years 7 months and 12 days between these two dates – the Appellants accept 3.62 years.”

³¹ Cookson v Knowles [1979] AC 556.

- [82] Applying the multiplicand, the total award for pre-trial loss would be \$12, 000.00
X 3.62 = \$43, 440.00.³²

The Post-trial Loss

- [83] In respect of the future post-trial loss, counsel for the appellants submitted that the retirement age of the deceased would have been 65 years and so no award should be made for post-trial loss. However, if the retirement age of 67 years is adopted, then at paragraphs 3.15 – 3.17 of their supplemental submissions the appellants submit that:

“3.15. Number of years between trial and proposed retirement date is 0.6 years (67-66.4).

3.16. Damages for post-trial loss of income - \$1,260.00 (0.6 X \$2,100.00).

3.17. Total damages for loss of income for the lost years - \$8,862.00.”

- [84] In supplemental written submissions filed pursuant to this Court’s order of 7th December 2022, the respondent provided detailed submissions in which he again adopted the methodology employed in the **Ogden Tables** with the variation allowing a deduction for an amount that the deceased would have spent for his personal maintenance. The respondent agrees that no claim could be advanced for post-retirement loss, however, in respect of pre-retirement loss, counsel submitted that the deceased, who would have been 66.4 years at the date of trial would have been entitled to retire at 70 years and have claimed the sum of \$37,200.00 for post-trial (pre-retirement) loss.

- [85] This represents a fundamental departure from what was argued in the court below where the respondent advanced his submissions on the basis that the deceased would have retired at 67 years which meant that the deceased would have worked for a further 1.5 years.³³

³² It is noteworthy that after applying the Ogden Tables approach the respondent at paragraph 24 has arrived at a pre-trial loss of \$42,600.00.

³³ See: appellants submissions in the court below at pages 76, 101 and 119 of the Record of Appeal.

- [86] In earlier written submissions advanced before this Court, counsel for the respondent submitted that the age of retirement is not cast in stone and in fatal accident cases and that a court can exercise its discretion based on the facts of any given case before it to deviate where it deems just to do so. This can be done whereas in this case, the deceased is self-employed and there is no prescribed compulsory retirement age. Counsel further submitted that the Court must conduct an enquiry as to all the circumstances of the case in order to determine how long after the age of retirement age at trial, the deceased would have likely maintained gainful employment.
- [87] I find much force in these submissions. As stated in **Alphonso v Ramnauth**, the identification of the true multiplier depends on the individual facts and circumstances of each case and there is no rigid formula. However, the multiplier is “related primarily to the deceased person’s age and hence to the probable length of his working life at the date of death” and in that regard our courts have generally taken the view that the working life of a person in the respondent’s general sphere of work (unskilled/non-professional) ends at 65.³⁴
- [88] Applying that ratio, it would follow that there should be no award made in respect of the post-trial (pre-retirement) loss.
- [89] Ultimately, I am satisfied that the dictum of this Court in **Alphonso v Ramnauth**, is still applicable today. In that case, Satrohan Singh JA made clear that:
- “In determining the multiplier a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident. {See *Franklyn Lloyd v Phillip Supra*}.”

³⁴ Ronald Fraser v Joe Dalrime ANUHCv2004/0513 (delivered 5th May 2010, unreported).

“...the identification of the true multiplier depended on the individual facts and circumstances of each case and that there was no rigid formula.”

[90] In wholly proceeding on the basis that the ‘parties have agreed that a multiplier of approximately four (4) years is appropriate, given that Mr. Willie was 62 years of age at the time of his death...’, the Master failed to apply the relevant legal principles in determining what if any is the appropriate multiplier for the post-trial loss. Had the learned Master properly carried out that analysis, he would have taken into account: (1) that there was in fact no agreement between the parties on this issue; (2) that at the point of trial the deceased would have been 66 years 5 month and 11 days old; (3) that the deceased was a self-employed farmer who was by all accounts unskilled; (3) that at the time of his passing, the deceased was largely supported by his children; and (4) the deceased’s general health and many contingencies, vicissitudes and imponderables of life.

[91] Having regard to all the evidence before him, I am not satisfied that there was any basis to make an award for post-trial (pre-retirement) loss. If as was represented in the court below, there was some consensus as to a retirement age of 67, then the post-trial loss would be comparatively small. Even assuming a retirement age of 67, it is clear that the award of \$90,720.00 for loss of future income is wholly unsupported and must be set aside.

Ground 11 - Costs

[92] Given the adjustments in the award of damages, the appellants submitted that the costs payable will have to be adjusted. I agree that this is appropriate. Costs are prescribed costs in accordance with CPR 65.5 and should now be quantified on the basis of the revised award. CPR 65.5(1) states that prescribed costs must be determined in accordance with Appendices B and C. Appendix B requires that the value of the claim must first be determined. The circumstances of this case warrant the value of the claim to be decided based on the amount ordered to be

paid.³⁵ The total value of the claim would therefore involve the sums for special damages plus the interest, general damages, and the amount substituted by this Court for pre-trial loss of earnings.

[93] The Court has not disturbed the award for special damages, hence the sum of \$10,371.20 plus interest at a rate of 3% from the date of filing the claim to the date of judgment applies. This Court has made clear in **Cleveland Donald v The Attorney General**³⁶ that interest is to be included in the total value of the claim and prescribed costs are to be awarded on the amount of the award together with the interest.

[94] Turning to the case at hand, the Master ordered interest to be paid from the date of filing the claim to the date of judgment. The claim was filed on 8th March 2019 and judgment on the assessment of damages was delivered on 17th February 2020. This results in a period of 11 months and 9 days upon which the interest on special damages is to be calculated. The monthly rate on 3% is 0.25% or \$0.0025 per month which gives an average interest of \$25.93 per month. Accordingly, the accumulated interest for 11 months amounts to \$285.21. The daily rate on 3% is 0.008219% or \$0.00008219 which amounts to a daily interest of \$0.8524 per day, multiplied by 9 days and the total is \$7.67. The total sum on special damages is therefore \$10,664.08.

[95] This sum in addition to general damages, and the amount substituted by this Court for pre-trial loss of earnings brings the total value of the claim to \$57,604.08. Appendix B provides that where the value of the claim does not exceed \$100,000.00, the scale of prescribed costs is 15%. 15% of \$57,604.08 amounts to \$8,640.61.

³⁵ See CPR 65.5(2) (a).

³⁶ Civil Appeal No. 32 of 2003 (Grenada) (delivered 26th July 2004, unreported).

[96] Appendix C's table showing the percentage of prescribed costs to be allowed at various stages of the claim is to be now considered. Column 3 shows that 60% is to be allowed where the matter progresses only up to default judgment and including assessment of damages. 60% of \$8,640.61 amounts to the sum of \$5,184.36. The respondent is therefore entitled to prescribed costs in the sum of \$5,184.36.

Costs in this Appeal

[97] Given my reasoning herein, it is apparent that the appellants have been only partially successful in prosecuting this appeal. Given the partial success of each party in these proceedings, I am satisfied that the result should be costs neutral. Accordingly, the appropriate order as to costs would be that there is no order as to costs.

[98] For the reasons above, I would and make the following orders:

- (1) The appeal is allowed in part.
- (2) The Master's award in respect of special damages in the court below is affirmed save that there is no recovery for the cost of the grant of letters of administration.
- (3) The Master's award in respect of pre-trial loss of earnings, that is, loss of earnings from the date of death to the date of trial is set aside and the sum of \$43,440.00 is substituted.
- (4) The Master's award of \$90,720.00 in respect of post-trial loss of earnings is set aside in its entirety.
- (5) The Master's award of prescribed costs is set aside and the sum of \$5,184.36 is substituted.
- (6) There will be interest on the total amount awarded at a rate of 6% per annum from the date of judgment until payment.

(7) There shall be no order as to costs on appeal.

I concur.

Mario Michel
Justice of Appeal

I concur.

Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar