

THE EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE HIGH COURT OF JUSTICE

Claim No. GDAHCV2005/0145

Between:

KIDA HARVEY
(The Administratrix of the Estate of Kinda Harvey, deceased]
Claimant

And

DON MCINTOSH
Defendant

Before:

Master Fidela Corbin Lincoln

On Written Submission:

Ms. Brenda Wardally-Beaumont of counsel for the Claimant
Dr. Francis Alexis Q.C for the Defendant

2015: October, 14
November, 5

Assessment of Damages Following Death – The Law Reform Miscellaneous Act Cap 2 - The Compensation for Injuries Act Cap. 59 – Whether Damages for Bereavement Recoverable

JUDGMENT

[1] **CORBIN LINCOLN M:** On 1st April 2001 Kinda Harvey, who was 19 months old, was struck by a motor vehicle owned and driven by the defendant. She died on the same day. The claimant, who is the mother and personal representative of the Estate of Kinda, commenced a claim against the defendant for damages for negligence.

- [2] The defendant admitted liability in the acknowledgment of service but disputed the quantum of damages payable save for the sum of \$1,281.00 claimed for funeral expenses.

The Claimant's Submission's

- [3] The claimant bases the claim for damages on the **Law Reform Miscellaneous Act** Cap 2 (“**the LRMA**”) and the **Compensation for Injuries Act** Cap. 59 (“**the CIA**”). The claimant submits that the estate is entitled to following damages:

(1) Loss of Expectation of Life	\$ 2,500.00
(2) Damages for negligence	\$40,000.00
(3) Damages for Bereavement	\$47,200.00

- [4] With respect to the claim for damages for bereavement the claimant submits that under the United Kingdom Fatal Accident Act 1976 damages can be recovered for bereavement. The claimant submits that *“the position in Grenada is that in the absence of Statutory provisions, we in Grenada should follow and adopt the UK position.”* Counsel has cited no authority for this submission.

The Defendant's Submissions

- [5] In written submissions the defendant contended that the right to bring claims under the **CIA** is a right *“conferred on dependents of the deceased person ...as stated by Section 2(5) of the Law Reform (Miscellaneous Torts) Act Cap....An award for damages regarding the death of a person is therefore known as a ‘dependency action’*” The defendant submits that since Kida Harvey is not and never was a dependent of the deceased the claim for damages under the **CIA** fails completely.
- [6] At the hearing however, Queen's Counsel for the defendant accepted that Kinda's Estate is entitled to maintain an action for damages under the **CIA** even in the absence of Kida Harvey (the mother) being a dependant of Kinda . The defendant maintains however that

no award can be made for bereavement since there are no statutory provisions in this jurisdiction providing for damages for bereavement. Further, there are no reception provisions which provide for the application of the UK Fatal Accidents Act 1976 in this jurisdiction.

The Compensation for Injuries Act

[7] Section 3 of the **CIA** states that :

“Whenever the death of any person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would before the commencement of this Act (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to a felony”

[8] Section 3 of the **CIA** therefore enables a cause of action, which would have been vested in the deceased but for his death, to survive.

[9] Section 8 of the **CIA** states that :

“ Every action in respect of injuries resulting in death shall be for the benefit of the wife, husband, parent or child of the person whose death was caused and shall be brought by the executor or administrator of the person deceased.”

[10] Section 10 of the **CIA** states that:

“ in every such action the judge... may give such damages as he or they may think proportioned to the injury resulting from the death, to the parties for whose benefit the action is brought...”

- [11] Section 6 of the **CIA** states that an action to recover compensation shall not be maintainable unless the action is commenced within **12 months** from the time of death.
- [12] Kinda died on 1st April 2001. This action was commenced on 31st March 2005, more than 12 months after the death of Kinda. The claimant's action under the **CIA** is therefore not maintainable having been commenced more than 12 months after the death of Kinda.
- [13] I digress to note – obiter dicta - that while the **LRMA** states that any rights conferred thereunder are “*not in derogation to the rights conferred on **the dependants** of the deceased*” under the **CIA**, the **CIA** does *not* state that the cause of action “***shall be for the benefit of the dependants***” like similar statutes in other jurisdictions ¹ but rather that it shall be for the benefit of the “***wife, husband, parent or child of the person whose death was caused.***” The action under the **CIA** states that it is for the benefit of the family members specified while the **LRMA** states that it is for the benefit of the Estate. It appears to me that there is nothing in the **CIA** which prevents the Estate maintaining an action for damages which the deceased would have been able to bring had she survived. In addition, while the **CIA** does not specifically state that the claim is to be brought for the benefit of **dependants** like the legislation in other jurisdictions, the wording “***for the benefit of the wife, husband, parent or child of the person whose death was caused***” has been interpreted as enabling a dependency action to be brought.² Hopefully these issues will arise and be considered by the court in the future.

The Law Reform Miscellaneous Act

- [14] Section 2 (1) of the **Law Reform Miscellaneous Act** Cap 2 (“**the LRMA**”) provides that upon the death of any person all causes of action subsisting against or vested in him shall survive against or for the benefit of his estate.

¹ e.g Section 3 Fatal Accidents Act Cap 7:59 of the Laws of Dominica.

² Tripple General Contracting Company Ltd. v Hermina Spencer {Administratrix of the Estate of Augustus Spencer, deceased} GDAHCVAP1998/0006.

[15] Section 2 (2) (c) of the **LRMA** states that :

“Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person – where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss of gain to his Estate consequent upon his death, except that a sum in respect of funeral expenses may be included.”

[16] Section 2 (5) of the **LRMA** states :

“ The rights conferred by this section for the benefit of the estates of the deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Compensation for Injuries Act...”

[17] The **LRMA** therefore enables a cause of action, which would have been vested in the deceased but for his death, to survive. Further, *“the cause of action is not made to vest in his estate so as to entitle the estate to claim for any loss or damage it may have suffered by reason of his death; it remains his cause of action for such loss and damage as have been sustained by him, and it is that action for that loss and damage which his personal representative is enabled to maintain, any damages recovered being for the benefit of his estate.”*³ The right of action under the **LRMA** is therefore for the injury and loss suffered by the deceased and pain and suffering could also be considered.⁴

[18] The **LRMA** specifically excludes recovery of any loss or gain to the Estate save for funeral expenses.

³ Wooding CJ in *Deonarine v Narine* [1968] 14 WIR 33 at 36

⁴ Hewlett J in *Jeffers v Dyer et al* Vol. 2 OECS Law Reports 336

Assessment of Damages Payable to the Deceased for the Benefit of the Estate

- [19] The **LRMA** enables an action to be maintained by the Estate for injury and loss suffered by the deceased. Damages are usually awarded to the Estate for loss of expectation of life, pain and suffering, lost earnings for lost years,⁵ funeral expenses and other special damages.

Funeral Expenses

- [20] The claimant seeks the sum of \$1,281.00 for funeral expenses. Funeral expenses are made expressly recoverable by the **LRMA**. In this case the claim for funeral expenses is not in dispute since it was admitted in the acknowledgment of service.

General Damages

- [21] The claimant submits that the court should award general damages under three heads: loss of expectation of life, “damages for negligence” and bereavement.

1. Loss of Expectation of Life

- [22] In **Benham v Gambling**⁶ Viscount Simon SC noted the wide variations in awards made under this head of damages in that jurisdiction. In addressing the ‘difficult task’ of indicating the main considerations to be borne in mind in assessing damages under this head he stated:

“I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure is not necessarily one which can be properly

⁵ Pickett v British Rail Engineering Ltd; British Rail Engineering Ltd v Pickett - [1979] 1 All ER 774; Gammell v Wilson and another - [1980] 2 All ER 557.

⁶ [1941] 1 All ER 7

attributed to a given individual. In any case, the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor—for example, in extreme old age the brevity of what life may be left may be relevant—but, as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up "life's fitful fever"—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. Asquith J appreciated this view, as his judgment shows, but I think that, in the light of the large amounts awarded in some previous cases in respect of quite young children, the figure he arrived at was unduly swollen by the consideration that the child might otherwise have had many years of life before it.

The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a court of law, but, in view of the earlier authorities, we must do our best to contribute to its solution. The judge observed that the earlier decisions quoted to him assumed "that human life is, on the whole, good." I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is significant that, at any rate in one case of which we were informed, the jury refused to award any damages under

this head at all. As Lord Wright said in Rose v Ford, special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or, at any rate, as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained to an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possession are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status.

It remains to observe, as Goddard LJ pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth, of course, is that, in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may

well be much greater than for deprivation of life. These considerations lead me to the conclusion that, in assessing damages under this head, whether in the case of a child or an adult, very moderate figure should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in Rose v Ford the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award."

[23] In **Benham** the deceased was 2 ½ years old and the Court reduced the award to £200, noting that even that sum would be excessive *"if it were not that the circumstances of the infant were most favourable"*.

[24] In this jurisdiction it has also been noted that there has been some inconsistencies in awards under this head of damages.⁷ In May 2004 in the case of **Anna Modeste and Judy Steven v Glen Jacobs and Christopher Glean**⁸ an award of EC\$2500.00 was made for loss of expectation of life in respect of an adult. In the BVI case of **Claudia Grant v Francisco Samuel**⁹ an award of US\$4000 was made for loss of expectation of life in respect of a 16 year old student. In **Sony Prince (Administratrix of the Estate Of Denville Sprauve, deceased) v Loring George and Goda Aero Servives Inc,**¹⁰ another BVI case, the court awarded US\$5000.00 in 2002 for loss of expectation of life for an adult. In **Yolande Rodney v Osborne Qvow**¹¹ the court awarded EC\$3,500 in 2006 for loss of expectation of life in relation to a 36 year old deceased. In **George Jolly v Ann Charles (Administrators of the Estate of Kriston Jolly) v Vallen Francois et al**¹² an award of \$10.000 was made in 2011 in the case of a 6 year old boy who died a few hours after sustaining injuries. This award was for both loss of expectation of life and pain and suffering. In **Carmillus Emmanuel et al v Ronald Punnet et al**¹³ the court awarded EC\$3500.00 in 2013 in relation to a 36 year old deceased. In **Peter Cherry et al v Trevor**

⁷ Lanns M in Carmillus Emmanuel et al v Ronald Punnet et al SVGHCVV2004/0364

⁸ cited by Lanns M in Carmillus Emmanuel et al v Ronald Punnet et al SVGHCVV2004/0364

⁹ BVIHCV1996/0072

¹⁰ BVIHCV1993/0035

¹¹ Claim No. 415 of 2004 cited by Lanns M in Carmillus Emmanuel et al v Ronald Punnet et al SVGHCVV2004/0364

¹² GDAHCV2010/0302

¹³ SVGHCVV2004/0364

Trim et al¹⁴ the court awarded EC\$3,500 in 2013 under this head of damages in relation to a male adult pensioner.

[25] Kinda was only 19 months at the time of her death. In making an award under this head I take into consideration the guidance set out in **Benham** and, in particular, that : (a) awards for young children should be reduced; and (b) awards are *“incapable of being measured in coin of the realm with any approach to real accuracy.”*¹⁵ I also take into consideration the awards made in this jurisdiction.

[26] I award the sum of \$1,500.00 for loss of expectation of life.

2. Damages for Negligence

[27] General damages for negligence are broken down into various heads. I must confess some difficulty in understanding the claim for the sum of \$40,000 for “damages for negligence”. The claimant’s submissions did not provide any clarity and there were no submissions in relation to the claim for this sum save for a statement that the claimant should be awarded \$40,000.00 for damages for negligence.

[28] At the hearing clarification was sought from counsel for the claimant with respect to this claim but counsel was unable to specify what the claim for “damages for negligence” entailed. Accordingly I am unable to make any award for “damages for negligence”.

3. Damages for Bereavement

[29] Counsel for the claimant submits that the sum of \$47,200.00 should be awarded for bereavement. Counsel submits that the authority for awarding compensation for bereavement is the UK Fatal Accidents Act 1976 which applies to Grenada. Counsel has

¹⁴ SLUHCV2011/0073

¹⁵ Viscount Simon SC in *Benham and Gambling* [1941] 1 All ER 7

however provided no authority for the submission that the UK Fatal Accident Act 1976 applies to Grenada.

[30] At common law a cause of action vested in a deceased died with the deceased and there is no right of action for a person who has suffered a loss arising out of the death of a relative. The common law position was changed by statutes such as the **LRMA** and the **CIA**.

[31] I bear in mind that an action under the **LRMA** is a survival action i.e it is the claim which the deceased would have been able to pursue if she had survived. In my view a claim for bereavement is not a claim which the deceased would have been able to pursue had she survived. Consequently, if the deceased would not have been able to pursue a claim for damages for bereavement the Estate cannot in the survival action under the **LRMA** pursue such a claim unless provided for by statute.

[32] The **LRMA** makes no provision for damages for bereavement to be recoverable. The claimant has provided no other statutory basis for an award of damages for bereavement. In the circumstance I am unable to find any basis for making an award for bereavement.

4. Pain and Suffering

[33] The claimant's statement of claim seeks damages for negligence but the claimant made no submissions with respect to this head of damages. Pain and suffering is however one of the heads of damages usually considered under general damages for negligence.

[34] In this regard the claimant's evidence is that when she picked Kinda up from the road after the accident she was bleeding from her head and was alive but not responding. She ran with her to a nearby shop and someone took her and Kinda to the hospital. When they arrived at the hospital she saw the medical staff checking for vital signs. She does not know what time Kinda died but under cross examination she stated that Kinda died that morning.

- [35] While the defendant stated in evidence in chief that Kinda died instantaneously, under cross examination he stated that his evidence in that regard is based on what he overheard the doctors saying when he went to the hospital.
- [36] There is no evidence of the precise time that Kinda died. There is no evidence that she died instantaneously. The evidence of the claimant suggests that Kinda did not survive for a long time after the accident. In my view Kinda would have experienced pain and suffering after struck by the motor vehicle albeit not for a very long time.
- [37] In **Anna Modeste** the court awarded EC\$1,500.00 for pain and suffering endured by the deceased for less than 1 day. In **Carmillus Emmanuel** the court awarded EC\$2000.00 for pain and suffering where the deceased was found to have died instantaneously or within 1 hour of sustaining the injuries. In **Peter Cherry** an award of EC\$50,000 was made for pain and suffering and loss of amenities endured by the deceased who survived for three days after sustaining the injuries.
- [38] Having regard to the awards made in this jurisdiction and giving an uplift for the passage of time since those decisions I would award the sum of \$2,500.00 to the claimant for pain and suffering.
- [39] In summary, I award the claimant damages as follows:
- (1) \$1,281.00 for funeral expenses
 - (2) \$1,500 for loss of expectation of life
 - (3) \$2,500 for pain and suffering
- [40] The defendant shall pay interest on the sum of \$1,281.00 at a rate of 3% from the date of the accident to the date of judgment on liability.

- [41] The defendant shall pay interest at a rate of 3% on the sums of \$1,500.00 and \$2,500.00 from the date of service of the claim to the date of judgment on liability.
- [42] The defendant shall pay prescribed costs to the claimant pursuant to the Civil Procedure Rules 2000 Part 65.5.

Fidela Corbin Lincoln
Master