

SAINT VINCENT AND THE GRENADINES
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO 364 OF 2004

BETWEEN:

[1] CARMILLUS EMMANUEL
[2] CECELIA JOHN
(Administratrix and Co-Administratrix respectively in the
Estate of Jasmine Emmanuel, deceased)

Applicants/Claimants

AND

[1] RONALD PUNNET
[2] HAROLD KIER
[3] KENDRICK SCARBOROUGH

First and Second Defendants

Respondent/Third Defendant

CONSOLIDATED WITH

CLAIM NO 249 OF 2005

BETWEEN:

DORNA HACKSHAW

Claimant

AND

[1] KENDRICK SCARBOROUGH
[2] ORNALD SAMUEL
[3] JOSETTE TOMMY

Respondent/Defendant/Ancillary Claimant

First Ancillary Defendant

Second Ancillary Defendant

Appearances:

Considered on the written submissions of:
Mr Sten Sargeant for Claimants in both Suits
(Carmillus Emmanuel, Cecelia John and Donna Hackshaw
Mr Samuel Commissiong for Third Defendant/Ancillary Claimant
(Kendrick Scarborough)

2013: April 17; July 24; 2014: May 30

JUDGMENT ON ASSESSMENT OF DAMAGES

INTRODUCTION

- [1] **LANNS, MASTER:** On 2nd September 2002, Jasmine Emmanuel (Jasmine) and Dorna Hackshaw were passengers in a motor vehicle being driven by Ronald Punnet along the Argyle Main Road on the east coast of the island bordering the Argyle Bay. There was a collision between the vehicle driven by Mr Punnet (P 1074) and that driven by Mr Scarborough (P 8412). Jasmine died instantaneously. She was 36 years old.
- [2] Dorna managed to crawl out of a window. However, she sustained injuries to her right foot, ankle, knee and shoulder. She received emergency treatment at the Milton Cato Hospital where her right foot was sutured, but subsequently, she had to be admitted for five days because she had developed an infection.
- [3] In July 2004, Carmillus Emmanuel, and Cecelia John, Jasmine's Personal Representatives, filed a claim in negligence, numbered 364 of 2004 against Ronald Punnet, Harold Kier, (owner of the vehicle driven by Mr Punnet) and Kendrick Scarborough, (the driver of the vehicle which negligently collided with the vehicle driven by Mr Punnet), seeking damages from all of them. The Claim was brought on behalf of the Estate of Jasmine Emmanuel, and on behalf of her dependents.
- [4] By Court Order dated 18th July 2005, the claim against Ronald Punnet and Harold Kier was discontinued.
- [5] In May 2005, Dorna Hackshaw filed Claim (numbered 249 of 2005 against Kendrick Scarborough only, for damages for personal injuries, loss and damage. In it, she alleged that the accident was caused solely by Scarborough's negligence.
- [6] The trial was presided over by Her Ladyship Mde Justice Gertel Thom, and on 19th January, 2011, the learned Judge handed down a decision on the issue of liability. At paragraph 37 of the Judgment, the Learned Judge stated thus:

"37 It is ordered that:

- (i) Judgment is entered for the Claimants
- (ii) The Third Defendant shall pay damages to the Claimants as assessed on application made by the Claimants. Such application to be made within three months.
- (iii) Costs to the Claimants to be prescribed costs
- (iv) The Ancillary Defendants shall indemnify the Third Defendant 30 % of damages and costs paid to the Claimants."

Appeal

- [7] The Ancillary Defendants, Samuel and Tommy appealed, and their appeal was on the 12th June 2012 allowed by the Court of Appeal. The result of the appeal was that finding of the learned trial Judge that the Ancillary Defendants were 30% liable for the accident, was set aside. I take it that the effect of the Court of Appeal's decision is that Scarborough was wholly responsible for the accident.

Application and submissions

- [8] Pursuant to the order of Thom J, Carmillus Emmanuel and Cecelia John, in their capacities as Administrators of Jasmine's Estate, and Dorna Hackshaw, through their legal representatives, filed an application for assessment of damages. Affidavits in support of the Application were sworn to and filed by Camillus, Dorna, and Erica McIntosh, and replying affidavits were sworn to and filed by Scarborough. With the claim having been discontinued against Punnet and Kier, and with Tommy and Josette out of the picture, it appears to me that the assessment only concerns the Administrators, Dorna and Scarborough
- [9] Interestingly, however, Mr Cecil Williams was present on the date of the assessment. He had put in submissions and authorities in relation to the assessment on behalf of Punnet and Kier. In fact, submissions were filed on behalf of all of the parties, prior to the decision of the Court of Appeal allowing the appeal of Tommy and Josette. In relation to the submissions on behalf of Punnet and Kier, Mr Cecil Williams in his written submissions noted that Punnet and Kier filed a Counterclaim on 16th March 2005 against Scarborough, seeking special damages and general damages, and that there was no defence filed against the Counterclaim. Further, Mr Williams stated that Punnet died before trial and Mona Punnet, his widow was substituted. Mr Williams then went on to set out a claim on behalf of Punnet for special damages of \$4,115.00 and \$20,000 for general damages for pain and suffering, as well as a claim for special damages of \$4,100.00 for Kier. I have not seen any application for assessment filed by Mrs Punnet as Personal Representative of Mr Punnet or by Kier, and the Judgment did not show that Mr Williams appeared for Mr Kier or Mr Punnet
- [10] That being said, the Court does not, at this moment, have an appreciation of the contents of all of the filings in the matter as the court file has not been made available to me. Only some of the documents filed, together with Affidavits, exhibits and submissions in respect of the assessment were copied and sent to me in Nevis via courier.
- [11] In any event, the Court does not interpret the Judgment of Thom J as including Punnet as and Kier as "Claimants". It must be reiterated, however, that the Court is of the opinion that the assessment only concerns Camillus Emmanuel and Cecelia John, (as Administrators of the Estate of Jasmine Emmanuel, deceased), and Dorna Hackshaw as Applicants/Claimants and Kendrick Scarborough as Respondent/Third Defendant/Defendant/Ancillary Claimant. The Judgment does not reveal any evidence being taken by or on behalf of Punnet or Kier. The Judgment indicates that the Claim was discontinued as against Punnet and Kier. It logically follows that the only issue would have

been costs on the discontinuance, which I assume was ordered by the Judge. I am therefore not of the view that I am obliged to pay any regard to the claim made and submissions put in by Mr Cecil Williams on behalf of Ronald Punnet and Harold Kier in relation to any Counterclaim allegedly filed by them. If indeed a counterclaim was filed, it would have been against the substantive Claimants, in their capacities as Administrators of the estate of Jasmine Emmanuel, deceased. It is most telling that the Judgment is in their favour. There is no Judgment against the Administrators.

Cross-examination declined

- [12] Counsel for the parties expressed no interest in cross-examining any of the affiants on their affidavits. They were content to rely on their affidavits, written submissions and authorities, as filed.

ISSUES

- [13] The main issues to be decided are (1) what quantum of damages the Administrators are entitled to under the **Compensation for Injuries Act** Cap 122 of the Revised Laws of Saint Vincent and the Grenadines, Edition 2009? (The Act); (2) What quantum of special and general damages the Administrators and Ms Hackshaw are entitled to recover under the Common Law?

ENTITLEMENTS UNDER THE ACT

- [14] The damages to be awarded under the Compensation for Injuries Act are designed to compensate for the loss to the estate of the deceased. Under this Act, an award is usually made for loss of expectation of life, (even where death was instantaneous), funeral expenses and other special damages and the 'lost years'. Damages are also recoverable for conscious pain and suffering endured by the deceased, and loss of amenities up to the death of the deceased.

SPECIAL DAMAGES

The Administratrix and Co Administratrix

- [15] It is the law that special damages must be pleaded and strictly proved. (*Ilkiv v Samuels*, (1963) 2 All ER 879)
- [16] The Administrators have pleaded a loss of \$4,655. 00 as part of special damages, being \$4,395 for funeral expenses, \$200.00 for burial spot and \$60.00 for grave diggers. I accept the evidence adduced in relation to the funeral expenses and for grave digging. No

documentary evidence is supplied in relation to grave digging. The explanation given is that no receipt was given for the amount paid. This is not unusual in that regard. In the circumstances, and on the authority of **Greer v Alston's Engineering**, (2003) 63 WIR, 388, I am content to make a nominal award of \$100.00 for grave digging. I therefore award the Administratrix the amount of \$4,555.00 as special damages for funeral expenses including burial spot and grave digging.

GENERAL DAMAGES

Loss of expectation of life

- [17] An award for loss of expectation of life is usually a modest conventional award. Counsel for the Claimant has suggested a figure of \$3500.00 based on the St Lucia case of **Mary Augustine Jallim v. Joseph Ghirawoo**, - Claim No. 2003/0483, decided in 2005. Mr Commissioning has suggested a figure of \$3,350.00, based, he says on the state of confusion in relation to awards under this head.
- [18] Mr Commissioning has quite correctly mentioned the fact that this award has been abolished in the United Kingdom, but continues to exist in Saint Vincent and the Grenadines. Counsel went on to submit that this award has been subjected to judicial abuse in that the award has been inconsistent, ranging from \$2,500.00 to \$3000.00 and finally to \$35000.00.
- [19] While I make no finding as to whether there has been judicial abuse, I am aware of some of the inconsistencies contained in cases other than those mentioned by Counsel. In **Anna Modeste and Judy Steven v. Glen Jacobs and Christopher Glean**, delivered on 10th May 2004, His Lordship, Benjamin J awarded EC\$2500.00 for loss of expectation of life in respect of an adult.
- [20] In the case of **Claudia Grant v Francisco Samuel Civil** Suit No 72 of 1996, (BVI) Benjamin J awarded US\$4000.00 for loss of expectation of life in respect of a 16 year old adolescent student. However, in the BVI case of **Sony Prince** (Administratrix of the Estate of **Denville Sprauve**, deceased) v **Loring George and Gorda Aero Services Inc**, BVIHCV1993/0035, decided in 2002, Benjamin J up rated that amount to US\$5000.00 for loss of expectation of life in respect of an adult.

- [21] In **Yoland Rodney v Osborne Qvow**, Claim No 415 of 2004 delivered in 2006, Cottle M. followed the case of **Ermine Charles v Ezra Herbert and Eworth Stevens**, Claim No 171 of 2003, from this jurisdiction and awarded the sum of \$3500.00 in respect of the 36 year old deceased. I propose to follow the case of **Yoland Rodney** supra, from this jurisdiction and award the Administrators the sum of **\$3500.00** for loss of expectation of life.

Pain and suffering and loss of amenities

- [22] No claim has been made in respect of pain and suffering and loss of amenities in relation to Jasmine. Being an item of general damages, no claim has to be pleaded for damages for pain and suffering for an award to be made. That being said, there is no indication as to the cause of death. There is no evidence as to whether Jasmine was conscious after the accident. Mr Sargeant in his written submissions stated "The Claimants make no suggestion under this head as the deceased "died on the spot". Similarly, Mr Commissioning stated "I concur on this submission. There can be no award under this head because the Deceased's death was instantaneous."
- [23] In this situation, where it appears that Jasmine died instantly, or to have survived less than an hour, and in the absence of evidence as to her injuries, and whether she suffered conscious pain, it appears, based on **Rose v Ford** (1951) 1 KB 99 that only nominal damages can be awarded. In the **Anna Modeste** case, supra, Benjamin J awarded a nominal sum of \$1500.00 for pain and suffering endured by the deceased for less than one day. And in **Yoland Rodney**, supra, Cottle M awarded the sum of \$2,000 for pain and suffering in respect of the deceased who died when his vehicle plunged over an embankment on a winding remote mountain road. Master Cottle was of the view that the deceased was aware throughout that fatal plunge of his impending injury and death.
- [24] In the present case, I am of the considered opinion that Jasmine must have been aware even for a brief moment of her impending injuries and death and must have felt the impact of the collision just before her death. But for the concession of Counsel, I would have adopted the approach of Cottle M and award the nominal sum of \$2,000.00 for pain and suffering.

Loss of earnings in the Lost Years

- [25] .Jasmine was 36 at the time of her death. It was pleaded that she was a domestic helper. Her weekly wages were not pleaded. The Claimants now seek in the Affidavit of Erica McIntosh filed 26th September 2012, to address the deficiency to prove her loss of earnings. Ms McIntosh has deposed she is an entrepreneur and owner of Erica's Country Style – a Company known worldwide for her pepper sauces and other condiments. She

further deposes that Jasmine was employed at her factory at Prospects for a period of eight years prior to her death, and that she paid her \$150.00 (in cash) per week or (\$150.00 x 52 = \$7,800.00 per year. She states further that she also paid National Insurance payments without making any deductions from her salary. There are no documents to substantiate these statements. I would have thought that Ms McIntosh would have had some kind of document to prove, at least the payment of National Insurance Contributions. In **Bonham-Carter v Hyde Park Hotel** (1948) 64 TLR 177 at 178 Lord Goddard CJ, said:

'Plaintiffs must understand that, if they bring action for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.'

- [26] Notwithstanding the inadequacy of the evidence, I am content to accept that Jasmine was employed by Ms McIntosh and that Ms McIntosh paid her **\$150.00** per week in cash. There is no evidence to refute that Jasmine was not employed at the time of her death. Mr Scarborough in his Affidavit, and in the submissions advanced on his behalf, attacked the claim for loss of wages, but his Counsel chose not to cross-examine Ms McIntosh on her Affidavit evidence; so that evidence stands uncontroverted.

The Multiplicand

- [27] The multiplicand is the annual loss of earnings to the deceased's estate. In the landmark decision of **Cookson v Knowles** [1979] AC. 556, Lord Diplock (at page 569 letter E) stated:

"... as a general rule, in fatal accident cases the damages should be assessed in two parts, the first and the less speculative component being an estimate of the loss sustained up to the date of trial, and the second component being an estimate of the loss to be sustained thereafter."

- [28] The multiplicand for loss sustained up to date of trial: At the time of her death, Jasmine had two minor children, namely, Jaslon Alisha Toneicia who was then 10 years old, having been born on 27th May 1992; and Ateisha Zoe'nica Zingha, who was then 8 years old, having been born on 15th April 1994. Their respective Certificate of Birth is exhibited to the Affidavit of the Administratrix filed on 24th September 2012. In calculating the multiplicand, the amount which the deceased spent exclusively on herself must be deducted, as well as her living expenses such as rent, gas, electricity, telephone etc. No

evidence has been led as to the deceased's living expenses. The court can only do the best with what it has.

- [29] Jasmine's net annual income is taken to be \$7,800 ($\150.00×52). From her annual income, Jasmine would have probably spent one quarter exclusively on herself, and another quarter on living expenses, such as rent, gas, electricity, telephone, etc. Deducting 50 per cent (or **\$3,900**) from \$7,800, I arrive at a multiplicand of **\$3,900**. The multiplier would be the number of years between death (in August 2002) and assessment hearing (in April 2013). This calculates to 10 years and 8 months = **\$41,600**. This figure is the extent of the pre-trial loss suffered by Jasmine's estate.

The Multiplicand for Loss to be sustained after the date of trial i.e. "future loss":

- [30] The figure used to calculate the pre-trial loss would be used to calculate the future loss.

Jasmine was 36 years old at the time of her death. At the date of assessment, she would have been 47. I would treat her as having had a working life of 60 years. She would therefore have worked for another 24 years. Taking into account the legal principles and the usual imponderables to which I have previously adverted, I would apply a multiplier of 12 as Master Cottle did in 2006 in **Yolanda Rodney v Osborne Quow**, supra, in respect of a 36 year old deceased. The award for future loss is $\$3900 \times 12 = \$46,800.00$. Adding this amount to the amount of \$41,600.00, the total loss of earnings for the lost years is **\$88,400.00**.

THE DEPENDENCY ACTION

- [31] The Administracies have brought a claim for the benefit of Jasmine's two children who would have been ordinarily dependent on their mother until the age of majority. Since their mother's death, both children have attained the age of majority. Jaslon Alisha Toneicia attained the age of 16 on 27th May 2008 and Ateisha Zoe'nica Zingha on 15th April 2010. They would have been dependent on their mother for a period of 6 years and 8 years respectively. The average length of dependency would be 7 years. The dependency award would be $\$3900 \times 7 = \$40,950.00$.

DORNA HACKSHAW

- [32] Dorna was 37 at the time of the accident, and 49 at the date of assessment. Dorna's injury was not very serious, but she endured pain and suffering. Dr Salmon in her Medical Report dated 21st October 2002 says that as a result of the accident, Dorna began to feel pain in the right foot, ankle, knee, shoulder and neck. She received stitches in the right anterior aspect of the right foot. She had to use crutches. When seen at the Milton Cato General Hospital on 6th August, 2002, she had difficulty in walking on the right leg, because of pain in the right foot, ankle, shoulder and neck. She had to be hospitalized for five days and placed on sick leave for fourteen days, as her foot had become swollen and infected. The wound was not healing properly. However, according to Dr Salmon's

Report, when Dorna was discharged from the Hospital, she showed eighty per cent improvement, and four weeks after that, her right foot was ninety eight per cent healed.

[33] Dorna has not presented any up dated Medical Report and thus, I make the reasonable inference that she has made significant progress over the years and that she is back to normal. I must point out however, that in her Affidavit in support of the assessment dated 25th September 2012, Dorna complains that "although it has been 10 years after, I still have a tingling feeling in the bottom of my foot coming up to my (sic) ankles at times." It is probable that there is some nerve damage. However, as there is no direct medical link to her present complaint, I can only pay cognizance to Dr Salmon's sole Medical Report which is to the effect that, by August/September 2002, Dorna's right foot was ninety eight per cent healed.

[34] HAVING CONSIDERED the Application for assessment in relation to Dorna; and having read her supporting Affidavit filed on 25th September 2012, and the documents exhibited thereto, i.e. receipts in proof of special damages, and the Medical Certificate of Dr Susan Salmon, dated 21st October 2002, which I accept; AND THE COURT being satisfied that, on the basis of the evidence presented; this Claimant has pleaded, proved and is entitled to special damages in the sum of \$485.20 being \$85.20 for hospital fees, and \$400.00 representing one week's wages; DOTH AWARD Dorna special damages in the sum of \$485.20. Interest is awarded on this amount at the rate of 3 per cent per annum from the date of the accident (2nd August 2002) to 19th January 2011, the date of entry of default judgment. I take into account that through no fault of the Third Defendant, it took an inordinately long time for the assessment hearing to take place. From the record, it seems that the Claimants were tardy in prosecuting the assessment, and contributed to the delay.

AND THE COURT, having taken into account Dorna's age; the nature of the injury sustained by her, the pain and suffering endured by her; AND UPON NOTING that Mr Commissiong has in his submissions indicated that although the amount of \$10,000 suggested by Dorna's Counsel for pain and suffering is excessive, he takes no objection to that amount;

DOTH THEREFORE AWARD the Claimant the sum of \$10,000 as general damages for pain and suffering. Interest is awarded on this sum at the rate of 6% per annum from the date of service of the Claim to the date of entry of default judgment.

[35] **SUMMARY OF THE AWARDS**

The Administraces

Funeral Expenses	\$ 4,555.00
Loss of Expectation of Life	\$ 3,500.00

Loss of earnings for the lost years	\$ 88,400.00
Dependency	<u>\$ 40,950.00</u>
Total:	\$137,405.00

Dorna Hackshaw

Hospital Expenses	\$ 485.20
Pain and Suffering	<u>\$ 10,000.00</u>
Total	\$ 10,485.20

[36] **Interest**

The Claimants are entitled to pre and post judgment interest. I must point out however that the House of Lords in **Cookson v Knowles**, supra held that in normal fatal accidents cases interest is payable on the pre-trial loss (i.e. from date of death to the date of trial). In so holding, the House of Lords departed from previous authorities such as **Jefford v. Gee** [1970] 1 All ER 604 at 612 which held that interest should be awarded from the date of service of the writ to the date of trial.

Costs

[37] The Claimants are entitled to costs as prescribed.

Conclusion

[38] There will be judgment for the Claimants as follows:

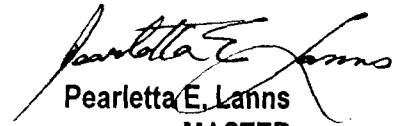
- [1] The Third named Defendant, Kendrick Scarborough shall pay to Carmillus Emmanuel and Cecilia John the Administratrix and Co-Administratrix respectively, the sum of \$137,405.00 in damages together with interest on special damages and pre-trial loss of earnings at the rate of 3 per cent per annum from the date of service of the claim to the date of Judgment on Liability, as well as interest on general damages at the rate of six per cent per annum from the date of service of the claim to the date of the Liability Judgment. No interest is payable on the figure for future loss of earnings.
- [2] The Third named Defendant, Kendrick Scarborough shall pay to Claimant Dorna Hackshaw, the sum of \$10,485.20 in damages together with interest on special damages at the rate of three per cent per annum from the date of the accident to the date of the Liability, Judgment, as well as interest on general damages for pain

and suffering at the rate of six per cent per annum from the date of service of the claim to the date of the Liability Judgment.

[3] The Third named Defendant, Kendrick Scarborough shall pay to Carmillus Emmanuel and Cecilia John the Administratrix and Co-Administratrix respectively, and Dorna Hackshaw costs as prescribed under CPR 65.5 Appendices B as amended, and Appendix C.

[39] The Court acknowledges the assistance of Counsel for the Claimants and Third Defendant by way of their submissions and authorities. Nevertheless, the court is not unmindful of the complexity and tediousness of computing the damages under certain heads of damage. This complexity is borne out by the difference in figures suggested by Counsel for the multiplicand and the multiplier in computing the loss of earnings for the lost years and for the value of the dependency, as well as for the loss of expectation of life. It would seem that the cases cited from the OECS have been very inconsistent in the method of assessing/computing of damages in fatal accidents. The result, as Mr Commissiong has submitted, is confusion. In any event, I have tried my best on the facts of this case, and with the documents before me, and based on my understanding of the principles to be applied and method of assessing damages in a case of this nature. If I did not get it right, then it would be very helpful for the jurisprudence, if the Court of Appeal could put me right.

[40] I greatly appreciate the assistance of Counsel for the parties.


Pearletta E. Lanns
MASTER