DAMAGES: 'THE LOST YEARS'

In Pickett v. British Rail Engineering Ltd.,[1] it was held by the House of Lords that an injured plaintiff whose working life had been shortened as a result of the defendant's negligence was entitled to be compensated for any loss of earnings during the period ('the lost years') when, but for his injuries, he would have been likely to continue at work. However, in assessing the measure of such damages, there had to be deducted from the total earnings the amount that the plaintiff would have spent out of these earnings on his own living expenses and pleasures during the lost years. In so holding, the House of Lords overruled the earlier Court of Appeal decision in Oliver v. Ashman,[2] "the most unjust decision on damages in modern times",[3] in which it had been held that damages for the lost years were irrecoverable. The facts of Pickett illustrate particularly well the injustice of the old rule. There, the plaintiff, who had developed a lung disease as a result of inhaling asbestos dust while working in the defendant's workshops over a number of years, brought an action for personal injuries in which liability was admitted but the quantum of damages contested. At the time of the trial the plaintiff was 53 years old, with an excellent health record and, but for his exposure to asbestos dust, could have expected to have continued working and earning until the normal retirement age of 65. However, the lung disease had shortened his life expectancy to one year. So he had lost 11 years during which he would have been earning good wages out of which he would no doubt have maintained his wife. But the rule in Oliver v. Ashman meant that Mr. Pickett would not recover any damages in respect of those 11 lost years, with a consequent loss to his dependant. It produced anomalous results in that, had he died before judgment in his action, his wife would have had a cause of action under the Fatal Accidents Acts which would have enabled her to recover the value of the provisions that he would have made for her needs out of his earnings during those 11 years; however, because his action was pursued to judgment in his lifetime,[4] he was unable to recover anything and to make any provision for his wife in respect of these years.

So the result of the decision in Pickett was to do substantial justice and on the whole no tears were shed for

Oliver v. Ashman which had been widely disliked.[5] However, the fact that the decision carried implications beyond its actual result was recognised by some of their Lordships[6] and, in a note 'The Lost Years'[7], W. V. Horton Rogers clearly crystallised one of these when he pointed out that "there seems no way of avoiding the conclusion that the personal representatives may maintain an action in respect of the lost years even in a case of instantaneous death."[8] And so it was held in Kandalla v. British Airways Board[9] where the plaintiff, the father of two women killed in an air crash for which the defendant was admittedly liable, brought an action under the Fatal Accidents Acts on behalf of himself and his wife and under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of the estates of the deceased persons. The latter claim was for the conventional amount for loss of expectation of life and for a further substantial sum in respect of what the two daughters might have been expected to earn had they not been prematurely killed. The claim for the lost years was based on Pickett and Griffiths J. while confessing no enthusiasm for the result, felt constrained to hold that the claims survived to the benefit of the estates. As far as assessment was concerned, the learned judge's view was that there was "no material before the court on which it could properly make an award for the 'lost years' over and above that which it assesses for the parents' support."[10] In the result he awarded the same sum (£54,000) as he had awarded before deductions under the Fatal Accidents Acts and this had to be deducted in toto from, and thereby extinguished, the fatal accidents award.[11]

The problem finally received the authoritative consideration of the House of Lords in the consolidated appeals of Gammell v. Wilson and others, Furness and another v. B. & S. Massey Ltd.,[12] on their facts far more difficult cases than Kandalla. In Gammell the plaintiff's 15 year old son was killed in a road accident and the plaintiff claimed damages on behalf of himself and his wife as dependants under the Fatal Accidents Acts and on behalf of the deceased's estate under the 1934 Act. The trial judge assessed the dependencies of the plaintiff and his wife at £250 and £1,750 respectively and, on the claim under the 1934 Act, awarded the estate damages totalling £9,335, including £1,750 for loss of expectation of life and £6,656 for the son's loss of future earnings during the years of life lost to him because of the defendants' negligence (the lost

years) on the basis that the son would have earned £416 per year net after deduction of living expenses to which the judge applied a multiplier of 16 years. In Furness the facts were broadly the same, save that the deceased was 22 years old at the date of his death, the fatal accident award was £2,028 and the award to the estate in respect of the lost years was £17,275. In each case, because the award to the estate under the 1934 Act exceeded that under the Fatal Accidents Acts, no award was made in respect of the fatal accident claim, in accordance with the rule that in assessing loss of dependency under the Fatal Accidents Acts the court is required to take into account any benefit accruing to a dependant from the deceased's estate.

Neither case posed the kind of dilemma that the decision in Pickett sought to resolve since, where the wage-earner has been killed in the accident, justice can substantially be done to the dependants by the fatal accidents award. It is difficult therefore not to agree with Griffiths J. when he observed that "any sums for the 'lost years' awarded under the Law Reform (Miscellaneous Provisions) Act 1934 which exceed the value of the Fatal Accidents Acts damages will be a pure windfall for the parents".[13] Nevertheless, in Gammell & Furness the House of Lords held unanimously that the provisions of the 1934 Act and the decision in Pickett compelled the conclusion that the right of action for damages for the lost years vested in the deceased immediately before death and survived for the benefit of the estates. Accordingly, the plaintiffs in both cases were held to be entitled to the damages awarded for those years despite the fact that those damages far exceeded the amount to which they were entitled under the Fatal Accidents Acts as dependants.

None of their lordships[14] evinced any greater enthusiasm for this result than Griffiths J. had been able to muster in Kandalla. Lord Diplock thought that the outcome was not "sensible or just",[15] Lord Fraser of Tullybelton shared that view and regretted the "unhappy state into which this part of the law of England has fallen",[16] Lord Russell of Killowen[17] thought that "the law has gone astray by excessive refinement of theory",[18] while Lord Scarman was at one with his brethren in thinking that some reform was now necessary.[19] The decision, without a doubt an inevitable consequence of Pickett, certainly creates a number of problems. There is, firstly, the very great discrepancy

that can arise, as happened in the Furness case, between the damages recoverable by the estate for the lost years and the damages recoverable by the dependants under the Fatal Accidents Acts. As Lord Scarman observed, "a law which allows the discrepancy to arise wears the appearance of anomaly, and is unlikely to be understood or acceptable."[20] Then there is the spectre of the double recovery which may well be possible in an appropriate case. Again, Lord Scarman:

> "In most fatal accident cases, the dependants will, of course, be the beneficiaries of the estate. In such cases there will be no 'double recovery', by which is meant no recovery both by the estate and the dependants of damages calculated by reference to the lost earnings of the lost years; for the dependants' claim will be reduced or extinguished (subject to certain exceptions) by the benefits they receive from the estate. But if the deceased has made a will leaving his estate, or a substantial part of it, to other than his dependants, both the estate and the dependants will have a claim.
>
> This element of advantage gained by beneficiaries of the estate who are not dependants of the deceased has been described by judges, and others, as a 'windfall'. It arises because the estate's claim is additional to, and not in derogation of, the rights of the dependants. If, which many believe, it is a mischief which should be removed from our law, legislation will be needed."[21]

Lastly, the award of damages to the estates of deceased persons, particularly young deceased persons, gives rise to some considerable problems of assessment. It is true that, as Lord Edmund-Davies pointed out, "the assessment of compensation for the lost years rests on no special basis of its own and proceeds on no peculiar principle." And as his lordship went on to observe, though it "may present unusual difficulties ... the task itself is the ordinary one of arriving at a fair figure to compensate the estate of the deceased for loss of a particular kind sustained by him in his lifetime at the hands of the defendant."[22] Naturally, where the person in respect of whom damages fall to be assessed is someone like Mr. Pickett, 53 years of age, a family man whose expectations for the future are reasonably clear, no special problems of assessment will arise. But where, as in Gammell & Furness, the deceased persons are

"adolescents just embarking on the process of earning",[23] the material available as a basis of assessment is likely to be meagre and exiguous. In such cases the value of the lost earnings, though real, will probably be assessable as small and Lord Edmund-Davies' counsel of "moderation in assessing such claims so as to reflect the high degree of speculation inevitably involved",[24] will need to be borne in mind and, again, Lord Scarman:

> "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 it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man, well established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it."[25]

The decision in Gammell & Furness was accompanied by a strong recommendation from the House that its effects be mitigated by legislative intervention. In addition to the anomalies that it sanctions, the fact is that it is the public that by and large bears the cost of the higher awards of damages to deceased persons' estates through increased insurance premiums in a situation where the logic of compensation does not require it.

Despite the criticisms and the absence of enthusiasm for it, Gammell was loyally applied in England in White v. London Transport Executive.[26] Benson v. Biggs Wall & Co. Ltd.[27], Clay V. Pooler[28], and Harris v. Empress Motors.[29] Thereafter the matter ceased to have even academic interest in England because of the provisions of section 4(2) of the Administration of Justice Act 1982, by virtue of which claims for damages for the 'lost years' no longer survive death.[30] But at least two of these decisions can, it is thought, continue to provide some guidance in Jamaica where, as we shall see, Gammell was adopted and applied almost immediately. In White (of some special interest, as the deceased was Jamaican-born), the deceased was 25 years old at the time of his death, unmarried and living with his mother. He was a gay (stricto sensu) bachelor who, after paying his mother for his keep, regularly spent the rest of his income on clothes, beer, records, women, presents for his family and his child. Webster J. took his living expenses to be what he spent on "housing, heating, food, clothing, necessary travelling and insurances and things of the kind, if relevant". Also relevant would be sums spent on entertainment and recreation and, perhaps, the cost of maintaining a car. The income for the 'lost years', therefore, would be that which was left after deducting the above expenses, and, in the light of the evidence before him in the instant case, Webster J. assessed this to be one third of his income for the first five years and one quarter of his income thereafter (the multiplier was 15). This two tier approach is not free from criticism,[31] based as it is on the learned judge's estimation that the deceased would have married after 5 years and would have had to expend more of his income on his dependants. But this is in fact contrary to authority[32] and inconsistent with the finding by Webster J. in White itself that in arriving at the deceased's notional surplus earnings, no deduction is to be made from his net earnings on account of the money he would have spent on his dependants.[33] Despite this criticism, though, White is of some interest for its emphasis on assessing damages for the 'lost years' with reference to the circumstances of the particular deceased person - his condition, his lifestyle etc. - and not by reference to any preconceived formula or percentage.

Harris v Empress Motors Ltd.,[34] the Court of Appeal approved what Webster J had done in White in relation to a single man without dependants: the judge should work out what the deceased would have spent each year to maintain

life - housing, food, clothes etc. He should add to this what a single person in the deceased's station would normally spend each year on his social life, holidays and the like, subtract the total from his net income and thereby arrive at the multiplicand for damages in the 'lost years'. This approach will obviously result in a much small multiplicand than in a case (which Harris was) of an older settled family-man, virtually all of whose income is spent on domestic purposes: food, clothes, mortgages, furniture, the family car and freezers. And this is probably as it should be, since a substantial damages award for the 'lost years' to the estate of a single man with no dependants heightens the appearance of anomaly, while that to the estate of a married man with dependants may help to excuse or justify it. In Harris the Court of Appeal expressly declined counsel's invitation to give guidance "as to what proportion of net earnings in the lost years should be deducted for the purpose of the Law Reform Act claim."[35] O'Connor L.J. found it impossible to do so "because so much depends on the amount of the joint expenditure and the number of persons among whom it is to be divided."[36] In other words, it is submitted, there is no escaping an assessment based on the available evidence. Certainly, Harris is no authority for saying that in England the judges had arrived at a "percentage formula" approach, a point to which I shall have to return.

THE JAMAICAN CASES

There may obviously be others, but the first case dealing with the principle that I have been able to track down (that is, the first case in which a written judgment was delivered) is Administrator General (Administrator of the estate of Derek Grant, deceased) v. Shipping Association of Jamaica et al.[37] The deceased was a 28 year old security guard, with four dependants (his mother and three young children). The evidence was that the deceased's net pay was $320.00 per month. The late Alexander J. (Ag., as he then was) deducted $190.00 per month from this amount as representing the amounts which he had found, in computing the Fatal Accidents Act award, to have been paid by the deceased for the maintenance of his four dependants. The learned judge then deducted a further $90.00 per month, representing the deceased's living expenses, and based his 'lost years' award on $40.00 per month or $480.00 per year, to which he applied a multiplier of 15, making a total of

$7,200.00. In arriving at this figure, the learned judge obviously fell into error: Harris makes it clear that the sum that is 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 and that 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.[38] In the instant case, the judge awarded $24,200.00 to the dependants under the Fatal Accidents Act claim and held that the Law Reform claim therefore merged into that amount and he therefore gave judgment for $24,200.00, plus $2,000.00 for loss of expectation of life. Had he applied the correct test, the Law Reform claim would in fact have amounted to $41,400.00, which amount would have been due to the estate. The deceased's mother, who did not stand to benefit under the estate, would of course have been entitled to the $1,800.00 which the judge awarded her under the Fatal Accident's Act claim.

In a judgment delivered a few days later (15th July, 1983), Ellis J. (Ag., as he then was) took a more orthodox approach in Wensley Johnson (Administrator of the estate of Elizabeth Arleen Johnson, deceased) v. Selvin Graham and another.[39] On the question of the general approach to the assessment of damages for the 'lost years' the following passage from the learned judge's judgment is worthy of quotation in full:

"Damages for Lost years.

The decision of The House of Lords in Gammell v. Wilson (1981) 2 W.L.R., 248 has confirmed the principle that damages can be awarded for the future loss of earnings of a deceased under the Law Reform (Miscellaneous Provisions) Act 1934. The House in arriving at its decision considered and interpreted Section 1 (2)(c) of the 1934 Act and concluded that the subsection does not preclude an award for damages.

The Jamaican Statute contains a similar provision at section 2(2)(c) and to which the interpretation of the House of Lords in Gammell's case may be applied. Although Gammell is of persuasive authority only, the similarity of the section, which was considered there, with the Jamaican provision constrains me to accept the decision in Gammell as a good authority in Jamaica.

In Jamaica therefore, damages are assessable for future loss of earnings or the "lost years".

Assessment of the Damages.

In the Gammell's case cited above Lord Scarman at page 265 at letter E said as follows:-

"There is no room for a "conventional" award in a case for 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 it can. In civil litigation, it is the balance of probabilities which matters .... A teenage boy or girl as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situations there will be an assessable claim .... But in all cases, it is a matter of evidence and a reasonable estimate based on it."

Lord Scarman then went on to admit that the problem which has troubled judges in these cases has been the calculation of the annual loss before applying a multiplier. He said:-

"The principle has been settled in the speeches in this House in Picketts case (1980) A.C. 136. The loss to the estate is what the deceased would have been likely to have available to save, spend, or distribute after the cost of living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live, are out of place. The judge must make the best estimate based on the known facts and his prospects at the time of death."

My understanding of the cited portions of Lord Scarman's speech is that a judge in assessing damages for "lost years" is entitled to speculate as to the earnings of a deceased person, and that from the earnings there must be deducted an amount which the deceased would have used for his maintenance during the "lost years".

Although a judge is entitled to speculate, his speculation must be reasonable and should be shown to hang on some evidence of earnings. A judge's speculation should not take him into the realms of unreality.

In the instant case, the deceased at the time of her death was earning $1,430 annually. I was invited by Mr. Pershadsingh to find that she would have qualified to be a bi-lingual secretary with the consequence that the alleged $350 per week earned by a bi-lingual secretary should be a factor in assessing damages for the "lost years". The deceased was nearly 19 years at time of death but her academic achievements reflected only 2 passes at the Jamaica School Certificate Examination. Her age and academic qualification do not indicate a reasonable likelihood that she would have achieved a qualification of a bi-lingual secretary. Any such finding would not be reasonable and would be contrary to the principles stated in the Pickett's case and which was adopted as correct in Gammell's case.

What I apprehend from the evidence, is that had the deceased lived she would have been a moderate wage earner earning $65 per week for 52 weeks or $3,380 per year. I have arrived at $3,380 by reasoning that at age nearly 19, the deceased would soon have embarked on full time work instead of working for only 39 weeks per year. It is my finding that the deceased would have expended 3/5 or $2,028 of her earnings on her personal maintenance and would therefore

have a "surplus" of $1,352 annually. Having found the surplus, the next factor is the number of lost years - the multiplier.

I am not convinced that 20 years multiplier would be reasonable. I find that a multiplier of 16 years is in keeping with the decided cases. In the circumstances, I assess the damages for "lost years" to be $1,352 x 16 = $21,632. It will be noted that no deduction has been made of any amount which the deceased would have spent on her dependant. This is in keeping with the decisions in Pickett's case (1980) A.C. 136 and White v. L.T.E. (1982) 2 W.L.R. 791 at 799."

I have quoted from Ellis J.'s judgment at some length, by way of respectful tribute to its full appreciation of the issues involved, both with regard to the multiplicand and the multiplier. Grappling with exiguous evidence, aggravated by the age of the deceased at the time of death (19), the learned judge nevertheless proceeded on the basis that the damages had to be assessed. It is to be noted that the level of deduction made for her personal maintenance was of the order of 60%, which if I may say so, is realistic (perhaps even generous) in the case of a low wage earner in Jamaica. But I shall come back to this.

The next written judgment that I have been able to track down is that of Chester Orr J. in Elsada Morgan (Administratrix estate Gladstone Morgan, deceased) v. Jamaica Public Service Co. Ltd. and another.[40] In this case the deceased was a 25 year old single man at the time of his death, but with four dependants (mother, father, brother and child) for the purposes of the Fatal Accidents Act. The deceased's salary was assessed by the learned judge at $50.00 per week and on the question of the lost years he had this to say:

> "The decision of the House of Lords in Gammell v. Wilson [1981] 1 All ER 578 has been followed by other judges. I see no reason to differ from my brethren. On the principles enunciated therein, I assess the surplus available to the deceased after deduction of his living expenses at $30.00 per week or $1,560.00 per annum.
>
> I apply a multiplier of 14; $1,560 x 14 = $21,840.00"

It does not appear from the judgment what evidence was before the learned judge to drive him to the deduction of $20 per week (or 40%) of the deceased's earnings for his living expenses, though one assumes that his use of the word "assess" is to be taken to mean he was assessing the evidence. What is clear to me is that it is highly unlikely

hat a 25 year old in Jamaica would have much of a surplus fter deducting living expenses from $50 per week. Having aid that, though, it is fair to point out that judges in ases such as these are really trying to make the best they an out of what is often scanty and equivocal evidence.

lsada Morgan went on appeal and the judgment of the Court f Appeal (5th May, 1986) is important. However, for the ake of completeness, it might be useful to complete this urvey of decisions at first instance by reference to that f Bingham J. in Kathleen Fakhourie (Executrix of the estate f Peter George Fakhourie, deceased) v. Linden Green and the ttorney General[41] and of Panton J. in Administrator General Administrator estate Garth Bethune Grindley, deceased) v. amella and Eric Wright.[42] In Fakhourie the deceased was a 1 year old family man at the time of his death and the case is only of interest because, although the learned judge used the phrase 'lost years' at least three times in his judgment, he did not in fact make any award under this head, as he appeared to have been of the view that it referred to damages under the Fatal Accidents Act. Indeed, he said as much when he observed (at p. 5-6) that "I now turn to the sum which ought to be recovered under the Fatal Accidents Act and made available for distribution among the widow and the 2 children ... as dependants, for what has been commonly referred to as the claim for the deceased's 'lost years'." So that from the standpoint of precedent, this case is really of no value and I only mention it in passing to demonstrate that as late as 1985 there continued to be confusion in the minds of some judges as to precisely what they were about in this area.

Of much greater interest is Grindley, in which Panton J.'s judgment opens felicitously:

> "arth Bethune Grindley was an extraordinary man. He was 35 years old at the time of his death; yet, he had sired thirteen (13) children by at least nine women. It seems as if he may have been running out of names for these children as there are two daughters who bear the name 'Karen' and another two who are known as 'Janet'. Garth Grindley lived with one of these women, Kathleen Parchment, at Lover's Lane, Black River. She described him, in evidence, as one who used to wear fancy clothes; one who was "handsome, quite loving, friendly, and very hardworking". He died on February 1, 1982, at the Kingston Public Hospital, after having been involved in a motor vehicle accident."

For the purpose of assessing damages for the 'lost years', the judge found that the deceased's take home pay was, on

average, $500.00 per week and that of this amount the available surplus would have been $200.00, on the following basis:

> "Considering that the deceased led an extraordinary personal life, one which involved many women, I found that he would have used for his personal maintenance no less than $300.00 per week. After all, he was a fancy dresser! The surplus therefore would have been definitely no higher than $200.00 per week."

Applying a multiplier of 14 (possibly a bit high in the light of subsequent authorities) Panton J. awarded $145,600.00 in damages for the lost years.

I think it is fair to say that, except for a couple cases, the first instance decisions cited demonstrate a fair awareness of the principles involved and, in particular, of the requirement to assess the evidence, scanty as it may be, and to arrive at a fair figure for compensation for the lost years. Elsada Morgan[43] provided the Court of Appeal with its first opportunity to consider the appropriateness of the award of damages under this head although, as has been seen, the Supreme Court had by this time been applying the principle quite freely. The first part of Carey J.A.'s judgment (he spoke for the Court) traces the history of the matter from Oliver v. Ashman, through the Australian case of Skelton v. Collins,[44] to Pickett and finally on to Gammell. Then he comes to the question of assessment and, after citing with approval some observations of Lord Scarman in Gammell (previously referred to in this paper at page 5, supra), the learned judge commented as follows:

> "I understand from these observations that an endeavour must be made to assess as damages from such evidence as is available the loss the victim has suffered during the lost years and the figure arrived at must bear a realistic relationship to the factual realities. Thus there can be no question of a nominal award because the evidence was exiguous."

There is no doubt, with respect, that this is a correct summary of the principles to be extracted from the relevant authorities. Then the learned judge fell into, with respect, an unfortunate error which has to some extent been a source of confusion in subsequent cases. I cannot, to be

air, avoid a lengthy quotation from the judgment of arey J.A.:

"In the present appeal, the learned judge allowed an amount of $21,840.00 for the deceased's loss of earnings in the lost years. He gave his reasons for this assessment - He said:

> "The decision of the House of Lords in Gammell v. Wilson (1961) 1 All E.R. 578 has been followed by other judges. I see no reason to differ from my brethren. On the principles enunciated therein, I assess the surplus available to the deceased after deduction from his living expenses at $30.00 per week or $1,560 per annum. I apply a multiplier of 14. $1560 x 14 = $21,840."

The learned judge assessed the deceased worker's weekly wage at $50.00. There was also evidence that he lived at home with his parents and contributed $10.00 weekly for his food and $20.00 to assist in the running of the house, and a further $10.00 to maintain a child he had by his girlfriend, Carmen Hudson. His mother also testified that he spent his money on clothes and shoes because he liked to dress well.

It was argued that his living expenses should be assessed at no more than one-third of his net earnings. Accordingly, the surplus which the judge should have assessed as living expenses, should be $17.00 per week, and using his multiplier of 14, the calculation would be $884 p.a. x 14 = $12,376.00. The basis for this argument rests on a judgment of Webster, J., in White & Anor v. London Transport Executive [1982] 1 All E.R. 410, [1982] 1 Q.B. 489 a case which does bear some similarity to the instant appeal. In that case the deceased was killed in an accident at work due to his employer's negligence. At the date of his death, he was aged 25, was unmarried and lived with his mother and step-father. He gave his mother between £15. and £25. per week. He spent most of his earnings on clothes and other items for himself and on girlfriends. The learned judge determined that the award to the estate for the deceased's lost earnings in the lost years would be one-third of his net earnings for the first 5 years of the 15 years purchase and one-quarter of those earnings for the remaining 10 years.

Although the case was decided before the decision of the Court of Appeal in Harris v. Empress Motors Ltd. (supra), the approach of Webster, J., did receive the approval of the Court. Both in White's case and Harris' case, a percentage formula representing the proportion of the deceased's net earnings that he would have spent exclusively on himself, was used. The reason for a resort to percentage is suggested by O'Connor, L.J., in Harris v. Empress Motors Limited (supra) at page 565:

> "In the course of time the courts have worked out a simple solution to the similar problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependants are wife and children. In times past the calculation called for a tedious inquiry into how much housekeeping money was paid to the wife, who paid how much for the children's shoes etc. This has

all been swept away and the modern practice is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentages have become conventional in the sense that they are used unless there is striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided on its own facts."

The experience in the United Kingdom has plainly led the Courts to adopt this mathematical formula. But we are not dealing with English conditions in this jurisdiction and I would be slow until we had gained more experience in this field to adopt a formula suited to English conditions but not yet tested in the Jamaican milieu.

We have no statistical accumulation of data in this Country to show what percentage of salary or wages, young apprentices spend on themselves, or for that matter settled married men with families. Plainly we have not yet arrived at a percentage to which the Courts may resort as is suggested in the case cited.

The question for a trial judge required to assess damages in this highly speculative area, is to discover on the available evidence what proportion of his net earnings a (deceased) workman spends exclusively on himself to maintain himself at the standard of life appropriate to his situation. Since we are dealing in this case with a young man a trainee, electrician, we are in the realm of intelligent extrapolation. What would be the deceased's prospects? Would he get married and have a family? The percentages of 33 1/2 or 25 were doubtless fair estimates in White v. London Transport Executive (supra), but there is no rule to be extracted from the cases prescribing these percentages as inevitable formula to be inflexibly applied to any or all situations. Each case must depend on its peculiar circumstances.

The global sum to be awarded is to be moderate not a conventional figure. The deceased in this case was in receipt of paltry wages and it was not to be assumed that he would not as time went by, improve in skill and accordingly, receive higher wages. Where the judge is concerned with a young workman at the bottom of the scale in terms of salary, regard should be had to the principle that damage for loss of earnings in the lost years should be fair compensation for the loss suffered by the deceased in his life-time, and not any formula of 33 1/2% or 25%. For to do otherwise would result not in moderate but in derisory awards, and would be compelling the judge to engage in the subtle mathematical calculations which Lord Scarman in Gammell v. Wilson, counselled, should be eschewed.

Viewed in this way, I do not think that the learned judge's award was perverse nor was it arrived at on an incorrect principle. It was moderate. I would not, therefore, disturb the award."

hile at the end of the day the judgment correctly calls for
n assessment by the trial judge of the available evidence,
e seriously misreads both White and Harris, resulting in a
ossible diminution in their authority in critical areas in

spect of which they are in fact very helpful. ecifically, Carey J.A. states that in both cases the urts applied a percentage formula representing the ceased's living expenses. In fact, this was not so. It true that in White, Webster J. concluded that the ceased in that case would have spent a certain percentage his income on himself, but he arrived at the percentage gure after an assessment of the evidence and not from any reconception based on a "statistical accumulation of data". milarly, misconceived is the reference to the judgment of Connor L.J. in Harris, any reading of which will show that at the judge was dealing with was the percentage formula at had become conventional in England in relation to fatal ccident cases, not 'lost years' cases. In neither case did he judges in fact apply a percentage formula in isolation f the evidence and in Harris in fact the appeals were emitted for reassessment on the basis of the available vidence.

ut like all heresy, once introduced, this particular one as proved to be difficult to dislodge and has had the nfortunate effect of limiting the attention paid in our ourts to what is in fact a very important - and, if I may ay so, accurate - analysis of the problem and its possible olution in Harris. Counsel have not been free of blame for he perpetration of the heresy and in Godfrey Dyer & Derrick yer v. Gloria Stone[45], leading counsel in the Court of ppeal apparently submitted that the court ought to have dopted "the conventional method approved in Harris". eading counsel on the other side submitted that the court ught to have assessed the evidence and applied the law to he facts and that "the learned trial judge was right in not sing the conventional method approved in Harris because his was expressly disapproved by this court in Elsada organ". Given this unanimity at the bar, it is hardly urprising that Campbell J.A., after citing out of context he same passage from O'Connor L.J.'s judgment dealing with onventional figures in relation to fatal accidents cases nd referring to Carey J.A.'s judgment in Elsada Morgan, eclined to adopt a conventional method in relation to the ost years calculation. According to Campbell J.A., "no elevant changes in the Jamaican milieu since 1986 [when lsada Morgan was decided] have been brought to my attention o as to persuade me to move from the policy position dopted in the abovementioned case." The irony is, that aving said this, the learned judge later in his judgment

then proceeds to summarise the approach to the calculation of damages in these cases in a manner which is not at all at variance from the approach of O'Connor L.J. in Harris:

> "The principle established for assessing the loss of future earnings for the "lost years" is firstly to ascertain from credible evidence what the net income of the deceased was at the date of death. Secondly, where as in this case there has been a relatively long period which has elapsed between the date of death and the trial of the action, to estimate the deceased's net income at the date of trial by reference to evidence of the net income being earned at the date of trial by persons in a position corresponding to that which the deceased held at the time of his death or by person's in a position to which the deceased might reasonably have attained. The average of these two levels of net income may then fairly be considered as the average annual net income of the deceased for the pre-trial years. The next exercise is to total the expenditures at the time of death which are exclusively incurred by the deceased to maintain himself reasonably consistent with his status in life. This is however only a part of his living expenses. In addition to these expenditures there must also be added as part of his living expenses a portion of those joint living expenses like rent and electricity which for purposes of calculating dependency under the Fatal Accidents Act would be treated as wholly for the benefit of the dependants. When these exclusive living expenses and the proportion of the joint living expenses of the deceased are totalled, this total sum is calculated as a percentage of the net income at the date of death. The average net income for each of the pre-trial years is reduced by this percentage and only the remaining balances constitute lost earnings for these years. A similar exercise is adopted for the post-trial period except that the living expenses computed as a percentage of the net income at the date of death is deducted not from the average net income but rather from the actual estimated net income at the date of trial."

In his judgment Forte J.A., referred to the Harris "method" as allowing "a percentage of the deceased's income to be applied to expenditure which he would have spent exclusively on himself, in preference to the method of attempting to assess that fact by way of available evidence" and he too followed Carey J.A. in rejecting "that method as inapplicable to the conditions existing in this country". Morgan J.A. also reiterated the court's disapproval of Harris.

O'Connor L.J. would certainly be surprised to discover that several judges of the Court of Appeal of Jamaica have rejected his "conventional method" approach in the "Jamaican milieu", particularly in the light of that learned judge's statement towards the end of his judgment in Harris that "in

rejecting the Straight Fatal Accidents Act solution I realise that I am differing from a considerable body of judicial opinion in the Queen's Bench Division, including the two judges in the present case". As I have attempted to demonstrate, there is no difference in the principles between the English and the Jamaican milieu and our Court of Appeal could well have sought for itself firmer ground for a display of judicial nationalism.

THE FUTURE

In Gammell, as has been observed, there was widespread dismay at the outcome. As already indicated, such judicial disquiet was swiftly translated into legislation in England abolishing the cause of action for damages for the lost years after death. It is one of the unfortunate features of way in which our courts have dealt with the matter that their acceptance of Gammell has been entirely uncritical and it certainly is my view that continued recovery under this head in Jamaica cannot be justified on any ground of social policy and ought to be abolished. Quite apart from social policy, the rules as they have emerged have led judges into exercises of demonstrable artificiality which in my view say nothing for the good sense of the law. While in the majority of cases the problem is mitigated by the fact the dependants and the beneficiaries are the same, the spectre of double recovery is indeed very real in some cases.

THE MULTIPLIER

In Dyer v. Dyer, the Court of Appeal considered the cases of Samuel Barrett v. Clinton Thomas,[46] Cecil McDonald v. Winston Williams[47] and Elsada Morgan and concluded that a multiplier of 11 is appropriate for a man aged 35 years old. In the more recent case of Clarendon Parish Council v. Junie Goulbourne,[48] the Court of Appeal followed this case and applied a multiplier of 12 to a 33 year old man, Gordon J.A. observing after a review of the cases that "the multiplier is age - related and ... if a multiplier of 14 years is appropriate for a man aged 25 years a multiplier of 15 is

[1979] 1 All E.R. 774.

[1961] 3 All E.R. 323.

See a note by W. V. Horton Rogers, 'The Lost Years', [1979] C.L.J. 47 at p. 50.

Mr. Pickett actually died while his appeal to the Court of Appeal was pending and his widow was substituted as plaintiff.

The High Court of Australia, for example, had refused to follow it in Skelton v. Collins (1966) 115 C.L.R. 94, and so had the Supreme Court of Canada in Andrews v. Grand & Toy Alberta Ltd. [1978] 1 W.W.R. 570; see also McGregor on Damages, 13th edition, para. 1177 et. seq. The Law Commission recommended legislation broadly in line with the decision in Pickett (Law Comm. no. 56. para 87). For past Pickett comment, see now McGregor, 14th ed. para. 1177 and a note by P.J. Davies, 'Personal Injuries; Lost Earnings and Interest', (1979) 95 L.Q.R. 187, showing somewhat less than enthusiasm for Pickett and preferring the dissenting opinion of Lord Russell that the problem was better suited to legislative intervention.

See per Lord Wilberforce at [1979] 1 All ER 774 at p. 781g, per Lord Salmon at p. 784 B & C and per Lord Scarman at 798d.

[1979] C.L.J. 47.

Ibid at p. 49; see also P.J. Davies, op. cit., esp. at p. 189.

[1980] 1 All E.R. 341.

Ibid at p. 352.

See a note, 'Damages for the lost years' by A.G.G. in (1980) 96 L.Q.R. 163.

[1981] 1 All ER 578.

In Kandalla, at p. 348.

With the possible exception of Lord Edmund-Davies, who seemed somewhat less perturbed than his brethren at the result.

[1981] 1 All E.R. 578, 581.

At p. 588.

The sole dissentient in Pickett.

At p. 590.

At p. 595.

Ibid.

Pp. 591-2.

At p. 587.

The phrase is Lord Wilberforce's in Pickett [1979] 1 All ER 774, 781.

nappropriate for a man aged 33 years". The effect of these two decisions is to assimilate the multipliers in fatal accident and personal injury cases, a move which one needs to be careful about since in the former case the multiplier runs from death while in the latter it runs from the date of trial.

CONCLUSION

Having said all of the above, I have no quarrell with the general proposition that we should try to adapt the principles to suit the Jamaican milieu. The only way we are going to be able to do this, however, is with accurate information and careful analysis. The judges have a role to play by ensuring that their decisions are reasoned and demonstrably consistent. Counsel have as great a role to play in ensuring that their submissions result from careful and thorough research. In this, the respective roles do not conflict, but are complementary.

C. DENNIS MORRISON
November 23, 1990

24. [1981] 1 All E.R. 578, 588.

25. Ibid, at p. 593.

26. [1982] 1 All ER. 410.

27. [1982] 3 All ER 300.

28. [1982] 3 All ER 570.

29. [1983] 3 All ER 561.

30. A provision modelled on the Damages (Scotland) Act 1976. S. 2 (3) & (9).

31. See [1982] All ER Annual Review 102 (J.R. Spencer).

32. See e.g. Pickett [1979] 1 All ER 774.

33. [1982] 1 All ER 410.

34. [1983] 3 All ER 561

35. [1983] 3 All ER 561, 577.

36. Ibid.

37. Suit no. C.L. 1974/A-018, judgment delivered 11/7/82.

38. Supra, p. 6.

39. Suit no. C.L. 1981/J011, judgment delivered 15/7/82.

40. Suit no. C.L. 1978/M050, judgment delivered 29/1/85.

41. Suit no. C.L. F10 of 1982, judgment delivered 20/6/85.

42. Suit no. C.L. 1985/A102, judgment delivered 26/5/87.

43. Supreme Court civil appeal no. 12/85, judgment delivered 5/5/86.

44. (1966) 115 C.L. R. 94.

45. Supreme Court civil appeal no. 7/88, judgment delivered 9/7/90.

46. Supreme Court civil appeal no. 14/80, judgment delivered 8/10/81.

47. Supreme Court civil appeal no. 83/81, judgment delivered 14/10/82.

48. Supreme Court civil appeal no. 75/89, judgment delivered 29/10/90.