FATAL ACCIDENT

LEGISLATION:

PROBLEMS & REFORM

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This paper is not intended to be a treatise on the subject of the Fatal Accident Legislation.

There have been three excellent papers written for these seminars since their commencement on the subject of the measure of damages for fatal injuries. These papers are, firstly, "Damages in Fatal Accident Cases" written in May, 1982 by our esteemed president C. Dennis Morrison, Q.C.; secondly 'Damages: the lost years' written in November, 1990 again by Dennis Morrison, Q.C., thereby rounding off his first paper with the development which had just begun to emerge when he delivered his first paper; and thirdly, "Fatal Accidents: Computation of Damages in Jamaica" by Sandra Minott-Phillips in about 1990.

I would in fact be providing a most valuable service if I did nothing else but reproduce these papers for your re-edification, but that would be a lot of reading for you (and for me), encompassing as they do over 46 pages, omitting the footnotes; and it would bore you immensely, (no reflection on the authors). My task as I perceive it is to raise with you some of the problems that I see in relation to the legislation and its implementation and to recommend some possible reforms, if I can.

The first problem that the practitioner is likely to encounter in bringing a suit under the fatal accidents legislation is the parsimoniousness of the awards under it. The fact is that English Common Law did not allow for damages to be claimed for an injury causing death however negligently such injury was caused and that it is by means of the **Fatal Accidents Act, 1846** popularly called Lord Campbell's Act, and later the **Law Reform (Miscellaneous Provisions) Act** that the working classes of both England and Jamaica have been unable to make any claim at all for the negligent death of a relative. The first Act became law in Jamaica, it seems, simultaneously with its enactment in England.

The legislators however were not intending to fill the hiatus which existed in the English Common Law and to compensate the grieving widow, mother or children of the deceased for their mental anguish, bereavement and deprivation of comfort, loss of companionship or of leadership and guidance.

Section 4 (4) of the present Jamaican **Fatal Accidents Act** repeating the English Act provides:-

> "..... the Court may award such damages to each of the near relations of the deceased as the Court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered ... shall be divided accordingly among

the near relations."

Thus Lord Wright in **Davies vs Powell Duffryn Associated Collieries Ltd. (1942) 1 ALL.E.R 459** in his oft quoted dictum (at 665) set out the position with unmistakable clarity, --

> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities" .

Section 4 (4) has been very strictly applied by the Courts: thus it is not sufficient to prove a mere speculative possibility of pecuniary benefit. When there is no actual existing financial support the Plaintiff must show that he has lost a reasonable probability of pecuniary advantage **(Barnett vs Cohen (1921) 2 K.B. 461.)**

The unpalatable consequences of this restriction have been in some small measure relieved by the decisions of the Courts stemming from the House of Lords decision in **Pickett vs British Rail Engineering [(1979) 1 ALL.E.R. 774]** holding that where a Plaintiff's life expectancy had been shortened as a result of sustained injury, he was entitled to compensation for loss of earnings during the period when, but for his injuries he would have been able to work and earn.

Applying the logic of this decision to the provisions of the **Law Reform (Miscellaneous Provisions) Act** passed in 1934 in England and in identical terms in Jamaica in 1955, which preserved for the benefit of a deceased's estate all causes of action which vested in the deceased at his death (see Section 2) it was held in **Kandalla vs British Airways Board (1980) 1 All E.R. 341** and in **Gammell vs Wilson (1981) 1 All E.R. 578** (H.L.) that the right of action for damages for the 'lost years' or loss of future earnings of the deceased survived for the benefit of the deceased's estate.

It is, of course, necessary in order for an award to be made as to the deceased's 'lost years', that administration of his estate should have been granted to his personal representative, where the deceased died intestate, and that the action shall have been brought on behalf of the estate within six (6) months of the grant of administration (See Section 2 (3) (b) of the **Law Reform Act**).

In the case of **Carl George Smith (Administrator of the Estate of Donovan Smith, deceased) vs Johnny Hinds et al (Suit No. C.L. S-365/85 (Unreported)** the deceased had been employed to his father (the Administrator) as Manager of a gift shop in Ocho Rios and also of his haulage truck and was paid a total of $650.00 per week from which he paid $250.00 per week to his parents, with whom he lived.

Both of his parents who lived together were gainfully employed and his father, in addition, had other significant means of livelihood.

In this situation Cooke J. found that there was no dependency in the parents upon the deceased and that the amount paid to them weekly was attributable to the deceased's living expenses. He accordingly declined to make an order under the **Fatal Accidents Act.**

As regards **the Law Reform Act**, the trial judge found that the deceased's estate was entitled to recover for his 'lost years' and having found that the deceased earned $39,000.00 per annum he deducted 38½% for statutory deductions and 63% of the balance for living expenses ending up with an average of $23,067 per annum. He then allowed a multiplier of 14 years which he divided into 6 years for the pre-trial period and 8 years for the post trial period amounting to a total of almost $120,000.00 to which was added approximately $9,000.00 for special damages and Funeral and Administration expenses, and $3,000.00 for loss of expectation of life.

An award for the lost years of the deceased may sometimes be an improvement on the penny-pinching pecuniary awards based on the support provided to dependent near relations. It may even be made in addition to an award under the **Fatal Accidents Act** where the beneficiaries of the estate are other than the dependent relatives. Where the beneficiaries of the estate and the dependent relatives are the same, the smaller award becomes subsumed in the greater.

Even while they were applying the relentless logic of awarding damages for the deceased's 'lost years', several members of the English judiciary were bemoaning the gratuitous benefits which it was according to the working class and peasantry who are by far the main victims of fatal accidents resulting from tortious acts. Griffiths, J. in **Kandalla vs British Airways Board** (ante), observed that "any sum for the 'lost years' awarded ..... which exceed the value of the **Fatal Accidents Acts** damages will be a pure windfall for the parents", thereby displaying a surprising lack of concern for the pain and bereavement which they must have experienced.

In **Gammell vs Wilson et al and Furness et all vs B & S Massey Ltd. (1981) 1 All E.R. 578** while upholding the award for lost years, several of the law lords expressed their unhappiness with the result. Lord Diplock thought it was "not sensible or just"; Lord Fraser of Tulleybelton regretted the "unhappy state into which this part of law of England has fallen"; and Lord Russell of Killowen thought that the law "has gone astray by excessive refinement of theory". These concerns have been echoed by lawyers who represent insurance companies and who have advocated legislative intervention to mitigate its effects. These critics point to the potential for inflating the cost of insurance to the public by higher awards of damages to deceased persons' estates.

There is however, another point of view, expressed by persons such as the author of this paper who see the bald awards under the Fatal

Accidents Act as failing to recognise the bereavement and anguish of close relatives and loved ones who, while their grief and sense of loss can never be adequately compensated, can nevertheless find solace in the fact that their future needs will be more substantially provided for than by the stark terms of the Section 4(4) of the **Fatal Accidents Act.**

Even awards for lost years have themselves been shown to be wanting in an inflationary situation such as we have seen in Jamaica in the decade of the nineties. This has been at least partly due to the unwillingness of the courts to make awards which anticipate either the predictable inflationary spiral or the clearest prospect of promotion and advancement of deceased workers. Thus in the case of **Carl George Smith** (op. cit.), the annual sums awarded for loss of future earnings were exactly the same for the pre-trial period as for the post-trial period based on a rate of earnings which was perhaps one-third of what it would have been, in reality, at the time of the trial.

The other gap in Section 4(4) of the **Fatal Accidents Act** which the lost years principle has been unable to fill, due to its own pecuniary nature, is in relation to the death of young persons who had not yet began to earn a livelihood, and whose earning capacity no matter how promising, could only be guessed at. The limitation was already indicated in the early formulation of the principle by Lord Scarman in the case of **Gammell vs Wilson et al, Furness et al**

vs B & S Massey Ltd. (1981 1 All E.R. 578. This liberal Lord stated -

> "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 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..... But in all cases it is a matter evidence and a reasonable estimate based on it."

The effect of the pecuniary nature of claims for lost years was starkly displayed in **Rhona Hibbert (Administratrix for the estate of Matthew Morgan, deceased) vs The Attorney General (C.L. H-167/82)** (unreported) which was tried in November 1988. The deceased

was a thirteen (13) year old school boy who lived with his mother and having failed his common entrance had nevertheless gained admission to a secondary school shortly before he was negligently gunned down by policeman. He had not yet begun to earn any livelihood of any sort though his mother said he was good at woodwork.

An award under the **Fatal Accidents Act** was plainly out of the question and the learned trial judge, Gordon, J., declined to make an award for lost years as he said "I have not been favoured with evidence which shows 'actual employment or a real prospect'. The plaintiff has failed to established an assessable claim under this head." She was awarded $3,000 for loss of expectation of life under the **Law Reform Act**; $2,303 for funeral expenses; and $5,000 for general damages for the pain and suffering of the deceased as he was conscious for an indeterminate period of hours after being shot and died about fourteen (14) hours after being shot. The total damages awarded was $10,303.

It is perhaps, too late to modify the manner of assessing awards by the courts and there is accordingly a need for the legislature to step in, much as it did in 1846 to fill another need and establish a range within which an award can be made for the bereavement of the near relations, especially in the case of an only child and a single mother or where there are close relationships between the deceased and other near relations, even if no dependency is

actually established.

The anticipated concerns of insurers as to the likely effect on the cost of insurance to the public of such legislated increase in compensation would, in my view be misplaced. The disparities in earnings between workers and say, middle-management is so great that it would take about 10 - 20 fatal accident claims on behalf of workers to equal the compensation that an insurance company would have to pay out for the accidental death of one person in the middle-management income bracket. The modest increases in awards which would be occasioned by the addition of a limited claim for bereavement would be unlikely to make any significant dent in the pockets of insurance companies whose major payments I suspect, are for repairs to motor vehicles and serious injuries short of death. An award under this head should not be amenable to adjustment on the basis of the income, actual or prospective of the deceased, but should be based on the strength of the relationship between the deceased and the near relation.

It would have been useful to look at how damages for fatal accident claims are assessed in other countries, particularly the United States, but time and circumstance made such research impossible.

EXEMPLARY DAMAGES

The **Law Reform (Miscellaneous Provisions) Act** for some mysterious reason which I have never been able to fathom, prohibits the

recovery of exemplary damages by the deceased's estate. Section 2 (2) states:-

> "Where the 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 (a) shall not include any exemplary damages....."

Whatever may have been the reason for excluding exemplary damages in 1934 or in 1955 the scope of exemplary damages then was very much wider than it is now as a result of the House of Lords decision in **Rookes vs Barnard ((1964) 1 All E.R. 367)** which limited the award of exemplary damages to (a) where there is oppressive arbitrary or unconstitutional action by the servants of the government and (b) where a defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff (per Lord Devlin pp. 407,408 & 410).

I am of the view that the only purpose which this restriction presently serves is to save the government from having to pay out sums of money which should justly be awarded when the oppressive, arbitrary and unconstitutional actions of its servants result in the death of their victims.

Even without the restriction in the **Law Reform Act** it is already generally true that it is cheaper for the government when the

victims of its servants torts are killed than when they are permanently or substantially incapacitated.

The very specific terms of Section 4(4) of the **Fatal Accidents Act** does not make it amenable to an award of exemplary damages and the situation remains in my view an anomaly that a victim of arbitrary and oppressive conduct who lives may be awarded exemplary damages but that his estate may not, if the conduct is so arbitrary and oppressive that he dies.

The repeal of Section 2(2) (a) of the **Law Reform Act** would not affect the vast majority of fatal accident claims involving motor vehicle negligence or other acts of simple negligence, but would in large measure be confined to assaults or acts of gross negligence by the servants of the government.

In the recent case of **Doris Fuller (Administratrix of Estate Agana Barrett, deceased) vs The Attorney General (C.L. F-152/93)** (the Constant spring Lock-up case) the plaintiff was unable to ask for an award of exemplary damages and had to fall back to claiming aggravated damages which the trial judge allowed under the **Law Reform Act** and awarded $100,000 for aggravated damages due to the extremely callous attitude of the police towards the situation of the prisoners crammed as they were into one cell.

As a case which is unparalleled in modern history as to the abuse

and mistreatment of human being it is tantalizing to speculate what sum a judge would have awarded for exemplary or punitive damages as it is sometimes called, had he not been barred from so doing. I would venture to say anything that less than one million dollars would be hopelessly short of the mark.

LOSS OF EXPECTATION OF LIFE

I would be remiss if I did not say something about loss of expectation of life and the fact that plaintiffs are being short-changed by the cautiousness of the judiciary and the apparent failure of the legal profession to insist that their clients get their just due in this regard, largely, I suspect, because the sums involved seem too small to worth fighting over.

My colleague, C. Dennis Morrison writing in 1982 stated:-

> ".....it has long been settled that, in cases where death has been the instantaneous result of the act on omission giving rise to the action, the amount of award should be a **moderate conventional sum** only: **Benham vs Gambling (1941 A.C. 157**. In England the conventional sum is around £750 - £1,200, while in Jamaica it would appear to be somewhere in the range of $1,500 - $2,000 (see **Administrator vs Aston Dacres (1981) C.L. 1978 A-001**, where Wolfe, J. awarded $2,000 under this head)."

The fact is that in the 1960's before the Jamaican currency changed from pounds to dollars at the rate of $2 to the £1, our rate of exchange was roughly (Ja) £1 to (UK)£1 and the conventional sum was roughly £300 to £750.

In the passage of time from 1968 to the present time the value of the Jamaican dollar relative to the English pound has fallen from an exchange rate of 2 to 1 to an exchange rate of 58 to 1, or in other words 29 times further than the English pound.

While not possessing the actual cost of living index for as far back as 1968 when the currency changed, my cautious calculations suggest that the value of the Jamaican dollar today is at least 150 times less than it was then. Thus an award of $3,000 - $5,000 for loss of expectation of life as is usually awarded today would be equivalent to about $20 to $30 just after the currency changed in 1969. Put the other way around if awards for loss of expectation of life kept abreast of the decline in the costs of living, it would range between $100,000 to $200,000 today. Granted however, that as a "moderate conventional sum" it is not expected to keep pace with the decline in the cost of living, it is not a token sum and there is no reason why it should not be today in the $30,000 - $50,000 range. After all, the Resident Magistrate's Court's jurisdiction which in 1960s, was £400 for contract and $1,000 for negligence, is now $100,000.

The awards will not however, improve unless counsel for the plaintiff is prepared to relentlessly argue for it. That improvement is possible is illustrated by two cases. Firstly, in **Doris Fuller (Administratrix for Estate Agana Barrett) vs The Attorney General** (ante) as has been noted the award in 1995 for loss of expectation of life was $3,000. In **Alicia Dixon (Administratrix for Estate Christopher Dixon, deceased) vs Kenneth Harris and the Attorney General C.L. D-239/85** decided in 1993 the same judge, (Carl Harrison, J. (Acting)), awarded $10,000 for loss of expectation of life. The moral here is, if you don't ask for it you can't expect to get it.

It may be worth nothing that the right to claim for loss of expectation of life as a separate head of damage was abolished in England by statute in 1982. It was also provided in the same statute (**Administration of Justice Act 1982 S. (1)(1)(b)**) that when the plaintiff's expectation of life has been reduced by the injuries -

> "The court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been reduced."

The learned author of McGregor on Damages - 15th edition 1988 makes the following comment (par. 1531)

> "The Courts are not now restricted to awarding the conventional sum; more or less may be awarded, depending essentially on the circumstances surrounding the particular plaintiff, such as his attitude to his loss and the number of years of life of which he has been deprived. On the whole, it is thought that the tendency should be upwards to go above the former conventional sum....- But it is too early to say if higher awards will become accepted, and even time may not tell if, as is probable, the amount given is not separately assessed but is all part of the total award for non-pecuniary loss".

There, it appears, the matter rests.