JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 7/88

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Miss Justice Morgan, J.A.

BETWEEN	GODFREY DYER DERRICK DYER	DEFENDANTS/APPELLANTS
AND	GLORIA STONE Executrix, Estate Edward Joslyn Stone	PLAINTIFF/RESPONDENT

Winston B. Frankson Q.C., Mr. John Givans & Dr. Bernard Marshall instructed by Dunn Cox & Orrett for the appellants

Richard Small and Mrs. Sandra Minott-Phillips instructed by J. Vernon Ricketts for the respondent

November 20, 21, 22, 23, 1989
January 22, 23, 24, 25, 26
April 2, 3, 4 & July 9,
1990

CAMPBELL, J.A.

Between 9 and 10 p.m. in the night of March 25, 1982 a fatal motor vehicle accident occurred along the main road at Crawford in the parish of Saint Elizabeth. Edward Joslyn Stone was killed. As a consequence of his death his wife Gloria Stone as executrix commenced an action against the appellants on January 6, 1983 under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. The action was heard on various days in 1985, 1986 and 1987. It culminated in a judgment given on December 18, 1987 for the wife/executrix in damages under the Fatal Accidents Act in the sum of $782,476.00 and under the Law

Reform (Miscellaneous Provisions) Act in the sum of $384,000.00.

From this judgment the appellants have appealed. Grounds 1, 2 and 3 relate to liability and the refusal of the learned trial judge to admit evidence relative thereto. Grounds 4, 5, 6 and 7 relate to the assessment of the damages and the improper admission of evidence relative thereto.

Grounds 1, 2 and 3 are clearly without merit. The learned trial judge made clear findings of fact amply supported by the evidence that the appellants were solely to blame for the fatal accident in which the life of Mr. Stone was extinguished.

No useful purpose is served by setting out the grounds of appeal relative to liability nor by recording the submissions advanced in respect of these grounds and I refrain from so doing.

The grounds of appeal relative to the assessment of the damages are as hereunder:

> "4. On the basis of the principle that damages should be even handed and just and be basically a conventional figure derived from experience and from awards in comparable cases the damages awarded are grossly excessive.
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> 5. The learned trial judge erred in principle in combining the damages awarded under the Fatal Accidents Act and the damages awarded under the Law Reform (Miscellaneous Provisions) Act and further erred in law in compensating the Dependants/Beneficiaries twice in respect of the death of the deceased.
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> 6. The trial judge having taken into account the effect of inflation in computing the damages under the Fatal Accidents Act was wrong in law, and was further wrong in law in awarding interest on such damages.

"7. The trial judge erred in law in permitting the recall of the witness Omar Davies to give further and supplementary evidence after the case for the Defendants was closed."

Mr. Frankson submitted that the learned trial judge did not, from the evidence which he had before him, ascertain with any particularity, or at all, the basic dependency of the widow and children, because he had failed to deduct from the household expenditure, any sum which the deceased would have spent on himself. Secondly, the evidence of expenditures given was unreliable and ought not to have been accepted as it revealed that the deceased was living beyond his net income of $40,635.00 at the time of death. He submitted that in such a situation a more reliable approach directed at arriving at a reasonable dependency figure would have been to adopt the conventional method approved in **Harris v. Empress Motors Ltd & Cole v.Crown Poultry Packers Ltd** (1983) 3 All E.R. 561. Thirdly, even if the "annualised expenditure" approach was proper, the learned trial judge erred in principle in adjusting his figure of dependency at death by using the annual inflation rate given in evidence by Dr. Omar Davies in ascertaining the total dependency for the years between the death of the deceased and the date of trial and in further ascertaining the multiplicand for the post-trial period.

To the contrary, Mr. Small submitted that since the evidence both in respect of the deceased's income and the annualised expenditures were not challenged and were detailed, comprehensive, and inherently reliable, the learned trial judge's findings of fact relative thereto and his reliance thereon cannot be faulted, though he had erred in his application of the law to the facts. The respondent's notice showed how, as

submitted by him, the law should have been applied to the facts. The learned trial judge was right in not using the conventional method approved in **Harris v. Empress Motors Ltd** (supra) because this was expressly disapproved by this court in **Jamaica Public Service Co Ltd v. Elsada Morgan et al** S.C.C.A. No. 12/85 delivered May 5, 1986 (unreported).

Mr. Small further submitted that the learned trial judge was justified in using the expert evidence given on the progressive rise in the level of inflation between the date of death and the date of trial in determining both the value of the aggregate dependency for the pre-trial period as well as for determining the Net Income at the date of trial from which the dependency for the post-trial period is to be ascertained. He submitted that such expert evidence in relation to the pre-trial period was not only admissible but relevant. He cited in support of his submission **Mitchell v. Mulholland** (1971) 2 All E.R. 1205 and **Central Soya of Jamaica Ltd v. Freeman** S.C.C.A. No. 18/84 delivered 18th March, 1985 (unreported). He submitted that even though the cases were concerned with assessment of damages for personal injuries, the rationale for the admission of evidence of inflation as therein approved was equally applicable to fatal accident cases because the rationale was to assist the court in arriving at a decision as to what is the appropriate income and dependency at the date of trial. Though he conceded that it was always desirable to adduce specific evidence of current level of income at the date of trial, he maintained that evidence of the rate of inflation between the date of death and the date of trial is admissible and ought to be utilised in arriving at a decision as to what the level of income is expected to be at the date of trial or as confirmatory evidence of the reliability of evidence already given of estimate of such income.

The conventional method of determining the multiplicand for the dependency suggested by Mr. Frankson is based on a statement in **Harris v. Empress Motors Ltd** (supra) at page 565 where **O'Connor L.J.** said:

> "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 dependents 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 out 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 principle approved in the above statement was adverted to by this court in **Jamaica Public Service Co Ltd v. Elsada Morgan** (supra) but the court was of the unanimous view that it would be untimely to adopt that principle. **Carey J.A.** speaking for a unanimous court said:

> "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 satistical 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."

No relevant changes in the Jamaican milieu since 1986 have been brought to my attention so to persuade me to move from the policy position which this court adopted in the abovementioned case. Accordingly the "annualised expenditure approach" adopted by the learned trial judge cannot be faulted in principle though as submitted by Mr. Small, he was in error in his application of the law to the facts as found by him. This error Mr. Small submitted was independently of the issue as to the relevance of evidence of inflation in arriving at the pre-trial aggregate dependency.

The learned trial judge in determining the amount of the dependency for the year of death made use of part only of the unchallenged evidence of expenditure by the deceased namely expenditure on rent, household helper, electricity, cooking gas, gardener, grocery, vacation, entertainment and Xmas extras, totalling $28,540.00. This figure is criticised and rightly so by Mr. Small and Mr. Frankson. Mr. Small's schedule of annualised expenditure based on the evidence, totalled, after a minor correction, $45,958.00. But as he concedes that clothing for the deceased which was not quantified had to be taken into account which I have estimated to be $2,000.00, the annualised expenditure would be $47,958.00. From Mr. Small's schedule of expenditure the sum of $5,765.00 inclusive of clothing would represent expenditure exclusively on the deceased. The dependency in 1982 would therefore be $42,193.00.

Mr. Frankson's submission on this, as earlier stated, was that since the annualised expenditure exceeds the net income of $40,635.00 it was unreliable, and therefore a percentage of the net income should be deducted as representing the amount expended by the deceased exclusively on himself. The balance would then represent the basic dependency in 1982. Alternatively,

if this method was not adopted, the annualised expenditure would firstly have to be brought into alignment with the net income and secondly a deduction made for expenditure incurred exclusively for the deceased's benefit. These were not done by the learned trial judge.

Having properly adopted the "annualised expenditure" approach the learned trial judge ought to have proceeded thus:

> (a) firstly, he should have made use of all the relevant annualised expenditures of which there was evidence;
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> (b) secondly, he should have apportioned the actual annualised expenditures between expenditures exclusively for the deceased's benefit and expenditures for dependants and then ascertain what is the percentage which the expenditures on dependants is, relative to the total actual annualised expenditure;
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> (c) thirdly, he should use this percentage to determine the amount of the net income of $40,635.00 which is to be regarded as the dependency in the year of death of the deceased.

The annualised expenditures are reduced to align them with the net income of $40,635.00 as a life underwriter because on the evidence only this income was used to meet expenditure. The income from the minibus which was being operated, albeit illegally, was being saved. The learned trial judge accepted this statement of Mr. Small. Equally there is no evidence that any savings account at the Commercial Banks or with the Life Underwriters Credit Union was being drawn on to cover current expenditure. Rather the evidence discloses a determined effort of the deceased to save towards the purchase of a house and motor car. In the light of these circumstances the evidence of Mrs. Stone as to many items of expenditure must be viewed as exaggerated albeit not deliberately and designedly so. Since however it is not possible to say which of the items of

expenditure are exaggerated and which are not, a just way of resolving the matter is by reducing proportionately the two segments of the annualised expenditure (dependants' and deceased's) from the level of $47,958.00 to $40,635.00 so to bring them in line with the net income of $40,635.00 which alone on the evidence is earmarked to meet expenditures.

Mr. Small conceded that one fifth of the expenditure of $13,000.00 on grocery would be attributable to the deceased. This together with specific expenditures on the deceased himself such as Xmas expenditure $200.00, doctor's bill $720.00, Life Insurance $245.00 and clothing which I earlier estimated at $2,000.00 totalling $5,765.00 would therefore be deductible from the annualised expenditure of $47,958.00 in arriving at the unadjusted dependency. Mr. Small however submitted that the entertainment expenses of $3,120.00 and car upkeep expenses of $3,000.00 in relation to which the Court invited submissions from counsel ought not to be considered other than as joint expenditures which like rent are to be allocated wholly to dependency because those expenditures underpinned a standard of living to which the dependants were accustomed and of which they are now deprived. Mr. Frankson accepted the allocations made by Mr. Small but contended that in addition to these and the estimated amount for clothing, the entertainment and car upkeep expenses should be allocated exclusively to the deceased because they pertain principally to his employment as an insurance underwriter. In my view, Mr. Frankson's submission has considerable merit. In the case of the car upkeep, the evidence discloses that the car could hardly be designated as a family car. The car, a Ford Escort was purchased as a new car in 1972. The deceased was then an overseer at W.I.S.C.O. living at Albany in Westmoreland. He thereafter became a salesman for a short time at Tropical

Battery Company in 1974. He left that job in 1974 to become an overseer at Grays Inn where he worked until February 1978 when he left and was employed as a Life Underwriter at Life of Jamaica, Spanish Town Branch. From the evidence, the deceased came to Kingston when he had the job as salesman at Tropical Battery Company. He then moved to Gray's Inn when that job was secured but he returned to Kingston and lived at 15 Denham Avenue, Meadowbrook Estates from November 1976. The deceased commuted daily from Kingston to Grays Inn. As life underwriter, 75% of his business was derived from St. Mary, Westmoreland, St. Elizabeth and Manchester with only 25% derived from the corporate area. He was required to give good service to persons in the rural areas whom he had underwritten. On this evidence it is plain that the constant availability of a car was an absolute necessity for the deceased in the efficient performance of his employment and the car would only be used to a very small extent for the benefit of the family. The relatively large sums of $600.00 on bus fares and $1,000.00 on taxi spent on getting children to and from school by a caring father speak eloquently to the relative unavailability of the car to satisfy the purely domestic needs of the family.

The entertainment expense on the evidence is expenditure on friends. Whatever value such gathering of friends at home may have in enriching the quality of life of the dependants, the immediate and direct expenditure is for the benefit of the invited friends who partake of the deceased's generosity. Such expenditure differ fundamentally from expenditure on dependants in taking them on holidays and to theatre. Further, a weekly expenditure on the average of $60.00 on entertainment, having regard to the relatively large sum and its frequency, seems to me more consistent with satisfying business promotional needs

than a purely private social domestic need. For the reasons stated, I would consider that both the car upkeep and the entertainment expenses should be treated as exclusively for the benefit of the deceased.

Therefore the sum which ought to be allocated as expenditure incurred for the benefit of the deceased would amount to $11,885.00. This would leave as dependency at the time of death the sum of $36,073.00 out of the annualised expenditure of $47,958.00. But this dependency must be proportionately reduced so that both it and the sum allocated to the deceased, also proportionately reduced, will together not exceed the net income of $40,635.00. The dependency at the time of death when so reduced amounts to $30,565.00 or 75% of net income.

The next exercise is to arrive at an average figure of dependency for each of the pre-trial years so that the aggregate dependency for that period may be ascertained. The learned trial judge determined the pre-trial years to be 5½ and this has not been disputed.

Mr. Frankson submits that the only net income which is in general relevant in determining the value of the dependency whether pre-trial or post-trial is the net income at the time of death. The prospect of increased income at the time of trial however glowing is irrelevant unless it can be quantified and substantiated by satisfactory and credible evidence. In this regard the evidence of inflation in society is irrelevant and the evidence of Dr. Omar Davies on the progressive rise in the level of inflation between the date of death and the date of trial was irrelevant and ought not to have been used by the learned trial judge in determining the aggregate dependency for the pre-trial period or for determining the multiplicand for the post-trial period.

The learned trial judge did make use of this evidence. He said:

> "I have considered the evidence of Dr. Davies on the movement of money over the years and the indications of the Consumer Price Index. I find that based on the evidence, the deceased would have developed his potential and been in the $150,000.00 p.a. income bracket had he survived to this date. This figure is within that given by Dr. Davies based on the earnings of the deceased at the time of his death viz $66,000.00. In arriving at the amount of the dependency for the first year I use the unchallenged figures given by the plaintiff.
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> |---|---|
> | Rent | $2,700.00 |
> | Helper | 2,400.00 |
> | Electricity | 2,040.00 |
> | Cooking gas | 240.00 |
> | Gardener | 780.00 |
> | Grocery | 13,000.00 |
> | Vacation | 2,000.00 |
> | Entertainment | 3,120.00 |
> | Xmas | 1,000.00 |
> | | $28,540.00 (sic) |
>
> By increasing this amount annually by 10% for 5½ years from the date of death to allow for the increase in the cost of living and the fall in the value of money I arrive at the sum of $200,476.00. Bearing all the factors aforementioned in mind I award a multiplicand of $62,000.00 p.a. for the remaining 9½ years viz $589,000.00."

Mr. Small submitted that while it is agreed that in the calculation of the post-trial dependency, post-trial inflation in society ought not to enter, pre-trial inflation ought properly to be considered for the pre-trial calculation as is similarly done in the award of damages in cases of personal injuries. As earlier stated he relied on **Mitchell v. Mulholland** (supra) and **Central Soya of Jamaica Ltd v. Freeman** (supra)

Mitchell v. Mulholland (supra) dealt with the relevancy of evidence specifically directed to the prospect of inflation in assessing post-trial financial loss in personal injury cases. The assessment of the pre-trial loss in that case did not involve any consideration of inflation. Mr. Small however relied on this case because of the statement of principle of **Widgery L.J.** at page 1217 which states:

> "No one doubts that an award of damages must reflect the value of the pound sterling at the date of the award and conventional sums attributed to, say, loss of an eye, have been adjusted upwards in recent years on that account. Inflation which has reduced the value of money at the date of the award must, thus, be taken into account."

This principle has never been doubted. It underpins the decision of this court in **Central Soya of Jamaica Ltd v. Freeman** (supra). But the principle is designed to promote consistency of awards in real terms over the years where such awards are based on substantially similar facts and are for non-pecuniary loss.

The cases are however distinctly unhelpful in the present exercise. The annual dependency in Fatal Accident cases though representing the loss or damage suffered by a dependant whether at the time of death of the provider, or at any time subsequent thereto, is inextricably and directly linked with the actual and/or estimated income of the provider and on nothing else. Inflation however much it may erode the real value of the dependency whether in the pre-trial or post-trial period, cannot per se result in any increase in the money value of that dependency. An increase can only result from an increase in the net income of the provider on the reasonable assumption that with increased net income he can and will provide more in the money value of the dependency. Further, even though periodic increases in money incomes may be partly due to secular upward

movements in the appropriate price level, there is no established principle that the level of income at any given time and the cost of living index must correlate such that the former can be usefully extrapolated by the use of consumer price indices from an agreed income level used as a base figure. Thus, in my view, the evidence of Dr. Omar Davies, the expert on the movement of the consumer price index as an indicator of inflation, albeit indisputable, is irrelevant and cannot be used in estimating income at any given time, nor in confirming evidence on estimates of income given aliunde, unless there is further evidence that such income is contractually or statutorily linked to the cost of living price index. Since there was no such evidence in this case, the learned trial judge ought not to have utilised the evidence of inflation given by Dr. Omar Davies for adjusting upwards the dependency which he determined at the time of death in order to ascertain the aggregate dependency for the pre-trial period. Equally he should not have used this evidence as capable of confirming and as actually confirming the level of income which the deceased would have attained in the year of trial for purposes of determining the dependency for the post-trial period.

Mr. Small submitted however that even if the evidence of inflation was rejected, there was satisfactory evidence from Mr. Parker the Spanish Town Branch Manager of Life of Jamaica where the deceased was employed, that in 1985 the deceased would have been earning between $120,000.00 - $150,000.00 per annum. This estimate was based on the deceased past performance including "the impact of economic services". The deceased in the year prior to his death earned $66,613.00 gross. His performance was admittedly very outstanding in production in which he led; production is based on premiums, income, written

and settled business, and number of cases. He was not yet a unit manager which is the first promotional step through to Assistant Manager, Manager, Vice President and President. He however had the potential to be trained as Unit Manager. Mr. Parker said that the leader in production at the branch who "is a chip off the Stone's block" earned about $105,000.00 up to the end of October, 1985.

I think the finding of the learned trial judge that the deceased income would have been "in the $150,000.00 p.a. income bracket" was due to the improper use of an annual estimated percentage rate of inflation and was influenced inordinately by the evidence of Dr. Omar Davies. Without this evidence he most likely would have based his estimate solely on the evidence of income from previous years which showed that though the deceased's gross income moved upward significantly between 1978 and 1980 it rose very little between 1980 and 1981. This evidence showed that for 1978 to 1981 inclusive the gross incomes were $19,351.00, $36,686.00, $61,286.00 and $66,013.00. This fact considered with the evidence of Mr. Parker on the level of income of the current leader and the estimates given by him duly discounted for contigencies and uncertainties would indicate in my view that a figure of $120,000.00 per annum would be a reasonable discounted estimate of the deceased's gross earning at the date of trial.

The net income from this sum of $120,000.00 after allowing a tax free income of $8,000.00 and deducting from the balance of $112,000.00 income tax and other statutory deductions which together Mr. Small accepts as 38½% amounts to $76,880.00.

The dependency from this estimated increased net income using the same proportion as at the time of death is $57,660.00 (75% of $76,880.00) and the average annual

dependency between the time of death and time of trial would be $44,113.00 ($57,660.00 + $30,565.00 ÷ 2).

The aggregate dependency for the pre-trial period would thus be $242,622.00.

Next is the calculation of the post-trial dependency. The multiplicand is calculated as 75% of $76,880.00 amounting to $57,660.00. But there is dispute as to the number of years purchase or multiplier which is to be taken, calculated from the date of death. Mr. Frankson submits that a multiplier of 15 years for the deceased then aged 35 years, albeit in excellent state of health and relatively secure employment was too high. To the concrary Mr. Small submits that by reference to decided cases the multiplier of 15 was well within the range of what was considered reasonable.

I cannot agree with Mr. Small that a multiplier of 15 years can be accepted as reasonable.

In **Samuel Barrett v. Clinton Thomas & V.W. Lee & Sons** S.C.C.A. 14/80 dated 8th October, 1981 (unreported) this court on appeal reduced a multiplier of 15 years given to an injured driver aged 35 at date of trial to one of 11 years (see Volume 1 pages 85-88 of Recent Personal Injury award by Mrs. Ursula Khan).

In **Cecil Wong McDonald v. Winston Williams** S.C.C.A. 83/81 dated 14th October, 1982 (unreported), this court in scaling down an award of damages for loss of earnings approved a multiplier of 10 years for a truck driver aged 37 at the time of trial. (See again Volume 2 pages 51-54 of the abovementioned compilation by Mrs. Ursula Khan)

In **Jamaica Public Service Co. Ltd v. Elsada Morgan** (supra) the plaintiff was aged 25 years at the time of death. He was in excellent health. The Court of Appeal approved a multiplier of 14 years. What is plain from this case is that this court in considering a multiplier of 14 years as appropriate for a healthy man aged 25 years could not consistently approve a multiplier of 14 years much less 15 years as also appropriate

I can see no good reason for not following the decision of this court in **Samuel Barrett v. Clinton Thomas & V.W. Lee & Sons** (supra). The figure of the learned trial judge is accordingly reduced from 15 years to 11 years.

The post-trial loss of dependency calculated for 5½ years (11-5½) with an annual dependency of $57,660.00 amounts to $317,130.00. This added to the pre-trial loss of dependency of $242,622.00 amounts to $559,752.00.

Turning now to the claim under the Law Reform (Miscellaneous Provisions) Act, the real complaint of Mr. Frankson is in grounds 4 and 5 namely that the award is grossly excessive and that in any event there is a duplication of awards instead of a deduction, to the extent that the law allows, of the award under the Law Reform (Miscellaneous Provisions) Act from the award under the Fatal Accidents Act to the extent that beneficiaries under the latter Act have also benefited under the former Act.

Mr. Small readily conceded that the learned trial judge was in error in not deducting the award under the Law Reform (Miscellaneous Provisions) Act from Mrs. Stone's award under the Fatal Accidents Act since she was the executrix and sole beneficiary of the deceased's estate. However he complained in his respondent's notice that the multiplicand of $25,000.00 used by the learned trial judge in assessing earnings for the "lost years" was inadequate and flowed from the incorrect application of legal principles relevant to such calculations. Thus the award for loss of earnings for the lost years was well below what it properly should have been.

The learned trial judge regrettably did not disclose clearly his reasoning which led to his determination of the multiplicand for assessing the loss of earnings. After adverting to cases cited to him which he correctly declined to follow he himself after referring to **Jamaica Public Service Co Ltd v. Elsada Morgan** (supra) expressed himself thus:

"Mr. Stone had in four years as a Life Underwriter accumulated $15,000 in the Life Underwriters Credit Union. He also had $17,000 saved in commercial banks. He was saving towards buying a house and a motor car. A successful life underwriter he, had to dress and look the part, he also had to entertain. The minibus he operated provided some $10,400 annually, this Mr. Small submitted went to savings. A non-smoker and a regular jogger, he was in good health at the time of his death. I assess the surplus available to the deceased at $25,000.00 per annum and award the sum of $25,000 X 15 = $375,000 under this head.
In fine there will be judgment for the plaintiff in the sum of $782,476.00 under the Fatal Accidents Act with interest at 3% from 25th January, 1983 to date.

For funeral expenses	$6,000
For loss of expectation of life	3,000
Loss of future earnings (lost years)	375,000

Under the Law Reform (Miscellaneous Provisions) Act."

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.

Applying the above principles, the average net income for the pre-trial period of 5½ years is $58,755.00 ($40,635 + $76,880 ÷ 2) and the estimated net income at the time of trial is $76,880.00.

The living expenses of the deceased other than joint expenses was found to be $11,885.00 but when 20% of those joint expenses such as rent $2,760.00 helper $2,400.00 electricity $2,040.00 cooking gas $240.00, gardener $780.00 and vacation $500.00 is added, the total living expenses amounts to $13,629. ($11,885 + $1,744). This living expense represents approximately 20% of expenditure at time of death.

This means that 28% of the average net income of $50,758.00 for the pre-trial period and 28% of the estimated net income of $76,880.00 for the post-trial period must be deducted as living expenses in computing the lost earnings for the "lost years."

For the pre-trial period the lost earning is thus $232,682.00 (72% of $53,758.00 X 5½), and for the post-trial period the lost earnings is $300,485.00 (72% of $76,880.00 X 5½) making a total lost earnings for the lost years of $533,167.00.

Mrs. Stone will benefit to the extent of $533,167.00 under the Law Reform (Miscellaneous Provisions) Act, she cannot therefore benefit under the Fatal Accidents Act except and to the extent that her dependency under this latter Act exceeds this amount.

There has been no appeal against the actual apportionment of the award under the Fatal Accidents Act between the beneficiaries and Mr. Small has invited the court to allow the percentage apportionments to remain undisturbed whatever is found by this court to be the correct amount that should have constituted the global award. I have considered it right to leave the percentages undisturbed because as I have said there is no appeal relative thereto and the apportionment on the facts appear reasonable. Thus the apportionment of the new global award of $559,752.00 is as follows -

Dale - 2.53%	$14,162.00	
Carolyn 3.22%	18,024.00	
Wayne 4.17%	23,342.00	
Glenroy 5.06%	28,323.00	
Stacey-Ann 7.45%	41,702.00	= $125,553.00
Mrs. Stone 77.57%	434,199.00	

Mrs. Stone's award under the Fatal Accidents Act is completely merged in the benefit she derives as executrix and sole beneficiary under the deceased's estate. The judgment under the Fatal Accidents Act is accordingly reduced to the sum

of $125,553.00 apportioned as above among the children beneficiary.

Under the Law Reform (Miscellaneous Provisions) Act the loss of future earnings in favour of the estate is increased from $375,000.00 to $533,167.00 together with the funeral expenses of $6,000.00 and loss of expectation of life $3,000.00 against which there has been no appeal.

As regards the question of interest the power of the court to award the same is statutory. It is contained in section 3 of the Law Reform (Miscellaneous Provisions) Act which provides as follows:

> "3. In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

The rest of the section is not relevant.

With a view to establishing some semblance of uniformity and consistency within the discretion granted by this section this court in **Central Soya of Jamaica Ltd v. Freeman** (supra) considered the section in conjunction with section 51 of the Judicature (Supreme Court) Act which provides as follows -

> "Every judgment debt shall in the Supreme Court carry interest at the rate of six per cent or such other rate per annum as the Minister may by Order from time to time prescribe in lieu thereof, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

This court after a detailed review of the section, and accepting in principle that unadjudicated damages and debts, during the period when they remain so, ought not to attract an interest rate equal to or higher than a judgment debt, laid down guidelines per Rowe P., in these words at pages 28-29 -

> "I do not think that interest on the general damages for pain, suffering and loss of amenities should exceed one half the rate applicable to judgment debts. As the law now stands I would suggest as a guideline for the award of interest in personal injury cases that:
>
> (a) interest be awarded on special damages at the rate of 3% from the date of the accident to the date of judgment;
>
> (b) interest be awarded on general damages at the rate of 3% from the date of the service of the writ to the date of judgment."

Though this case laid down guidelines in personal injury cases such guidelines are Mutatis Mutandis equally applicable in fatal accident cases because before laying down these guidelines relevant English decisions were considered. One such decision was **Cookson v. Knowles** (1978) 2 All E.R. 604 which approved the principle that Fatal Accident damages ought to be assessed in two segments namely, pre-trial being the dependency lost between death and the date of trial, on which interest should be awarded for that period at "half the short term interest rates" current for the period between the date of death and the date of trial, and post-trial being the dependency lost after the date of trial on which no interest is to be awarded. **Gifford v. Gee** (1970) 1 All E.R. 1202 a personal injury case which had already been applied in this jurisdiction had established that general damages awarded for loss of future earnings should bear no interest.

The learned trial judge in this case awarded interest on the full dependency under the Fatal Accidents Act at 3% from 25th January, 1983 to date (meaning December 18, 1987.) He said -

> "In fine there will be judgment for the plaintiff in the sum of $782,476.00 under the Fatal Accidents Act with interest at 3% from 25th January, 1983 to date."

The learned trial judge was correct in awarding interest at 3% which is consonant with the guidelines in **Central Soya of Jamaica Ltd v. Freeman** (Supra). He was however in error in calculating interest from January 25, 1983 which would appear to be the date of service of the writ. It should have been awarded from the date of death. He was equally in error in awarding interest on both the pre-trial and post-trial amounts.

In conclusion I would allow the appeal and reduce the total judgment of the court from $1,166,476.00 to $667,720.00 made up as hereunder -

Under the Fatal Accidents Act (Dependency to children only)	$125,553.00
Under the Law Reform (Miscellaneous Provisions) Act - Funeral expenses	6,000.00
Loss of expectation of life	3,000.00
Loss of earnings in the lost years	533,167.00

Interest at 3% on the amount of $54,420.00 being the pre-trial portion included in the above judgment under the Fatal Accidents Act from date of death to 18th December, 1987. The interest as calculated will be apportioned among the children. Interest at 3% is also awarded on the Funeral expenses of $6,000.00 from the date of service of the writ.

On the principle established in **Gifford v. Gee** (supra) no interest is awarded on the earnings for the lost years. The fact that I have calculated the earnings for the lost years in pre-trial and post-trial segments was solely for the purpose of arriving at a more equitable level of loss sustained by averaging the net income in the pre-trial period which if not done would

have provided the estate with a windfall by having the deceased's estimated net income at the date of trial treated as the basis for calculation of his loss from the date of his death when in fact he is not deemed to have realised that estimated net income until 5½ years after his death. This method of calculation does not transform the character of the earnings which remain future earnings for the lost years on which no interest is to be awarded.

Finally, a perusal of Mrs. Khan's collections of Personal Injury Awards shows that it is very rare indeed for our trial judges to indicate the multiplier or years of purchase which they have applied having regard to the age of the injured person at the date of trial in assessing the loss of future earnings or the multiplier having regard to the age of the deceased person at date of death in assessing future earnings for the lost years. It is most desirable that these practices be adopted so that our own local judiciary can in time obtain guidance in difficult cases from the judicial opinion generally held by us in these matters in the context of what Carey J.A. has felicitously described in **Jamaica Public Service Co Ltd v. Elsada Morgan** (supra) as the "Jamaican Milieu."

FORTE, J.A.

I have had the opportunity of reading the judgment in draft of **Campbell, J.A.**, and agree that the appeal in relation to liability should be dismissed. However, in respect to the question of damages I offer a few words of my own.

The determination of proper awards in these cases has in the past, given trial judges great difficulty because of the artificiality of the assessment and the necessity to examine the possible variables that may have existed in the life of the deceased had he lived during the years of assessment. In the words of **Lord Diplock** in **Cookson v. Knowles** (1978) 2 All E. R. 604 at page 608 -

> "This kind of assessment, artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow's death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing in work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill-health? Would they have increased, and if so, when and by how much? To what extent if any would he have passed on the benefit of any increases to his wife and dependent children?"

Before this, in the case of **Mallet v. McMonagle** (1969) 2 W.L.R. 767 at page 773, **Lord Diplock** in speaking of the estimate of the amount of dependency had the following to say -

"The starting point in any estimate of the amount of the 'dependency' is the annual value of the material benefits provided for the dependants out of the earnings of the deceased at the date of his death. But, quite apart from inflation with which I have already dealt, there are many factors which might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependants. They might have diminished with a recession in trade or he might have had spells of unemployment. As his children grew up and became independent the proportion of his earnings spent on his dependants would have been likely to fall."

Similarly, **Lord Fraser** of Tullybelton in **Cookson v. Knowles** (supra) gave some guidance in the proper approach in these matters -

" ... the damages awarded to dependants under the Fatal Accidents Acts for loss of support during what would (but for the fatal accident) have been the remainder of the deceased person's working life have to be based on estimates of many uncertain factors, including the length of time during which the deceased would probably have continued to work and the amount that he would probably have earned during that time. The court has to make the best estimates that it can having regard to the deceased's age and state of health and to his actual earnings immediately before his death, as well as to the prospects of any increases in his earnings due to promotion or other reasons. But it has always been recognized, and is clearly sensible, that when events have occurred, between the date of death and the date of trial, which enable the court to rely on ascertained facts rather than on mere estimates, they should be taken into account in assessing damages ..... . Similarly if the rate of wages paid to those in the same occupation as the deceased person has increased between the date of death and the date of trial the increase is rightly taken

> "into account in assessing damages due to his dependants under the Fatal Accidents Acts. Assessment of damages in this way requires the pecuniary loss to be split into two parts, relating respectively to the period before the trial and the period after the trial, in the same way as it is split in a personal accident case. To that extent the same method of assessment is used in both classes of case. The loss of support between the date of death and the date of trial is the total of the amounts assumed to have been lost for each week between those dates, although as a matter of practical convenience it is usual to take the median rate of wages as the multiplicand. ..... That is convenient, although it is strictly speaking too favourable to the plaintiff, because it treats the probability that, but for the fatal accident, the deceased would have continued to earn the rate for the job and to apply the same proportion of his (perhaps increased) earnings to support his dependants as if it were a certainty. I mention that in order to emphasise how uncertain is the basis on which the whole calculation proceeds. ..... For the period after the date of trial, the proper multiplicand is, in my opinion, based on the rate of wages for the job at the date of trial. The reason is that that is the latest available information, and being a hard fact, it is a more reliable starting point for the calculation than the rate of wages at the time of death. The appropriate multiplier will be related primarily to the deceased person's age and hence to the probable length of his working life at the date of death."

Mr. Frankson in the process of his arguments invited this Court to conclude that the best procedure in arriving at an amount for the "lost years" is that expressed in the case of **Harris v. Empress Motors Ltd** (1983) 3 All E.R. 561 to be the conventional method. This method allows 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.

However, this Court in the case of **Jamaica Public Service Co Ltd v. Elsada Morgan** S.C.C.A. 12/85 (unreported) rejected that method as inapplicable to the conditions existing in this country. **Carey J.A.**, had this to say:

> "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."

I see no reason to disagree with that conclusion at this time.

It is my view that the cases demonstrate that in assessing the multiplicand in awards under the Fatal Accidents Act the Court must give consideration to the following matters:

1. The earnings of the deceased at the time of his death, and evidence of his probable advancement in his employment had he lived and any consequent increase in wages.

2. Evidence of the proportion of his earnings which he spent on his dependants and on himself up until the time of his death.

3. As at the time of the trial evidence will be available in respect of any events which may have taken place between the date of death and the date of trial, upon which the Court can act in its determination of the amount of dependency ..... and as any assessment of dependency after the date of trial, must be based on a high degree of speculation and assumptions, these periods must be assessed separately.

4. The evidence of probable earnings at the time of trial, together with the evidence of earnings at the time of death, must be considered together and the median of these two amounts, should form the assessed earnings of the deceased for the period between death and trial. For the period after the date of trial, the likely

earnings of the deceased at the date of trial would be the basis upon which to find the multiplicand, that being the latest information and a "hard fact" upon which some reliability can be placed.

5. The proportion of his income, which the deceased spent on his dependants, at the time of his death would in normal circumstances be regarded as the proportion which the deceased would continue to spend on his dependants had he lived. However, evidence of the unlikelihood that he would continue to expend the same proportion on his dependants in the light of increases in wages over the years, would be relevant in determining this factor.

MULTIPLIER

In respect to the multiplier, consideration must be given to the age of the deceased at the time of his death, and any evidence of his condition of health, both of which would be relevant factors in determining the amount of working years he may have enjoyed had his life not been untimely terminated. In the assessment, consideration should also be given to the normal retiring age of the country in which the deceased resides, the stresses of the particular job at which the deceased was employed, and how long in all the particular circumstances, he would be expected to continue working. Provisions should also be made for the uncertainties which could have occurred in the future, such as illness, or accident, which could have rendered him unable to continue in employment, had he lived. These are some of the factors which normally would assist in determining the number of working years lost and consequently the duration of the loss to the dependants of the benefits they would have derived from the deceased had he been able to continue in employment.

Other factors such as (i) the age of the widow (ii) the probability of her seeking employment, hence diminishing the scope of her dependency; and (iii) the ages of the children

in so far they may be reaching the age of majority, thus decreasing the number of years in which they would have been dependant on the deceased, would necessarily be relevant in determining the multiplier.

In the instant case, the evidence revealed that at the time of his death, the deceased who was born on the 17th April, 1947, was only about one month from his 35th birthday. He was at that time married to Gloria Veronica Stone, who was then 33 years of age, and whom he had taken as his bride on the 14th May, 1972. This union produced three children, Wayne born on the 24th April, 1971 Glenroy born on 22nd December, 1972 and Stacie Ann born 13th September, 1976. The deceased, however had two children not of this union and who lived outside of the matrimonial home with their separate mothers in the parish of Westmoreland. These are Dale born 11th October, 1969 and Carolyn born 10th March, 1971.

The undisputed evidence is that the deceased was a Life Underwriter employed to Life of Jamaica at its Spanish Town Branch and had been so employed since the year 1978. Described, as a very sober, genial and sociable person, in the few years that he worked with the company before his death "his performance was very outstanding in production". He became a member of the "Top Ten Production Club" which consisted of the top ten performers throughout the country. He received many awards including the "National Quality Award" and was also a member of the million dollar round table. He qualified for the latter in three successive years i.e. 1979 - 1981 and indeed led his branch in those 3 years. His Branch Manager in his testimony, stated that having examined his performance over those three years he saw in him the potential to be trained as Unit Manager.

Of him, his branch manager testified thus -

> "Having regard to his past performance and the experience I have had at this branch since 1982, including impact of economic services, I expect his earnings in 1985 would have been between $120 - $150,000.00 per annum. The leader in my branch did about $105,000.00 at the end of October. I am trying to get that leader to reach $150,000.00. This leader is a chip off the Stone's block."

It appears then, that the deceased was a relatively young man standing at the threshold of great success in his employment and consequent promotional advancement had he survived. At the time of his death his gross income was $66,613.07 which gave him net earnings of $40,635.53. The evidence at the trial therefore sought to establish that his potential earning capacity consequent on his demonstrated ability as a Life Insurance Underwriter, would in all probability, have resulted in his earnings increasing by the date of trial. If he had continued to lead the branch in sales, as the evidence suggested he would have, he would at the lowest have done as well as the then leader of the branch who in October had already earned $105,000.00. If the leader had continued at the same "pace" he would have earned for the year $105,000.00 plus $10,500.00 for each of the next two months, totalling $126,000.00. It appears then that the estimate of $120 - $150,000.00 given by the witness Mr. Parker as the probable earning that the deceased would realise in 1985 (the time of his evidence) was a reasonable assessment, and one which would be of great assistance in determining the amount of dependency.

In those circumstances, given this undisputed evidence of "hard facts" the Court in my view ought not to calculate the probable increase in the earning capacity of the deceased by reference to inflationary trends, and this inspite of the fact

that at the time of trial, the evidence of inflation would be based on known factors. In any event, evidence of past inflationary trends as it relates to increase in earnings, could only be relevant, if there was some evidence to show how in the particular circumstances relating to the company in which the deceased was employed, inflation would affect its wage structure and this in regard to the particular position held by the deceased or which would have been held by him, had he lived.

In this case, the learned trial judge ought not to have troubled himself with the evidence of inflation in so far as it related to the probable earnings that the deceased would have enjoyed, was he still living at the time of trial. In my view, the evidence of Mr. Parker, relating to the earnings of the person who at that time, was at the same standard as the deceased was at the time of his death, gave a good and adequate insight into the earning capacity the deceased would have enjoyed had he lived.

For those reasons, therefore, it is my view, allowing for uncertainties, that the figure of $120,000.00 which appears at the lower end of the scale in Mr. Parker's estimate, is in all the circumstances of this case, the appropriate figure to be used in determining the multiplicand.

EVIDENCE OF DEPENDENCY AT TIME OF DEATH

This evidence was given by the widow, and a careful calculation, reveals that the total expenditure attested to, exceeds that of the deceased's net earnings. Before considering this evidence it may be useful to refer to the fact that there was some evidence of the deceased earning some income from the illegal operation of a minibus; this income being the benefit

from an illegal activity cannot be taken into account in any assessment in these cases, and ought to be disregarded in any determination of the multiplicand. [see **Burns v. Edman** (1970) 1 All E.R. 886].

The evidence through the widow revealed the following total expenditure -

Rental	$2,760.00
Helper	2,400.00
Electricity	2,040.00
Cooking gas	240.00
Gardener	780.00
Grocery	13,000.00
Vacation	500.00
Entertainment	3,120.00
Christmas spending	2,300.00
Education	1,260.00
Maintenance	2,400.00
Boy's Lunch	1,400.00
Taxi children	1,000.00
Bus fare - Stacie Ann	600.00
Pocket money	1,200.00
Doctor's Bills	3,000.00
Wife's Allowance	2,400.00
Car upkeep	3,000.00
Wife's Insurance Policy	425.00
Son's Insurance Policy	238.00
Clothing	1,000.00
Carolyn	50.00
Insurance Premium (deceased)	245.00
	$45,958.00

This amount compared with the net income of the deceased which was at time of his death $40,635.53, ought to have caused some reluctance in the learned trial judge to accept that evidence as totally credible. He appeared not to have done so, because he found the dependency to be as follows -

Rent	$2,760.00
Helper	2,400.00
Electricity	2,040.00
Cooking gas	240.00
Gardener	780.00
Grocery	13,000.00
Vacation	2,000.00
Entertainment	3,120.00
Christmas	2,100.00
	$28,440.00

These figures upon which the learned trial judge apparently acted, ignored without any specific reason several items of expenditure in respect of the dependency attested to by the widow. These are -

Education	$1,260.00
Maintenance	2,400.00
Lunch	1,460.00
Taxi	1,000.00
Bus fare Stacie Ann	600.00
Pocket money	1,200.00
Doctor's Bill Dep. $3,000.00 less $720.00	2,800.00
Wife's allowance (for self)	2,400.00
Life Insurance Policies (wife and son)	425.00 238.00
Clothing	1,000.00
Carolyn	50.00
Motor car upkeep	3,000.00
	$17,853.00

In addition, the finding in respect of the item "vacation $2,000.00" is not supported by the evidence which states that expenditure in that regard was $500.00 per annum.

Making an allowance for this amendment the total dependency according to the evidence of the widow amounts to $44,793.00 which exceeds the net income of the deceased; and would result in the deceased spending on himself out of total expenditure of $45,958.00 the sum of $1,165.00 being $720.00 on Doctor Bills $200 at Christmas and $245.00 for Insurance Premiums on his own life. Counsel for the widow, in his arguments before us presented a chart for easy reference, in respect of his submissions as to the expenditure for (i) the deceased exclusively (ii) dependants and deceased jointly and (iii) exclusively for the dependants.

In so doing, and indeed in his submissions he correctly allocated the following, to the deceased's expenditure solely on himself -

Grocery 1/5 of $13,000.00	$2,600.00
Christmas	200.00
Doctor's Bills	720.00
Life Insurance (self)	245.00
	$3,765.00

The contention before us then is that out of an expenditure of $45,958.00, the evidence reveals that the deceased spent the sum of $3,765.00 exclusively on himself. There are indeed some items which are undisputable items which would come under the dependency, but there are others which require some examination to determine whether they are joint, exclusively for deceased, or exclusively for the dependants. The latter are -

1. Entertainment
2. Car upkeep

ENTERTAINMENT

The evidence came from the widow as follows -

> "We entertained friends at home, spent $60.00 per week on this."

Counsel for the respondent, argued that this expenditure was for the joint benefit of husband and wife and therefore should be calculated in the dependency. For their part, Counsel for the appellant contended that this was an expense which was mainly for fellowship with friends who were the major beneficiaries of the expenditure.

In my view, this sum ought not to be included in the dependency, this being an item of expenditure provided by the deceased for the enjoyment of friends, and not to satisfy any needs of either his wife or his children.

MOTOR CAR UPKEEP

Mr. Richard Small for the respondent contended that since the car was used for the convenience of the dependants and the deceased jointly, and there being no way in which the car could be severed, then the sum equal to the amount necessary

for the annual upkeep of the car should be included in the financial calculation of the dependancy. The evidence, however shows that the deceased used the motor vehicle continuously in the course of his employment, and given the amount of travelling he was compelled to do, the motor car was a necessary instrument in his earning opportunities. In addition already in the items of expenditure, allowance is made for the transportation of the children to and from school. Apart from this there is evidence that one excursion was made to the theatre each month.

In those circumstances, it is reasonable to infer that any use of the motor car by the family was occasional and not sufficient to conclude that the car was a "family car". On the other hand it is clear that the deceased used the car extensively and almost exclusively for the purpose of keeping his appointments with his various clients and potential clients. Consequently it is my view that the amount spent on the upkeep of the car, should form part of the sum that the deceased spent exclusively on himself, particularly having regard to -

(i) the evidence in relation to the actual use of the car and

(ii) the fact that allowance is made for the expenditure for transporting the children to and from school.

These two items i.e. entertainment and motor car upkeep should, in my opinion be added to the expenses exclusively for the benefit of the deceased which would therefore amount to $3,705.00 plus $3,120.00 (entertainment) plus $3,000.00 (upkeep) giving a total of $9,805.00.

In my view, on the evidence of the widow the items to be taken into consideration in respect of the dependency are -

Rental	$ 2,760.00	
Helper	2,400.00	
Electricity	2,040.00	
Cooking gas	240.00	
Gardener	780.00	
Grocery	10,400.00	
Vacation	500.00	
Christmas	2,100.00	
Education	1,260.00	
Maintenance	2,400.00	
Boy's lunch	1,460.00	
Taxi (children)	1,000.00	
Stacie Ann bus fare	600.00	
Pocket money (children)	1,200.00	
Doctor's Bills	2,880.00	(4/5 total expenditure)
Wife's allowance	2,400.00	
Wife's Life Insurance Policy	425.00	
Son's Insurance Policy	238.00	
Clothing	1,000.00	
Carolyn	50.00	
	$36,073.00	

On the other hand her evidence relating to the expenses solely for the deceased, pointed to other areas of expenditure which the deceased would have had, apart from the $9,885.00 already calculated. It is reasonable to assume that the deceased, particularly having regard to his field of endeavour would be required to keep himself neatly attired and would have incurred some expense in clothing himself.

The widow, in her evidence testified to that fact as follows -

> "He purchased clothes for himself. He was a family man. He would go out to functions and domino sessions."

Here there is testimony which pointed to areas of expenditure which the deceased would have applied exclusively to himself. Again, the widow testified to the fact that the deceased had a savings account at the National Commercial Bank with a balance of $7,000.00 at the time of his death. In the

Underwriters Credit Union there was also a balance of $15,000.00. These amounts were saved with the intention of buying a home for the family.

It is clear therefore, that the deceased had an excess in money, over and above the sum spent on his dependants at least some of which he would have spent on himself.

The learned trial judge faced with evidence of expenditure which exceeded the net income of the deceased, apparently arbitrarily omitted items of expenditure from the dependency, on the basis that he had "not deducted from the multiplicand of $28,540.00 that portion normally regarded as living expenses of the deceased himself" and that one would offset the other.

Some attempt was made in the arguments before us to justify the evidence of the excess expenditure by reference to the income the deceased derived from the illegal operation of the minibus. I have earlier in this judgment, averred to the fact that that evidence is not competent for consideration in determining the dependency.

In any event this would be considerably uncertain as to its longevity as there would always be the probability that the arms of the law would have intervened to discontinue his illegal activity, thereby putting an end to those earnings. Additionally, it appears from the evidence that the minibus had only been acquired by the deceased six months prior to his death and consequently had only been a source of income for that period. In this regard, the widow testified thus -

> "At one stage he had a driver, he drove the minibus on week-ends up to time of his death. At time of his death he operated unit - Thursday evenings, part day Friday, all day Saturday and part time Sunday. He made weekly average $200.00. He had been driving bus about six months."

It is my view, that in those circumstances, though the illegal earnings may have been providing expenditure in excess of the net legal earnings for those six months, it would be incorrect to determine the dependency, on the basis that that (illegal) income would have been continuously available annually and that the percentage spent out of the deceased's income on the dependency would be the same had that illegal income been cut off.

How then, could the dependency be determined, given the evidence of the excess expenditure. The author of Kemp and Kemp Quantum of Damages - Volume 1 4th Edition at page 235 suggests the following with which I agree -

> "Where it is difficult to obtain reliable evidence as to payments made by the deceased to or for the benefit of his dependants, an alternative, although less accurate, approach may be adopted. Start with the deceased's net income at the date of his death: estimate how much of this he spent on himself: then, if his pattern of life justifies the assumption, take the remainder of his net income as being spent for the benefit of his dependants."

It was argued by counsel for the respondent that the unchallenged evidence of the sums spent on the dependants should be used to determine the percentage of the deceased's earnings which he spent on his dependants e.g. if he spent $36,073.00 on his dependants out of an income of $40,635.53 then he would have spent about 88% of his income on his dependants. However, if the chart tendered by counsel were to be used, giving a figure of $40,993.00 spent on dependants, it would mean that the deceased spent more than his net income on his dependants.

The figure of $36,073.00, the result of my own calculations, is in my opinion, also the subject of doubt because when added to the expenditure of $9,885.00 and other necessary expenditure by the deceased the total would also be in excess of the net income. True enough the deceased may have been spending in excess of his income but if that were so, it is obvious that that could not continue for very long.

In these circumstances, since the figures are available, it is my view that the evidence in relation to expenditure exclusively for the deceased, ought to be considered to see if it could clear up the fog created by the evidence of dependancy.

The deceased expenditure on himself as I have already gleaned from the evidence is $9,885.00. However, some allowance must be made for expenditure on clothing particularly having regard to his occupation, and also for the fact that he had been saving money, which without proof to the contrary, it can be assumed came from his earnings. Nevertheless, without these considerations, an expenditure of $9,885.00 out of an income of $40,635.53 amounts to about 25% of income.

Given this evidence what proportion of income ought the court to use in determining the multiplicand. In my view the general speculative nature of these figures and the absence of evidence of some of the expenditure which the deceased must have spent on himself e.g. clothing, and entertainment of clients, dictates that an amount in excess of 25% must have been spent exclusively on the deceased. Counsel for the appellant contended that a sum of $2,000.00 per annum should be assessed for deceased's clothing. In reply counsel for the respondent submitted that an amount of $2,000.00 being twice that used for clothing in respect of the dependants was too high. It appeared that

respondent counsel was conceding that the deceased must have spent something on clothing himself. Having regard to his profession it is accepted that he would be expected to dress in immaculate condition at all times. An amount should therefore have entered into consideration in any determination of the sum spent by the deceased on himself. Consequently it is my view that the learned trial judge ought to have allotted a figure. I would say that a reasonable sum should be $2,000.00 per annum. This would result in the amount of $9,885.00 + $2,000.00 = $11,885.00, being the total sum that the deceased would have spent exclusively on himself. The proportion resulting in respect of income earned at date of death would therefore be about 29% leaving 71% as the amount for dependants.

The multiplicand therefore ought to be arrived at by taking the median between $40,635.53 (income at death) and $76,880.00 (net income at trial based on gross income of $120,000.00 less 38½% tax after personal allowance of $8,000.00.) This amounts to $58,758.00. The deceased would have spent 71% of this on his dependants calculated for the 5½ years between death and trial amounting to a total of $41,719.00 (the multiplicand) X 5½ i.e. $229,455.00.

The multiplicand, however for the period commencing at trial would be 71% of $76,880.00 (the net income at time of trial had the deceased lived.) This would result in a multiplicand of $54,595.00

MULTIPLIER IN INSTANT CASE

Applying the principles already stated, was the learned trial judge correct in assessing the multiplier at 15 years? The deceased at the time of his death was 35 years of age and enjoying good health. However, without the ability to foresee the future, in spite of his good health, allowance must be made for the possibility that ill-health, or some

disability caused from accident or otherwise may sometime in the future have resulted in a shortening of his working life. Assuming that the normal retiring age is 60 years, then the deceased in normal circumstances would have had 25 working years remaining. The learned trial judge concluded that the multiplier to be used was 15 years. In my view the age of the dependants particularly the children ought to be an important factor in this assessment. In the instant case the youngest of the children at 15 years after the death of the deceased would be 20 years and the eldest 27 years. It could be argued then that the dependency in relation to the children would have long ended at the expiration of 15 years. The learned trial judge apparently used 15 years as the multiplier as a result of the good health of the deceased without any expressed consideration of any other factor. In my view in all the circumstances of the case and having regard to previous decisions of this Court as cited in the judgment of **Campbell J.A.**, the multiplier used by the learned trial judge was too high and a multiplier of 12 years is reasonable.

I would conclude, therefore that the award under the Fatal Accidents Act should be as follows -

(1)	For the period between death and trial i.e 5½ years x multiplicand of $41,719.00	= $229,455.00
(2)	For the period after trial using a multiplicand of $54,585.00 and the remainder of the multiplier of 12 years i.e. 6½ years x $54,585.00	= $354,803.00
	Total	$584,258.00

LAW REFORM (MISCELLANEOUS PROVISIONS) ACT

The learned trial judge in his judgment, determined as follows -

> "I assess the surplus available to the deceased at $25,000.00 per annum and award the sum of $25,000.00 x 15 = $375,000.00 under this head."

Unfortunately, it is not readily ascertainable how the figure of $25,000.00 was arrived at, and consequently a review of the evidence becomes necessary.

The principles to be applied in assessing damages recoverable by a deceased's estate under this Act for the deceased's loss of earnings in the lost years are in my view clearly and correctly stated in the headnote of the case of **Harris v. Empress Motors Ltd Cole v. Crown Poultry Packers Ltd** (1963) 3 All E.R. 561 as follows -

> "The following principles are to be applied in calculating the living expenses to be deducted from his net earnings in the lost years in order to reach the amount of recoverable damages:
>
> (i) the ingredients that go to make up 'living expenses' are the same whether the deceased was young or old, single or married, or with or without dependants;
>
> (ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of life appropriate to his situation;
>
> (iii) accordingly, any sums that he would have expended exclusively to maintain or benefit others will not form part of his living expenses and will not be deductible from his net earnings for the purposes of the 1934 Act. However, where the deceased expended the whole or part of his net earnings on living expenses (such as rent, mortgage interest, rates, heating, electricity, gas, telephone etc and the costs of running a car) for the joint benefit of himself and his dependants, a proportion of that expenditure, (the exact proportion being dependent on the number of dependants) should be treated as expenditure

> " exclusively attributable to his living expenses and thus deductible from his net earnings in making the assessment under the 1934 Act; ...."

In addition to the $11,885.00 already ascertained earlier, as an amount forming part of the deceased's living expenses, there are several items of expenditure applicable to the joint benefit of the deceased and his dependants, a proportion of which for the purpose of the Law Reform (Miscellaneous Provisions) Act must be included in the assessment of his living expenses. The items and proportion attributable to living expenses of the deceased are as follows -

Rental	$2,760.00	÷ 5 =	$552.00
Helper	2,400.00	÷ 5 =	480.00
Electricity	2,040.00	÷ 5 =	408.00
Cooking gas	240.00	÷ 5 =	48.00
			$1,488.00

The total expenditure which the deceased would have required for his living expenses would therefore be $11,885.00 plus $1,468.00 being $13,373.00 leaving from a net income of $40,635.53 a surplus of $27,262.00.

This surplus would represent approximately 67% of the net earnings of the deceased at the time of his death. The average earning of the deceased between death and date of trial based on assessment of a net income of $76,880.00 per annum at the time of trial, has already been calculated at $58,758.00. The multiplicand for the 5½ years up to the time of trial would therefore be 67% of $58,758.00 which amounts to $39,368.00. For this period the amount for loss of earnings would be $39,368.00 x 5½ = $216,524.00.

In calculating the award for the period after trial, the net income at the date of trial is used to determine the multiplicand, by taking the percentage arrived at as the

proportion of his income that the deceased having spent on his living expenses would have as surplus. This would therefore be 67% of the $76,880.00 which equals $51,510.20 which for the 6½ years loss of earning would total $334,815.00. The award under this head i.e. for loss of earnings would therefore be $216,524.00 plus $334,815.00 = $551,339.00.

In keeping with the proportions awarded by the learned trial judge under the Fatal Accident claim, and which has not been challenged on appeal the award in relation to each dependant under the Fatal Accidents Act would be as follows -

Dale	2.53%	$14,781.00
Carolyn	3.22%	18,813.00
Wayne	4.17%	24,363.00
Glenroy	5.06%	29,563.00
Stacie Ann	7.45%	43,527.00
Widow	77.57%	453,211.00
Total		$584,258.00

The amount awarded to the widow under the Fatal Accidents Act would therefore be set off by the amount awarded under the Law Reform (Miscellaneous Provisions) Act as being a beneficiary in the Estate of the deceased she would not be entitled to receive awards under both heads. I would make the following awards:

Under the Fatal Accidents Act the sum of $131,047.00 being the award to the children.

Under the Law Reform (Miscellaneous Provisions) Act as follows -

Funeral Expenses	$6,000.00
Loss of Expectation of life	3,000.00
Loss of earnings in the lost years	551,339.00
	$560,339.00

I would therefore allow the appeal and reduce the judgment from $1,166,476.00 to $691,386.00 particularised as above.

MORGAN, J.A.:

To find the value of the dependency at the time of death, the method often used is to obtain evidence of the annual expenditure of the deceased on himself for personal and living expenses and then deduct this amount from the annual net income he received at time of death. The remainder can properly be regarded as the value of the dependency (**Davies vs. Powell Duffryn Associated Collieries Ltd.** (1942) A.C. 601 p. 617). This principle admits of easy application but is not possible in these circumstances as the widow here has given evidence of dependency which exceeds the net annual income of the deceased.
Mr. Frankson has submitted that the method approved in **Harris vs. Empress Motors Ltd. et al** (1983) 3 All E.R. 561 should be used, but this Court has disapproved of this method in **Jamaica Public Service Co. Ltd. vs. Elsada Morgan et al** S.C.C.A. No. 12/85 delivered May 5, 1986 (unreported). What then?

Gordon, J. did not find the widow to be untruthful nor did he express that her credit was impugned. As such her evidence, in my view, can still be looked at. In doing so, her figures can be regarded as estimated or exaggerated but, notwithstanding, may be used as a pivot to find the basic dependency.

On this point, I have anxiously considered the divergent methods used by Campbell and Forte JJA in the judgments which they have written and which I have had the advantage of reading in draft. I think that the right decision must be in favour of the method used by Campbell JA which, though the more difficult one in calculation, is that which, on balance, does the better justice. However, this method computes to a higher percentage of the basic

dependency than that of Forte JA. This has resulted in different awards in the judgments. I accordingly agree with the final award of Campbell JA.

There is no disagreement on the principles used on the other points and with those I concur.

CAMPBELL, J.A.:

The appeal by unanimous decision is dismissed on the issue of liability and allowed on the issue of the damages awarded.

By majority the quantum of damages awarded is reduced to $667,720.00 as earlier computed and quantified.