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MAGCO LEGAL LESSONS #20

LEGAL TOPIC: COMPENSATION FOR WRONGFUL DEATH UNDER THE COMPENSATION FOR INJURIES ACT CHAPTER 8:05.

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INTRODUCTION

In cases where there has been a fatal injury, the tortfeasor may be liable to compensate any Dependants of the Deceased under the **Compensation for Injuries Act Chapter 8:05**:

> *"(3) Whenever the death of any person is caused by some wrongful act, neglect, or default, and the act, neglect, or default is such as would before the commencement of this Act (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been under such circumstances as amount in law to an arrestable offence."*

"(4) Every action in respect of any personal injury resulting in death shall be for the benefit of the dependants of the person whose death has been so caused and shall be brought by and in the names of the executor or administrator of the deceased person; but, if within six months of the death, no such action has been taken by and in the name of the executor or administrator, then an action may be brought by and in the name of any of the dependants of the deceased person."

(2) (1) In this act "dependant" means wife, husband, parent, grandparent, child, grandchild and any person who is, or who is the issue of a brother, sister, uncle or aunt.

It should be noted, however, that persons who claim to be entitled for Compensation under the Act, must, in addition to falling within the definition of "Dependant" provided for by the Act, prove that they did in fact depend on the Deceased as the source, wholly or in part, for his or her means of subsistence, as was outlined in ***Mary London (Administratix in the estate of the Deceased, Kennis London) v North Central Regional Health Authority CV2013-05017.***

ASSESSMENT OF AWARD

Awards of damages under the **Compensation for Injuries Act** are separated into two different heads: Pre-Trial Losses and Post-Trial Losses. Pre-Trial losses are treated as Special Damages and must be calculated and proved exactly, whereas Post-Trial or Future Losses are assessed using the Multiplier/Multiplicand Method. This was outlined in ***Tesheira v Gulf View Medical Centre Ltd and Roopchand TT 2015 HC 116*** where the statement of Lord Diplock in ***Cookson v Knowles [1978] 2 All ER 604*** was considered:

"1. In the normal fatal accident case, the damages ought, as a general rule, to be split into two parts: (a) The pecuniary loss which it is estimated the dependants have already sustained from the date of the death up to the date of trial ("the pre-trial loss") and(b) the pecuniary loss which it is estimated they will sustain from the trial onwards ("the future loss").
2. Interest on the pre-trial loss should be awarded for a period between the date of death and the date of trial at half the short-term interest rates current during that period.
3. For the purpose of calculating the future loss, the "dependency" used as the multiplicand should be the figure to which it is estimated the annual dependency would have amounted by the date of trial.
4. No interest should be awarded on the future loss.
5. No other allowance should be made for the prospective continuing inflation after the date of trial."

Pre Trial Loss:

In ***Lisa Ann Mc Kenzie, Ornella Mc Kenzie and Daniella Mc Kenzie v Medcorp Ltd and Cancer Centre of The Caribbean Ltd TT 2019 HC 14*** it was stated that pre-trial loss ought to be treated as Special Damages and ought to be specially proved. This includes all the money which the Claimant would have been kept out of from the date of death of the Deceased to the date of trial (including Funeral Expenses), and Interest is awarded under this head.

Future Loss:

As previously stated, this is calculated using the Multiplier/Multiplicand method:

The Multiplicand

The Multiplicand is the net annual value of dependency recoverable by the Dependents commencing from the date of the death of the deceased. The case of ***Tesheira v Gulf View Medical Centre Ltd and Roopchand (supra)*** states that the more common method of assessing the value of dependency has been to express the multiplicand as a fraction or percentage of the Deceased's net earnings. In ***Rackal v La Pierre and Trinidad Tobago Housing Development Corporation TT 2017 HC 192*** it was stated that in calculating the Net Earnings for the purpose of determining the Multiplicand, the following are usually deducted from the gross income of the Deceased: the expenses incurred in earning the income, tax liabilities, National Insurance Contributions, and Health Surcharge. Once the net earnings of the Deceased have been assessed, the value of the dependency is to be determined.

In ***Tesheira v Gulf View Medical Centre Ltd and Roopchand (supra)*** the following was stated:

> *"In the course of time the courts have worked out a simple solution to the problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependants are wife and children. In times past the calculation called for tedious enquiry as to how much housekeeping money was paid to the wife, who paid how much for the children's shoes, etc. This has all been swept away and modern practice is to deduct a percentage of the net income 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 departing from the principle but each case must depend on its own facts. Where the family unit is husband and wife, the conventional figure is 33% and the rationale for this is that broadly speaking the net income is spent as to one-third for the benefit of each and one-third for their joint benefit. Clothes is an example of several benefit, rental an example of joint benefit. No deduction is made in respect of the joint portion because one cannot buy or drive half a motor car. Part of the net income may be spent for the benefit of neither husband nor wife. If the facts be for example, that out of the net income of 8,000 p.a. the deceased was paying 2,000 to a charity the percentage would be applied to 6,000 and not 8,000. Where there are children, the deduction falls to 25% as was agreed in the Harris case."*

Therefore, after the net annual earnings of the Deceased are determined, a deduction would be made based on the dependants which the Deceased had; In cases where the Deceased left a spouse but no children, the conventional deduction usually made would be 33%, however where the Deceased left a spouse and children, this deduction would fall to 25%. After the appropriate deductions are made, the figure that is left would be the Multiplicand.

The Multiplier:

The Multiplier is calculated from the number of years the dependency would have continued had the Deceased lived. In assessing the Multiplier, ***Tesheira v Gulf View Medical Centre Ltd and Roopchand (supra)*** quoted the case of ***Corbett v Barking, Havering and Brentwood Health Authority [1991] 2 QB 408*** where Purchas LJ set out several factors which would be considered relevant to the assessment of the multiplier. The factors listed were as follows:

(1) The likelihood of the provider of the support continuing to exist;
(2) The likelihood of the dependant being alive to benefit from that support;
(3) The possibility of the providing capacity of the provider being affected by the changes and chances of life in either a positive or negative manner;
(4) The possibility of the needs of the dependant being altered by the changes and chances of life, again in a positive or negative way;
(5) An actuarial discount to compensate (a) for the immediate receipt of compensatory damages in advance of the date where the loss would in fact have been incurred and (b) the requirement that the capital should be exhausted at the end of the period of the dependency."

The case of ***Corbett v Barking, Havering and Brentwood Health Authority [1991] 2 QB 408 (supra)*** further states that as a general rule in order to arrive at the multiplier, it is necessary:

(a) To consider the combined effect of (1) and (3) to arrive at the number of years during which the provision of support is likely to be available if needed by the dependant
(b) Consider the combined effects of (2) and (4) to arrive at the number of years during which the dependant is likely to need the support
(c) Apply (5) to the lesser of (a) and (b) above, with an added but usually minor discount to take account of an outside chance that choice between (a) and (b) might in the event prove to be wrong."

The point of adding an actuarial discount to compensate must be read in conjunction with the decision of Lord Lloyd in ***Wells v Wells [1998] 3 All ER 481***:*"There is no purpose in the courts making as accurate a prediction as they can of the plaintiff's future needs if the resulting sum is arbitrarily reduced for no better reason than the prediction might be wrong. A prediction remains a prediction. Contingencies should be taken into account where they work in one direction but not where they cancel out. There is no more logic or justice in reducing the whole life multiplier by 15% or 20% on an agreed expectation of life than there would be in increasing it by the same amount…. The whole point of agreeing a life expectancy, if it can be done, it to exclude any further speculation.*

Therefore the Multiplier would be calculated based on the number of years which the Deceased may have continued to work had it not been for the fatal injury, taking into account the possibility of the providing capacity being affected by the changes and chances of life. The likelihood of the Dependants being alive to benefit from that support is then considered, along with the possibility of their needs being altered by the changes and chances of life. A minor discount is then usually added to the Multiplier.

After the Product of the Multiplier and Multiplicand is determined, this sum is added to any sum awarded for Pre-Trial Loss. The Total sum of the Pre-Trial Loss and Future Loss would be the total Damages awarded, and this sum would be divided among the

Dependants of the Deceased in shares which would be determined at trial, as provided for in the **Compensation for Injuries Act**:

> *"7(1) In every action in respect of injury resulting in death, such damages may be awarded as are proportioned to the injury resulting from the death to the persons respectively for whom and whose benefit the action is brought.*
>
> *(2) The amount so recovered, after deducting the costs, if any, not recovered from the defendant, shall be divided among the persons mentioned above in such shares as are determined at the trial"*

DUPLICATION OF AWARDS

Where wrongful death has occurred, a claim may be brought under the **Compensation for Injuries Act** for the benefit of the Dependants of the Deceased as discussed and the **Supreme Court of Judicature Act Chapter 4:01** on behalf of the estate of the Deceased. It is important to note that there may be some overlap between these two claims, and as a result the rule where it comes to Duplication of Awards must be noted; where a Claimant is seeking damages under the **Compensation for Injuries Act** as a Dependant as well as for the benefit of the Estate of the Deceased under the **Supreme Court of Judicature Act,** in order to minimize this overlap, the practice is to deduct the award made under the **Compensation for Injuries Act** where the Dependants are the same as those under the Deceased's estate. As a rule, damages are not usually awarded under the **Compensation for Injuries Act** if it is a smaller sum than that which is to be awarded under the **Supreme Court of Judicature Act** ***(Maureen Samuel (LPR of the Estate of Stephen Duncan) v Susan Salraj HCA No. 2656 of 1998).*** This Principle was more recently outlined in ***Charlotte Yvonne Chung Shah v Leo Raymond CV2009-02469*** which made reference to ***Maureen Samuel v Susan Salraj (supra).***