

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

1994

Common Law Side

No. 28

BETWEEN

GEORGETTE WHYLLY

Plaintiff

AND

CHARLES TUCKER

First Defendant

AND

WALTER SAUNDERS
and GIGI SAUNDERS

(Trading as United Parcel Services)

Second Defendant

AND

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

1994

Common Law Side

No. 29

BETWEEN

GEORGETTE WHYLLY

(Administratrix of the Estate of Anthony Whyly, Deceased

Plaintiff

AND

WALTER SAUNDERS
and

GIGI SAUNDERS

(Trading as United Parcel Services)

First Defendant

AND

CHARLES TUCKER

Second Defendant

Appearances: Michael Turner for the plaintiff
Meta McMillan-Hughes for the defendant

ASSESSMENT OF DAMAGES

Estelle G. Gray Evans, Acting Registrar

These actions arose out of a traffic accident which occurred on or about the 28th day of June 1993 in which the plaintiff was injured while a passenger in a vehicle driven by her late husband, Anthony Whyly, deceased, which collided with a vehicle

*Seen
GAB
28/10/99*

driven by the first defendant and owned by the second defendant. The said Anthony Whyly was killed in the said collision.

By her Statement of Claim in Action No. 28 of 1994, the plaintiff claimed damages for personal injury, interest and costs.

By her Statement of Claim in Action No. 29 of 1994, the plaintiff as Administratrix of the Estate of the late Anthony Whyly, deceased, claimed damages for herself as a dependant and on behalf of Estella Whyly, the mother of the said deceased, under the provisions of the Fatal Accident Act, Chapter 61, Revised Statute of the Commonwealth of the Bahamas, interest and costs.

The said actions were ordered to be heard together with respect to the issue of liability but separately on the issue of quantum.

In his Judgment dated 17th April, 1998, Strachan, J. found that the defendants were liable to pay to the plaintiff damages to be assessed and that the amount recoverable in respect of the defendants' liability to the plaintiff was 80% of the said damages. The said deceased being 20% contributorily negligent.

At the time the parties appeared before me on the hearing of the assessment all except one (1) head of damage had been agreed in both actions. The only outstanding issue being whether or not the plaintiff was entitled to claim loss of dependency in respect of the deceased's pension from the Royal Bahamas Police Force.

At the date of his death in 1993, the deceased was a Sergeant on the Royal Bahamas Police Force. According to a letter from The Treasury Department dated 22nd September, 1993, had he lived and **"served for 25 years and retire from the Police Force, a pension of one-half of the annual salary on retirement would have been payable for life."** The deceased would have completed 25 years of service on the Police Force on 19th August, 1999, at the age of 41.

According to the learned authors of *Kemp & Kemp The Quantum of Damages* Volume 1 at paragraphs 6-094 et seq:

Except where the plaintiff already reached pensionable age at the date of trial, claims for loss of pension will be claims for prospective loss. Where the plaintiff has reached pensionable age, part of the claim will be special damages for past loss and part will be general damages for prospective loss.

Where the loss is a future loss, there is a simple way of calculating the damages....The plaintiff should approach a number of insurance companies and seek quotations from them for a pension which would cover his or her prospective loss...To counter any argument that the quotations were not as low as the market could provide the defendant should be invited to obtain similar quotations, if he wishes...

The alternative method is for the facts to be placed before the court to assess the present value of the plaintiff's loss. As the loss will in many cases not commence for a number of years, this is peculiarly a

situation where the court can benefit from actuarial evidence."

The plaintiff opted to use the latter method and obtained the following letter dated 2nd March, 1999, from Wilhelm J.B. van Zanden, Fellow Canadian Institute of Actuaries:

"Dear Mr. Turner:

You have requested that I provide you with the present value of an annual pension payment.

The facts are as follows:

- male born on 23 January 1958
- date of employment of 19 August 1974
- entitlement of \$10,810 per year on attainment of 25 years of service or 19 August 1999
- the individual died on 28th June, 1993

You have asked what the value of the pension benefit would be at 19 August, 1999, if the person in question were still alive at that date.

For the purposes of the calculations I have assumed that payments are made monthly at the rate of \$900.83 each, and that the first payment would be due on 19 September 1999. I have also assumed that payments will cease on the death of the recipient.

Using the 1971 Group annuity Mortality Table and a reasonable, but prudent discount factor, the value of this benefit at 19 August 1999 is \$146,270.

You have also asked me to provide you with the value resulting from using a 4.5% per year discount factor. Using the same mortality table, this results in a value at 19 August 1999 of \$183,324.00."

On the basis of the aforesaid letter, the plaintiff claims as a loss of dependence in respect of the deceased's pension, the sum of \$183,324.00. However, the plaintiff accepts that this sum should be reduced to \$122,216.00, allowing for the wife's 2/3 dependency.

Counsel for the plaintiff submitted that the amount claimed by the plaintiff as loss of pension was more than reasonable especially when one considers that the deceased, had he lived and received his pension, would have been entitled to receive the sum of \$11,800.00 per annum for 34 years (assuming a life span of 75 years) for a total in excess of \$400,000.00.

Counsel for the defendant had several objections to the plaintiff's claim for loss of pension.

Firstly, she objected on the ground that to the plaintiff's claim for loss of pension had not been pleaded. Counsel for the plaintiff submitted that her claim for pension was a claim in general damages, for which the court would look at actuarial and other evidence for assistance in assessing, and therefore need not be specifically pleaded. As

indicated previously, the learned authors of *Kemp & Kemp*, states that as a prospective loss, a claim for pension is indeed a claim in general damages.

Counsel for the defendants further submitted that there was no evidence that the deceased would have in fact retired in August 1999 or that he was obliged to retire after 25 years of service as a police officer.

Counsel for the plaintiff submitted in reply that the only person who could really give that evidence was the deceased and he relied on the documentary evidence in his bundle of documents. In addition to the letter from The Treasury Department hereinbefore referred to, the bundle also included the following letters which the plaintiff says supports her claim for pension loss:

Letter dated 23rd June, 1993, from the Pay and Quartermaster of the Royal Bahamas Police Force:

"TO WHOM IT MAY CONCERN:

Re: Sgt. 664 Anthony Whyllly

The above-named officer was enlisted in the Royal Bahamas Police Force on the 19th August, 1974, and his contract expires on 19th August, 1995.

He receives a total salary of #21,620.00 per annum including allowances.

Based on his past and present performances it is safe to assume that his future prospect for continued employment is assured."

A letter dated 3rd March, 1999, from B.K. Bonamy, Commissioner of Police, to Mr. Michael C.E. Turner (counsel for the plaintiff)

"Re: Sergeant Anthony Whyllly (Deceased)

Further to our conversation (Turner/Bonamy) of today's date, please find the information attached as requested."

To that letter was attached the following:

**"SALARY PROGRESSION FOR
EX SARGEANT 664 ANTHONY WHLLY**

At the time of his death on 28th June, 1993, Ex Sergeant Whyllly was earning \$20,000.00 per annum.

His salary would have progressed as follows:

01/07/93	Conversion	\$21,200.00 Max
01/07/94	Conversion	\$21,900.00 Max
01/07/97	Conversion	\$23,600.00 Max
01/07/98		\$23,600.00 Max"

Counsel for the plaintiff submitted that from the foregoing correspondence there could be no question that the police would have kept the deceased in their employ and the only question for the court was really not one of entitlement to pension but rather of computation.

Counsel for the defendants further submitted that if the deceased would have retired at age 41, the plaintiff ought not to be awarded loss of earnings as well as pension for the same period (i.e. the period between 41 and 65 years of age).

Counsel for the defendant indicated that the sum agreed by the parties as loss of earnings was calculated on the basis that the deceased would have worked until age 60 or 65. She was therefore of the view and so submitted that the plaintiff ought not to be able to claim loss of earnings as well as pension for the same period, that is the period between ages 41 and 65. She further submitted any award for loss of pension ought only be made for the period post age 65. Counsel for the plaintiff conceded this point.

Having reviewed and considered the evidence provided by the plaintiff, together with counsels' submissions, concessions, and the authorities cited, I find that the plaintiff is entitled to claim loss of dependency in respect of the deceased's pension for the period post 65 years of age.

According to the evidence, the deceased would have been entitled to receive as a pension a sum equal to one-half of his annual salary. At the date of his expected retirement his salary would have been \$23,600.00. Therefore his annual pension would have been \$11,800.00 per annum. Assuming a life span of 75 years, it was common ground that a multiplier of 10 would be reasonable.

In the end it was agreed that an award for loss of pension ought to be calculated as follows: the sum to which the deceased would have been entitled as an annual pension i.e \$11,800.00 times a multiplier of 10, for a total of \$118,000.00. Allowing for the wife's dependency of 2/3 that sum would be reduced to \$78,666.67, say **\$78,000.00**. The sum of \$78,000.00 is therefore allowed as the plaintiff's loss of dependency with respect to the deceased's pension.

With respect to the personal injury claim in action No. 28 of 1994, damages have been agreed between the parties and are allowed as follows:

• Medical expenses	\$19,400.00
• Interest at 6% per annum for six (6) years (i.e. from date of accident to date of assessment)	\$ 6,984.00
• Loss of motor car	\$ 4,000.00
• General damages for pain and suffering	\$70,000.00
• Interest thereon at 6% per annum for five (5) years (i.e. from the date of the Writ to the date of assessment)	\$21,000.00
• Future medical expenses	<u>\$ 20,000.00</u>
TOTAL	\$141,484.00

Damages in the Fatal Accident Claim in Action No. 29 of 1994 with respect to Georgette Whyllly have been agreed between the parties and are allowed as follows:

Pre-trial	Funeral expenses	\$ 6,925.00
	Interest thereon at 6% p.a.	\$ 1,976.00
	Dependency	\$ 41,240.00
	Interest thereon	\$ 2,526.00
	Do It Yourself services	\$ 5,748.00
Post Trial	Interest thereon	\$ 345.00
	Dependency	\$106,754.00
	\$10,415 (15-4.75=10.25)	
	Do it Yourself services (\$1,210.00 p.a. x 10.25)	<u>\$ 12,403.00</u>
	Total	\$177,917.00

Damages in the Fatal Accident Claim in Action No. 29 of 1994 with respect to Estella Whyllly have been agreed between the parties and are allowed as follows

Pre Trial	Dependency	\$ 8,550.00
	Interest	\$ 513.00
	Do It Yourself Services	\$ 3,833.00
Post Trial	Interest	\$ 230.00
	Dependency (12 - 4.75 = 7.25 x 1,800.00)	\$13,050.00
	Do It Yourself Services (7.25 x \$807.00)	<u>\$ 5,851.00</u>
	Total	\$32,027.00

Judgment will therefore be entered for the plaintiff in the sum of \$343,542.40 made up as follows:-

Action No. 28 of 1994	\$141,484.00
Action No. 29 of 1994 re Georgette Whyllly	\$177,917.00
Action No. 29 of 1994 re Estella Whyllly	\$ 32,027.00
Action No. 29 - Pension proceeds	\$ 78,000.00
TOTAL NET AWARD OF DAMAGES	\$429,428.00
Less 20% contributory negligence	\$ 85,885.60
TOTAL NET AWARD OF DAMAGES	\$343,542.40

Dated the 20th day of August A.D. 1999



Estelle G. Gray Evans
Registrar (Acting)