

THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 797 of 2018

**HERLINDA DIEGO
HECTOR HERMAN DIEGO
KENRY JAMAR DIEGO
By next friend Herlinda Diego**

CLAIMANTS

AND

JERRY O’HARA DAVID

DEFENDANT

Written Submissions

20th June, 2019 Claimant

Oral Submissions

25th June, 2019

Decision

25th June, 2019

Peta-Gay Bradley for the Claimant.

**Keywords: Tort – Death by Negligent Driving – Summary Judgment -
Assessment of Damages – Dependents – Torts Act Cap 172 (the Act)**

JUDGMENT

This is the assessment of damages following summary judgment in a matter concerning a fatal accident. Jerry David was the driver and owner of a motor vehicle which struck Andres Phillip Diego as he was riding his bicycle along the Stann Creek Valley Road. Mr Diego died as a result of his injuries. By entry of the summary judgment herein, Mr David’s liability for causing his death has been proven.

The marriage certificate presented evidences the deceased's marriage to Herlinda Diego, the Claimant. The birth certificates for Hector Herman born on 15th January, 2001 and Kerry Jamar born on 20th October, 2002 is sufficient proof of their standing to bring a claim under section 9 of the Act.

Special Damages

The Claim Form seeks special damages of \$150.00 and a receipt is provided by Lorenza Trejo indicating that it is the cost of transporting the deceased's body. That amount having been proven to the requisite standard will be awarded as special damages.

General Damages

A rounded sum of \$20,500.00 will be awarded for loss of expectation of life based on *Edgar Arana v Adelardo Jose Mai Claim No. 322 of 2017* where Abel J recognized the need to increase the conventional figure to a sum which although nominal only, showed greater respect for the value of human life. I wish to associate myself with that decision.

There was no claim for funeral expenses as the Defendant had paid for those prior to the Claim being filed.

Assessing the Dependency

The evidence was that Mr Diego was 52 years old at the time of his death. Counsel submitted that he was 54 but the documentary evidence reveals otherwise. He was a healthy labourer/welder earning \$500.00 per week on average for the last five years. He was not employed in a fixed job so he did not have one particular

employer. Mrs Diego says she was certain of this sum because he provided her with \$335.00 every week to spend on the entire household. The Court certainly appreciates the difficulty involved with proving the income of a person so employed by documentary evidence. In any event even where the documentary evidence is lacking the Court is allowed to assess a fair figure for his income. In the circumstances, the sum of \$500.00 per month seems fair and the Court accepts same as Mr Diego's income.

The multiplicand:

Counsel asked the Court to apply the percentage method since no evidence of the actual value of the dependency was offered. She relied on **Administrator General for Jamaica v People Favorite Baking Company Limited and Romaine Henry Consolidated with Smith, Lyncent et al [2017] JMSC Civil 11 which states at paragraph 62:**

“In assessing the value of the dependency, the courts in the UK have tended, in the absence of evidence to the contrary, to express the annual dependency as a percentage of the deceased's earnings. Thus, in the case of the death of a husband where there are no children, the widow's dependence is 66.6% of his earnings. Where there are children, the widow and children's dependency would be 75% of his earnings.”

She encouraged the Court to use 75% as the multiplicand although there was evidence from the Claimant that the deceased used to spend approximately 1/3 of his salary on himself monthly and that he gave her exactly \$335.00 every week to spend on the entire household. This is certain evidence that the dependency for the wife and children was not 75% but rather, somewhere in the vicinity of 66.6%.

There is also no evidence provided of whether Mrs Diego works. While she was willing to say that the children relied on their father solely for their financial support she refrains from saying the same about herself or giving any indication as to her own **total** and precise position. The Court found this disturbing. It must not

be forgotten that the spouse's income is to be factored into the assessment of the loss to the dependents. Under these circumstances, if it exists, it can form no part of the calculation. For all these reasons the Court will refrain from using the conventional 75% and use instead 66.6% for the spouse and children and an estimate of 58% for the spouse alone. This estimate is calculated using the same figure by which the conventional percentage for spouse and children is separated from that for spouse alone.

The multiplier

Counsel then asked the Court to consider 6 years as the multiplier throughout, although the children were 15 and 17 years old respectively at the time of their father's death. **Munkman on Damages 11th ed at 16.14** makes clear that *“(t)he multiplier will often have to be approached carefully because part of the multiplier will be attributed to the period when the children are dependent and the balance when they cease to be dependent.”*

Counsel referred to **Administrator General for Jamaica v People's Favorite Baking Company Limited et al** (ibid) where the court arrived at a multiplier of eight for a 46 year old deceased. She also sought support from **Sanchez v Gianchandani (385 of 1999)** as cited in **Rita Griffith v Alberto Efrain Chan Belize Claim No. 614 of 2008** where a multiplier of 6 was used for a deceased father of 45 who had left six children of various ages between two and sixteen. She however, never referred to the stern warning against using the same multiplier where the ages of the beneficiaries vary which Justice Legall referred to at paragraph 36 of **Rita Griffith v Alberto Efrain Chan** (ibid):

“In assessing the value of the dependency, the courts in the UK have tended, in the absence of evidence to the contrary, to express the annual dependency as a percentage of the deceased's earnings. Thus, in the case of the death of a husband where there are no

children, the widow's dependency is 66.6% of his earnings. Where there are children, the widow and children's dependency would be 75% of his earnings."

Ordinarily, the dependency period for the children would be until they attain the age of 18. However, Mrs Diego informed that both boys desire to further their education at ITVET School and had a reasonable expectation that their father would have financed same. She does not indicate the length of time this course of training would be expected to take. This Court will allow only an additional two years beyond attaining the age of 18 for each child. This means that the multiplier for Hector would be three years and for Kenry, five years. A multiplicand of 66.66% will be used throughout that entire period.

The submissions by counsel seem to be a multiplier of six years for the widow. This court finds this to be reasonable. The result is that for five years she will use a multiplicand of 66.66% and for one year, as the widow alone, 59% for a total of six years.

Calculations

The multiplicand at 66.66% for Hector, Kenry and Herlinda for 3 years:

$\$24,000 \times 3 = \$72,000$

Less 33.33% = \$48,000 (rounded)

Divide by 3 = \$16,000 each.

The multiplicand at 66.66% for Kenry and Herlinda:

$\$24,000 \times 2 = \$48,000$

Less 33.33% = \$32,000 (rounded)

Divide by 2 = \$16,000 each.

The multiplicand at 59% for Herlinda:

\$24,000 x 1 = \$24,000

Less 41% = \$14,160

Total: Hector (3 year dependency) = \$16,000.

Kenry (five year dependency) = \$32,000.

Herlinda (six year dependency) = \$46,160.
\$94,160

Pre trial award

Hector (556 days) \$8,124.20

Kenry (556 days) \$9,749.04

Herlinda (556 days) \$11,719.15

Total \$29,592.39

Post trial award (total award)\$94,160 - (pre trial award)\$29,592.39 = \$64,567.61

Disposition

It is ordered:

1. Special damages are awarded in the sum of \$150.00.
2. Damages for loss of expectation of life are awarded in the sum of \$20,500.00 to be divided equally among the Dependents.
3. Pre trial damages for loss of dependency are awarded in the sum of \$29,592.39 with interest at the rate of 3% per annum from the date of death to the date of judgment herein.
4. The pre trial damages are to be divided as follows:

Hector Diego	\$8,124.20
Kenry Diego	\$9,749.04
Herlinda Diego	\$11,719.15
5. Post trial damages for loss of dependency are awarded in the sum of \$64,567.61 to be divided as follows:

Hector Diego	\$7,875.80
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Kenry Diego \$22,250.96
Herlinda Diego \$34,440.85

4. Prescribed cost in the sum of \$13,708.20 are to be paid by the Defendant.

**SONYA YOUNG
SUPREME COURT JUDGE**