Case no: H2-02-100

Neutral Citation Number: [2003] EWHC 310 (TCC)
IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

The Royal Courts of Justice
The Strand
London WC2A 2LL

Tuesday, 28th January 2003

Before:

HIS HONOUR JUDGE DAVID WILCOX

- - - - - -

TAYLOR AND BARTLEY

CLAIMANT

-v-

PROSOL FAÇADE ACCESS LIMITED AND OTHERS

DEFENDANT

- - - - - -

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190 Fleet Street, London EC4A 2AG
Tel: 020 7404 1400
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LAWRENCE WEST (Instructed by Clement Jones) appeared for the Claimant
OLIVER TICCIATI (Instructed by various solicitors) appeared for the Defendant

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JUDGMENT

(This transcript has been prepared without the assistance of any documents.)

Tuesday, 28th January 2003

JUDGMENT

HHJ DAVID WILCOX:

1. The claimants are the administrators of the estate of Peter Docking, deceased. They bring this action on behalf of the estate of the deceased pursuant to the Law Reform Miscellaneous Provisions Act 1934 on behalf of the defendant, pursuant to the Fatal Accidents Act 1976.

2. Peter Docking was employed by the 5th defendant, Pall Mall, as a window cleaner. On 28th April 1998 he was cleaning the windows of a nine-storey office building occupied by the Hong Kong Shanghai Bank Incorporation, the 6th defendant, at 3 Lower Thames Street, London EC3. In order to gain access to the outside windows Mr Docking and his fellow employee were required to use a suspended access system, comprising a cradle suspended from a gantry which ran on parallel lines on the roof of the building. At 11:45 am on 22nd April 1998 the cradle containing both men fell to the ground killing them.

3. As between the six defendants, liability issues have been agreed. There is no formal admission of liability, but the defendants have agreed to meet any award which this court may make on behalf of the deceased's partner and their dependant children. I have agreed that this is a proper way to deal with this case on behalf of the infants, and their mother consents.

4. The dependants are: Laura Jane Taylor, born on 30th June 1968 who lived with Peter Docking from about 1990; secondly, Ellie Jane Docking, born 10th May 1993, their first daughter; thirdly, Ginnie Lee Docking, born 23rd January 1996, their second daughter. Peter Docking was born 1st March 1967. He and Laura Taylor had already made arrangements to be married on 11th July 1998; all the arrangements, catering arrangements, banns had been called, bridesmaids' dresses commissioned, rings engraved. I am satisfied that theirs had been a stable and long term relationship which would have continued in marriage.

5. The deceased's work record from June 1984 until April 1998 was somewhat chequered. The unchallenged evidence of Laura Taylor, however, is that there were no substantial periods of unemployment. The deceased changed his employment from time to time as is recorded in the Inland Revenue letter of 6th November 1999. There are recorded periods of unemployment but I accept Miss Taylor's evidence that during these periods, although not recorded in that letter as employment, he also worked variously as a courier and road-sweeper. There is no evidence that he received any benefit during these periods which drives me to the conclusion that her evidence must be right about that.

6. As so often occurs when a young man matures, it is reflected in his attitude to both work and responsibility. Miss Taylor's unchallenged evidence is that when Ellie was born Peter Docking settled down, and was continuously and conscientiously in employment. I accept that evidence.

7. Miss Taylor's father is a black cab driver. The evidence indicates that the deceased had embarked upon acquiring, what is colloquially known as, 'the knowledge' in order to qualify as a black cab driver. He passed his ordinary driving test and in due course I am satisfied that he would have passed the carriage office tests, enabling him to become a black cab driver in the Metropolis. Whilst he was dyslexic and found reading and writing difficult, there is no basis, in my judgment, for concluding that this would have been a bar to his qualifying as a black cab driver. It would, of course, affect his ability to follow any employment requiring the preparation and use of documents – that would be necessary in any job involving more than very basic supervisory skills. It would have rendered the acquisition of route knowledge more difficult and thus slower. I observe that he had done some 400 out of the 600 routes involved in the acquisition of the required information for the carriage office 'knowledge' requirements. He had the solid support of his father-in-law to be, and I am satisfied that he would have qualified as a black cab driver by April 2000, the second anniversary of his death, and would have followed this occupation on a part-time basis supplementing his main earnings as a window cleaner.

8. There are figures provided by Paul Collins, accountants who specialise in the preparation of accounts for black cab taxi drivers who work part-time, as comparatives to indicate the probable earnings level had the deceased lived. Criticism is made of these figures by Mr Ticciati on the ground that one of the drivers is not an exact comparator, since he is an older driver. Nonetheless, I accept that these figures give a fair and reliable guide to what the deceased would have earned from this source, had he qualified.

9. His window cleaning occupied the time between 6 am and 2 pm. Afternoons, evenings, weekends and holidays would have been available to him as a taxi driver. The claimant's figure, which I accept, is a cautious and realistic estimate of the earnings that would have been earned from this source. At the time of his death, the deceased was earning £9,516 per annum net from his principle occupation. These modest earnings came about because of his relatively temporary status as a probationary window cleaner. The defendants accept that his earnings over a three-year period would have risen to the level of Mr Wright, who was his colleague in the cradle, and who also lost his life. Their contention is, however, that he would not have become a black cab driver. That contention, I reject. Mr Wright's earnings were £16,800 gross. Mr Wright had a modest supervisory responsibility. There is no reason why the deceased should not have been promoted to a similar level within several years. Dyslexia would not have been an impediment to this modest promotion.

10. The claimants contend that the multiplier, as at the date of death, for a man aged 31 years of age, and assuming a retirement at 65 years, should be 22.37 – which adjusted for facts other than mortality produces a multiplier of 21.7. The defendants submit that 20 is the appropriate multiplier, taking into account the possibility of unemployment; the risk that the marriage might have broken down, under the circumstances, not entitling the widow to support from him; and the further risk that Laura Taylor might have died before the deceased's 65th birthday. I reject the submission that an adjustment should be made on account of unemployment; the deceased would have had the safety net of the second part-time employment as a taxi driver, such rendering such a risk, a remote risk. There is no evidential basis upon which I could conclude that the marriage would have failed: I accept that there existed a theoretical risk of Laura Taylor dying before the deceased. The deceased, of course, may well have followed employment as a taxi driver well after his 65th birthday and retirement from his principle occupation. In my judgment, the appropriate multipliers are those contended for by the claimant, namely 21.7.

11. Ginnie was 2 ¼ years of age at the date of her father's death. Mr West submits that the multiplier should be 13.05, assuming that she would be dependant until 18 years. That assumption, in my judgment, is appropriate bearing in mind the pressures for children to remain in full-time education and training, and necessitating parental contribution. I do not consider that a reduction to 12.05 as contended for by the defendant is warranted, based upon the risks of unemployment and death.

12. I turn now to the issue relating to Laura Taylor's earnings and how they should be approached in the assessment of the dependency. The defendant maintains that Laura Taylor's earning capacity should be taken into account. She has not worked since the accident because of the psychological effects of the accident upon both her and the children.. Furthermore, there is no one to care for the children gratuitously as the father did if she takes full-time employment. It is conceded by the claimant that when Ginnie can go to and from school alone, it is reasonable to assume that Miss Taylor would be able to secure full-time employment. In assessing the financial dependency, regard is to be had to her actual earnings and not to a theoretical earning capacity measured by the pre-accident earnings.

13. Miss Taylor, in her written statement, asserts that at the time of the deceased's death she was earning £250 net per week. The pay record shows that she was working for a period shortly before his death on a part-time basis, and indeed for much of the earlier period, and earning an average of £91.28 per week, or £4,746.56 net per year. However, between February 1998 and 28th April 1998 she worked full-time. She was paid for the months of May and June and then made redundant at the end of June – that is redundancy from her job as a credit controller with Cable & Wireless.

14. Had the deceased lived and achieved reasonable earnings as a qualified window cleaner and had followed part-time employment as a black cab driver, there would have been no one to look after the children whilst mother went out to work. With the husband earning reasonably she would not have had the economic imperative that she

must go out to work and earn. She would have had the choice of enjoying the stability of a good provider, enabling her to run their home, and being able to look after and bring up the children. In considering whether her earning capacity should be taken account of, my starting point must be Section 3(1) of the Fatal Accidents Act 1976 (as amended). The relevant part there is this:

> "In the action such damages, other than damages for bereavement, may be awarded as are proportional to the injury resulting from such death to the dependants respectively."

This is in similar terms to the original provision in Lord Campbell's act which was held in Dalton-v-South East Railway Company, 4 CB (N.S.), page 296 at pages 305-306, to give rise to the test,

> "… that the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned."

15. The defendant submits that Mrs Taylor's earning capacity, on the basis of a full-time employment and as at the date of death should be taken into account and relies upon a passage in the judgment of Lord Denning in the Court of Appeal in Cookson-v-Knowles [1997] QB, page 913, the relevant passage being at page 922:

> "Seeing that the husband helped the wife in her work, it was quite legitimate for the judge to regard them as conducting a joint operation. He took the combined earnings of husband and wife and calculated the dependency as two-thirds of the combined figure. He regarded that as completely lost by his death. He seems to have disregarded the future earning capacity from the wife, we do not think that was right. After his death she retained her earning capacity. By his death the dependants were deprived of the contribution provided by the husband, but not of the contribution provided by the wife. It is true that she could no longer do her previous work as a cleaner after his death, but she could do other work, at any rate part-time work whilst the children were at school, and full-time work later. The prospects of remarriage are, of course, to be disregarded but not her prospects of going out to work and earning money [ass Malyon v Plummer 1965/QB 330, 346, per Pearsono L.J.].
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> "It is very different from those cases where the widow was not working at the time of his death so that her earnings did not come into the family pool. In those cases, it may be said that she is not bound to go out to work so as to reduce the award ass Hewitt v Heads (1973) QB 64 although we are not sure about this. She may prefer to go out to work rather than sit at home grieving over the loss of her husband. But when her earnings before his death come into the family pool, so also her earning capacity after his death must be taken into account."

Cookson-v-Knowles went to the House of Lords on issues not concerning the widow's earnings and it was a case that was principally concerned with interest and the effect of inflation on damages.

16. Mr West, whilst he cites upon Howard v Hill (1973) QB p.74, does not invite me to disregard the whole of the wife's earning potential. In Howard v Hill, Mr Cumming-Booth J held that where a wife was working at the time of death but intended to give up work when the child she was carrying was born, that her earning capacity should not be taken into account, notwithstanding her declared intention to resume employment in future with substantial earnings. At page 69, he posed the question:

> "What is the correct approach in a Fatal Accident Act case to the situation of a widow who has an earning capacity which she will probably use after a fairly short period of years? As far as I know there is no explicit authority in English cases, although there is a great deal of authority to the effect that a wife's private means are not to be taken into account.
>
> "There is useful discussion in the well-known textbook of Kemp & Kemp, 2nd Edition, on the "Relevance or Otherwise of a Widow's Capacity to Support Herself". There has been two cases in Australia which were approved in the High Court of Australia dealing with the matter. [See Caroll-v-Purcell 1927 ALJR 384 AM in Goodger-v-Knapman 1924 SASR 347.] (And I rely on the citation from that case, given in the textbook to which I have referred.) Murray CJ said at page 358,
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> > "Mr Thompson asked me to make a further reduction by reason of the widow being relieved from the heavy part of her domestic duties and thereby set free to go out and earn something on her own account. I do not accede to the suggestion as I am unable to see how liberty to work can reasonably be brought within the discretion of a pecuniary advantage she derived from the death of her husband. Any money she might earn would be the result of her labour, not of his death. The same decision was made by Woolf J, in Australia in Usher-v-Williams 1955 60 WALR 69,80:
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> > "The argument for the diminution of the claim by some allowance of the widow's earning potential proceeds on the theory that the husband's death has released a flood of earning capacity. In my opinion, the plaintiff's ability to earn is not a gain resultant from the death of her husband within the principle established by Davis-v-Powell Duffryn Collieries Ltd. The widow's ability to work was always there and she could perhaps – as many women do, particularly in professions have preferred to work after marriage. The same argument that is put forward for the defendants could be applied to any woman who goes out to work through necessity to support herself and her children following her husband's death. And if it can be applied to the widow, there is no reason why it should not be used to diminish or extinguish the children's claims and in a case were, by her

efforts, she is able to support them as well as her husband did in his lifetime. I, therefore, hold that the widow's earning capacity is not to be taken into account in diminution of damages."

"I agree with the principle enunciated in those cases and I follow them. I, therefore, make no deduction in respect of the widow's capacity to earn, even though I am satisfied that there is a matter of probability that she will fairly soon be obtaining a significant degree of financial independence."

And then at page 70, paragraph G, Cumming-Booth J went on to say,

"And so subject, as I say, to changes and chances of the unknown future, this widow has been deprived of the prospect of a settled and stable financial future afforded by her husband over a period of some 40 years."

17. Mr West, for the claimant, realistically, does not invite me to follow Howard-v-Hill in making no deduction at all in respect of the widow's capacity to earn. He contends that until Ginnie is 14 years of age, the widow will not be in a position to go out to work, and the court should, therefore, look at the present realities and not hypothetical probabilities. The claimant pragmatically accepts that the court shall take account of some of her earnings but submits only those after Ginnie achieves 14 years of age.

18. The concession in the pleadings and in submission that only the earnings post Ginnie's 14th birthday must be taken into account in arriving at Miss Taylor's dependency refers to the case of Coward-v-Comex Houlder Diving Limited [July 1988] Court of Appeal. The decision is unreported, save for the transcript in the textbook, Kemp & Kemp, Quantum of Damages M2-232. In that case the deceased and his wife operated a joint family purse. In the judgment it is evident that this decision, which takes account of the widow's earnings, proceeds on the evidential basis that she would have continued to go on working and contributing had the deceased lived. It was held appropriate, in assessing the widow's dependency to take account of the existing financial arrangements at the time of death, as affording evidence as to what arrangements would have continued had death not occurred; and what probable benefits the widow would have enjoyed. It was not argued that her earning capacity should not be taken into account in that case.

19. In my judgment, the wife's earning capacity, logically must be taken into account in assessing her dependency if the evidence, at the time of death, impels the reasonable inference that both would have earned and contributed had the deceased lived, as the Court of Appeal clearly acknowledged in Coward-v-Comex Houlder. There is no support for the claimant's halfway house to be found either in Howard-v-Hill or Coward-v-Comex Houlder. In most cases, the most reliable guide as to what would happen in the future if the deceased lived, is what in fact did happen in the past when he was alive, as in Coward-v-Comex Houlder. But the fact that it is convenient to have recourse to the past for guidance as to what would happen in the hypothetical

future, which - owing to the death of the deceased - will never occur, must not blind one to the fact that one is estimating a loss which will be sustained in the future.

20. In this case, where much of the evidence is not challenged, the court is entitled to give weight to the claimant's evidence as to what was intended and realistic at the time of death in assessing the probabilities as to what would have happened had Peter Docking remained alive. The evidence, of course, to be considered by the court would include the historic evidence as to any existing arrangement. Because of the age of the children and the earnings regime that would have been followed by the deceased, there would have been limited opportunity for Mrs Taylor to work whilst looking after the children during the afternoon and evenings and at weekends in the absence of her husband's care, or other care.

21. She now contends and accepts that, until Ginnie is 14 years of age, she will not be in the position to go out to work, the court should, therefore, look at the present realities and not hypothetical probabilities. This is a practical, but not a relevant, consideration. The relevant consideration under the Fatal Accidents Act is: 'what would have happened in relation to her employment had the deceased remained alive?'; not 'what the widow is now constrained to do in consequence of his death'.

22. Her unchallenged evidence is that she and the deceased had already spoken to her prospective mother-in-law about the possibility of paying her to look after the children whilst they both went out to work. They were planning ahead for when the deceased qualified as a black cab driver and he would no longer be able to look after the children during the day. There was a provisional arrangement made to pay a wage to Granny Taylor as carer, equating to the net wage of a school teacher's assistant of about £100 per week because she, grandmother, would have to give up that employment in order to care for her grandchildren. This arrangement pre-supposed that it would be financially justifiable in terms of Miss Taylor's earnings and would have produced a significant financial benefit to the family after payment for care. There would have been no necessity to employ a carer after Ginnie's 14th birthday.

23. The pleaded concession, to which I have made reference, is of limited value. It acknowledges that after Ginnie's 14th birthday no care would be necessary to enable mother to go out to work. It also contends for a multiplier for the period beyond that birthday. The earning capacity figure, however, is based upon pre-death earnings and does not reflect the probability of modest pay rises; nor does it reflect the probability that, had the deceased lived, his widow would have continued to work full-time. She had been made redundant shortly after the accident. That would have happened, in any event, but in my judgment, she would have obtained similar full-time employment quickly. She says in her evidence,

> "I knew I was going to be made redundant before I left. I had spoken to the Elite Employment Agency who confirmed that it was likely that they would get me a similar job to the one I was doing at Cable & Wireless. I did have an

interview at Travel Workshop in Bromley but I did not attend this interview because of intervening events."

24. The fair earnings figure from the date of accident until the date of trial would, in my judgment, be £13,500 and thereafter the figure would be £14,000. From the date of death until Ginnie's birthday, the net earnings figure would be further reduced, of course, by the amount of the childcare cost that would be paid to grandmother to enable the parents to work full-time. From the date of death until trial, this would amount to £5,250 deduction, thereafter in the sum of £5,750. This gives earning capacity figures of £8,250 and £9,250 respectively for the periods until Ginnie's birthday and £14,000 thereafter.

25. I turn to the question of tax credit. It is evident that the deceased would have been the main earner from the date of his obtaining a cab licence by April 2000. The Children's Tax Credit would have been set against his income. Of course, indirectly, Miss Taylor has lost the benefit of this credit. It is properly reflected in the claimant's earning figures for the deceased, from which the dependency figures are derived. She has lost in consequence of the deceased not being alive, the benefit of the Children's Tax Credit, that the deceased would have enjoyed. In assessing the future net earning capacity of Miss Taylor, it is to be noted that she is not entitled to a further reduction. As a surviving and only wage earner, she would now be entitled to claim this credit herself.

26. Now, I turn to the loss of dependency of the deceased's services as father. The deceased regularly took sole responsibility of the children. £15,000 is claimed under this head. Father's care in part enabled mother to go out to work. Father's prospective part-time employment as a taxi driver would have reduced his ability to render these services in the future. Grandmother would have provided some substitute care, and financial account for the cost and value of this has already been taken into account. To accede to this claim in full might give rise to some small measure of double recovery. This figure, I am told, is now agreed.

27. I turn to loss of dependency by Laura Jane Taylor of the deceased's services. She was dependent on the deceased's services in maintaining and decorating their home, doing the gardening and looking after car maintenance and the like. I am satisfied that the deceased would have continued to provide such services in his lifetime. Pursuit of the two employments would have reduced the opportunity to render all of these services in the measure contended for. A lifetime multiplier, of 27.92 is sought. After retirement from his principle occupation at 65, I am satisfied that the deceased would have continued to occupy himself rendered such services. The sum of £850 per annum is a reasonable assessment of the value of such services, and a multiplier of 25 is appropriate. Thus, £21,250 represents the fair value of these lost services.

28. Finally, there is a comment made in the defendant's submission that no credit is given for benefits that she presently receives by way of income support, child benefit and housing benefit. These are, of course, all tailored to her needs and are means tested

and will reflect such matters as possession of capital. She will be in receipt of monies as a result of this judgment. Any benefits which she may continue to be entitled to will no longer be in the amount of the present terms, if any. Therefore, to off set her present benefits and to attribute to her a full or substantial earning capacity would give an unwarranted reduction in favour of the defendants. I take no account, therefore, of those benefits that she presently receives, which in any event were not in consequence of the deceased's death.

29. I will hear counsel as to the final terms of the judgment and orders to be made.