

SAINT LUCIA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

CLAIM NO: 942 OF 2000

BETWEEN:

- (1) MONICA PLUMMER**
- (2) MONICA PLUMMER**, Administratrix of the estate of
the late **TREVOR JAMES**; and Tutrix of the minor children of the said
TREVOR JAMES

Claimants

and

- (1) CONWAY BAY LIMITED**
- (2) SANDY BAY LIMITED**

Defendants

Consolidated with

CLAIM NO: 1041 OF 2000

BETWEEN:

- (1) JOAN MATHURIN** as Administratrix of the Estate of the late
Trevor James

Claimants

and

- (1) CONWAY BAY LIMITED**
- (2) SANDY BAY LIMITED**

Defendants

Appearances:

Mr. Parry Husbands QC for Monica Plummer
Mr. Kenneth Monplaisir QC for Joan Mathurin
Mr. Anthony McNamara QC for the Defendants

2003: June 27
July 8

JUDGMENT

Introduction

- [1] **Shanks J:** These claims arise out of a tragic accident which occurred on 19 October 1997 when there was an explosion on a boat which was operated by the Defendants, who own and run the Sandals Halcyon Hotel. Trevor James, who was employed by Sandals as a diving instructor, was on the boat and was killed in the explosion. The Defendants have admitted liability for the accident. The two claims (which have been consolidated) are brought by the mothers of Mr. James's children (who have both been granted letters of administration) both on behalf of his dependants under Art 988 of the Civil Code and on behalf of his succession under Art 609.

Facts

- [2] At the time of his death Mr. James earned \$3,000 per month as a diving instructor. According to the evidence of the Manager of the hotel, Jean St Rose, if he had remained in employment during the five years following his death, his salary would have increased by 2% per year so that it would now be just under \$39,000 per year. I accept that evidence which was not really challenged. I was not told very much else about Mr. James except that he did not smoke and, given his profession, it was unlikely that he drank much, that his services as a diving instructor were much sought after and that he loved his children dearly.

[3] Joan Mathurin had two children by Mr. James, namely Levhih, who was born on 6 February 1981, and Christi, who was born on 30 May 1983. In 1991 she left St Lucia with the children and went to live in USA where she still lives in Brooklyn, New York. I was told that Christi, who was 14 at the time of the death and is now 20, is going to college in September 2003. Levhih, who is now 22, suffered a severe psychological reaction to his father's death and suffers from schizophrenia. Ms Mathurin told me that she looks after Levhih and works part-time in a hospital in Long Island for which she is paid US\$13,000 pa.

[4] Ms Mathurin put in a witness statement stating that Mr. James sent \$1,500 every month for the children, that they would visit him every summer in St Lucia and that he would pay for the airfare and all their needs while they were in St Lucia. There was, however, absolutely no documentary support for any of these assertions. In the light of this and because Ms. Mathurin had made a new life in USA and it was impossible that Mr. James was both sending \$1,500 a month to support his children there and providing the support to Ms Plummer and her children in St Lucia which was alleged by Ms Plummer, I expressed the view in the course of the hearing that I was not inclined to accept the Ms. Mathurin's evidence. I therefore allowed Mr. Monplaisir QC to tender her for cross-examination on these points.

[5] In the course of a forceful cross-examination by Mr. McNamara QC she acknowledged that she had no independent evidence to support her case and she stated that the monthly payments had been made to her by Mr. James's mother who had herself received them through a bank account in the USA. She did not tell the court anything further about Mr.

James's mother or the payments save that she had not communicated with her since his death over five years ago. In the light of all this I am afraid I cannot accept that she in fact received \$1,500 per month from Mr. James for the children. I am prepared to accept that he may have provided occasional contributions in money or kind but, given in particular his responsibilities to Ms Plummer and her children, I imagine any such assistance was sporadic and modest.

[6] Monica Plummer also had two children by Mr. James, namely Starjay, who was born on 11 February 1989, and Surewinner, who was born on 4 May 1990. Ms Plummer's unchallenged affidavit evidence is that she and Mr. James lived with the two children in La Clery in Castries from the time of the birth of the first child until his death. She also says in her affidavit that Mr. James gave her \$900 fortnightly for the upkeep of the home and that he used to buy clothes, shoes and other things for the children. Mr. McNamara again pointed out that there were no documents put forward to support Ms Plummer's evidence about these payments and asked me to find that her figures were unrealistic.

[7] However, since she and Mr. James were living together, I do not find it all that surprising that there is no documentary evidence and I do not find the amount of \$900 a fortnight to run a household of four particularly surprising, although I should say that no details of the make-up of this sum or even as to whether the house was owned or rented were provided. Since Mr. McNamara did not apply to cross-examine Ms. Plummer on her affidavit, I am content to accept the sworn evidence in that affidavit and do the best I can with it. I should also say that unfortunately there was also no evidence as to whether Ms Plummer was

earning anything before Mr. James's death and that all I am told as to the period since his death is that it is a struggle to find money for the children.

Quantification of claims

- [8] The quantification of claims under Arts 609 and 988 of the Code and the interaction between them is an esoteric and complicated area of law on which I have been greatly assisted by all counsel in the case and in particular by the extremely full and comprehensive (as well as extremely fair and realistic) skeleton argument put in by Mr. McNamara QC on behalf of the Defendants.

Art 988

- [9] I think the sensible starting point is to assess the value of the claims under Art 988. A claim under this Article of the Code is designed to compensate certain dependants of the deceased for the loss (traditionally referred to as "loss of dependency") suffered by them as a result of the death for which the Defendants are liable (see Art 988(5)). Art 988(3) lists those for whose benefit the claim can be brought. It includes illegitimate children (see Art 988(9)) but not, it seems, "common law" wives. This provision is clearly in need of review but for the moment neither Mr. Husbands QC nor Mr. Monplaisir QC for the Claimants was able to point to any provision which would give a common law wife the benefit of a claim under the Article. It is therefore not open to either Ms. Plummer as Ms. Mathurin to claim under Act 988 in their own right. I turn therefore to consider the losses suffered by Mr. James's children by reason of his death.

[10] Given my findings in relation to the money allegedly paid by Mr. James for the benefit of Ms. Mathurin's children I do not think that any such loss has been sufficiently proved in relation to Levhih and Christi. Further, even if there had been some way of assessing any amounts which would have been paid over the last few years but for Mr. James's death the likelihood is that any such payments would have come to a complete end some time ago given that Levhih is 22 and Christi is 20 and they live in USA. It is right to note in this context that although he is 22, Levhih is probably still in need of financial assistance because of his psychiatric condition. However, this does not help him since I was told that his condition is itself a result of his father's death, so that his needs (if any) for financial assistance as a consequence of his illness would not have existed if his father had lived, which is the hypothesis on which the damages are to be assessed.

[11] Starjay and Surewinner are in a different category. I have found that at the time of his death Mr. James was providing \$900 a fortnight (say \$1,900 per month) towards the home and something towards the children's clothing and other expenses. I was helpfully referred by Mr. Mc Namara to the English case of *Dodds v Dodds* [1978] 1 QB 543, which deals with the assessment of the loss of dependency in a case where a child, but not the mother, is able to bring the Art 988 claim. That case makes it clear that the amount of the child's dependency includes amounts which benefit the child exclusively and amounts which are spent on the whole family (see: p551 B-F).

[12] Adopting the approach in *Dodds* here I think it is fair to balance the part of the \$1,900 spent on the home which is exclusively referable to Mr. James and Ms Plummer against the other costs incurred on the children and say that the children's dependency amounted

to \$1,900 per month at the time of the death. That figure represents 63.3% of Mr. James's earnings at the date of his death but it does not seem inordinately high to me, particularly in the light of the result in the *Dodds* case where there was only one child and the mother also contributed to the household expenses and the dependency of the child was found to amount to 47.5% of his father's earnings (see p551F).

[13] Given the lack of evidence about the make-up of the \$900 per fortnight and Ms Plummer's intentions in relation to work and that the \$1,900 per month dependency is certainly not ungenerous, I would not propose to allow any increase to reflect changes that might have taken place in the amount of the dependency between 1997 and today had Mr. James not died. I will therefore take as the multiplicand the figure of \$1,900 per month or \$22,800 per year.

[14] Since the children were 7 and 8 respectively at the time of the accident and would in the normal course become independent at some stage between the age of 18 and 25 I think it is reasonable to apply a multiplier of 10 to the annual loss as proposed by Mr. McNamara, which gives a total figure for their loss of \$228,000. In accordance with the approach adopted in the English Court of Appeal in *Cookson v Knowles* [1978] 2 AllER 604, this loss will carry interest at half the normal 6% rate for the five years between the death and the trial which amounts to an additional \$3,420 (ie $22,800 \times 5 \times 3\%$), giving a total loss of \$231,420.

[15] This sum has to be divided between Starjay and Surewinner in such shares as the court directs under Art 988(5). Since Surewinner is younger she should receive slightly more

than Starjay and I would direct that they are paid in the proportions 10:9, which gives Surewinner \$121,800 and Starjay \$109,620.

Art 609

- [16] The claim under Art 609 is brought for the benefit of Mr. James's succession. It is based on the cause of action vested in him against the Defendants at the moment of his death. The damages recoverable represent the losses suffered by the deceased himself as a consequence of the neglect of the Defendants.
- [17] These damages usually include a conventional sum for "loss of expectation of life". Mr. McNamara referred me to a number of St Lucian cases from the 1980's where the sum awarded was \$1,500. He was prepared to suggest that the court may wish to award more than this. In my view, given the change in the value of money since the 1980's, the time has come to increase the conventional sum to the alternative figure suggested by Mr. McNamara, namely \$3,000. This is still a meagre sum reflecting the law's rather harsh view that life is full of hardships and misery as well as pleasure and joy. I will therefore award \$3,000 to Mr. James's succession under this head.
- [18] Much more substantial is the claim for damages representing Mr. James's loss of earnings during what are called the "lost years". This head of claim is problematic and anomalous and has been the subject of criticism throughout the Commonwealth; it has been abolished by statute in England and other Commonwealth countries but, in spite of reference to the question by Matthew J in the case *Auguste v Maynard* (case 1984/440, 30.9.86, a case in which Mr. Monplaisir QC also appeared), the St Lucian legislature appears not to have

addressed the matter as yet. Although there may be an argument that, by reason of the English legislation (section 4(2) of the Administration of Justice Act 1982) and the provisions of Art 917A of the Civil Code, the lost years claim has also been abolished in St Lucia, Mr. McNamara expressly declined to advance any such argument and since Matthew J held (again without the benefit of argument to the contrary) in *Auguste* that the claim could still be advanced, I will proceed on that basis.

[19] The basis of the lost years claim is explained by Matthew J at pp 9/10 of the report of the *Auguste* case to which I was referred by Mr. McNamara. The loss which is recoverable is a "notional surplus" representing the difference between the deceased's estimated net earnings during the lost years of life on the one hand and the estimated cost of his maintenance and of providing himself with the facilities for a reasonably satisfying and enjoyable life during that period (which costs will have been saved by reason of the death) on the other. In arriving at the notional surplus no deduction is made from the net earnings on account of money which would have been spent on dependants: it is this feature which can give rise to a double liability when there are claims under both Arts 609 and 988.

[20] The first task is to estimate the value of the net earnings which Mr. James would have received during the lost years. The familiar multiplicand/multiplier approach is adopted save that, although known changes in circumstances since the death are taken into account, the multiplier is "back-dated" to the date of death (see: *Cookson v Knowles* [1978] 2 AllER 604). I have no hesitation in accepting Mr. McNamara's submission, based on the cases set out at p13 of his skeleton argument and Mr. James's age when he died, that the appropriate multiplier in this case is 14, notwithstanding Mr. Monplaisir QC's persuasive

words in favour of 15 or 16; indeed, bearing in mind Mr. James's profession, I think that 14 is probably a rather generous figure.

[21] As to the multiplicand, Mr. McNamara helpfully produced a calculation in his skeleton argument showing the amount Mr. James would have earned during the five years since his death, including the 2% annual increase, which gave a figure of \$187,436. To this figure must be applied interest at half the normal rate for five years, ie $187,436 \times 5 \times 3\% = \$28,115$. Mr. James's annual salary five years after death would have been, as I have said, \$38,967. Mr. McNamara was ready to concede if necessary that a 2% annual increase should be applied to this sum in assessing the loss over the years following the trial and Mr. Husbands QC and Mr. Monplaisir QC argued for the application of a rate of 3 or 4%. In my view it would be wrong in principle to adjust the multiplicand at all from the figure of \$38,967 which would have been the annual salary as at 2003: the level of the multiplier is designed to take into account all the future contingencies including inflation and wage increases, as well as the chances of premature death or illness not caused by the Defendants. The figure of \$38,967 must be therefore be multiplied by nine, the balance of the multiplier figure five years after the death, which gives \$350,703. The total figure for loss of earnings is therefore \$566,254 (ie $187,436 + 28,115 + 350,703$).

[22] The next stage is to assess the extent of the notional surplus in Mr. James's case. This exercise is inevitably approached with a judicial "broad brush", particularly so in a case like this where there is not a lot of hard evidence. Mr. McNamara referred me to a number of cases on the question of the notional surplus, in particular an English case decided by Webster J shortly before the abolition of the lost years claim in England (*White v LTE*

[1982] 2 WLR 791), *Auguste v Maynard* which I have already mentioned, and two other St Lucian cases namely *Wilson v Sonson* (case no 430/1986, Matthew J, 30.3.97) and *Philbert v Raye* (case no 415/1989, d'Auvergne J, 13.5.91).

[23] All these cases appeared to concern claims where the deceased was at the time of his death a young man with no wife or dependant children (presumably because claims where the deceased has dependants will more naturally focus on Art 988). However, both Webster J in *White* and Matthew J in *Auguste* assessed the notional surplus on the basis that the deceased would have started a family some years later and assessed it as a different percentage of annual earnings for the period during which the deceased would have been single and that during which he would have had a family. I do not think that that approach is necessary or appropriate in this case because at the time of his death Mr. James was established with a young family already. So I turn to consider the appropriate percentage to apply to the annual earnings in the case of a man in his mid 30's with a young family which he is supporting who is earning around \$3,000 a month.

[24] The difficulty here is that the two cases I have mentioned point in different directions. Webster J assessed the surplus while the deceased was single at one-third and that while he had a family at 25%. Matthew J assessed the surplus during the single years at 30% and that during the family years at 40%. I confess I find the arguments somewhat baffling, particularly bearing in mind that, as I have said, no deduction is to be made in respect of money spent on dependants.

[25] My solution is to wield a very broad brush. In my view the sensible course is to say that in any normal case the surplus which a deceased would have left over after maintaining himself and providing himself with a satisfying and enjoyable life would be one-third of his earnings. I certainly so hold in relation to Mr. James, a man of 37 earning about \$3,000 per month and living with and supporting his common law wife and two children. I note at this point that it is perfectly consistent to find in respect of a particular individual that he provides, say, two-thirds of his salary to his dependants but that two-thirds of his salary is also to be deducted in arriving at a notional surplus of one-third: this is because there are expenses which are necessarily incurred both on maintaining dependants and on maintaining oneself, most obviously and significantly housing costs.

[26] Applying this one-third factor to the loss of earnings figure that I have already reached gives damages for loss of earnings during the lost years of \$188,751. To this must be added the \$3,000 for loss of expectation of life which I have awarded, which gives a total of \$191,751. *Prima facie*, this sum should be awarded to the administrators for the benefit of his succession. It was common ground on all sides that Mr. James's only heirs are the four children for whose benefit these claims are brought and that each of them would receive one quarter of the succession, which would give them \$47,937 each under this claim. It was also common ground, however, that, notwithstanding the rather difficult provision at Art 609(5), it is not possible for one individual to receive overlapping damages under both Arts 609 and 988 (see pp 10/11 of *Auguste* decision).

Outcome

[27] In this case I have decided that Joan Mathurin's children are entitled to nothing under Art 988, so there should be judgment for her as administratrix under Art 609 for \$95,874 to be divided between Levhih and Christi in equal shares of \$47,937. In the case of Monica Plummer's children, however, the Art 988 claim is greater than their share of the claim for the loss of earnings during the lost years; they should therefore be confined to the amount of the award I have already made under Art 988 plus their share of the award for loss of expectation of life (that is \$750 each). It was agreed that costs should follow the event at the prescribed level.

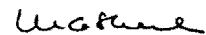
[28] I will therefore order and direct as follows:

- (1) Judgment for Joan Mathurin as administratrix of the succession of Trevor James against the Defendants in the sum of \$95,874, which sum is to be distributed by her in equal shares of \$47,937 to Levhih and Christi Mathurin;
- (2) Judgment for Monica Plummer as administratrix of the succession of Trevor James in the sums of \$231,420 and \$1,500;
- (3) The sum of \$231,420 shall be divided \$109,620 to Starjay James and \$121,800 to Surewinner James; the \$1,500 to be divided between them equally.
- (4) Defendants to pay Ms. Mathurin's costs in the sum of \$23,174.
- (5) Defendants to pay Ms. Plummer's costs in the sum of \$43,938.

Post-script

[29] I wish to make two points by way of post-script:

- (1) Ms Mathurin and Ms Plummer will I am sure understand that the awards made to them are made entirely for the benefit of their respective children and that any money they receive is held on trust for those children; in the case of Christi Mathurin there is no reason for her share not to be distributed to her immediately; different considerations may apply in the case of Levhih and the other children and the mothers may want to take advice and/or apply to court for directions as to what to do with the money;
- (2) As I have already indicated, Matthew J as long ago as 1986 referred to the fact that the legislature in St Lucia may want to consider the question of the "lost years" claim: as I hope the above demonstrates the claim is indeed anomalous and problematic and I would urge the legislature to find some time to consider whether it should remain part of the law of St Lucia. On this topic, consideration also surely needs to be given as to whether a common law wife should not be included in those for whom an Art 988 claim can be brought under Art 988(3).



Murray Shanks
High Court Judge (Ag.)