

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2007/041

BETWEEN:

[1] CYRIL MATHURIN
[2] JASON MATHURIN

Appellants

and

ANTHONY AUGUSTIN
Qua Administrator of the Estate of
YASMIN NATASHA AUGUSTIN (deceased)

Respondent

Before:

| | |
|-------------------------------|-------------------------|
| The Hon. Mr. Denys Barrow, SC | Justice of Appeal |
| The Hon. Mr. Hugh Rawlins | Justice of Appeal |
| The Hon. Mde. Ola Mae Edwards | Justice of Appeal (Ag.) |

Appearances:

Mr. Shawn Innocent for the Appellants
Mr. Hilford Deterville, QC with Ms. Samantha Charles for the Respondent

Civil Appeal – Death – Negligence – Assessment of Damages – the lost years – Article 609 Civil Code of Saint Lucia – s.1 (2) (c) Law Reform (Miscellaneous Provisions) Act 1934 – Right to recover damages for the lost years abolished – Administration of Justice Act 1982 – Conflict of the English and Saint Lucian laws – Whether damages for lost years are recoverable -

The sole issue on this appeal was whether the estate of the deceased was entitled to recover damages for the deceased's loss of future earnings during the years of life lost to her because of the defendants' negligence. Under the Law Reform (Miscellaneous) Provisions Act 1934 of England and Article 609 of the Civil Code of Saint Lucia damages for the lost of years were recoverable. The Administration of Justice Act 1982 section 4 changed English law by abolishing the right to recover damages for the lost of years. Counsel for the appellant contended that this change in English law had effect in Saint Lucia by virtue of article 917A (1) of the Code, which extended English law to St. Lucia. Counsel for the respondent contended that article 917A (1) of the Code is qualified by article 917A (3) which provides that where a conflict exists between the law of England and the express provisions of the Code the provisions shall prevail.

Held, dismissing the appeal with costs:

- (1) Notwithstanding the change in English law damages can be recovered for the lost years in a case of death based on the provisions of Article 609 of the Civil Code, which states that on the death of any person after the commencement of this Chapter, all causes of action subsisting or vested in him shall survive against, or as the case may be, for the benefit of, his succession.
- (2) That the amendment to the English law of damages for the lost years did not extend to Saint Lucia because it conflicts with the express provision of the Code.
- (3) The appellant must pay to the respondent prescribed costs to be quantified based on the quantum of damages for the lost years that are awarded or agreed. Such costs were to be assessed, if not agreed.

Veronique Ismael v Justin Albert St. Lucia Claim No. SLUHCV 0717 of 2002 (judgment delivered 8 December 2006) overruled.

Gammell v Wilson [1981] 1 All ER 578 distinguished.

2008: February 8;
June 2.

JUDGMENT

- [1] **BARROW, J.A.:** The sole issue on this appeal is whether the estate of the deceased is entitled to recover damages for the deceased's loss of future earnings during the years of life lost to her because of the defendants' negligence. Damages awarded under this head are referred to as damages for 'the lost years'. Master Mathurin held that the estate was entitled to such damages. The defendants have appealed that decision.
- [2] Liability was conceded by the defendants (appellants) for causing the death of 25 year old Yasmin Natasha Augustin, who died instantly in a motor vehicle accident on 30th May 2003. The dispute between the parties arose on the assessment of damages. Subsequent to the filing of the notice of appeal, damages payable to the dependants of the deceased were agreed. Damages for the lost years, payable to

the estate, remained contested. Such damages were claimed and awarded based on the provisions of article 609 of the **Civil Code** (the Code). That article states:

“609. (1) On the death of any person after the commencement of this Chapter, all causes of action subsisting or vested in him shall survive against, or, as the case may be, for the benefit of, his succession:

- [3] There is no disagreement between counsel as to the interpretation of that provision because the almost identical provision in English law was closely considered by the House of Lords in **Gammell v Wilson**.¹ In that case the defendants contended the estate could not recover damages for the deceased’s loss of earnings during the lost years because the cause of action for such earnings was a ‘gain to the estate’ while the loss of earnings was a ‘loss to the estate’ and therefore, in accordance with the requirements of section 1 (2) (c) of the **Law Reform (Miscellaneous Provisions) Act 1934** damages were to be calculated without reference to any loss or gain to the estate consequent on the deceased’s death. The opening provisions of section 1 of the 1934 Act read:

“(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.
...”

As noted, article 609 of the Code is in almost identical language.

- [4] The House decided that on a true construction of the 1934 Act the restriction on an estate recovering or being deprived of a loss or gain applied only to a loss or gain directly consequent on the death and not to a loss or gain resulting from a right to recover damages. That right vested in the deceased immediately before his death and then passed to his estate, regardless of whether or not the beneficiaries of the estate were also dependants. Section 1 of the 1934 Act preserved that right and made it survive the deceased. Therefore, damages for the lost year were held to be recoverable by the estate.

¹ [1981] 1 All ER 578

- [5] It will be appreciated that this decision in 1981 was not a judicial determination that damages were recoverable at common law after death but an interpretation of the 1934 Act. That interpretation, by parity of reasoning, was also the true interpretation of article 609 of the Code. Therefore, under the respective legislation of both England and St Lucia damages for the lost years were recoverable.
- [6] Their Lordships in **Gammell v Wilson** had been scathing in their view of the state of the law of damages. Lord Diplock, for instance, stated that “the law of damages for death has, in my view, reached a state for which I can see no social, moral or logical justification.”² He joined in the call by other members of the House for legislation to “bring ... sense and justice to the law relating to damages for death recoverable by the estate of the deceased.”³
- [7] Legislation in England to bring about the recommended change came in the form of section 4 of the **Administration of Justice Act 1982**. This section introduced a new section 1 (2) (a) into the 1934 Act which states that damages recoverable for the benefit of the estate of a deceased person shall not include any damages for loss of income in respect of any period after the person’s death. In short, the right to recover damages for the lost years was abolished.
- [8] Counsel for the appellants contends that this alteration in the law of England had effect in Saint Lucia by virtue of article 917A (1) of the Code. That provision states:
“917A. (Ad. 34-1956). (1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to this Colony ...”
- [9] The entire case for the appellants rests on the argument that the incorporation into the law of Saint Lucia, by article 917A. (1), of “the law of England for the time being relating to ... torts ...”, incorporates English law as it stands at the time of adjudication. Counsel argued that the expression “for the time being” is an ambulatory expression and cited in support an impressive number of cases in

² At 581 g

³ At 583 h

which this interpretation was given to this phrase, including **Eversley Thompson v R**⁴, in which Byron CJ referred to a number of decisions to that effect.⁵

[10] In response, counsel for the respondent contended that article 917A (1) of the Code is qualified by article 917A (3) which provides that where a conflict exists between the law of England and the express provisions of the Code the provisions of the Code shall prevail. Article 917A (3) reads:

“(3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail.”

[11] It is a formidable argument, I think, because there is here a clear conflict between the present law of England and article 609 of the Code. The 1982 Act made the law of England directly the opposite of what it had been before and, hence, the opposite of article 609 of the Code. Their Lordships in **Gammell v Wilson** were agreed that the entitlement to damages for the lost years had become so settled in English law that it could not be undone by judicial decision but required legislative intervention. Lord Russell had stated⁶ he “would welcome legislation which overruled in the future the results of the decision” in **Pickett v British Rail Engineering Ltd.**⁷ That was a decision in favour of a living plaintiff whose expectation of life had been shortened. It followed from the principle **Pickett** established that damages for the lost years should be awarded to the estate where the injured person died. Lord Russell’s statement that the results of the decision needed to be overruled elucidates the proposition that what the 1982 Act did was to reverse the course of English law.

[12] The position, therefore, is that before the 1982 Act, English law and Saint Lucian law were the same. After the 1982 Act, English law and Saint Lucian law conflicted. In that situation of conflict article 917A (3) of the Code prevented

⁴ Saint Vincent and the Grenadines (judgment delivered 21 July 1997)

⁵ At p 5 of the judgment.

⁶ At 590 f; emphasis added

⁷ [1979] 1 All ER 774

English law from taking effect in Saint Lucia, because that provision of the Code made article 609 prevail over the 1982 Act.

[13] The skeleton argument for the appellants relied on a decision of Edwards J in **Veronique Ismael v Justin Albert**⁸ which held that the decision in **Gammell v Wilson** is no longer “binding authority” in Saint Lucia.⁹ The **Ismael** case decided that article 917A (3) did not become engaged because the current law of England did not conflict with article 609 and none of the provisions of that article “reveal any preference for the common law reflected in **Gammell v Wilson** to be applied in survival actions over the current law of England ... The local statutory provisions are silent on the point in issue. If there is silence, then there can be no statutory conflict in my opinion.”¹⁰

[14] With respect, the error in that conclusion stems from the failure to appreciate that what underpinned the decision in **Gammell v Wilson** was not the common law but section 1 of the 1934 Act. This appears in the following statement of Lord Diplock:

“It was not until the passing of the **Law Reform (Miscellaneous Provisions) Act 1934** that the personal representative of the deceased had a cause of action for loss to the deceased’s estate resulting from his premature death.

Section 1 of the 1934 Act by abolishing the maxim *actio personalis moritur cum persona* enabled damages suffered by the deceased before his death under the three heads, loss of earnings, pain and suffering and loss of expectation of life, to be recovered for the benefit of his estate in an action brought after his death.”¹¹

[15] Section 1 of the 1934 Act¹², which abolished the rule that a personal cause of action died with the person, is mirrored in article 609 of the Code, earlier reproduced¹³, which provides that on the death of a person all causes of action vested in him shall survive for the benefit of his succession. Contrary to the view

⁸ St. Lucia Claim No. SLUHCV 0717 of 2002 (judgment delivered 8 December 2006)

⁹ Paragraph [122]

¹⁰ Paragraph [123]

¹¹ [1981] 1 All ER 578 at 582 d to e

¹² See paragraph [3], above

¹³ Paragraph [2], above

expressed in **Ismael**, the current law of England which abolishes recovery of damages for the lost years, conflicts with the express provision of article 609 of the Code, which permits the recovery of such damages. As has been established, in the case of conflict the Code prevails.

[16] On that view it is unnecessary to decide which is correct of the two opposing interpretations of the phrase “the law of England for the time being”. Even if that phrase means English law as it presently stands, with its abolition of damages for the lost years in a case of death, that law does not extend to Saint Lucia because it conflicts with the express provision of the Code.

[17] In the result I would uphold the Master’s decision that the respondent is entitled to an award of damages in favour of the estate for the lost years. I would dismiss the appeal with prescribed costs to be quantified based on the quantum of damages for the lost years that are awarded or agreed. Such costs shall be assessed, if not agreed.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]