

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2017/0319

BETWEEN:

GERMINA CHERUBIN
QUA ADMINISTRATRIX OF THE ESTATE OF ANTHONY CHERUBIN
Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA
FIRE OFFICER RUDY AVRIL
Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:

Mr. Eghan Modeste of Counsel for the Claimant, Germina Cherubin
Mr. Seryozha Cenac for the Defendants
Mrs. Shervon Pierre holding a watching brief for New India Assurance
Company Ltd.

Present:

Ms. Germina Cherubin

2019: March 6, 7.

DECISION ON ASSESSMENT OF DAMAGES

- [1] CENAC-PHULGENCE J: On 16th November 2018, after a no case submission by the defendants, I entered judgment for the claimant for damages to be assessed and costs. The assessment of damages is the subject of this decision. The Court gave directions to facilitate the assessment. The claimant and defendants filed submissions on 11th and 31st January 2019 respectively with reply submissions being filed by the claimant on 18th February 2019.
- [2] **The claimant, Ms. Germina Cherubin (“Ms. Cherubin”) as administratrix of the estate of Anthony Cherubin filed a claim against the defendants for damages**

arising out of the negligence of the 2nd defendant, Fire Officer Rudy Avril who was driving an ambulance and was acting as a servant or agent of the 1st defendant. The negligent driving of the 2nd defendant led to the death of Anthony Cherubin. The claim was brought for the benefit of the estate of Anthony Cherubin pursuant to article 609 and his dependants pursuant to article 988 of the Civil Code.

- [3] Ms. Cherubin in her statement of claim claimed the following relief:
- (a) Special damages in the sum of \$8,600.00 together with interest from the date of filing of the claim to the date of judgment;
 - (b) General damages for pain and suffering and bereavement;
 - (c) Damages for loss of expectation of life;
 - (d) Damages pursuant to article 609;
 - (e) Damages pursuant to article 988;
 - (f) interest and
 - (g) costs.

Special Damages

- [4] The special damages as particularised in the statement of claim are:
- (a) Police report -\$200.00
 - (b) Funeral expenses-\$6,900.00
 - (c) Application for grant of letters of administration-\$1,500.00
- [5] A total of \$8,900.00 is claimed as special damages in the statement of claim; **however in submissions counsel for the claimant, Mr. Eghan Modeste ("Mr. Modeste") invites the Court to award \$9,151.08. What accounts for the difference is the sum of \$6,451.08 for funeral expenses and \$1,000.00 for the obituary.**
- [6] In relation to the claim for funeral expenses, Mr. Modeste says the sum paid is **\$6,451.08 to Crick's Funeral Home and \$500.00 to DBS Obits for the obituaries.** But he says the receipt for the obituaries clearly shows that the sum paid for the obituaries was \$500.00 with a balance of \$500.00 suggesting

that the total cost for the obituaries was \$1,000.00. He says the sum awarded for obituaries should therefore be \$1,000.00.

[7] Counsel for the defendants in their submissions point out that the receipt for funeral expenses is in the name of Sylvia Cadasse and not that of Ms. Cherubin and therefore there is no proof that Ms. Cherubin incurred this expense. They invite the Court not to award this sum. They make a similar submission in relation to the police accident report and again invite the Court **not to make this award as the receipt is in the name of Mannee's Bakery.**

[8] In relation to the obituaries, counsel for the defendants suggest that Ms. Cherubin has only proven that she paid \$500.00 towards that expense and therefore \$1,000.00 ought not to be allowed.

[9] In relation to the application for letters of administration, Mr. Modeste points out that Ms. Cherubin was consistent in her responses in cross-examination that she had submitted a receipt, although what was before the Court was an invoice. Counsel says this clearly shows that Ms. Cherubin misunderstood the invoice to be a receipt and invites the Court to find that this sum should be awarded to her. Counsel for the defendants disagrees and submits that an invoice and not a bill of payment or receipt was produced.

Analysis

[10] It is a well-established legal principle that special damages must be claimed specifically and proved strictly.¹ **'Special damage, in the sense of monetary loss which the plaintiff has sustained up to the date of the trial, must be pleaded and particularised ... it is plain law ... that you can recover in an action only special damage which has been pleaded, and, of course, proved.'**²

[11] Kangaloo JA in **Mario's Pizzeria Ltd v Hardeo Ramjit**³ said this:

"...special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are

¹ *Stroms Bruks Aktie Bolag v Hutchinson* [1905] AC 515.

² Per Diplock J. in *Ilkiw v Samuels* [1963] 1 WLR. 991.

³ CA 146 of 2003, Trinidad and Tobago.

exceptional in their character and therefore, they must be claimed **specially and proved strictly.**"

[12] The purpose of an award of special damages is to compensate for out-of-pocket expenses. It is not intended to compensate for expenses not incurred or paid, hence the rule that these damages must be specifically pleaded and proven. In the Jamaican case of Hepburn Harris⁴ Rowe P. put it this way:

"Plaintiffs ought not to be encouraged to throw figures at trial judges, make no effort to substantiate them by even their own books of account and to rely on logical argument to say that specific sums must have been earned."

[13] The claim for funeral expenses suffers from the ill fate that whilst there is a receipt proving that the amount claimed was paid, there is no proof that this amount was paid or incurred by Ms. Cherubin. The receipt exhibited in support of this claim is in the name of Sylvia Cadasse. There is no evidence from Ms. Cherubin to assist the Court in understanding why she would be making a claim in respect of an amount seemingly incurred by someone else. Whilst there may be a perfectly good explanation, the evidence does not reveal what that is.

[14] The receipt in relation to **the traffic accident report is in the name of Mannee's Bakery** again suggesting that Ms. Cherubin did not incur this expense.

[15] In relation to the above items Mr. Modeste conceded that these amounts had not been proven as expenses of the claimant. The Court therefore makes no award in relation to these two items.

[16] The receipt with respect to the obituaries supports a claim for \$500.00 and not \$1,000.00. The fact that the receipt shows a balance of \$500.00 does not prove that Ms. Cherubin expended \$1,000.00. The amount awarded will be \$500.00.

⁴ (unreported) SCCA 40/90 delivered December 10, 1990 quoted in Assessment of Damages for Personal Injuries (Revised Edition of Case note No. 2) compiled and edited by Mr. Justice Karl S. Harrison at page 18.

[17] Although Ms. Cherubin was adamant in her evidence that she paid the amount of \$1,500.00 for the application for letters of administration to Michel & Company, one must admit that there is a big difference between an invoice and a receipt. An invoice does not in any way suggest that an amount was paid but merely represents the charge for a service which is to be paid. Counsel for the claimant was in the best position to assist Ms. Cherubin by providing a receipt if the monies were indeed paid as the letters of administration were actually done by his Chambers. If indeed Ms. Cherubin had a receipt as she said she did, then it should have been provided to the Court. Despite this obvious deficiency, I am prepared to accept Ms. **Cherubin's evidence and award her the \$1,500.00** in this regard. This was agreed to by counsel for the defendants at the assessment hearing.

[18] In light of the foregoing, the special damages awarded will be in the sum of \$2,000.00. I note that in *Bertha Compton (nee Blaize) Qua Administratrix of the Estate of the late Macrina Blaize) v Dr. Christina Nathaniel et al*,⁵ the Court awarded the special damages despite the fact that some of the elements had not been proven by documentary evidence but noted that there was no dispute from the defendants and the sums claimed were reasonable. I make this point as this is not the case in this claim. The defendants are challenging the amounts claimed.

General Damages

Damages on behalf of the Estate of Anthony Cherubin-Article 609

[19] Article 609 of the Civil Code provides:

“609.

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

...

(2) Where a cause of action survives as aforesaid for the benefit of the succession of a deceased person, the damages recoverable for the benefit of the succession of that person—

⁵ SLUHCV2000/0031, delivered 20th August 2010.

- (a) ...
- (b) ...
- (c) Where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his or her succession consequent on his or her death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in delict or quasi-delict which by virtue of this article has survived against the succession of a deceased person, unless either—

- (a) proceedings against him or her in respect of that cause of action were pending at the date of his or her death; or
- (b) proceedings are taken in respect thereof not later than 6 months after his or her personal representative took out representation.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Chapter, to have been subsisting against him before his or her death such cause of action in respect of that act or omission as would have subsisted if he or she had died after the damage was suffered.

(5) ...

(6) ...”

A. Damages for Loss of Expectation of Life

[20] The claimant submits that an award of \$5,000.00 is reasonable. Mr. Modeste relies on the cases of *Jallim v Ghirawoo*⁶ where the Court awarded \$3,500.00 and *Sandra Ann-Marie George (administrator of the Estate of Karlos George) v Nigel Don-Juan Glasgow*⁷ where an award of \$5,000.00 was made.

[21] Counsel for the defendants submit that the award should be \$3,000.00 and note that Anthony Cherubin was 48 at the time of his death as opposed to the deceased in *Sandra Ann-Marie George* case who was 36. They rely on the

⁶ SLUHCV2003/0483.

⁷ SVGHCV2011/0465, delivered 2nd February 2017.

cases of *Delma Elick v Kert Joseph*⁸ and *Valencia Delaire et al v Anel Chedy*⁹ in which an award of \$3,000.00 was made.

[22] In the case of *Bertha Compton (nee Blaize) Qua Administratrix of the Estate of the late Macrina Blaize) v Dr. Christina Nathaniel et al*,¹⁰ Georges J [Ag.] said the following:

“Article 609 of the Civil Code permits the making of a conventional award for loss of expectation of life. As Lord Mance declared in delivering the opinion of Her Majesty’s Board in *George v Eagle Air Services Ltd* (paragraph 5 supra) the abolition in England of such awards by the Administration of Justice Act 1982 section 1(20)(A) has been held by the Eastern Caribbean Court of Appeal to have no effect in Saint Lucia: *Mathurin v Augustin* (HCV 2007/041, 2nd June 2008). In order to accommodate inflation the standard sum under that head has progressively been uprated and indeed in *Jallim v Ghirawoo* (2003/0483, 17th February 2005) the Court of Appeal indicated obiter in relation to an accident occurring in October 2002 that in its view in 2005 the time had come to uprate the conventional award to \$3,500.00. Bearing in mind that the *George v Eagle Air Services Ltd* case related to an accident in 1990 the Board considered \$2,500.00 appropriate. In light of the prevailing trend as well as the decision of Shanks J in *Plummer et al v Conway Bay Ltd* Suit No. 1041 of 2000 increasing an award to \$3,000.00 which was subsequently upheld by the Court of Appeal and affirmed by the Privy Counsel (No. 81 of 2006) I would myself award a like amount under that head which in fact accords with that suggested by counsel for each side.” (my emphasis)

[23] There is no set scale for an award for loss of expectation of life and so the Court must take into account similar awards made in the jurisdiction whilst seeking to ensure consistency with such awards.

[24] In the case of *Veronica Auguste v Tyrone Maynard et al*¹¹ Matthew J explained that while damages under this head had traditionally been limited to a small conventional award for loss of expectation of life, the current approach adopted by our courts following the landmark decisions of *Pickett v British*

⁸ SLUHCV2016/0222 at para 7-8.

⁹ SLUHCV2016/0432 delivered 13th July 2017.

¹⁰ SLUHCV2000/0031, delivered 20th August 2010 at para 9.

¹¹ SLUHCV1984/0440.

Rail Engineering Limited¹² and Gammell v Wilson¹³ is to allow recovery for **future earnings for the “lost years”**.

[25] Having perused the various cases and taking into account the pronouncement of the Court of Appeal in Jallim v Ghirawoo, I would award the sum of \$5,000.00 for loss of expectation of life.

B. Damages for Bereavement

[26] Mr. Modeste claims the sum of \$10,000.00 for bereavement. He cites the case of Veronique Ismael v Justin Albert et al¹⁴ in support of this claim. Counsel for the defendants just simply says that that claim is too excessive and suggests a sum of \$4,000.00 as the award.

[27] It is to be noted that the action pursuant to article 609 relates to causes of action which are subsisting against or vested in the deceased surviving against, or, as the case may be, for the benefit of, his or her succession. I do not see that a claim for bereavement falls into either of these categories.

[28] Consequently, if the deceased would not have been able to pursue a claim for damages for bereavement the estate cannot in the survival action under article 609 pursue such a claim unless provided for by statute. The law as it stands does not provide for a claim for bereavement and I therefore make no award for damages for bereavement.

C. Damages for pain and suffering

[29] The medical report of Dr. Charfuah Fevrier dated 28th February 2017 revealed the following in relation to Anthony Cherubin.

[30] When Anthony Cherubin presented at the Accident and Emergency Department on 3rd December 2016 at 12:35 p.m., he was in moderate to severe painful distress complaining of pain to the right hip. He was initially

¹² [1979] 1 AER 774.

¹³ [1980] 2 AER 557.

¹⁴ SLUHCV2002/0717, delivered 8th December 2006, unreported.

assessed as having: (a) polytrauma with blunt trauma to head and a posterior dislocation to the right hip. X-rays of the pelvis revealed a fracture to the pelvis and right ulna. A focused abdominal sonogram for trauma revealed fluid in Morrisons Pouch suggestive of trauma to the liver.

[31] He was administered analgesics, and the displaced hip and fractured ulna were both successfully reduced by the Orthopaedic specialist. As I understand it, reduction is a surgical procedure to repair a fracture or dislocation to correct alignment.

[32] **Subsequently, Anthony Cherubin's level of consciousness decreased and he** was intubated. He went into cardiac arrest and was resuscitated. The report notes that persistent oozing was noted along the lesser curvature of the stomach. Mr. Cherubin was in ICU where he remained hypotensive (lowering blood pressure). Despite treatment being administered, Mr. Cherubin became increasingly bradycardic and went into cardiac arrest with unsuccessful resuscitation. He was pronounced dead at 1:15 p.m. on 4th December 2016.

Analysis

[33] This is the point at which the claimant and defendants seriously part company. Mr. Modeste suggests an award of \$150,000.00 and relies on the cases of Peter Cherry et al v Trevor Trim et al¹⁵ where the award was \$50,000.00. Mr. Modeste also relies on other cases where he says the court awarded \$40,000.00 to \$60,000.00 for similar injuries to that of Mr. Cherubin.

[34] The defendants contend that \$150,000.00 is grossly overstated. They submit that the cases referred to by the claimant do not assist as they relate to living persons most of whom suffered permanent deformity in some cases for the **rest of their lives. In Mr. Cherubin's case, the report revealed that the** dislocated hip and fractured ulna were both successfully reduced. There is no evidence that there was any resulting deformity. The defendants rely on the

¹⁵ SLUHCV2011/0073, delivered 31st October 2013, unreported.

case of Sandra Ann-Marie George and submit that the sum of \$4,500.00 should be awarded.

[35] The decisions have made it clear that damages for pain and suffering may be awarded in survival actions, **'although such damages will generally be small as death so often follows quickly upon the injury and, even where it does not, may be preceded by a period of unconsciousness relieving the victim of any physical pain.'**¹⁶

[36] In the case of Anna Modeste et al v Glen Jacobs et al,¹⁷ an award of \$1,500.00 was made where the deceased died the day after the injuries were sustained.

[37] Let us examine the circumstances in the case at bar. There is no denying that Mr. Cherubin suffered some serious injuries. Mr. Cherubin was conscious when he arrived at hospital and complained of pain to his hip. That was successfully resolved with surgery as the medical report suggests. He was given pain medication which would suggest that his pain would have been reduced or alleviated. The medical report indicates that when Mr. Cherubin was further assessed, he was noted with decreased level of consciousness and intubated immediately. Thereafter, Mr. Cherubin would have gone into cardiac arrest. He was admitted to ICU where he remained intubated until he passed away. Mr. Cherubin died after being at hospital for about 26 hours most of which time he was intubated. There is no evidence of how Mr. **Cherubin's** decreased level of consciousness would have affected his response to pain. In these circumstances, I agree that an award of \$150,000.00 is unreasonable. Having taken into consideration the circumstances of this case and the cases in the jurisdiction, I am of the view that an award of \$5,000.00 is reasonable and I so award.

¹⁶ Mc Gregor on Damages, 15th ed., para. 1609.

¹⁷ See fn.8.

D. Damages for the Lost Years (Loss of Earnings)

- [38] In calculating the award for loss of earnings, the loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which the job and career prospects at the time of death would suggest he was reasonably likely to achieve.
- [39] **Ms. Cherubin's** evidence is that Mr. Cherubin was employed as a driver for **Mannee's Bakery and earned a monthly salary of \$1,020.00. In support of this, a salary slip from his employer is exhibited. Ms. Cherubin's evidence is** that 90% of that sum was spent by Mr. Cherubin on household and living expenses in relation to his dependants.
- [40] Counsel, Mr. Modeste submits that Mr. Cherubin would have worked for a further 17 years given that he was 48 years at the date of the accident. He therefore submits that the award for the loss of earnings for the lost years would be \$171,360.00 discounted by 10%. The award should be \$154,224.00. Counsel relies on the case of Bertha Compton where two cases are referenced where multipliers of 15 and 14 were used and submits that the applicable multiplier should be 14.
- [41] The defendants say that the claimant is entitled to the sum of \$81,887.96. They say that the sum to be used is the net and not gross pay minus a deduction for self-maintenance with a 2% annual increase and 3% interest. They submit that the multiplicand is therefore \$7,444.36. Relying on the case of Monica Plummer et al v Conway Bay Ltd et al,¹⁸ they submit that a multiplier of 11 should be used noting that Mr. Cherubin had sickle cell which played a part in his death.

¹⁸ SLUHCV2000/0942, delivered 8th July 2003, unreported.

Analysis

[42] In the case of *Cookson v Knowles*,¹⁹ Lord Diplock established guidelines in assessing damages in fatal accident cases. As a general rule, the assessment is split into two parts, namely:

(a) Pre-trial loss which is pecuniary loss which it is estimated was already sustained from the date of death up to the date of trial. The multiplier for the pre-trial loss is the actual number of years between death and trial; and

(b) The future loss which is pecuniary loss which it is estimated they will sustain from the trial onwards. The multiplier for post-trial loss is calculated by deducting the pre-trial period of years from the multiplier.

Pre-Trial Loss of Earnings:

[43] The evidence is that Mr. Cherubin earned a net pay of \$644.31 monthly. It is the net and not gross pay that has to be used in making any assessment. That figure is subject to a 10% reduction to represent what the deceased would have spent exclusively on himself. That leaves a monthly figure of \$579.88. The period between the date of death and the date of assessment is 26 months. Therefore the award for pre-trial loss of earnings would be $\$579.88 \times 26 = \$15,076.88$.

Loss of Future Earnings (The Lost Years)

[44] There is no evidence that Mr. Cherubin would have received a salary increase annually and so I do not factor this into my assessment. The applicable multiplicand would therefore be $\$579.88 \times 12 = \$6,958.56$ annually.

[45] Mr. Cherubin was 48 years at the date of the accident. In relation to the applicable multiplier, the cases show that a multiplier of 14 or 15 would **normally be applied to someone Mr. Cherubin's age** as he would have had another 15 years to work until retirement. In the circumstances, taking into account the two years between the date of the death and the date of assessment, the applicable multiplier should be 13. I do not accept the

¹⁹ [1978] 2 All ER 604.

defendants' submission that the fact that Mr. Cherubin suffered from sickle cell should be taken into account. There is no evidence that the fact that Mr. Cherubin suffered from sickle cell in any way affected his ability to work. The fact that it is stated on the death certificate to my mind just suggests the ailments that he suffered with and is not stated as the cause of his death. Certainly, the medical report suggests that he suffered cardiac arrest and was unable to be resuscitated. The award for the lost years is therefore \$6,958.56x13=\$90,461.28.

[46] The total damages for loss of earnings would be \$105,538.16.

The Dependency Claim

[47] Article 988(2) and (10), of the Civil Code provide as follows:

“988.

(2) Where the death of a person is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect of his or her injury thereby, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony.

...

(10) For the purposes of an action brought under this article, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.”

[48] Ms. Cherubin is the widow of Mr. Cherubin. She says as his wife she depended on him for financial support and they had three daughters all of whom depended on Mr. Cherubin for financial support. The evidence of Ms. Cherubin is that Mr. Cherubin spent over 90% of his monthly salary on household and living expenses. The evidence shows that Mr. and Mrs. Cherubin had three daughters, Andrea Annalisa Cherubin who is now 23 years; Winsha Cherubin now 20 years old and Cherricca Abigail Cherubin now 9 years old. The evidence revealed that Andrea Cherubin attends nursing

school and requires \$25.00 per day and that Cherricca Cherubin requires \$20.00 per day for school.

[49] **Counsel, Mr. Modeste submits that Ms. Cherubin's evidence was that she and her husband shared the household expenses 'half half'; he paid the bills and they contributed to the groceries together. The evidence also revealed that Ms. Cherubin earned a monthly salary of between \$800.00 and \$1,200.00 and that she contributed to the household as well. Counsel suggested that the appropriate multiplicand should be 65% of Mr. Cherubin's earnings and calculates this to be \$663.00 monthly. He suggests a multiplier of 11 given that the last daughter was 7 years old at the time of Mr. Cherubin's death. The total sum claimed for dependency is \$87,516.00 (pre-trial dependency being $\$663.00 \times 12 \times 2 = \$15,912.00$ and post-trial dependency being $\$663.00 \times 12 \times 9 = \$71,604.00$).**

[50] Counsel for the defendants using the net income of Mr. Cherubin has submitted that the dependency award should be \$55,667.52. They submit that a ratio of 60:40 should be used given the evidence that the expenses were shared half half though Ms. Cherubin also said that he put most. They submit that a multiplier of 12 is reasonable given the age of the youngest daughter.

Analysis

[51] There is no dispute that Ms. Cherubin along with her daughters, Andrea and Cherricca were dependents of Mr. Cherubin at the time of his death. There is no evidence to support any assertion that Winsha was a dependent at the date **of her father's demise as she had already attained the age of 18 years at that date.**

[52] I accept the submission of Mr. Cherubin contributing 65% of his income to the household but that is to be calculated using his net salary and not the gross. In that event the applicable multiplicand would be \$418.80 monthly (being 65% of \$644.31).

[53] I also accept that the appropriate multiplier as the defendants have submitted is 12, given the age of the dependent children and the fact that Ms. Cherubin was not solely dependent on her husband but also made her contributions.

[54] The calculation for the dependency award is as follows:

(a) Pre-trial dependency is $\$418.80 \times 12 \times 2 = \$10,051.20$

(b) Post-trial dependency is $\$418.80 \times 12 \times 10 = \$50,256.00$

The total award is \$60,307.20.

Whether the claimant is entitled to damages under both article 609 and 988

[55] **It is Mr. Modeste's** submission that the claimant in this case is entitled to both awards of damages under both articles 609 and 988 notwithstanding the pronouncements of the Privy Council in *Andrina George v Eagle Air Services*.²⁰ Counsel submits that the Code is very clear that damages can be awarded under both articles and therefore until the provisions are amended, they stand and the opinion expressed in *Andrina George* cannot override the provisions of the Code.

[56] Article 609(5) provides that:

“(5) The rights conferred by this article for the benefit of the successions of deceased persons shall be in addition to and not in derogation of any right conferred on the dependants of deceased persons by the provisions of article 988, and so much of this article as relates to causes of action against the successions of deceased persons shall apply in relation to causes of action under the said article as it applies in relation to other causes of action not expressly excepted from the operation of paragraph (1) of this article.”

[57] Mr. Modeste submits that this article means that a claimant is entitled to damages under both an estate claim and a dependency claim and that the Civil Code as it stands does not allow for any reduction in any of the awards. Whilst counsel was prepared to admit that in a dependency claim, there is some overlap with the loss of earnings which may be awarded on the estate claim, he insisted that the Code just did not permit the Court to make any

²⁰ PC Appeal No. 1 of 2007.

adjustments. Mr. Modeste relied on the case of Bertha Compton in support of his submission that the current law in England has been amended to deal with double recovery in fatal accident cases and this conflicts with article 609 which clearly allows for damages to be awarded under both article 609 and 988 without one excluding or affecting the other. He cites this as a case of conflict in which the Code would prevail in accordance with article 917A of the Code.

[58] **He submits further that the Privy Council's observation** in *Andrina George* cannot override the Code and therefore the Court should make the two awards without any adjustments.

[59] Counsel for the defendants refer to the case of *Monica Plummer et al v Conway Bay Limited et al*,²¹ where Shanks J remarked that it is common ground that notwithstanding the rather difficult provision at article 609(5), it is not possible for one individual to receive overlapping damages under both articles 609 and 988.

Analysis

[60] Article 609(5) has, it would appear, been a troubling provision. Mr. Modeste interprets the provision to mean that one can get two distinct awards under article 609 (survival claim) and 988 (dependency claim) and the two do not affect or concern each other and are therefore both recoverable. I do not agree with that interpretation. Article 609 to my mind simply states that a claimant can bring a claim for both the estate and dependents of a deceased and does not have to choose one over the other. This is open to a claimant.

[61] Interestingly, in *Peter Cherry et al v Trevor Trim*²² whilst a dependency award was made, the Court notes that there was no award for loss of earnings for the lost years as no evidence had been provided to establish the **deceased's salary or the proportion of his salary** spent on himself. The issue

²¹ SLUHCV2000/0942 consolidated with SLUHCV2000/1041, delivered 8th July 2003, unreported.

²² SLUHCV2011/0073, delivered 31st October 2013, unreported.

of having to make adjustments in the survival and dependency claims simply did not arise.

[62] Mr. Modeste accepts that a dependency claim overlaps with a claim for damages for the loss of earnings for the lost years which is the point which was clearly made by the Privy Council in *Andrina George*. A court cannot allow a claimant to recover double damages. Each case must be looked at based on its own facts and circumstances. There are cases where the dependency claim would take into account not just contributions lost from a deceased's monthly income but also any payments of allowances or pension being received and in such circumstances these amounts would be allowed as they would not form part of earnings for future loss.

[63] In *Davies v Powells Duffryn Associated Co. Ltd.* (No. 2)²³ Lord MacMillan stated:

“Except where there is express statutory direction to the contrary, the damages to be awarded to a dependent of a deceased person under the Fatal Accidents Act must take into account any pecuniary benefit accruing to that dependent in consequence of the death of the deceased. It is the net loss on balance which constitutes the measure of damages.”

[64] In the present case, the dependents are also beneficiaries under the **deceased's estate and** are therefore precluded at common law from twice recovering. Therefore, the amount of the dependency awarded must be deducted from the total claim awarded under article 609 as the two amounts cannot be awarded to the dependent.

Assessment

[65] Damages pursuant to the Article 609 are assessed as follows:

- (1) Damages for pain and suffering in the sum of \$5,000.00.
- (2) Damages for loss of expectation of life in the sum of \$5,000.00.
- (3) Damages for loss of earnings in the sum of \$105,538.56.
- (4) Special damages in the sum of \$2,000.00.

²³ [1942] AC 601 at 609.

Total: \$117,538.56.

The dependency claim pursuant to Article 988 is assessed at \$60,307.20 which sum is to be deducted from the amount assessed under Article 609.²⁴

Order

[66] In the premises, judgment is entered for the claimant for the larger sum of \$117,538.56 with \$60,307.20 of that amount being paid as the dependency claim under article 988 and the balance of \$55,731.36 being awarded as damages under article 609 **for the deceased's estate for distribution on an intestacy.**

Interest

[67] In keeping with the principles laid down in the Court of Appeal decision of Martin Alphonso et al v Deodat Ramnath,²⁵ no pre-judgment interest is awarded on the total award to the date of assessment. No pre-judgment interest is awarded on the damages awarded for loss of earnings and loss of expectation of life. The interest awards are as follows:

- (a) Interest is awarded on the sum of \$5,000.00 being the damages for pain and suffering at the rate of 6% per annum from the date of service of the claim to the date of this assessment;
- (b) Interest on the sum of \$2,000.00 being the award for special damages at the rate of 3% per annum from 4th December 2016 (date of death of deceased) to the date of this assessment.
- (c) Interest is awarded on the global award of \$117,538.56 at the rate of 6% per annum from the date of this assessment to the date of payment.

Costs

[68] Prescribed costs are normally awarded to a successful party on the claim in accordance with CPR 65, Appendix B and in this case those costs would have been in the sum of \$17,192.32 in favour of the claimant. However, at the

²⁴ See the case of Triple General Contracting Company Ltd. v Hermina Spencer, St. Vincent and the Grenadines High Court Civil Appeal No. 6 of 1998 (delivered 12th April 1999, unreported).

²⁵ (1997) 56 WIR 183.

delivery of the decision on the assessment, counsel for the defendants made an application pursuant to Part 35.5 that they not be made to pay the costs of the claim on the basis that they had made an offer to settle to the claimant by letter dated 12th November 2018 in the sum of \$230,000.00 which offer was open until 14th November 2018 which was the date slated for the trial in the matter.

[69] Rule 35.5 of the Civil Procedure Rules 2000 provides:

“The general rule for defendants’ offers is that, if the defendant makes an offer to settle which is not accepted and in –

- a. the case of an offer to settle a claim for damages – the court **awards less than 85% of the amount of the defendant’s offer;**
- b. any other case – the court considers that the claimant acted **unreasonably in not accepting the defendant’s offer;**
- c. the claimant must pay any costs incurred by the defendant after the latest date on which the offer could have been **accepted without the court’s permission.”**

[70] **The Court notes that there was no written response to the defendants’ offer of** 12th November 2018 but accepts also that there were continued discussions and the amount claimed was increased to \$265,000.00 and subsequently decreased to \$149,000.00. I am of the view that the defendants seemed to have made concerted efforts to make reasonable offers. Even the lowest offer of \$149,000.00 which the defendants indicated was what the insurers thought the Court would have likely awarded is more than what this Court has determined is reasonable and has awarded on this assessment.

[71] In the circumstances, the Court considers that the defendants and claimant should each pay to the other half of the prescribed costs in the sum of \$8,596.16.

[72] **The claimant claims costs on an ‘ancillary claim’ which he says was filed** against the claimant. In the defence to the claim filed on 28th June 2017, the defendants filed an ancillary claim. The pleadings in relation to that ancillary claim are specifically against Perry Cherry. There are no pleadings relating to the claimant. After this heading, ancillary claim and the pleadings in relation to **same, the defendants state “In the Premises, as against the Claimant, the**

Defendants pray for: a declaration that FM Avril was not negligent; a declaration that the collision was caused and/or contributed to by the negligence of the deceased and/or Perry Cherry; a dismissal of the claim against the defendants; and **costs.**” **To my mind, these reliefs are consequent** upon the defence filed by the defendants and do not represent a separate claim against the claimant as there was a separate claim against Perry Cherry.

[73] In those circumstances, the submission that costs should be paid on the ancillary claim is rejected.

[74] Finally, I wish to thank counsel for their submissions in this matter.

Kimberly Cenac-Phulgence
High Court Judge

By The Court

Registrar