IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P115 of 2013

BETWEEN

PRESIDENTIAL INSURANCE COMPANY LIMITED

2nd Defendant/
Appellant

AND

MIKKI ZIMMER
(Legal Personal Representative of the Estate
Of her husband PATRICK ZIMMER, deceased)

1st Defendant

AND

ROBERT CARDENAS
(Legal Personal Representative of the Estate of
the Estate of his son JASON CARDENAS, Deceased)

Claimant/
Respondent

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
M. Mohammed, J. A.

APPEARANCES:
Mr. K Sagar for the 2nd Defendant/Appellant
Ms. M. King for the Claimant/Respondent

DATE DELIVERED: May 2nd, 2017

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

M. Mohammed,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça J.A.

1. This is an appeal from the assessment of damages arising out of the death of Jason Cardenas (the deceased). The appellant, Presidential Insurance Company Limited (herein referred to interchangeably as the appellant or the insurers), contends that the award of damages is too high and is unsupportable, having regard to the evidence.

2. On July 7th 2007, the deceased, then 34 years old, was a passenger in a motor vehicle owned and driven by Patrick Zimmer. The deceased was sitting in the front passenger seat. In the rear of the vehicle there was another passenger. They were proceeding west

along Ariapita Avenue in Port of Spain. Mr Zimmer attempted to turn south to proceed towards the Audrey Jeffers Highway when in the vicinity of the Good Health Medical Centre, the vehicle ran into the medium, which separates the southern and northern bound lanes. This caused the vehicle to "flip twice". It landed on its roof and immediately burst into flames. Mr Zimmer and the rear seated passenger were trapped in the vehicle. The deceased managed to escape the vehicle but he was in flames. Two persons came to his aid and extinguished the flames. The deceased was subsequently taken to hospital where unfortunately he later died. Mr Zimmer also died in the accident.

3. These proceedings were commenced by Mr Robert Cardenas, the father of the deceased, as the legal personal representative of the estate of the deceased (I shall hereafter refer to Mr Cardenas as the respondent or Mr Cardenas). The defendants were the legal personal representative of the estate of Mr Zimmer and the appellant, which at all material times was the insurer of Mr Zimmer's vehicle.

4. Mr Cardenas claimed in the claim form and statement of case that the accident, which resulted in the death of his son, was caused by the negligence of Mr Zimmer. He claimed against the defendants (a) general damages, (b) damages for the estate of the deceased under the provisions of the Supreme Court of Judicature Act, and (c) special damages. Mr Cardenas also claimed interest, costs and such further or other relief as to the Court may seem just.

5. The appellant filed a defence in which it denied liability but it subsequently accepted liability and the matter proceeded to the assessment of damages.

6. In brief details of the claim set out in the claim form, it was stated that the claim was brought "for the benefit of the deceased's estate" under the provisions of the Compensation for Injuries Act and the Supreme Court of Judicature Act. The claim under the Compensation for Injuries Act lies for the benefit of the dependents of the deceased (see sections 4 and 5 of that Act) and not the estate. Under the Supreme Court of Judicature Act the action survives for the benefit of the estate of the deceased (see section 27). The trial Judge was of the view that the claim under the Compensation for Injuries Act was not adequately pleaded and was defective as there was no sufficient plea of a dependency. He therefore did not assess damages under that Act and there has been no appeal from that finding. The Judge, however, assessed damages under the Supreme Court of Judicature Act.

7. The only person to give evidence at the assessment of damages was Mr Cardenas. The Judge had before him at the assessment of damages, the witness statement of Mr Cardenas, which was treated as his evidence in chief. It consisted of seven paragraphs from which two paragraphs were struck out, namely, paragraphs 6 and 7. A copy of the curriculum vitaé of the deceased, which was annexed at one of the other paragraphs of the witness statement (i.e. para 3), was also struck out. There has been no appeal from the Judge's striking out of these matters.

8. In the witness statement, Mr Cardenas set out the following:

    1. He is the father and legal personal representative of the deceased;
    2. The deceased died intestate, a bachelor and without children;
    3. The deceased was born on July 25th 1972 in London, England and was therefore 34 years old at the time of his death;
    4. He died in the motor vehicle accident referred to above from "flame burns";
    5. The deceased attended the De Montfort University in Leicester, England where he attained a Bachelor's Degree in Engineering Information Technology. He also obtained a NEBS Certificate in Management and was an APM Prince 2 Practitioner.

9. Mr Cardenas further stated in his witness statement at paragraphs 4 & 5, the following:

    4. "On January 31st 2007, the deceased incorporated JC Consulting Services Limited, an international business company existing under and by virtue of the laws of the Commonwealth of Dominica. The deceased was the director of the company and provided strategic and tactical advice in programme management services for various international companies.
    (A copy of the certificate of incorporation of the company and other documents relating to the company were annexed to the witness statement.)

    5. On March 25th 2007, the deceased entered into a Consulting Agreement with Fujitsu Transaction Solutions (Trinidad) Limited for the purpose of providing Programme Director services. The remuneration for the deceased's services was agreed between the parties to be $8,333.33USD per month plus any and all business expenses approved in advance by Fujitsu for the period March 25 2007 to September 25 2007; and for the period September 26 2007 to March 25 2008, the deceased's remuneration was agreed to be $8,916.00USD per month plus any and all business expenses approved in advance by Fujitsu. Also upon successful completion of the contract, the deceased would have been entitled to a bonus payment of up to 20%. Had the accident not occurred, the deceased would have earned at least $69,579.99USD before bonuses. A copy of the consulting agreement between Fujitsu and the deceased together with a copy of an invoice from the deceased is hereto annexed and marked 'RC5'".

10. The appellant has challenged the admissibility of the Consulting Agreement referred to at paragraph 5 of the witness statement and I will come to that later in this judgment. For the moment, however, I will summarise the meaning and effect of the agreement as is relevant to this appeal.

11. The Consulting Agreement is made between the Fujitsu Transaction Solutions (Trinidad) Limited (Fujitsu) and a company called JC Consulting Services Limited (the company) of which, from the documents annexed to paragraph 4 of the witness statement, the deceased was at the time of his death the sole shareholder and director. Contrary to what is stated in the witness statement, therefore, the Consulting Agreement is not made between Fujitsu and the deceased personally.

12. According to the agreement Fujitsu engaged the company for the purposes of providing "Programme Director services as further identified in Exhibit A". According to Exhibit A, the "terms of reference and services" are stated as follows:

    1. The Programme Director reports to the Executive Vice President, Project Management- Caribbean and is responsible for delivery of all Fujitsu project and programme management services to the Government of the Republic of Trinidad and Tobago on time, within budget and to the expected quality.

    2. The Consultant's services as Programme Director, include:

        - Strategic and tactical advice to improve Fujitsu's project and programme management capabilities and services;

        - Providing Project/Programme Management input for new business opportunities;

        - Planning projects and programmes related to Fujitsu's business with the Government of the Republic of Trinidad and Tobago (GoRTT);

- Directing all phases of Fujitsu's GoRTT Programme Management services in accordance with PM1® and Prince 2 methodologies as best practice programme management;

- Providing training and knowledge transfer for project/programme management best practices.

13. The term of the agreement was one year, from March 25th 2007 to March 24th 2008. The parties agreed to consider an extension of the agreement for such period as they may mutually agree in writing. The Consulting Agreement further provided for an early termination "for cause", which essentially was on two days' notice following the service of a notice of default, if the default was not remedied. The Consulting Agreement further provided an early termination "for convenience" on giving of thirty days' notice.

14. The remuneration payable under the agreement was as follows: for the period March 25th 2007 to September 25th 2007 a monthly sum of US$8,333.33 and from September 26th 2007 to March 25th 2008, US$8,916.00 per month. It was further provided that "upon successful completion of milestones and/or deliverable objectives to be agreed between the parties", the company would be eligible for a bonus of up to 20% of the remuneration payable every three months for the duration of the agreement.

15. Although the agreement is made between Fujitsu and the company, I do not believe that there is any dispute that the services under the Consulting Agreement on the part of the company were to be performed by the deceased. Further, as the deceased was the sole owner and director of the company it seems to me appropriate, as the parties have done in this matter, to regard the earnings of the company under the Consulting Agreement as the earnings of the deceased.

16. Mr Cardenas was cross-examined and this is the extent of his cross-examination as appears from the record of appeal.

> "I was not present when that agreement was made [referring to the Consultant Agreement]. I took no part in the negotiation for the agreement. The information I speak of here, I got from documents from my son, not from my personal knowledge. I know it was for an initial period of two years. I can't speak of anything of that agreement of my own personal knowledge."

It was therefore clear from Mr Cardenas's cross-examination that he had no personal knowledge of the Consulting Agreement or the circumstances surrounding it and that his evidence in relation to the agreement was derived from the agreement itself.

17. The Judge awarded damages under three heads, (a) funeral expenses, (b) loss of expectation of life; and (c) loss of earnings in respect of the lost years, that is to say the pecuniary benefit the deceased might have earned but for the accident.

18. In relation to the funeral expenses, the sum claimed by Mr Cardenas was conceded. In the case of loss of expectation of life the Court awarded the conventional sum of $20,000. With regard to the lost years, the Judge arrived at an annual multiplicand of US$39,600. In arriving at that figure, he had regard to the monthly sum of US$8,333.33 agreed to be paid by Fujitsu under the Consulting Agreement. The Judge noted that it "could not be guaranteed" that the deceased would be earning that sum "for the rest of his career". The Judge, however went on to state that he "has considered the deceased qualifications in making a determination". The Judge then considered that the sum shown in the Consulting Agreement was a gross figure and arrived at a net monthly figure (i.e. after tax) of US$5,000 as the monthly earnings of the deceased, had he lived. From this the

Judge deducted a further one-third for living expenses of the deceased and arrived at a monthly sum of US$3,300 or the annual sum of US$39,600 as the multiplicand. The Judge then used a multiplier of 12. In that way he arrived at the total award for the lost years of US$475,200, which is equivalent to TT$3,035,387.52 (at the conversion rate of TT$6.3879 to US$1.00 applicable at the time of the assessment).

19. The insurers have appealed. They do not challenge the awards in respect of the loss of expectation of life or funeral expenses. The insurers' challenge is directed to the award made by the Judge in respect of the lost years.

20. There is no dispute between the parties that in a claim under the Supreme Court of Judicature Act, the estate of the deceased can recover the earnings lost to the deceased for the period his working life would have lasted but for the accident. This was decided by the House of Lords in ***Gammell v Wilson [1982] AC 27***, which we have followed in this jurisdiction. Although such claims are no longer available in England, having been abolished by their Administration Act 1982, they continue to be available in this jurisdiction.

21. In assessing the claims for the lost years, the usual approach is to determine the multiplicand and the multiplier. The multiplicand is arrived at by determining the net sum the deceased likely would have earned during the lost years. By the net sum, I am referring to the gross earnings of the deceased less an appropriate deduction for income tax, if any, and other statutory deductions. From the net sum, there is a further deduction

to reflect what the deceased would have likely spent on his living expenses, since that expenditure cannot constitute part of his estate.

22. In ***Harris v Empress Motors Ltd [1984]1 WLR 212***, the Court of Appeal of England considered the proper approach in calculating the sum to be deducted for living expenses. The Court of Appeal noted that the Courts at first instance adopted three approaches to the assessment of the claim for the lost years. These were (1) the same approach as when considering a dependency claim which in this jurisdiction is made under the Compensation for Injuries Act; (2) the savings approach which restricted the loss to such sums as the deceased would have saved during the lost years; and (3) the available surplus approach which took the surplus that remained after deducting from the net earnings of the deceased the amount he would have expended to maintain himself at his standard of living. The Court of Appeal favoured the available surplus approach. It was held that there is to be deducted from the deceased's net earnings the proportion that the deceased would have expended to maintain himself at his standard of living, but not including any sums spent exclusively for the maintenance or benefit of others. Where a proportion of his earnings is expenditure for the joint benefit of the deceased and others, only a "pro rata" proportion of those expenses is to be deducted.

23. The Court further noted that the constituent ingredients of living expenses are the same whether the victim be young or old, single or married, with or without dependents. Living expenses may include, among others, the cost of housing, utilities, food, necessary travel,

cost of a holiday, entertainment and social activity as well as a vehicle, if the deceased has one.

24. The ***Harris*** case has been followed in this jurisdiction.

25. Having arrived at the multiplicand, the Court must then determine the multiplier. This is arrived at in much the same way as the multiplier in the case of a claim by a living claimant for loss of future earnings. The Court must therefore consider the years the deceased might have worked but for his early demise and make an appropriate adjustment for accelerated payment of a capital sum that would ordinarily have been earned over a period of years and for life's imponderables, both good and bad.

26. It is fair to say that this is essentially the approach adopted by the trial Judge. The appellant's challenge to the award, however, is put on two main planks. First it was submitted that there are deficiencies in the pleadings of the respondent, the consequence of which is that he should recover nothing in respect of the lost years. Second, it was submitted that there was no evidence before the Judge on which he could properly make an award in respect of the lost years. I will elaborate on these submissions as I come to discuss them.

27. As to the first submission that the respondent's pleadings were defective, the appellant submitted that it was incumbent on Mr Cardenas to set out in his pleadings the heads of damages claimed but he did not do so. Accordingly, there is no claim before the Court for

the lost years and the Court, therefore, should not have .made an award in respect of a non-existent claim.

28. A similar submission was made by the insurers before the trial Judge but was not accepted by him. The Judge was of the view that the respondent's case as pleaded gave the essential information for an assessment of damages under s 27 of the Supreme Court of Judicature Act. He indicated that in respect of the claim for the lost years under that Act, it is necessary for the claimant to set out the age of the deceased, his job at the time of his death, his salary and any special qualifications. He was of the view that these facts were set out in the statement of case and that it contained the essential information for an assessment of damages under the Supreme Court of Judicature Act.

29. In my view, the Judge was right not to accept to the appellant's submission.

30. Under rule 8.6(1) of the Civil Proceedings Rules, 1998, (the CPR) the claimant must include in the claim form or in the statement of case, a short statement of all the facts on which he relies. In ***Bernard v Seebalack [2010] UKPC 15 (para 16)***, it was said that the "statement of case must be short as the nature of the claim reasonably allows" and where general damages are claimed, the statement of case should identify all the heads of loss that are claimed. The purpose for doing so is to warn the defendant that any compensation will extend to that damage.

31. The Privy Council in the ***Bernard*** case, cited with approval the following from the judgment of Lord Donavon in giving the judgment of the Court of Appeal in ***Perestrello v United Paint Co Ltd [1969] 3 ALL ER 479,485***:

> "Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet….
> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represent out of pocket expenses or loss of earnings, incurred prior to trial, and which is capable of substantially exact calculations. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense of fairness to the defendant requires that it be pleaded….
> The claim which the present plaintiffs now seek to prove is one of liquated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed….
> …a mere statement that the plaintiffs claim "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of a wrongful act and of which the defendants are entitled to fair warning."

These observations, the Privy Council in the ***Bernard*** case said, are applicable to rule 8.6 of the CPR. The obligation to properly plead and when necessary provide particulars of the damages claimed is therefore informed by principles of fairness.

32. The damages claimed need not be particularised in the statement of case, but if they are not and the damages claimed are sufficiently pleaded, particulars may be provided by way of further information or in the form of a witness statement (see ***Bernard*** at para 27).

33. In my view the pleadings in this case were sufficient to support the claim for the lost years and warn the appellant that the claim of the respondent extended to such damage.

34. Mr Cardenas pleaded that as administrator, he was claiming damages for the estate under the provisions of the Supreme Court of Judicature Act. As the Judge noted such a claim would include a claim for the lost years. He also pleaded what the deceased was earning at the time of his death and this can only be construed as a claim by Mr Cardenas as administrator of the estate of the deceased for earnings lost by reason of the death of the deceased. He also set out the age of the deceased and his occupation.

35. In the witness statement, Mr Cardenas gave further particulars of the deceased's qualifications, his earnings, what the deceased did and was doing at the time of his death and gave particulars of the Consulting Agreement, which he disclosed. Whether there is sufficient evidence of the facts pleaded is a different issue, but in my view the pleaded facts are sufficient to support a claim for the lost years and the insurers could be in no doubt that the claim extended to such loss.

36. The other core submission of the appellant on which the challenge to the award of damages was based related to the sufficiency of the evidence before the Judge. The points taken were directed to the elements that go to the determination of the multiplicand, namely the deceased's earnings and his living expenses. It was first submitted that the Consulting Agreement is inadmissible hearsay and ought not to have been admitted in evidence. If the agreement is excluded, it was argued, there is no independent evidence as to the deceased's earnings, because it is clear on the evidence of Mr Cardenas that he had no personal knowledge of the earnings of the deceased and his evidence depended entirely on the Consulting Agreement. In those circumstances no award for the lost years can be made. Secondly it was submitted that even if the Consulting Agreement was properly

admitted, there is no evidence as to the likely earnings of the deceased after the expiration of the agreement and this would impact on the quantum of the multiplicand as it would be limited to what the deceased would have earned for the duration of the Consulting Agreement only. Thirdly, it was argued, that there was no evidence on which the Court could properly have arrived at the deduction to be made from the deceased's earnings in respect of his living expenses and, therefore, the Court could not properly arrive at the multiplicand.

37. As to the admissibility of the Consulting Agreement, it is relevant to note that there was no challenge to the authenticity of the document. It was never suggested to Mr Cardenas that the agreement was not signed by the deceased and certainly from the tenor of Mr Cardenas's witness statement, it is his evidence that it was. Neither was it suggested that the agreement was a fabrication. In short, no submission was made to this Court that the Consulting Agreement is not an authentic document.

38. The Consulting Agreement constitutes an out of court statement and whether such a statement is hearsay and inadmissible will depend on the use to which it is put. An out of court statement tendered for its truth is hearsay and is *prima face* inadmissible. Statements in a written document tendered to establish a contract between parties are, however, not hearsay. They are offered as evidence of statements made to which the law attaches duties and liabilities. The statements are relied on not as evidence of their truth, but as evidence of the making of the statements to which the law attaches duties and liabilities. It is for the Court to determine on an objective basis the legal effect of the statements. If a promise is made by A to pay B $100 for services to be performed, it is

immaterial whether A truthfully intended to pay B for his services. What is material is what are the duties and liabilities the law, on an objective basis, will attach to that statement. As was noted in ***RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh and Co KG (UK Production) (2010) UKSC 14***, by Lord Clarke in giving the judgment of the Court (at para 45):

> "The general principles are not in doubt. Where there is a binding contract between the parties, and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective statement of mind, but upon consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations…."

The Consulting Agreement is therefore evidence of statements made by the parties to the agreement upon which the court will determine on an objective basis the obligations and liabilities of the parties. In those circumstances, in my view, the Consulting Agreement is not hearsay and was properly in evidence before the Judge. I have outlined earlier in this judgment the meaning and effect of the agreement (see paras. 11-14).

39. With respect to the sufficiency of the evidence I will first consider counsel's submissions as it relates to the evidence of the earnings of the deceased.

40. Counsel argued that if the Consulting Agreement were properly before the court, the respondent may succeed on the claim for the lost years but that in calculating the multiplicand, the Court can only properly take into account what the deceased might have earned for the duration of the Consulting Agreement. For the period after the expiry of the agreement, it was argued, that there is no evidential basis on which the Court could

find what the deceased might have earned during the lost years. It was contended that the respondent should have led evidence of the employment history of the deceased and his earnings. In the absence of such evidence, it was argued that evidence should have been led as to what someone with the qualifications of the deceased might have earned and the regularity of employment of such a person. With such evidence the Court could have made a finding as to the deceased earnings after the Consulting Agreement expired but could not do so only on the strength of the Consulting Agreement.

41. The respondent might have led evidence as suggested by counsel, but the issue is not what evidence the respondent failed to produce but whether the evidence led was sufficient for the Court to arrive at a determination of Mr Cardenas's claim for the lost years.

42. In order for the Court to do so, as I mentioned, the first step is to determine what the deceased might have earned during his lifetime but for his accident. In a case where the victim had a long history of steady employment by the time of his death, there could be no objection to the Court taking his earnings at the time of his death to arrive at the multiplicand. The Court draws an inference on the basis of that evidence on a balance of probability that the victim would have continued in that employment and earning the salary attached to such employment. It is, of course, not a certainty that he would have done so as he might have lost his job or suffered an ailment that might have prevented him from continuing in employment. But the Court acts on a balance of probabilities and will usually cater for such imponderables by adopting the appropriate multiplier. So even though there can be no certainty that the victim would have continued in employment, the Court will act on the evidence and draw the appropriate inferences.

43. But there need not always be evidence of a long history of employment before the Court can determine the earnings of the victim. In ***Gamell v Wilson***, supra, the House of Lords upheld awards for the lost years in cases where the victims were both young men and now setting out in life. In that case there were in fact two appeals, one involving a boy of 15 years old when he was killed and the other a young man of 22. Lord Scarman, in his speech outlined the proper approach for the assessment of damages in these cases in these terms (at p. 78):

> "The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellant in Gamell's case was disposed to argue by analogy with damages for loss of expectation of life that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a "conventional" award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the loss of earning capacity would ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award – not even a "conventional" award – should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim: it will depend on the evidence. A teenage boy or girl, however, as in Gamell's case may well be able to show either actual employment or real prospect, in either of which situations there will be an assessable claim. In the case of a young man already in employment (as was young Mr Furness), one must expect to find evidence upon which a fair estimate of loss can be made. A man, well established in life, like Mr Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based upon it."

44. It is relevant to emphasise from that quotation the following points, (a) damages should be a fair compensation for the loss suffered; (b) there is no room for a conventional award;

(c) the loss is pecuniary and it must be shown on the facts to be capable of being estimated; (d) in all cases it will depend on the evidence; (e) there will be an assessable claim where the facts show actual employment or prospects of employment; (f) in the case of a young man already in employment one would expect to find evidence upon which a fair estimate of loss will be made; and (g) there will be no difficulty in establishing the loos of earnings of a man well established in life.

45. Lord Scarman then addressed the submission in relation to the boy, who was only 15 years old when he was killed, that the evidence before the Court was too scanty or meagre to assess his claim. He said:

> "It was urged that the factual basis, upon which [the judge] proceeded, was too exiguous to enable a reasonable assessment to be made. I do not agree. The boy was 15. His father is of the Romany blood, uneducated and illiterate. His mother is a well-educated woman who, as a witness impressed the judge. She knew her boy and was confident he would make his way in the world. He never went to school, but his mother taught his three "Rs". At 14 (the year before he died), he began work. When he died, he was earning £20 a week from the sort of work he, with his Romany background, was well placed to find (fruit picking, scrap dealing and road surfacing). He was saving up for a van in order to follow the career of an antique dealer (in the footsteps of an uncle). When he died, his future was not merely matter for speculation: he had made a start, was in work, and had won the confidence of his sensible mother, who had herself educated him.

46. The House of Lords therefore concluded that there was sufficient evidence on which the earnings of the young boy could be assessed. This evidence consisted of his educational background, the work he was doing and his earnings at the time of his death. He had made a start and his future was not a matter of speculation. The evidence was considered sufficient and not too meagre or scanty to make an assessment of the earnings during the lost years.

47. Other cases dealing with loss of earnings in respect of children further demonstrate the Court's preparedness to act on exiguous material once it permits an assessment on a balance of probabilities of the child's loss of earnings or his prospects. ***Croke v Wiseman [1982] 1 WLR 71*** and ***Almond v Leeds Western Health Authority [1990] 1 Med L.R. 370*** are examples of this.

48. In the ***Croke*** case, the child was seven years old at the time of the trial. He had never worked and the Court found he would never be able to hold a job. The Court nevertheless arrived at an award for loss of earnings. The Court took into account that the child came from an "excellent home"; his father was an enterprising man, starting his own business and the mother a qualified teacher and they "continued with the family" even after injury to the child. In the light of such background it was open to the trial Judge to assume that the child would grow to up to lead a useful working life, capable of earning at least the national wage.

49. In ***Almond***, the child was approximately ten years old at the time of assessment. Like the child in ***Croke*** it was unlikely he would be able to obtain or hold a job. The Court made an award for loss of future earnings. The Court considered the child's educational background. He came from "intelligent parents both of whom achieved good positions". The Court accepted the evidence of the child's mother that she wished to see her family "obtain their educational potential" and concluded that on a balance of probability he would have undergone tertiary education either at a university or a polytechnic. On the

basis of that evidence, the Court found that the child could have qualified for and obtained a non-manual job earning one and a half times the national wage.

50. As Lord Scarman noted in the ***Gamell*** case, the assessment of damages all depends on the evidence. The children's cases above referred to, as does the ***Gamell*** case, show that once there is some evidence on which the Court can avoid speculation and determine on a balance of probability the loss of earnings, it will do so.

51. In this case, the evidence cannot be regarded as insufficient or too exiguous or too scanty to make a determination of the earnings of the deceased during the lost years. The deceased had a university qualification, namely a Bachelor's degree in Engineering and Information Technology. He had other qualifications as well as mentioned in Mr Cardenas's witness statement referred to earlier. He was the sole owner and director of a company that provided strategic and tactical advice in programme management services for various international companies. The Consulting Agreement gave particulars of what services were expected of the deceased's company and by extension the deceased and so provided evidence from which it can be inferred of what the deceased was capable of doing and there was evidence of what he was capable of earning. The deceased in this case not only made a start in life but was well away. This was ample evidence on which the Judge could have inferred what the deceased might have earned during his working life but for the accident.

52. According to the Consulting Agreement at the time of his death, the deceased was earning the sum of US$8,333.33 per month. This figure would have increased to US$8,916.00 from September 26th 2007. The average of these two figures is US$8,624.66. The Judge came to a net figure of US$5,000.

53. There is a document, among the documents annexed to Mr Cardenas's witness statement at paragraph 4, that indicates that the deceased's company was exempt from taxes under the laws of Dominica for a period of 20 years, from the date of its incorporation, which was in January 2007. It is fair to say that although the income of the company would be exempt from tax under the laws of Dominica that income earned by the company in this jurisdiction would not be tax exempt, more so in the hands of the deceased. It was, therefore, appropriate, as the Judge did, to deduct an amount for taxes. At the time of the death of the deceased and up until December 31st 2016, the tax rate was 25% on chargeable income. That was changed with effect from January 01st 2017. From that date, the tax rate is 30% for every dollar that exceeds one million dollars of chargeable income per annum. The rate of 25% remains in place for chargeable income below one million dollars (see Finance (No. 3) Act 2016). If a 25% deduction is made to the average monthly income, which is the applicable rate at the time of the assessment, this would result in a net figure of US$6,468.50 per month. This is significantly more than the net figure arrived at by the trial Judge. The Judge seems to have made a further deduction because, he said, there was no certainty that the deceased would earn that income for the rest of his career. In my view the better approach would have been to make an adjustment

to the multiplier. However there has been no complaint that the net figure is too low. I think for the purposes of this appeal, it is sufficient for me to say there is sufficient evidence on which the Judge could have come to a determination of the earnings of the deceased during the lost years, even if the net figure he arrived at might be generous so far as the defendants are concerned.

54. The other submission of the appellant that was made as it related to the multiplicand, was, as I have mentioned earlier, with respect to the deduction made for the living expenses of the deceased. The Judge made a one-third deduction from the net income of the deceased to arrive at his living expenses or in other words what the deceased would have spent to maintain himself at his standard of living. The Judge in that regard referred to ***Harris*** and to ***White v London Transport Executive [1982] Q.B. 489***.

55. So far as the Judge so directed himself there can be and has been no objection. As regards the one-third deduction, which the Judge arrived at, as representing the deceased living expenses, he noted that although the "one-third deduction is often made" the Courts have sometimes applied a higher deduction. He however, did not think a higher deduction was merited. He noted:

> "The deceased had been a single man with his own company earning relatively a lot of money. The court reasons that it is likely he would have had a large surplus. In the circumstances, the court sees nothing that could warrant the deduction of a larger sum for living expenses."

56. The statement of the Judge that a one-third deduction is often used is not incorrect. The basis for the one-third deduction seems to be founded on the judgment of O'Connor LJ in the ***Harris*** case where he said:

> "In the course of time the courts have worked out a simple solution to the similar problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependants are wife and children. In times past the calculation called for tedious enquiry as to how much housekeeping money was paid to the wife, who paid how much for the children's shoes, etc. This has all been swept away and modern practice is to deduct a percentage of the net income to represent what the deceased would have spent exclusively on himself. The percentages have become conventional in the sense that they are used unless there is striking evidence to make the conventional figure inappropriate because there is no departing from the principle but each case must depend on its own facts. Where the family unit is husband and wife, the conventional figure is 33% and the rationale for this is that broadly speaking the net income is spent as to one-third for the benefit of each and one-third for their joint benefit. Clothes is an example of several benefit, rental an example of joint benefit. No deduction is made in respect of the joint portion because one cannot buy or drive half a motor car. Part of the net income may be spent for the benefit of neither husband nor wife. If the facts be for example, that out of the net income of £8,000 p.a. the deceased was paying £2,000 to a charity the percentage would be applied to £6,000 and not £8,000. Where there are children, the deduction falls to 25% as was agreed in the Harris case."

57. O'Connor LJ, was there referring to dependency claims, which in his jurisdiction are made under the Compensation for Injuries Act. The percentage deduction for living expenses in respect of such claims had, according to O'Connor LJ, become conventional in the sense that they would be used unless there is striking evidence to make the conventional figure inappropriate. Therefore, where the deceased was living with his wife and no children, the conventional approach in the absence of striking evidence would produce the result that the deceased would have spent one-third exclusively on himself, one-third on his wife and one-third for their joint benefit.

58. In ***Jamaica Public Service Company v Morgan and Another (1986) 44 WIR 310,*** the Court of Appeal of Jamaica was reluctant to adopt the percentages outlined in ***Harris***. The Court noted that (at p.317) "the experience in the United Kingdom has plainly led the Court to adopt this mathematical formula. But we are not dealing with English conditions in this jurisdiction and I would be slow until we have gained more experience in this field to adopt a formula suited to English conditions but not yet tested in the Jamaican milieu." In this jurisdiction, no similar reservations have ever been expressed and our Courts have adopted the conventional percentages expressed in ***Harris*** and in the sense referred to by O'Connor LJ and have applied them to claims in respect of the lost years making such adjustments as the evidence might require (see for e.g. ***CV 2013-00266 Mendoza and Anor. v N&S Electrical Company Ltd. and Anor.; CV 2011-01931 Boodram v Persad and Otrs; CV 2008-01892 Alice Lee Poy John v Securiserve Ltd; CV 2009-02469 Chung Shah V Raymond and Ors. and HCA 2656/1998 Samuel v Surajh***).

59. I have no difficulty with the adoption of the conventional percentages in the sense identified in ***Harris*** in the absence of data peculiar to this jurisdiction. But in so doing, attention must be paid to the context in which the statement of O'Connor LJ was made in ***Harris***. It is relevant, therefore, to bear in mind that the conventional percentages identified by O'Connor LJ in ***Harris*** were in relation to dependency claims under the equivalent of our Compensation for Injuries Act. Under that Act, the deduction to be made from the victim's earnings in respect of living expenses is the amount he would have spent exclusively on himself. There is no deduction for expenditure made for the joint benefit of the deceased's spouse and children.

60. The question in ***Harris*** was whether in respect of claims for the lost years a similar approach should be adopted as existed in respect of dependency claims. ***Harris*** answered that in the negative in that where monies were expended for the joint benefit of the victim and others a "pro rata" deduction should be made. So that in claims in respect of the lost years, the deduction for the victim's living expenses would usually be greater than in dependency claims.

61. In ***Harris*** among the items of expenditure identified as being for the joint benefit of the victim and others is expenditure in respect of rent. It is simple to think of others such as the cost of electricity, cable, internet and a vehicle that is used by members of the family of the victim as well as the victim. In this case, where the deceased is unmarried, with no children and living on his own, such expenditure as can be identified as joint expenditure should really all be attributable to the deceased's living expenses. In that case the one-third conventional deduction identified in ***Harris*** in respect of dependency claims may translate to two-thirds in a claim in respect of the lost years when the joint benefit expenditure is taken into account. To the extent that the Judge thought that in a claim such as this the usual deduction is one-third, he fell into error.

62. While, therefore, I accept that the conventional percentages mentioned in ***Harris*** might be a convenient starting point to which adjustment may be made having regard to the evidence, it must be noted that it is a starting point from which joint benefit expenditure is not included. What is the appropriate deduction in each case depends on the evidence. I

do not, however, accept the submission of the appellant that there is insufficient evidence on which to arrive at an appropriate deduction for the deceased's living expenses. In my judgment, there is ample evidence on which the Court could have arrived at the appropriate deduction for living expenses.

63. It is of course appropriate, as it is in every case, to draw and apply whatever reasonable inferences the evidence allows. As the task of the Court is to determine the living expenses of the deceased not only at the time of his death but years into the future, the inferences to be drawn include inferences as to what would be "likely or most likely to have happened to the deceased if any of the relevant circumstances existing at his death were unlikely to remain constant" (see ***White v London Transport Executive, supra***. at p 500).

64. In ***White*** it was stated (at p 500) that:

> "The first inference which needs to be drawn, as it seems to me, if my definition of the loss in question is correct, is whether, and, if so, broadly, to what extent, the deceased prospective earnings matched the circumstances into which he had been born and was living. Because if a man born and brought up in very comfortable circumstances is a relatively low earner his earnings might not even be sufficient to meet his reasonable needs, let alone to exceed them: while, on the other hand, a man with relatively modest demands, earning a relatively a lot of money compared with that earned by most men in his circumstances, would be likely to have a large surplus."

The deceased in this case was living in Westmoorings. This an area of Trinidad in which, I think it is well known, that some of the most expensive housing in the country is located. It seems to me that it can be inferred that the deceased in those circumstances was living a

very comfortable life-style which his level of earnings was able to sustain. It is probable that the deceased would have had his own vehicle and, of course, would have expended his earnings on such things, apart from housing, as food, electricity, telephone and cable. It is also appropriate to infer that he would have expended part of his earnings on holidays, entertainment and social activities as well as necessary travel relating to the business of his company, which was domiciled in Dominica.

65. In determining the quantum of expenditure in relation to such heads of expenditure, it is appropriate for the Court to apply its own knowledge in very broad terms of the cost of living. In all the circumstances I infer that the appropriate deduction for the deceased's living expenses would be two-thirds of his net earnings.

66. As I mentioned the inferences that are appropriate to be drawn relate not just to the circumstances of the deceased at the date of his death but to what may change in the future. In this regard, the consideration would be whether the deceased would marry and start a family. If he did then it would be fair to infer that he would spend less on himself and more for the benefit of others including expenditure for their joint benefit. This could produce a lower deduction in respect of living expenses. However, in this matter, the Judge drew no inference as to whether the deceased, who was 34 years old at the time of his death, would marry and start a family. On the evidence, I see nothing that would support such an inference and I, therefore, decline as well to draw such an inference.

67. In view of the above the multiplicand is reduced to the monthly sum of US$1,666.67 (US$5000 less two thirds or the sum of US$3,333.33 for the living expenses of the deceased) or the annual amount of US$20,000.04.

68. With respect to the multiplier, the Judge came to the conclusion that a multiplier of 12 is appropriate. He considered that the deceased might have retired at the age of 55. This, in essence, meant that the Judge found that the working life of the deceased, but for the accident, was 21 years. It would follow that the older the retirement age and so the longer the working life of the deceased, the larger should be the multiplier. A retirement age of 55 seems to me to be an early age. I am not quite sure on the evidence how that retirement age was arrived at. However, as there has been no appeal or argument in relation to the multiplier I will not dwell on it.

69. In the circumstances, the appeal is allowed to the extent that the award in respect of the lost years is varied by reducing the award of the trial Judge from $3,035,387.52 to the sum of $1,533,099.07 (being US$20,000.04 x 12 and converted to TT dollars at the conversion rate of TT$6.3879 to US$1.00).

70. There shall be no order as to costs.

A. Mendonça,
Justice of Appeal