1989 March 28

(A. LOIZOU, P., DEMETRIADES, STYLIANIDES, JJ.)

MARIA CHR. PHYLACTOU, AS ADMINISTRATRIX OF THE ESTATE OF THE DECEASED ANDREAS PHYLACTOU PANARETOU LATE OF TSADA,

Appellant-Plaintiff,

v.

CHRISTODOULOS TALIOTIS,

Respondent-Defendant.

(Civil Appeal No. 7108).

Damages — Fatal accident — The Administration of Estates Law, Cap. 189, section 34 — Loss of future earnings — The basis of calculation — Review of authorities — The difficulties when the deceased was an adolescent about to embark on earning his living — In such a case the process is rather a speculation than calculation — «Living expenses» should be deducted from the earnings — What expenses qualify as «living expenses».

Damages — Fatal accident — Interference on appeal with the quantum — Principles applicable.

The deceased was born in 1969. He met his death on 26.4.83. The action was brought by his mother, the administratrix of his estate. On a full liability basis the Court awarded for loss of future earnings* £8,000 by using a multiplier of 16 and a multiplicant of £500 per year.

The complaint of the appellant is that the £500 per year is too low. The Court should have taken into consideration that the deceased might become a scientist and find employment abroad. However, no

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* This item of damages is no longer applicable in cases of deaths occurring as from 1.1.86 (See Law 157/86).

evidence was adduced to that effect Indeed the evidence on the subject before the trial Court was meagre This is not surprising

Having reviewed the case law on the point in issue, the Court

Held, *dismissing the appeal* (1) The Judge in this case had to do a rather difficult task, to assess the loss of earnings for the «lost years» on slender evidence in a speculative way The Judge would have misdirected himself if he speculated or rather guessed, as suggested by appellant

(2) This Court has not been persuaded that there are reasons justifying interference with the quantum of damages

Appeal dismissed No order as to costs

Cases referred to

Skelton v Collins (1966) 115 C L R 94,

Pickett v British Rail Engineering Ltd [1979] 1 All E R 774 (H L)

Kandalla v British Airways Board [1980] 1 All E R 341,

Gammell v Wilson [1981] 1 All E R 578,

Chrysostomou v Plovidba (1983) 1 C L R 596,

Kassinou v Efstathiou (1984) 1 C L R 77,

Davies and Another v Powell Duffryn Associated Collieries Ltd [1942] 1 All E R 657,

White and another v London Transport Executive [1982] 1 All E R 410,

Harris v Empress Motors Ltd [1983] 3 All E R 561,

Constantinou v Salachouris (1969) 1 C L R 416,

Christodoulides v Kypnanou (1968) 1 C L R 130,

Roumba v Shiakalli etc & Another (1969) 1 C L R 537,

Karavallis v Economides (1970) 1 C L R 271

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Chrysostomis, P.D.C.) dated the 16th December, 1985 (Action No. 825/83) whereby the defendant was adjudged to pay

to the plaintiff the sum of £4,800 - as damage due to the death of Andreas Ph Panaretou when he was run over by motor bus TGL 985 driven by the defendant

A Dracos, for the appellant

St Erotocritou (Mrs) for the respondent

Cur adv vult

A LOIZOU P The Judgment of the Court will be delivered by Mr Justice Stylianides

STYLIANIDES J Andreas Phylactou Panaretou of Tsada village, student of the second form of the 3rd Gymnasium of Paphos - born on 20th November 1969 - met his death on 26th April 1983, when he was run over by motor bus TGL 985 owned and driven by the respondent

This action was brought by his mother, administratrix of his estate She claimed damages for dependency under section 58 of the Civil Wrongs Law, Cap 148, and damages under section 34 of the Administration of Estates Law, Cap 189

The trial Court found that the deceased and the respondent were equally to blame for the accident

His family consisted of the father, mother, a sister and a brother At the material time the father was a builder, employed by a local firm, the mother was a peasant housewife, the sister was a draughtswoman and the brother was a student of higher education abroad There was no dependency

Under the Administration of Estates Law, Cap 189, section 34 the claim was For pain and suffering, loss of expectation of life, special damages including funeral expenses and loss of earnings for the «lost years»

The trial Judge assessed the quantum of damages on a full liability basis as follows -

(a) Nil for pain and suffering as the death was almost instant

(b) £1,000 - for loss of expectation of life

(c) £600 - special damages and funeral expenses, and

(d) £8,000 - for loss of future earnings

Having regard to the responsibility of the respondent, judgment was given for the plaintiff and against the defendant for £4,800 -

The plaintiff now appeals against the Judge's decision Her complaint relates only to the damages awarded to the estate for loss of future earnings

Section 34(2)(c) of the Administration of Estates Law, Cap 189, is a verbatim reproduction of the provisions of section 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934 The Courts in this country, following the construction placed on this statutory provision by the English Courts, did not take into consideration the element of loss of earnings for the 'lost years' in assessing damages to the estate, as it was held that the Law excluded this element as an item for damages

The High Court of Australia in *Skelton v Collins* (1966) 115, C L.R 94, departed from the English decisions and held that damages for loss of earnings are recoverable for the period during which the capacity to earn money might have been exercised, which was curtailed, because the tort cut short the expected span of life of a person

The English Courts in *Pickett v British Rail Engineering Ltd* [1979] 1 All E R 774 (H L), *Kandalla v British Airways Board* [1980] 1 All E R 341 *Gammell v Wilson* [1981] 1 All E R 578 (H L), held that, as damages for cutting short a man's working life, the «lost years», are in no sense «consequent on the death», the damages recoverable for the benefit of the estate include damages which the deceased could have recovered if living in respect of the «lost years»

The Courts of our Republic, since Independence, are not bound by decisions of any foreign Court. Nevertheless, in view of the fact that branches of our system of Law are based on the English Common Law and principles of Equity and statutory provisions are identical or similar to statutory provisions of England, reference to decisions of English Courts of Appeal and other Commonwealth countries, especially on the construction of a statute, is useful, as these decisions have great persuasive authority

The decisions in the above English cases were followed and applied by A Loizou, J , as he then was, in *Chrysostomou v Plovidba* (1983) 1 C L R 596, an admiralty action, and by the

Court of Appeal in *Kassinou v. Efstathiou* (1984) 1 C.L.R. 77, whereby the Judgment of the District Court of Nicosia was affirmed.

This element of damages was disfavoured by the Courts, both here and in England. It was pointed out that it was an unsatisfactory situation or anomaly which could be cured only by legislation. In England it was remedied by the Administration of Justice Act, 1982. In our country the Administration of Estates (Amendment) Law, 1985 (Law No. 157/85) was passed and came into force on 1st January, 1986. Section 34(2)(a) was amended to read:-

«(a) Shall not include -

(i) exemplary damages;

(ii) damages for loss of income in respect of any period after that person's death».

The problem that arises in the present case will not arise again, except in those cases where death has occurred before 1st January, 1986.

In the present case the trial Judge, having regard to the age of the deceased, used a multiplier of sixteen years. This figure did not come under any criticism by the appellant.

With regard to the multiplicand the trial Court referred to the principles governing the assessment of future loss of earnings, the evidence before him and concluded:-

«In the light of all the afore-mentioned principles and bearing in mind in this case that had the deceased not been killed, he would have been a wage earner and also bearing in mind the conditions prevailing in Cyprus as regard wage earnings, I have arrived at the conclusion that a multiplicand of £500 per annum is reasonable under the circumstances and very close to what was awarded in *Gammell* case which is a (1980) case. Thus, the Plaintiff is entitled to an amount of £8,000.- on a full liability basis».

Learned counsel for the appellant contended that the amount of £500.- was indequate and manifestly low and not warranted by

the evidence adduced as a whole. He argued that there was a reasonable expectation of pecuniary advantage by the deceased becoming a scientist and employed with good prospects outside the Republic, though no evidence was adduced to that effect. The trial Court misdirected itself by not considering that the deceased might have the prospect of employment abroad. He submitted that bearing in mind the deceased's prospects in life, education, abilities and employment, the award was an entirely erroneous estimate of damages.

On what basis should damages for the «lost years» be assessed?

The High Court of Australia in *Skelton v. Collins* (supra) held that damages should be assessed under this head, having regard to the plaintiff's pre-accident expectancy. Any assessment should, of course, take into account the vicissitudes and uncertainties of life and also the fact that if the plaintiff had survived for the full period it would have been necessary for him to maintain himself out of his earnings and, no doubt, his expenditure on his own maintenance would have increased as his earnings increased. Taylor J., adopted the «savings only» solution and all other members of the Court agreed with the Judgment of Taylor J. on this aspect of the case.

In *Pickett v. British Rail Engineering Ltd.* (supra) the House of Lords held that an injured plaintiff was entitled to recover damages for loss of earnings during the «years lost» by the reduction of his expectation of life but that those damages should be computed after taking out all his probable living expenses during that period.

With regard to the assessment of damages under the Fatal Accidents Act, Lord Wright said in *Davies and Another v. Powell Duffryn Associated Collieries Ltd.* [1942] 1 All E.R. 657, at p. 665:-

> «The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employement. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase.»

In *Pickett* (supra) Lord Wilberforce said at pp. 781-782:-

«My Lords, in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the 'lost years' to be taken account of comes closer to the ordinary man's expectations than one which limits his interest to his shortened span of life The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market has a value which can be assessed A man who receives that assessed value would surely consider himself and be considered compensated a man denied it would not And I do not think that to act in this way creates insoluble problems of assessment in other cases In that of a young child (cf *Benham v Gambling*) neither present nor future earnings could enter into the matter, in the more difficult case of adolescents just embarking on the process of earning (*cf Skelton v Collings*) the value of 'lost' earnings might be real but would probably be assessable as small

There will remain some difficulties In cases, probably the normal where a man's actual dependants coincide with those for whom he provides out of the damages he receives, whatever they obtain by inheritance will simply be set off against their own claim If on the other hand this coincidence is lacking, there might be duplication of recovery To that extent injustice may be caused to the wrongdoer But if there is a choice between taking a view of the law which mitigates a clear and recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think that our duty is clear and recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think that our duty is clear We should carry the judical process of seeking a just principle as far as we can, confident that a wise legislator will correct resultant anomalies.

My Lords, I have reached the conclusion which I would recommend so far without reference to *Skelton v Collins* in which the High Court of Australia, refusing to follow *Oliver v Ashman,* achieved the same result The value of this authority is twofold first in recommending by reference to authority (per Taylor J) and in principle (per Windeyer J) the preferable solution, and, secondly, in demonstrating that this can properly be reached by judicial process. The judgments, further, bring out an important ingredient, which I would

accept, namely that the amount to be recovered in respect of earnings in the 'lost' years should be that amount after deduction of an estimated sum to represent the victim's probable living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others, and this he would do out of his surplus».

Lord Salmon said at p. 784:-

«Damages for the loss of earnings during the 'lost years' should be assessed justly and with moderation. There can be no question of these damages being fixed at any conventional figure because damages for pecuniary loss, unlike damages for pain and suffering, can be naturally measured in money. The amount awarded will depend on the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration.

.....

I think that in assessing those damages, there should be deducted the plaintiff's own living expenses which he would have expended during the 'lost years' because these clearly can never constitute any part of his estate. The assessment of these living expenses may, no doubt, sometimes present difficulties, but certainly no difficulties which would be insuperable for the courts to resolve, as they always have done in assessing dependancy under the Fatal Accidents Acts».

Lord Diplock in *Gammell v. Wilson* (supra) said at p. 583:-

«Here was an obvious injustice which this House remedied by overruling *Oliver v. Ashman* and holding that a living plaintiff could recover damages for loss of earnings during the lost years, but that in assessing the measure of such damages there should be deducted from the total earnings the amount that he would have spent out of those earnings on his own living expenses and pleasures since these would represent an expense that would be saved in consequence of his death. In the case of a married man of middle age and of a settled pattern of life, which was the case of Mr Pickett, the effect of this deduction is to leave a net figure which represents the amount which he would have spent on providing for his wife and any other dependants, together with any savings that he might have set aside out of his income. If one ignores the savings element, which in most cases would be likely to be small, this net figure is substantially the same as the damages that would have been recoverable by the widow under the Fatal Accidents Acts: it represents the dependency. So, in the particular case of Mr Pickett's widow the result was to do substantial justice.

My Lords, if the only victims of fatal accidents were middle-aged married men in steady employment living their lives according to a wellsettled pattern that would have been unlikely to change if they had lived on uninjured, the assessment of damages for loss of earnings during the lost years may not involve what can only be matters of purest speculation. But, as the instant appeals demonstrate and so do other unreported cases which have been drawn to the attention of this House, in cases where there is no such settled pattern (and this must be so in a high proportion of cases of fatal injuries) the judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by the judicial process. Guesses by different judges are likely to differ widely, yet no one can say that one is right and another wrong.»

The difficulty, however, arises where the deceased is so young with no established earning capacity or settled pattern of life. It is true, as Lord Fraser said in the *Gammell* case (supra), that, in cases in which the deceased is a young man with no established earning

capacity or settled pattern of life, it is hardly possible to make a reasonable estimate of his probable earnings during the «lost years» and it is quite impossible to take the further step of making a reasonable estimate of the free balance that would have been available above the cost of maintaining himself throughout the «lost years», and the amount of that free balance is the relevant figure for calculating damages. The process of assessing damages in such cases is so extremely uncertain that it can hardly be dignified with the name of calculation: it is little more than speculation. Yet that is the process which the courts are obliged to carry out at present.

Lord Scarman in the same case said at p. 593:-

«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 appellants in *Gammell's* case were 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.....

The problem in these cases, which has troubled the judges since the decision in *Pickett's* case, has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in this House in *Pickett's* case. 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 his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations, based as they must be on events or contingencies of a life which he will

not live, are out of place; the judge must make the best estimate based on the known facts and his prospects at time of death. The principle was stated by Lord Wilberforce in *Pickett's* case [1979] 1 All E.R. 774 at 781-782, ...»

In *White and another v. London Transport Executive* [1982] 1 All E.R. 410, Webster J. propounded the «surplus funds» solution and said at p. 418:-

«The House of Lords have quite clearly laid down that living expenses at the very least are to be deducted from the deceased's net earnings. At the same time they have laid down that the award is not to be a conventional one. The court therefore has to measure in pecuniary terms the loss of something which is less, and appreciably less, than the deceased's prospective net earnings. What is that thing, the loss of which is to be measured? If it can be positively defined, as distinct from being deduced from what is left after certain not very precisely defined deductions are made, it seems to me that the thing, the loss of which has to be measured, is the amenity of earning more than is needed to live a reasonably satisfying and potentially enjoyable life, taking into account in each case the particular circumstances of life of the particular deceased person. Thus, for example, in this day and age the ordinary working man's life would not be regarded by him as reasonably satisfactory and potentially enjoyable if he could not afford a short holiday, a modest amount of entertainment and social activity and, depending on his particular circumstances, a car. And it seems to me, therefore, that the amenity which he is deemed to have lost is the difference between what would be the cost of maintaining himself and providing those facilities, and, his prospective net earnings; and in the cost of maintaining himself I include the cost of his housing, heating, food, clothing, necessary travelling and insurances and things of that kind, if relevant. Although it seems to me in some ways artificial to do so, for reasons I have already given it appears that he is to be treated for this purpose as an eternally single man, on the principle, I suppose, that the money he in fact spends on his family, if he has one, or if it is likely that he will have one, is money which would be available after making provision for all the matters I have referred to, to be spent in other ways if he so desired, that is to say if he were to prefer to spend it in other ways rather than to

have a family. If he is to be treated in this way it must follow that, although the House of Lords, as I have mentioned, said that the award of damages should be moderate, his notional surplus must be large enough to cover at least a not insubstantial part of the cost of maintaining a family, for although in the case of a man in the deceased's circumstances it can be regarded as probable in normal circumstances that his wife, if he were to marry, would do some paid work from time to time, it cannot be supposed that she alone would pay for the housing and maintenance of the children».

In *Harris v. Empress Motors Ltd.* [1983] 3 All E.R. 561 (C.A.), the Court of Appeal considered all previous Case-law on the matter and concluded that the future is speculative and allowance has to be made for the fact that a man may never marry, may never save a farthing. With regard to the deductions, the following principles were formulated:-

(1) The ingredients that go to make up «living expenses» are the same whether the victim be young or old, single or married, with or without dependants.

(2) The sum to be deducted as living expenses is the proportion of the victims's net earnings that he spends to maintain himself at the standard of life appropriate to his case.

(3) Any sums expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings.

The basis for the assessment of compensation for the «lost years» was adopted and applied by this Court in the cases of *Chrisostomou v. Plovidha* and *Kassinou v. Efstathiou* (supra). In these cases, however, both deceased were married adults, well settled wage earners.

The evidence before the trial Court came from the plainfiff's mother, the Headmaster of the Gymnasium and from Eleni Egglezaki, a medical practitioner. The Court referred to that evidence and took it into consideration. The evidence of the mother is that her son was a bright boy who intended to pursue higher education and that a scholarship might be given to him. The Headmaster testified that the deceased was attending the second form of the Gymnasium and he was of excellent conduct and performance. He said that it was not difficult for a person to obtain

abroad the qualifications of a teacher of secondary education though it was a costly operation; he added that a great number of qualified teachers of secondary education are for years on a waiting list for appointment

Eleni Egglezaki, a medical practitioner at Paphos Hospital, gave evidence about the years required for the study of medicine and the prospects and conditions of employment in Government Service

The evidence before the trial Judge was meagre This is not surprising

The principles upon which this Court will interfere with the assessment of damages of this kind are well settled This Court would not be justified to interfere with the findings of the trial Judge on the question of amount of damages, unless it is convinced, either that the trial Court acted upon some wrong principle of law, or that the amount awarded was so extremely high, or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled (See *Loizos Constantinou v Georghios Salachouris* (1969) 1 C L R 416, *Kynakos Chnstodoulides v. Matheos Kypnanou (1968) 1 C L R 130; Georghios Roumba v Neophytos Shiakalli etc & Another* (1969) 1 C L R. 537, *Elpidoros Karavallis v Andreas N Economiades* (1970) 1 C L R 271)

The Judge in this case had to do a rather difficult task, to assess the loss of earnings for the «lost years» on slender evidence in a speculative way The Judge would have misdirected himself if he speculated or rather guessed, as suggested by Mr. Dracos

We can dispose of this appeal, on the short ground that we have not been persuaded that there are reasons which would justify interference with the award of the trial Court in the instant case

It cannot be said, either that the Judge erred in principle, or that the figure of his assessment is so law that it must be wrong We think it was a moderate and reasonable estimate, but, even if it is considered low, it is not so low as to justify the intervention of this Court

The appeal is dismissed, but in all the circumstances of the case we make no order as to costs

Appeal dismissed.
No order as to costs.