Privy Council Appeal No 1 of 2007

Felicia Andrina George
Administratrix of the Estate of
Hughes Williams (Deceased) *Appellant*

v.

Eagle Air Services Limited *Respondent*

FROM

THE COURT OF APPEAL OF
THE EASTERN CARIBBEAN (ST LUCIA)

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 12th May 2009

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Present at the hearing:-

Lord Mance
Lord Neuberger of Abbotsbury
Sir Jonathan Parker

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[Delivered by ***Lord Mance****]*

1. The appellant, Mrs Felicia Andrina George, appeals by special leave granted on 3rd May 2007 against decisions of d'Auvergne J dated 11th December 2001 and the Court of Appeal dated 1st November 2004, in each case dismissing her claim for damages against Eagle Air Services Ltd. The claim was brought by writ issued on 6th July 1993, and relates to the death in an air crash on 12th July 1990 of Mr Hughes Williams. Mr Williams was Mrs George's common law husband and the father of her five children, the first four born in respectively 1978, 1984, 1986 and 1987 and the last born on 28th July 1990 after Mr Williams's death.

[2009] UKPC 21

2. The title of the action identifies Mrs George, correctly, as "Administratrix of the Estate of Hughes Williams deceased", but the statement of claim, as endorsed on the writ and as subsequently amended, makes clear that she was also appointed tutrix of her five children on 7th October 1992. The action is brought for the benefit both of the estate and, under the Fatal Accidents Acts, of herself and the five dependent children.

3. Mr Williams was a mechanic working for the respondents in St Lucia and his duties included servicing and repairing their aircraft. The statement of claim alleged and the defence served by the respondents admitted that Mr Williams and the pilot, Mr Allan Clavier, were killed in an air crash at Union Island involving the respondents' aircraft J6-Sl-W on 12th July 1990. The claim alleged that Mr Williams was travelling on the aircraft in the course of his employment and that his death was caused by pilot negligence, and it went on to give some particulars relating to mishandling of the aircraft as it was about to land at Union Island. (These particulars can now be seen to have been derived from an accident investigation report dated 5th September 1990 made by Mr E. A. Phillips, Director of Aviation and Inspector of Accidents).

4. The defence alleged that the aircraft had been serviced by Mr Williams and was airworthy for the flight; it alleged that Mr Williams was travelling "outside the scope of his employment, [and] was on a gratuitous ride which was never sanctioned or authorised by the Defendant"; and it further alleged that the respondents had "never authorised the Pilot to mishandle or carry out any activities which was [sic] not consistent with normal and safe landing procedure" and that "in the event such mishandling occurred, it was outside the scope of the Pilot's employment". Otherwise, the defence simply denied the allegations of negligence, and advanced no positive case to explain the crash.

5. The matter came first before d'Auvergne J on 2nd May 1996, when Mr Larcher, representing the respondents, recorded that he had just been served with the "comprehensive" report to which the Board has already made reference, and that Mr Montplaisir QC, representing Mrs George, had informed him that it was intended to put this into evidence. Mr Montplaisir conceded that there should be an adjournment, and the matter went off to 13th January 1997 when both Mrs George and Mr Williams' mother (Mrs Agatha Henry), who at that stage had also brought her own dependency action, gave evidence. The matter was again adjourned, firstly because of the absence of an original death certificate (although why this was necessary in the light of the defence is unclear) and, secondly, because the accident report "needs to be produced in court but

[the respondents] wish ... this to be done in a formal way" and were "not disposed to allow it to be put in evidence by consent". Notice was on 20th January 1997 given on behalf of the appellant of intent to produce the report as documentary evidence at the adjourned hearing on 27th January 1997. What happened is unclear, save that there was a long period of unexplained delay, at the end of which Mr Larcher sought and obtained a formal order dated 12th July 1999 that the report "be served on the Defendant" (though what that added to the previous provision to him of a copy is unclear) and for a general exchange of documents on or before 20th July 1999.

6. On 25th September 2000 the trial resumed, with Mrs George being recalled and repeating and amplifying her previous evidence. Asked about her case on negligence, she said that, not having been there, she did not know what caused the aircraft to crash or what the pilot did but that "I say the pilot was negligent because I had a dead body back". Mr Ewart Hinkson, part owner and manager of the respondents, also gave evidence, saying inter alia that the aircraft had no need for any repairs when it left St Lucia and "had to be airworthy or it would not have left St Lucia airport for Union Island". He denied that he had authorised Mr Williams to fly, or that Mr Williams's employment required him to fly, on the aircraft, but accepted that Mr Williams did not like flying.

7. The matter was adjourned for written addresses to be submitted by 10th October 2000, after which final oral submissions were made on 6th November 2000. In his written address, under the heading "Negligence", Mr Montplaisir relied heavily on the accident report. However, in his oral submissions on 6th November Mr Larcher submitted that there was no evidence of negligence, and, when Mr Montplaisir sought in reply to refer to the report, Mr Larcher objected that it "was never submitted as an exhibit", to which Mr Montplaisir submitted that it "was intended to be an exhibit". The matter was adjourned for this issue to be researched until 30th November 2000. Mr Montplaisir then applied for leave for the report to be admitted. Mr Larcher successfully resisted the application on the ground that its admission would have required it to be tendered through someone who could have been cross-examined and the application was too late and prejudicial after all the evidence.

8. On that basis, though over a year later, d'Auvergne J gave judgment dismissing the action for want of "any evidence …. as to how the accident which caused the death of the Deceased, together with Pilot Clavier occurred". In paragraph 16 of her judgment, she succinctly summarised the way in which the claim was put:

> "Learned Counsel submitted that on the admission of the Managing Director of the Defendant's Company, that pilot Clavier was in control of the plane and was carrying out the work he was employed to do; and that the accident occurred in the course of the Pilot's employment, therefore, the Defendant is liable for injury sustained by the Deceased and consequently has the responsibility to pay damages to the Deceased's estate and dependants."

9. Mrs George, by now acting in person, appealed and in her skeleton raised three issues: "1. Whether the death of Hughes Williams was caused by the negligence of the pilot and employee of [the respondents]. 2. Since the aircraft was airworthy when it took off at Vigie Airport St Lucia, whether the Doctrine RES IPSA LOQUITUR applies to his [sic] claim? 3. Whether the learned trial judge was right to refuse to admit the report of the Director of Civil Aviation, Eastern Caribbean State of [sic] Evidence Contrary to Article 32 of code of Civil Procedure". The Court of Appeal recited the course of events at trial relating to the report, concluded that "the report could not have been admitted into evidence at that eleventh hour" and in these circumstances saw no reason to fault the judge's reasoning, since "in the absence of the report there simply was no evidence of negligence to support the particulars contained in the pleadings". The Court of Appeal did not address the second issue raised in Mrs George's skeleton. Like the judge, it declined to award costs against Mrs George.

10. This is a sad case, and one in which Mrs George has reason to believe that the legal system has not operated either with the speed or with the efficacy that would be hoped. It was on any view regrettable that the position regarding the report was not brought to a head and clarified at an early stage of the trial. The Board has had some doubt whether the proper inference to be drawn from the course of procedural events at trial may not have been that the report was effectively accepted as part of the trial material, or that that there was at least a sufficiently excusable misunderstanding about this to justify some further indulgence to a plaintiff whose claim might otherwise fail in its entirety. But, on the whole, the Board does not feel that it can or should go behind the considered decisions of both courts below, which have resulted in the exclusion of the report.

11. Mr James Guthrie QC and Mr Daniel Lewis, who at the Board's invitation and with the support of Messrs. Charles Russell, were good enough to provide some assistance to Mrs George's case pro bono at an earlier stage of the appeal to the Board, mentioned as one among a number of possibilities that the report might have been admissible as a

public document. However the Board rather doubts that. Even if the maker had been produced, much of what he reported might have proved objectionable on the ground that he was himself only reporting on the basis of hearsay. On the other hand, it might have been possible, given appropriate notice, either to lay a proper basis for the admission of any such hearsay or to obtain and produce other admissible evidence, whether oral or written, to confirm it. But none of this was done.

12. That is not however the end of the matter. There remains the second issue raised by Mrs George's skeleton in the Court of Appeal, that of res ipsa loquitur. The maxim is discussed in Shawcross and Beaumont's Air Law in Chapter VII at paragraphs 50 to 65, where it is stated that, in cases, like the present, where the Warsaw system is not suggested to apply, "the maxim is potentially of great importance owing to the difficulty of discharging the burden of proof in aviation cases". Shawcross and Beaumont note that the perils of air flight have in the past led to reluctance to apply the maxim to air crashes, but cite a considerable number of more recent cases in which it has been held applicable, and quote a statement of the United States Federal Court of Appeals in *Higginbotham v. Mobil Oil Corpn* 545 F 2d 422 (5th Cir, 1977):

> "Major improvements in design and manufacturing technology, in pilot training and in ground control, communications, and navigational aids, among other things, have combined to give air travel an estimable safety record ….. Logic, experience and precedent compel us to reject the argument that airplane crashes ordinarily occur in the absence of default by someone connected with the design, manufacture, or operation of the craft".

13. In the Board's view, the same considerations here apply to justify the invocation and application of the maxim. The basis for its application is in fact well laid by paragraph 16 of d'Auvergne J's judgment, quoted in paragraph 8 above. This was the respondents' aircraft, their flight and their pilot. Aircraft, even small aircraft, do not usually crash, and certainly should not do so. And, if they do, then, especially where the crash is on land as here, it is not unreasonable to suppose that their owner/operators will inform themselves of any unusual causes and not unreasonable to place on them the burden of producing an explanation which is at least consistent with absence of fault on their part. The respondents have in fact never suggested or attempted to suggest any explanation of the accident or any reason preventing them giving an explanation. In the Board's opinion, they have in the result failed to displace the inference of negligence which in the circumstances results from the crash itself.

14. On that basis Mrs George's claim should have succeeded. The contention that Mr Williams was a joy-rider appears to the Board misconceived. He must have been on board this small aircraft with the pilot's consent, as Mr Hinkson accepted. He did not like flying, so that it is unlikely that he asked to fly - just as it is unlikely that the pilot would have asked him to fly - without some cause, probably related to the machine's operation albeit now unknowable. But, even if one supposes that Mr Williams was a joy-rider, the Board considers that a duty of care was still owed to him, in the same way as to anyone else on board. The aircraft was on any view being piloted on the respondents' business. (The plea in the defence that, if the pilot mishandled the aircraft, he was acting outside the scope of his employment is patently unsustainable.) The respondents and their pilot owed a duty of care to him, like anyone else on board.

15. That leaves the question of the damages to be awarded. Mrs George emphasised that she did not seek, or want, an order remitting the matter to the High Court for damages to be assessed. She asked the Board to assess damages. She relied on her letter to the Board dated 14th January 2009, in which she repeated figures apparently submitted to the Court of Appeal in 2004, quantifying the claim including interest at £4,493,628.80. The breakdown of this total which she put before the Board shows that it is computed on the basis of alleged basic pay and overtime earnings for the period 1990 to 2016, compounded at 5% p.a. plus interest thereon compounded at 8% p.a. Mrs George's explanation of the fact that these figures were calculated in pounds sterling was that the respondents' insurers are British.

16. These figures bear no relation to the evidence that Mrs George gave at trial, or the figures that Mr Monplaisir QC put forward on her behalf in his final written address at trial, which totalled only $282,284 (without any interest) but themselves present a number of problems. At the conclusion of the hearing before the Board on 2nd March 2009 the Board made an order for an interim payment to Mrs George in the sum of $250,000 within 21 days. The Board has concluded that it is not possible at this stage for it to reach any decision as to the final award to be made, without further information and assistance on various points, which it will identify and give both parties an opportunity to address. Messrs Charles Russell, when informing the Board in April 2007 that Mrs George did not wish to be represented formally by them or by counsel, volunteered that they would be available to assist, should the Board require the assistance of amicus curiae. The Board would therefore also propose to invite their assistance in that capacity. The issues regarding damages, including the

question whether there should be any remission to the High Court in St Lucia, will be stood over for further consideration on this basis.

17. For the reasons given, the Board will humbly advise Her Majesty that Mrs George's appeal against the decisions of d'Auvergne J and the Court of Appeal dismissing her claim as administratrix of the estate of Mr Hughes Williams and as tutrix of their five children should be allowed, and that judgment should be entered for her as appellant against the respondents for damages to be assessed; and that all questions relating to the amount of such damages and to the forum for their determination be stood over for further consideration by the Board. The parties should have 21 days to make any submissions as to the costs of the proceedings to date. In the absence of any such submissions, the respondents should pay the appellant's costs of the proceedings to date before the Board as well as in the courts below, to be assessed if not agreed.