IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2008/HCV 01916

BETWEEN	FENELLA KENNEDY-HOLLAND (Suing in her capacity as Co-Executrix of Estate, Kenneth Stanley Kennedy, deceased)	1st CLAIMANT
A N D	SHEILA GWENDOLINE KENNEDY (Suing in her capacity as near relation and Dependent of Estate, Kenneth Stanley Kennedy, deceased)	2nd CLAIMANT
A N D	JOAN WILLIAMS (Appointed as Administrator Ad Litem in respect of Estate, Henry Ellis Wisdom, deceased pursuant to an Order of Hon. Mr. Justice Sykes made on 4th May 2009)	1st DEFENDANT
A N D	DAWN PARIS (nee, WISDOM)	2nd DEFENDANT
A N D	RONALD PARIS	3rd DEFENDANT
AND	THE ADMINISTRATOR GENERAL FOR JAMAICA (Appointed as Administrator Ad Litem in respect of Estate, Phillip Edward Wisdom, deceased pursuant to an Order of the Honourable Mr. Justice Sykes made on the 5th day of June, 2009)	4th DEFENDANT

IN OPEN COURT

Allan Wood and Amanda Wong instructed by Livingston Alexander and Levy for the claimants

Jerome Spencer instructed by Patterson Mair Hamilton for the first defendant

Paul Beswick instructed by Ballentyne and Beswick for the second and third defendants

Laverne Walter for the fourth defendant

June 29 and 30, 2009

ADMISSIBILITY OF PARAGRAPHS OF A WITNESS STATEMENT - SECTIONS 31E AND 31F OF THE EVIDENCE ACT - RULES 8.9 (3), 8.11 (3), 10.5 (6), 29.1, 29.1 (a), 29.2, 29.5 (1), (a), (c), 29.5 (2)

SYKES J.

1. An objection has been taken to a number of paragraphs in the witness statement of Mrs. Fenella Kennedy-Holland, one of the claimants and daughter of Mr. Kenneth Kennedy in this claim under the Fatal Accidents Act and the Law Reform (Miscellaneous) Provisions Act. The other claimant is Mrs. Sheila Kennedy, widow of Mr. Kennedy, the deceased. I agree with the objection taken. These are my reasons for excluding some of the paragraphs.

2. The claim in this case arose because of a collapsed wall. It is agreed that Mr. and Mrs. Ronald Paris, husband and wife and attorneys at law, occupied property located at 10 Lagoon View Walk in the parish of St. James on June 2, 2006, when the wall collapsed while Mr. Kenneth Kennedy was walking by. Unfortunately, he died from his injuries.

3. Mrs. Kennedy-Holland has given a witness statement dated June 16, 2009 and served on June 19. On June 29, she climbed the steps to the witness box. She took the oath. Identified her witness statement. Her counsel asked that it be accepted as her evidence in chief and also sought permission to amplify her statement. Before the court

could respond, an objection was taken by Messieurs Spence and Beswick. They objected to large portions of the statement on the bases, that much of what was in the statement was hearsay and not the best evidence. This precipitated lengthy submissions.

4. One may wonder why these objections were not taken before the trial. An explanation is needed. When the matter first came before me in May 2009 on an application for interim payment, it became apparent to me that there would be considerable difficulty in making that order without forming a view of the expert evidence tendered in this case. Mr. Wood at that time had submitted that the evidence was clearly in favour of his client's success and so since the other requirements were met, the court should make the order. It was by no means as clear cut as presented by Mr. Wood.

5. Rule 17.6 (3) states that a court may make an order for interim payment only if it is satisfied that if the matter goes to trial the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable). At the time the application for interim payment came before me the first and fourth defendants were not yet parties to the claim.

6. Additionally, for the application to succeed, I would be required to decide an issue of law where the facts are in dispute. This is important because the facts determine the area of law that is engaged. Also, there was conflicting expert evidence on both sides.

7. In this state of affairs, I decided that hearing the application would not be a good use of judicial time. I suggested that the parties should seek an early trial date especially in light of the fact that Mrs. Kennedy, the widow, was now over eighty years old. I took the view the parties agreed that an early trial date should be sought and hence the matter was set for June 23, 29 and 30, 2009.

8. This meant that the parties now had to make strenuous efforts to get the witness statements and other material together to meet these trial dates. Thus there was very little time for technical objections

to be taken before the trial date. This explains why the objections are being heard at trial instead of at the pretrial review or some other pretrial hearing. No fault for taking the objection now should be ascribed to the defendant because in the compressed time frame within which all were operating, it would have been extremely unlikely that they would have been able to secure a date prior to the commencement of the trial for the issue of admissibility to be resolved.

9. Additionally, any decision on admissibility taken before the trial may itself have precipitated an appeal which would have led to further delay. In all the circumstances of this case, it was better to have the issue of admissibility resolved during the trial. The rules were designed for flexibility and where the circumstances of the case dictate, then a departure from the expected path is to be expected.

Witness statements

10. Let me say that when the objection was first taken I was not in favour of them but as the submissions progressed and having examined, overnight, the relevant rules of the Civil Procedure Rules ("CPR"), the Evidence Act and the relevant case law, there is substance to the objections.

11. A large part of the problem is the way in which the witness statement was prepared. It combined opinion with allegations of fact coming directly from the witness and allegations of fact coming from other persons. Sometimes all these were combined in one paragraph or sometimes, in the same sentence. It also had exhibits attached. Part 29 of the CPR governs the preparation and deployment, at trial, of witness statements and the lesson from this case is that practitioners would do well to adhere strictly to the provisions of part 29.

12. The witness statement is nothing more than the written form of what the witness would have been able to say had the witness been giving viva voce evidence from the outset.

13. Let me begin by referring to rule 29.1 (1) which provides that the court may control the evidence to be given at the trial. Rule 29.1 (2)

gives the court power to exclude evidence that would otherwise be admissible. Rule 29.2 (1) (a) states that the general rule is that any fact which needs to be proved by evidence of witnesses is to be proved by oral evidence given in public. Rule 29, therefore, evinces a strong bias in favour of oral testimony.

14. Rule 29 also makes provision for evidence to be given by way of witness statements which, when admitted at trial, stands as the examination in chief of the witness. Rule 29.5 (1) states the things that must (not may) be in the witness statement. The relevant matters that must be in the statement that are applicable to this case are found in paragraphs (c) and (d). They read:

> *A witness statement must*
>
> ...
>
> *(c) sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary in order to identify the document;*
>
> *(d) not include any matters of information or belief which are not admissible and, where admissible, state the source of any matters of information or belief.*

15. Rule 29.5 (2) empowers the court "to order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement."

16. These provisions to which I have just referred only serve to emphasise that the preparation of witness statements must take place using the law of evidence as the guiding light. Failure to use the law of evidence as the compass when a litigant is negotiating the waters of proof may prove to be quite a hazardous enterprise as has turned out to be the case in this trial.

17. A question that arises is why does rule 29.5 (1) (c) express itself in the way that it does, that is to say, why does the rule permit only

sufficient reference to identify the document without stating the contents unless repeating the contents is necessary to identify the document? Why is it that there is no express provision that exhibits should be attached to the witness statements as is indeed expressed on other areas of the CPR, notably, rules 8.9 (3); 8.11 (3) and 10.5 (6)? It would seem to me that the reason, is as Macdonald-Bishop J. stated, speaking extra judicially, in an unpublished paper entitled "*An Examination of Some Pertinent Issues Relating to the Presentation of Evidence Within the Context of the CPR, 2002*" (June 6, 2009). The reason identified by her Ladyship was that it was not intended that exhibits should be attached to the witness statements because objection may be taken to the admissibility of the exhibits. Her Ladyship recommended and I agree that the preferred course is to keep the witness statement and the exhibit separate in the event that objection is taken to the exhibit and the objection is upheld, the risk of inadmissible evidence coming in through the witness statements is eliminated.

18. Additionally, a witness statement per se is not evidence. It does not become evidence unless and until the court makes it stand as the witness's evidence in chief (see rule 29.8 (2)). This means that a court may decide that the witness statement is not admissible as the witness' evidence in chief. It would seem to me that when rule 29.8 (2) is read along with rule 29.5 (2), it is possible that a court, at trial, may order that inadmissible material be excluded from the witness statement and on making this order, the witness statement may fall by the way side because the inadmissible material may be so extensive and so permeates the witness statement that nothing of value is left after the exclusion of the inadmissible evidence.

19. Should this occur, what happens then? Does it mean that the trial thwarted? Not necessarily. It seems to me that the court may order that the witness gives his evidence orally. This may mean that the trial takes longer. Given the premium placed by the Constitution on access to the court and the right to have one's civil rights and obligations determined (see section 20 of the Constitution), it would seem to me that it would be very rare that a litigant should be barred from attempting to establish his case if his witness statement is not

permitted to stand as his examination in chief and there is other admissible evidence that may establish the case.

20. This question of the witness statement and admissible evidence is linked to section 31E and F in this particular case. Mr. Wood contends, in the face of the objection, that the evidence in the witness statement of Mrs. Kennedy-Holland and the attached documents are admissible under either section 31E or 31F of the Evidence Act. Is this so?

The Evidence Act

21. Section 31E of the Evidence Act is as follows in the relevant parts:

> *(1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.*
>
> *(2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.*
>
> *(3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.*
>
> *(4) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if*

it is proved to the satisfaction of the court that such person –

(a) is dead;

(b) ...

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d)

(5) *...*

(6) *The court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements of notification as specified in subsection (2).*

(7) *Where the party intending to tender the statement in evidence has called, as witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the court.*

22. Section 31F states:

(1) *Subject to section 31G, a statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if in relation to*

(a) ...

(b) civil proceedings, the condition specified in
(i) subsection (2); and
(ii) subsection (4)
are satisfied

(2) The conditions referred to in subsection (1) (a) and (b) (i) are that -

(a) the document was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid;

(b) the information contained in the document was supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement;

(c) each person through whom the information was supplied received it in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid.

(3) (provision regarding twenty one days notice to other party in the case).

(4) (Right to require person who made the statement to attend).

(5) (not obliged to all witness if dead or outside of Jamaica and it is not reasonably practicable to secure his attendance)

23. Sections 31E and F are making inroads into the hearsay rule. They were inspired by sections 23 and 24 of the Criminal Justice Act of 1988. It seems to me that, subject to the actual wording of the

Jamaican legislation, English cases on the provisions are helpful though not binding.

24. Section 31E (1) is expressed in wide but not unlimited terms. To understand this provision one must have the hearsay rule in mind. Section 31E (1) makes a statement made by any person (regardless of whether that statement was made orally or in a document or otherwise) admissible for the truth of the contents of the statement in any civil proceedings once it is established that had the maker of the statement been in the witness box, he would have been able to give the statement in evidence.

25. It is vital to observe that what is admissible is the statement made and not the medium by which the statement is captured. This means that if the statement is in a document, the concern of the provision is not the document per se but the statement captured in the document. If the statement was made orally (and not captured in any document) or "otherwise" (i.e. any other medium), the statement can be repeated or given by anyone who heard it, and it can be produced from any medium that captured it.

26. The maker of the document containing the statement, or the hearer of the oral statement, or the person who is producing the statement made otherwise than orally or in a document, is not necessarily the maker of the statement for the purposes of the provision.

27. Section 31E (2) reinforce the distinction between the maker of the statement and the maker of the document another twist by making provision for notice to be given if the maker of the statement is not being called. The section does not refer to the maker of the document that contains the statement.

28. An example from a case will reinforce the point. In ***R v McGillivray*** (1993) 97 Cr. App. Rep. 232, the deceased was injured and before he died he told two police officers that the appellant was the one who injured him. The deceased did not sign the document and he did not write it. The document made by the police officers was admitted into evidence on the basis that it contained the statement of the

deceased. The appellant appealed on the ground that the document was neither written nor signed by the deceased. The Court of Appeal held that the statement of the deceased was a statement made in a document. The deceased made the statement and the police made the document.

29. On the facts of the case, the maker of the statement and the maker of the document were different persons. The dictum of Watkins L.J., however, made it clear that the maker of the statement and the maker of the document may be one and the same person. At page 237 his Lordship stated:

> *In our judgment where, as here, a person who has been injured and some time later, but before the trial of the defendant, dies after having made a statement to police officers which is recorded contemporaneously by one of them, and the deceased has signed the record as accurate, that is in law a statement made by that person in a document and is accordingly admissible in law.*

30. Therefore in giving effect to section 31E (1) the court must ask itself, "If the maker of the statement had come into the witness box, would what he said be admissible as the truth of its contents or admissible under any exception to the hearsay rule or other rule of evidence?" If the answer is yes, and the proposed evidence is not subject to exclusion under the discretionary power in section 31L then the proposed evidence is admissible. If the answer is no, then the evidence is inadmissible. I wish to point that in asking the question, the court must be alert to the possibility that the proposed evidence may be admissible, even if not coming in for the truth of its contents, under an exception to the hearsay rule. Therefore if an exception to the hearsay rule can be established then the evidence comes in; if not, it stays out.

31. Section 31E (2) requires notice of twenty one days to be given to the other parties in the case by the proponent of the evidence. Section 32E (3) permits the notified party to require the maker of the

statement to attend as witness. The statute realistically appreciated that dead persons cannot be called to the witness box and if the person has died then he cannot not be called (section 31E (5)). Section 31E (6) permits the court, in appropriate cases, to dispense with the notice requirements. Section 31E (7) reflects an understanding of the rule against self corroboration in that it provides that if the maker of the statement is called, then the statement is only admissible with the leave of the court. This makes sense, since the calling of the witness obviates the necessity to rely on the statement being put into evidence through another person.

32. It should by now become obvious that the maker of the statement must be known so that the notice and counter notice provisions can operate properly. This only underscores the point that section 31E is concerned primarily with the statement that is being proposed to be given in evidence and not the means by which the statement is to be given.

33. Applying these principles to this case, it seems to me that Mr. Wood is on good ground when he said that if it is proved that Mr. Kennedy is dead (and there is no doubt about that since this is claim under the Fatal Accidents Act), then subject to the notice requirements, the evidence to be given by Mrs. Fenella Kennedy-Holland of what her father told her would be admissible provided that it can be shown that had he been in the witness box what Mrs. Kennedy-Holland is saying that he said would be admissible as evidence of the truth of its contents or admissible by way of exception to the hearsay rule, or any other rule of evidence.

34. I need to refer at this point to section 31L which provides that a court may exclude evidence "if, in the opinion of the court, the prejudicial effect outweighs its probative value." This provision recognises that there may be instances where evidence is technically admissible but may be excluded if there is the risk that greater weight may be attached to the evidence than is warranted or that very little weight is to be given to the evidence.

35. Turning now to section 31F, similar considerations apply. Section 31F (1) speaks of a statement in a document. Note that the significant point here, as under section 31E, is not the document in and of itself but the statement in the document. The statement in the document is admissible only if the maker of the statement, had he turned up to testify, would have been able to give direct evidence of what is contained in the statement.

36. I must spend sometime here explaining what I mean, in this context, of the maker of the statement in the context of section 31F. As pointed out in ***R v Kishor Derodra*** [2000] 1 Cr. App. Rep. 41, what is admitted is not the document qua document as if it were an item of real evidence, but rather the representation of fact in the statement in the document. On this analysis, the focus is not on who made the document but rather on who made the statement in the document. The Court further pointed out that a maker of the statement must be identified because unless this is done the protection offered by the statute would be useless. The protection the court has in mind are those found in section 31E (4) and (5) and section 31F (4) and (5) of the Evidence Act (Jam). In these provisions, the proponent of the statement has to identify the person who made the statement thereby giving rise to the right of the notified party to require the maker of the statement to be called as a witness. This ties in with section 31F (6) which permits the proponent to establish that the maker of the statement cannot be called because one of the paragraphs in section 31F (6) applies.

37. It should be observed that section 31F (2) distinguishes between the information contained in the document and the maker of the document. This provision is concerned with transmission of the information through multiple persons. The chain may be long or short; it does not matter. What matters is whether the information contained in the document was supplied by a person, even if not the maker, who may be supposed to have had or reasonably be supposed to have had personal knowledge of the matters dealt with in the statement. The point is that section 31F (2) recognises that in the context of a business operation, trade, occupation or profession, a transmitter of the statement is not necessarily the maker of the

statement. The statement must be captured in a document at some point. Purely oral making and transmission of the statement cannot be admitted under section 31F.

38. The fact that the document was created or a person received the document in the course of his trade, business, profession or other occupation, is not the end of the enquiry. The court must ask whether the information contained the document was supplied by a person who may have or reasonably supposed to have had personal knowledge of the matters dealt with in the statement. In effect, this requirement is directed at the issue of reliability.

39. Admittedly, section 31F (2) (b) is not easy to interpret, if for no other reason, other than that it makes the distinction between a person who had or may be supposed to have personal knowledge of the matters dealt with in the statement on the one hand, and the maker of the statement, on the other. What then is the significance and point of this distinction? The facts of ***Derodra*** will suffice. In that case, the prosecution sought to tender a document actually created by a police officer who had entered a report in the computer data base made to him by a tenant of the appellant. The report was that a burglary had taken place at the appellant's property. This fact of the burglary became an issue because the appellant had not disclosed to his insurers that a burglary had taken place at his property. It was argued that the police officer was the maker of the statement and since he was available, he should have been called as witness. The Court of Appeal disagreed and held that the tenant was the maker of the statement. Note here that the oral report of the tenant was recorded in a document.

40. Applying section 31F (2) to ***Derodra***, what this means is that the information was supplied by the tenant who, in the particular case, was also the person who made the statement entered in the computer by the police officer. In other words, section 31F (2) appreciates that the provider of the information may also be the maker of the statement but that is not necessarily so.

41. If I were to tinker with facts of ***Derodra*** in this way, the point will be clearer. Let the chain be lengthened. Suppose, the tenant had asked A to make the report, and A did so, then A would be a person who supplied the information to the police and if A met the requirements of section 31F (2) (b) and (c), that is to say, A had personal knowledge or may reasonably be supposed to have had personal knowledge of the matters in the statement, then the statement is admissible, even though the maker of the statement would be the tenant. A, in this example is a transmitter of the statement but he is hedged around by preconditions in section 31F (2) (b) and (c). The conditions preserve the reliability of the original statement during its course of transmission to the point where it is capture in a document.

42. Let the chain be lengthened even further. Suppose that the tenant told A, and A was in fact a person who had personal knowledge of the fact as well as having received it in the course of trade, business or occupation, etc., and A told C, and C did not have knowledge and could not reasonably be supposed to have had personal knowledge of the facts, and C makes the report, then it would seem that the chain is broken and the report would be inadmissible because it was transmitted through C who would not have been within section 31F (2) (b). Also C did not received it in the course of trade, profession, business, occupation or office, then his transmission breaks the chain.

43. The upshot of all this is that sections 31E and 31F are not as helpful as some have thought. They are quite restrictive. This may explain why so few cases, civil and criminal, have sought to utilise these provisions.

44. It seems therefore that for section 31F to operate properly, it is vital that the proponent of the evidence identify which statement in the document he is seeking to have admitted and having done this he must identify the maker of that statement. After he does this, he is required to notify the other parties to the civil case, at least twenty one days before the trial, of both the statement and the maker of the statement. The notified party then, if he wishes, may notify the proponent that the maker of the statement needs to attend trial. At this point, the proponent either produces the witness or seeks to

establish, by admissible evidence (which may itself be evidence admitted under either of the provisions of the Evidence Act. See ***R v Luis Castillo*** [1996] 1 Cr. App. R. 438)).

45. For Mr. Wood to succeed in having the documents attached to the witness statements admitted in to evidence, he would need to say which statements in the documents he wished to have admitted. In instances where he wished to have the whole document admitted, that is to say, all the statements in the documents, he would need to meet the requirements of section 31F.

Application

46. I now apply all that has been said to the paragraphs objected to by the second and third defendants. The paragraphs that I have found to be admissible have not been set out in extenso. I have given a brief summary of what they say. Where the paragraphs have been excluded, I have set them out in full and given the reasons for their exclusion.

47. There are a number of paragraphs that satisfy the requirements under section 31E (1) of the Evidence Act. There is nothing to suggest that the evidence in these paragraphs are more prejudicial than probative so as to engage section 31L. Let me state as well that the distinction between admissibility and weight is important. The fact that any paragraph is admitted should not be taken to mean that I have attached or will necessarily any weight to it. This assessment will come at the end of the trial.

The admissible paragraphs in Mrs. Fenella Kennedy-Holland's witness statement

48. Paragraphs 12 to 20 are admissible because they give the working life history and achievement of Mr. Kennedy. The paragraphs, for example, tell of when he began his career as an hotelier and the various hotels with which he was employed in Europe and the West Indies. They also speak to his interest and effort to establish a Caribbean trade magazine dedicated to covering tourism.

49. Paragraph 24 is admissible because it informs of Mr. Kennedy's earnings per month. So too is paragraph 25 which provides evidence of the additional interests that Mr. Kennedy developed in his later years.

50. Paragraphs 27, 28, 32 - 35 inclusive are all admissible because they contain information relating to Mr. Kennedy's business efforts in other parts of the Caribbean as well as Jamaica. They do not contain information that he could not have given had he been in the witness box giving viva voce evidence.

The excluded paragraphs

51. I begin with paragraph 11:

> *11. At the time of his death, my late father was in excellent health and had no medical complications or conditions which prevented him from leading a normal life. In fact, his last health assessment took place just over a month before the incident, on 11th April 2006 in which it was concluded that he was of good general health. I am aware that he had two medical conditions. The first condition occurred in 2005 when he was diagnosed with large bladder calculi. However, this was surgically removed and never recurred. The second condition was ischaemic heart disease for which he had a coronary angioplasty and a coronary stent had been inserted in 2002. After the operation in 2002, he retained excellent health and had remained symptom free. My father's continued state of health was due to the fact that he kept physically active by taking daily walks with his dogs and maintained a proper diet. In this regard, I refer to Dr. Osmond Tomlinson's (my father's Physician) Medical Report dated 13th May, 2009 which is exhibited hereto in Bundle A marked*

*"**FKH7**" and which confirms the health of my father at the material time.*

52. In this paragraph, the evidence admissible is the first sentence, part of the second sentence up to the numerals "2006", and the last two sentences. Everything after "2006" up to the last two sentences is excluded. The reason for the exclusion is that the witness at this point is actually giving the contents of the medical report. This is not evidence that Mr. Kennedy could have given had he been in the witness box and as I understand the case, it is not being said that Mrs. Kennedy-Holland was seeking to put in the evidence of Dr. Tomlinson as evidence he would have given had he been called as a witness. This serves to underline the importance of identifying the maker of the statement when seeking to put in evidence under sections 31E or 31F. Unless this is done, the notified party won't know which whose statement the proponent of the evidence wishes to adduce.

53. Paragraphs 22 and 23 read:

> *22. My father was a phenomenal man who contributed greatly to development of the tourism industry in Jamaica and also internationally in those countries where he worked. After his death many persons in industry called or wrote expressing sympathy at the death of our father and several articles were published in the Gleaner detailing and paying tribute to his life, for example I exhibit hereto in Bundle A marked "**FKH8**" for identification an article published in the Gleaner Hospitality Jamaica Magazine dated Wednesday 14th June 2006; an article published in the Daily Gleaner dated Sunday 4th June 2006, two (2) days after his death and another short article published by Hospitality Jamaica, the two of which I downloaded from the internet from the Gleaner's website.*

*23. Persons who he worked with over the years in the industry also sent glowing tributes, for example in Bundle A marked "**FKH9**" for identification is a letter dated 6th June 2006 from the Honourable Mr. Karl Hendrickson, O.J, CD., who extolled my father's contribution to the tourist industry and also an e-mail from Joan McConnell is dated 8th June 2006 to my brother and myself.*

54. These two paragraphs do not purport to be evidence Mr. Kennedy was saying about himself. They are Mrs. Kennedy-Holland's opinion of her father, which of course she is entitled to have, but unfortunately, such opinions are not immediately relevant to the issues before the court. Evidence must not only satisfy the technical rules of admissibility but must also be relevant to the issues before the court.

55. I now go to paragraph 26. It reads:

26. My father had two consultancy offers that I was aware of. First of all he was expected to assume the position as consultant to plan the opening of a new hotel in Reading, formerly Reading Reef Club owned by Ian Kerr and that was expected to be a three (3) year consultancy contract remuneration package of US$100,000.00 per annum. Secondly, an offer from the Bird Group of Companies in the UK in respect of a three (3) year consultancy contract to open a five-star hotel and spa in Warwickshire and on the basis of a remuneration package in the amount of £100,000.00 per annum. This prospect came about when my father traveled to a World Travel Market in London which is the largest tourism market place show in the world and which my father attended regularly to make and to maintain contacts in the industry. When he returned to

*Jamaica he told the family about the hotel and spa that Tony Bird wanted him to plan and so this is how I became aware of this prospect. I am also aware from my father that the hotel was in its early stage of planning and this was confirmed by Mr. Bird in his letter which was addressed to my mother a few weeks after the death of my father dated 15th June 2006 on the letter head of the Bird Group of Companies Limited and which confirmed that there were discussions regarding the potential five-star hotel for Stratford-Upon-Avon. A copy of the Bird Group of Companies letter dated 15th June 2006 is exhibited hereto in Bundle A marked "**FKH10**" for identification.*

56. It appears that this paragraph was directed to the loss of future earnings. However, when the paragraph is read carefully, there is nothing to suggest that the negotiations between Mr. Kennedy and the persons who wished to retain his expertise had reached to the point where a contract was concluded between the parties. The very language of Mrs. Kennedy-Holland betrays this when she speaks of the consultancies as prospects as distinct from definitely concluded arrangements. The proposed exhibit FKH 10, a letter dated June 15, 2006, reinforces the point. In that letter, the writer speaks of trying to contact Mr. Kennedy about a consultation but he had not been able to find him. There is nothing in the letter that remotely suggests that a contract was concluded. The loss being alleged is too remote to be recoverable and so no useful purpose would be serve by admitting this evidence. This evidence may be technically admissible but at this point it is more prejudicial than probative and so I have excluded it under section 31L of the Evidence Act.

57. The next three paragraphs are paragraphs 29 - 31 which read as follows:

29. *At the time of his death, my father was to have received a 2 percent shareholding in the TBK project which as I understand from him was to be calculated as a return for sweat equity which unfortunately he never had the chance to put in. I have located my father's papers and projections on the two parks and on a review of same and based on my recollection of discussions we had in relation to this project, he anticipated earning nearly US$600,000.00 over a five year period from the value of his shares alone. He also intimated to me that he intended to buy a further 3 percent which would have made his income even higher. The financial statements and projections for TBK Investments show my father was a principal investor and had an option to purchase and acquire additional shares. He even discussed with myself and my husband the possibility of us buying some shares in the venture. I have calculated the approximate US$600,000.00 which he would have earned over five years based on his 2 percent shares for one park which amounted to US$299,200.00 and double that amount for both Marine Parks works out to US$598,400.00 which I have rounded off to US$600,000.00. Those earnings represented his value in the shares alone and exclude the possibility that my father would also have been paid a remuneration package by TBK to work on the initial stages of the setting up of the sites and to work and liaise with the various Government agencies in both Barbados and St. Lucia.*

30. *I have exhibited hereto the papers, projections and a Draft Lease which I found concerning the Marine Dolphin Park in Barbados such as the Marine Discovery, Barbados*

*Prospectus and the financial projections which my father received prior to his death, in Bundle A marked "**FKH11**" for identification. Also attached is a copy of a facsimile transmittal from Almond Hotel in Barbados from Ralph Taylor who is its chairman and managing director attaching a draft lease with my father's notations on it which was to have been made effective with TBK, a company incorporated in Barbados, for a period of time. Attached also in Bundle A marked "**FKH12**" for identification, is a copy of the relevant statutory documentation incorporating TBK Investments Inc., in Barbados relative to the development of the Marine Park in that country.*

31. *In relation to the proposed Dolphin Park in St. Lucia, I located amongst my father's business papers and documents such as the development proposal dated January 2006, submitted by TBK Investments Inc., to the planning department of the Ministry of Finance and Planning in Castries, St Lucia, which is attached hereto in Bundle A marked "**FKH13**" for identification together with a few e-mails which are dated the day my father died and the day before showing that right up until the time of his death he was working on these projects in conjunction with his partners in Barbados as the e-mail correspondence indicates.*

58. These three paragraphs are dealing with Mr. Kennedy's proposed business enterprises which were to be established in Barbados and St. Lucia. The purpose of these paragraphs was to establish what he and his estate have lost. I am afraid that the proposed damages is too remote. There is nothing to suggest that any of these projects was

approved by the relevant authorities in the mentioned countries to say nothing of generating income. The income projected from these enterprises are at best, intelligent and informed speculation, but speculation nonetheless. On the premise that this evidence was technically admissible, their prejudicial effect outweighs their probative value and so are excluded by the statutory discretion given to me under section 31L of the Evidence Act. The alleged loss is too remote to be recoverable.

59. Paragraph 36 has admissible and inadmissible evidence. I set out the paragraph in full. It reads:

> 36. *My father's plan was that he was going to make approximately net £150.00 per Yo Bro board which he planned to sell at a price of £750.00 per board. He anticipated that a hotel chain like Sandals would have taken at least 10 boards per hotel, possibly more as what Sandals liked about the idea was that it was environmentally friendly, did not have an engine or the costs associated with other water sports equipment. So using the math of 10 boards for 22 Sandals properties that amounts to 220 boards times £150.00, works out to £33,000.00 just for one chain of hotels in respect of the sale of the YoBro boards. In relation to the YoBro project and the Water Ventures joint project I exhibit hereto in Bundle A marked "**FKH14**" for identification a few samples of e-mails between Water Ventures and myself and my father about the YoBro equipment dated 6th December 2005; a letter from one of the principals from Water Ventures dated 6th December 2005; and another e-mail dated 17th January 2006 regarding the sale of the boards to the Sandals chain. Also attached to those exhibits is the Water Ventures retail price list*

for other equipment which my father had distribution rights for the Caribbean.

60. In my view, only the first two sentences of this paragraph are admissible. They have proposed evidence that Mr. Kennedy could give had he been in court. They are, therefore, admissible under section 31E (1). The rest of the paragraph is inadmissible because it is based on assumptions that are too speculative. On what basis could it be said that the Sandals hotel chain would take at least ten of these boards per each property within the chain? No contract between Mr. Kennedy and Sandals has been proffered. These paragraphs would not prove the point in issue and even if admissible I would exclude them under section 31L.

61. Now to paragraph 37. It reads:

37. My father was quite able to pursue all these prospects and in discussions with me he stated he intended to do so. He was very adept in computer technology and would work around the timelines for each project either on site or by other means. For example, in relation to his consultancy contract in Jamaica with the hotel being set up by Ian Kerr, it was expected that it would have been up and running by the time he would have been required to go to the UK in 2010 to be on site full time for the opening of the new five-star hotel spa and golf club to be constructed by the Bird Group of Companies Limited. The UK job was much bigger than his consultancy contract with Ian Kerr as it involved a large operation starting from scratch whereas in Jamaica his contract required working with companies that were already stable and established with a full complement of staff and administration. In relation to the Dolphin Parks I am aware that my father was planning to travel between Barbados and Jamaica for two years and to also

fit in two trips per year to the UK where he ultimately intended to return with my mother to concentrate on the opening of the hotel and spa for 2010. The plan as explained to me by my father was that whilst in the UK he planned to visit Barbados and St. Lucia to check on the Dolphin Parks which by that time would have been established and operational. My father was more than capable of liaising between several clients over the time frame and it is my belief that he would have been able to accept all the consultancies offered to him and to carry out the projects assigned to him based on his prior experience and projections as to how each project would operate.

62. This paragraph is Mrs. Kennedy-Holland's opinion of how she thinks her father would have been able to execute and meet his many and varied commitments. This evidence is inadmissible.

The documents

63. Many of the documents were linked to the excluded paragraphs. The documents do not stand alone and it would seem to me if the proposed evidence to which the documents relate have been excluded, then the documents would also be excluded unless they can be shown to be relevant and admissible to some issue other than the issue for which they were proffered.

64. Assuming the documents were admissible under section 31F, they are excluded on the basis of relevance in light of the fact that the paragraphs in which some of the documents are mentioned have been excluded. Secondly, the probative value of many of them would now be in question since the paragraph would now be excluded. The comments I made in respect of each excluded paragraph which made reference to a document need not be repeated. I stand by them in relation to the documents referred to in each excluded paragraph.

65. Having regard to the interpretation of section 31F, the claimant would need to say statements in the documents she is relying on and then identify the maker of those parts of the documents on which she relies. This would activate the protective notice requirements.

66. I observed that some of the documents appear to be from companies registries from jurisdictions outside of Jamaica. No evidence was put before me indicating whether those documents would be admissible in judicial proceedings in those countries and if they are, what would they be admissible to prove. These are additional reasons on which I exclude the documents that appear to be articles and memoranda of association and certificates of incorporation.

Conclusion

67. The preparation of witness statement, even in the simplest of case, does require great care. The practioner must have a full grasp of the law of evidence so that only admissible evidence is contained in the witness statement. The need for this is even more important when witness statements are being prepared with common law and statutory rules of admissibility applying at one and the same time.

68. The fact that the objection is taken very late is not a relevant consideration on the issue of admissibility. It may have costs implications for the objector but once the issue has arisen, it must be addressed and decided by the court.