ELIJAH BOB LITANA v BERNARD CHIMBA AND THE ATTORNEY-GENERAL (1987) Z.R. 26 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND SAKALA, JJ.S.
2ND JULY,1987
(S.C.Z. JUDGMENT NO.16 OF 1987)

Flynote

Evidence - Expert evidence - Desirability of - Speed of Vehicle - Whether negligent.
Tort - Negligence - Speed of vehicle - Expert evidence - Desirability of.
Damages - Law Reform (Miscellaneous Provisions) Act - Loss of expectation of life.

Headnote

The plaintiff appealed against a judgment of the High Court concerning a claim for damages arising out of a motor accident in which two young children of the appellant aged one and a half and three and a half were killed. The trial Commissioner found that the appellant must have been driving too fast because he was unable to stop or swerve around the vehicle with which he collided. In awarding damages he awarded special damages but no damages under the Law Reform (Miscellaneous Provisions) Act, Cap. 74 and found that there had been contributory negligence on the part of the appellant to the extent that he was fifty percent to blame for the accident. In consequence the damages were reduced by one half. The appellant appealed against the finding of contributory negligence and the failure to award damages for loss of expectation of life.

Held:

(i) In the absence of expert evidence as to the estimated speed of the appellant it is not competent for trial court to come to a conclusion about the speed of a vehicle.
(ii) Awards for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act should be moderate and should-be fixed regardless of the age of the deceased.

Cases cited:

(1) Benham v Gambling [1941] 1 All E.R. 7

(2) Yorkshire Electricity Board v Naylor [1967] 2 All E.R. 1
(3) Administrator - General v Lucas William Albasini (1971) Z.R. 10
(4) Attorney-General v The Administrator-General (In Re Schulle) (1987) Z.R. 1

Legislation referred to:

Law Reform (Miscellaneous Provisions) Act, Cap. 74.

For the appellant: M.Chitabo, Mwanawasa & Co.
For the respondent:. J.Mwanachongo, Senior State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal from a judgment of the High Court concerning a claim for damages arising out of a motor accident. The facts of the case were that the appellant was driving at night on the road from Ndola to Kabwe when he collided with an army truck which reversed across the road in front of him. As a result of the accident the two children of the appellant aged one-and-half and three-and-a-half years respectively, were killed and the appellant suffered a minor injury to his knee. The appellant's car was also extensively damaged.

The learned trial commissioner found that the appellant must have been driving too fast because he was unable to stop or to swerve around the vehicle with which he collided. In awarding damages he awarded special damages but no damages under the Law Reform (Miscellaneous Provisions) Act, Cap. 74, and found that there had been contributory negligence on the part of the appellant to the extent that he was fifty per cent to blame for the accident. In consequence he reduced the damages by one half. It is against the finding of contributory negligence and against the failure to award the damages for loss of expectation of life that the appellant now appeals.

Mr Chitabo, on behalf of the appellant argued that in the whole of the evidence there was no reference whatsoever to the appellant's speed, except the reply by the appellant, in an answer to the court, when he stated that his speed was between forty to forty - five miles per hour. Mr Chitabo further drew our attention to the fact that the learned trial commissioner, in dealing with the conduct of the appellant, said that he had collided with a stationary truck. We agree that this was a misdirection on the part of the learned trial commissioner in that there was ample evidence that the truck was in fact reversing across the road in front of the appellant's vehicle when the accident occurred.

Mr Mwanachongo on behalf of the State, whilst conceding that there was a misdirection by the learned trial commissioner, has maintained that the finding that the appellant was driving at an excessive speed was correct because even the speed of forty to forty - five miles per hour was excessive as indicated by the fact that one of the children received an injury to the skull as a result of which the brains were extruded. There was no attendance on behalf of the respondent at the trial and, therefore, no cross-examination of the appellant. There was no expert evidence as to the estimated speed of the appellant having regard to the damage to the vehicles and the injuries to the occupants and in the absence of such evidence, it was not competent for the trial court to come to a conclusion that the speed of the appellant's vehicle was excessive. The injury to the dead child may well have occurred had the vehicle collided

with an object at a much lesser speed. In the event we are bound to agree with Mr Chitabo that there was nothing in the evidence to indicate that the appellant was driving at excessive speed. We do not consider that a speed of forty to forty- five miles per hour at night on a main road is necessarily excessive, nor do we agree that there is any principle of law that a motorist, when driving at night must drive at such a speed that he may be able to avoid a lorry reversing across the road in front of

him without warning. It follows therefore that this ground of appeal succeeds and we find that there was no contributory negligence on the part of the appellant.

So far as the damages are concerned Mr Mwanachongo has conceded that the learned trial commissioner should have awarded damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act 9 Cap. 74, as claimed in the Statement of Claim. As the learned trial commissioner did not award these damages we agree that they should have been awarded and the appeal is allowed in this respect also. In view of the fact that they were not awarded in the court below, it is for this court to make an award under that head of damages. It appears from some of the arguments advanced to us in this case that there may be some confusion as to the nature of damages that can be awarded under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. We should make it clear that a claim under the Fatal Accidents Act is a claim on behalf of the dependants for the loss arising to them out of the death of the deceased; This usually takes the form of an award in respect of the loss of the anticipated earnings of the deceased. An award under the Law Reform (Miscellaneous Provisions) Act is for the benefit of the estate of the deceased, and includes funeral expenses and damages for the loss of the deceased's expectation of life.

The history of awards under this latter act starts with the case of *Benham v Gambling* (1). There the court of Appeal held that awards under this head should be moderate and preferably fixed, and, in that case, the award in respect of a very young child was made in the sum of 200 pounds. This figure prevailed for a number of years until in the case of *Yorkshire Electricity Board v Naylor* (2), the House of Lords set aside an award of 1,000 pounds for loss of expectation of life and in its place substituted an award of 500 pounds, with the comment that, taking into account the change of the value of money at that date, the figure was moderate and appropriate in accordance with the principles laid down in *Benham v Gambling*. Shortly after that case, Cullinan, J., delivered a judgment in the case of *Administrator - General v Lucas William Albasini* (3). In that case the learned judge, having referred to the case of *Benham v Gambling* and *Yorkshire Electricity Board v Naylor,* awarded the sum of K800 for loss, of expectation of life after taking into account the fact that the Kwacha was in a very strong position against the English pound. The latest award in Zambia of which there will be a report is in the case of *The Attorney-General v The Administrator - General* (In *Re Schulle deceased*) (4). In that case there had been an award by the High court of K1,500 for loss of expectation of life and there was no appeal either way against such an award. The date of the High Court award in that case was the 2nd of October, 1985; just a few days before the general devaluation of the Kwacha. In accordance with the practice approved by this court, the date of the trial and award is the date at which the state of inflation is taken into account.

We respectfully agree with the principles which have been laid down in the case of *Benham v Gambling and Yorkshire Electricity Board v Naylor,* that is to say, that awards for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act should be moderate and should be fixed, because, in the words of Lord Devlin in the latter case, the law is less likely to fall into disrespect if judges treat *Benham v Gambling* as an injunction to stick to a fixed standard than if they start revaluing happiness each according to his own ideas. We also agree with the comments of Viscount Dilhorne in that case that although Lord Simon in *Benham vGambling* had

said that damages should be reduced in the case of very young children he did not say that they should be set substantially less than those awarded to an adult. With respect to Lord Simon we take the view that to differentiate between a young child and an adult because an adult has passed the risks and uncertainties of childhood is drawing a fine distinction about the immeasurable value of happiness which should not be left to the opinion of different judges.

There is nothing exceptional in this case of two very young children and we see no reason to change what we consider should be a fixed award from that which was last awarded in the *Schulle* case. The award in that case was made on the 2nd October, 1985 and in this case the original award was made in May, 1984, which is the date to be taken into account when considering the effect of inflation. Neither of the awards, therefore, took into account the general devaluation of the Kwacha which took place on the 3rd October, 1985. Consequently the award in this appeal will not take such devaluation into account. Following the *Schulle* case, therefore, the awards should be K1,500 for loss of expectation of life in respect of each child.

We feel it is our duty to give guidance to courts dealing with awards after the 3rd October,1985. Without taking into account any future serious fluctuation in the value of the kwacha after the date of this judgment, (a matter which will have to be considered in future decisions), we recommend that the proper award of damages for loss of expectation of life, regardless of the age of the deceased should be K3,000.

This appeal is allowed and in addition to the damages awarded in the court below, which will now be awarded in full and will not be reduced by fifty percent in respect of contributory negligence, we award K1,500 in respect of each of the two deceased children for their loss of expectation of life make a total of an additional sum of K3,000 under that head.

Costs to the appellant.
Appeal Allowed
