DAYA RAM

v.

PENI CARA
TAITUSI LOMANI
WATISONI ROKOVEDRA

[COURT OF APPEAL, 1983 (Gould V. P., Speight J. A., Quilliam J. A.) 22, 28 March]

Damages—death—Loss of earnings—loss of expectation of life—applicability of English authorities to social situation in Fiji—Law Reform (Miscellaneous Provisions) (Death and Interest Act (Cap. 27).

The Supreme Court had awarded damages to the appellant following the death of his son. The amount awarded included sums for loss of expectation of life and loss of future earnings. Both these sums were challenged.

Held: 1. A nominal sum of $1,250 was appropriate for loss of expectation of life.
2. The Supreme Court had correctly held that damages for lost years were recoverable in Fiji but although the correct multiplier had been used the contribution which the deceased might have been expected to make to his family had been underestimated. Accordingly the quantum of damages under this head would be varied.

Cases referred to:

Flint v. Lovell (1935) 1 KB 354
Davies v. Powell Duffryn Associated Collieries Ltd. (1942) AC 601
Rose v. Ford (1937) AC 826
Benham v. Gambling (1941) AC 157
Pickett v. British Rail Engineering Ltd. (1980) AC 136
Gamell v. Wilson (1980) 2 All E.R. 557; (1981) 1 All E.R. 578 (H.L.)
White & Anr. v. London Transport Executive (1982) 1 All E.R. 410
Oliver v. Ashman (1961) 3 All E.R. 323
Fero Tabakisuva v. Sant Kumar S.C. 465/80

Appeal against quantum of damages awarded in the Supreme Court.

H. Nagin for the Appellant
J. N. Singh with *Miss A. Prasad* for the Respondents

SPEIGHT J.A.:

Judgment of the Court

This is an appeal against a judgment delivered by Mr Justice Kermode on the 13th

A October, 1982 wherein he awarded the present appellant damages totalling $5,200 in respect of the death of his son. The claim had been brought by the appellant against the respondents who were respectively the two owners and the driver of a motor vehicle which had been involved in a collision with the appellant's son Satish Kumar as a result of which he died on the 11th November 1978. The learned trial Judge had held that the 3rd Respondent as driver was totally to blame for the accident and no question arises as to that finding of liability.

B

The appeal is brought on the ground that the award was inadequate and that the evidence and the law required a much higher award. In fixing the sum at $5,200 the learned Judge made awards under headings as follows:

C

Loss of earnings in the lost years	$3,750
For loss of life	1,250
Funeral expenses	200
	$5,200

No question arises on the smallest item namely that for funeral expenses but the submissions by Mr Nagin on behalf of the appellant is that each of the other two items is insufficient.

D

The principles to be adopted by an appellate court in considering the amount of damages have been discussed in many cases and for present purposes we are content to accept the view expressed in the case of *Flint v. Lovell* (1935) 1 K.B. 354 as applied in relation to awards made by a Judge alone in the following passage from *Davies v. Powell Duffryn Associated Collieries Ltd.* (1942) A.C. 601:

E

"Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like the exercise the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer F L.J. in *Flint v. Lovell.* In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellant court is to interfere, whether on the ground of excess or insufficiency."

G

Turning to the present case we will deal first with the lesser item challenged namely loss of expectation of life. The basis of making an award for the loss sustained by the removal of a proposed predominantly happy life was established in *Rose v. Ford* (1937) A.C. 826, and in *Benham v. Gambling* (1941) A.C. 157 the House of Lords in effect decided that only moderate awards should be made under this head. Generally speaking over a number of years H a token award in England has been of the order of £400–£500. In the last few years however, commensurate with the general lessening of the value of the pound this figure has been increasing so that of very recent times sums of the order of £1,250 have been settled as a conventional figure. Mr Nagin has submitted that to keep pace with this trend a similar figure

should be awarded in Fiji and converted into local currency. He contends for an award of $1,875. We think that this is an erroneous approach because widely different factors apply from one country to another particularly in money scales. Payments under this head have been awarded in Fiji over the years again as a fairly nominal sum. The best information that Mr Nagin could give the Court was of awards in the area of $700–$800 in the 1960s and 1970s. Following the English trend it seems appropriate that increased amounts should be awarded here and it Appears to us that the sum of $1,250 awarded by the learned trial judge is a very appropriate and justifiable figure and we do not see any reason to disturb that part of the award. A B

We turn now to the larger item namely loss of earnings for what are described as "the lost years". It is essential to remember throughout one's consideration of this topic the basis upon which such an award is made. It is not an award to dependants for the loss of support which they would have been entitled to expect had there not been the death of the breadwinner. Such claims are brought in Fiji under the Compensation to Relatives Act (Cap. 29). In such cases, in this and other jurisdictions, such a claim is calculated by examining the amount of money which dependent relatives had been receiving in the past for their support and which they might legitimately have expected to have received in the future provided the deceased had had the means to make such payments and could have been expected to continue making them. This was a purely mathematical calculation of how much he would have been worth in money terms to his dependants for what ever was the expected period of dependancy. The present item of claim is quite different. It finds its justification in the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27. The claim is brought under section 2 and is for the benefit of the estate in respect of all causes of action which the deceased had at the time of his death. In the case of a person who is injured an action lies by him in tort for such damages as will represent in money terms his loss of future earnings; how he would have spent those earnings in the future is irrelevant to such a claim. By the statutory provision of Cap. 27 in the case of a man who is injured and dies the cause of action for the lost years vests in the deceased when he is injured and in the case of instantaneous death immediately before his death, and after death passes to his personal representative. Such claims are authorised in the English legislation by the Law Reform (Miscellaneous Provisions) Act 134 which is for present purpose the equivalent of the Fiji Statute. C D E F

Accordingly the claim on behalf of a deceased estate for loss of earnings for lost years is now firmly established as on the same footing as the same claim by a living person, subject to the reservation as to deduction of personal living expenses. Authorities relied upon before this Court were *Pickett v. British Rail Engineering Ltd.* (1980) A.C. 136; *Gammell v. Wilson* (1980) 2 All E.R. 557 (C.A.) and (1981) 1 All E.R. 578 (H.L.) and *White & Anor. v. London Transport Executive* (1982) 1 All E.R. 410, and are not the subject of challenge. G

In dealing with this aspect of the claim Kermode J. said:

"As far as I am aware damages for "the lost years" were first awarded in Fiji in C.A. 465 FO 1980 *Fero Tabakisuva v. Sant Kumar & Anor.* in which case I fully considered the issue. The House of Lords in *Gammell v. Wilson & Anor.; Furness & Anor. v. B & S Massey Ltd.* (1981) 1 All E.R. 578 upheld the majority of the Court of Appeal in Gammell's case where it was held that where a person died in consequence of a H

A defendant's negligence before he himself could bring a claim for negligence or prosecute it to judgment his estate was entitled to recover damages under section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 for his "lost years" for the recovery of such damages was not excluded by section 1(2)*(c)* of the Act (corresponding to section 2(2)*(c)* of the Fiji Act).

B Lord Diplock in his judgment in Gammell's case pointed out that 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 House of Lords in overruling *Oliver v. Ashman* (1961) 3 All E.R. 323 held that C 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 he would have spent out of those earnings on his own living expenses and pleasures since that would represent an expense that would be saved in consequence of death.

D I used that method as a basis for assessing damages in Fero Tabakisuva's case and I propose to do the same in this case."

Now little further quotation from authority is necessary to establish the validity of such a claim in Fiji for Mr Singh for the respondent expressly said that he conceded the "lost years" principle and only challenged the appellant's case on the question of assessment of quantum.

E

However as the matter has never been expressly before this Court, for it was not raised in an appeal taken on other grounds in *Fero Tabakisuva v. Sant Kumar,* we think it desirable to say that the view taken by Kermode J. in following *Gammell v. Wilson* was correct.

Some reference to the reported cases is however necessary on the matter in dispute—that F is, correct approach on the question of assessment.

In *Gammell v. Wilson* Lord Diplock said at p.582 at b—

" . . . . but, so long as the old rule *actio personalis moritur cum persona* applied, if he died from his injuries before he had brought his action and recovered judgment, his own G cause of action lapsed and where he left a widow or dependant relatives who had looked to him for their support it was replaced by a statutory cause of action for their benefit under the Fatal Accidents Acts 1846 to 1908. The damages recoverable under these Acts were purely compensatory and were assessed according to the jury's estimate of the economic loss which the dependants had suffered and would continue to suffer in consequence of the withdrawal of the deceased's support. It was not until passing of the H Law Reform (Miscellaneous Provisions) Act 1934 that the personal representative of the deceased had a cause of action for loss to the deceased's estate resulting from his premature death."

and at p.583 at d—

> "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."

Lord Fraser of Tullybelton at p. 588 at f—

> " . . . In such cases it is hardly possible to make a reasonable estimate of his probable earnings during the 'lost years' and it is, I think, 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."

And Lord Scarman at p. 593 at g to h—

> " . . . . 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 like to achieve."

And in *Pickett's case* (supra) Lord Wilberforce said:

> " . . . . . the amount to be recovered in respect of earnings in the 'lost' years should be 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."

The questions are:

(*a*) What is an appropriate number of years to count as lost?

(*b*) What is an appropriate estimate of his "surplus" funds over and above his personal living expenses in those years?

In the present case Kermode J. awarded $3,750 for loss of earnings using a yearly figure of $250 and a multiplier of 15 years. Neither counsel challenges the multiplier, and we agree that nothing has arisen to suggest this was an inappropriate figure.

A

The main area of contention was the figure of $250 per annum.

The deceased was 19 years of age, the eldest of 4 children and unmarried. He lived with his parents and had been required by his father, who was in poor health, to leave school and go to work to help support the family. It seems he had been working for less than a year.

B

He was employed by the Post & Telecommunication Department as a technician and his gross salary was $2,080—a net after tax of $1,598 per annum. The evidence was that he was well educated and had good prospects of advancement. He could have been selected for further technical training and if graduated risen to between $4,476 and $4,466 per annum. When these chances would have come was not stated, but he had s secure job and was C regarded as a good worker and his health was good.

He was said to be a sober and quiet living young man. He gave his father his fortnightly wages of $60 and father would give him back amounts for himself which varied—some weeks $20, sometimes less, according to the young man's needs. The learned trial Judge assessed that he contributed about $26 per fortnight to the household expenses, but we have D no evidence on which we could make an assessment of how much of that figure would be reflected in the cost of his keep and how much was for family support. Similarly the evidence is vague as to what overall amount would be given back to him by his father for personal expenses—clothing was mentioned, but with no helpful detail.

It was said by the father that he would have expected the son to marry by the time he was E 25 years, but that the expectation also was that he would stay in the family home after marriage and help the others financially especially when the father was no longer able to work. This burden may have been somewhat eased as his two younger brothers came to manhood and may have also helped the family finances. They were 7 and 9 years younger.

Much has been said in the judgments referred to about the amount of guesswork involved F in approaching this sort of problem *White's* case (supra) is a particularly interesting and relevant example of how various factors may be weighed.

We are trying to assess what his income would have been in the lost years, which is speculative enough, and also the amount which he would have spent on his own support and pleasures, increasing doubtless as he matured. But the difficulties are compounded by the G evidence given that, as is often the case in Indian families, children continue to live in the family group for many years, even in adulthood, and even after marriage. The problem therefore is even more difficult here than in the type of cases discussed in *Pickett, Gammell, Furness and White,* where it was contemplated that the deceased would have run his own home.

H One factor seems to offset another; the young man seems likely to have received increasing salary as the years went by, but on the other hand he probably would have been obliged to lead a more frugal life than perhaps would be the case of a young European male, because of the well recognised moral obligation on the young Indian male to make more than usual contributions to his family and dependants.

A

If we turn to the award we find validity in the criticism advanced by Mr Nagin. Although one must eschew too great a resort to mathematics the sum of $250 per annum used here as a base must mean that the learned Judge thought that upwards of $25 per week out of his $30 net income was being absorbed by his personal living expenses. The evidence does not appear to us to justify such a conclusion. Nor does any regard seem to have been paid to the possibility, indeed good possibility, of substantial increase in salary, nor to the fact that because of moral obligation to his family, and probably legal obligation to a future wife and children, a substantial fraction of his income would not have been spent on personal needs. In other words a proper balance does not appear to have been struck between future liabilities and future surplus. B

Although we do not think too much weight can be paid to Mr Nagin's over hopeful picture of the future, we feel that proper regard had not been paid to relevant legal principles as set out in the case references we have given, particularly to future income and liabilities and hence the award was altogether too low if these factors are taken into account. C

Giving the matter the best consideration we can and taking all contingencies into account we think that assessed over a 15 year period an average net salary of $2,500 would not be an unreasonable estimate, and at the very most two thirds of it would have been consumed on his personal needs and expenses even allowing that he might have had to find housing for himself. This would leave a balance which should properly form the basis of the estate claim of at least $833 per annum. D

A proper award in our view therefore would be— E

Loss of earnings	$12,500
Loss of life expectancy	1,250
Funeral expenses	200
	$13,950

F

The appeal is allowed and judgment is for the appellant for that sum with costs.

Appeal allowed in part.