Civil Action No. 5 of 1984

Gabriel Ika vs. Dangari Tom

Dates of Hearing: 26.8.85
04.9.85

Date of Decision: 4:9:85
Gioura for Plaintiff:
Kaierua for Defendant:

Interim Decision of Donne C.J.

This is a claim made under The Fatal Accidents Act 1846-1959 (U.K.) which by virtue of section 4 of the Custom and Adopted Laws Act 1971 has been adopted at Nauru. The claim is for special damages of $3,150 for funeral expenses and general damages in respect of the death of the daughter of the plaintiff Febrelda Ika aged 4 years who was killed as a result of being struck by a motor vehicle driven by the defendant on the main island road in the Ewa District on the 28th April, 1984.

Negligence is admitted by the defendant who alleges contributory negligence in the plaintiff for not keeping a proper look out and care for the child and negligence in the child for entering and crossing the highway in front of the vehicle.

The defendant was found guilty of negligent driving at a trial held in the Supreme Court on the 29th May, 1985 and counsel have agreed that the facts adduced at that trial be considered as evidence in this case.

In order to succeed in a claim under the Fatal Accident Acts 1846-1959, it is necessary for the claimant to show that he has lost by the death of the deceased some pecuniary benefit or a reasonable probability of pecuniary advantage. The leading case on this point is Barnett v. Cohen (1921) 2 K.B. 461. In that case, the deceased, a boy ~~about~~ almost 4 years of age was killed as result of the negligent act of employees of the defendant in allowing a pole they unloaded from a van to hit him. His father, the plaintiff, could only base his claim upon his anticipation of the future services and help of the pecuniary aid in the future of his child. In his judgment in that case, McCardie J cited the case of Taff Vale Ry. Co. v. Jenkins (1913) A.C. 1 quoting Lord Haldane at p.4:

> "The basis (of the claim) is not what has been called solatium, that is to say, damages given for injured feelings or on the grounds of sentiment, but damages based on compensation for a pecuniary loss. But then, loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them."

McCardie J at p.471 states:

> "I think that the only way to distinguish where the plaintiff has failed from the cases where he has succeeded is to say that in the former, there is a mere speculative possibility of benefit, whereas in the latter, there is a reasonable probability of pecuniary advantage. The latter is assessable. The former is non-assessable. This test, though necessarily loose seems to be the only one to apply."

After holding the father of the child had not proved damage either actual or prospective, and that the action thus failed, McCardie added:

> "The suggested heads of damage, other than the one I have dealt with (the claim for loss of pecuniary advantage) are clearly invalid. The burial expenses are not recoverable: see Clark v. London General Omnibras Co. (1906) 2 K.B. 648 ..... I sympathise with the plaintiff in the loss of his child, but I am in law to give judgment for the defendants."

Commenting on this case, the learned author of McGregor on Damages (13th Edn) p.827 para 1236 says:

> (iv) Infant children .... The situation here is the reverse of the last. On the one hand there is no clear evidence of the desire or the ability of the child to assist the parents in later years; on the other hand, the parents have all the expenses of bringing up the child ahead of them. Thus in Barnett v. Cohen the claim of a father, earning a good income but with poor health, for loss through the death of his four-year old son was dismissed: there was no reasonable probability of pecuniary benefit, only a speculative possibility. The claim, said McCardie J., "is pressed to extinction by the weight of multiplied contingencies." It is significant that after this decision further cases do not appear in the reports in respect of very young children.

In the case before me, there is no evidence whatsoever to prove any pecuniary loss or any reasonable probability of any. That is, of course, understandable, the child being only 4 years of age at the time of her death. There is, therefore, no claim that can be sustainable under the Fatal Accidents Act 1846-1959.

Mr. Gioura for the plaintiff after considering the position, submitted that there could be a claim for funeral expenses under The Law Reform (Miscellaneous Provisions) Act 1934 (U.K.) which has been adopted in Nauru and, if I understood him correctly, he requested that the case proceed on the basis of a claim under this Act. Mr. Kaierua made no submissions thereon and did no appose this submission. To allow the case to proceed under The Law Reform Act would, of course, inovlve an amendment of the proceedings. There is general power to amend a civil proceeding before judment so that the real question in issue can be dealth with - section 75 Civil Procedure Act 1972' and it seems to me that this would be a proper case to amend to enable a claim to be made under The Law Reform (Miscellaneous Provisions) Act 1934. However, there are two matters which must be considered. The first is that no form of amendment has been submitted by the plaintiff. Secondly, an action under the Act is made for the benefit of the estate of the deceased person and must be brought by the trustee of the estate. The position is the same in respect of a claim under The Fatal Accidents Act 1846-1959 but the point was not taken and in view of the inevitable consequencies of the claim, I did not raise it. However, if the claim is pursued under The Law Reform Act (supra) the question of trusttee is very important as in my view, given below, there is a claim sustainable. Consequently, if indeed the claim is pursued, it must be established that the plaintiff is the trustee of the estate of the deceased. Steps should be taken to effect this. In Nauru, intestate estate of Nauruans are not subject to the provisions of the Succession Probate and Administration Act 1976. The Nauru Land Committee has statutory jurisidiction to determine questions as to the ownership or rights in respect of land between Nauruans. (Secttion 6 Nauru Lands Committee Ordinance1956-1963) This enables the Committee to deal with the real estate of the deceased. As to personal estate, it may be that custom allows the Committee also to consider questions relating to it. I should think it also possible that custom may permit the Committee to decide the question as to who should be trustee in this case which in all probability will result in a

monetary award of damages for the beneficiaries of the personal estate of the deceased. However, I make no finding as to what is the appropriate procedure and shall hear counsel thereon when the case is resumed.

With a view to assistaing the parties who have indicated a settlement of the claim is possible, I shall deal briefly with what I believe are the principles applying to claims in respect of the death of young children brought under the provisions of The Law Reform (Miscellaneous Provisions) Act 1934 (hereinafter referred to as "the Act").

The Act provides (inter alia) that all causes of action vested in a deceased person will survive on his death (section 1(i) There are certain exceptions to this but they are irrelevant in this case which is governed by section 1(2)(c) which reads:

> "where the death of that person has been caused by the act or omission which gives rise to the cause of action, (the damages recoverable) shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funderal expenses may be included."

There is also provision that damages recoverable shall not include exemplary damages.

There would appear to be two claims available in that case; a claim for damages for the loss of expectation of life of the child and a claim for funeral expenses.

A case in point, which has been cited and followed in many other cases, is the decision of the English House of Lords in Benham v. Gambling (1941) 1 All ER. 7 relating to a claim arising out of the death of achild 2½ years old. The House of Lords made some helpful observations on the assessment of damages for loss of expectation of life. I would refer to three passages. Viscount Simon L.C. at page 12 (lines 2 to D) said:

> "In the first place, I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure is not necessarily one which can be properly attributed to a given individual. In any case, the thing to be valued is

> not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor - for example, in extreme old age the brevity of what life may be left may be relevant - but, as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume, for the purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures - all that makes up "life's fitful fever" - have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost."

and again at p.13 (lines B to C4):

> "The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained to established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate become less incalculable."

and finally on the same page he says (lines F3-8):

> "These considerations lead me to the conclusion that, in assessing damages under this head, whether in the case of a child or an adult, very moderate figure should be chosen."

The House of Lords reduced to L350 an award by the Court Appeal of L1,200. Damages more recently awarded since that case have rarely exceeded L500. In Nauru, it could be considered awards would be less, based on the local economy.

Insofar as funeral expenses are concerned, there is no doubt that normal funeral expenses here would have to take into consideration local custom. It seemed, however, to me on the evidence I have already received, an award of expenses much less that that claimed under this heading would be arrived at.

I do not propose to traverse this matter any further and again emphasise that except in the case of the claim under the Fatal Accidents case, my other observations are intended to

assist the parties in that consideration of the suggested claim under The Law Reform (Miscellaneous Provisions Act 1934). The action therefor stands adjourned for further setting down for hearing by the parties.

CHIEF JUSTICE