MARY PATRICIA SOKO (Suing as next friend of the minor child PRISCA MWANZA) v THE ATTORNEY - GENERAL (1989) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, AG. J.S., AND CHIRWA, J.S.
13TH SEPTEMBER AND 1ST NOVEMBER, 1989
(S.C.Z. JUDGMENT NO.12 OF 1989)

Flynote
Tort - damages for personal injury - quantum of damages - circumstances when an appellate court can interfere - test for measuring damages for physical injury

Headnote
The plaintiff, an eleven-year-old child on whose behalf this action was brought, was shot and seriously injured by a police officer who was acting in the course of his employment and for whose action the defendant is answerable. By the terms of a consent judgment on liability, the defendant agreed to pay damages to be assessed in respect of the negligent and reckless discharge of a firearm by the defendant's servant, employee or agent aforesaid. The damages were assessed by a district registrar and it is against the award of K30, 000 as such damages that the appellant appealed.

Held:
(i) An appellate court will only interfere with the judgment of the court below on grounds which include errors of law or fact and awards which are inordinately high or inordinately low so as to be an erroneous estimate of the awardable damages.
(ii) The test for measuring, in money, the compensation to be accorded a given amount of physical pain or mental suffering should be what the common man in Zambia would regard as a fair sum.

Cases referred to:
1. Corrigan v Tiger and another (1981) Z.R. 60
2. Attorney -General v Kaleya (1982) Z.R. 1
3. West v Shephard (1964) A.C. 236
4. Miller v Attorney-General (1983) Z.R. 66
5. Attorney -General v Mwiinde S.C.Z. Judgment no. 5 (1987)
6. Daish v Wauto (1972) 2 Q.B. 252
7. United Bus Company of Zambia Ltd v Shanzi (1977) Z.R. 397

For the Appellant: L. P. Mwanawasa,. Mwanawasa and Company.
For the respondent: J. Mwanachongo, Senior State Advocate.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court

For convenience, we shall refer to the child Prisca Mwanza on whose behalf the action was brought by the appellant, her mother and next friend as the plaintiff. The respondent will be called the defendant. The plaintiff was born on 29th April, 1973. On 3rd August, 1984, when she was eleven years old, she was shot and seriously injured by a police office who was acting in the course of his employment and for whose action the defendant is answerable. By the terms of a consent judgment on liability, the defendant agreed to pay damages to be assessed in respect of the negligent and reckless discharge of a firearm by the defendant's servant, employee or agent aforesaid. The damages were assessed by a district registrar on 4th June,

1987, and it is against the award of K30,000 as such damages that this appeal is brought.

There was evidence before the learned district registrar that at the time of the accident in 1984 the plaintiff was doing her grade six at Twafwane Primary School in Chililabombwe. The report submitted by her headmaster indicated that she was performing above average. She was ambitious and keen on learning. She was active in sport and was on the school's junior netball team. She participated in short distance races of 100 races and 200 metres and also in the relay races. She was a class monitor and in the opinion of the headmaster, she would have easily gone to secondary school and would have later done a useful course, such as nursing or teaching. At the hearing on the assessment in May 1987, the plaintiff was still doing grade six but this time at the Lion's School for the blind where she was slowly learning to read braille. She no longer helped her mother with household chores.

The plaintiff's life changed on 3rd August, 1984. She had just returned from participating in sporting activities at school and she was playing with her young sister in their mother's yard when the negligent and reckless police officer discharged the fateful shot. The details of the actual shooting do not appear on the record but the plaintiff sustained injuries which can only be regarded as extremely severe. The consultant surgeon's report on record shows that the bullet entered outside the right eyeball damaging the right eye, the front of the brain (frontal lobe), and the left eye. The bullet exit was through the left temporal region a few inches behind the left orbital margin. These were extensive injuries. She was unconscious on admission to the hospital but , with treatment, gradually regained consciousness; but was unable to see. The right eye which was completely destroyed became atrophied. During hospitalisation, she showed emotional imbalance, crying and becoming violent without reason. She also developed convulsions at home after her discharge which took place on 19th September, 1984. She continued to attend hospital as an outpatient and, as at 19th February 1985, the date of the report, the doctor found that her condition remained the same: She lost vision in both eyes; she suffered emotional imbalance and was on phenobarbitone. The surgeon concluded:

> "This unfortunate girl sustained injuries to both eyes and brain injury following gun shot and although her life is being spared, the rest of he life she will remain blind and perhaps mentally disordered due to frontal lobe injury and has to depend on others for her continuation of life".

The eye specialist's report dated 20th February 1985 read:

> "This child right eye is totally destroyed with no vision at all. The left eye is seriously damaged with scar tissues covering the optic nerve and central retina. She can see light and detect hand movements but will never be able to see enough to find her way about or to read and write. There is no possibility of further improvement".

There was evidence from the mother that the plaintiff no longer does any normal work, nor can she walk alone at night. According to the plaintiff herself, and as the medical evidence confirmed, she can barely see with the badly damaged left eye objects at vary close range but cannot use it to read and has had to learn braille. The learned district registrar was also able , from ocular observation and a glance at pictures produced, to see that the plaintiff's pretty face had been severely disfigured. There can be no doubt but that the child suffered very seriously and that, as the doctor and the mother indicated, she will forever be dependent on others. Apart from the injuries and the permanent disability, she underwent pain and suffering; she lost future prospects and the pleasures and amenities of life. She was clearly entitled to reasonable and adequate compensation.

The learned district registrar assessed the damages in a global sum of K30,000 and stated that the damages had been reduced because she was stabilising and learning to read and write braille. He also specifically indicated that the amount of K30,000 was for the total permanent blindness the girl had suffered. Mr Mwanawasa, who argues that the amount was totally inadequate, pointed out that the district registrar clearly omitted to make any awards under the other heads of claim which were argued before him. This was a correct observation and to the extent that the learned district registrar only concerned himself with the blindness and not anything else, he had fallen into error and we are entitled to interfere. We have explained that explained the circumstances when this court will interfere with awards assessed below in a number of cases, including *Corrigan v Tiger and another*(1) *Attorney-General v Kaleya*(2); and several others. The grounds for interfering includes errors of law or fact and awards which are inordinately high or inordinately low so as to be an erroneous estimate of the awardable damages. To confine the damages in this case simply to the loss of sight was erroneous when other heads of claim fell to be considered. In any case the result was that the award made was inordinately low in the circumstance and we have no difficulty in setting in aside.

We are at large. Mr. Mwanawasa argued that it was wrong for the learned district registrar to reduce the damages because the plaintiff was learning braille without taking into account that the child's social and career prospects have been completely shattered. Quite obviously the court is entitled to have regard to the way the injured person had finally ended up after treatment and the manner in which the plaintiff is coping or likely to cope. The only mistake below was that this factor was considered in isolation from the consideration which ought to have been made of what Mr.. Mwanawasa referred to as the shattered future prospects. Mr. Mwanawasa also made the valid complaint that the award did not take into account pain and suffering, quite apart from the disfigurement suffered. We also argued, again quite validly, that the award for loss of amenities and pleasures of life should have taken into account the fact that this child actually enjoyed sports and would no longer participate. The most serious complaint raised by Mr. Mwanawasa concerned the apparent misapprehension of the severity of the injuries and the loss suffered by the plaintiff. The medical evidence and the oral evidence were all before the learned districted registrar and, in confining himself to the permanent blindness suffered, he did not deal with the brain injury. As the passage from the doctor's report which we have quoted shows, this was a much more serious injury, with more serious consequences, in our view, than simply the loss of sight, although that too is serious enough. To be mentally disordered and emotionally imbalanced as a result of brain injury is, from any point of view, a major tragedy.

One of the leading legal reference books on damages for personal injuries is Kemp And Kemp and the case reported therein indicates quite clearly that the courts should regard plaintiffs in the position of this child as having suffered injuries of utmost severity; attracting very substantial damages. The examples in *Kemp v Kemp* show that the English courts give as high as sixty thousand pounds, and sometimes more. As Mr. Mwnanachonga rightly observed, the task of measuring human suffering of this nature in terms of cash is not an easy one; but the court should try to award fair and adequate compensation. No money can ever fully compensate for serious physical injuries and no yardstick exists for measuring in money the compensation to be accorded a given amount of physical pain or mental suffering because the loss is imponderable in cash. The test should be what the common man in Zambia would regard as a fair sum, such as would in the words of Lord Devin in *West v Shephard* (3) allow the wrong doer to 'hold up his head among his neighbours and say with their approval that the has done the fair thing.'

While it is accepted practice that the courts will have to regard previous decisions and awards in similar situations - for the sake of maintaining reasonableness and consistency - it is generally accepted that in this country it would be unwise to follow the very high awards in England. We accepted this approach in *Miller v Attorney-General* (4) where we further observed to the effect that it is necessary to do justice in the individual cases on its merits and

to have regard to current money values. Mr. Mwanawasa estimated some English awards and suggested they be used for guidance, taking inflation into account. Subject to what we have cautioned about the use of English awards in such cases, we accept that general guidance can be obtained from these cases but that the question of inflation should be dealt with as approved by us in *Attorney-General v Mwiinga* (5), that is to say, inflation can be taken into account only up to the date of assessment in the court below. Inflation between the date of trial and the date of appeal is not taken into account.

We were also requested to award damages on aggravated footing. Though the consent judgment referred to recklessness in the discharge of the firearm, the details of the occurrence were not forthcoming and it is, therefore, impossible for us to say to what extent, if any, the compensatory damages should encompass an exemplary or aggravated element. The damages to which the child is entitled can be classified into pecuniary and non-pecuniary damages. The pecuniary relate to loss of prospective earning capacity while non-pecuniary embrace pain, suffering and loss of amenities of life in relation to the injuries, disabilities and the consequences already discussed.

In the case of working plaintiffs, the loss of earning capacity can account for very substantial portions of the awards in personal injury claims. In the case of a child, such as here, the court is called upon to guess, to make what the learned authors of Mcgregor On Damages call a 'guesstimate' of how well the child, if uninjured would have fared as an earner on attaining adulthood. A good example of this is afforded by *Daish v Wauton* (6) where a five-year-old plaintiff received £6,000 under this head. According to the school report, our plaintiff was a bright girl who would have gone on to secondary school and to a sensible career. The blindness, coupled with the brain damage, make it unlikely that she has any opportunity left for any good and well-paying career, which she would otherwise have had up to normal retiring age. This is a real loss; but rather than attempting to make a separate assessment under this head, we propose to take it into account in arriving at the global award which we intend to make.

With regard to pain and suffering and loss of amenities of life, we bear in mind the consequences of the injuries in this case. Most notable are the disabilities resulting from permanent blindness and disorder due to the brain injury. In all the circumstances and for all the matters hereinbefore discussed, we consider that a sum of K200,000 (Two Hundred Thousand Kwacha) will be fair to compensate the child and to assist her, in a small way, to cope with the serious handicaps visited upon her. The appeal is allowed and we make the award indicated, with costs to be taxed in default of agreement. In keeping with the principles in *UBZ v Shanzi* (7) there will be interest on the award at 10% from the date of service of the writ to the date of this judgment, such rate of interest being what we consider to be a fair average of the appropriate applicable since service of the writ, given the constant fluctuations in our currency.

Appeal allowed