ZAMBIA STATE INSURANCE CORPORATION AND ZAMBIA CONSOLIDATED COPPER MINES v ANDREW MUCHILI (ADMINISTRATOR OF THE ESTATE OF THE LATE NELSON CHINENE) (1988 - 1989) Z.R. 149 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, AND CHAILA, JJ.S.
17TH AUGUST, AND 9TH NOVEMBER, 1989
(S.C.Z. JUDGMENT NO. 10 OF 1989)

Flynote

Tort - Damages - Right of estate to recover damages - Assessment under Law Reform (Miscellaneous Provisions) Act, Cap. 74 and Fatal Accidents Acts 1846 - 1908.

Headnote

The respondent sued as the administrator of the estate of her husband who was killed in a mine accident and died within a few hours of the accident. She sued in her own capacity and on behalf of the estate of the deceased. The first appellant consented to judgment with damages to be assessed. A subsequent statement of claim included damages for loss of rights under two insurance schemes which claim was not included in the writ. The Registrar made an award in respect of the loss of rights under the insurance schemes. The first appellant consented to judgment and the Registrar assessed the damages on each claim. He awarded damages for loss of prospective earnings to the estate as well as a sum to the estate for loss of promotion prospects by the deceased. He also made an award for posthumous prospective pain and suffering and

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loss of amenities. An award of K10,000.00 for pain and suffering between injury and death was also made. In the case of dependency the Registrar assessed the multiplier years of working life for the deceased aged 42 years, as being 13 years. He did not apportion the award as between the dependent widow and the children of various ages. The registrar allowed interest on the sums awarded from the date of the accident to the date of payment at the same rate.

The appellant appealed against the awards made by the Registrar as being wrong in principle.

Held:

(i) An estate can have no right to recover for loss of prospective earnings particularly where persons entitled under the estate constitute the dependents who recover loss of dependency. The same principle applies to loss of promotion prospects.

(ii) When a deceased dies within hours of the injury causing death the award for pain and suffering must reflect both the extent and the duration of the pain and suffering. Where death is instantaneous it is unlikely that any substantial award can be made.

(iii) Any award for pain and suffering should reflect its extent and duration. It is unlikely that any or a substantial award can be made where the deceased died within hours of the injury.

(iv) In the case of a deceased aged 42 years a multiplier of 13 years was not wrong.

(v) Where the deceased was a husband and father it is better first to calculate the family dependency and thereafter apportion the figure between the widow and each child.

(vi) In awarding damages a distinction should normally be made for pre-trial and post-trial damages.

Cases referred to:

(1) Musonda and Bwalya v Attorney-General (1988-89) Z.R. 75
(2) Pickett v British Rail Engineering [1980] A..C. 136
(3) Litana v Chimba and Attorney-General (1987) Z.R. 26
(4) Burgess v Florence Nightingale Hospital [1955] 1 Q.B.D. 5
(5) Malyon v Plummer [1964] 1 Q.B.D. 330
(6) Feay v Barnwell [1938] 1 All E.R. 31
(7) British Transport Commission v Gourley [1956] A..C. 185
(8) Cookson v Knowles [1977] 2 All E.R. 820
(9) Lim Poh Choo v Camden and Islington Area Health Authority [1979] 2 All E.R. 910

Legislation referred to:

1. Fatal Accidents Acts 1846 to 1908
2. Law Reform (Miscellaneous Provisions) Act, Cap. 74

Other Works referred to:

McGregor on Damages (14 Edn.) Par. 1178
Kemp and Kemp on Damages

For the appellants: M.M. Mundashi, Legal Counsel (ZSIC)
For the responden: D.M. Luywa, Luywa & Co.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

The issue in this appeal is whether the learned deputy registrar's award of damages should be interfered with, downwards as the appellants have asked us to do. For convenience, we will refer to the respondent as the

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plaintiff and to the appellants as the defendants, which is what they were in the action. The plaintiff took out a writ of summons as administrator of the estate of one Nelson Chinene (hereinafter called the deceased) claiming damages for the benefit of the dependants of the deceased under the Fatal Accidents Acts, 1846 to 1908, and for the benefit of the estate under the Law Reform (Miscellaneous Previsions) Act, Cap. 74. The deceased died within twenty-four hours after an underground mine accident, at Mufulira on 26th December,1985, which the plaintiff attributed to the negligence of the second defendant, ZCCM, who were his employers. The first defendant was joined as insurer of the second defendant. After appearances had been separately entered by the two defendants, the case took a somewhat unusual course. The claim was not pursued against the second defendant, the employer; the first defendant consented to judgment for damages to be assessed and the plaintiff subsequently prepared a statement of claim which went beyond the scope of the action as constituted in the writ and in which claims sounding in the deceased's contract of employment were included, notwithstanding that these could not have been covered by the terms of the consent to judgment given by the first defendant.

At the assessment, there was no appearance for the first defendant, who alone is the substantive party to this appeal. Evidence was led, and accepted, which showed that the deceased was 42 years old and would have retired at 55 years of age. He left a widow and six children, whose ages ranged between one year and twelve years. The deceased's annual salary amounted to K8,916.00 with a 5% annual bonus and he received free accommodation in lieu of which he would have been in receipt of a housing allowance at the rate of 20% of salary. Mr Mundashi has not asked us to disturb these basic facts, his complaint being directed towards the awards to which we shall shortly turn. The deceased was, according to the evidence accepted, entitled to three times his annual salary; twice, in respect of a group accident scheme and a group life insurance scheme. The plaintiff asked the learned deputy registrar to make an award under various heads and finally the following were awarded:

(a) K 1,000.00 for the deceased's less of promotion prospects;
(b) K10,000.00for pain and suffering;
(c) K 5,000.00 for loss of expectation of life:
(d) K40,000.00 for loss of dependency for the widow and children;

This sum having been stated by the learned deputy registrar to be the total of separate sums adding up to K16,000.00 for the children and K11,500.00 for the widow (actual total K27,500.00) and which appears to have been an attempt to round off the award to a lump sum, as a counsel had suggested to the learned deputy registrar;

(e) K86,131.50, being the allowed half of thirteen years' gross emoluments at K13,251.00 per annum lost by the deceased in the form of basic salary, bonus, 20% housing, employers 10% pension contribution, employers Zambian National Provident Fund contribution and leave pay in respect of thirty days per annum;

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(f) K1,000.00 agreed for funeral expenses; and
(g) K53,496.00 due to the estate under the two group insurance schemes previously mentioned.

The grand total came to K195,627.50 which was ordered to carry interest at 10% from 26th December 1985, the date of death, to the date of payment. In arriving at the said award, the learned deputy registrar had rejected certain heads of claim as speculative and scaled down the figures, under the heads which were allowed, from those which learned counsel for the plaintiff had proposed. Mr *Mundashi* has attacked the whole of the assessment as having been conducted and concluded on a basis which is not tenable in law. In particular, it was his submission that the learned deputy registrar applied wrong principles and that the award be set aside and another substituted based on the basic facts which he did not seek to challenge. He suggested, and Mr *Luywa* agreed, that the rate of annual dependency for the widow and children be taken at three quarters of annual salary, exclusive of allowances. By consent, therefore, the total annual family dependency for the purpose of this exercise will be the figure agreed by the parties, subject to what we will say shortly regarding the question of housing. Mr *Mundashi* also argued that in computing the multiplier, the various contingencies and uncertainties of life ought to have been taken into account so that it was wrong to simply take the balance of the deceased's working life to retirement, namely thirteen years, as the multiplier. Mr *Luywa* countered this by citing *Musonda and Bwalya v Attorney-General* (1), where, in the circumstances of the particular case the periods up to retirement were considered as appropriate.

There were also arguments regarding the order for the payment of interest; the award of group insurance monies; and certain bailiff's fees arising out of attempts to execute the judgment below. We will deal with all these issues in due course.

For the reasons which will become apparent, it seems to us to be inevitable that Mr *Mundashi's* general complaint against the assessment in this case must be upheld. It seems to us also that it will be more convenient and easier for us, since this is a re-hearing on the record, to re-assess the award rather than to attempt to fathom the principles which the learned deputy registrar employed and the reasons therefor, as none appear to have been given and because the assessment appears to have proceeded on some rough and ready basis which it is not easy to reconcile with the principles and the approach which the courts have evolved since the inception of these statutory causes of action arising from torts causing death. In this regard, it is also not correct for Mr. *Luywa* to submit, as he did, that certain awards were not in dispute, such as the award of six-and-a-half years' gross emoluments to the estate of the deceased. Mr *Mundashi* complained against the whole of the assessment.

It may be fruitful to outline some of the basic principles which registrars may find useful when faced with claims under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Acts, 1846 to 1908 and this we propose to do to the extent that these principles fall to be considered in this case, as well as generally for the sake of completeness. We begin with claims for the benefit of the estate under the Law Reform

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Miscellaneous Provisions) Act. With regard to prospective pecuniary losses, the decided cases have construed the Act in such a way that the estate can have no right to recover for loss of prospective earnings and this has been particularly important where the persons entitled under the estate constitute the dependants who recover loss of dependency which is calculated on the basis of the same prospective earnings. The wrongdoer cannot be called upon to make a double payment to or to suffer a double recovery by the plaintiff: see the speeches in the case of *Pickett v British Rail Engineering* (2). The courts have not, so far as we can ascertain, made awards to estates of deceased persons in the form of what the authors of *McGregor on Damages* (1980) 14th ed at para 1178 allude to as 'wages in heaven'. The award of six-and-a-half years' loss of emoluments to the estate of the deceased in this case cannot possibly be upheld and no award can properly be made under such head of claim. The award of K1,000 for loss of promotion prospects by the deceased falls in the same category and stands to be struck out for the same reasons.

Funeral expenses reasonably incurred by the estate and reasonable in extent are by statute always recoverable. The agreed sum of K1,000 cannot be disturbed.

With regard to prospective non-pecuniary damages, we have not come across any awards which relate to the period after death and no award should be made for the posthumous prospective pain and suffering or loss of amenities when all these would no longer be experienced because of the fact of death. However, losses already accrued before death, both pecuniary and non-pecuniary, will normally be recoverable in full. Examples of recoverable pecuniary losses already accrued would include earnings actually lost or medical expenses incurred by the deceased himself between the injury and his death. Accrued non-pecuniary damages would include those for pain and suffering in the period between the injury and the death; loss of expectation of life, which is generally a conventional figure, and loss, if any, of amenities of life in the period between the injury and the death. In the present case, it is necessary to review the awards which were made for pain and suffering by the deceased who died within twenty-four hours of the injury and for loss of expectation of life. K10,000 and K5,000 were awarded respectively. Mr *Mundashi* argued that the award of K10,000 for pain and suffering should be interfered with since there was no evidence that the deceased had suffered any between the injury and the death. As already noted, the deceased died within hours rather than days and any award under this head must reflect both the extent and the duration of pain and suffering endured by the complainant. In this regard, it is unlikely that any award or any substantial award can be made where death was instantaneous. Similarly, account would have to be taken of the difference, in the case of subsequent death, between an injured person who remained in a coma and one who was fully sentient. As the death here was practically instantaneous, the deceased could not have endured any pain and suffering for more than a day. The award of K10,000 was, accordingly, so high that it was an erroneous estimate of the damages to which the estate was entitled under this head. We set it aside. In its place we award a sum of K100, as a convenient figure since, generally speaking, awards for pain and suffering

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in this country have been suggested by this court to relate to a figure of around K200 to K300 per week, a figure which we hope will assist parties who wish to settle personal injury cases out of court to compute damages for pain and suffering. With regard to the award of K5,000 for loss of expectation of life, Mr Mundashi relies *on Litana v Chimba and Attorney-General* (3), in which we suggested a conventional figure of K3,000 regardless of the age of the deceased. As indicated in that case, serious downward fluctuations is the value of our money cannot be altogether ignored and for that reason a conventional figure of K3,500 would not now be amiss. Mr *Luywa,* of course, sought to defend the learned deputy registrar's award but one draw back, which he may not have fully appreciated at the time, is that in Zambia, unlike the present position in England, the Law Reform damages have to be deducted from the Fatal Accidents damages where the beneficiaries are the same, as in this case. It is obviously preferable to deduct a smaller figure. Accordingly, we substitute an award of K3,500.00.

We turn to the claims by the dependants under the Fatal Accidents Acts, 1846 to 1908. We should observe again in passing, that there can be no recovery by the dependants for non-pecuniary loss. Equally, other than funeral expenses if actually incurred by them, there would be no recovery in respect of expenses incurred by the dependants, as for instance, the cost of hospital care for the deceased borne by a dependant before the death. An important consideration to bear in mind is that a dependant's pecuniary loss, if it is to be recoverable at all, must be attributable to the family relationship recognised by the Acts. Thus losses from a purely business relationship will not be recoverable: see, for example, *Burgess v Florence Nightingale Hospital* (4), where a professional dancing partnership between the deceased wife and the dependant husband terminated upon the death and resulted in loss of business earnings. However, a colourable business arrangement between the husband and wife, where the husband was in truth the sole breadwinner brought about a result to the contrary and the loss attributed to the family relationship in *Malyon v Plummer* (5), which result was somewhat similar to the outcome in *Feay v Barnwell* (6), where the court allowed recovery by the husband for the loss of the old-age pension which he had received in respect of his wife before her death, since this was held to be a benefit derived from the family relationship. We refer to the foregoing only in passing as they do not arise in this case. What follows next arises, namely, the recoverable loss of pecuniary benefit (which may be actual or prospective) from the relationship which would be derived from the continuance of life and which may consist of money, property or services; that is to say, the value of the dependency. The dependants are entitled to no more than this, saving just exception for funeral expenses if actually borne by them.

The general method of assessment is to take the annual figure of dependency and multiply it by a figure of years representing the probable duration of the dependency, duly discounted to allow for the fact that a lump sum is to be received now instead of periodical payments over the years. Briefly stated, the multiplicand is multiplied by the multiplier. Adjustments can then be made on either side for a variety of reasons or to take into account a variety of factors, for examples of which reference

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should be made to any good reference books or the Law Reports. The multiplicand, in the case of a wage earner, will normally be a percentage of not earnings after taxes: see v *British Transport Commission Gourley* (7). Variations in the multiplicand could also take into account the future prospects of the deceased, that is, he might have later earned more or less and so on. Future inflation should perhaps not be accorded too prominent a position in computing the multiplicand, unless it is advancing in giant strides. Even in the latter case, the better view seems to favour the disregarding of future inflation on the biases, briefly stated, that it is almost always possible to counter future inflation by prudent investment: see *Cookson v Knowles* (8) and also *Lim Poh Choo v Camden and Islington Area Health Authority* (9).

It should be noted that in an exercise of this nature, it is perfectly legitimate for any variations warranted by the facts or circumstances of any given case to be taken into account by adjusting either the multiplicand or the multiplier, as the court sees fit for any given set of circumstances. In the present case, the multiplicand has been agreed at three quarters of the deceased's annual salary, also agreed at K8,915.00.

We were not called upon to interfere with this. However, we were requested to reduce the multiplier from thirteen years to ten years. The multiplier represents the period of years of the lost dependency and the starting point is the number of years the dependency would have lasted had the deceased not been killed. Apart from discounting for a lump sum, it is proper to consider, as Mr. *Mundashi* suggested, and if necessary, to make adjustments in respect of the uncertainties and contingencies of life, together with other factors, such as life expectancy, whether the occupation was hazardous or not, and so on. In this case, the deceased was 42 years old and would have retired at 55 years. He would no doubt have continued in some other useful pursuit thereafter since the average life expectancy in Zambia has improved considerably. Thus, the wife and the very young among the children could have expected to be looked after even beyond the remaining thirteen years of formal employment with the particular employer. In all the circumstances of this case, we do not see that the multiplier of thirteen years was so wrong that we must interfere. We will uphold the multiplier selected by the learned deputy registrar.

The award will reflect the foregoing. Where, as here, the deceased was the husband and father and the breadwinner, it is better first to calculate the family dependency and thereafter to apportion the resulting figure between the wife and each child. None of this exercise appears to have been attempted by the learned deputy registrar. As to the apportionment itself, the widow should normally take the bulk because her dependency would have lasted throughout her life while that of the children would cease or diminish on reaching adulthood. In any case, the mother would normally use some of her own portion towards the maintenance of the children. Further, the examples in *Kemp and Kemp*, a most respected reference book in this area, will also show that, for a good reason, the youngest children take more than the older ones. There should also be a deduction of deductible collateral benefits which do not include insurance moneys and similar fruits of the deceased's own foresight or the largesse of employers. For most practical purposes, and certainly those of this case, it

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is the Law Reform damages which fall to be deducted.

Before we sum up, we should refer to some collateral issues which arose. There was an award of K53,496 claimed by the estate under the contract of employment in respect of two insurance schemes. This claim was not included in the writ and first cropped up in the statement of claim which was drawn up subsequently after the first defendant had already consented to judgment for damages to be assessed under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Acts. We agree with Mr. *Mundashi* that this was not propely an item arising under the consent judgment nor could it be part of the damages to be assessed under the action as constituted. There was, furthermore, a dispute whether this money had already been paid or not, but in the view that we take this item was not properly before the court and does not arise for our consideration other than to disallow it in this action. The said award is set aside but we express the hope that if in fact it is payable and has not been paid, the first defendant will consider effecting payment and obviate another court action or further litigation. What is certain is that the amount and the claim to which it relates were improperly introduced into this action and the consent judgment obtained did not, in its terms, cover this item. We do not know if, in the event that the matter is not settled, the plaintiff would pursue the claim under this action or a new one, if the failure to proceed against the second defendant can be regarded as an indication that there are issues as yet unresolved in this same action.

The second issue concerns the housing allowance. The fact that the deceased received free housing represented a real benefit to the family which in this case amounted to the equivalent of twenty percent of annual salary. This is a benefit which must be taken into account since the widow and the children will require to secure accommodation. Unlike the other dependency, there would be no justification in deducting from such allowance any portion attributable to the deceased's own upkeep since the family will still require a comparable home. We award this additional sum for a period of thirteen years.

The third issue concerns the bailiff's fees. In respect of the first writ of fieri facias which was issued prematurely and wrongfully, the plaintiff is liable to reimburse the first defendant a sum of K5,955 by way of a set off against the award herein. With regard to the bailiff's fees on the second writ of execution, these will be borne by the first defendant on the ground that, although there was a payment into court of the judgment sum ordered below, notice thereof was not served on the plaintiff who attempted execution at a time when a single judge of this court had authorised the same, before further leave to prosecute the appeal was granted.

Fourthly, there was an argument concerning the award of interest at ten percent from the date of the accident to the date of payment. This was not a correct order since the authorities, especially those of this court, have laid down that a distinction should normally be made between pre-trial and post-trial interest. Although the authorities, especially *Cookson and Knowles* (8) above, suggest also that the award be split between pre-trial and post-trial amounts and higher interest be paid on the former and less on the latter, we find that the justice of this particular case will still be

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served by awarding ten percent interest on the whole of the amount from the date of the accident to the date of judgment in the High Court. The normal rate of interest at six percent which every judgment carries in the absence of any other order will apply thereafter.

We should also mention that the whole of the resulting award will, quite apart from the question of the bailiff's fees, be subject to the deduction of the interim payment of K100,000 which was authorised to be drawn out by the plaintiff by this court on an earlier occasion.

To sum up, we allow this appeal and set aside the assessment in the Court below. In substitution, we have awarded the following:

(a)	K100	for pain and suffering;
(b)	K3,500	for loss of expectation of life;
(c)	K 1,000	for funeral expenses;
(d)	K86,931	for family dependency;
(e)	K23,181	for the additional aspect of the dependency in respect of housing.

TOTAL: K114,712
DEDUCT: K 3,500 for merger

The Balance is: K111,212

Add: K22,242.00 Interest thereon at ten percent from the date of the death that is December 1985 to the judgment below, that is December 1987.

Grand TOTAL: K133,454.00

The principal amount of K111,212 carries interest at six percent from January 1988 to the interim payment which interest should then be added to the total of K133,454.00. Thereafter, the interim payment and the bailiff's fees of K5,955.00 must be deducted. For clarity, we should point out that the only portion of the principal sum capable of carrying any further interest at six percent after the interim payment will be the small sum remaining after deducting the interim payment and the bailiff's fees from the said principal sum; this is in order to avoid interest upon interest.

For completeness, the award is apportioned as follows: fifty percent to the widow; thirty percent to the three youngest children equally; and twenty percent to the three older children equally.

With regard to costs, the costs of the motion to reverse a judgement of a single judge of this court must be borne by the appellant, the first defendant, who was the defaulter at the time. The costs of this appeal, itself, will be borne by the respondent, the plaintiff, since the first defendant has been successful in having the award reduced. These costs are to be taxed in default of agreement.

Appeal allowed in part.