BANK OF ZAMBIA v CAROLINE ANDERSON AND ANDREW W. ANDERSON
(1993 - 1994) Z.R. 47 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND MUZYAMBA, JJ.S.
29TH JUNE AND 22ND OCTOBER, 1993.
(S.C.Z. JUDGMENT NO. 13 OF 1993)

Flynote

Damages - Assessment of - Principles for calculation of - Need for compliance to.

Headnote

The first respondent was injured and the motor vehicle of the second respondent was damaged beyond repair in an accident caused by the admitted negligence of the servant of the appellant. The High Court's award for damages for personal injury and failure to award damages for the loss of motor vehicle led to an appeal and cross-appeal.

Held:
Where the trial judge applied the wrong principle in assessing damages, the appeal court is at large in respect of the whole general damages. The court will consider future loss of earnings and amenities, damages for pain and suffering on a weekly basis of K2, 000 and take into account the trend in the value of the kwacha. Interest on general damages should run from the date of issue of the writ until the date of judgment.

Legislation referred to:
1. Law Reform (Miscellaneous Provisions) Act cap. 74, s. 4.
2. Administration of Justice Act, 1969, s. 22.

Cases referred to:
(1) Connolly v Camden and Islington Area Health Authority [1981] 3 All E.R. 250.
(2) Cookson v Knowles [1977] 2 All E.R. 820.
(3) Kunda v Attorney-General (1993-94) Z.R. 1.
(4) Shanzi v United Bus Company of Zambia (1977) Z.R. 397.
(5) Jefford and Another v Gee [1970] 1 All E.R. 1202.
(6) Miller v Attorney-General (1983) Z.R. 66.
(7) Pickett v British Rail Engineering Ltd; British Rail Engineering Ltd v Pickett [1979] 1 All E.R. 7741.
(8) Birkett v Hayes and Another [1982] 2 All E.R. 710.

For the appellant: M.M. Mundashi, Zambia State Insurance Corporation.
For the respondent: J.H. Jearay, D. H. Kemp & Co.

Judgment

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

This is an appeal and cross-appeal against an award by the High Court of damages for personal injuries and failure to award damages for damage of a motor vehicle.

The first respondent was injured and the motor vehicle of the second respondent was damaged to the extent of being a total write-off in an accident on 28th December, 1986, caused by the admitted negligence of the servant of the appellant.

In the Court below the learned trial judge omitted to give judgment in favour of the second respondent in the sum of K95, 000 for the damage to the respondent's motor vehicle and, by consent, we allow the appeal in that respect and award the agreed damages to the second respondent with interest to be referred to later in this judgment.

The first respondent was found to have suffered the following injuries:

(1) laceration of the scalp with no fracture of the skull, resulting in concussion and retrograde amnesia extending to Christmas 1986;
(2) severe fracture of the right hemi-pelvis with a complete central dislocation of the head of the femur;
(3) damage to right sciatic nerve;
(4) a fracture of the pubic remus;
(5) fractured ribs bilaterally; and
(6) damaged tendon in the right foot causing a permanent dropped foot.

Subsequently, after some operations, the respondent fell at a clinic in South Africa and sustained a fracture of the right femur, for which she had to undergo another operation. The reason for the fracture, according to her doctor, was that, as a result of the accident, she had developed osteoporosis in which the bone had become very thin and particularly susceptible to spiral fractures.

By the time of the trial in May ,1992, the respondent had undergone five operations to her leg. The last medical report in March, 1991, indicated that the right hip, after hip replacement, had only about 40 degrees of free flexion from a fixed flexion deformity position of about 30 degrees. She still had elements of a right dropped foot. There was not a full range of movement in the right ankle after a tendon transplant and there was wasting of the calf and quadriceps muscles measuring three to three and half centimetres. There was substantial permanent disability particularly in the right hip and the right leg as a whole causing an ugly walk.

It was anticipated that she would require a further two hip replacements in her lifetime. The report further indicated that the respondent had cosmetic disfigurement from scars on her lower and upper leg together with wasting of the leg. There was also a permanent need for use of a stick.

The respondent's evidence, which was supported by the opinion expressed in the medical reports, was to the effect that she used to be very active in sports, including golf and skiing, which she enjoyed participating in with her family. She could no longer take part in any such activities, nor could she continue with the household chores. As a result of the injury she would suffer permanent backaches and, although she could manage to drive a car, she found walking very difficult and tiring.

In cross-examination the respondent said that her relationship with her husband was no longer the same. She conceded that she had servants to do the household chores.

The learned trial judge awarded K1, 000, 000 for the respondent's loss of potential capacity to engage in salaried employment, and based this on an award by the English courts to a 5 year old child. The award for pain and suffering was calculated at K1, 500 per week from the date of the accident until the date of the judgment and, for loss of amenities, an award of

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K500 000 was made. Interest at 10 per cent per annum was awarded on the total damages, including the cost of future operations, from the date of the accident to the date of judgment.

The appellant appealed against the award on three grounds. First that the award for loss of future earnings should not have been made in the absence of evidence that the respondent was earning an income at the time of the accident or that she would be entitled to earn an income in the future. Second, that the learned trial judge should have awarded interest separately under the various heads of damages, and third, that the learned trial judge should have a global figure for loss of amenities and pain and suffering.

The respondents cross-appealed on four grounds: first that the damage for pain and suffering should not have been calculated on a weekly basis when the consequences of the injuries were ongoing, second, that a lump sum should have been awarded to pain and suffering and loss of amenities (including loss of earning capacity), third that the award of ten per cent interest was wrong having regard to current interest rates and, fourth, that the agreed damages for the motor vehicle should have been included in the award.

Mr Mundashi, for the appellant, informed this Court that the appellant had paid the cost of post and future treatment and the agreed special damages. It had also paid K500, 000 for loss of amenities and K456, 000 for pain and suffering (calculated at K1, 500 per week from the date of accident to the date of the judgment). The agreed damages of K95, 000 for the motor vehicle had not been paid, nor had the K1, 000, 000 for loss of earnings.

Mr Mundashi informed us that his arguments would concern the award for loss of earnings, the rate of interest, whether interest after judgment should continue at the awarded rate, whether it should be simple or compound interest and the *quantum* of general damages.

His first argument was that no claim for future loss of earnings was pleaded nor was there any evidence to support such a claim. He argued that the Court could not make any such award without figures of post or anticipated earnings upon which to base a calculation. He cited the case of *Connolly v Camden and Islington Area Health Authority* [1] in which a 5 year old child, who was rendered by negligence unlikely to be able to earn a living and whose life expectancy was reduced to 27,2 years, was held to be entitled to claim for lost potential earnings but who was found in that case to be entitled to nothing because there was no material to support an award.

In connection with the appropriate rate of interest to be awarded, Mr Mundashi cited the cases of *Cookson v Knowles* [2]. He argued that this was authority for the principles that interest on general damages should run from the date of the issue of the writ to the date of the trial and that interest on special damages should be at half rate. He did not address the Court on the recommendation by the Court of Appeal in that case that no interest should be awarded on the lump sum awarded for pain and suffering and loss of amenities. Nor did he refer to the effect of later English and Zambian decisions on that recommendation. We will refer to those cases later in this judgment.

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Mr Mundashi conceded that the rate of interest awarded was too low. He cited the case of *Kunda v Attorney-General* [3] and suggested that the Court should be guided by the rate of 15% awarded in that case from the date of the issue of the writ to the date of the Supreme

Court judgment.

Mr Mundashi raised a new matter on which he asked this Court to adjudicate. He urged this Court to rule that interest on the judgment sum should continue at the rate awarded in the judgment until payment and that such interest should be simple interest and not compound interest. He referred to s. 4(1) of the Law Reform (Miscellaneous Provisions) Act which provides that nothing in the Act shall authorise the giving of interest upon interest.

Finally, Mr Mundashi argued that the K900, 000 award for pain and suffering and loss of amenities was so high that this Court should interfere. He maintained that a calculation of K1, 500 per week for pain and suffering was excessive when compared with the rate of K300 per week applied in 1990 and other rates applied in recent years.

Mr Jearay, for the respondent, replied to the argument relating to possible loss of earnings that there was no authority for saying that an unemployed person could not claim for possible future loss of ability to compete in the labour market. He suggested that such possible loss should be dealt with in the award for loss of amenities.

With regard to pain and suffering Mr Jearay pointed out that no award had been made for future general pain and suffering and in particular in respect of the future surgical operations for hip replacement.

He also maintained that a lump sum should have been awarded for pain and suffering and loss of amenities.

As to interest, Mr Jearay conceded that interest on general damage should have been awarded from the date of service of the writ and not from the date of the accident. He asked for interest on special damages from the date of accident to the date of payment at half appropriate rate, namely the short-term deposit rate which at the date of trial was 36%.

He also asked for interest on the general damages at the full rate of 36% from the date of the service of the writ to the date of trial.

As to interest after judgment, Mr Jearay argued that order 36 rule 8 of the High Court Rules as amended by Statutory Instrument 174 of 1990, which provides for interest on judgment debts to be paid at the current commercial bank lending rate unless otherwise ordered, should prevail. He maintained that there was good reason for the Court to order otherwise.

In his argument concerning general damages, Mr Jearay argued that courts should take into account the rate of inflation (at present over 200%), the original dates of comparable assessment and the personal circumstances of individual plaintiffs.

He argued that the learned trial judge had adopted the wrong method of calculating damages for pain and suffering in this case, where such pain and suffering in ongoing, with the result that no figure for future pain and suffering had been taken into account.

Mr Jearay pointed out that the award for loss of amenities was equivalent to just over US $900, at present exchange rates, which he maintained was grossly inadequate. He referred such to the comments of the Court in

the textbook case of *Frank v Cox* where impairment of movement resulting from a hip injury in

a person of advancing years was considered to be more serious than in a younger person.

Before we deal with the individual grounds of appeal we must indicate that we entirely agree with Mr Jearay's criticism of the learned trial judge's having failed to take into account the future pain and suffering and particularly that of the two future operations. The learned trial judge applied the wrong principle in assessing these damages and we are at large in respect of the whole of the general damages. With regard to the calculation of damages for pain and suffering, however, we confirm that we are never averse to lower court's indicating its method of calculations; and in this case at the relevant date of the award, that is October 1992, had it been appropriate to calculate damages for pain and suffering on a weekly basis, we would suggest, for future guidance, that a proper figure would be K2, 000. Were we to consider a proper figure for the present time we would of course take into account the current trend in the value in kwacha. With regard to the award of K1, 000, 000 for loss of potential future earning capacity, we consider that the claim for general damage includes a claim under this head without the need for specified pleading in the case of a person who has not worked before. Where a plaintiff is not in employment at the time of the accident it is impossible to put forward figures of actual loss of earnings, but with due respect to the learned judge in the Connolly case, even in the absence of such figures, it is within the power of the court to make some award for the possibility that by some misfortune the first respondent might be left in a position where she had no support from her husband. The husband gave evidence that he was and is a successful architect and this Court cannot ignore the common knowledge that he is in comfortable circumstances. Whilst, therefore, we agree that as a matter of principle, despite the lack of figures to show what might be the future loss under this head, some consideration for such a loss should be taken into account in assessing damages for loss of amenities, such damages in this particular case will not be very high. We emphasise that, although an amount should be taken into consideration despite the lack of figures, it is in the interest of a claimant to assist the Court by producing evidence to show what earnings, having regard to the qualifications of a claimant, would have been available had it not been for the incapacity for which damages are claimed.

So far as interest was concerned both counsel agree that interest on general damages should run from the date of the issue of the writ and we confirm that this is correct in accordance with our judgment in *Shanzi v United Bus of Company of Zambia* [4]. In that case we followed the Court of appeal case of *Jefford v Gee* [5]. These authorities both provided, as counsel agreed, that interest on special damages should run from the date of the accident at half rate until the date of trial. Although we agreed with this principle in the past, there is now an anomoly which has shown itself because of the rapid and high increase in the rates of bank interest. It frequently occurs that there is considerable delay between the date of the trial and the date of judgment.

To allow for the resulting increase in the rate of interest it has been the

practice in most cases in the past for interest to be awarded to the date of judgment. This should be the practice in all cases, and the reference to the date of trial should be discontinued unless special circumstances make that the correct date.

Since the authorities we have referred to there have been changes in the decided cases. In *Miller v Attorney-General* [6] this Court set out the recent history of the law in England and pointed that in the Cookson case the Court of Appeal had decided that no interest on general damages for pain and suffering and loss of amenities should be awarded for the period before trial because that Court considered that the trial judge would assess the damages on the value of money at the date of trial and thus compensate for the loss to the plaintiff before that date.

The House of Lords in *Pickett v British Rail Engineering Ltd* [7] overruled the Cookson decision on the ground that interest should be awarded to compensate a plaintiff for being deprived of the use of damages until judgment. In *Birkett v Hayes and Another* [8] the Court of Appeal followed that decision and awarded interest at 2% although, as we pointed out, it would have preferred to award no interest whatsoever.

In the Miller case we commented that we were not bound by the English cases but we accepted their persuasive authority and awarded interest on the general damages at 2%. The interest on special damages we awarded at the rate of 7%. The date of trial in that case was November, 1986. At the time of the English cases the Courts there were talking of ''racing inflation''. In this country the rate of inflation is much worse than that. Correspondingly, bank interests have risen but, even so, do not keep abreast of inflation. Were the Courts to award as little as 2% pre-trial interest that rate would be derisory and for that reason this Court awarded 15% interest in the Kunda case early this year. In that case the award of interest by the learned High Court judge had not been the subject of appeal, nor was it discussed. In the event it was confirmed by this Court, but the rate was higher than that which would follow the guidelines which would be referred to later and should not be taken as a precedent for further awards of such interest.

It is noted that one of the reasons for overruling Cookson given by Lord Scarman in Pickett was that the Law Reform (Miscellaneous Provisions) Act, as amended by s. 22 of the Administration of Justice Act 1969, provides that the Court shall exercise its power to award interest on damages unless there are special reasons for not so doing. That amendment has not been applied to Zambia and it is therefore not mandatory for such interest to be awarded here. However, there is still a valid argument that a plaintiff should be compensated for being deprived of money until judgment. Courts will of course also bear in mind that, when damages are awarded for future pain and suffering and loss of amenities, a plaintiff will receive such damages in advance, and while, of course, no interest is awarded for such future damages, courts will take into account the benefit to the plaintiff of advance payment. All these matters will be considered and it would not be improper for a court to say, as we have done in the past, that the lump sum has been calculated in order to take into account any interest which should be payable and that no separate award of interest under that head will be made. In cases where interest is

awarded it would be appropriate to follow the example of courts in *Birkett* [8] and *Miller* [6] where interest was awarded at approximately one quarter of the current bank short-term deposit rate. This latter rate will also take into account the practice of this Court to calculate the interest at an average rate over the period from the date of the issue of the writ to the date of judgment.

With regard to Mr Mundashi's argument that interest at the rate awarded by the Court should run until the date of payment we agree with Mr Jearay that interest after judgment is interest on a judgment debt and is entirely separate from the interest awarded in the judgment. That interest, at the rate awarded by the Court, becomes part of the judgment debt. The judgment debt carries interest in accordance with the law unless otherwise awarded. In this case there is no reason to order otherwise.

We do agree, however, that under s. 4 of the Law Reform (Miscellaneous Provisions) Act the Court awarding damages cannot order the payment of interest upon interest. The interest on damages awarded by the Court must be simple interest. When that interest merges with the judgment debt the whole judgment debt bears interest in accordance with the law relating to judgment debts and not in accordance with the Law Reform (Miscellaneous Provisions) Act.

We now turn to the award of general damages for pain and suffering on loss of amenities. In calculating the amount due we will take into account the pain and suffering since the date of the accident, the operations already undergone, the future operations, and the past and future day-to-day pain suffered during walking and other activities. For the loss of amenities we will take into account the inability to participate in sport and family activities, the slight possibility that the respondent will suffer because of her loss of earning capacity, the slight handicap of being unable to carry out household chores, which is mitigated by the employment of servants but which is still a disability which was not suffered before the accident, the cosmetic disadvantage caused by the scars including the pronouncedly ugly limp and the detriment to her married life. We have considered the guidelines of the English Judicial Studies Board where damages for similar injuries range from £20, 000 to £46, 570 at the date of trial, and we would place the respondent's disabilities in the middle range of those examples. We confirm that in Zambia a simple multiplication of English awards by the current rate of exchange is not appropriate. The purchasing power of the pound and the kwacha and the quality of life that each currency is expected to buy is different in the two countries, and awards in Zambia will consequently be smaller. We have also taken into account other recent awards in Zambia although there are none for hip and lap injuries as in this case.

In this respect we would comment that, with having seen the effect of inflation since past awards, the calculation of some of them may have been too low. This is because of the dramatic fall in the value of the kwacha, and we have taken this into account in our assessment of the damages. That is to say we have noted that at the date of the award in the Court below the rate of exchange was approximately K450 to the English pound. However, this is merely taken into account and does not form the basis of any exact calculation.

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The appeal is dismissed, the cross-appeal is allowed and the High Court award is set aside. In its place we make the following awards:

(1) To the first **5** respondent: damages for loss of motor vehicles K95, 000.00
(2) To the second respondent: general damages for pain and suffering and loss of amenities K4, 500, 000.00
(3) Special damages (already paid) K2, 642, 992.00

As to interest, we agree with Mr Jearay that 35% per annum is a fair average of the rate of interest applicable over the relevant period and, in accordance with our earlier comment, we award interest on the general damages at slightly over a quarter of that rate, namely at the rate of 10% from the date of issue of the writ until the date of this judgment. On the special damages, we award interest at the rate of 18% from the date of the accident until the date of this judgment or the date of payment, whichever is the earlier.

Costs of this appeal to the respondents.
Appeal dismissed, cross-appeal allowed.
