(1961) 08 MAD CK 0015

Madras High Court

Case No: App. No. 163 of 1958

K.M. Krishna Gounder		APPELLANT
	Vs	
P.N. Narasingam Pillai and Others		RESPONDENT

Date of Decision: Aug. 7, 1961

Acts Referred:

- Fatal Accidents Act, 1855 - Section 1
- Motor Vehicles Act, 1988 - Section 96(2)

Citation: AIR 1962 Mad 309 : (1962) 75 LW 156

Hon'ble Judges: Jagadisan, J

Bench: Single Bench

Judgement

(1) This is an appeal against the judgment and decree in O.S No. 103 of 1957, on the file of the court of the Subordinate judge, Cuddalore,

awarding the second plaintiff a decree for damages in a sum of Rs. 6,000/- against defendants 1and 2, on the grounds that the 2nd defendant

drove the lorry of the first defendant negligently and ran over and killed the second plaintiff infant son. The first defendant is the appellant.

(2) The first plaintiff is the husband of the second plaintiff and their son Dakshinamoorthi was run over and killed on 17-11-1955 by the lorry of the

first defendant MDF.802 driven by the second defendant. The third defendant in the suit was the insurer who was impleaded as a party on the plea

of the first defendant that the third defendant company was a necessary party.

(3) The plaintiff alleged that the second defendant was employed to drive the lorry that he had no licence for driving a heavy transport vehicle, that

the second defendant drove the lorry rashly and negligently and caused the death of the boy Dakshinamoorthi. They claimed damages under the

Fatal Accidents Act to the extent of Rs. 12000/- which consisted of (1) Rs.2000/- pecuniary loss to the estate of the deceased; (2) Rs. 5000/- for

physical suffering and mental agony of the deceased; (3) Rs 5000/- for loss of expectation of life of the deceased.

(4) The defendants resisted the suit contented that the lorry was not driven negligently or rashly, that there was contributory negligence on the part

of the deceased Dahskshinamoorthi, and that the quantum of damages claimed was excessive.

(5) The learned Subordinate Judge of cuddalore, who tried the suit found that the lorry was driven by the second defendant without a licence

requiste for driving a heavy type vehicle, that the second defendant was guility of negligence in running over the boy and estimated the amount of

damages as Rs.6000/- The second plaintiff was however awarded full costs on the amount sued for in the plaintiff on the ground that she could not

have made a precise estimate of the damages. The costs of the third defendant, the insurance company were directed to be paid by the first

defendant. Defendants 1and 2 were also directed to pay the court-fee due to the Government as suit was filed in forma pauperis.

(6) The liability of defendants 1and 2to the second plaintiff, who is now held to be the representative of the estate of the deceased

Dakshinamoothy, to pay damages for the death of her son caused by the running over of the lorry has been established fully and completely by the

evidence on record.

(After discussion of evidence His Lordship proceeded as follows :) The net result of the evidence unmistakably shows that the second defendant,

who was not competent to drive the vechile.was entrusted with the vehicle and he drove it negligently and rashly and thereby ran over the second

plaintiff son.

(7) It was the contention of the first defendant that the second defendant was not his driver. In his evidence before the court he stated that he did

not no who drove the lorry at the time of the occurrence. The second defendant however did not plead that he was not employed under the first

defendant to drive the vehicle. The first defendant would have it one Perumal was the driver employed to drive the lorr This Perumal has not been

examined. The evidence of the first plaintiff as P.W.4 is that the second defendant was in the employment of the first defendant and that he has

seen him drive the lorry on several occasions. On the side of the defendant the trip sheets relating to the lorry were deliberately susppressed. If the

trip sheets had been produced they might have disclosed the fact that the second defendant has been operating the vehicle. I have no hesitation in

disbelieving the first defendant and holding that the second defendant was a servant employed under him to drive the lorry.

(8) Mr. T.V. Balakrihnan, learned counsel for the appellant, contented that the award of Rs, 6000/- by way of damages was very exorbitant and

excessive in the circumstances of the case. The claim for damages is based upon the provisions of the Indian Fatal Accident Act, 1855.

(9) Section 1-A of the Act is as follows:--

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death is not

ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death

had not ensued shall withstanding the death of the person injured, and although the death shall have been caused under such circumstances as

amount in law to felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so

caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in every such action

the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively for whom and for

whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered

from the defendant, shall be divided amongst the before mentioned parties, or any of them in such shares as the court by its judgment or decree

shall direct.

2. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint. Provided

that, in any such action or suit, the executor, administrator or representative f the deceased may insert a claim for and recover any pecuniary loss to

the estate of the deceased occasioned by such wrongful act, neglect or default which sum, when recovered, shall be deemed part of the assets of

the estate of the deceased.

(10) At the time of the trial the plaintiffs gave up their claim for Rs. 2000/- u/s 1-A of the Act. u/s 2 of the Act damages can be granted for physical

suffering and mental agony suffered by the deceased as also for the loss of the expectation of life of the deceased. See Gobald Motor Service Ltd.

and Another Vs. R.M.K. Velusami and Others, . The boy died almost instantaneously after he was run over and the evidence was that the boy

died within half an hour of the accident. The learned Subordinate judge has awarded damages in the sum of Rs. 1000 for the mental agony and

suffering of the boy at the moment of his death. This award of Rs. 1000/- has not been challenged before me as being improper or unwarranted. In

respect of the damages for loss of expectation of life the learned subordinate judge fixed it at RS. 5000/- He dealt with the matter in these words:

Regarding the damages for loss of expectation of life, I think the damages of Rs. 5000/- claimed is reasonable. The boy was 7 years old when

died and he could have lived at least for 50 or 60 years. I therefore allow the damages on this account at Rs. 5000/-

The learned subordinate judge has awarded the damages merely by having regard to the fact that the boy was of the tender years when he died.

This is not a correct basis of estimate of damages for loss of expectation of life.

(11) Assessment of damages for shortening of life has been a controversial and thorny problem. It is not easy to assess by a post-mortem estimate.

Life is individual or valueless and cannot be equated to the coins of the realm. It is full of unpredictable vicissitudes and it is the very essence of life

of any individual that joys and sorrows alternate and mingle. There may be special types of cases like an imbecile or a cripple or a person in

hopeless and chronic difficulties where the value of life might be computed in some approximate measures. In cases of children of tender years who

are cut off from life before anything is known about their talents, capacity or intelligence the assessment of damages suffered by them for the

premature termination of their lives cannot be made on any settled principles of law and must on any settled principles of law and must therefore, to

a very large extent, be a matter of conjecture and guesswork.

(12) The House of Lords decided in Rose v.Ford, 1937 AC 826 that the damages for loss of expectation of life are recoverable on behalf of the

estate of deceased in an action under the Law Reform (Miscellaneous Provisions) Act, 1934. But there was great divergence of judicial views in

the matter of the estate of damages under this head and the English Courts acted and moved like rudderless ships sailing in unsteady weather.

The amount of damages awarded was generally high and was anything upto ï¿½2000. The matter was however brought into the crucible and

received a scientific analysis and the treatment in the decision of the house of Lords in Benham v. Gambling, 1941 AC 157. Viscount Simon

formulated the following principles that should govern the decision of courts of estimating damages for loss of expectation of life.(1) The thing to be

valued is not the prospect of length of days, but the prospects of the predominantly happy life. (2) The age of the individual may not always be a

relevant factor. In extreme old age the brevity of what life may be left may be relevant. (3) It would be fallacious to assume that all human life is

continuously an enjoyable thing so that the shortening of it calls for compensation to be paid on 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 fitfull fever have to be allowed for in the estimate.""(4) Before damages

are awarded in respect of the shortenings of life of a given individual it is necessary for the court to be satisfied that the circumstances of the

individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant''s

negligence. (5) In assessing damages for this purpose, the question is not whether the deceased had the capacity and ability to appreciate that his

further life on earth would bring him happiness; the test is not subjective and the rights sum award depends upon an objective estimate of what kind

of future on earth the victim might have enjoyed whether he has justly estimated that future or not,(6) The proper sum to be awarded should not

depend upon the social position or prospects of wordily possession of the deceased individual;""Lawyers and Judges may here join hands with

moralista and philosophers and declare that the degree of happiness to be attended by a human being does not depend on wealth or status."" (7) In

putting the money value on the prospective balance of happiness in years that the deceased might have otherwise have lived, the jury or judge of

fact is attempting to equate in commencing. (8) The estimate of damages should not rest on statistical or actuarial test. (9) In the case of a child or

an adult very moderate figures should be chosen. In Benham''s case 1941 AC 157, the victim was a child of 21/2 years old and the House of

Lords held that the proper measure of damages would be ï¿½ 200.

(13) In Garcia v. Harland and Wolff, 1943 2 All ER 477, Atkinson, J., observed at page 485,

Untill 1941 AC 157, I think Judges found themselves in the greatest difficulty in estimating what were the fair damages in respect of the shortening

of expectation of life. That case went to the house of Lords and gave the House an opportunity of laying down principles for the guidance of judges

who have to deal with these matters..... In that case, it is ofcourse quite clear that the Lords were impressed not with the injustice but with

the difficulty of giving damages to A, because B has had his life shortened. It is one thing that gives damages to the person injured in an accident,

but you cannot give damages to the dead man, and the house of Lords was obviously impressed with the awarding of large damages to one person

because another person has had his or her life shortened.

(14) Berham''s case, 1941 AC 157 set the pattern for estimate of damages for loss of expectation of life and as observed by Kemp in his book on

Quantum of damages"" Volume 2, page 282, it is ""the most notable example of judicial legislation in recent years"". Singleton, L J., observed in

Joyce v. British Electricity Authority, 1955 CA 185 that since 1941AC 157 ""the damages in the case of the grown man or woman who could

aspect to have a happy life have been assessed often at figures around ï¿½350 or ï¿½400."" In Sellers v. Best, 1954 2 All ER 389, Pearson, J.,

awarded in the case of an adult married woman what he called"" the more or less conventional sum of ï¿½400.""Speciman awards have been

selected and put in a tabular statement at pages 284-85 of Kemp''s book. A glance at that table shows that in one instance where a child of three

was run over and killed, Oliver J..awarded ï¿½300. In another instance where the victim was a child of four years old Streatfield, J., awarded

damages of ï¿½200

(15) There is now no difficulty in stating the principles that should weigh.with the court in awarding damages under this head of loss of expectation

of life, particularly after the classical pronouncement of Viscount Simon, in Benham''s case, 1941 AC 157. But the application of the principles to

given set of facts is yet not free from difficulty. The balance of prospective happiness of the individual has first to be ascertained and that has to be

commuted in money value. Even the best and at least judicial endeavor to discharge this task of ascertainment of damages cannot possibly

eliminate some speculation or imaginative thinking.

(16) The scanty evidence that is available on records with regards to the unfortunate victim is that he was seven years old at the time of the

occurrence, and that he was studying in second class in an Elementary School at Villupuram. According to the father of the boy P.W.4, the boy

was never ill, was always healthy, and was clever and enthusiatic. The bereaved father could only say that, if his son had met with the accident, he

would have earned Rs.50 or Rs. 60 per month as a clerk. This evidence stands uncontradicted and it will not too much to assume that the boy

would have been spared many more years of life and would have taken his place as a citizen of India and derived all the advantages in life thrown

open to the citizens of India under our present Constitution.In these circumstances. I am unable to say that the award of Rs.5000/- given by the

learned Subordinate Judge as damages for loss of expectation of life is in any way excessive or extravagant. Though the learned Subordinate Judge

fixed the figure without giving good reasons, I find that his conclusion is correct for the reasons set forth above.

(17) It is next argued on behalf of the appellant that the third defendant-Insurance company should not have been awarded costs as against the first

defendant. The third defendant was impleaded practically on the invitation of the first defendant. Section 96(2) of the Motor Vehicles Act provides

as follows:

No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the

proceedings in which the judgment is given the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment

so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall

be entitled to be made a party thereto and to defend the action on any of the following grounds, namely..... (b) that there has been a breach of

a specified condition of the policy, being one of the following condition, namely..... (ii) a condition excluding driving by a named person or

persons or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification.

One of the terms of the policy Ex.B-1 excluded the liability of the insurer if the driving of the vehicle was by an unlicensed person. the second

defendant had not the necessary licence to drive a heavy vechicle like motor lorry at the time of the occurrence. The Insurance company, the third

defendant therefore, rightly came to be impleaded and defendant the suit. the finding of the learned Subordinate judge that third defendant is not

liable to the second plaintiff for the suit claim because of the terms of the policy has not been challenged before me. The contention of the appellant

is that he should not have been made liable for the cost of the third defendant. I am unable to agree with this contention. The plaintiffs were not

parties to the contract of insurance between the first defendant and the third defendant of their own accord or on their own violation. It was the first

defendant who was responsible for bringing in the third defendant as a party to the suit, and the third defendant having succeeded in the defence

raised by him, the only proper person that could be called upon to pay his costs will be the first defendant, the appellant.

(18) The learned Subordinate Judge was also right in awarding full costs to the plaintiffs on the amount sued for in the plaint, through actually the

plaintiffs succeeded in obtaining the decree only for Rs.6000/- It is too much to except the plaintiffs to be precise and accurate in the matter of

estimate of damages and it cannot be said that their claim was in any way higher inflated so as to make them liable to pay costs to the defendant for

the amount disallowed. In the result, the appeal fails and is dismissed with costs, one set to respondents 1and 4.

(19) Appeal dismissed