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7,1965

IN THE PRIVY COUNCIL

No. 51 of 1961

UNIVERSITY OF LONDON
INSTITUTION OF CHARTERED
- FEB 1966
27
LONDON, ENGL.

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR
EASTERN AFRICA

80935

BETWEEN :

GULBANU RAJABALI KASSAM Appellant

- and -

KAMPALA AERATED WATER COMPANY
LIMITED Respondents

10 CASE FOR THE RESPONDENTS

Record

1. This is an appeal from the judgment and order of the Court of Appeal for Eastern Africa dated the 8th day of May 1961 allowing in part an Appeal by the Respondents herein from a judgment and decree of the High Court of Uganda dated the 30th day of September 1960.

pp.75-96

pp.37-38

20 2. The action arose out of a collision which occurred on the 31st day of August 1959 between a motor lorry driven by a servant of the Respondents and a motor car in which Rajabali Kassam, his wife and other members of his family including the Appellant were passengers. Rajabali Kassam (hereinafter referred to as "the deceased"), his wife and one of his daughters were killed, and this action was brought by the Appellant, the deceased's eldest surviving daughter, on her own behalf and on behalf of other dependent children. By her plaint dated the 16th day of February 1960 a claim was also made on behalf of the deceased's estate for damages for loss of expectation of life and loss sustained by the estate, but this head of claim was apparently withdrawn on the grounds that

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letters of administration had not been granted by the date of the issue of the plaint.

3. This Appeal is concerned solely with the quantum of damages which should be awarded in respect of dependent children of the deceased.

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4. In addition to herself, the eldest surviving daughter of the deceased, the Plaintiff by the plaint named the following persons as dependants on whose behalf the action was brought:

- (a) Sadrudin Rajabali Kassam, aged 20 years, son of the deceased 10
- (b) Badrudin Rajabali Kassam, aged 19 years, son of the deceased
- (c) Zarina Rajabali Kassam, aged 17 years, daughter of the deceased
- (d) Shah Sultan Rajabali Kassam, aged 15 years
- (e) Amirali Rajabali Kassam, aged 12 years
- (f) Roshanali Rajabali Kassam, aged 10 years
- (g) Nazma Rajabali Kassam, aged 3 years.

It was admitted that all the persons aforesaid named in the plaint were children of the deceased. 20

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5. The plaint alleged that the death of the deceased and the consequent loss to the estate and to the dependants were caused by the negligent driving of the Respondents' servant. The Respondents by their defence denied both negligence and damages.

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pp.26-32

6. The issue of liability was tried on the 16th, 20th, 21st, 22nd and 23rd days of September 1960, before the Honourable Mr. Justice Lyon who on the 23rd day of September 1960 adjudged that the negligence of the Respondents' servant was the sole cause of the collision and accordingly entered judgment for the Appellant. The question of damages was adjourned to a subsequent date. 30

7. No issue arises on this appeal on the question of liability.

8. The evidence with regard to the quantum of damages to be awarded in respect of the dependencies was sparse and in some respects inconsistent and inconclusive. The Appellant herself said in the course of her evidence that she was 23 years of age, single, but engaged to be married. She said that the deceased's daughter Zarina (one of the persons for whom a loss of dependency was claimed as aforesaid) would be "married in a month too". She said that all the children marked on the plaint by the trial Judge were living with the deceased who "kept them all".
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9. At the adjourned hearing on the 28th day of September 1960 evidence was given on behalf of the Appellant by one Bhaichand Nagji Shah, an accountant and auditor, who produced the trading accounts and balance sheet of the deceased for the year ending 1958, and a list of the deceased's assets and liabilities at the date of his death. This witness gave evidence with regard to the deceased's income and the value of his estate at the date of death. The substance of the relevant part of his evidence together with the accounts produced may be summarised as follows:-
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- (a) The deceased's income from his business as a shopkeeper in Bamunanika for the years 1955, 1956, 1957, 1958 and for the year 1959 up to the 31st day of August averaged ₹744 per annum.
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- (b) The assets of the deceased at the time of his death consisted of a fixed deposit amounting to 111,000/- and shares to the value of 3000/- in the Diamond Jubilee Investment Trust Limited, and 14,583/- the value of the stock in his shop.
- (c) The nett amount spent for the maintenance of the deceased himself and his family in the year 1958 was 8889/- after deducting amounts expended on poll tax, income tax and life insurance.
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- (d) In addition to the sums drawn by the deceased his savings over the years (invested in the Diamond Jubilee Investment Trust Limited as aforesaid) amounted to 111,000/-.
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- pp.33-35
- p.36b p.36c
- p.36A
- p.33 1.16
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p.36b (e) The accounts for the year 1958 show salaries to the deceased's children Sadrudin Rajabali, Miss Dolatkhanu Rajabali (killed in the accident) and Miss Gulbanu Rajabali (the Appellant) of 3900/-, 2900/- and 2900/- respectively, with counter entries for their maintenance of 1800/-, 1500/- and 1500/-.

p.36c The balance sheet as at 31st December 1958 shows Sadrudin Rajabali a creditor for the sum of 4505/-, Miss Dolatkhanu Rajabali a creditor for 26400/- and Miss Gulbanu Rajabali (the Appellant) a creditor for the sum of 17300/-.

p.35 l.26 (f) In the nine months of the year 1959 during which the deceased was alive his profits were approximately 12000/- and he put the sum of £1000 into the Diamond Jubilee Investment Trust Ltd.

p.35 l.32

p.37 10. Upon the material recited above and from the evidence of the Appellant, the accountant and the accounts produced the learned trial Judge entered judgment for the Appellant for the sum of £6000, which included agreed items to the total amount of £96. The reasoning whereby he arrived at this figure is contained in a short judgment delivered on the 30th day of September 1960, the relevant part of which is as follows:-

"I am not satisfied that the three alleged payments of Shs. 3,900/-, Shs. 2,900/-, and Shs. 2,900/- were or would be made to any of the children in this case. I am, however, satisfied that the deceased father did earn an average of £744 per annum over the five years 1955-1959. He was killed at the end of August, 1959. Some of the children are still carrying on his business, but in Kampala not in Bamunanika. He left an estate of some Shs.120,000/-. I am quite satisfied that had he not died he would have continued to pay out, for the benefit of his children, something between £10 to £12 per week.

p.38 Making use of the actuarial table to which Mr. Wilkinson referred me on the 28th September, I propose to award a round figure as damages and a figure which includes the agreed special damage. The figure in that table over a 15 year period on the basis of £10 per week is £5,400.

Judgment is therefore entered for the Plaintiff for £6,000 with costs and interest as prayed."

11. It is submitted that the learned trial Judge arrived at the figure for damages upon a principle which was erroneous in law. It is submitted that the learned Judge misdirected himself in arriving at the aforesaid figure of £6,000 in the following respects:-

- 10 (1) While the learned Judge was justified, from the actuarial tables referred to by him, in arriving at the conclusion that the deceased, as a person in early middle age, had an expectation of life of 15 years, to apply this figure as the capitalising factor in assessing the value of the dependencies involves wholly ignoring the probable duration of those dependencies. Thus the evidence of the Plaintiff herself established that she herself and another daughter, Zarina, were to be married "in a month". The evidence further established that the two elder male children, Sadrudin and Badrudin, aged 20 and 19 years respectively, were both gainfully employed at the date of the deceased's death. The learned Judge has not considered whether all the persons named in the plaint as dependants were in each case in fact dependent, nor has he considered in relation to each such person the likely duration of such dependency.
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- (2) No account has been taken of the benefit received by the dependants by reason of the death of the deceased, though the learned Judge found as a fact that the deceased left an estate of some 120,000/-.
- (3) No account has been taken of the fact that, the claim under Part III Law Reform (Miscellaneous Provisions) Ordinance 1953 having been abandoned, a possibility existed of a further claim under this head being brought in the future.
- (4) It is not clear whether the learned Judge intended the phrase "for the benefit of his children" to refer to the surviving children only. The evidence given by the accountant Bhaichand Nagji Shah was to the effect that
- p.37-38
- p.7
- p.36b
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- p.37 1.36

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p.35 1.8 the deceased's annual payments for himself, his wife and the remainder of his family was 8889/- nett.

12. It is submitted that in a case such as this, where the only surviving persons for whom dependency is claimed are children of the deceased, the damages to be awarded must necessarily be assessed by reference to the period in respect of which each such child was likely, but for the death of the deceased, to have remained a dependent of the deceased, and to attribute to each such child (in the absence of any evidence with regard to the actual maintenance costs of each individual child) his due proportion of the total sum expended on the whole family. 10

p.41 13. The Respondents appealed to the Court of Appeal for Eastern Africa, on a number of grounds, the substance of which are contained in the criticism of the judgment of the learned trial Judge in paragraph 11 hereof. 20

p.86 14. Counsel for both parties requested the Court of Appeal, if it came to the conclusion that the learned trial Judge had misdirected himself, that the case should not be sent back for retrial but itself to assess the damages. The Court of Appeal, through Gould J.A., agreed to do so with expressed reluctance, and did in fact assess such damages at the sum of 37833/- including the agreed items of special and other damages. Accordingly it is submitted that the award should be upheld unless it be demonstrated to have been arrived at either upon a misapprehension of the nature and effect of the evidence or upon some erroneous principle of law. 30

p.75-95
p.95 15. The judgment of Gould J.A., with which Forbes V.P. and Corrie J.A. concurred, can be considered under four main heads (1) The value of the deceased's estate, and the benefit accordingly derived by the dependants by reason of the death of the deceased (2) Which of the dependants named in the plaint were in fact dependent on the deceased at the date of his death (3) The duration of such dependency (4) The consequent valuation of the dependencies and the assessment of damages. 40

16. On the question of the valuation of the deceased's estate and the sum (if any) to be

deducted from the damages by reason of the benefit derived by the dependants consequent upon the deceased's death, Gould J.A. dealt firstly with the relevant legal principles, and said

10 "In the present case the value of the estate must undoubtedly be taken into consideration and a relevant factor in the determination of the net benefit to the surviving children is the expectancy that they would in any event ultimately have received something by way of inheritance. In the approach to the problem I prefer the guidance to be derived from Nance v. British Columbia Electric Railway Co. Ltd. (supra) in the particular circumstances, to the method adopted in Muirhead v. Railway Executive (supra). The approach I propose to adopt approximates what was urged in argument by counsel for the Respondent;"

p.82 11.28-40
1951 A.C.601
1901 2 All Eng. 448
1951 A.C.
(Unreported)

20 and further said

30 "As I have indicated, the deceased was apparently a man who had proper concern for his family's interests and I think it proper to assume that the surviving children would have ultimately shared the estate of the deceased - in the absence of any guide I will assume that they would have done so in equal shares. Allowance will have to be made for the fact that Dolatkhanu would have had a share but I do not think it necessary to take into account the possibility that Mrs. Kassam might have survived her husband. There is no evidence of her age, but she had already had nine children, the eldest of whom, Dolatkhanu, would now have been not less than 24 years of age, and the deceased at the date of his death was still in early middle age. I propose therefore to approach the problem of the appropriate deduction to be made in respect of the estate upon the footing of accelerated receipt, rather than present value. It will be necessary to consider also the probability that in fifteen years' time the estate would have been increased by further savings, and also the element of the certainty of present receipt of the money as against the uncertainty of its future receipt, and the fact that a share would have gone to Dolatkanu."

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p.91 11.6-32

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In applying these principles to the facts of the present case Gould J.A. expressed his conclusions and the reasons for them as follows:-

p.92 11.10-34

"I arrive then at this proposition - the net value of the acceleration is the difference between the amount actually received (Shs. 89,425/60) and the present value of the same sum payable in fifteen years plus the present value of the estimated savings also payable after 15 years; the difference must be diminished by an amount in respect of the uncertainty which I have mentioned above and the fact that Dolatkhanu (now deceased) might also have shared in the estate - this amount is almost completely speculative and I would fix it at Shs. 20,000/-. Working on a basis of simple interest at 5% I find that the present value of a sum receivable in fifteen years time is four-sevenths of that sum. Therefore the present value of the estate (Shs. 89,425/-) plus the estimated savings (Shs. 80,000/-) is four-sevenths of Shs. 169,425/- which is Shs. 96,814/-: after deduction of the sum of Shs. 20,000/- above mentioned the net result is Shs. 76,814/-. The amount actually receivable from the estate being Shs. 89,425/- the difference, or the value of the acceleration, is Shs. 12,611/-."

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The Court further held that a further sum of 2000/- should be considered as deductible in respect of the possibility of a further action in respect of the deceased's loss of expectation of life and damage to the estate under Part III of the Law Reform (Miscellaneous Provisions) Ordinance 1953, and in so doing followed the reasoning of Lord Russell of Killowen in Davis v. Powell Duffryn 1942 1 All E.R. 657 (1942 A.C.601).

It is submitted that upon a matter which is necessarily speculative a number of different methods of calculation may be adopted, but that the approach of Gould J.A. in this case, which was meticulous and detailed, follows the authorities cited by him and accords with the correct legal principles, and is not inconsistent with the mode of calculation approved by the Court of Appeal in Daniels v. Jones, 1961 1 W.L.R. 1103. Accordingly it is submitted that upon this issue the judgment of the Court of Appeal was correct and should be upheld.

17. On the question as to which of the persons named as dependants in the plaint were in fact dependent at the time of the deceased's death, Gould J.A. reviewed in some detail the evidence, described by him as "unpromising and unworthy material", and arrived at the conclusion that the Appellant herself, and the deceased's sons Sadrudin and Badrudin, were not dependent at the date of the deceased's death, and that the dependency of the daughter Zarina must be limited to the period between death and her marriage, a period which would result in an award of damages smaller in amount than the value of the benefit received by her consequent upon the deceased's death. Gould J.A. expressed his conclusions upon this issue thus:

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p.87 1.45
p.88 1.30
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"Upon this unpromising and unworthy material the court is asked to find whether these particular children were dependants. If the statements of account are true representations of the legal relationship between the children and the deceased then the deceased was crediting them with substantial salaries and charging them smaller amounts for food and other expenses. That would indicate that they were not dependent upon him (except as an employer) or would at least reduce the amount of their dependency to a minimum. Counsel for the Respondent submitted that the accounts did not represent legal relations but were probably for taxation purposes. Counsel for the appellant company, on the other hand, invited the court to accept the entries in the accounts as showing what they purported to show - that the children concerned were genuinely employed at the wages shown. I think that I must accept this submission. The accounts were put forward on behalf of the Respondent and though she might not be completely bound by them, to any extent that she proposed to ask the court to disregard them, it was for her to call evidence to support her contention. As it was, although the Respondent, the two sons Sadrudin and Badrudin, and the deceased's accountant Mr. Shah, all gave evidence in the court below, not one of them was asked any question to throw light on these entries in the accounts. This is a matter which ought not to have been left to speculation, and I must therefore hold that the Respondent, Sadrudin and

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Badrudin, were not dependants but were gainfully employed at remuneration exceeding the cost of their maintenance. The death of the deceased does not affect the matter as there is evidence that Sadrudin and Badrudin have since operated a shop, and the Respondent has since married. If it might be thought that in spite of their employment there was some small residual dependency in the case of these children it would in any event be less than the benefit receivable by them from the estate of the deceased."

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It is submitted that the facts amply justify the conclusion that no material dependency was proved in respect of the Appellant, Zarina, Sadrudin or Badrudin.

18. The Court considered the question of the duration of the dependencies of each of the children found to have been dependent, and considered the proper basis upon which the damages should be assessed.

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On the general principle of assessment Gould J.A., after considering the contentions of the parties as revealed in argument, said

p.83 l.39 -
p.84 l.2

"Nevertheless, I am confident that when this method is adopted and the final figure is ascertained by multiplying the annual value of the dependency by a number of years, allowance must be made in fixing that number for the anticipated or possible termination of the various individual dependencies, and if they will terminate after different intervals some sort of average must be struck; then when the apportionment is made the adjustment between the various dependants can be made;"

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and further said

p.85 ll.26-33

"Whatever the method of calculation adopted it is clear that the expected length of the individual dependencies is a relevant factor. That is why the possibility of the remarriage of a widow is taken into account and if she remarries, her dependency may cease entirely, as was the case in Mead v. Clarke Chapman & Co. Ltd. (1956) 1 W.L.R. 76".

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Applying these principles to the facts of the case,

Gould J. considered that the proper period over which the dependent children would, on the balance of probabilities, have remained dependent was 21 years in the case of the male children, and 25 years in the case of the female children. It is submitted that in so finding, if the Court erred at all, it erred in favour of the Appellant, since it may be said that the probabilities of the case might justify the assumption that the male children would cease to be dependent at an earlier age than 21, and the female children to have married and ceased to be dependent before the age of 25.

p.89 l.13
p.89 l.27

19. It was agreed by Counsel for both parties that the deceased having died intestate, each child inherited an equal share of the deceased's estate. In applying the legal principles considered by him as aforesaid to the facts of the case Gould J.A. set out the basis upon which he arrived at the figure of 37833/- as the proper award of damages as follows:-

"The estimate of £10-£12 per week can be averaged at £11, a total annual dependency of £572. That is approximately £63.10. 0 per annum for each child and as the dependency of the daughter Zarina is limited to one year it is clear that the benefit receivable by her arising out of the death of the deceased (one-eighth of Shs. 14,611/-) exceeds the value of her dependency - she is therefore not entitled to damages. I have already held that the respondent, Sadrudin and Badrudin were not dependants, and it follows that only Shah, Amirali, Rshanali and Nazma are entitled to general damages. In accordance with what I have said earlier I estimate their dependencies respectively as 10 years, 9 years, 11 years and 15 years. That is an average dependency of $11\frac{1}{4}$ years which, multiplied by four-ninths of £572 = £2860 or Shs. 57,200/-. This amount must be discounted as it would in the normal course have been applied for the benefit of the dependants in question over a number of years, and its equivalent as a lump sum payable at death must be arrived at. For the purpose of this calculation I have

p.94 l.2
p.95 l.10

referred to Whitaker's Almanac (1961) p.1046 and am content to accept $8\frac{1}{2}$ years purchase of the equivalent annuity ($4/9$ th x £572) as a sufficiently approximate guide to its present value. The result is Shs. 43,218/-. I have applied this principle at this stage as that was the approach adopted in Nance v. British Columbia Electric Railway Co. Ltd. (supra): otherwise I would have been in some doubt as to whether it was not more logical to apply it to the net cash payable after deduction of the benefit receivable from the estate. As has been seen, the total benefit from the estate is Shs. 14,611/- of which these four dependants are entitled to four-eighths, or Shs. 7,305/-. After deduction of that figure there remains the sum of Shs. 35,913/- as general damages. This I would apportion among the four dependants as follows :-

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Shah	Shs. 7,981/-	Amirali	Shs. 7,183/-
Rashamali	" 8,778/-	Nazma	Shs. 11,971/-

In addition to the general damages of Shs. 35,913/- there are agreed items of Shs. 1,000/- general damages to the Respondent personally Shs. 600/- special damages for funeral expenses and Shs. 320/- for medical expenses, bring the total to Shs. 37,833/-.

In the final result I would allow the appeal to the extent that I would reduce the award of damages from Shs. 120,000/- to Shs. 37,833/- and order that the decree be amended accordingly."

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20. It is submitted that the Court of Appeal for Eastern Africa, having been requested by Counsel for both parties to assess damages on the evidence and material available to it, has done so in accordance with the correct legal principles and has given the proper weight and interpretation to the evidence before it.

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21. Accordingly the Respondents humbly submit that the judgment of the Court of Appeal for Eastern Africa was right and should be upheld and that the Appeal should be dismissed with costs for the following amongst other

R E A S O N S

- (1) BECAUSE the assessment of damages in the sum of Shs.37833/- was fair and reasonable in the circumstances
- (2) BECAUSE in assessing damages at the request of the parties upon the information before it the Court of Appeal for Eastern Africa was acting as a tribunal of fact and correctly interpreted the weight and effect of the evidence before it and the legal principles to be applied
- (3) BECAUSE in assessing the damages the Court of Appeal for Eastern Africa applied the correct legal principles
- (4) BECAUSE the Court of Appeal for Eastern Africa drew the correct and reasonable inferences from the facts and evidence available to it
- (5) BECAUSE the Court of Appeal for Eastern Africa was correct in overruling the learned trial Judge and in substituting a lower award
- (6) BECAUSE the judgment and order of the Court of Appeal for Eastern Africa were correct and should be upheld.

JOHN D. STOCKER

No. 51 of 1961
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B E T W E E N :

GULBANU RAJABALI
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- and -

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