

(1990) 07 KL CK 0039
In the High Court Of Kerala
Case No : M.F.A. No. 266 of 1985

Valiyakathodi Mohammed Koya

APPELLANT

Vs

Ayyappankadu Ramamoorthi Mohan and Others

RESPONDENT

Date of Decision : 20-07-1990

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110B

Citation : (1991) ACJ 140 : AIR 1991 Ker 47

Hon'ble Judges : Varghese Kalliat, J;T.V. Ramakrishnan, J

Bench : Division Bench

Advocate : T.P.M. Ibrahim Khan, for the Appellant; Mathews Jacob, for the Respondent

Judgement

Varghese Kalliat, J.—Appellant is a boy aged 12 years. He met with an accident. It was on 24-2-1984 at about 9.30 a.m. The unfortunate event happened under these circumstances. Appellant was walking along the side of a road. A bus which was stationary was in the process of alighting passengers. A moving bus behind the static bus was trying to go forward. Meanwhile, a car driven by the 1st respondent herein wanted to overtake both the buses. This was done with utmost carelessness and with high speed. In this process, the car hit the appellant and he sustained injuries.

2. Respondents 1 and 2 contested the matter by filing a written statement. The case of the respondents is that the accident was unavoidable and it was inevitable. This they said on the basis that the boy -- the appellant wanted to cut across the road from the front side of the first bus and he did it suddenly and in that process, the boy collided with the left mud guard portion of the car. The driver of the car stopped the vehicle at once. In short, respondents submitted that the accident took place on account of the gross negligence of the appellant himself. Of course, they also submitted that it will be most unjustifiable if the Tribunal holds that the entire responsibility for the accident lies with the driver of the vehicle. At any rate, the Tribunal should hold that the accident took place on

account of contributory negligence of the appellant also. They also disputed the responsibility of the quantum of compensation claimed by the appellant.

3. The 3rd respondent is the insurer. Third respondent also contended that the accident occurred on account of the negligence of the appellant herein.

4. Naturally, from the contentions raised, two issues arise in this case. The Tribunal raised correctly the two issues, viz. "Whether the accident was due to rash and negligence driving as alleged and what if any is the compensation payable". The Tribunal, after considering the evidence, came to the conclusion that both the appellant and the driver of the vehicle should share equally the blame for the accident.

5. Counsel for the appellant submitted that the finding of the Tribunal that the appellant was also negligent and that is a contributory fact for the accident, is totally incorrect on the evidence adduced in the case. The question whether the appellant was negligent is a question of fact and being a first appeal, this Court is bound to examine that question on a re-assessment of the evidence in the case.

6. PW 4 is the victim -- the appellant. Of course, he is a minor boy aged 13 years at the time when he was examined as a witness. It cannot be said that a boy aged 13 cannot speak how the accident took place when he himself is the victim of the accident. But, the court must be cautious to accept the evidence of a minor boy aged 13 years even though he is undisputably an eye witness to the accident. The evidence given by the appellant is important in one respect. He has said that he was walking along the side of the road. Nowhere he has stated that he wanted to cross the road. He has said that the motor car hit him on his back side. The Court has observed the demeanour and the manner in which the boy has deposed before the Court. The Court said : "The boy is not able to speak clearly and answered my question with some difficulty. His eye lids are dropping".

7. P.W. 6 claims that he is an eye-witness to the accident. He has said that the accident took place in the Highway, and that the road is south to north. Appellant was walking towards north, and that he was on the western side of the road. He has stated about the presence of the stationary bus and the fact that another bus and the car in question came from the southern side and the driver of the car wanted to overtake both the buses and that was done by driving the car through the wrong side and in that process, the vehicle hit the boy who was walking on the western side of the road. The question of negligence on the part of the boy depends largely on the fact that the boy met with the accident since he wanted to cross the road and that he did it suddenly and without taking appropriate caution in the matter of crossing a highway. If the fact that the boy made a sudden attempt to run across the road is not proved, since this is the basis of the defence to say that the boy is negligent, the Court can safely conclude that the boy cannot be blamed for the unfortunate accident. To P. W. 6 a suggestion was made by putting this question:

Though there is no positive and clear denial of the suggestion, the answer given

by witness is a rustic method of giving an answer in the negative by a rustic witness. The tenor of the deposition of this witness also informs us to make such a conclusion.

8. Further we have to consider the evidence of P.W. 6 along with the evidence of R. W. 1, the first respondent who was driving the car. It has to be remembered that the definite case pleaded by respondent No. 1 in the written statement is that "the appellant--the injured suddenly cut across the road from the front side of the first bus and happened to hit against the left mud guard portion of the car". The above quote is the key note of the defence for the respondents to say that the accident occurred on account of the peculiar situation created by the appellant. It was his case that by no human skill, the accident could have avoided. If the fact stated in the written statement is proved, we have to say that there is great force in the submission made by counsel for the respondents that what the Tribunal has done is correct, viz., that the blame has to be shared by the appellant and the first respondent, who was driving the car at the fateful moment. But surprisingly R.W. 1, the first respondent did not say that there was an attempt by the appellant to cut across the road. He has said clearly that he did not see the appellant running towards the car to cut across the road. We shall quote his own words:--

9. Further it is pertinent in his evidence (R.W. 1) that he is not sure whether the hitting was on the front mud guard or the rear mud guard of the car. R.W. 1 also stated that the car at the crucial hour was on top gear. The basic fact of the defence pleaded has not been established. So long as there is no evidence as regards the determinative factor relating to negligence of the appellant, viz., whether the appellant had attempted to cut across the road, it is difficult for us to agree with the finding of the Tribunal that the blame should be shared by the first respondent, the driver of the car and the appellant. We disagree with the Tribunal on this finding and hold that the appellant was not negligent.

10. The next question that has to be considered is as to the adequacy of the quantum of compensation awarded by the Tribunal. The claim of the appellant before the Tribunal was an amount of Rs. 1,00,000/- as the total compensation. The Tribunal found that the appellant is entitled to a total compensation of Rs. 60,000/- and directed payment of Rs. 30,000/- on the basis that the blame for the accident has to be shared equally by the appellant and the first respondent. Now, we have found that the appellant cannot be mulcted with any blame for the accident which caused injuries to him. There is no appeal against the quantum fixed by Tribunal by the respondents. The appeal is by the appellant on the ground that the finding of contributory negligence on the part of the appellant as well as the quantum fixed are unjustifiable in the circumstances of the case.

11. Appellant has claimed an amount of Rs. 25,000/- for the pain and suffering. The Tribunal has awarded only Rs. 5,000/-. Counsel for the Tribunal submitted that the pain and suffering involved in the case is a continuing one. It is a suffering which has to be endured throughout the life of the appellant. Cockburn,

C.J. in *Phillips v. South Western Rly. Co.* (1879) 4 QBD 406, observed thus:--

"A jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts; to effect a cure, or to lessen the amount of an injury".

Sellers, LJ in (1962) 1 QB 638 (*Wise v. Kaye*) said :

"The first element..... is the physical injury itself the physical injury itself has always been a head of claim which has justified and required in law an award of damages according to the extent, gravity and duration of the injury".

Lord Roche in *Rose v. Ford* (1937) 3 All ER 359 observed thus (at page 379):--

"I regard impaired health and vitality, not merely as a cause of pain and suffering, but as a loss of a good thing in itself".

12. We are considering the question of appropriate compensation to be paid for pain and suffering in this case. In this judgment, we have already quoted what the Tribunal has observed when the appellant was examined as a witness. His eye sight has been considerably impaired. There is evidence to show that his nervous system has been affected and that he cannot walk properly without the aid and assistance of another person. He is not in a position to speak clearly, and he has lost his memory power also. He was attending an L.P. School and was in the 5th standard. After the accident, the parents were compelled to stop sending him to the school. From the medical evidence, it is possible to understand the great agony, discomfort and pain the appellant had to suffer and is continuing to suffer. The Doctor P.W. 2 has deposed the nature of the injuries, the boy suffered on account of the accident. The doctor said that the "Patient was unconscious; multiple abrasions all over the body. Pupils were dilated and reacting on the left side. On the right side, pupils sluggishly reacting". The appellant was referred to a neuro surgeon, and the neuro surgeon diagnosed brain stem injury. The case was reviewed again on 3-3-1984 and continued the conservative management. This doctor P.W. 2 has said brain stem injury is the most common cause for paralysis. The doctor also examined the appellant in the presence of the Tribunal and found that the appellant has dropping eye lids. Of course, the doctor said that by plastic surgery it can be corrected. The witness also said that brain injury can cause loss of memory. The appellant was unconscious for a considerable number of days. The aforesaid facts should be taken into account to decide the question of the severity of the pain and suffering the appellant has undergone and is undergoing on account of the accident.

13. Of course, pain and suffering is a phrase which suggests a double head of damage. But, it is not possible to draw a sharp line between the two concepts.

14. What are the constituents which make up that concept of "pain and suffering". It includes suffering attributable to the injury itself and to any consequential medical treatment and worry about the effect of the injury upon the victim's way of life and prospects, including worry attributable to "compensation neurosis". Some text books quoting *Wise v. Kaye* (1962) 1 QB 638 said no damages will be awarded under the head "pain and suffering" however severe the injury, if the plaintiff suffered no pain because he remained unconscious or was otherwise incapable of experiencing pain. In *Wise v. Kaye*, plaintiff remained unconscious from the moment of the accident and was deprived of all attributes of life, but life itself. By a majority the Court of Appeal upheld an award of ? 15,000 for loss of amenity. This case was considered by the House of Lords in *H. West and Son Ltd. v. Shephard* (1964) AC 326. In this case, Lord Reid, Lord Trucker, Lord Morris and Lord Pearce expressed their opinion.

15. Plaintiff in that case was knocked down by a motor lorry on November 28, 1959. She was aged 41. The driver was found to be negligent. Plaintiff sustained severe head injury resulting in cerebral atrophy and paralysis of all four limbs. She was unable to speak, such communications as she did make being limited to movements of the eyes, face and right hand. She could appreciate the difference between articles of food that she liked and disliked, showing her likes and dislikes by facial expression. She showed some signs of recognition of relatives and nursing staff, and must to some extent have understood what was said to her because she could respond to commands by moving her right hand. She was unable to feed herself and required full time hospital nursing. Any relaxation of her medical and nursing care would terminate fatally. There was no further prospect of further improvement and her expectation of life had been reduced to about five years. She might, to some extent, at least, have appreciated the condition which she was in.

16. The trial Judge awarded, inter alia ? 500 as damages for loss of expectation of life and ? 17,500 as general damages. In arriving at the figure of ? 17,500 the Judge referred to the award in *Wise v. Kaye* where the plaintiff had remained in an unconscious stage and considered that the present plaintiff's stage is worse, since she must have some knowledge of her condition. The Judge also took into account the fact that she may die in five years. The Court of Appeal (Lord Denning M. R., Lord Upjohn and Lord Diplock) holding that there was no error in the Judge's assessment, upheld that award. The House of Lords dismissing the appeal. (Lord Reid and Lord Devalin dissenting) held that the trial Judge had not erred in his approach to the assessment of general damages and that his award, although high was not so high that it should be interfered with. Lord Reid, Lord Trucker, Lord Morris of Borth-y-Gest and Lord Pearce said the guidance in *Benham v. Gambling* (1941) AC 157 applies only to the assessment of damages for loss of expectation of life and it does not extend to any other class of case. Lord Reid said: "All that I would take from *Benham's* case (1941) AC 157 is that in assessing damages on an objective basis, independently of what the injured person knew or felt, a low figure was taken. And that is some justification for

taking a moderate figure for the objective element in a claim by a living person for loss of amenity and attaching more importance to what he knows and feels about his deprivation than to his actual injuries".

17. Lord Morris said: "Indeed, I think that Viscount Simon was indicating as much when he said "Damages which would be proper for a disabling injury may well be much greater than for deprivation of life". It may be that a thesis can be formulated leading to the conclusion that the reasoning which guided Viscount Simon towards the result which he announced is reasoning which logically should be applied when bodily deprivations are the subject-matter for a monetary award. If this be so then here in an occasion for the reminder that logic is not the life of the law. The guidance given in *Benham v. Gambling* was considered to be solely designed and intended to apply to the assessment of damages in respect of the rather special head of damages for loss of expectation of life.

18. Lord Tucker completely agreed with the reasoning and conclusion of Lord Morris of Borth-y-Gest, I do not think that it is necessary or just to do so and I agree with the majority decisions in *Wise v. Kaye* to that effect. *Benham v. Gambling* artificially and drastically limited the liability of defendants in respect of loss of expectation of life. But I would not extend that artificial limitation to any claims for loss of some or even all of the amenities of living during a plaintiff's life however low that life may have been brought". Lord Trucker and Lord Morris in this case held the fact of unconsciousness is relevant in respect of and will eliminate those heads of damages which can only exist by being felt or thought or expressed but it does not eliminate the actuality of the deprivation of the ordinary experience and amenities of life.

19. In personal injury cases there are three categories of general damages. Consolatory damages, compensatory damages and damages for loss of expectation of life. Consolatory damages are awarded on the basis of the plaintiffs pain and suffering (past, present and future) and mental distress in order to console the plaintiff for the enforced acceptance of a state of affairs which cannot be altered, the cause of which is the accident. Although, prima facie an unconscious plaintiff will not suffer pain or mental distress, precedents would tell us that compensation can be given for "loss of pleasure". See Diplock LJ in *Wise v. Kaye* (1962) 1 QB 638. Diplock LJ in this case took into consideration that, but for the injury suffered by the plaintiff, she would have experienced the joys of courtship, marriage and motherhood and further said that it was a time in her life when the balance of happiness over unhappiness was likely to be the greatest,

20. Compensatory damages are awarded to provide the good services of a plaintiff, but for his injuries, would either have been able to provide for himself or would not have needed. This is what is commonly known as pecuniary loss. This is in the nature of restitution in integrum. In fact, it is inaccurate to describe this head of damages as damages for "loss of amenities of life". It can be illustrated thus :--

The amputation of a hand preventing a plaintiff from playing cricket would merit consolatory damages; the same loss preventing a man from carrying on his employment would merit compensatory damages. Consolatory and compensatory damages represent different elements in an award for general damages for personal injuries and are exhaustive except for the third head of damages for loss of expectation, of life which is *sui generis*.

21. In this case, counsel argued that the victim (appellant) was unconscious and he was not aware of any pain and suffering he was undergoing as a result of the injuries he has sustained and so, he is not entitled to any substantial amount as damages under this count. We cannot agree.

22. The first question we have to answer is whether the deprivation or loss of amenities of life comes within the objective test so as to entitle an unconscious plaintiff to claim for that loss although he does not know about it. Deprivation and loss of enjoyment of life, as distinct from mental suffering, is a matter to be taken into account. A plaintiff is entitled to be compensated for the injury he sustains in his person or his physical capacity of "enjoying life" (see Cockburn, C.J. in *Pair v. London and North-Western Railway Co.* 4 QBD 406. There is really an independent objective element in assessing damages for loss of amenity where a person is deprived of the ordinary experience of life as a human being. This objective element is of such value as to outweigh even pain and suffering.

23. On the head of damages for deprivation of amenities, the measure of damages should primarily be the measure of deprivation of the natural gifts, faculties and capabilities of a human being. To what extent the appellant has been deprived of the human experience both physical and mental. This has to be determined for the purpose of ascertaining the degree of deprivation whether it is high or low. Damages should be assessed on the following basis. First one should consider the gravity and degree of the deprivation (2), duration of the deprivation and (3) the Court should consider whether something extra should be given for the degree of awareness of the deprivation. English courts have approved mental anxiety or compensation neurosis as a proper head for damages.

24. From the medical evidence, it is possible to say that the boy is now the wreck of human being suffering from considerable and irremediable brain damage which has left him only boarderly sentient. Certainly, he is totally dependent on others. This case illustrates with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries. The award of the Court should cover "past, present and future loss" by granting a lump sum assessed at the conclusion of the legal process. The award is final. There is no procedure prescribed to review the award in future, which would enable a substitution of real fact for estimate. Mankind is denied the privilege of knowledge of the future with certainty. The result is so much of the award as is attributed to the future loss and suffering will almost surely be liable to err. In (1979) 1 All ER 332 (*Lim v. Camden Health Authority*), considering the insuperable complexities of the

problem, Lord Denning MR said that the decision should not be considered as final and it should be considered as an interim award liable to be reviewed. The house of Lords in (1979) 2 All ER 910 (*Lim v. Camden Health Authority*), speaking through Lord Scarman said :-- "It is an attractive, ingenious suggestion, but, in my judgment, unsound. For so radical a reform can be made neither by judges nor by modification of rules of Court". Certainly the problem raises issues of social, economic and financial policy, matters not within the domain of judicial activism, matters not amenable to judicial reform. Certainly it will invoke controversies and we feel that the matter can be resolved by the legislature only after full consideration of factors which may not be brought into clear focus and weighed and assessed in a foreign process. It has to be remembered that Judge/Judges however wise, creative and imaginative he/they may be is/are "cabined, cribbed, confined, bound in" not as was Macbeth, to his saucy doubts and fears, but by the evidence and arguments of the litigants. This weighty limitation inherent in the forensic process sets bounds and confines to the area of judicial law reform. The question of devaluation and fluctuation incidental to economic and financial policy creates different problems for which no device has been suggested when the judges follow a lump sum system as compensation payable for personal injuries. Yet another difficulty in this branch of law is that the case now we are dealing with is not a rare exception. Certainly, the courts have to face frequently the task of assessing the damages to be awarded to a petitioner who by an accidental injury has been converted from an active, healthy and intelligent member of society to a barely sentient human wreck.

25. We have to take note of the fact that in the past it was unlikely that the victim would long survive his catastrophic injury, but the development of modern medical science inviting miracles of cure and lengthening of the life is such that in many cases the expectation of life remains substantially as it was before the accident which demands a high and costly level of continuing care and medical treatment. Complexities in the present state of law on this subject are many and insuperable. A radical appraisal of the law is needed. Who has to do it. Lord Denning MR suggested that the courts can do it. (see (1979) 1 All ER 352). We do not agree.

26. Lord Denning believes the reform can be made by the Judges whereas we would suggest that such an appraisal calls for social financial economic and administrative decisions, which only the legislature can take. It is profitable to refer to the report of the Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Report).

27. Different modes and modalities are applied by different courts in estimating reasonable compensation in personal injury cases. It creates confusion, it falls to this Court amidst these confusions and perplexities, to provide the trial judges with guidance which will enable them to reach reasonable and consistent awards until such time as Parliament intervenes by legislation to reform the law. We feel

that "perfect justice is not attainable; nor would it be wise in the search for the nearest approximation to justice to abandon principles already judicially determined, whatever one's saucy doubts and fears".

28. With reference to a judicial process which must so often be undertaken such as that of the assessment of damages for personal injuries we would favour simplicity of expression and an absence to the greatest extent possible of any elaborate or complex formulae. But we feel to say that in assessing damages for catastrophic but not fatal, personal injuries, a moderate estimate has to be made for the continuing care and medical attention required for "the living dead".

29. In making the estimate, the principle that has been said by Lord Denning MR in the compensation case reported in (1979) 1 All ER 332 though overruled by House of Lords is of much relevance fair compensation must mean that she is to be kept in as much comfort and tended with as much care as compassion for her so rightfully demands; and that she should not want for anything that money can buy. But I see no justification in law or in morals in awarding to her large sums of money in addition to those needed to keep her in comfort".

30. In this aspect of the case, when the Court grants compensation for loss of future earning on account of the injury sustained by the petitioner and compensation for pain and suffering and loss of amenities there is possibility of overlapping. So in the estimate to be made for granting compensation for future care, the Court should take care to ensure that sums to be awarded, when looked at in the round is fair and reasonable. It must proceed on the basis that resort will be had to capital (the total lump sum payment) which would yield income that may be used for the expenditure.

31. We may also indicate that certain personal injury cases that come before us reveal that the trial Judge/Judges often take/takes an approach that the defendants are wrong doers; so they make them pay up in full with the feeling that they do not deserve any consideration. We do not agree. It is a "tendentious way of putting the case". The foundation of the question of compensation to be determined may have been due to a pardonable error of quick judgment at an unexpected unfortunate point of time such as may befall any one of us. We say this so as to remove the misapprehension so often repeated that the injured or the claimants of the deceased are entitled to be fully compensated for all the loss and detriments suffered. We feel that it is not the correct law. The victim or the claimants of the victim are only entitled to what is, in the circumstances a fair compensation, fair both to the victim and to the tortfeasor. In a way the respondents (defendants) should not be treated as wrongdoers. Some of them are only vicariously liable. When the amount is paid by the Insurance Company and the statute insists so, we have to consider the impact of the same. We feel that it is worth recording the wise words of Parke B over a century ago:

"Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life You are

not to consider the value of existence as if you were bargaining with an annuity office I advise you to take a reasonable view of the case and give what you consider fair compensation".

(See *Armstrong v. South Eastern Railway Co.* (1847) 11 Jur 758, quoted with approval by Brett, J. in *Rowley v. London and North Western Railway Co.* (1873) 8 Exch 221 , and approved in the leading case of *Phillips v. London and South Western Railway Co.* (1879) 5 QBD 78.

32. In the case at hand, the boy is aged 13. The Supreme Court has said the span of life is 70. We are uncertain about the future. We cannot predict how long the boy would live and for how many years compensation for the care and comfort of the boy should be provided. In this field of uncertainties, sums awarded get too large. This may injure the body politic. It may have a counter productive impact just like what has happened in the United States of America in the matter of medical malpractice cases. In United States of America, as large sums are awarded on medical malpractice cases, premiums for insurance rise higher and higher and naturally these are pushed back to the public in the shape of higher and higher fees for medical attention. If large sums are awarded in motor vehicle accident cases, naturally amounts have to be paid by the Insurance Companies and they will in turn create a natural tendency for premiums for insurance to rise higher and higher.

33. The question is what is fair compensation. There is no dispute that fair compensation in this case must mean that the appellant is to be kept in "as much comfort and tended with as much care as compassion" for him so rightfully demands and that he should not want for anything that money can buy. It is a modern problem. The development of modern science, particularly medical science gives a prolonged life in a body destitute of mind; a prolonged life which is of no use to the person and society.

34. In the case we are dealing with, we have already held that there is no contributory negligence on the part of the appellant. So, whatever amount we award under the head pain and suffering, which head we expand to include loss of amenities and future care and attention, required in this particular case, will not be reduced on account of contributory negligence. The Tribunal has awarded only Rs. 5,000/- as against the claim of Rs. 25,000/-. Before determining the amount under the above head, we also feel that the court should take note of the total amount, the victim is entitled to as compensation. The Tribunal has awarded Rs. 5,000/- for medical expenses and Rs. 50,000/- for disability and loss of earning power. Certainly, when the Tribunal awarded Rs. 5,000/- for medical expenses and Rs. 50,000/- for disability and loss of earning power, the Tribunal was aware of the fact that the appellant will be entitled to get only half of it, because the Tribunal has found contributory negligence on the part of the appellant. We have found that the appellant is entitled to the entire amount.

35. Taking all these circumstances into consideration, we feel that the

compensation determined for pain and suffering, a head which has been expanded by us by including loss of amenities and future care and attention required in this particular case, the amount of Rs. 5,000/- is inadequate. We feel that it will be only just and proper to fix the compensation on this count at Rs. 15,000/-.

In the result, appellant is entitled to a total compensation of Rs. 70,000/-. This amount will carry interest at 12% per annum from the date of petition till realisation. We direct the 3rd respondent to pay this amount. Appeal is disposed of as above.